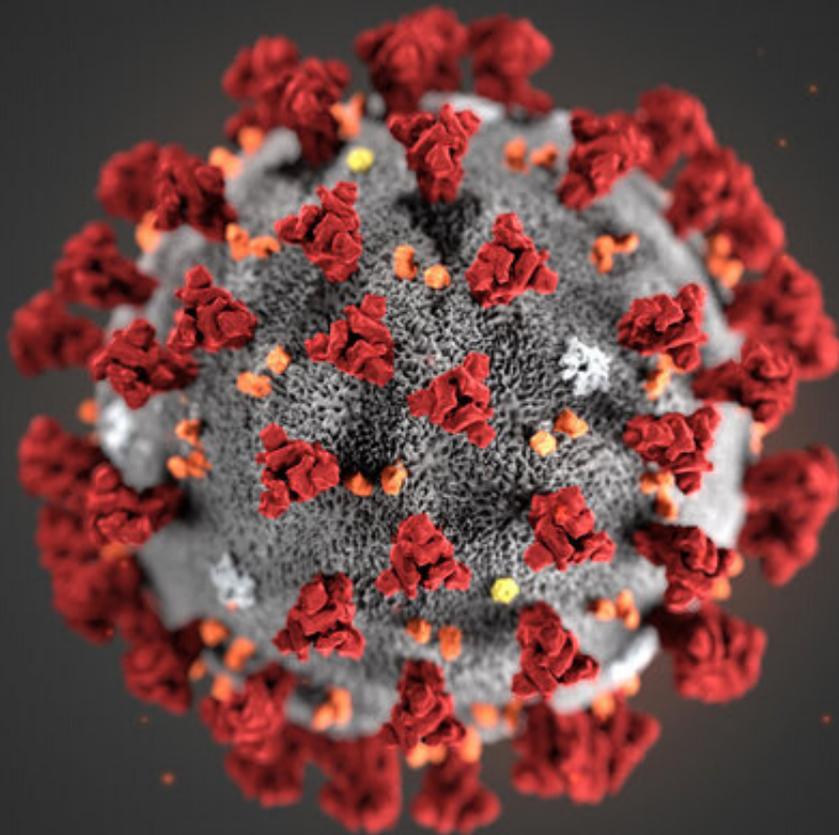


31st March, 2020

Pandemic Legal intelligence for Managers Employer's Perspective



Legal intelligence Series - COVID | V

AHMEDABAD | BENGALURU | NEW DELHI | KOLKATA | MUMBAI

Wages & Salary

1. Whether employers can reduce the salaries or bonus of the employees for the lockdown period of COVID-19 due to effect on the turnover of the organization?

Answer: The Ministry of Home Affairs vide Order no. 40-3/2020 DM-I(A) dated 29.03.2020 has directed all the employers, be it in the industry or in the shops and commercial establishments, to make payment of wages of their workers, on the due date at their work places, without any deductions, for the period of lockdown.

However, for establishments other than the ones mentioned in the notification and for employees in a more organized sectors such as retainers and employees who don't fall under the ambit of 'wages', need to take an informed decision.

Every arrangement between employees and employer need to be dealt with meticulously.



Termination

2. Whether there can be termination of an employee by the employer if the respective employee gets infected by the Corona Virus? What legislations and/or directives govern it?

Answer: It is advisable not to terminate any employee on the sole ground that he/she is a COVID-19 patient or a suspected COVID-19 patient.

The Ministry of Labour has issued an advisory on 20.03.2020 asking all the employers not to deduct the wages or terminate the employees during this pandemic.

Similarly The Ministry of Home Affairs vide Order no. 40-3/2020-DM-I(A) dated 29.03.2020 has asked the employers not to deduct or delay wages of their workers during the period of lockdown.



Medical Expenses

3. What are the obligations of the employers with regards to the medical expenses for COVID – 19 victims or expenses for the employees?

Answer: The Insurance Regulatory and Development Authority of India (IRDA) has issued guidelines No. IRDAI/HLT/REG/CIR/054/03/2020 dated 04.03.2020 for health insurance policies, medical expenses, etc. which would apply to insurance policies taken by the employer in the employee's name.

The guidelines cover expeditious payment of insurance amount, coverage of quarantine treatment cost, Corona virus treatment cost, etc. For specific queries on implementation, please get in touch with your legal advisor.



