MEMORANDUM

Date: April 30, 2020

To:

Auto Component Manufacturers Association
6th Floor, The Capital Court,
Olof Palme Marg, Munirka,
New Delhi – 110 067

Re: Response to specific employment queries

1. Background

The Auto Component Manufacturers Association ("**ACMA**") has sought our response on certain employment queries in terms of the brief for legal opinion emailed to us April 29, 2020.

Before we respond to these specific queries, it is important to refer to certain orders and advisories issued recently by the Centre which are relevant in the context of the queries raised by you.

On March 20, 2020, the Ministry of Labour and Employment ("**MoLE**") issued a letter requesting the Chief Secretaries of States/ UTs ("**MoLE Letter**") to issue necessary advisory to the employers/ owners of all establishments in their respective States to:

a) not dismiss their employees (particularly casual or contractual workers) from service or reduce their wages;
b) treat the workers who take leave as being on duty without any consequential deduction in their wages for the leave period; and
c) treat employees as being "on duty" if their place of employment is made non-operational due to COVID-19.

This was followed by some States such as Telangana, Delhi and Chandigarh mandating employers to treat employees staying at home due to lockdown as being "on duty" and paying them full salary. Certain States such as Maharashtra, Haryana and Kerala advised/ requested employers to treat their employees as being "on duty" if they take leave or their place of employment is made non-operational due to COVID-19, and refrain from reducing their salary or dismissing them from service during lockdown.

On March 29, 2020, the Ministry of Home Affairs ("**MHA**") issued an order ("**MHA Order**") under Section 10(2)(l) of the Disaster Management Act, 2005 ("**DMA**"). The MHA Order directed all the State /UT Governments/ Authorities to, (a) take action; and (b) issue necessary orders to their law enforcement authorities on ground i.e., the District Magistrate, Deputy Commissioner, Senior Superintendent of Police, Superintendent of Police, Deputy Commissioner of Police to take specified additional measures during the lockdown. These specified additional measures included requiring employers of all offices, shops, industrial and commercial establishments, to continue paying wages to their workers, on the due date, without any deduction for the period that their establishments were closed during the lockdown. Any person who violates the MHA Order is liable to criminal proceedings under Section 188 of the Indian Penal Code, 1860 ("**IPC**") and be punished with imprisonment up to 6 months, or with fine up to Rs.1000/- or with both. Moreover, the MHA Order makes specified law enforcement authorities personally liable for implementation of the specified lockdown measures.

Typically, advisories are not legal binding. In this context, it is important to refer to a recent order of the Hon'ble Supreme Court in the matter ***Shri Alakh Alok Srivastava vs. UOI***, which was passed during the lockdown on 31st March 2020. In this matter the Supreme Court adjudicated on the welfare of stranded migrant labourers. This order holds that an advisory which in the nature of an order made by a public authority will attract Section 188 of the IPC and all state governments, public authorities and citizens are expected to comply with the directives, advisories and orders issued by the Centre in letter and spirit in the interest of public safety. **In light of this order, the MoLE Letter may be considered as legally binding and therefore, enforceable against an employer.**

The MHA Order does not clarify whether the term "workers" is limited to workmen as defined under the Industrial Disputes Act, 1947 ("**IDA**") or also extends to the non-workmen who are governed by the provisions of the State-specific Shop and Establishment Acts or the managerial or supervisory employees who are exempt under such laws. It also does not clarify whether the term "workers" is intended to cover just the permanent employees of an organisation or its probationers, fixed-term employees, casual or temporary employees, contract labour or outsourced staff.

Pertinently, Section 10(2)(l) of the DMA empowers the MHA to take "*such measures as necessary for mitigation of impact of a disaster*" and is wide enough to include the measures contained in the MHA Order to safeguard interest of employees. Further, the provisions of the DMA have an overriding effect over any other law in force. **Hence, the MHA Order has legislative sanction and may be enforceable against an employer.** It may be noted that, only the Supreme Court and High Courts have the jurisdiction to entertain any suit or proceeding in respect of any violation of

the MHA Order. In terms of Section 51 of the DMA, an employer who refuses to comply with the MHA Order is liable to be punished with imprisonment which may extend to 1 year or with fine, or with both unless he is able to demonstrate that non-compliance on his part was on account of a reasonable cause. As this is the first time in the history of India that the DMA has been invoked, there is no jurisprudence on what will qualify as a justifiable "reasonable cause" in the current COVID-19 crisis.

