TO : Auto Component Manufacturers Association
FROM : Khaitan & Co, Delhi
DATE : 3 May 2020

1. BACKGROUND

1.1. In the backdrop of the novel coronavirus (COVID-19) situation in India, the Ministry of Labour and Employment vide circular dated 20 March 2020 ("**Circular**") advised all employers of private and public establishments to extend their cooperation by not terminating their employees' services or reducing their wages. The Circular stipulates that any employee availing leave shall be deemed to be on duty without any consequential deduction in wages for the lockdown period. Further, if the place of employment is to be made non-operational due to COVID-19, the employees of such unit will be deemed to be on duty.

1.2. Pursuant to the Circular, states of Telangana, Delhi, Uttar Pradesh, Madhya Pradesh, Daman and Diu and Maharashtra issued orders on similar lines, to ensure that employees of establishments that are temporarily closed pursuant to the lockdown orders shall be provided holiday with wages for the period of such temporary closure. The states of Karnataka, Gujarat and Haryana have issued advisories regarding non-termination of the employees' services and non-reduction of their wages for the lockdown period. The orders / advisories as set out above shall collectively be referred to as ("**State Orders / State Advisories**").

1.3. Further, the Ministry of Home Affairs, vide order dated 29 March 2020, issued directions restricting movement of inter-state migrant workmen across state borders and directing employers to pay full wages to such workers for the duration of the lockdown ("**MHA Order**").

1.4. The Ministry of Labour and Employment issued an advisory dated 22 April 2020, directing principal employers to make timely payments to contractors engaged for providing services such as private security and cleaning / housekeeping, during the lockdown period, to ensure that the contractor is able to pay salary to the contract labour who have rendered services during such period ("**Advisory to Principal Employer**").

The Circular, State Orders / State Advisories and Advisory to Principal Employer shall collectively be referred to as "**Advisories**".

1.5. In view of the above background, Auto Component Manufacturers Association (ACMA), an association of Auto Component Manufacturers in India, comprising of over 850 (eight hundred and fifty) auto component manufacturers ranging from small, medium and large enterprises ("**Member Enterprise**") is formulating a guideline to ensure that its Member Enterprise are in compliance with the Advisories**.**

1.6. We understand that the Member Enterprise is engaged in manufacturing operations which have temporarily been suspended pursuant to the nationwide lockdown orders issued by the Central and state governments which has resulted in in severe financial stress to them.

1.7. Based on the information provided to us, we understand that the Member Enterprise broadly engages 3 (three) categories of workforce namely:

i) Permanent workmen, who are on the rolls of the concerned company;

ii) Casual labour, who are engaged on need based, and for a period less than 240 days in a year; and

iii) Contract workmen, who are engaged through third party service providers, depending on the requirement on daily/weekly/monthly basis.

1.8. We are not privy to the details as regards the location of business operations of Member Enterprise and number of employees, employed by each such Member Enterprise.

1.9. In view of the above facts and understanding, ACMA has approached Khaitan & Co ("**we" / "us"**) on behalf of its Member Enterprise to provide a legal opinion ("**Opinion**") on various queries from the perspective of Indian employment laws concerning workforce management in the backdrop of COVID-19 outbreak.

1.10. Broadly the queries can be categorized into 4 (four) categories namely (1) Permanent Workmen, (2) Casual Labour, (3) Contract Labour and (3) Miscellaneous. For the ease of reference, we have dealt with queries under each category separately.

1.11. **Queries pertaining to Permanent Workmen**

1.11.1. In view of the MHA Order, whether is it necessary to make payment of full wages during the period of lockdown to all permanent workmen?

1.11.2. In view of financial stress, can the Member Enterprise pay minimum wages as prescribed by the respective State Governments to permanent workmen during the period of closure?

1.11.3. If the above is not possible, can Permanent Workmen be paid the basic wages and DA, excluding other allowances such as transportation allowance, canteen subsidy, education allowance, production linked linked incentives etc.?

1.11.4. Assuming, even after lifting of lockdown, there will be a regulated opening up of manufacturing operations and it may take some months to reach full production level. During this period the Member Enterprise is contemplating to engage part of its permanent work force as required for the production. In such case, is it necessary to pay full wages to all permanent workmen, although some of them may not be required to report for duty due to lower production level?

1.11.5. During the extended lockdown period and in the period of sub optimal production post lockdown, can the Member Enterprise declare "lay off" under the Industrial Dispute Act and pay only "Sustenance Allowance"? In case this is possible, kindly suggest the procedure to be followed for lay off under the Industrial Dispute Act. Can it be declared from back date - April 1, 2020?

1.12. **Queries pertaining to Casual Labour**

1.12.1. Whether non-engagement of casual labor and accordingly non-payment of wages be treated as non-compliance of Notification dated 29 March 2020?

1.12.2. If essential, whether the Member Enterprise pay minimum wages prescribed by the respective State Governments to casual employees during the period of closure?

1.12.3. If the above is not possible, can we pay Contractual Labour the basic wages and DA, excluding other allowances such as transportation allowance, canteen subsidy, education allowance, production linked incentives etc.

1.12.4. In case lay off is permissible under the Industrial Dispute Act, is it necessary to pay "Sustenance Allowance" to them, since they are not permanent employees.

1.13. **Queries pertaining to Contract Labour**

1.13.1. Since contract workmen are engaged as required from time to time on daily/weekly/monthly basis, will the non-engagement of contract workmen and accordingly no wage payment to them during lockdown be considered as non-compliance of MHA order?