CSR Expenses

4. Considering the circular of Central Government on inclusion of expenses spent on various activities relating to COVID-19 as CSR expense, Whether CSR fund expense by corporates for hospitals, government or anyone can be treated as CSR expense? Will there be any Contractual or Tax implications?

Answer: Prima facie it seems that there should not be any contractual implications as contracts for CSR activities and expenses are subject to Schedule VII and further depends on respective company policy.

As far as taxation aspect is concerned, there can be implications as provisions of Income Tax Act, 1961 does not allow the treatment of expenses on CSR as donation. As per section 37(1) of Income tax Act, 1961 the expenses incurred by the companies on CSR is taxable.

An informed decision should be taken before deciding on any specific tax or contractual implication in relation to CSR funds.



Mandatory or Advisory

5. Whether the Guidelines or Obligations for employers relating to various aspects of work force and employee management issued by the Government of India are directory or compulsory in nature?

Would non-compliance of the guidelines attract risk of legal action?

Answer: The guidelines issued by the Government are directory and some times it is advisory as well. It is emphasized that they ought to be adhered to strictly as any violation of the rights of the employees may be subject to scrutiny and/or cognisance by the competent authorities.

It must be also noted that Disaster Management Act,2005 has already been invoked which has an overriding effect on other provisions of law, as applicable.



Work From Home

6. Is the work from home policy mandatory? What aspects should be kept in mind?

Answer: The Ministry of Health and Family Welfare (MoHFW) on 16.03.2020 has issued an Advisory on Social Distancing and work from home policies and subsequently the State Governments have also issued notifications and ordered for imposition of Section 144 of CrPC, 1872 after a national lockdown was declared by the Central Government.

Therefore, work from home is the only plausible alternative for any work-force to continue their business operations unless the services or goods provided fall under the category of essential commodities / services.

There are various hidden repercussions of the same and every company should adopt a work from home policy after incorporating all do's and don'ts.



Employee's Travel History

7. An employee who recently travelled to another COVID-19 affected country is not being allowed entry to India. Can the employer help the employee get back into the country?

Answer: The Ministry of Health and Family Welfare vide letter no F. No. 25022/12/2017, dated 23.03.2020 had issued travel restrictions and advisories which are subject to change on a frequent basis, aforesaid question can be referred through such advisories issued by government.

On a general note, any person travelling to India from outside is subject to strict guidelines in relation to proper disclosures, isolation, quarantine and any other instructions issued to that person, for a prescribed period. Hence, it is advised to declare such travel history.

If entry is not being allowed based on security reasons in light of the pandemic, the employer does not have any option but to comply with such directives.



Protocol for Covid-19

8. Whether employers need to establish any protocol for COVID-19 exposure and sickness?

Answer: The general guidelines issued by the Central and the State Governments are applicable to all employers. However, the employers can also make their own guidelines with respect to:

- i) employees returning from travel,**
- ii) employees who have symptoms similar to COVID-19, but have not yet been diagnosed,**
- iii) employees who have tested positive for COVID-19,**
- iv) consequences and implications of breach of protocols.**

The consequences of such breach will be subject to all applicable laws, notifications and directives by the Government from time to time.



