COVID-19: Judicial Pronouncements

Payment of wages and termination during lockdown

The Government of India issued an order on 29 March 2020 directing all employers to pay full salary to employees and workers (both permanent and contract) and prohibiting termination for the duration of the pandemic-driven national lockdown ("**Order**"). Non-compliance potentially carries legal action under the Disaster Management Act, 2005 ("**DMA**") (under which the Order is issued).

The Order has resulted in a number of public interest litigation ("**PIL**") filings both challenging the legality and validity of the Order (as well as central ministry and state government advisories in furtherance of the Order, as relevant to the specific petitioner), as well as decrying non-compliance and seeking its enforcement.

1. **Public Interest Litigation by Employers**

PIL petitions challenging the Order (and relevant advisories) were filed before the Supreme Court in *Nagreeka Exports Ltd. Vs. Union of India*, *Ludhiana Hand Tools Association Vs. Union of India, Ficus Pax Pvt. Ltd. Vs. Union of India* and *Twin City Industrial Employers Association Vs. Union of India* on the following grounds:

(i) The Order is beyond the scope of powers granted to the government under the DMA. The DMA empowers committees to frame plans to meet disasters and allocate funds for emergency response / mitigation, but does not authorize the government or the DMA committees to direct private employers to pay full wages to employees.
(ii) The Order is discriminatory and violative of the right to equality under Article 14 of the Constitution. It effectively only upholds the rights of employees while ignoring the rights of employers, whereas the economic rights of both groups have been affected by the pandemic. It also violates the "equal work, equal play" principle by not differentiating between workers who are working during lockdown (in businesses under exemption) and instead arbitrarily expands the scope to all workers.
(iii) The Order will force employers into insolvency, given their excessive financial burden, and thus violates the constitutional right to trade under Article 19(1)(g).
(iv) It contravenes the Industrial Disputes Act, 1947 ("**IDA**", a special employee welfare legislation) which specifically contemplates the right to layoff workmen due to natural calamity upon following the required procedure.
(v) The petitions have also suggested: (a) utilization of the unclaimed Provident Fund deposits; and (b) subsidizing 70 – 80% of lockdown wages using funds collected by the Employees' State Insurance Corporation ("**ESIC**"), the PM Cares Fund, or other government scheme.

The petitions were heard on 27 April 2020 (note that Nagreeka Exports Ltd. has withdrawn its petition but the rest subsist). The Supreme Court allowed the central government two weeks' response time and directed it to "place its policy" on record on the implementation of the Order, but did not address the plea for interim relief that would protect employers from paying full wages during the pendency of the PIL. **In fact, when considering the *Twin City* PIL, the Supreme Court specifically refused to intervene and stay the Order so as to protect small and medium enterprises from paying full wages on the basis that, despite threats being issued, no employer had actually been prosecuted under the Order or the DMA.**

2. **Public Interest Litigation by exempt organisations**

Certain businesses which were permitted to continued operations during lockdown (being exempt, as "essential goods / services") have also raised challenges to the Order. Their basis for challenge may become increasingly relevant across organisations and industries as relaxations are introduced on the lockdown.

(i) In *Align Components Pvt. Ltd Vs. Union of India*, the Bombay High Court on 30 April 2020 declined to intervene in a petition for relief from paying full wages on the basis that a similar issue is under consideration before the Supreme Court (see point 1 of this note). The petitioner had suggested payment of 50% of wages, as manufacturing activities have been restricted under lockdown. Notably, however, the Court stated that **since the lockdown has been partially lifted for industrial activities in certain areas, employers are at liberty to deduct wages (subject to following procedure under law) for workers voluntarily remaining absent. This will also apply to areas where there may not have been a lockdown.**

(ii) Petition filed on 1 May 2020 (and currently pending) before the Supreme Court by Teknomin Construction Limited (work contractors for mine development) sought subsidization of 70% wages with funds from government schemes (ESIC, PM Cares Fund etc.). Highlights of the challenges to the Order are as follows:

(a) Despite their lockdown exemption, securing workers for continued mining operations has been problematic. The PIL relies, and requests application of, the Bombay High Court order (above) that allowed wage deduction of absentee employees in areas where restrictions are relaxed.
(b) The Order itself is challenged as violative of Articles 14 and 39 of the Constitution, specifically the principles of "equal work, equal pay" and "no work, no pay", as it does not differentiate between workers who report to work during the lockdown and those who do not.
(c) The DMA does not empower the government to enforce financial obligations upon private establishments. While under the DMA the government can requisition resources for rescue operations, this requires payment of compensation. The ultimate onus of any compensation towards workers under the DMA lies on the government and cannot be shifted to private employers.
(d) It is the obligation of the state to provide financial assistance to workers during lockdown, as is the practice is several other countries. The Order violates Article 300A of the Constitution by interfering with and dispossessing the employer of his property other than by procedure established by law.
(e) The petitioner should be entitled to lay-off and retrench workers under the provisions of the IDA in the event of a natural calamity, and the government cannot legally override contracts between employers and contract labour and restrain termination of contracts.
(f) In fact, the amounts paid to workers cannot be treated as "wages" per the definition under the IDA – they are at most an advance payment adjustable against future wages or lay-off / retrenchment compensation.
(g) The Order was issued without inviting objections and not in a fair, reasonable and transparent manner, and the government accordingly acted unilaterally and arbitrarily without following the principle of natural justice.

3. **Public Interest Litigation by Employee Bodies**

Media industry: Multiple journalist organizations have moved the Supreme Court with a PIL against media houses and trade bodies for wage cuts, unpaid leave, layoffs and closure of business in violation of the Order and labour ministry advisories in support of the Order. The PIL particularly cites that the

media industry is exempt from the lockdown as an "essential service" and journalists are eligible to work through the lockdown. The PIL also claims violation of the retrenchment and business closure procedure under the IDA (which requires government approval, retrenchment compensation etc.), the Working Journalists Act, 1955 as well as their contracts of service.

The matter was heard on 27 April 2020. Notice has been issued to the government and respondent employers and will be heard after 2 weeks' time.

IT/ITES/BPO sector: A Pune-based IT union has filed a PIL on 27 April 2020 before the Supreme Court against IT companies that have ordered pay cuts, withheld salaries and laid off employees in contravention of the Order and government advisories. The PIL offers similar grounds as the media industry PIL (above) and further requests that the Supreme Court issue directions to both private and public sector companies to protect employees' rights (including payment of subsistence salaries instead of lay-offs, and financial assistance to employees upon closure of their companies). The petition also seeks action against the errant companies for contravention of the DMA.

Takeaways

The petitioners across the various PILs have made compelling cases in respect of the legality and validity of the Order, and the economic burden that it imposes on struggling industries at a time when business is closed off.

From a strictly legal perspective, the DMA does not provide the government with the statutory scope to direct private employers to pay wages during a disaster, and the legality of the Order is also questionable from a constitutional perspective (being potentially arbitrary, discriminatory and violative of fundamental rights to equality, trade and property). Further, the Order also contravenes the special labour law - the IDA, which permits termination of employees upon following the established procedure (specifically including during a natural calamity). To that extent, this administrative issuance is on tenuous ground.

While the Bombay High Court order recognizes that wages are not due upon voluntary absenteeism in the wake of the relaxations (and this will only become more relevant as the lockdown eases), the legal basis for not applying the "no work no wage" principle across the duration of the lockdown is unclear.

That said, from a humanitarian perspective, the need to financially support workers through the pandemic is unquestionable (and perhaps the Supreme Court's abstention from granting interim relief to employers, including small and medium scale industries, is indicative of this). The petitions filed by the media and IT trade bodies cannot be lightly considered, but any scenario that contemplates ultimate bankruptcy of businesses should no doubt be avoided.

The government, when placing its policy on record before the Supreme Court, should consider realistic avenues of discharging this financial obligation (such as via existing or new government schemes, wage subsidies and furlough, payroll loans etc.), rather than placing the burden squarely and solely on employers.