

Legal Opinion on Payment of Wages during "LOCKDOWN" Period

April 13, 2020

References:

- 1.** Order No. 40-3/2020-DM-I(A) dated 29.03.2020 from Ministry of Home Affairs, Government of India, thereby invoking the provisions of Disaster Management Act, 2005 and giving directions for Ministries & Departments of Government of India, and State Government/ Union Territories, to contain the spread of COVID-19 in the country.
- 2.** Advisory Letter No. D.O.No.M-11011/08/2020-Media dated 20.03.2020 from the Ministry of Labour & Employment, Government of India, thereby advising Employers not to terminate the Employees or reduce Wages during the Lockdown period.
- 3.** Andhra Pradesh - Order No. Lr. No. I&C Dept/SPL.CS/187, dated 31.03.2020 from Industries & Commerce Department, Government of Andhra Pradesh dated directing payment of wages to workers of Industry, Shops and Commercial Establishments during the lockdown.
- 4.** Assam – Advisory letter No.L.E.16/2018/4035-98 dated 21.03.2020 from Office of the Labour Commissioner, Government of Assam advising Employers not to terminate employees /workers from job or to reduce their wages in view of outbreak of COVID-19 pandemic.
- 5.** Chandigarh – Order No. F-2071/F-II(6)-2020/5023 dated 23.03.2020 from Principal Secretary Health, Chandigarh Administration ordering to consider the employees of private Establishments/Industries/Factories/Shops etc. (including temporary / casual/ contractual/ outsourced/daily-wages workers) who are required to stay at home in view of the orders of Chandigarh Administration shall be treated as "on duty" and be paid in full"
- 6.** Gujarat – Advisory letter dated 21.03.2020 from Office of Labour Commissioner, Gujarat advising private Establishments not to terminate employees or reduce Wages in view Of COVID-19 Pandemic and Order dated 02.04.2020 from Office of the Collector & District Magistrate, Gandhinagar, Gujarat, giving directions that wherever, employees/workers of Factories, shops and establishments are required to stay at home in view of lockdown due to COVID-19, as announced by the government of India, their absence for duty shall be treated as paid holiday and they should be paid full salary/wages with full emoluments as eligible, during this period.
- 7.** Karnataka – Advisory letter no. 170/2018(7) dated 24.03.2020 from Deputy Secretary, Department of Labour Karnataka advising Employers not to terminate employees or reduce wages in view of COVID-19 Pandemic.
- 8.** Kerala – Order No. 4113/2020 dated 26.03.2020 from Labour Department, Kerala, directing employers of Shops/Commercial establishments/Construction field are directed not to terminate or reduce the wages of the employees who are unable to appear for work in the state of Kerala.
- 9.** Maharashtra – Order No. 2020/Pra.No.45/Work-09 dated 31.03.2020 from Department of Industries, Energy & Labour, Government of Maharashtra directing Private, Establishment, Shops (Except Essential Services), Factories etc. Workers, contractual, temporary, daily wages workers who had to remain at home/place due to the outbreak of COVID-19 and lockdown orders by Government of Maharashtra, all such worker/ employees shall be deemed to be on duty and to be paid full salary and allowances.
- 10.** Punjab – Advisory Letter No. COVID-19/2020/8452-53 dated 28.03.2020 from Principal Secretary, Labour, Government of Punjab advising all employers /owners of industries, Factories, Shops and Commercial Establishments etc, not to terminate their

employees/workers particularly casual or contractual workers from jobs and not to deduct their wages/salary. If any employee/worker of such unit takes leave due to this Pandemic, he may be treated as on duty without any deduction in wages for this period.

