THE IMPACT OF COVID-19 ON THE EMPLOYER-EMPLOYEE RIGHTS AND LIABILITIES

Can Employment Be Terminated?

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Mohi Kumari
5/5/2020

WHAT IS THE IMPACT OF COVID-19 ON THE EMPLOYER-EMPLOYEE RIGHTS AND LIABILITIES: CAN EMPLOYMENT BE TERMINATED?

In the current scenario, the entire world has come to a standstill due to COVID-19; it can be safely said that employees all around the world are facing the cruel brunt of the pandemic. There is a lot of confusion arise when it comes to the determination of the rights of the Employers, especially the right to terminate. The following are the questions which may be most frequently asked by the people when it comes to the state of employment in India during the lockdown:

1. **What are the steps and measures taken by the Government to avoid large-scale unemployment during the lockdown period?**

The Government has issued various circulars and notifications to curb unemployment during the pandemic. For example, The Ministry of Labour and Employment had issued and Advisory on March 20, 2020[1] ("**MLE Circular**"), stating the following:

> *In the current challenging situation, all the Employers of Public/Private Establishments may be **advised** to extend their cooperation **by not terminating their employees**, especially, casual or contractual workers from job or not to reduce their wages. **If any worker takes leave, he or she should be deemed to be on the job or duty without any deduction in wages** for this period. Further, if any place of employment is to be made non-functional or not operational due to COVID-19, the employees of the unit will be considered to be on duty.*

Another circular in regards to unemployment has been issued by the Ministry of Home Affairs[2].The circular was published on March 29, 2020, under Section 10(2)(l) of the Disaster Management Act, 2005 ("**D.M. Act**"). In short, it directs all employers for payment of wages to the employees without any deductions for thelockdown period. Penal provisions are also available in India for the same.

However, looking at the advisory issued by the Ministry of Labour and Employment, it is clear that the same is not binding. It is well established that reports do not have the same effect as and legislation and other rules and regulation and, therefore, cannot be enforced on the employees.

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[1], D.O. No. M-11011/08/2020-Media (March 23, 2020)
[2] No. 40-3/2020-DM-I(A)

2. **Taking into account the directives mentioned above, is it possible for the employer to ignore such directions and refuse to pay a salary to the employees' on the basis of principle"No work, no pay"?**

There is no such policy like No work, No pay. But, Art 39 of the Indian Constitutional law states the provision of 'equal pay for equal work' , according to this principle, if a person does not work, it should result in no payment. In this context, we may look at the March 20 Circular formulated for effective implementation of the lockdown which has directed the following:

> ***All the employer**s, either it is industry or the shops and commercial establishments, **shall make payment of wages to their workers**, at their workplaces, on due date, **without any deduction**, for the lockdown period.*

As noted above, the noncompliance of the same will lead to penal consequences under the D.M. Act. This does not only apply to employers but also landlords forcing laborers and students to vacate premises.

Various judicial precedents have been laid down to establish the applicability of the principle of no work, no pay. For example, in *Dharam Singh Rajput v. Bank of India*, the Punjab and Haryana High Court has laid down that if the employee remains absent in regular working hours, the employer is entitled to deduct salary. Delhi High Court in *Engineering Projects (P) Ltd. v. EngineeringProjects (P) Ltd. Employees Union,*[3] has laid down the same principle. However, the Supreme Court in *J.N. Shrivastava v. Union of India*[4]has stated that that that principle of `no work no pay' is not applicable when an employee is willing to work, but the employer prevents him from doing his duties (i.e., work). In the current situation, there is no doubt that the employees are prevented from doing work and not willing to opt for the same.

Therefore going by the precedent mentioned above, the employers are bound to pay. However, this obligation to pay will also depend on the contractual agreement signed by the employer and employee.

3. **What are the options available to the employer to deal with the financial crisis?**

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[3]1986 LIC 1366
[4]1999 I LLJ 546 (S.C.)

