

FAQ'S for Indian employers: Can Employees be terminated during COVID-19?

written by Jidesh Kumar | April 15, 2020



Employee Termination During Covid 19 Crisis

During the Covid-19, we, King Stubb & Kasiva, have been approached by clients across industry verticals who have made inquiries concerning Employment and Labour law-related aspects in India. We are providing below excerpts and a summary of our legal opinion for a few questions posed to us about the termination of employees by Indian companies with the objective of providing options to CEOs, CFOs, in-house legal teams, and other key stakeholders, while they deal with cash flow issues during Covid-19.

For the reader's ease, we have provided our response in the form of questions and answers and hope the same will be of assistance.

1. QUERY 1: *What are the categories of employees in an 'Industry' or 'Shops and Commercial Establishment' to which the MHA Order (defined hereinafter) applies?*

Response: The MHA Order issued under the powers granted to it by the Disaster Management Act, 2005, among other things, clearly spells out the responsibility of the employer towards its workers during the lockdown caused by the COVID-19 crisis and is produced verbatim herein below for your ready reference:

"All the employers, be it in the Industry or in the shops and commercial establishments, shall make payment of wages of their workers, at their workplaces, on the due date, without any deduction, for the period their establishments are under closure during the lockdown;"

Based on the above extract from the MHA Order, it is abundantly clear that the same applies to workers, drawing wages, at their workplace. It also states that this is applicable only to those establishments that are closed during the lockdown.

Since the MHA Order does not define who is a worker, it is important to place reliance on the various legislations that define the term 'worker' and also those legislations that define the term 'wages' and also workers to whom wages need to be paid, to arrive at the correct interpretation of the MHA Order.

The Code on Wages, 2019, is an Act of the Parliament of India that consolidates the provisions of four labor laws concerning wage and bonus payments and makes universal the provisions for minimum wages and timely payment of wages for all workers in India. However, this act though published in the official gazette, will only come into effect, on a future date notified by the Central Government. To that day, the existing regulations continue.

The Payment of Wages Act, 1936 ("POW Act") defines what is 'wages'. The

preamble to the POW Act states that it is an Act to regulate the payment of wages to certain classes of employed persons, whereas it is expedient to regulate the payment of wages to certain classes of employed persons. This makes it clear that there are other classes of employed persons to whom 'wages' need not be paid. Wages[1] as per section 2(vi) and section 3 of the PoW Act clearly state that employers shall pay wages to their workmen engaged in factories, industries, or other establishments governed by the Act. Most corporates and employees engaged in industries, factories, and other establishments, but performing managerial, administrative, and supervisory functions as stated above shall not be governed under the PoW Act. Further, the POW Act also clearly states under section 1(6) that it is applicable to such a class of employees whose wage does not exceed INR 24000 (Indian Rupees Twenty-Four Thousand) per month.

The term worker is defined as per Section 2 (l) of the Factories Act, 1948 to mean a person employed directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer whether for remuneration or not in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the Union

There is mention of 'wages' to be paid to employees in two other legislation, namely, the Industrial Disputes Act, 1947 ("ID Act") and the Shops and Commercial Establishments Act, 1961 ('SCE Act').

It is thus, imperative to understand who is eligible to earn 'wages' under the ID Act. The ID Act mentions that under Section 2 (rr) of the said Act, wages mean all remuneration capable of being expressed in terms of money, which would if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment. Thus wages under the ID Act needs to be paid only to the workman. The term workman[2] is defined as per Section 2(s) of the ID Act. The term workmen apply to people performing manual, unskilled, skilled, technical, operational, clerical or supervisory work and employed in an industry, but shall not include any person employed in a managerial or administrative capacity. It also does not include those who are employed in a supervisory capacity and who earn wages exceeding Rs. 10,000/-.

The SCE Act (each state has its own Shops and Commercial Act along with a specific set of rules), states that wages need to be paid to employees as per the POW Act. As per the POW Act, employees who are earning more than INR 24000/- per month are not governed under the POW Act and hence are not required to be paid wages under the MHA Order.

Section 2 (cc) of the ID Act defines "closure" to mean the permanent closing down of a place of employment or part thereof. India, being a common law country, our laws are subject to strict interpretation. It can also be safe to interpret that this does not apply to an establishment that has work from home or is partly working or is not under closure through other arrangements. However, we are proceeding with the assumption that the MHA Order is applicable even to those with work from home or other arrangements in place and 'closure' mentioned in the MHA order includes partial closure and/or inability to perform normal operations.

Finally, workplace shall have the meaning under the ID Act, if such workplace

falls under the definition of industry/undertaking therein, else shall be either a shop or establishment under the SCE Act.

Opinion:

It is clear from the preamble and definition of terms under the various legislations as well as the MHA order that employers are mandated to pay only wages to eligible employees. Based on the above definitions and meanings under the various statutes, it is clear that wages are required to be paid only to the following class of employees, namely, a) employees of an industrial establishment that are workmen; and b) employees of shops and establishment that are non-exempted by the SCE Act of the respective State.

- *QUERY 2: If the employees are earning wages, can they be terminated, or can an amendment in the employment contract be effectuated unilaterally?*

Response: Based on our analysis of employees in query 1 above and the interpretation of the MHA Order, we are of the opinion that if the employees are earning wages, they cannot be terminated in light of the MHA Order and shall continue to be employed and paid until the lockdown continues or until such time prescribed by the Government in this regard.

No unilateral amendment to an employment contract is possible unless it is specifically stated in the employment contract between the employer and employee. If the employment agreement or the manual does not set out unilateral powers to the company, it will need to obtain the employee's consent, implied or express, before such a change is affected, which affects their employment terms and/or conditions is made.