1.13.2. If essential, can the enterprises pay minimum wages prescribed by the respective State Governments to contract employees during the period of closure.

1.13.3. Can the enterprises inform the Service provider not to provide contract employees and stop payment for them on the principle of "no work no pay'.

1.13.4. Since contract employees comprise of migrating workmen, many of them join and leave from time to time i.e. there is large attrition. In many cases, contract workmen have served for less than 10/20 days/one month/six months prior to start of lockdown. In such case is the payment to be made to contract workmen who reported to work even for one day prior to commencement of lockdown or keeping in view the nature of availability and engagement of such workmen, restrict the payment of wages only to such workmen who have worked for a reasonable period (number of days?) before commencement of lockdown date.

1.13.5. In case lay off is permissible under the Industrial Dispute Act and hence there is no need to engage contract workmen, is there any requirement to pay "Sustenance Allowance" to contract employees, since they are not on permanent rolls of the Member Enterprise.

1.14. **Miscellaneous Queries**

1.14.1. Should the legal advice be for employers to pay Salary and wages 'under protest' or 'advance' please suggest suitable draft of letter to be given to workmen and staff (white collar)?

1.14.2. Whether the MHA Order/ state government directives under Disaster Management Act 2005 ("Disaster Management Act") constitutionally valid and over- rides various labour legislations?

1.14.3. In each of the above category of workmen, remuneration consists of –

a) Monthly wages + DA and other monthly allowances (example House Rent Allowance).

b) Some allowances relating to work. Example – conveyance allowance, uniform, washing allowance, transport arrangement, etc.

c) Payment of variable pay linked to attendance, production, quality, safety and other parameters which are generally applicable when the enterprise is in operation.

To comply with MHA directive, which of the above elements need to be paid?

In case lay off is permissible, the "Sustenance Allowance" will be applicable to which of the above elements of remuneration.

1.14.4. Since various opinions are available in the public domain and some enterprises have approached Hon'ble High Court/Supreme Court seeking decision with respect to validity of MHA/State Government orders, can the enterprises make payment (full/partial) as advance or under protest, which could be adjusted subsequently based on the Court orders, as received in due course. In this case what would be the basis for payment of PF/ESI.

1.14.5. In the Industrial Dispute Act, the "Sustenance Allowance" under lay off is payable for a maximum period of 45 days. Therefore, in case the lockdown is for a longer period, can the "Sustenance Allowance" payment discontinue after 45 days or is it to be paid for the entire period of lockdown?

1.14.6. Blue Collar vs While Collar personnel: Enterprises have varied remuneration structure applicable for blue collar/white collar personnel. Can the enterprises take different approach for blue collar and white-collar personnel for payment of remuneration for the period of lockdown or resumption of operations?

1.14.7. Should a Member Enterprise announce a cut of salaries of its white collared employees, in which case is a letter of consent required from the employees? Is there a liability of taxation on the amount deducted?

1.14.8. How to handle Trainees under NEEM scheme or otherwise who work on shop floor like operating engineers (DETs)?

1.14.9. Should separate opinions be sought for unionised and non unionised plants? Can Management take decision without consensus of unionised workmen? What if different unions have different views?

1.14.10. How to handle union agreements under negotiations legally as this is no time to negotiate for either side?

1.14.11. Can we close the plant legally at this time through normal existing legal process?

1.14.12. Any other advice which learned counsel may suggest.

RESPONSES TO THE QUERIES PERTAINING TO PERMANENT WORKMEN

2. IN VIEW OF THE MHA ORDER, WHETHER IS IT NECESSARY TO MAKE PAYMENT OF FULL WAGES DURING THE PERIOD OF LOCKDOWN TO ALL PERMANENT WORKMEN?

Powers of Central and state governments under the Disaster Management Act:

2.1. The Advisories were issued pursuant to the wide powers conferred on the Central and state governments under the Disaster Management Act, to combat any threatening or actual disaster situation. In the absence of an exhaustive list of the scope of actions that may be taken or ordered by the Central or state authorities in this regard, it is not entirely clear as to whether the Central and state government are authorized and have the power to direct private parties/employers to necessarily make payments to their employees, without regard to the employers' state of affairs or impact on continuity of their business due to COVID-19. This power is further questionable when labour legislations such as Industrial Dispute Act, 1947 ("**ID Act**") and Industrial Establishments (Standing Orders) Act 1946 already deal with and provide guidance in terms of payment of wages / lay-off in the context of an epidemic, i.e. the Advisories seek to override an already existing law.

2.2. If the Advisories are challenged, the validity or reasonableness of any such orders / advisories will be assessed by the competent courts in view of the situation at hand and the correlation of the order with the government's obligation to avert or contain any impending or actual disaster.

2.3. In this regard, you may note that writ petitions have been filed before the Supreme Court (please see few petitions as set out in the footnote[1]) against the legality and enforceability of MHA Order and other state orders mandating payment of full wages during the lockdown period. The writ petitions are currently pending adjudication before the Supreme Court. Further, the MHA Order and the order issued by the Industries, Energy and Labour Department, Government of Maharashtra dated 31 March 2020 ("**Maharashtra State Order**") have also been challenged before the Bombay High Court[2] and Bombay High Court, Aurangabad Bench[3], respectively. While the Bombay High Court has not passed any interim order, the Bombay High Court, Aurangabad Bench has passed an interim order, which appears ambiguous. On one hand, the Hon'ble Judge has mentioned that pending adjudication of a similar matter (relating to payment of full wages) before the Supreme Court, he would not be inclined to interfere with impugned order, and would expect the petitioners (employers) to pay gross monthly wages. On the other hand, the Hon'ble Judge concludes that payment of gross monthly wages by the petitioners to the workers shall be subject to the result of the said petition (the next date of hearing is 18 May 2020). Such concluding statement, on the face of it, construes that the petitioners are not obligated to pay full wages to the workers. However, more clarity may be provided in the next date of hearing.