If we go by the precedents as mentioned above and the circulars issued by the Government, it is true that the employer cannot terminate the employment. However, the same is subject to many conditions. The following options are available to the employer:

1. *Settlement:* A settlement agreement can be reached with the employees, after carrying on discussions so that both parties interests are taken into consideration[5]
2. *Layoff*: According to this, the employer may pay eligible workers, only 50% of basic wages and dearness allowance for the period a workman is laid-off.[6]
3. *Retrenchment*: it is the termination of employment by the employer subject to certain conditions[7]
4. *Closure*: If the financial crisis is to the extent that the business can no longer be run by the employer, the employer can opt for permanent closure.[8]

Each has its advantages and loopholes and should be chosen, taking into account social and legal ramifications. However, it is pertinent to consider that the said options arise out of Industrial Disputes Act, 1947 ("**I.D. Act**"), and shall not be applicable if the employee doesn't fall within the definition of 'workman.'

4. How shall it be determined that the employee is a workman or not?

Section 2(s) of I.D. Act, defines workman to includes *any person (including an apprentice) employed in any kind of industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work,* but does not include specific categories of person, which include:

1. the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or

2. (ii) who is serving as a police officer or prison employee; or

3. who is engaged as a manager or holding administrative position; or

4. who is being employed as a supervisor, draws wages more than ten thousand rupees per mensem , either by the nature of the duties attached to the office or because of the powers vested in him, functions mainly of a managerial position.

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[5] Section 2(p) of Industrial Disputes Act, 1947
[6] Section 2(kkk) of Industrial Disputes Act, 1947
[7] Section 2(oo) of Industrial Disputes Act, 1947
[8] Section 2 (cc) of Industrial Disputes Act, 1947

Therefore, persons falling in the category, as mentioned earlier, will not be considered as a workman.

5. **Would a person employed does not perform a managerial or administrative capacity or a supervisory capacity drawing wages exceeding a stipulated limit would?**

No. It will necessarily depend on the nature of work, whichis whether it is *manual, unskilled, skilled, technical, operational clerical, or supervisory*. If it does not fall within the categories mentioned above, such a person will not qualify as a workman. Therefore doctors, teachers, etc. will not come under the definition of workman.

6. **What if a person employed as a supervisor, who necessarily falls outside the ambit of a workman, however, he may also perform other functions which are manual, unskilled, skilled, technical, operational clerical or supervisory. Will he be considered as workman?**

It's not mandatory. We will have to consider and check the person who is doing supervisory work is earning more than ten thousand rupees per month or not as wages. If not, he would be a workman.

7. **Would an employee who falls within the category mentioned in Section 2(s) of the I.D. Act but draws wages above ten thousand rupees per month would classify as a workman?**

Yes. This section is commonly misunderstood. The upper wage limit applies only to the supervisors.

8. **How to determine if a person is a workman or not if he/she discharges both supervisory function as well as some other functions?**

It is tough to decide the same. But it can be chosen based on what that person deliver most as an employee. If the dominant part is *manual, technical, unskilled, operational, skilled, or clerical*, then such a worker would qualify as a workman.

9. **What about workers who have been engaged by contractors? Would they also be treated as a workman if all the conditions have been satisfied?**

Such workers are treated as employees under various acts such as Employees' State Insurance Act, 1948, etc. However, for the I.D. Act, they cannot be regarded as

workers unless there is a state amendment to that effect. For example State of Rajasthan has amended the legislation to include contract laborers within the ambit of a workman.

10. **What is lay off, and under what condition can the employer exercise the right to *lay off*? Would the use of this option directly contravene direction given by the Government in the MHA Circular?**

Lay off refers to a situation in which an employer is unable to employ a worker due to some specified reasons, which include a shortage of raw material, natural calamity. In such a situation, an employer can pay compensation to the workman for the laid-off period, except holidays, only fifty percent of the aggregate of basic wages and dearness allowance payable.

The second part of the question is quite complicated. It can be argued, with the help of relevant documents such as the balance sheet, etc. that the employer is not in the condition to pay complete wages due to the extreme financial crisis and that if the measure mentioned in the MHA circular id followed the same will lead to the closure of the industry thereby causing large-scale unemployment which will be counter-active to the objective of the circular. It can also be argued that the D.M. Act would only be applicable if the employer refuses to pay altogether and not when the law, namely the I.D. Act expressly provides this option to the employer. Lastly, Section 51 of the D.M. Act clearly states that the punishment shall be imposed if the noncompliance is done without reasonable cause. Therefore if the employer can prove that there are sufficient reasons to opt for any of the options available, he may not be punished.

What needs to be kept in mind that such clauses to that effect is mentioned in the contractual agreement. If so, then all industrial establishments may be able to exercise this option.

