

CAN PRIVATE EMPLOYERS PAY REDUCED SALARY DURING LOCKDOWN

Corona Virus has created an unprecedented situation having devastating impact on the finance of our country. All industries/businesses across the country have got adversely affected and one question which is pestering all is, “*Whether the various orders and directions issued by the Government calling upon the private employers not to deduct the salaries of its employees and further advising them not to terminate their employment during this lockdown period, are mandatory in nature?*”

Central Government as well as several State Governments issued advisories/orders advising the employer to treat the workers “on duty” and not to take any coercive steps against them. However, these advisories were not binding and were merely directory in nature.

However, on 29.03.2020, the Ministry of Home Affairs, Government of India, in exercise of powers contained in Section 10(2)(l) of the DMA, passes an order (No. 40—3/2020-DM-1(A)) directing for mandatory payment of wages without deduction by employers of private/government establishments to their workers and making any violation of the order punishable under the DM Act. The said order reads as under:

“Whereas, to deal with the situation and for the effective implementation of the lockdown measures, and to mitigate the economic hardship of the migrant workers, in exercise of the powers, conferred under Section 10(2)(l) of the DMA, the undersigned, in the capacity as Chairperson, National Executive Committee here directs the State/Union Territory Government and State/Union Territory Authorities ... to take following additional measures:

(i) ...

(ii) ...

(iii) *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 work places, on the due date, without any deduction, for the period their establishments are*



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under closure during the lockdown; ...”

In order to examine the issue at hand, provisions of the Industrial Disputes Act 1947 (ID Act), Disaster Management Act, 2005 (DM Act) and Epidemic Disease Act, 1897 are to be considered. A PIL has also been filed before the Supreme Court of India challenging the validity of the aforementioned order dated 29.03.2020, though no order has been passed in that petition till date.

Under the ID Act following points are to be noted:

- Lay off has been defined to mean failure, refusal or inability of the employer to give employment to the workmen whose name is borne on the muster rolls of his industrial establishment. Natural Calamity is one such reason provided in the said definition because of which employer can deny employment or lay off the workman.
- Compensation for lay off is not payable (i) if the industrial establishment employed less than 50 workmen (average per working day) in the preceding year and (ii) Seasonal character industrial establishments. Industrial establishment means factory, mine and plantation, (iii) to casual workman, (iv) to workman, who had his name in the muster-rolls but has not completed one year of continuous services.
- Workmen laid off, subject to their being eligible, shall be entitled to **50% wages** for the laid off day.
- If the period of lay off is more than 45 days in preceding 12 months, employer and employee can enter into agreement for payment of compensation for beyond 45 days lay off.

Above points show that provisions relating to layoff under the ID Act are industry specific and would not govern the employees which are employed in places other than an industrial establishment as defined under the ID Act. The ID Act provides that in case of layoff, workman concerned would be entitled to 50% of the wages. However, the order dated 29.03.2020 passed under DM Act is much wider and covers workers, primarily of the category of workmen (though not specifically stated so) working in all types of organization irrespective of its size. The aim is to prevent violation of lock down and social distancing norms by the labourers, who had started or could have started, migrating to their native places in the absence of livelihood and to ensure that they are not deprived of food and other basic amenities.

The order dated 29.03.2020 directing full payment of wages/ salaries during lockdown to all the workers has been passed under section 10(2)(1) of the DM Act.

Following provisions of the DM Act may be noted:

10. Powers and functions of National Executive Committee.-(1) The National Executive Committee shall assistfor the purpose of disaster management in the count.

(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:*

51. Punishment for obstructions, etc. - provides that whosoever obstructs or refuses to comply with any direction given by any authority under the Act would be punished with imprisonments or with fine or both.

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.

We are of the view that the order dated 29.03.2020 will have the effect of law. The order dated 29.03.2020 has been criticized by some stating that this order cannot override any statutory provisions like ID Act. However, the fact remains that Section 10 of DM Act, is a statutory provision and once an order is passed in compliance of any statutory provision, such order will take the statutory color. On the contrary if the above stance is accepted, Section 72 of the DM Act would become otiose. Order dated 29th of March 2020 is aimed at containment of disaster (a contagious disease) whereas ID Act is general law of the land governing employer employee relationship in normal circumstance. Extraordinary situations, created by Corona Virus, require extra-ordinary measures for containment, there being no cure in sight. In our view therefore, employer cannot resort to the provisions of lay-off as long as order dated 29.03.2020 is in force.

Another argument to attack the order dated 29.03.2020 is that under the DM Act, the central government has no power to direct private entities to take actions for containment of the epidemic. Such measures, it is being contended, are to be by government authorities on their own and cannot be passed on to private entities. Even this stance has no force for the reason that the expressions “give directions”, “measures to be taken by them” under Section 10 of the DM Act are wide enough to include not only measures that can be taken by the govt entities themselves but also includes such measures which are to be secured through involvement of private parties. Directions for use of private hospitals for treatment of patients and private hotels around the airport in Delhi to provide accommodation to the travelers at a specified rate during the lockdown cannot be violated by such hospitals and/hotels. If such interpretation is accepted, then the entire act would become a toothless legislation leaving the central government to be completely helpless and hapless.

Yet another point which is being taken to nullify the above order date 29.03.2020, is that both the employer and the employee are equally affected by the epidemic and employer cannot be treated discriminately. It is true that the epidemic has affected both the employer and the employee equally i.e. both of them are not free to move out of their houses. However, in terms of financial impact, the employees are worst affected as their survival is totally dependent on their wages. Here the doctrine of reasonable classification would come into play. Employee, more so of the workmen category, as a class has been treated separately for a

definite object sought to be achieved namely to ensure that they strictly follow the lockdown and social distancing norms in the present situation. It is well known fact that in the absence of employment, many labourers had come out on road and had started walking towards their native places. Such widespread movement of large number of human beings is definitely dangerous and contrary to the efforts of containment of the disaster. Accordingly, it can be said that order dated 29.03.2020 is based on a reasonable classification.

Another point to be noted here is that the order dated 29.03.2020 can be modified by the competent authority in times to come depending on several factors including inability/difficulty of employers in continuing to pay full wages if the lockdown is to be extended for longer period. Until that is done private employers would be bound to pay salaries/wages to the employees during the lockdown in compliance with the direction contained in the order dated 29.03.2020.

In so far as employees other than workmen are concerned, employer will be at liberty to exercise it's right under the respective employment contracts including a mutual settlement between the two parties for lesser payment or no payment of salaries during the lockdown, as the case may be. In respect of the employees who have not reported for work despite direction, the employer shall always be at liberty not to pay for the period of unauthorized absenteeism.

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