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COVID-19 | EMPLOYER'S GUIDE ON KEY EMPLOYMENT CONSIDERATIONS

On 11 March 2020, the World Health Organisation (WHO) declared COVID-19 as a pandemic and a public health emergency of international concern. While the first confirmed case of COVID-19 in India was reported on 30 January 2020, it was not until March 2020 that the public and government began taking cognizance of it. The number of confirmed cases in India has crossed 2,76,000 as of 10 June 2020. During these past months, State Governments have been resorting to stringent measures to control the outbreak and promote maximum social distancing while announcing 'Unlocking' phase-wise and sector-wise.

Several questions come up in this backdrop and remain unanswered on the business and employment front. In this guide, the Employment, Labour and Benefits team at Khaitan & Co attempts to address the frequently asked questions in the current circumstances from an employment law and practice standpoint.

SECTION I - EMPLOYER'S OBLIGATIONS & GENERAL MEASURES FOR WORKPLACE MANAGEMENT

Part A - Managing Suspect Cases

Who is a suspect case?

Employers may refer to the guidelines issued by WHO and National Centre for Disease Control (India) to determine whether an employee may be considered as a 'suspect case'.

Can an employer mandate medical examination of employees?

As far as non-invasive medical examination is concerned, lockdown guidelines issued by the Ministry of Home Affairs, Government of India (MHA), require all employers to mandatorily make provision for thermal screening of employees at all entry and exit points of their workplaces. In respect of invasive medical procedures, while there are no statutory provisions in this regard, the employers may, as a measure to ensure good health and safety of employees, urge employees to self-assess their health and, if required, get themselves tested at a nearby designated COVID-19 testing facility before they resume work.

Is an employer required to ensure that each of its employees is using the Aarogya Setu app?

Under the guidelines issued previously, the MHA had tasked the head of each organisation with the responsibility of ensuring 100% compliance with the use of *Aarogya Setu* app by their employees. However, the latest guidelines have revised the same to provide that employers must ensure that the app is installed by all employees having compatible mobile phones, only on a best effort basis.

In order to comply with this directive, an employer may consider issuing a communication to employees in this regard. The communication may state that if employees have a compatible device, they should download the app and send a confirmation on the same to the employer, and in case they do not have a compatible device, they can use the government's *Aarogy Setu Interactive Voice Response System* service (which works in a similar fashion as the app) through their landline / mobile number.

Does the employer have an obligation to report a suspect case to the health authorities?

The Ministry of Health and Family Welfare, Government of India (MoHFW) issued guidelines on preventive measures to be taken by employers at their workplaces. As per the guidelines, in case any employee working in a shared space is found to be suffering from symptoms suggestive of COVID-19, the employer must place the employee in an isolation room / area and also immediately report the matter to the concerned health authorities through the prescribed helplines. Further risk assessment and action in this

regard would be taken by the designated public health authority based on the degree of symptoms exhibited by the concerned person.

Part B: Managing Confirmed Cases

Can an employer publicly disclose the identity of an employee who has contracted COVID-19?

As stated in our previous response, any employee found to be a suspect / confirmed case of COVID-19 must be immediately reported to the relevant health authorities. Such disclosure is mandated by law and thus does not pose any legal issue. However, as regards general public disclosure of the concerned person's identity, please note that any information on medical history / physical health of an individual falls within the definitional attributes of 'sensitive personal data' under the Information Technology Act, 2000. Such information should not be disclosed without written consent of the concerned individual and thus, employers should avoid dissemination of information on symptomatic employees on a broadcast basis. Having said that, the exercise of reverse contact tracing within the organization may be done on a restricted basis by identifying and connecting with those employees who are likely to have come in close contact with the concerned individual. This would avoid general disclosure to all and would also serve the purpose of contact tracing internally, until the relevant health authorities swing into action.

If an employee contracts COVID-19 at the workplace, is the employer required to undertake contact tracing?