Refusal to Work

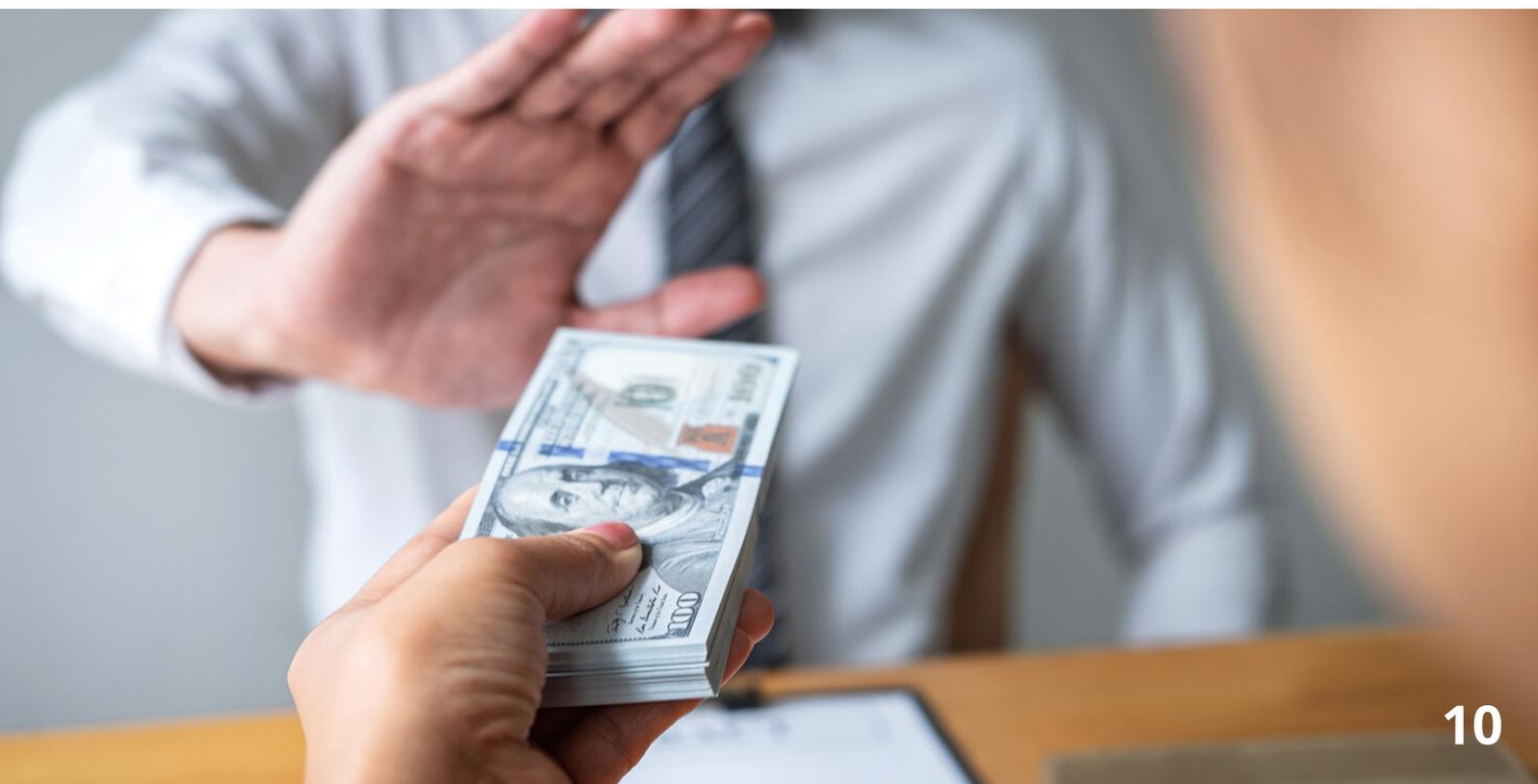
9. Whether employees can refuse to work if they believe that there has been an exposure to COVID-19 in the workplace?

Answer: Yes, on a serious apprehension, an employee can refuse to work at a place where COVID – 19 exposures have been detected.

Contractual terms between the employer and employee in this aspect would be governed by the various government guidelines on this pandemic situation including but not limited to social distancing, crowd control measures and others. The MoHFW advisory on social distancing dated 16.03.2020 would govern this aspect and all the legalities arising therein.

10. Whether employers are under an obligation to report a sick employee who is infected by the Corona Virus to the government?

Answer: Yes, if there is a serious apprehension and the particular employee does not cooperate, an employer can report the employee to appropriate medical authorities.



Compensation to Employee

11. Whether the employer is obligated to compensate the employee who travelled to an affected area for work and contracted COVID-19? Whether such compensatory expenses can be treated as CSR Expenses?

Answer: Worker's compensation may be available if the employee contracted the illness during or in the course of the employment.

It also depends on the employer-employee contracts and there is no straight jacket formula to decide if compensation is to be given or not. It would be interesting to see if Companies would be mandated by the Government to provide compensation.

Keep tracking our section on Updates / FAQs for more development / clarifications.



Excessive Paid Leaves

12. Whether employers would be under an obligation to provide to the employees excessive paid leaves than the paid leaves decided under the contract?

Answer: The grant of excessive paid leaves in majority situations would completely depend on the contractual terms between employee and employer and the company's contingency policies.