11. **Would the option of lay off not be exercisable by the employer unless the events specified in Section 2(kkk) of the I.D. Act are different from the event on the basis of which the employer is trying to layoff workmen? Can the conditions on which lay off can be granted changed?**

The grounds mentioned inSection 2(kkk) of the Industrial Dispute Act are not exhaustive.Therefore, if the terms of contractual arrangement do not allow any lay off based on natural calamity, then it would not entitle the employer to layoff. Similarly, if the contractual agreement allows the employer the right to lay off in any other circumstances as well, he may exercise such a right.

12. Would COVID-19 qualify as one of the reasons mentioned in Section 2(kkk) to allow the employer to exercise the right to lay off?

As mentioned above, various reasons such as shortage of raw material, breakdown of machinery, natural calamity etc. can qualify the employer to lay off. Now comes the question of whether COVID-19 would be eligible for the same. In this regard to the memorandum issued by the Ministry of Finance on February 19, 2020[9] , which clearly states that the situation arising out of the COVID-19 situation would be considered as natural calamity. Therefore the right off layoff would be available to the employer during the lockdown.

13. What compliances have to be followed by the employer before an employee can *lay off* workmen on account of COVID-19?

If the conditions mentioned in Section 2(kkk) have complied with the employee agreement, then such a right can be exercised by the employer.

However, there are certain exceptions to the same. Section 25M of Industrial Disputes Act, 1947 states that no workmen can be laid off whose name is on the muster rolls of an industrial establishment with the prior permission of the appropriate Government unless such layoff is due to shortage of power or due to any natural calamity, and if its mine, such layoff can also due to fire, flood, excess of hazardous gas or explosion. Therefore as COVID-19 has been classified as natural calamity, it necessarily implies that such a permission of the G0vernment will not be required for the employer to exercise the right of lay off.

The employer has to provide notice of such layoff in terms of Rule 75A of Industrial Disputes (Central) Rules, 1957 ("Central Rules").

14. Would the compensation be paid to all the workmen being laid-off?

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[9], No. F.18/4/2020-PP

No. As per Section 25 C of the I.D. Act, such compensation is payable only regarding workman other than a casual workman whose name is mentioned on the muster rolls of an industrial establishment and must have completed one year of continuous service under the employer. If other workmen are laid off, they will be governed by their respective employment agreements.

15. What is the maximum period up to which a workman may be laid-off?

The ID Act does not provide for the maximum number of days noir does it provide for any procedure for lay off. However, the proviso to section 25C of the I.D. Act, contemplates a situation where the workers may be laid off for more than 45 days during 12 months.

16. Is it a condition precedent for the employer to pay the employee before he is laid off?

No. The compensation for layoff need not be paid before sending workers on laid-off, unlike retrenchment, where it is necessary.

17. It is mentioned that the amount payable during the *layoff* period to an eligible workman is known as "*compensation,*" is it different from the concept of wages under the I.D. Act?

Yes, both layoff compensation and wages are different concepts.

18. What is the effect on the employer's liability with respect to payment of bonus or provident fund contribution or ESI contribution if layoff compensation and wages are different concepts?

It depends on which legislation it falls under. For example, ESI Act has mentioned explicitly that layoff compensation is considered as wages, while with respect to the provident fund, there is a circular which does not consider layoff compensation as basic wages. Various courts have considered layoff compensation to be wages as far as bonus is concerned.

19. Can you explain what the difference between layoff and retrenchment is?

	Layoff	**Retrenchment**
Meaning	It means a temporary inability to continue with	It means dismissal or termination of services of

	the employment due to various reasons like failure of machinery, shortage of resources like coal, power or stocks, or any natural calamity or any related reason.	a workman by an employer.
Discontinuation in service	It does not involve any discontinuation in a continuous service.	It involves discontinuation in a continuous service.
Can I get re-employed?	Yes, after the layoff period is over, one can rejoin.	It is the discretion of the employer, whether to re-employ you or not.
Compensation	You get layoff compensation.	You get retrenchment compensation along with gratuity benefits.

20. When does termination of services amount to retrenchment?

Termination of services will amount to retrenchment, except:

a) if the workman takes voluntary retirement

b) when the workman retires reaching the age of superannuation if the contract between the workman and employee contains a stipulation in that behalf.

c) If the employment contract between the workman and employer is not renewed on its expiry or such contract terminated under a stipulation.

d) If the cause of termination of services is the persistent ill-health of the workman.