In case of a positive case at the workplace, the employer is required to inform the nearest medical facility (hospital / clinic) or call the relevant state / district helpline. Further risk assessment and course of action, including the manner of contact tracing, would be decided by the designated public health authority. As per the protocol established by the MoHFW, the rapid response team of the concerned district will be requisitioned to undertake the listing of contacts and categorizing them as high and low risk contacts based on their exposure and proximity to the infected person. While the high-risk contacts will be quarantined for 14 days and tested for COVID-19, the low-risk contacts may continue to work while closely monitoring their health. The employer would be required to render all necessary assistance to the authorities in this contact tracing process.

In case of a confirmed COVID-19 case, can the employer be held liable? Further, is the workplace required to be shut down temporarily?

On 23 April 2020, the Secretary, MHA, issued a clarificatory order which states that apprehensions regarding possible criminal liability of the employer in case of an employee testing positive for COVID-19, are misplaced and without any basis. The order also emphasised that orders must not be used by field officers to harass the management of any manufacturing / commercial establishments.

In respect of temporary closure, the guidelines issued by the MoHFW provide that in case one or two cases are reported, there is no requirement to temporarily shut down the office or cease operations in other areas of the office. The employer only needs to strictly follow the prescribed disinfection protocol in the parts of the premises visited by the concerned employee. However, in case of a larger outbreak, the building will have to be closed down and may be re-opened after 48 hours when it is declared fit for re-occupation after carrying out thorough disinfection procedures.

If an infected employee has exhausted his sick leaves and requests for additional leaves, can the employer refuse to grant the same?

Given the general duty of the employer to ensure health and safety of employees at workplace, it is important that the employers adopt a sympathetic approach and grant additional leaves to any employee who is established to have infected with COVID-19. Please note that certain states such as Karnataka and Uttar Pradesh have issued specific notifications in this regard, which require employers to grant 28 days of paid sick leave to employees who have tested positive for COVID-19.

Can an employee raise claims of unfair labour practice if his / her services have been terminated due to the infection?

If an employee's services have been terminated after he remained ill for a prolonged period, the claim, if raised, may not be sustainable since the Industrial Disputes Act, 1947 (IDA) allows termination of services on the ground of continued ill-health. However, any such action on the employer's part should be determined on the basis of medical opinion, if possible.

Having said that, it is important that employers adopt a sympathetic approach towards infected employees and any arbitrary action simply by virtue of an employee being under treatment for the infection for 28 days must be avoided.

How soon should an employee who has been infected and recovered be allowed to the office again?

As soon as the competent medical authorities have cleared the concerned employee i.e. two specimens turn negative within a period of 24 hours, the concerned employee may be allowed to join office again.

Part C – Miscellaneous

Can a company defer / cancel the employment of new joinees (who have not yet joined the services), in view of the outbreak and the local restrictions on operations?

Companies should review the terms of the appointment letters issued to new joinees. In general, if the appointment letter stipulates a specific date on which the employee is required to report to work, the same should be considered as the effective date of commencement of employment relationship, unless there is any other stipulation indicating the contrary. The company may, in such case, either delay the joining or revoke the offer of employment prior to the specified date of joining. Ultimately, it must be determined on a case-to-case basis as to when the employment relationship would really commence and whether the company has any flexibility to either delay the joining or revoke the offer at any time prior to such commencement.

What measures should be taken by the employer to prevent the risk of contagion at the workplace?

The lockdown orders issued both at the central and the state level require employers to mandatorily follow certain safety and social distancing guidelines. Further, MoHFW has released its own guidelines on preventive measures to contain the spread of COVID-19 at the workplace. These measures primarily relate to maintaining physical distance, staggering of work hours, thermal screening, disinfection and sanitization arrangements, compulsory use of masks, prohibition on travel from containment zones and use of the Aarogya Setu app. For a detailed analysis in this regard, please refer to our ERGO available here.