However, some State Governments like the Government of Karnataka vide notification no. 170 dated 05.03.2020 had issued instructions to the labour department for providing additional paid leave to their employees who have been infected by COVID-19.

PAID

Mandatory Medical Test

13. Whether employers can make medical tests of their employees mandatory or it would be on the basis of consent of the employees? What privacy measures employer shall be aware of, since such data regarding an individual's health would qualify as 'sensitive personal data'?

Answer: i. Employers of various sectors may conduct medical tests for its employees provided consent is duly obtained. However, where there is a serious apprehension regarding someone's health condition, it may be mandatorily done.

ii. Information pertaining to medical status will constitute sensitive personal data and consent should be taken from employees for collection, disclosure or other use, as permitted under the Companies privacy policy or applicable law, unless specifically exempted by law/competent authorities.

14. What are the employer's obligations to prevent harassment of those suspected of being infected?

Answer: No separate mandate guidelines or rules are issued on this aspect still it is advisable that it shall be the responsibility of the employer to prevent and protect employees from any harassment, including those suspected of being infected.



Hourly Basis Payment & Reporting

15. Whether payment on hourly basis in the companies, where reporting timings are a major concern, can be affected if a state of emergency is declared?

Answer: Yes, the payment to employees who work on hourly basis can be affected in the current situation of complete lockdown and if the state of emergency is declared.

In such a case, the employers may come up with some employee benefit scheme and the government may also come up with some relief measures. Currently, there are no such provisions in place.

For Building and Construction workers however, the Finance Minister of India vide its Press Release 26.03.2019 announced that the States have been asked to use the Building and Construction Workers Welfare Fund to provide relief to construction workers.

The government said it would pay the entire provident fund contribution of those who earn less than Rs 15,000 per month in companies having less than 100 workers as they are at risk of losing their jobs.

That amounts to 24% of basic pay--12% from the employee and 12% from the employer. This will be paid by the government for three months.

In addition, the Ministry of Labour and Employment vide Notification dated 27.03.2020 has declared that the Employees' Provident Fund Regulations will be amended to include the Coronavirus pandemic as grounds for allowing a non-refundable advance of 75% of the corpus or three months of wages, whichever is lower, from their accounts.

One may refer to legal updates and also connect with their legal advisor for better understanding on the issue.

Travel Restriction

16. Whether employer can forbid employees to travel privately, for example via public transport, or to an area of high risk?

Answer: Though the Government has issued specific guidelines for travel in the current scenario of complete lockdown all the flights, buses and trains stand cancelled till 14.04.2020, the employer can issue its own guidelines once the lockdown is lifted in order to ensure the safety of the other employees of the organization from COVID – 19.

Revised Leave Entitlement Policy

17. Whether employers need to relook at their leave entitlement policy?

Answer: Whether to revise the leave entitlement policy or not is completely an employer's prerogative but since the government has already directed for a nationwide lockdown, an employee cannot be punished for being on leave during these times.

The MHA order dated 29.03.2020 and the MoHFW guidelines dated 16.03.2020 on social distancing would play a pivotal role in this.

However, specific instances of being absent from work for not so valid reasons can be subject to legal evaluation.



Advisory

18. What shall be the impact of notifications issued by Central Ministry of Labour on COVID – 19?

Answer: The Advisory issued by the Ministry of Labour and Employment on 20.03.2020 seems to be more in the nature of an advise rather than a mandate and thus, it would be upto the interpretation of the employer on how to deal with situations such as too many leaves by the employees, issues in work from home, etc.

On specific issues, proper legal opinion should be resorted to in order to avoid unforeseen liabilities at a later stage.

Quarantine Leaves

19. What are the rights, duties and obligation of the employers and employees with respect to quarantine leaves?

Answer: As of now, no specific guidelines have been issued by the Central Government or MCA and therefore, the quarantine leaves would generally be governed by the employer – employee contract.

However, Rule 10(c) of INDUSTRIAL EMPLOYMENT (STANDING ORDERS) CENTRAL RULES, 1946 talks about Quarantine leaves

(c) Quarantine leave shall be granted to a workman, who is prevented from attending to his duty because of his coming into contact, through no fault of his own, with a person suffering from a contagious disease.

The leave shall be granted for such period as is covered by a certificate from the medical officer of the mine. Payment for the period of quarantine leave shall be at the rate of 50 percent of the wages (basic plus dearness allowance) payable to a workman.