- *QUERY 3: If the category of employees is not earning wages under the PoW Act, are they eligible to receive salaries during the lockdown?*

Response: The various Indian labor legislations provide protection only to those employees that earn 'wages' under the POW Act, irrespective of whether they work in factories or industries or shops or establishments. For all other employees, who do not earn wages under the POW Act, their relationship with the employers is entirely governed by the employee handbooks and/or their employment agreements.

So, there is no statutory mandate on the companies to pay salaries to these employees that are not earning 'wages'. The companies may also defer payments or alter payment terms if there are such business conditions that may cause loss to the company or lead the company to insolvency. This may be achieved by communicating in writing to the employees and also by obtaining either express or implied consent from the employees.

- *QUERY 4: Whether the employees who are not required to be paid wages as per the MHA Order can be terminated?*

Response: Yes, employees who are not required to be paid wages under the MHA Order and whose services do not fall under the ambit of the MHA Order can be terminated by the employers. Termination for such employees will have to be carried out as per the employment contract duly executed between them and/ or as per the SCE Act of the relevant jurisdiction where the employee is located and is engaged by the employer.

For e.g. Under the Karnataka Shops and Establishments Act, 1962, mandates employers to provide a minimum of 1 month of notice prior to dismissal or wages in lieu of such notice^[3] for an employee who is in continuous employment of the employer for the period of six (6) months or more. Further, the Karnataka Act also prescribes that any such termination shall be made by giving reasonable cause to the employee. Loss of business, poor performance,

etc., are all valid reasons to terminate employees.

- QUERY 5: *If the above category of employees, can be terminated, what are the steps/safeguards that an employer may take into consideration?*

Response: It is recommended that the employer, before making a decision to terminate, shall at all times ensure that they are in compliance with the provisions of termination under the employment contract and the SCE Act of the State where the employee is located and engaged in services, as the case may be,

When the employee is terminated, it is also highly likely for the employee may disagree with the interpretation that he is not a 'wages' earner and hence cannot be terminated. Hence, it is very important to issue a carefully worded termination letter.

The Employee may approach the COVID-19 employee helpline and use the helpline as a forum to register a complaint and seek relief against the employer for non-payment

of wages from the Government. During the epidemic situation, there is a high probability of the administration taking a very conservative view and not going by legal interpretation/ opinion of whether an employee is eligible to be terminated or not. There is a strong possibility of the labor department, overstepping its jurisdiction, to entertain complaints from employees sympathetically (and also recommend to the police to register a complaint) and directing the employer to pay wages to the complainant employee on compassionate grounds.

In such an eventuality, we advise, that the employer pays the employee salary 'under protest' with a disclaimer that the company reserves the right to recover the same from the employee after the COVID-19 crisis. It is recommended that companies adopting these measures create appropriate termination letters and incidental documentation as evidence for future purposes if the matter ends up in the Courts.

This measure should assist companies to conserve cash flow in the short to medium term and also demonstrate [optical] compliance with the directives of the police and the labor department's interpretation of the MHA Order and in parallel create a cause of action to recover the monies paid to the terminated employees, when normalcy returns.

CONCLUSION:

We are, therefore, of the considered opinion based on the interpretation of the MHA Order, that workers who do not earn 'wages' under the POW Act, can be terminated, provided the employer is in compliance with the employment agreement, ID Act, and/or the SCE Act, as the case may be.

We trust that the aforesaid is of assistance to you. In the event you have additional queries or require any clarifications or require legal assistance, please feel welcome to get in touch with us by e-mail at jidesh@ksandk.com or on +91 9972225878. We have also populated extensive legal material on Covid-19 which can be accessed at.

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DISCLAIMER

Please note that this is not a legal opinion and is only the summary of excerpts from legal opinions that we have provided to our clients on the basis of their facts and legal situations. You are requested to not base your legal and/or business opinions on this note and are advised to seek

independent legal advice. We are not liable to the reader or any person (natural or juristic or otherwise) for any losses that may be caused to them after taking any legal or business actions placing reliance on this academic note. This document has been prepared on the basis of guidelines of the government [both central and state] as of April 15, 2020, and does not take into account any further guidance provided by the government.

ANNEXURES

LAWS/DOCUMENTS REVIEWED

In connection with the preparation of this Memorandum, we have examined the relevant provisions of the following statutes and regulations:

1. The Code on Wages Act, 2019
2. The Karnataka Shops and Commercial Establishments Act, 1961
3. The Industrial Disputes Act, 1947 ("ID Act");
4. The Payment of Wages Act, 1936 ("PoW Act")
5. The Factories Act, 1948
6. Notification issued by Ministry of Labour and Employment dated March 20th, 2020;
7. Notification issued by the Ministry of Labour and Employment dated March 23rd, 2020.
8. The order issued by Ministry of Home Affairs dated March 29th, 2020 bearing no. 40-3/2020-DM-I (A) ("MHA Order")

[1] "Wages" means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes-- (a) any remuneration payable under any award or settlement between the parties or order of a Court; (b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period; (c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name); (d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made; (e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force; but does not include-- (1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court; or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government; (3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon; (4) any travelling allowance or the value of any travelling concession; (5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or (6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).]

[2] "Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding

under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.]

[3] Section 39 of the Karnataka S & E Act: No employer shall remove or dismiss an employee who has put in service under him continuously for a period of not less than six months, except for a reasonable cause and unless and until one month's previous notice or pay in lieu thereof has been given to him

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