2.4. Therefore, in absence of sufficient jurisprudence on the subject at hand and given each disaster will have its own set of complications and requirement for containment, it cannot be said with certainty if in the current circumstances the competent courts will favorably view the Advisories.

2.5. Notwithstanding our views on the powers of the Central and state government to issue the Advisories, assuming that the MHA Order has indeed been issued in accordance with the law, we set out below the scope and applicability of the MHA Order.

Applicability of MHA Order:

2.6. The MHA Order had been issued with the objective of ensuring effective restrictions on the movement of migrant workers in particular (typically workers who have migrated away from their villages/hometown in search of jobs and livelihood) from their workplace location towards their hometowns, during the lockdown period. The nationwide lockdown of business and commercial activities has rendered majority of such workers in the organized sector jobless and without any means to support their food and shelter expenses at their temporary residence in the city of their last jobs. There were reports that most contract workers (including daily wage workers) had been terminated from their employment by their employers once the lockdown commenced, and in absence of wages or means to support livelihood in their migratory residence, these workers were left with no choice but to go to their hometown and families, not caring much about risking contact with COVID-19 virus. This mass exodus threatened to escalate into a national health and humanitarian crisis, with millions of workers traveling on foot to their hometowns in the absence

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1 Ficus Pax Private Limited v. Union of India [Diary number 10983/2020, writ petition filed on 22 April 2020], National Alliance of Journalist v. Union of India [Diary No. 10948/2020, writ petition filed on 17 April 2020]; and Ludhiana Hand Tools Association v. Union of India [Diary No.-10993/2020, writ petition filed on 22 April 2020].

2 Yusuf Iqbal Yusuf v. Union of India [LD VC 32 of 2020].

3 Align Components Private Limited and another v. Union of India and others [W.P Stamp number 10569 of 2020]

of any available public transport. It was in this backdrop that the MHA Order was issued, requesting respective state governments and authorities to *inter-alia* ensure that (i) employers do not terminate or reduce wages of their workers, and (ii) homeowners do not force-out the worker unable to pay their rent; so that the migrant workers are not forced to migrate back to their families and hometown during the lockdown period, and community spread of the COVID-19 outbreak is contained.

2.7. However, in the absence of a clarification / definition of who would constitute 'migrant workers', the same will have to interpreted in the context of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 ("**ISMW Act**"). As per the ISMW Act, an 'inter-state migrant workman' means any person who is recruited by or through a contractor in one state under an agreement or other arrangement for employment in an establishment in another state, whether with or without the knowledge of the principal employer in relation to such establishment.

2.8. Paragraph (iii) the MHA Order uses the term 'worker' (instead of 'migrant worker'). However, in our view, the MHA Order (if upheld by a court) will have to be interpreted in the context of the crisis that the migrant workmen were facing, as set out in the preamble of the said order. Any other interpretation (that the said order would be applicable to all 'workers') would go beyond the very intent of the MHA Order. Accordingly, in view of paragraph 2.5 above, the MHA Order will only be applicable in respect of inter-state migrant workmen (who have been engaged through a contractor), and not regular workmen who are on the Member Enterprise's payroll.

If the Member Enterprise do not engage any inter-state migrant workmen on its premises, then it can be inferred that the MHA Order would not be applicable to Member Enterprise.

3. IN VIEW OF FINANCIAL STRESS, CAN THE ENTERPRISES PAY MINIMUM WAGES AS PRESCRIBED BY THE RESPECTIVE STATE GOVERNMENTS TO PERMANENT WORKMEN DURING THE PERIOD OF CLOSURE?

3.1. Member Enterprise may deduct certain components of wages and pay reduced wages, as per the procedure prescribed under Section 9A of the ID Act or through consent / deemed consent obtained under appropriate documentation.

3.2. We are of the view that the provisions for reduction of wages set out in the relevant statutes (*explained below*) should not be impacted as a result of these Advisories.

Procedure for reduction of wages for workman category:

3.3. Section 9A of ID Act read with Schedule IV of ID Act provides that any reduction in wages will amount to change in conditions of service. As per the ID Act, no such change can be effectuated without furnishing the concerned workmen (non-managerial employees) with 21 (twenty-one) days' notice (42 (forty-two) days' notice in the states of West Bengal, Andhra Pradesh and Telangana) prior to such change. Such notice would be sent in the prescribed manner (the procedure for issue of a notice under Section 9A of ID Act is prescribed under the Industrial Disputes Rules of the relevant state).

3.4. Even if Section 9A notice under the ID Act is provided to the workmen likely to be affected, they do have an option to refuse to accept such changes. The workmen can raise an industrial dispute challenging such change in their conditions of service. Therefore, to avoid any litigation or backlash by the workmen, it would be advisable not to reduce their wages unilaterally without the workmen's consent.

3.5. Various judicial precedents have held that non-compliance of Section 9A of the ID Act, to the extent that notice of change has not been served on the concerned workmen, renders the change in conditions of service *void ab initio*. The object and purpose of enacting Section 9A is to afford an opportunity to the workmen to consider the effect of the proposed change and, if necessary, to represent their point of view on the proposal.