Quarantine leave cannot be claimed, if a workman has refused to accept during the previous three months prophylactic treatment for the disease in question.

For specific complications however, one may resort to legal opinion.

Employee's Discrimination

20. Would it amount to discrimination if an employee with COVID -19 symptoms is treated differently? Can action be taken against such an employer?

Answer: World Health Organization describes Pandemic as 'the worldwide spread of a new disease. An influenza pandemic occurs when a new influenza virus emerges and spreads around the world, and most people do not have immunity. Viruses that have caused past pandemics typically originated from animal influenza viruses.' WHO has also described COVID-19 as a pandemic.

While Indian law prohibits discrimination against employees on the basis of disability, the law does not consider an individual with an infectious disease such as COVID-19 to be disabled.

Therefore, while an employer can implement different measures for employees based on whether they pose a risk of infection, such measures should be implemented in a manner that does not discriminate based on these protected classifications.

It is the responsibility of the employer to prevent and protect employees from any harassment, including those suspected of being infected. However, in a situation like current times the differential treatment of a COVID 19 suspect will be in discharge of a public order.



Hiring a Corona Effectuated Employee | Medical Certificate

21. Can an employer refuse hiring a person solely on the ground that he/she is infected with Corona Virus?

Answer: Since employing such a person would open up the possibility of the other employee's getting infected, the employer can refuse hiring such a person.

But, if he/she has been certified fit to resume duties by designated competent authorities-then employer cannot refuse. Currently, there is a global hiring freeze across functions from employees to vendors/ consultants.

This is a very important and socially responsible discussion; a well informed decision in consultation with legal advisor should be always emphasised.

22. In case of sick leaves, whether the Employer is entitled to ask for a Medical Certificate?

Answer: Since currently, the entire country is on a lockdown, such a requirement of a medical certificate would not be there.

However, after the lockdown is lifted and if an employee chooses to stay absent from work on health grounds, an employer is entitled to ask for a medical certificate.



Breach of Privacy

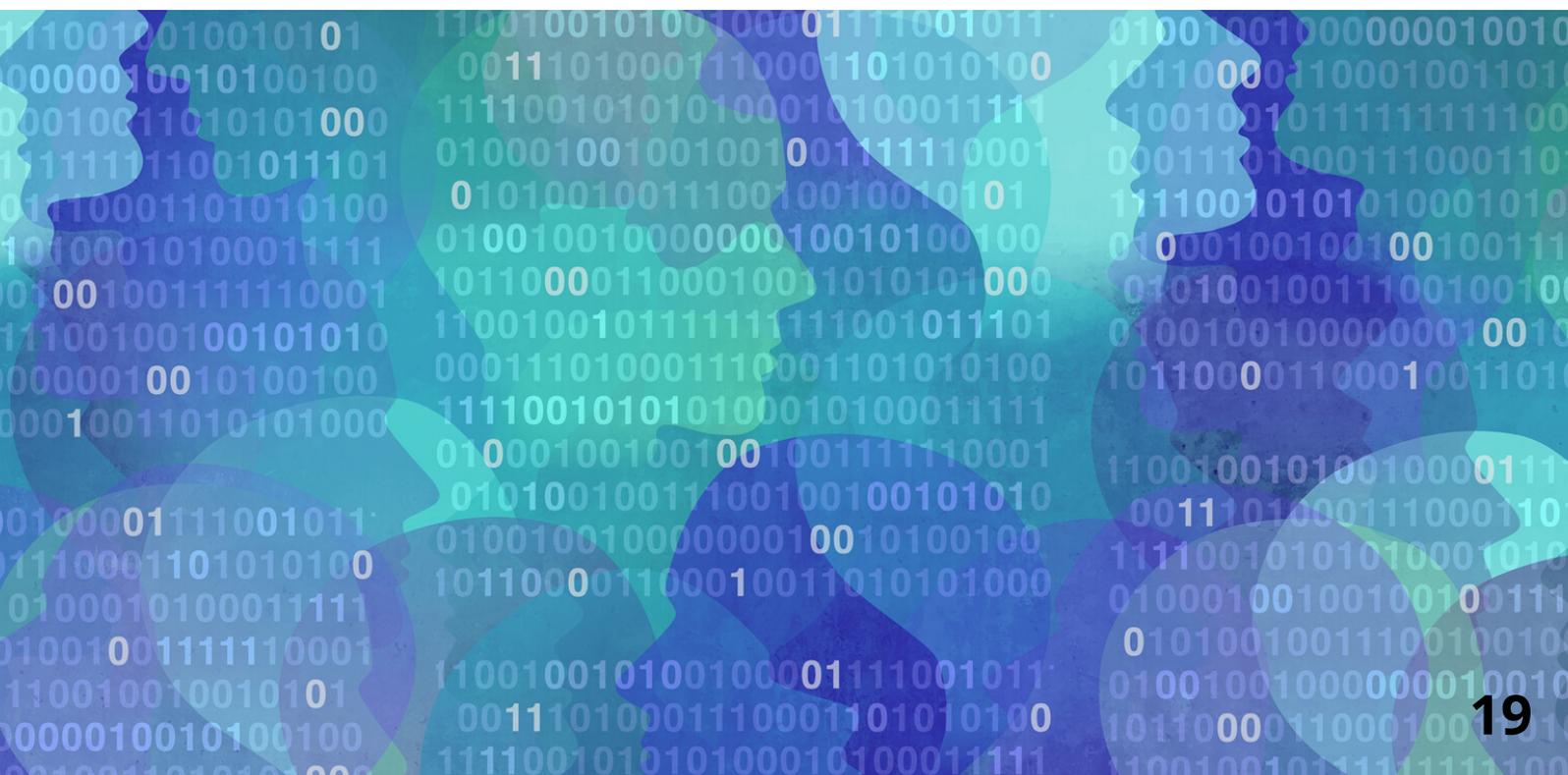
23. If and when an employee is showing symptoms of Corona Virus, would asking for details of his recent travel, his recent visit to a social gathering, medical records, etc. amount to breach of his privacy?