- 11.** Tamil Nadu – Order No. GO. (D) No. 195 dated 30.03.2020 from Revenue & Disaster Management (DM-II) Department directing employers to make payment of wages to their workers on the due dates, without any deductions.
- 12.** Uttar Pradesh – Order No. 4169-74 dated 05.04.2020 from Additional Labour Commissioner, Kanpur, Uttar Pradesh, directing Owners/Employers of all Factories, Shops & Establishments to ensure employees/workers of Factories, shops & establishments are required to stay at home in view of lockdown due to COVID-19, as announced by the government of India, their absence for duty shall be treated as paid holiday and they should be paid full salary/wages with full emoluments as eligible, during this period.
- 13.** Uttarakhand – Order No, 2122-25 dated 01.04.2020 from Deputy Labour Commissioner, Rudrapur, Udhamasinghnagar, Uttarakhand, instructed all employers, in any industry or in the shops and commercial establishments, shall make payment of wages for their workers, at their workplace, on the due date without any deduction, for the period their establishments are under closure during the lockdown.

Background:

Entire World has been badly affected due to the pandemic of Corona Virus COVID-19 and India is also going through the difficult times. In order to combat the spread of the virus, the Central Government as well as the State Governments have issued several Notifications, Circulars, Guidelines and Orders for the citizens and Employers (be it Advisory or Orders) and specifically referring below important aspects that financially impacts to the Employers.

1. *Not to terminate employees, particularly casual or contractual workers from jobs or reduce their wages.*
2. *If any worker takes leave, he should be deemed to be on duty without any consequential deductions in wages for this period.*
3. *If the place of employment is to be made non-operational due to COVID-19, the employees of such unit will be deemed to be on duty.*
4. *Full Wages to be paid on time and without any deductions.*

In this regard, some of the Legal experts have expressed their views towards the maintainability of the Orders / Advisories issued by Central / State Government for payment of Wages to the employees and as a Principal Employer ensuring the same for Contract Labourers also. The views of these Experts are briefed here under:

➤ **Opinion of Adv. Jeetender Gupta, Supreme Court of India (07.04.2020):**

The Home Secretary, Ministry of Home Affairs, Government of India has issued the Order dated 29.03.2020 in exercise to the powers conferred under Section 10(2)(I) of the Disaster Management Act, 2015 ("DMA") and acting in the capacity as Chairperson of its National Executive Committee, it is binding upon all concerned. Section 10(2)(I) of DMA empowers National Executive Committee to give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster. And in terms of Section 72 of DMA, the Act shall have overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Till such time the above order by Ministry of Home Affairs is not modified or set aside by a competent court i.e. High Court / Supreme Court, the said order is binding and remains in force. Under the circumstances, Employer's cannot force or

ask employees to utilize their accrued annual/privilege leave for absence during lockdown period. It can only be done with the consent of workers. Availing leave is an employee's prerogative and the employers cannot compel them to adjust accrued annual leave.

Section 51 of the Disaster Management Act prescribes Punishment for obstruction, etc. against whoever, without reasonable cause refuses to comply with any such direction. As per Section 71 of DMA, no court (except the Supreme Court or a High Court) shall have jurisdiction to entertain any suit or proceeding in respect of any such direction. And in terms of Section 72 of DMA, the Act shall have overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

➤ **Opinion of Adv. Sanjay Mohan, SRS Associates, Chennai. (07.04.2020):**

In the light of the invocation of the powers vested in the appropriate State Governments on the basis of directions issued by the National Executive Committee functioning under the provisions of the Disaster Management Act states that wherein specific directions have been issued to "all employers, in relation to the industry or in shops and commercial establishments, shall make payment of wages to their workers at their workplaces on the due dates without any deduction for the period their establishments are under closure due to lock down," every employee will be entitled to full wages during "closure due to the lockdown."

The invocation of the powers under the Disaster Management Act changes the entire situation and every single employee during the period of compulsory lockdown will be entitled to wages in order to mitigate the difficulties encountered by employees on account of the compulsory lockdown and this is part of disaster management that the Government of India /the State Governments are in charge of.

Some employers are under the impression that leave account can be debited straightaway without the consent of the employees. The law does not permit the employer to do that unless there is consent from the employee to do so and for such a lengthy period of time it is possible that the leave account itself would have been overshot.