Practical challenges of Section 9A notice under ID Act:

3.6. Having said the above, in view of the situation at hand, we understand that providing a notice of 21 (twenty-one) days (or 42 (forty-two) days, as the case may be) and submitting the same to the competent authority may impose practical challenges for the Member Enterprise. Therefore, Member Enterprise may seek individual consent from the concerned workmen to reduce their wages. Since obtaining physical signatures would logistically pose a challenge at this juncture, consent may be obtained via email / tick box acceptance on the intranet portal of the Member Enterprise.

3.7. Deemed Acceptance: Alternatively, Member Enterprise may also draft the notice / letter to include an enabling provision of deemed acceptance, i.e. such concerned workman would be given adequate opportunity to express any concerns / reservations regarding reduction in wages within a stipulated timeline (ranging from 2 (two) to 3 (three) working days), failing which the contents of the notice / letter would be deemed to have been accepted by such workman.

3.8. The notice / letter mentioned above is required to be carefully drafted to ensure that the workman understand the concerns of the Member Enterprise and are convinced of the matter at hand to the extent possible.

Trade Unions: It would be advisable for the Member Enterprise to consult with the trade unions (if any) and take them into confidence before effectuating any reduction in wages. The Member Enterprise should also check the terms of the settlement agreement that may have been executed with the trade unions (if any), for any consent / procedural requirements, before effectuating such reduction in wages.

4. EVEN AFTER LIFTING OF LOCKDOWN, IT IS EXPECTED THAT THERE WILL BE A REGULATED OPENING UP OF MANUFACTURING OPERATIONS AND IT MAY TAKE SOME MONTHS TO REACH FULL PRODUCTION LEVEL. DURING THIS PERIOD THE ENTERPRISES MAY ENGAGE PART OF THE PERMANENT WORK FORCE AS REQUIRED FOR THE PRODUCTION. IN SUCH CASE IS IT NECESSARY TO PAY FULL WAGES TO ALL PERMANENT WORKMEN, ALTHOUGH SOME OF THEM MAY NOT BE REQUIRED TO REPORT FOR DUTY DUE TO LOWER PRODUCTION LEVEL?

4.1. At the outset, please note that the under Indian employment laws, if an employer is not able to provide work to its employees or there is some unforeseen situation due to which the normal operations cannot be carried out, the employer still has to pay its employees who are on the rolls of the company. This aspect has also been affirmed by the Supreme Court in the case of *State of Bihar v Kripa Nand [AIR 2014 SC 3653],* wherein it was held that the general rule is "no work, no pay", the exception is "**no work, yet pay**", and that such exception would come into play when there is a compulsory waiting period and the employee, although willing to work, is unable to join / discharge any duty for no fault on his part.

4.2. To save pay roll cost, Member Enterprise could explore the option of lay off or reduction of wages by following the due process.

Invoking Lay off provisions under ID Act

4.3. Since, the Member Enterprise has a manufacturing facility, it could invoke the 'Lay-off' provisions as set out under ID Act. '*Lay off*' contemplates a situation wherein the employer is unable to provide employment to 'workmen' for reasons beyond the control of the employer. Considering the advisories issued by various state governments, declaring COVID-19 as a 'pandemic', an employer's inability to provide work would fall within the ambit of lay off.

4.4. For the period of inability to provide employment, the Member Enterprise could pay 50% of the basic wages and dearness allowance (if any) for a period of 45 days, if such workmen have completed at least 240 days of continuous service with the Member Enterprise. For any further period, the Member Enterprise may consider to enter into a prior written agreement with the workmen and opt for unpaid leave of absence (although it is advisable to continue to comply with the minimum wages requirements); however, such period should be a reasonable one (say a month), and if the Member Enterprise foresees a prolonged period of 'no work' situation, it may contemplate to have discussion with workmen to consider the option of voluntary resignation. *[Also please refer to para 4.6 in relation to option to retrench workman pursuant to expiration of 45 days period]*

4.5. Given the sensitivities involved, the Member Enterprise should enter into a written agreement with the concerned 'workman' encapsulating the period of lay off, payment which will be made to them during such period along with future course of action pursuant to expiration of 'lay off' period.

4.6. Do note that the process to invoke lay off might differ depending on the number of employees and location where the Member Enterprise has operations. Broadly, the ID Act provides for different procedure which an employer is required to adhere depending on the number of workmen employed and the location(state) where the Member Enterprise has its operations.

(a) **Manufacturing facility having less than 50 workmen:** Employer and workmen can enter into mutual agreement and agree on the period of lay off and the compensation payable to them, unless the contract /standing orders (if applicable) provide otherwise.

(b) **Manufacturing facility having more than 50 and less than 100:** The employer has a right to retrench the workmen (pursuant to expiry of 45 days) and also can set off the layoff compensation paid to workmen during the preceding 12 months against the retrenchment compensation (statutory severance compensation).

(c) **Manufacturing facility having more than 100 workmen**: The option of retrenchment (pursuant to expiration of lay off period) is not available to an employer. However, in the state of West Bengal, if the manufacturing facility has 50 or more workmen, the employer will not have a right to retrench, pursuant to expiration of lay off period.

Reduction of Wages (Section 9A of ID Act)

4.7. Please refer to our response to query 3 above.

5. DURING THE EXTENDED LOCKDOWN PERIOD AND IN THE PERIOD OF SUB OPTIMAL PRODUCTION POST LOCKDOWN, CAN THE MEMBER ENTERPRISE DECLARE "LAY OFF" UNDER THE INDUSTRIAL DISPUTES ACT AND PAY ONLY "SUSTENANCE ALLOWANCE"? IN CASE THIS IS POSSIBLE, KINDLY SUGGEST THE PROCEDURE TO BE FOLLOWED FOR LAY OFF UNDER THE INDUSTRIAL DISPUTES ACT? CAN IT BE DECLARED FROM BACK DATE (1 APRIL 2020)?

