

Employment in Covid-19 Times: 15 Frequent Queries

On March 24, 2020, the government ordered a nation-wide lockdown for 21 days effective from March 25, 2020 (“**CG Notification**”). Amidst this unprecedented situation, organizations have been grappling with various issues confronting employment policies and practices. This FAQ captures some of the frequent queries we have been asked over the past couple of weeks and we hope they are useful for organisations facing similar concerns.

1. Who has to shut down?

With effect from March 25, 2020, all public and private organizations must be closed, unless specifically exempt as per CG Notification. All non-exempted shops, commercial and industrial establishments may require employees to work-from-home (“**WFH**”) only. The exceptions inter alia include:

- hospitals and related medical establishments, their manufacturing and distribution units such as chemists, ambulances services, diagnostics, etc.
- shops dealing with essentials such as food, animal fodder, dairy products
- banks, insurance offices, and ATMs
- print and electronic media
- telecommunications, internet, broadcasting and cable services
- IT/ITES only for essential services;
- e-commerce delivery of essential goods like food, pharmaceuticals, medical equipment
- petrol pumps, gas stations, and their retail and storage outlets
- power generation, transmission and distribution units and services
- capital and debt market services as notified by SEBI
- cold storage and warehousing services
- private security services;
- manufacturing units of essential commodities such as food, pharmaceuticals, medical equipment, fuel, etc. and their input chain
- production units which require continual processing, with prior approval from concerned state government
- transport services for essential goods, fire, law and order, and emergency situations
- hospitality services which are accommodating tourists and persons stranded, medical and emergency staff, air and sea crew
- establishments used as quarantine facilities

[PSA Note: Since CG Notification is under the Disaster Management Act, 2005 and most state lockdown orders were under the Epidemic Diseases Act, 1897, organizations must read the two

together, specifically for employment matters. The state lockdown orders are as of date not superseded, and any additional restriction or requirement will continue to apply as well.]

2. Are employers obligated to provide work from home? What are the key aspects that employers should be mindful of if they do not have a dedicated WFH policy?

Prior to March 23, 2020, different alternatives were being explored, such as rotational work shifts, mandating physical attendance for employees who cannot work from home owing to job description, etc. However, in light of state lockdowns since March 23, 2020 and CG Notification, now, employers can either close operations or require employees to WFH. Hence, it is mandatory for employers to assess their preparedness for enabling and implementing WFH.

In the event an organization does not have a dedicated policy, as a first step, it will be essential to determine employment profiles that can function remotely. Where an employee can WFH, employers should evaluate the physical and technological infrastructure availability, its security, remote reporting chain, indicative timelines for response and delivery, escalation matrix, and virtual meeting protocols. Alongside, WFH methods must comply with applicable law requirements around working hours, overtime, leave and holidays. It is advisable that employers prepare an interim policy to communicate effectively and efficiently with employees for WFH duration.

However, where WFH is not possible either because the nature of job is such or an employee is unable or unwilling to WFH despite such possibility, employers must carefully evaluate future course of action including paid leaves, loss of pay, or disciplinary action.

3. What are the permissible alternatives where WFH is not possible?

CG Notification does not clarify employer's recourse where WFH is impossible. Impossibility could arise due to various factors, including a situation where an employee is not fulfilling the employment duties during lockdown, despite all enabling provisions for WFH.

Before deciding the next steps, an employer must identify if the employee is a white-collar employee or workman, and closely review implications under factories, industrial disputes, shops & commercial establishment laws, employment contract, internal policies, and any state specific order, directive, or advisory issued for COVID-19. For instance, in Delhi, the lockdown notification of March 23, 2020 states that employees (including temporary, contractual, outsourced) who are required to stay home shall be considered on-duty and paid full salary. This can be interpreted to mean that all employees, temporary or permanent, must be deemed on-duty and cannot be asked to avail leaves, paid reduced wages, or terminated.

Subject to assessment as stated above, employers could consider the following alternatives where WFH is impossible:

- paid leaves
- utilization of accumulated leaves instead of encashment

- leave with loss of pay
- counselling and advisory
- initiating disciplinary action

4. Are employers obligated to pay remuneration during lockdown?

Any employee working from home must be paid in accordance with applicable law and employment contract. The question becomes pertinent only where an organization cannot allow, or if the employee does not WFH.