➤ **Opinion of Adv. B.C. Prabhakar, President, Karnataka Employer's Associations. (07.04.2020):**

Due to COVID -19 situation various Orders / Directions and Advisories have been issued and the Managements need to ensure that they shall comply with all such order/circulars issued by various departments of State and Central Government in relation to COVID-19:

The Orders issued by the Central Government dated 20.03.2020 and 29.03.2020 pertaining to lockdown and payment of wages should be mandatorily followed. The company should strictly adhere to the guidelines issued under the said order till 14th April, 2020 and must continue to follow the said guidelines if there is any further extension or revision of the Government Order till the expiry of the same.

The orders invoked the extraordinary powers vested with the Executive committee and the Disaster management bodies under Sections 10 and 12 of the Disaster Management Act, 2005. These Sections provide blanket powers to the Committee to take any measure as deemed necessary to either prevent or contain a disaster. Such law is applicable to employees other than workmen also unless the company enters into an agreement with them for renegotiation of their wages.

The non-observance of the advisory to pay salary during the lock down period may result in filing of complaints by the aggrieved workmen before the authorities. It may also result in the police taking action and arresting the Directors of the company. Besides, it may lead to adverse publicity which is best avoided during this sensitive period. In addition, it is relevant to note that the Chandigarh Police on Monday, 30.03.2020, have arrested a Mani Majra-based owner of a tavern for forcing his eight labourers to leave job.

The Supreme Court in *Alakh Alok Srivastava Vs. Union of India*, Civil Writ Petition Number 468/2020, a case that primarily dealt with the plight of Migrant Laborers in the light of the COVID-19 lockdown, ordered on 31.03.2020, that all the notifications must be obeyed. Specifically, the court stated that:

- ***"Disobedience to an order promulgated by a public servant would result in punishment under section 188 of the Indian Penal Code. An advisory which is in the nature of an order made by the public authority attracts section 188 of the Indian Penal Code."***
- ***"We trust and expect that all concerned viz., State Governments, Public Authorities and Citizens of this country will faithfully comply with the directives, advisories and orders issued by the Union of India in letter and spirit in the interest of public safety."***

➤ **Opinion of Adv. Anand Gopalan, Partner at T.S. Goplan & Co., Chennai. (08.04.2020)**

The directions issued by the Governments to employers to pay wages to all the workmen neither comes within the framework of the DMA and EDA nor is backed by a statutory law.

A reading of the provisions of the DMA Act would show that powers have not been vested with either the State or the Central Government to direct private employers to pay wages during a disaster despite the employees not working. The scope of the Act empowers committees to frame plans to meet disasters. The substantial part of the EDA Act is Section 2 and it only enables the government to prescribe measures to prevent the outbreak of such disease or the spread thereof. The same certainly does clothe the government with a power to direct a private employer to pay wages.

These are the two enactments based on which the governments have been issuing directions. Given the provisions of both the Acts and the language of the sections as analyzed above, there is no statutory provision to support the directions of the Central or State government with regard to payment of wages.

The Industrial Disputes Act 1947 is a Special Law which mandates payment of lay-off compensation in the event of a natural calamity or other connected reasons. The liability in this Special Law which is specific has restricted the payment of 50% wages as compensation. Being so the various directions/circulars/communications of the government can at best be advisory and not mandatory. The government would need to appreciate this legal position.

The Indian Government would need to come up with a scheme to subsidise employers towards the wages paid during the lockdown. The scheme can be linked to profits earned by the industrial establishment and the wage bill for a month. In the absence of such a scheme, private employers especially small and medium industries will be put through hardships that could even bankrupt them.

The government while drawing a stimulus or revival plan for the economy should certainly consider subsidising the wage cost for the lockdown period, if not in entirety, at least in part. If for any reason the government decides to extend the lockdown it should bear the wage burden and should not give any advisory for payment of full wages given it lacks the authority to do so.

➤ **Opinion of Adv. Bharat Goyal, Mumbai. (12.04.2020)**

As per the Circular dated 29.03.2020 issued by the Ministry of Home Affairs, the Company is required to pay full wages to its employees for the lockdown period and will be required

to strictly adhere to the guidelines contained in the said order during the entire period of lockdown.

The Principal Employer will be required to ensure payment of wages to all contract workers deployed as on the day of the notification, for the entire period of lockdown. An employer is obliged not to terminate the services of any of its employees including contract labour during the lockdown period. The contract would include manpower supply contract as well as job contracts, taking into consideration the definition of 'contractor' under Section 2(c) of the Contract Labour (Regulation and Abolition) Act.