5.1. As regards, invoking 'lay off' provisions retrospectively, do note that the same may be construed as 'arbitrary' and therefore, should be avoided.

5.2. In relation to the procedure, to be followed for effectuating 'lay off', please refer to our response to query 2(iv) above.

RESPONSES TO THE QUERIES PERTAINING TO CASUAL LABOUR

6. WILL NON-ENGAGEMENT OF CASUAL LABOUR AND ACCORDINGLY NON-PAYMENT OF WAGES BE TREATED AS NON-COMPLIANCE OF MHA ORDER?

6.1. **Please refer to our response to query 2 above.**

6.2. We note that casual workers are engaged on a need basis. In view of the same, strictly from a legal perspective, if such workers have not been engaged by the Member Enterprise or if engaged but they could not perform their duties, the liability to pay wages should not accrue to the Member Enterprise.

Having said the above, and given the sensitivities involved, Member Enterprise may consider adopting a humanitarian approach and pay certain minimum amount (equivalent to minimum wages) for the duration of the lockdown period.

7. IF ESSENTIAL, CAN THE ENTERPRISES PAY MINIMUM WAGES PRESCRIBED BY THE RESPECTIVE STATE GOVERNMENTS TO CASUAL EMPLOYEES DURING THE PERIOD OF CLOSURE?

7.1. Please refer to our response to query 6 above.

8. IF THE ABOVE IS NOT POSSIBLE, CAN WE PAY CONTRACTUAL LABOUR THE BASIC WAGES AND DA, EXCLUDING OTHER ALLOWANCES SUCH AS TRANSPORTATION ALLOWANCE, CANTEEN SUBSIDY, EDUCATION ALLOWANCE, PRODUCTION LINKED INCENTIVES ETC.?

8.1. Since, Contract Labour has a separate head in relation to the queries, we are assuming the query postulated under this section is in relation to casual labour. In this regard, please refer to answer to our response to query 6 above

9. IN CASE LAY OFF IS PERMISSIBLE UNDER THE INDUSTRIAL DISPUTES ACT, AND THERE IS NO NEED TO ENGAGE CASUAL WORKMEN, IS IT NECESSARY TO PAY "SUSTENANCE ALLOWANCE" TO THEM, SINCE THEY ARE NOT PERMANENT EMPLOYEES?

9.1. The Liability to pay lay off compensation to casual workmen under the ID Act will not accrue in relation to casual workmen. In terms of the provisions of Section 25 C of the ID Act, casual workmen are specifically excluded.

RESPONSES TO THE QUERIES PERTAINING TO CONTRACT LABOUR

10. SINCE CONTRACT WORKMEN ARE ENGAGED AS REQUIRED FROM TIME TO TIME ON DAILY/WEEKLY/MONTHLY BASIS, WILL THE NON-ENGAGEMENT OF CONTRACT WORKMEN AND ACCORDINGLY NO WAGE PAYMENT TO THEM DURING LOCKDOWN BE CONSIDERED AS NON COMPLIANCE OF MHA ORDER?

10.1. As regards non-payment of wages to Contract Labour who are not required to render services to the Member Enterprise, please note that as per the Contract Labour (Regulation and Abolition) Act 1970, contract labour is engaged by a principal employer "*in or in connection with the work of an establishment*". It is for the work actually done by a contract labour that the principal employer, along with the contractor, is made responsible for payment of 'wages'. In *Anusuya Vithal v JH Mehta [AIR 1960 Bom 201],* the Bombay High Court observed that 'wages' is a payment made for the services rendered and is attributable to the actual work done.

10.2. Having said the above, if the service agreement provides for a minimum guaranteed payment during suspended service period, irrespective of whether such contract workers are deployed at the premises of the principal employer, then in such scenario, the Member Enterprise may be liable to make payments to its service providers.

10.3. Notwithstanding the above, and strictly from a legal perspective, in the event of non-deployment of Contract Labour on the premises of the Member Enterprise, it is not mandatory for the Member Enterprise (as the principal employer) to pay wages to Contract Labour. Any liability of payment of wages rests with the respective contractor (being the direct employer of such Contract Labour). However, though not legally required to, many companies across sectors are exercising caution and agreeing with the contractor to pay certain amounts as subsistence allowance on humanitarian grounds to contract labour for the duration of the lockdown period and non-deployment on their premises.

11. IF ESSENTIAL, CAN THE ENTERPRISES PAY MINIMUM WAGES PRESCRIBED BY THE RESPECTIVE STATE GOVERNMENTS TO CONTRACT EMPLOYEES DURING THE PERIOD OF CLOSURE?

11.1. Please refer to our response to query 10 above.

12. CAN THE ENTERPRISES INFORM THE SERVICE PROVIDER NOT TO PROVIDE CONTRACT EMPLOYEES AND STOP PAYMENT FOR THEM ON THE PRINCIPLE OF "NO WORK NO PAY"?

12.1. Member Enterprise may intimate the contractor that it would not require the services of such Contract Labour and invoke the provisions under the relevant services agreement for non-engagement of such Contract Labour.