In addition to the aforesaid mandatory measures, employers may also take the following precautions to prevent the risk of contagion at workplace:

- cancel all business / work trips to the affected regions, particularly containment zones;
- educate employees / stakeholders on basic hygiene and the manner of reporting any suspected case to the employer / public health authorities;
- encourage self-reporting and self-quarantine;
- frequently communicate regulatory updates / official guidelines and similar developments to employees (WHO, Ministry of Health and Welfare, state level guidelines / regulations);
- appoint health and safety offices and train managers / H&S officers / HR personnel on spotting symptoms, emergency response protocol and containment measures;
- put in place a dedicated hotline and helpdesks for employees especially those working from home;
- provide for a leave policy with additional sick / medical leaves, wherever necessary;

- put in place an anti-discrimination policy to ensure that employees who are required to go on sick leave / affected employees do not feel discriminated against; and
- encourage working from home, wherever feasible and as advised by the state / local governments.

What should be done if an employee refuses to report to work because of the risk of contagion?

For establishments which remain shut as per lockdown orders, the employer must make necessary arrangements to ensure that employees are able to work from home.

Further, for establishments which are permitted to continue / resume operations after the lifting of restrictions, employers must still endeavor to follow the practice of work from home to the maximum extent possible. However, wherever it is not suitable, the employer may require employees to report to work after taking the prescribed safety measures at the workplace.

In case an employee refuses or fails to report to work, the employer may first require him / her to explain such refusal / absence. In case such explanation is found to be unsatisfactory, appropriate action may be initiated as per company policy. Please note that in the case of *Align Components Private Limited and Another v Union of India and Others [Writ Petition 10569 of 2020]*, the Bombay High Court (Aurangabad Bench), passed an interim order dated 30 April 2020 clarifying that at workplaces which are permitted to operate, employees would be expected to report for duty and in case of any voluntary absence, the employer would be at liberty to deduct their wages for the period of absence subject to applicable procedures laid down in law.

Has the government introduced any relaxations or changes to support employers during the lockdown period?

Yes, owing to the impact of COVID-19 and consequent lockdown restrictions upon employers, the Central Government has introduced certain relaxations and measures, which are as below:

- Provident Fund Contributions: The government has introduced temporary relaxations from social security contribution requirements with an attempt to provide more liquidity in the hands of employers and employees. These relaxations are set out below.

  a) For all establishments, both employers' and employee's contributions under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) have been reduced from 12% to 10% for a period of 3 months i.e. May 2020 to July 2020.

  b) The Central Government has launched a scheme wherein it will be making both the employer's and employees' share of provident fund contributions for certain establishments i.e. those with up to 100 employees, of which atleast 90 % of

employees earn below INR 15,000 per month. The scheme was originally introduced for 3 months beginning March 2020 and has been extended until August 2020.

- Increased Working Hours: Several states, including Maharashtra, Punjab, Haryana, Gujarat, Madhya Pradesh, Uttar Pradesh, Uttarakhand, Odisha and Himachal Pradesh have temporarily increased the limits on working hours applicable under the Factories Act, 1948. The statutory daily and weekly limits of 9 hours and 48 hours have been increased to 12 hours and 72 hours respectively, in most of the aforesaid states. However, such an increase is subject to payment of overtime wages in the manner prescribed in the state-specific notifications.

- Sweeping Labour Reforms: A few states have announced / are considering radical labour law reforms and relaxations to offset the economic impact of the pandemic. The Madhya Pradesh Government has introduced several amendments and an ordinance *inter alia* allowing temporary exemptions from major employment obligations including specific provisions under the Factories Act, 1948 and IDA. Similarly, by way of press releases, the Uttar Pradesh and Gujarat Governments have also announced ordinances to exempt all manufacturing establishments from applicable labour laws, except those expressly excluded, for a period of 3 years and 1200 days respectively. Further, the Odisha Government has also announced amendments to increase the threshold of applicability of the Factories Act, 1948 to 50 workers and that of Chapter VB of the IDA to 300 workers. However, the respective ordinances / amendments of Uttar Pradesh, Gujarat and Odisha are currently awaited.