The orders promulgated by the Government of India and in particular the order dated 29.03.2020 has been made by invoking the powers under the Epidemic Diseases Act 1857 and the Disaster Management Act 2005. The said order invokes the extraordinary powers vested with the Executive Committee and the Disaster Management Bodies under Sections 10 and 12 of the Disaster Management Act 2005. It needs to be noted that any violation of the provisions of the order shall result in the employer being proceeded with under the Epidemics Diseases Act, Disaster Management Act and the Indian Penal Code.

Both the Disaster Management and the Epidemic Diseases Act supersede the provisions of the Industrial Disputes Act, Standing Order and other labour laws on account of the non-obstante provision of Section 72 of the Disaster Management Act. The provisions of Section 72 of the said Act shall have an overriding effect, notwithstanding any inconsistency or conflict with any other law. The said Acts will therefore prevail over the provisions of the Industrial Disputes Act 1947.

➤ **Opinion in Labour Law Reporter**

Clarification regarding Employers liability for payment of wages to the employees during lockdown period

Unprecedented and rare unforcastable COVID-19 have compelled the employers to close/shut their shops/establishments/industries. As a result thereto and stoppage of transport services including prohibition of movement of employees, hardly any employee could report for duty other than those who have been rendering essential and public utility services. Now on closing of March, the question for consideration has arisen as to whether employer is required to pay wages to the employees by invoking principle of 'no work no wages'.

In context with above, it is pertinent to state that various labour laws ensuring Payment of Wages to the employees come within the purview of concurrent list as per Articles 245 and 246 of the Constitution of India. However, the Disaster Management Act, 2005 hereinafter referred to as DM Act is within the scope of Govt. of India. Also, the 'Doctrine of Repugnancy', is well explained by the Supreme Court of India, the instant doctrine deals with an event "where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy" Hence the DM Act will prevail over the Labour Laws and related enactments.

It is pertinent that for correctly comprehending susceptibility of Section 72 of the DM Act is produced below:

Section 72. Act to have overriding effect

The provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

In view of the above, no employer can withhold or deny the wages to the employees or to terminate their services on the pretext of lockdown. Even lay-off pertaining to workman as provided under section 2 (kkk) read with section 25-C of the Industrial Disputes Act would not be permissible. The authorities under DM Act are empowered to take action under sections 186, 188, 267, 270, 271 of Indian Penal Code read with sections 51 to 54 DM Act.

Visit our website www.labourlawreporter.com for latest order/communication issued by Ministry of Labour & Employment dated 20.03.2020 and Ministry of Home Affairs dated 29.03.2020.

Editor
Labour Law Reporter

Our opinion and understanding:

While deciding on the payment of Wages for the lockdown period and not to terminate the services of an employee, the relevant provisions of the Disaster Management Act, 2005, needs to be considered, which reads as under:

Provision under Disaster Management Act, 2005:

Section 10. Powers and functions of National Executive Committee —

(1) The National Executive Committee shall assist the National Authority in the discharge of its functions and have the responsibility for implementing the policies and plans of the National Authority and ensure the compliance of directions issued by the Central Government for the purpose of disaster management in the country.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the National Executive Committee may—

(l) lay down guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster;

Section 24. Powers and functions of State Executive Committee in the event of threatening disaster situation — For the purpose of, assisting and protecting the community affected by disaster or providing relief to such community or, preventing or combating disruption or dealing with the effects of any threatening disaster situation, the State Executive Committee may —

(a) control and restrict, vehicular traffic to, from or within, the vulnerable or affected area;

(b) control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area;

(c) remove debris, conduct search and carry out rescue operations;

(d) provide shelter, food, drinking water, essential provisions, healthcare and services in accordance with the standards laid down by the National Authority and State Authority;

(e) give direction to the concerned Department of the Government of the State, any District Authority or other authority, within the local limits of the State to take such measure or steps for rescue, evacuation or providing immediate relief saving lives or property, as may be necessary in its opinion;