13. SINCE CONTRACT EMPLOYEES COMPRISE OF MIGRATING WORKMEN, MANY OF THEM JOIN AND LEAVE FROM TIME TO TIME I.E. THERE IS LARGE ATTRITION. IN MANY CASES, CONTRACT WORKMEN HAVE SERVED FOR LESS THAN 10/20 DAYS/ONE MONTH/SIX MONTHS PRIOR TO START OF LOCKDOWN. IN SUCH CASE IS THE PAYMENT TO BE MADE TO CONTRACT WORKMEN WHO REPORTED TO WORK EVEN FOR ONE DAY PRIOR TO COMMENCEMENT OF LOCKDOWN OR KEEPING IN VIEW THE NATURE OF AVAILABILITY AND ENGAGEMENT OF SUCH WORKMEN, RESTRICT THE PAYMENT OF WAGES ONLY TO SUCH WORKMEN WHO HAVE WORKED FOR A REASONABLE PERIOD (NUMBER OF DAYS?) BEFORE COMMENCEMENT OF LOCKDOWN DATE?

13.1. Please refer to our response to query 2 above. As an abundant caution, and in terms of the MHA Order, if such contract workers fall within the ambit of the definition of 'inter-state migrant workmen' then in such a scenario, Member Enterprise should make the necessary payments.

14. IN CASE LAY OFF IS PERMISSIBLE UNDER THE INDUSTRIAL DISPUTES ACT AND HENCE THERE IS NO NEED TO ENGAGE CONTRACT WORKMEN, IS THERE ANY REQUIREMENT TO PAY "SUSTENANCE ALLOWANCE" TO CONTRACT EMPLOYEES SINCE THEY ARE NOT ON PERMANENT ROLLS OF THE MEMBER ENTERPRISE?

14.1. As regard, your specific query, the liability to pay lay off compensation will not accrue to the Member Enterprise in relation to contract workers. Given the nature of the query, it is advisable to provide our responses under two scenarios

DURING LOCKDOWN

14.2. ***If the contract labour is willing to attend to their duties in a situation but the company is unable to offer them work:*** Principle of 'no work, no pay' will not be applicable. In such a situation, while the principal employer will not be liable to make any payments as the contract workers are not rendering any services, any liability for payments would be on the contractor. Please refer to our detailed response to query 10 above.

POST LOCKDOWN

14.3. Member Enterprise may assess the necessary provisions of the services agreement and communicate to the contractor in case it intends to suspend / terminate the services agreement.

14.4. If the contractor is unable to provide work to its employees pursuant to the termination of the agreement with the Member Enterprise, the contractor may proceed to retrench such workmen. In such a scenario, the liability to pay severance compensation (if any) would be of the contractor/service provider and not of the principal employer.

RESPONSES TO THE MISCELLANEOUS QUERIES

15. SHOULD THE LEGAL ADVICE BE FOR EMPLOYERS TO PAY SALARY AND WAGES 'UNDER PROTEST' OR 'ADVANCE' PLEASE SUGGEST SUITABLE DRAFT OF LETTER TO BE GIVEN TO WORKMEN AND STAFF (WHITE COLLAR)

15.1. From a legal perspective, such an option may not be legally tenable or justifiable as the same would contravene the settled position of law. Such option essentially implies that the employer is not making any payment of salaries/ wages for the lock down period. To explicate in a scenario where the Member Enterprise pays salary/wages as an advance or under protest, subject to the condition that it may be set off against the salary/wages which will accrue to an employee in future (if the Hon'ble Supreme Court quashes the Advisories),such action will contravene the Hon'ble Supreme Court precedent of ***'no work yet pay' (discussed in query 4 above).***

15.2. While the Member Enterprise can explore various option to save pay roll cost (salary/wage reduction, lay off), but not making any payment for the lock down period for its permanent workmen/ employees is not likely to hold good in the court of law and is also more prone to reputational risk.

15.3. From a workforce management perspective, such action would leave employees/ workman disgruntled espousing a reason for an industrial dispute.

15.4. In view of the aforementioned legal implication/ consequences and also from a good will/ brand value standpoint such an option ought not be exercised as opposed to the extant jurisprudence set out through the judicial precedent mentioned herein in respect of 'no work no pay' during scenarios of employees being unable to work for no reason attributable to them.

16. WHETHER MHA ORDER /STATE GOVERNMENT DIRECTIVE UNDER DISASTER MANAGEMENT ACT 2005 ("DISASTER MANAGEMENT ACT") CONSTITUTIONALLY VALID AND OVER-RIDES VARIOUS LABOUR LEGISLATIONS?

The State Orders/ Advisories have been issued in accordance with the powers of the state governments under the Epidemic Diseases Act 1897 ("**Epidemic Diseases Act**") and Disaster Management Act. As per Section 2 of the Epidemic Diseases Act, during an outbreak of any dangerous epidemic disease, if the state government is of the opinion that the ordinary provisions of law for the time being in force are insufficient, the state government may take such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary, to prevent spread of disease.

In *Rai Sahib Ram Jawaya Kapur and others v. State of Punjab [AIR 1995 SC 549]* the Hon'ble Supreme Court clarified the reach of an executive action. It held that once Parliament and/or any State Legislature frames any legislation, the executive power of the respective governments shall be strictly in accordance with the provisions of any said legislation. The same has been reiterated by the Hon'ble Supreme Court recently in *Government of NCT of Delhi v. Union of India [2019 (9) SCJ 375].*

The powers conferred on the executive by the Epidemic Diseases Act and Disaster Management Act is for a specific purpose i.e. to curtail spread of the disease / disaster and take remedial actions. Such powers are to be exercised for fulfilling the objective of the legislation, **only if the ordinary provisions of the law for the time being in force are insufficient for the purpose**. To this extent, the imposition of a nationwide lockdown and restriction on movement of people is justified and legally tenable.

