MEMORANDUM

Date: May 3, 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 the following queries as a follow up to our Memorandum dated April 30, 2020.

All capitalized terms used but not defined in this memorandum will have the same meaning as ascribed to them in our Memorandum dated April 30, 2020.

2. Response to Specific Queries

i) Can an employer pay salary to its employees 'under protest' or as 'advance'?

JSA Response

The MHA Order imposes an obligation on the employers to pay full wages to their employees. However, the legality of the MHA Order has been challenged in the Supreme Court and the matter is subjudice. Therefore, until there is more clarity on the legality and applicability of the MHA Order, it is advisable for employers to continue paying full salaries to their employees.

That said, an employer may opt to comply with such payment obligation 'under protest' and simultaneously challenge the constitutionality of the MHA Order before a court of law.

To reiterate, the MHA Order requires an employer to pay wages to its employees on the respective due dates without any kind of deduction during the lockdown period. In our view, this payment obligation is in respect of the wages payable for the current wage period i.e., the wage period that coincides with the lockdown period and is not a payment obligation in respect any subsequent

wage periods. As such, an employer paying wages to its employees during lockdown pursuant to the MHA Order cannot require its employees to treat such payments as an advance for work to be performed by them in future. Such an action may be perceived as a violation of the MHA Order.

ii) Is an employer required to pay full wages or continue the employment of trainees under NEEM scheme or otherwise who work on shop floor like operating engineers (DETs)?

JSA Response

A trainee under NEEM Scheme or otherwise may fall under the category of an apprentice or probationer. There may also be instances where an individual has been designated as a trainee but performs the roles and responsibilities of an employee. As the MHA Order does not assign a restricted meaning to workers, it would generally include all employees including trainees, apprentices or probationers. Furthermore, as per the March 30, 2020 Order of the Ministry of Skill Development and Entrepreneurship, all establishments under designated and optional trade need to pay full stipend to their apprentices during lockdown. Therefore, the employers would need to pay full wages/ stipend to trainees for the lockdown period if they qualify as probationers/ apprentices and such amounts would have been ordinarily payable to them under existing contractual obligations had there been no COVID-19 outbreak and related lockdown.

iii) What is the process to be followed for implementing wage reductions or other similar measures in unionized and non-unionized plants? Is it sufficient for an employer to obtain consent of the trade union of unionized workmen? How should an employer deal with different trade unions having different views regarding management decisions?

JSA Response

Typically, an employer has a right to unilaterally change the terms and conditions of service of its workmen employees under Section 9A of the IDA. Section 9A of the IDA requires an employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule of the IDA, to give to the workmen likely to be affected by such change, a notice in the prescribed manner of the nature of the change proposed to be effected, before effecting such change. Further, the employer is enjoined not to effect the proposed change within 21 (twenty-one) days of giving such notice. Provided however that, no notice is required to be given for effecting any such change (i) where the change is effected in pursuance of any settlement or award; or (ii) where the workman likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Service (Temporary Service) Rules, Revised

Leave Rules, Civil Services Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply. It may be noted that such notice is also required to be sent by registered post to the secretary of the registered trade union of the workmen, if any.

The conditions of service for change of which the above notice is to be given (as specified in the Fourth Schedule to the IDA) are as follows:-

1. **Wages,** including the period and mode of payment;
2. Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force;
3. Compensatory and other allowances;
4. Hours of work and rest intervals;
5. Leave with wages and holidays;
6. Starting, alternating or discontinuance of shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Withdrawal of any customary concession or privilege or change in usage;
9. Introduction of new rules of discipline, or alteration of existing rules except insofar as they are provided in standing orders;
10. Rationalization, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen;
11. Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift not occasioned by circumstances over which the employer has no control.

The workmen can then either agree to the change, or object to it and raise an industrial dispute. Where an objection is raised, the dispute must be resolved by the relevant tribunal and the change cannot be made until the dispute is resolved.

The Trade Unions Act, 1926 ("**TUA**") which lays down the law relating to registered trade unions defines a "trade union" to mean the combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen and or between employers and employers, or for imposing restrictive conditions on the conduct of any trade business, and includes a federation of two or more trade unions. "Trade dispute" has been defined as any dispute between employers and workmen or between workmen and workmen or between employers and employers, which is connected with

the employment or non-employment or the terms of employment or the conditions of labour, of any person. Hence, both, the IDA and the TUA are designed to afford protection to the workmen employees.

Under the IDA, an employer is required to give a notice to the trade union, if any, regarding certain matters such as for example, a notice of change under Section 9A as discussed above. However, the employee related matters before implementation of which, an employer is required to bargain collectively, in good faith with a recognized trade union have not been prescribed. Sometimes employers enter into a settlement or collective bargaining agreement with a recognized trade union of their workmen regarding matters before implementation of which the recognized trade union needs to be consulted by the employer. Unless such an agreement is in place, there is no obligation to consult the trade union.

However, if there is a trade union of workmen of an establishment then while deciding issues such as reduction of wages, change in conditions of service, etc., an employer should exercise caution. The role of the trade unions is to protect the interest of workers and negotiate with the employer on their behalf. Therefore, in unionized plants, it is advisable for the employers to take the consent of the trade union before implementing wage reductions or other similar measures. Further, it would be sufficient for an employer to obtain the consent of the trade union, and consent from individual workmen would not be required. In cases where the employer does not consult the union and imposes changes which are detrimental to the interests of the workers, there is a risk of the trade union raising an industrial dispute to challenge such decision.

In case of multiplicity of trade unions, the employer is required to recognize one trade union which commands the support of majority of workmen/employees for the purpose of collective bargaining. A settlement arrived at as a result of discussion/ negotiations with such recognized trade union will be binding on all workmen/employees.

As such, even where there is a trade union an employer may proceed unilaterally under Section 9A of the IDA to change a condition of service or enter into a bilateral settlement with recognized trade union of workmen under Section 18 of the IDA and file the same with the concerned labour authorities under joint application.

Even in case of non-unionized plants, an employer has both the options discussed above. The bilateral settlement in this case may be executed with a body which represents the interest of majority of workmen.

iv) What is the process to be followed in respect of union agreements under negotiations during lockdown?

JSA Response

Due to the lockdown restrictions, it may not be possible for employers and trade unions to modify existing terms of settlements or negotiate new terms. Since settlements are typically executed for a specific period, they will continue to be in force for remainder of their term during lockdown. If their term expires during lockdown, employers may consider continuing observance with agreed terms till the lockdown is lifted. Alternatively, the employer may also explore the option of formulating a unilateral offer and consulting the representatives of the trade union to accept such offer and record the mutual agreement, if any, in the form of a settlement under Section 18 of the IDA, to be filed with the labour authorities under joint application.

v) Can an employer close the plant during the lockdown through existing legal process?

JSA Response

The requirement under the MHA Order to pay salaries to employees on the respective due dates without any kind of deduction, presupposes continuing employees in service during the lockdown. As the closure of the plant will necessarily mean retrenchment of workmen of the plant, such closure may be perceived as a violation of the MHA Order.

Once the lockdown is lifted, subject to new statutory requirements, if any, an employer should be able to close the plant in accordance with the statutory procedures prescribed under Chapter VA or VB of the IDA as applicable to the concerned plant.

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