(f) require any department of the Government of the State or any other body or authority or person in charge of any relevant resources to make available the resources for the purposes of emergency response, rescue and relief;

(g) require experts and consultants in the field of disasters to provide advice and assistance for rescue and relief;

(h) procure exclusive or preferential use of amenities from any authority or person as and when required;

(i) construct temporary bridges or other necessary structures and demolish unsafe structures which may be hazardous to public;

(j) ensure that non-governmental organisations carry out their activities in an equitable and non-discriminatory manner;

(k) disseminate information to public to deal with any threatening disaster situation or disaster;

(l) take such steps as the Central Government or the State Government may direct in this regard or take such other steps as are required or warranted by the form of any threatening disaster situation or disaster.

Section 51. Punishment for obstruction, etc.—Whoever, without reasonable cause—

(a) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years.

Section 58. Offence by Companies —

(1) Where an offence under this Act has been committed by a Company or body Corporate, every person who at the time the offence was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the Company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Company, and it is proved that the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any Director, Manager, Secretary or other Officer of the Company, such Director, Manager, Secretary or other Officer shall also, be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation—For the purpose of this section—

- (a) "Company" means any body Corporate and includes a firm or other association of individuals; and
- (b) "Director", in relation to a firm, means a partner in the firm.

Section 71. Bar of jurisdiction of Court — No court (except the Supreme Court or a High Court) shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken, orders made, direction, instruction or guidelines issued by the Central Government, National Authority, State Government, State Authority or District Authority in pursuance of any power conferred by, or in relation to its functions, by this Act.

Section 72. Act to have overriding effect — The provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 78. Power of State Government to make rules —

(1) The State Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely —

(c) the powers and functions of the Chairperson of the State Executive Committee under sub-section (3), and the procedure to be followed by the State Executive Committee in exercise of its powers and discharge of its functions under sub-section (4) of section 20;

Conclusion:

In view of the Legal Opinion given by the learned Advocates, Labour Law Reporter and going through the relevant provisions of the Disaster Management Act 2005, Epidemic Act 1897 and Industrial Dispute Act 1947, we can understand that in view of the Orders issued by the Central / State Government under the provisions of Disaster Management Act, 2005 which overrides the provisions of any other Labour Law in force by virtue of Section 72 of Disaster Management Act, we are left with no other option than to follow the Orders issued by the authority for payment of Wages to the employees and not to terminate their services, during the lockdown period.

Further, the Chief Secretary, Maharashtra State, acting in the capacity of Chairperson of State Disaster Management Committee, under Section 24 of the Disaster Management Act, 2005, has issued Orders dated 31.03.2020, thereby mandating the payment of Wages to all the Workers (including engaged through Contractor, Outsourced employees and workers, Temporaries, Daily Wage earners) who are bound to be at home due to the Orders issued by the Government for containing the spread COVID-19 virus, all such employees / workers should be paid Wages including allowance considering as if they are present for duties. This will be applicable to all Semi-Government, Private establishment, Industries, Shops and Commercial establishments. Any violation of the Orders passed under Disaster Management Act, will attract criminal litigation and penalties under Section 51 and Section 58 of the Disaster Management Act. Hence, it is advisable to ensure that the Advisory issued by the State Government and Central Government are complied to avoid any un-necessary embarrassment.

Considering the above legal condition, it can be construed that the option of Lay-off under the provisions of Section 2 (kkk) read with Section 25 (c) and / or Section 25 (m) of the Industrial Disputes Act, 1947, can be exercised only after the waiver of Notifications / Orders issued under Section 10 or Section 24 of the Disaster Management Act, 2005, by the competent authority. Till such time the above Order by Ministry of Home Affairs is not modified or set aside by a competent court i.e. Supreme Court / High Court, the said order is binding and remains in force.

Further, in view of the huge financial incidence on account of payment of Wages for the lockdown period, it is suggested that the matter may suitably be represented to the Government through Association of Employers viz. CII or EFI, for either subsidising the Wages or allowing the Lay-off on account of natural calamity, or any other relief / benefit for reducing the financial burden of the Companies.