CG Notification does not state anything about employer's payment obligations. Some state lockdown orders such as Delhi, Tamil Nadu, Uttar Pradesh, and Telangana have mandated employers to pay remuneration without any deduction. Additionally, the central Ministry of Labour & Employment issued an advisory to all private employers on March 20, 2020 ("**MLE Advisory**") as per which any establishment which is non-operational must deem its employees on-duty. An establishment will be non-operational where core activities cannot be carried out remotely and will include all shops, commercial establishments and manufacturing units which are engaged in nonessential goods. It also states that an employee taking leave during lockdown must be deemed on-duty without wage deduction. In similar vein, the Cabinet Secretary issued an advisory to state governments on March 22, 2020 ("**CG Advisory**") which directs state governments to request employers to provide remuneration during lockdown.

In light of these, there is no pan-India legal mandate for employers to pay during lockdown. Thus, employers are not obligated to pay employees who refuse to WFH, provided there is no restriction under state orders. Such specific cases can be dealt with in accordance with company's policies and applicable law on leaves, loss of pay and disciplinary action.

Nonetheless, where the employer is non-operational and no reason can be attributed to the employee, it is advisable to pay as if the employee is on-duty.

5. Are employers required to make social security contributions during lockdown?

Yes, employees are eligible to receive remuneration and permissible deductions towards social security laws such as Employees' Provident Fund & Miscellaneous Provisions, Payment of Gratuity and Employees' State Insurance acts. For contributions under Employees' State Insurance Act, Employees' State Insurance Corporation has relaxed the timeline for contribution liability in February and March 2020, upto April 15 and May 15, 2020 respectively. Specific to Payment of Bonus Act, employers are required to pay minimum bonus @8.33% of the average annual or pro-rated wages to eligible employees. There is no notice or circular which suspends this provision, and hence, the obligation remains. However, as the said law allows 8 months from close of accounting year for making payments, organizations can revise their internal practices to delay the payments.

6. Can employees be required to use paid leaves?

State governments have issued different advisories and directions on this aspect. For instance, Karnataka advisory states that employers must sanction paid leaves. Maharashtra advisory states that employees on leave shall be deemed on-duty. Uttar Pradesh lockdown order provides that employees must be paid holidays with wages. Thus, each case must be evaluated independently

factoring applicable law, COVID-19 directions/advisory, employer's leave policy and employment contract terms.

As such, paid leave (also called privilege or annual leaves) is an entitlement for employees under state specific factories and shops & establishments acts. Typically, the leave entitlements under these laws range between 12 – 15 days. They also permit carry forward and accumulation in future within certain limit, generally, between 30 – 50 days. These are statutory rights, and an employer cannot require employees to avail their paid leaves during lockdown. It is also mandatory that any contractual term or arrangement must be more beneficial to the employee.

Nevertheless, where the employer and employees voluntarily agree, or where the contract allows employer to change policies unilaterally (except in case of a workman under the Industrial Disputes Act), an employer can require utilization of paid leaves accruing in a year or those which are accumulated over the course of time.

7. Can employers reduce salaries for employees during lockdown?

In case of employees appointed through an employment contract, an employer cannot unilaterally reduce the salaries of such employees, as it would amount to an amendment of a fundamental contractual clause. Further, in case of workmen, this would qualify as unjust practice and result in industrial disputes. It is important to note that MLE Advisory states that employers should not reduce wages during lockdown, indicating the ideal action for employers. Where economic hardships create an exigent situation that may result in possible salary reduction, the employer must factor state specific COVID-19 directions and advisories (for example, Maharashtra advisory states not to reduce remuneration) and obtain consent from concerned employees, although such consent is extremely unlikely.

8. Can employees be considered on leave with loss of pay?

Instances for leave with loss of pay is dependent on applicable law and employment contract. Some state governments through COVID-19 directions/advisory have required employers to deem employees on leave as on-duty and pay them remuneration. For instance, Delhi lockdown clearly mandates employers to deem employees at home on-duty and pay them remuneration. Thus, employers must account for these before deciding on unpaid leave for an employee. But, where there are no state directives/advisories, and an employee despite provision of WFH, refuses or is unable to work, employers may not be obligated to sanction paid leaves. Such cases can be dealt with as per employer's internal policies and the employment contract.