21. I see that when the termination of an employment contract is in accordance with a *stipulation in that behalf* contained in the contract, it will not amount to retrenchment. Employment contracts of most of the organizations allow terminating employment by giving a few months'

prior notice or salary in lieu thereof. So if a workman is terminated based on the stipulation contained, would that amount to retrenchment?

There are varying opinions on the same, including one Supreme Court decision on termination of a probationary employee, which held that termination would not amount to retrenchment if it is done on the rights conferred under such agreement. However, a sensible approach would be to confine such stipulation to just those cases which are pre-specified and not dependent upon the arbitrary exercise of such right by an employer.

22. **Are there any qualifying criteria for being entitled to retrenchment compensation, or is it payable to all the workmen who are retrenched?**

Just like layoff cases, any worker who *serves more than one year under an employer* is entitled to Retrenchment compensation, and no, it is not payable to all the employees retrenched.

23. **The workman is required to be in *continuous services for not less than one year* to claim *retrenchment compensation*. However, if this condition is satisfied, can the workmen be distinguished on the nature of tenure or nature of service like daily wager, part-time, casual worker, or apprentice?**

If the requirement of continuous service is satisfied, there is no need to distinguish the workmen as a daily wager, part-time, casual worker, or apprentice.

24. **What are the compliances required before the retrenchment of workmen?**

The response to the question would rely on specific factors:

(a) the nature of establishment

(b) the number of workmen engaged with such establishment on an average per working day for the previous 12 months.

If the establishment is:

(a) either a factory, mine or plantation, and,

(b) on an average per working day it has engaged minimum hundred workmen establishment for the previous12 months, the establishment can retrench workmen only:

- giving a three months' notice in writing specifying the reasons for retrenchment and the period of notice has expired to the workman
- prior permission of the appropriate Government.

If the permission is not accepted/refused within 60 days from the date when the application was made, such permission is deemed to have been granted. According to this, the employer may need to wait for 60 days to retrench a workman if there is no communication on the same before that.

Considering the cases of *all other establishments*, an establishment which has employed at least 50 workmen on average per working day in the previous calendar month, a workman can be retrenched by the employer on the following conditions:

(a) the workman is given *one month's notice in writing specifying the reasons for retrenchment* and *shall also mention about when this is going to be finished or whether workman will be paid in lieu of such notices,*

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to 15 days average pay for every completed year of continuous service or

(c) as may be specified by the appropriate Government by notification in the Official Gazette.

25. Is anyone of the conditions specified by you in the above response directory, such that we can escape such conditions?

The notice being served to the appropriate Government has been held to be directory and, therefore, noncompliance of which may not render the termination illegal.

26. What would be the consequences of noncompliance with mandatory conditions? Would it make the retrenchment invalid, and the workman would have to be reinstated to the services?

As stated by the Supreme Court, payment of compensation is the norm, and if the mandatory conditions are not met, then the termination would be illegal and invalid, reinstatement to the services being an exception.

27. **Since the payment of retrenchment compensation at the *time of retrenchment* is a mandatory condition, can one delay in the payment of such compensation by a few days?**

There can be no delay; the retrenchment compensation needs to be paid on or before the time of retrenchment.

28. **Should the eligible employees also receive the amount of gratuity at the same time of retrenchment compensation?**

The amount of gratuity can be paid to the eligible workmen within 30 days and

therefore, no compulsion to pay on the same day of retrenchment compensation.

29. **How is retrenchment compensation calculated?**

For the calculation of retrenchment compensation, *15 days* of *average pay for each completed year of the service or any part thereof in excess of six months* is to be taken into account.

Average pay is defined u/s 2(aaa) of the I.D. Act[10], means the average of the wages payable to any workman:

(i) in the case of monthly paid workers, in the three months,

(ii) in the case of weekly paid workers, in the four complete weeks,

(iii) in the case of daily paid workman, in the twelve full working days

30. **Is the method used for the calculation of retrenchment compensation different from the calculation of gratuity entitlement?**

Gratuity entitlement is calculated at the rate of *fifteen days' wages based on the average rate of wages last taken by the employee concerned for each completed year of the continuous service. The calculation of 15 days' wages is calculated by dividing*

[10]Section 2(aaa) in The Industrial Disputes Act, 1947.

the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen, and therefore, the method used for calculation of retrenchment compensation is different as prescribed under the I.D. Act.