- Procedural Relaxations: Owing to the present circumstances, various central and state authorities have been announcing certain procedural relaxations. For instance, extensions have been granted on filing of payment returns under the EPF Act, Employees' State Insurance Act, 1948 and annual returns under various other central labour statutes. Similarly, a few states have also introduced relaxations regarding payment of professional tax, renewal of licenses etc.

Pursuant to the temporary rate reduction under EPF Act, does the employer need a declaration by the employee to contribute at reduced rates?

The notification dated 18 May 2020 issued by the Ministry of Labour and Employment, Government of India, has amended the rate of both employer's and employee's contributions from 12% to 10% for the wage months May 2020, June 2020 and July 2020. Given that this is a change in the law (and not a change effectuated by the employer), the employer does not need a declaration by employees to contribute at these reduced rates. That said, an employee may, if he so desires, make contributions at a rate exceeding 10%. In such a situation, the employer would not be required to match such excess contributions and can make contributions at the reduced rate of 10%.

SECTION II

WORK FROM HOME

What preparedness should an employer undertake to facilitate work from home for employees?

The employers could adopt the following measures to facilitate work from home for their employees:

- ensure effective communication amongst employees (including team managers/supervisors), to prevent disruption in business operations;
- ensure employees are aware of and adhere to the confidentiality obligation (as per the terms of their respective employment contract and/or handbook);
- employees should be provided proper IT equipment such as laptop / internet / webcam, etc. to be able to effectively work from home;
- if an employee is required to carry certain information/documents, it should be provided in encrypted format;
- company should ensure that effective IT tools / apps such as VPN, skype, cloud storage, IM, file sharing, virtual collaboration, etc. that are needed to support work from home are in place;
- company should ensure that employees are aware of and have been trained to use IT tools / apps;
- employers should intimate the employees about the temporariness of work from home, tentative duration and their expectations while working from home;
- employers should have a dedicated remote working facility that allows employees to record the hours worked on a particular project on daily basis leading to effective monitoring of employees' working hours;
- ensure work from home is not implemented on a case to case basis, resulting in discrimination of employees;
- since, IT support is crucial in a work from home scenario, adequate support personnel may be designated by the establishment in staggered timings, to address any technical glitches; and
- employers should ensure that the contact information of all employees and relevant stakeholders is readily available.

Whether an employer can take disciplinary action if an employee is not performing his/her assigned duties, while working from home?

Yes, an employer can act against an employee in accordance with established procedures, if the employee is found lacking in performance of assigned duties. However, such disciplinary action should not be in violation of applicable laws and principles of

natural justice, and due consideration should be accorded to the current lockdown situation and limitations for employees to perform their assigned tasks from home, such as unavailability of adequate IT resources or connectivity issues.

SECTION III

HANDLING CLOSURES / SHUTDOWNS

Is an establishment permitted to continue / resume its operations against the backdrop of COVID-19?

The nation-wide lockdown originally imposed with effect from 25 March 2020 has been extended at periodic intervals, albeit with gradual relaxations. The latest order dated 30 May 2020 issued by the MHA has extended the lockdown in containment zones until 30 June 2020. However, it provides for resumption of other activities in a phased manner in areas outside containment zones.

While most kinds of manufacturing as well as commercial establishments have been permitted to resume operations under the aforesaid order, please note that several states have imposed more stringent lockdown restrictions based on an assessment of severity of the local situation. Accordingly, employers must assess whether their operations fall under the prohibited or the permitted category under the central lockdown order read with state / local government orders.

Can the employer reduce wages of employees for the period that they are unable to work due to lockdown restrictions?