The legality of the MHA Order has been challenged by certain employers before the Hon'ble Supreme Court under Article 32 of the Constitution. However, as of date the MHA Order has not been stayed by the Supreme Court.

Our advice may need to be reconsidered if there is a new order superseding or clarifying the MHA Order/ MoLE Letter or the MHA Order/ MoLE Letter are set aside by the Supreme Court.

2. Response to Specific Queries

i) Is an employer required to make payment of full wages to its permanent workmen, contract workers and casual workers during the lockdown?

JSA Response

In terms of the MHA Order, the employers are required to continue paying wages to all workers, on the due date, without any deduction during the lockdown (until May 3, 2020 unless the lockdown is extended further or there is a new order superseding or clarifying the MHA Order or the MHA Order is set aside by the Supreme Court). As the MHA Order does not assign a restricted meaning to 'workers', it would include all employees, including permanent workmen, contract workers and casual workers of an enterprise.

ii) In view of the financial burden during lockdown, can an employer pay only minimum wages as prescribed by respective State Governments to its permanent workmen, contract workers and casual workers during the lockdown?

JSA Response

As there is a specific restriction on reduction of wages during the lockdown under the MHA Order, in our view, employers do not have an option under the MHA Order to reduce wages on any pretext, including in view of financial stress. It remains to be seen how the MHA Order will be

interpreted by the Supreme Court/ High Courts for employers who could not pay wages to their workers due to cash flow issues.

iii) Can an employer pay its permanent workmen and casual workers only basic wages and dearness allowance, and exclude payment of other allowances such as transportation allowance, canteen subsidy, education allowance, production linked incentives etc.?

JSA Response

The MHA Order directs employers to pay full wages to workers without any deduction. It is silent on the components that need to be included in wages for the purpose of compliance with this payment obligation imposed on the employers under the DMA. We are of the view if the basic wages and dearness allowance of the permanent and casual workmen are not below the minimum wages, the employer should at least pay basic wages, dearness allowance and the education allowance to such employees.

In our view, in case the non-payment of transportation allowance, canteen subsidy and production linked incentive is challenged before the courts, the employers may be able to justify the reasonableness of non-payment of such components during the lockdown when there was zero production due to their factory being closed. The case would be strong on merits if there was evidence to support the employer's factory was closed, workers were at home and not working during this period and the employer had a cash flow issue.

iv) Is an employer required to make payment of full wages to all permanent workmen and casual workers even after the lockdown is lifted?

JSA Response

Subject to new statutory requirements, after the lockdown is lifted, an employer should be able to negotiate wage reductions with their permanent workmen and casual workers and enter into an agreement to document the mutual understanding. It needs to be ensured that such wage reduction satisfies the minimum wage requirements, wherever applicable.

Further, the mutual agreement with such workmen will need to be in the form of a settlement to be filed with the labour authorities under joint application in accordance with the provisions of the IDA.

Subject to new statutory requirements, an employer also has the option of unilaterally reducing the wages after the lockdown is lifted by following the process prescribed under Section 9A of the IDA. However, the employees are more likely to raise an industrial dispute if this is done.

v) Can an employer "lay-off" workmen during the extended lockdown or in the period of sub optimal production post lockdown? What is the procedure to be followed for lay-off?

JSA Response

As there are specific requirements under the MHA Order to pay wages to workers on the due dates without any kind of deduction during the lockdown, lay-off of workmen employees during the extended lockdown may be perceived as a violation of the MHA Order.

Having said that, after May 3, 2020, subject to new statutory requirements, an employer can lay-off workmen employees in accordance with the procedure prescribed under the IDA.