Answer: No, it does not amount to breach of privacy..

Employers should ask for details and utilise the information for the specific purpose. Exercise due care and diligence in maintaining privacy where necessary and required.

It is a social and moral responsibility of every individual to report any suspect of COVID-19 symptoms or with travel history from infected geographies.

Since, it is sensitive information it should be used only for important purposes. As, every country has its individual dashboard, the information of patients are utilised in the same as well.



Accrued Annual Leave

23. Whether employees can be asked to utilize their accrued annual leave for the period of this lockdown and when such accrued leave is exhausted, can they be put on leave without pay? If not, what are the other alternatives available to the employer?

Answer: Employees are entitled to use their accrued annual leave at their discretion, subject to approvals from their managers. Even though employees may be encouraged to make use of their accrued annual leave, they cannot be coerced or mandated by the employer to do so, directly or indirectly. Additionally, all employees are eligible to encash their accrued but un-availed annual/privileged leave at the time of cessation from employment. Indian law does not permit employers to mandate employees to go on unpaid leave. Hence, as a result of the lockdown, if an employer requires the employees to not come for work, the employer shall have to pay the employees for such duration of lockdown and the employees cannot be coerced or mandated to utilise their annual leave for this purpose.

It is interesting to note that Order no. 40-3/2020-DM-I(A) dated 29.03.2020 by Ministry of Home Affairs is not applicable for establishments other than the ones mentioned in the notification and for employees in a more organized sectors such as retainers and employees in huge companies who are on 'salary' and not 'wages'. **A legally feasible risk analysis of your model should be carried out to have better implementation at your end.**



Mandatory Payment

24. In industries where it is not possible for employees to work from home, is it mandatory for employers to pay the employees for the period of the lockdown?

Answer: Irrespective of the fact that employees of certain industries cannot work from home, the employers shall have to pay them for the entire period of the lockdown. The Central Government has issued an advisory stating that if the place of employment is made non-operational due to COVID-19, the employees of such unit will be deemed to be on duty. Similar directives have been issued by State Governments in Karnataka, Haryana, and Maharashtra.

Further, in the States of Telangana and Uttar Pradesh, the government has directed that all shops and establishment other than those exempted from the lockdown shall be closed during notified lock down period and that such days shall be declared as paid holiday for all categories of employees.



ABOUT US

AMLEGALS is a multi-specialised law firm. We would love to hear your views, queries, feedback and comments on covid19@amlegals.com or rohit.lalwani@amlegals.com.

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