

COVID-19: Risks and liabilities to be considered by the Board of Directors of Indian Companies

written by Jidesh Kumar | March 20, 2020



'Understanding transmission of the virus is key to its containment and future prevention' – David Veessler, a structural virologist based in Seattle.

The buck stops at the Board! As the number of confirmed cases of coronavirus COVID19 continue to rise, the most asked question around the globe is- How to stop the spread of this deadly virus? Thanks to television and social media, we are flooded with preventive measures and cures to combat COVID19. Should the Board of Directors of various Indian companies believe that taking adequate hygiene measures to ensure workplace safety are enough to combat the situation?

What are the COVID-19 Risk and Liabilities for Board of Directors?

Work From Home and

Workplace Safety:

Allowing employees

to work from home may not just be a feel-good option. As employers, Indian corporates are vicariously liable to provide a safe working environment. A comfortable

work environment during normal times could be unsafe during the spread of such

a pandemic; for reasons seemingly beyond the employer's control.

All companies and

senior management must consider work from home as a preventive remedy to contain the spread of the virus. In a recent case in Agra, a First Information

Report was filed under section 269[1] and 270[2] of the Indian Penal Code against

an infected lady for escaping quarantine and travelling from one state to another.

Creating,

promoting, or passively contributing to a situation that enables the virus to spread can be a punishable offence for which a company and its Board could be held liable. Police have registered a case under sections 143[3], 147[4], 149[5], 188[6] and 283[7] of the Indian Penal Code against

a television celebrity, Rajith Kumar in Cochin [Kerala], for violating the COVID19 advisory. Hundreds of his fans gathered at the airport to greet him.

Similarly,

the responsibility of directing employees to adhere to preventive regulations falls upon the directors and officers.

In these difficult

times, it is a duty of the employer to prevent the spread of the pandemic by avoiding gathering at workplace and directors are bound to take decisions to prevent situations that could promote the virus to spread; not doing so could lead to allegations of negligence. The first instance which comes to mind in this context is a workplace canteen.

It is not uncommon

to see canteens overcrowded, either because of the peak lunch hour, the caterers serving food are awaited, space constraint, or due to formal or informal celebrations. In short, situations purportedly created or permitted by

the employer due to which employees have no choice but to expose themselves to

a greater risk of spread of the pandemic. Some factories and offices have extended working hours of canteens and are providing workmen with breaks in shifts to avoid gathering of large crowds. The same is done to ensure that the

workflow and culture of the workplace are not disrupted.

Empathize towards

the employees:

'Awareness is like the sun. When it shines on things, they are transformed.'

Creating awareness

among employees can contain panic. Using the company's internal communication tools, the Board of Directors should provide detailed and updated information about the virus, its symptoms, precautionary measures, etc. from time to time.

Company must update their current policies to deal with the issue at hand and ensure proper reporting channels from those who are affected or have symptoms of the virus to the top management directly, because delay, could only attribute to trouble.

Travel

and Leave:

Further,

the obligation to provide a safe working environment also requires companies to

put travel curbs in place – including monitoring of personal travel.

Management

needs to vocally discourage a typical tendency where employees show their dedication

by being present at the workplace even if they are unwell because if these sick

employees spread disease, it is the employer who will be vicariously liable to

the affected employees. In Karnataka, a 28 day paid and casual leave has been mandated for employees infected with COVID19.

Absenteeism

from workplace:

It is essential for the reporting heads and management to consider sick leaves, without apprehension and accommodate such leaves of the employee who intend to remain absent from work. Typically, such acts of employees in excess could cause repercussions from the employer, however, it is required to be mindful of such issues and allow the same in the interest of the company, This however, shall be guided by the company policy in place already, and hence recommended that the Board of Directors be flexible while approving such absenteeism.

Disaster

Management Plan and Communication:

A major role of the Board in enterprise risk oversight is to make sure that there are contingency plans in place even before a crisis arise. It is the responsibility of the Board of Directors to create a disaster management plan to be documented in the minutes of the meetings of the Board in order to ensure transparency and clarity on expectations. The Board must consider such crises as global and react proactively to be solution-oriented. The Board has to exhibit great leadership to ensure that the rest of the people in the company do not panic. Constant communication and guidance is the key. For instance, many courts have not allowed for 'force majeure' clauses to cover the coronavirus disease for not being able to consummate transactions and obligations under contracts. Such alerts must be communicated to relevant teams so that the manner of handling specific situations is known.

Hygiene:

It is the implied duty of the Board of Directors to provide a safe and hygienic workplace to its employees, Sanitizing floors, lifts, desks, computers and keyboards, printers, fax machines, including surface tables that employees use

in common is essential and contributes to a safe and hygienic work environment.

Installation of hand sanitizers in common floor areas may ensure proper hygiene and less absenteeism.

Insurance:

The

Board should ensure that adequate group insurance policies are in place, and details such as nature and extent of coverage, designated hospitals, manner of

settlement, emergency handling, etc., are notified to all employees. The Board

should have adequate Directors and Officers (D&O) liability cover in place.

Conclusion:

With

the rise of cases in India and elsewhere, the criticality of COVID -19 seems

to
be increasing by the hour. It is of utmost importance that directors be proactive to curb the virus and ensure safety of their employees. This will also help reduce risk and liability from legal claims to which, during these harrowing times, the Board and directors have higher exposure to than can be imagined.

Third

party claims cannot be underestimated during these testing times, more so for Indian corporate having operations or securities listed abroad. The following are merely instances–

- Customer communication – what all needs to be done to prevent claims of negligence, non-performance, delay in delivery, product liability due to coronavirus?
- Investor engagement – handling business disruption, insider trading (should trading windows be closed?), revision of earnings guidance, balancing disclosure and privacy concerns; should an upcoming general meeting be postponed?
- Can business disruption be covered adequately by insurance?
- Does the failure to respond appropriately to the coronavirus outbreak lead to enforcement actions alleging consumer protection violations, or environmental law violations?
- If a factory or workplace is to be evacuated and disinfected, can payment of rent be suspended?
- Is there a need for special insurance cover for key employees who are vital for the survival of the business?
- Is there a need to revisit key documents such as shareholders' agreements, limited partnership agreements and the like?

Lastly,

the assistance of outside counsel to benchmark with the right industry practice

is extremely essential to address these unique issues.

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- [1] Negligent act likely to spread infection of disease dangerous to life.–Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.
 - [2] Malignant act likely to spread infection of disease dangerous to life.–Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
 - [3] Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.
 - [4] Whoever is guilty of rioting, shall be punished with imprisonment of

either description for a term which may extend to two years, or with fine, or with both.

- [5] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.
- [6] Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. Illustration An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.
- [7] Danger or obstruction in public way or line of navigation.—Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

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