9. Can employees be terminated?

As per MLE Advisory, employers should not terminate employment during lockdown. It further states that if any establishment is non-operational, it must deem its employees on-duty. Thus, while termination can be carried out as per employment terms and applicable law (such as Industrial Disputes Act for workman termination), it is advisable that employers do not terminate employment during lockdown. Specific care should be taken where employer contemplates termination of workman or where the workforce is unionised, as a termination in the given circumstances is very likely to be questioned as an illegal termination resulting in potential industrial dispute under the Industrial Disputes Act.

10. What are some issues encountered in hiring or renewing employment contracts during lockdown?

An employment offer shall become a binding contract when there is acceptance. Acceptance can be formal, oral or inferred from conduct. However, lockdown prevents many employers and potential employees from executing formal physical contracts, which is a very common practice. In COVID-19 times, employers can continue hiring new employees by requiring e-mail acceptance, or by digital/electronic signing of the offer letter.

We have also received questions on what should be the joining date for new employees. Absence of a specific joining date has a bearing on a new employee's remuneration, and contracts must stipulate their effective date, failing which the signing or execution date is deemed as the date on which parties' obligations trigger. Hence, employers must identify a joining date (preferably a date after April 15, 2020) and caveat it adequately to state that the date is subject to change through further communication.

Additionally, many organizations require pre-employment medical fitness check-up as a pre-requisite. During lockdown, this cannot be completed. To address such situations, employers must include specific language in the offer letter, which states that the (i) employee consents to medical and fitness check-up during the employment term, (ii) continued employment is contingent on clearing these tests, and (iii) employer has the right to terminate if an employee refuses or fails the tests.

11. Can employers conduct medical check-up at the time of re-joining?

Conducting medical check-up at the time of re-joining after lockdown is possible where the employment contract or policies allow the employer to conduct fitness and medical check-ups during the course of employment. In the absence of such an enabling clause, employers can perform the tests with employee's consent, as it would be a new employment condition. Further, where the test results are obtained in electronic formats, which is the most common scenario, employers need to obtain specific consent for accessing those reports. This is because health information and medical records qualify as sensitive personal information, and cannot be processed without consent as per the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

12. What essentials must be complied for exempt organizations?

The Ministry of Labour and Employment issued an advisory on preventive measures to be taken by employers who continue to operate on March 19, 2020. As per this, employers must:

- keep work places clean and hygienic with frequent sanitization, particularly for frequently touched surfaces;
- ensure regular supply of hand sanitizers, soap and running water in washrooms and dispensers at prominent places;
- promote regular and thorough hand-washing by employees;
- create posters and other forms of communication for guiding occupational health and safety;
- create awareness about respiratory hygiene and physical distancing;
- advise employees to avoid shaking hands and hugging as greetings;

- encourage WFH wherever feasible;
- conduct meetings through video conferencing and reschedule meetings for large number of attendees;
- advise employees at higher risk like older and pregnant employees to take extra precautions;
- widely circulate do's and don'ts amidst employees; and
- develop policies and procedures for employees to report if they are sick or experiencing asymptomatic.

While these are advisory, it is imperative that employers follow this, as failure may result in future claims under employer health insurance policies and applicable law as work related health hazard. Hence, it is highly recommended that employers consider the above advisory as an occupational health and safety mandate under the factories and relevant shops & commercial establishment laws.

13. If an employee has COVID-19, what are the implications?

Any employee who had exposure or may have symptoms or has contracted COVID-19 should be prevented from working at employer's premises in order to protect the health and safety of other employees. Employers must strongly recommend the employee to self-quarantine and isolate at home, circulate a suo moto report as required under state specific orders and access healthcare services immediately. With respect to employer's liability for compensation or bearing medical expenses, it will be important to determine if the transmission occurred at workplace where the employer will be solely liable. For other situations where transmission has been in relation to employment, there is ample subjectivity and it will be difficult to substantiate and prove such claims.

14. Do employers have an obligation to report COVID-19 employees?

No, employers do not have such obligation. They must advise the COVID-19 employees to self-report as per state specific directions.

15. Are employers required to conduct awareness programmes?

While there is no mandatory requirement, as stated at #12 above, employers must conduct awareness initiatives to avoid any future claims and liabilities.

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