Under the provisions of IDA, an employer can lay off a workman employee whose name is borne on its muster rolls and who has completed 1 year in service provided that –

a) provisions of lay-off under Chapter VA of the IDA will be applicable to factories that have more than 50 workmen, but less than 100 workmen and provisions of Chapter VB of the IDA will be applicable to factories that have more than 100 workmen; and

b) where provisions of Chapter VB of the IDA are applicable, prior permission of the concerned labour authority would need to be obtained before lay-off, except in cases where the lay -off is due to a natural calamity.

It is pertinent to mention here that the term "natural calamity" is not defined under the IDA or other labour laws. In this context, it is important to note that the Ministry of Finance vide its office memorandum dated February 19, 2020 clarified that COVID-19 should be considered as a case of 'natural calamity' under force majeure clauses appearing in the Manual for Procurement of Goods, 2017 of the Government of India. Going forward, the courts may consider the business disruption caused by the COVID-19 outbreak as a natural calamity. If this happens, the factories will have more flexibility to implement layoffs as they would not be dependent on grant of permission by the labour authorities.

Further, please note that certain States have amended the threshold for the applicability of Chapter VB of the IDA. Therefore, applicability of Chapter VA or VB of the IDA would depend on the

location of the enterprise. As such, this memorandum should not be considered as a substitute for specific legal advice.

vi) Can an employer declare lay-off from a back date?

JSA Response

The IDA is a beneficial legislation which aims to protect the interest of workmen. The IDA has specific provisions for lay-offs. In our view, declaration of a layoff from a backdate will have the effect of depriving the workmen of their statutory rights under the IDA and will therefore be violative of the provisions of the IDA. In case of a challenge, even the courts are unlikely to uphold an interpretation which is not beneficial to workmen.

vii) Is an employer required to pay compensation to permanent workmen who have been laid off?

JSA Response

Yes, under the provisions of the IDA, workman employees who have been laid-off are entitled to 50% of their remuneration (basic wages and dearness allowances) for the first 45 days of lay-off ("**Lay-off Compensation**"). Please note that, lay-off can be extended beyond 45 days without payment of Lay-off Compensation (not even 50%) provided there is an agreement with the concerned workman to that effect.

viii) Is an employer required to pay Lay-off Compensation to its casual workers and contract workers once lay-off has been declared?

JSA Response

The IDA specifically excludes the application of provisions relating to lay-off to casual workers. Further, contract workers who have been engaged through independent contractors are not generally treated as workmen employees of the principal employer, provided that (a) a direct connection cannot be established between contract workers and principal employer, or (b) contract workers are not engaged in jobs that are perennial in nature and identical to the jobs which are done by the principal employer's regular employees, or (c) where the engagement of contract workers through a contractor is not a mere camouflage or smokescreen. As such, in the above circumstances, a principal employer is not required to comply with the layoff related provisions of the IDA in respect of its contract workers. Therefore, the provisions relating to payment of Lay-

off Compensation would not be applicable to contract workers and casual workers. As such, a principal employer may not be under an obligation to pay Lay-off Compensation or any other compensation to contract workers and casual workers if such employer declares a lay-off.

ix) Can an employer instruct service providers/ contractors to stop making payments to its contract workers on the principle of "no work no pay"?

JSA Response

The principle of 'no work no pay' is typically applicable when an employee wilfully absents himself from work, without authorization or justification. It is not applicable where an employee is ready and willing to work but is prevented from attending to his duties by the employer or on account of other justifiable circumstances.

In the current situation, given that the lockdown orders require most individuals to stay at home and various entities to close their establishments during the lockdown, it would be difficult for an entity to justify a policy of 'no work no pay' for its contract workers. Moreover, adopting such policy may be perceived as a direct violation of the MHA Order.

In this regard, please note that, the Ministry of Labour and Employment through its advisory dated April 22, 2020 requested all principal employers to pay their contractors providing outsourced services such as private security, cleaning/housekeeping during lockdown so that contractors can pay salaries to such outsourced workers.