On 29 March 2020, the Secretary, MHA, issued an order in exercise of powers under the Disaster Management Act, 2005 (MHA Order), which *inter alia* directed employers to pay full wages to workers for the duration of the lockdown. Note that the order is intended to prevent economic hardship of migrant workers but is couched in vague terms to cover all workers. Further, several states such as Maharashtra, Uttar Pradesh, Delhi, Madhya Pradesh, Jharkhand, Gujarat etc. issued orders / advisories on similar lines, to ensure that employees of establishments that are temporarily closed pursuant to the lockdown orders shall be provided full wages for the period of such temporary closure.

However, please note that the lockdown order issued on 17 May 2020 by the Secretary, MHA, provides that *inter alia*, the MHA Order shall cease to have effect beginning 18 May 2020. Further, a bunch of writ petitions have been filed before the Supreme Court challenging the validity of the MHA Order, primarily arguing that such a mandate is outside the powers given to the government by the Disaster Management Act, 2005. In the writ petition of *Ficus Pax Private Limited v Union of India [Writ Petition 10983 of 2020]*, the Union of India has filed its counter affidavit and the matter is listed to be heard next on 12 June 2020.

Are there any statutory requirements which may be triggered during lockdown?

The lockdown may trigger the requirements of layoff under the IDA where the establishment is a non-seasonal factory, mine or plantation with 50 or more workmen. The IDA stipulates payment of layoff compensation to workmen (non-managerial employees)

during the period the employer is unable to provide work to them. In addition to this, the provisions under the model / certified standing orders as applicable to the establishment and the terms of employment of the particular employee may have to be referred to.

Can the employer put its employees on furlough for the period of lockdown?

The term 'furlough' is not used in its literal sense in India. Construing the same as leave without pay, please note that Indian laws do not expressly envisage the same. Further, as discussed in the previous response, the IDA recognizes and permits 'lay-off' of employees at only specific kinds of establishments i.e. factories, mines and plantations (subject to other terms of their employment), and also stipulates layoff compensation to be paid to them during such period. Thus, in view of such provisions as well as the state orders / advisories requiring employers to pay their employees full wages during the lockdown period, a unilateral decision requiring employees to proceed on leave without pay may be difficult to implement at an establishment. However, depending upon business exigencies, an employer may strategise and employ an alternate plan for payment of salaries, based on discussions with the potentially impacted employees.

Is an employer obligated to pay wages to contract workers engaged through a manpower service provider for the period of the lockdown?

Ordinarily, contract workers are paid wages by the manpower service provider i.e. the contractor and the principal employer makes payments only against the services rendered to him by the contract workers. Such language is typically incorporated in the manpower services agreement itself, which would state that the contractor is required to raise an invoice for the work performed, to be paid by the principal employer. However, note that this is a general view, and a conclusive determination could vary from case to case, based on an assessment of the provisions of the manpower services agreement and any other arrangement between the parties in this regard.

Can the principal employer claim 'force majeure' as regards engagement of contract workers through a manpower service provider?

Principal employers should review the manpower services agreement executed with vendors / contractors. If there is no force majeure clause covering situations of epidemic, the provisions of the Indian Contract Act, 1872 will apply. As regards COVID-19, the answer to the question of claiming force majeure is not a definitive one – several factors including the local situation, the purpose of engagement of contract workers, the possible means of fulfilment of the terms of contract etc. will have to be assessed.

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The information in this guide is as of 10 June 2020 and based on the advisory / notifications / orders existing as on date in India. Any changes in such advisory / notifications / orders could have an impact on the validity of our information stated herein.

The purpose of this guide is to answer some of the perplexing questions being faced by employers in India in the backdrop of COVID-19. For a detailed understanding of the applicable laws and advisories that may assume significance for employers who are assessing the current situation and developing suitable strategies, please reach out to the Employment Labour and Benefits team at Khaitan & Co.

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