However, labour laws in India (ID Act and Industrial Employment Standing Order Act, 1946) already contemplate and allow closure of establishments due to an epidemic and provide the mechanism to lay-off / retrench 'workmen', subject to fulfilment of the conditions mentioned therein. Therefore, it cannot be said that the extant labour laws in force are insufficient for this purpose.

In view of the above, **it can be argued that it was beyond the purview of the Epidemic Diseases Act and / or Disaster Management Act**, and the executive's power in this regard, to direct private employers not to terminate the employment or reduce wages of its employees. Any such direction should be effectuated by an amendment in the law, or by way of necessary notifications under the applicable laws or through an ordinance.

As mentioned above, the validity of the Advisories has been challenged before the Hon'ble Supreme Court and also before the various High Courts in India. The validity or reasonableness of any such order will be assessed in view of the situation at hand and the correlation of the orders with the government's obligation to avert or contain any impending or actual disaster. Therefore, it cannot be said with certainty if in the current circumstances the Hon'ble Supreme Court will favourably view such Advisories and direct private employers to pay wages to all its employees for the lock down period.

17. IN EACH OF THE ABOVE CATEGORY OF WORKMEN, REMUNERATION CONSISTS OF –

(a) **Monthly wages + DA and other monthly allowances (example House Allowance).**

(b) **Some allowances relating to work. Example – conveyance allowance, uniform, washing allowance, transport arrangement, etc**

(c) **Payment of variable pay linked to attendance, production, quality, safety and other parameters which are generally applicable when the enterprise is in operation.**

(d) **To comply with MHA directive, which of the above elements need to be paid. In case lay off is permissible, the "Sustenance Allowance" will be applicable to which of Is the above elements of remuneration.**

17.1. As mentioned above, in the matter Align Components Pvt. Ltd., and another Vs. Union of India and others [*Writ Petition No.10569 of 2020*], the petitioners challenged the MW Order and sought relief from paying full monthly wages to its workers on account of cessation of their manufacturing operation during the lock down period. The Petitioner also agreed to pay 50% of the gross wages or the minimum wages (whichever is higher) to its workers during the cessation of their manufacturing operations. The Aurangabad Bench of the Hon'ble Bombay High Court ("Bench") while hearing the matter referred to the fact that a similar issue is pending before the Hon'ble Supreme Court and thus it would not interfere. Further, the Bench stated that it expects the Petitioners to pay gross wages except conveyance allowance and food allowance. However, payment of gross wages (except food and conveyance allowance) would be subject to the result of the Petition. The next date of hearing is 18 May 2020.

17.2. In view of the above, if the Member Enterprise can demonstrate that the variable pay is linked to various contingent factors and is a variable amount which could vary from INR 0 to any specified amount (depending on business and individual performance), then it cannot be considered to be wages payable to an employee/workmen as a matter of right. In such scenario, variable pay cannot be said to be an emolument which a workman will definitely be entitled to in a financial year. In view of the nature of payment of variable pay, it would not be covered within the ambit of 'wages' under ID Act and any change in this regard would not trigger the requirements of section 9A of ID Act. Therefore, the Member Enterprise can deduct/withhold the variable pay unilaterally without obtaining the consent of the concerned employees/ workman. However, as a good practice, Member Enterprise can opt to enter into a written agreement in this regard specifying the reasons for non-payment of variable pay or issuing a brief written communication wherein employees' are apprised of the COVID-19 crisis and consequent withholding of their variable pay component.

17.3. In relation to withholding of allowances which are contingent to performance of a specific action by an employee, the Member Enterprise can withhold the allowances payable to such employee. Member Enterprise can choose not to pay the monthly allowances, if it can substantiate that the allowances is in the nature of reimbursement and payable to employees, on performance of certain action on their part (conveyance, travelling allowance, petrol allowance) by an employee. To summarize, please note that if any allowance is in the nomenclature of performance related allowance, however, it is paid to such employee irrespective of his performance, such allowance shall be required to be paid and cannot be deducted.

17.4. As regards lay off compensation, please refer to our response to query 4 above.

18. SINCE VARIOUS OPINIONS ARE AVAILABLE IN THE PUBLIC DOMAIN AND SOME ENTERPRISES HAVE OF MHA/STATE GOVERNMENT ORDERS, CAN THE ENTERPRISES MAKE PAYMENT (FULL/PARTIAL) AS ADVANCE OR UNDER PROTEST, WHICH COULD BE ADJUSTED SUBSEQUENTLY BASED ON THE COURT ORDERS, AS RECEIVED IN DUE COURSE? IN THIS CASE WHAT WOULD BE THE BASIS FOR PAYMENT OF PF/ESI.

18.1. Please refer to our response to query 15 above.

19. UNDER THE INDUSTRIAL DISPUTES ACT, THE "SUSTENANCE ALLOWANCE" UNDER LAY OFF IS PAYABLE FOR A MAXIMUM PERIOD OF 45 DAYS. THEREFORE, IN CASE THE LOCKDOWN IS FOR A LONGER PERIOD, CAN THE "SUSTENANCE ALLOWANCE" PAYMENT DISCONTINUE AFTER 45 DAYS OR IS TO BE PAID FOR THE ENTIRE PERIOD OF LOCKDOWN.

