COVID-19

FAQ FOR EMPLOYERS

EMPLOYMENT LAW TEAM, INDUSLAW

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As confirmed cases of COVID-19 soar across the world including India, the Central Government together with various State Governments, predictably, have issued a number of regulations to contain this global pandemic. These are uncertain and unprecedented times, especially for employers given that workplaces and/or travel can often be an easy medium of transmission for the virus. We at IndusLaw have put together a list of the most common questions we have received from employer personnel across all sectors in the last fortnight. We hope this helps management representatives navigate through these extraordinary circumstances.
Is it mandatory for an employer to have work from home (WFH) for all employees?

The Ministry of Health and Family Welfare (MoHFW) has issued an Advisory on Social Distancing ([https://www.mohfw.gov.in/SocialDistancingAdvisorybyMOHFW.pdf](https://www.mohfw.gov.in/SocialDistancingAdvisorybyMOHFW.pdf)), wherein it has encouraged employers to allow employees to work from home wherever feasible. This has been followed up by some State authorities who have advised private establishments to encourage their employees to work from home. Since the virus seems to spread by contact, employers should strongly advise employees to work from home. The instances where WFH, depending on the industry/job profile, would be compulsory are: (1) Cities and districts that have mandated a compulsory lockdown of all non-essential activities and enterprises; (2) Cities and districts that have stipulated that industrial establishments employing a large number of workers (workmen and non-workmen) should deploy them in half numbers on alternate days; and (3) Areas where Section 144 of the Code Of Criminal Procedure, 1973 dealing with unlawful assembly has been imposed.

Can an employer ask employees to go on paid leave? Alternatively, can employees be shifted to another division/unit?

In India, paid leave is the right of an employee under a State’s Shops and Establishments Act (SEA). While a number of States have specific exemptions for non-workmen employees in their local SEAs, it is still unlikely that employers could compulsorily enforce paid leaves unless of course employees agree to such an arrangement voluntarily. Also, for employees who satisfy the definition of ‘workmen’ under the Industrial Disputes Act, 1947 (IDA), the instruction on paid leaves may amount to a ‘change in conditions of service’ bringing its own set of formalities for the employer. It is certainly of relevance in this context to note that some State administrations are specifically setting out that employers should consider their employees to be ‘on duty’ while there is a mandatory lockdown. As for employees (workmen and non-workmen) being shifted to another division/unit, it is certainly possible as long as there is no material adverse change to the terms of the employment contract.

Can an employer ask employees to go on unpaid leave?

Given that paid leave is a right of an employee, an employer asking its employees (workmen and non-workmen) to go on unpaid leaves may not stand the scrutiny of law. For employees who satisfy the definition of ‘workmen’ under the IDA, this would also amount to a ‘change in conditions of service’ bringing its own set of formalities for the employer.

Can an employer reduce salaries for the time period that their sales are at rock bottom?

This can be explored through two ways: (i) mutual agreement to amend the employment terms; and (ii) provision of statutory notice under the IDA, subject to satisfaction of certain conditions. The latter option however is fraught with certain legal risks.
Can an employer mandate compulsory medical tests for its employees?

While certain sectors have imposed medical tests across their staff rolls (e.g. hospitality and aviation), employers from other sectors may conduct medical tests for its employees (workmen and non-workmen) provided consent is duly obtained. However, since data regarding an individual’s health qualifies as ‘sensitive personal information’ under the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, the employer should ensure that appropriate HR policies are suitably updated to address these new practices and confidentiality of the data is maintained as per prescribed standards.

Does an employer have an obligation to inform the Government if an employee has a confirmed case of COVID-19?

While none of the relevant notifications/circulars issued by the Central and State Governments so far directs mandatory disclosures from employers, if there is a confirmed case of COVID-19, out of abundant caution, perhaps the employer should choose to inform the Government. The MoHFW’s helpline number +91-11-2397 8046 and their email addresses are ncov2019@gov.in and ncov2019@gmail.com.

Can an employer mandate compulsory temperature screening for employees?

Yes, an employer may mandate temperature screening for employees. However, since data regarding an individual’s health qualifies as ‘sensitive personal information’ under the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, the employer should ensure that appropriate HR policies are suitably updated to address these new practices and accepted by the employees. The collected data would also have to be stored in line with standards sets by law.

Should employers continue use of bio-metric devices in their premises?

The Central and some State Governments have themselves suspended the use of biometrics for their own employees and it appears many private establishments have followed suit and have imposed manual attendance temporarily. Since the virus seems to spread by contact, perhaps employers should default to manual / contactless systems of access and attendance.
Can an employer use print or electronic media to educate its employees about the Corona Virus?

The MoHFW and various State governments have released various notifications regarding COVID-19, which include hygiene guidelines and training material. While it may be a proactive step for private establishments to conduct their own awareness programs, it is best that they restrict the campaigns to the content already distributed by MoHFW and the relevant State government(s).

What obligation does an employer have towards medical expenses of a corona virus affected employee?

This is a very interesting question purely because the answer would considerably depend on how the employee (workmen and non-workmen) contracted the infection i.e., whether in office or on a business trip or in circumstances entirely disconnected with his/her professional commitments. That said, Karnataka seems to be the only State as of now which has explicitly set out that all employers are required to provide infected employees 28 days’ mandatory paid sick leave.

On a related note, the Insurance Regulatory and Development Authority of India (IRDA) has issued a guideline on March 4, 2020 that stipulates that in the context of health insurance policies that cover hospitalization expenses, in order to alleviate the hardships that may be caused to the policyholders, insurers should ensure that the cases related to COVID-19 are expeditiously handled.
What obligation does an employer have towards its mobile workforce deployed in impacted countries?

Various organisations have a large number of employees working in overseas locations, including high risk COVID-19 countries like China, Italy, Japan, South Korea, France, Spain, Germany etc. In such cases, an employer has to rely on the relevant deputation/secondment arrangement and employment law of the host country. The employer needs to be well versed with the advisories and directions issued by the regulatory authorities of those impacted countries. In case an employee wants to return to India, the employer should explore ways to amend his/her contract and return to India, subject to Indian and other applicable regulatory travel advisories and restrictions.

Can or should an employer disclose details to the general workforce when an employee has been affected by COVID-19?

An employer should keep the identity and medical information of its employees infected by COVID-19 completely confidential. However, to avoid the spread of COVID-19, the employer would do well to inform the workforce that one of its employees who has been physically present at the workplace, has been infected, without sharing personal details of the employee. The employer should ask the infected employee to identify individuals they came into contact within the workplace. The employer should also contact the identified employees and inform them, without disclosing the infected employee’s identity, that an employee who has been physically present in the workplace has tested positive for COVID-19.
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