As such, it appears that the Government's intention as of today is to maintain the *status quo* in so far as the employment status, income and benefits of all employees, including contract workers are concerned during the lockdown.

x) Is an employer required to make payment of full wages to all contract workers, including contract workers whose engagement with the enterprise has been for a short duration, and in some instances for less than ten days prior to the lockdown?

JSA Response

As the MHA Order does not assign a restricted meaning to workers, it would include all contract workers, including contract workers who have been engaged by the employer only for a short duration prior to the lockdown. Therefore, all contract workers who would have ordinarily been a part of the production system had the lockdown not been in place, would need to be paid in full.

However, please note that currently there is no legal obligation on employers to renew the contract labour arrangements or fixed-term contracts whose term is coming to an end during the lockdown.

xi) Whether the MHA Order and directives by the State Governments are constitutionally valid and override existing labour laws?

JSA Response

The MHA Order has legislative sanction under Section 6(2)(i) and Section 10(2)(l) of the DMA. These provisions empower the MHA to take "*such measures as necessary for mitigation of impact of a disaster*" and is wide enough to include the measures contained in the MHA Order to safeguard interest of the employees. Further, the provisions of the DMA have an overriding effect over any other law in force.

Similarly, the directives of State Governments have been issued either under the Epidemics Diseases Act, 1897 ("**EDA**") or in pursuance of the Central Government orders under the DMA. The EDA enables the State Governments to take such measures as it deems necessary to prevent the outbreak of an epidemic. The language of these provisions indicates that they are intended to prevent epidemic and control its spread.

That said, the legality of the MHA Order has been challenged before the Hon'ble Supreme Court, under Article 32 of the Constitution of India in three separate petitions. It remains to be seen whether the Supreme Court will uphold the constitutionality of the MHA Order, interpret it in a manner that balances the interests of both, employers and employees, affirm its applicability to private employers and/or issue directions to the Government to provide wage subsidy.

xii) Can an employer make payment of wages to its permanent workmen, casual workers and contract workers under protest until the constitutionality of the MHA Order and directives by the State Governments has been tested by courts? In such case, what would be the basis for making EPF/ESI contributions?

JSA Response

In our view, given that COVID-19 pandemic has created an unprecedented crisis, an employer may consider complying with the MHA Order to make wage payments under protest and simultaneously challenge the constitutionality of the MHA Order or the State Government directives before a court of law.

In the current situation, an employer may defer making Employee Provident Fund/Employee State Insurance contributions to the extent permissible. In this regard, please note that, the ESIC has through notice dated April 13, 2020 extended the time period for making ESI contributions for the month of February up to April and for the month of March 2020, up to May 2020. Similarly, the EPFO vide notice dated April 15, 2020 allowed a grace period of 30 days (from 16th April 2020 to 15th May 2020) for filing electronic-challan-cum-return to employers of those establishments which have disbursed wages for March 2020 to their employees. We anticipate that the ESIC/EPFO may come with similar relaxations for contributions payable for the subsequent months.

xiii) Would an employer need to adopt a different approach in relation to payment of wages to employees who cannot be classified as 'workmen' under the IDA?

JSA Response

The MHA Order aims at protecting the interest of "workers" of offices, shops, commercial and industrial establishments. It does not limit "workers" to mean workmen. The term "workers" is wide enough to include non-workmen governed by the provisions of the State-specific Shop and Establishment Acts, or managerial or supervisory employees who are otherwise exempt under the applicable employment laws governing terms and conditions of service. Accordingly, the requirement to pay full wages during lockdown would be applicable even to employees who do not qualify as "workmen" under the IDA until there is more clarity on the MHA Order.

However, after the lockdown is lifted, subject to new statutory requirements, employers should be able to exercise more flexibility in negotiating salary reductions with non-workmen employees in accordance with applicable procedures wherever applicable.

xiv) Any other advice?

When contemplating any salary reduction measures during the lockdown, it might be helpful for the enterprises to consider a 'top-down' approach, with senior/ managerial employees being asked to participate first. Further, it is important that salary payments are made to the workmen category employees. For non-workmen employees, salary deductions should be undertaken after obtaining their prior written consent of the concerned employees.

***