19.1. Your understanding is correct in this regard. Please refer to our response to query 4 above.

20. COMPLIANCE - BLUE COLLAR VS WHILE COLLAR PERSONNEL: ENTERPRISES HAVE VARIED REMUNERATION STRUCTURE APPLICABLE FOR BLUE COLLAR/WHITE COLLAR PERSONNEL. CAN THE ENTERPRISES TAKE DIFFERENT APPROACH FOR BLUE COLLAR AND WHITE COLLAR PERSONNEL FOR PAYMENT OF REMUNERATION FOR THE PERIOD OF LOCKDOWN OR RESUMPTION OF OPERATIONS?

20.1. Yes, the Member Enterprise may exercise discretion to devise different approach for different categories of employees i.e. (Workman and Non-workman). Having said that, the Member Enterprise should be mindful that any such change/ alteration/ revision of salary or wages should be prospective and should not be discriminatory in nature.

21. SHOULD A MEMBER ENTERPRISE ANNOUNCE A CUT A SALARIES OF ITS WHITE COLLARED EMPLOYEES, IN WHICH CASE IS A LETTER OF CONSENT REQUIRED FROM THE EMPLOYEES? IS THERE A LIABILITY OF TAXATION ON THE AMOUNT DEDUCTED?

21.1. For employees who are not 'workman' under the ID Act, the Member Enterprise can notify the change in salary reduction by email/ brief written communication which is duly acknowledged by the concerned employee. It is advisable that the Member Enterprise executes an addendum to the employment agreement / appointment letter effecting such change if there is any reference of emoluments (which Member Enterprise is liable to pay to such employees) in the said document. The Member Enterprise should ensure that there are no unilateral / arbitrary actions to change the salary of the employees to avoid any litigation or backlash by the employees during or post lifting of the lockdown.

22. HOW TO HANDLE TRAINEES UNDER NEEM SCHEME OR OTHERWISE WHO WORK ON SHOP FLOOR LIKE OPERATING ENGINEERS (DET)?

22.1. Since, the NEEM Regulations allows the NEEM Facilitator to terminate the contract by giving thirty days' written notice to the Trainee, the Member Enterprise could explore the option to terminate the contract of few trainees (depending on the business requirement). The Member Enterprise could provide a reason that on account of unprecedented crisis, their operations have been curtailed due to which they will not be able to impart training to all the trainees.

23. SHOULD SEPARATE OPINIONS BE SOUGHT FOR UNIONISED AND NON UNIONISED PLANTS ? CAN MANAGEMENT TAKE DECISION WITHOUT CONSENSUS OF UNIONISED WORKMEN? WHAT IF DIFFERENT UNIONS HAVE DIFFERENT VIEWS?

23.1. From a practical and business continuity perspective, and to maintain industrial peace unions should be taken into confidence and their consent should be obtained prior to effectuating any change.

23.2. Please also refer to our response to query 3 above.

24. HOW TO HANDLE UNION AGREEMENTS UNDER NEGOTIATIONS LEGALLY AS THIS IS NO TIME TO NEGOTIATE FOR EITHER SIDE?

24.1. In a scenario, where the negotiation with the union cannot be undertaken, the management should apprise the union by way of a written letter, and/or by any way of written communication regarding the proposed change due to unprecedented crisis which is warranted for the survival of the business.

24.2. Also refer to our response to query 3 above.

25. CAN WE CLOSE THE PLANT LEGALLY AT THIS TIME THROUGH NORMAL EXISTING LEGAL PROCESS?

25.1. Yes, the Member Enterprise can do so in accordance with the procedure set out under ID Act. Since, the closure will be on account of pandemic, which would be construed as circumstances beyond the control of the employer, the possibility of trade union or workers raising an industrial dispute alleging that the closure of the manufacturing unit is vitiated on mala fide intentions and/or on account of colorable exercise of power by the management to terminate the services of the employees appears to be remote.

26. ANY OTHER ADVICE WHICH LEARNED COUNSEL MAY SUGGEST?

26.1. In our view, every aspect has been duly and appropriately covered.

27. ASSUMPTIONS AND QUALIFICATIONS

27.1. The analysis in this Opinion is as of the date mentioned herein and based on the laws in India existing as on date and is limited to the issues specifically discussed in the Opinion. Any changes in the law after the date of this analysis, which are retroactive, could have an impact on the validity of our conclusions stated herein.

27.2. For this Opinion, we had to rely upon various notifications, orders and advisories issued by different authorities and departments of central and state governments in a short span of time. No common portal or standardized practices have been adopted by local authorities for dissemination of notifications and orders from time to time, and we are reliant on external sources to procure copies of the relevant orders.

27.3. No person other than the addressee of this Opinion is permitted to see any part of this letter or summary of all or part of its contents, or to rely on our analysis in this Opinion (or any part of it), unless we give our prior written consent. It may not be relied upon by any other person or for any other purpose or quoted or referred to in any document or filed with any government or other agency without our prior written consent.

27.4. This Opinion is strictly limited to the matters expressly addressed herein and is not to be read as opinion in relation to any other factual or legal matter.

27.5. We have not consulted with or taken the view of any governmental or statutory body or any court of law and cannot be held responsible for any different view of law that may be taken by such bodies.

27.6. For the avoidance of doubt, we do not assume any responsibility for updating this Opinion as of any date subsequent to the date of this Opinion, and assume no responsibility for advising of any changes with respect to any matters described in this Opinion that may occur subsequent to the date of this Opinion, or from the discovery subsequent to the date of this Opinion of information not previously known to us pertaining to the events occurring on or prior to the date of this Opinion.

Yours faithfully

For Khaitan & Co LLP

Ajay Bhargava	Anshul Prakash
Partner	**Partner**