31. What other compliance would an employer to consider before retrenching a workman? For example, can the inter se seniority factor of the workman play a role in deciding the retrenchment?

Indeed. As far as Section 25G of the I.D. Act, the principle of *last come first go* followed, except if there is a recorded explanation behind deviation from the principle. At the end of the day, if the workman *belongs to a particular category of workmen in that establishment*, without any agreement between the employer and the workman, the employer is required to customarily retrench the workman who was the last individual to be employed in that category, except if the employer retrenches some other workman for reasons to be recorded.

32. Suppose the situation improves in the future, and the employer wants to re-hire, is there any statutory obligation which gives preference to retrenched workmen?

Yes, Section 25H of the I.D. Act states that when the employer is re-hiring, the retrenched workman has to be given preference if he offers himself for re-employment. The procedure which has to be followed is prescribed under Rule 78 of Central Rule or corresponding State Rules, as applicable.

33. Are there any compliances required if an employer, instead of exploring piecemeal action, decides to close the undertaking altogether?

If the other options available are not viable, the employer is also entitled to permanently close the undertaking.

Talking about compliances, retrenchment would also depend upon factors like the nature of the establishment and the number of workmen engaged with such establishment on an average per working day for the previous 12 months.

If the establishment is, either a factory, mine or plantation, and, on an average per working day it has engaged minimum hundred workmen establishment for the previous 12 months, the establishment can retrench workmen only by giving a three months' notice in writing specifying the reasons for retrenchment and the period of

notice has expired to the workman and prior permission of the appropriate Government.

If the permission is not accepted/refused within 60 days from the date when the application was made, such permission is deemed to have been granted. Pursuant to such an event, the employer may need to wait for 60 days to retrench a workman if there is no communication on the same before that.

Considering the cases of *all other establishments*, an establishment which has employed at least 50 workmen on average per working day in the previous 12 months, the employer would be required to serve, at least 60 days before the date on which the intended closure by specifying the reasons for the intended closure of the undertaking.

There will be no need for such notice where the undertaking is to be closed (a) employs less than 50 workmen or (ii) employed less than 50 workmen on an average per working day in the preceding 12 months.

34. Can an employer decide to only temporarily close the undertaking?

No, an employer cannot adopt temporary closure. Temporary closure of an undertaking has been defined to be a *lockout*. However, this definition has a very specific application. For example, according to the courts, if an establishment is shut down due to financial crunches or lack of recourses like power or raw material, that would not be a lockout within the meaning of the I.D. Act.

35. If an employer closes the undertaking, what would be the compensation payable?

The payable compensation would be equivalent to fifteen days' average pay for every completed year of the continuous service or any part thereof in excess of six months.

However, undertakings that do not require prior approval of the appropriate Government are an exception to the aforesaid principle, and if it is closed down on due to unavoidable circumstances, the compensation for retrenchment would be limited to his average pay for three months.

The following would not qualify as *unavoidable circumstances*:

(i) financial losses/difficulties

(ii) accumulation of undisposed off stocks

(iii) the expiry of the period of the lease or license granted to it

(iv) cases where the undertaking is in mining operations, then exhaustion of the minerals in the area in which such operations are carried on.

36. What are the alternative options that an employer may consider?

Employer may consider voluntary separation scheme, which includes workmen.

37. What options are available to the non-workman category of employees?

They cannot claim the protection afforded to a workman under the I.D. Act as they will be governed by the contractual arrangements.

38. What are the decisions taken by the Government to alleviate the concern of the employers?

The time duration within which the contribution payable under the ESI Act is to be made has now been relaxed by the Government. The ESI contribution for February 2020 and March 2020 can be filed and paid till April 15, 2020, and May 15, 2020, respectively. Similarly, one-time relaxation has been offered to employers to file their contribution for the period ending in September, 2019 by May 15, 2020.

The timeline for filing annual returns for the year 2019 has also been relaxed and extended till April 30, 2020.

39. So this means that all statutory obligations would continue to be applicable?

Yes, unless the Government introduces a specific relaxation or exemption, all other compliances would continue to be applicable.