

# Payment of wages during COVID-19 Lockdown To pay, or not to pay

Apr 24, 2020, 5:22 PM IST

Much ado surrounds the issue of employers' obligation to pay wages during the COVID-19 lockdown period. An overwhelming majority of the industries, shops and establishments have taken a holistic view and have hence been empathetic to the plight of their workforce.

This benign move needs to be reciprocated by the workers by teaming together with their employers and the governments in evolving inventive and mutually acceptable measures to overcome this unprecedented situation.

## Whither Discord

However, ill-advisedly, a section of owners seem to be summarily discarding workers' claim for wages. Forceful arguments are being advanced by lawyers and labour experts in favour of the capital to say the various orders and notifications issued by the Central government invoking the provisions of the National Disaster Management Act, 2005 (NDMA) are without jurisdiction and hence cannot stand the test of judicial scrutiny.

On this foundational premise, it is argued that payment of wages during the lockdown period is merely a moral obligation and not a statutory mandate. As a sequel to this proposition, it is contended that employers are not just free to deny wages but also lay-off the workmen and then retrench them.

## Advisory vs. Mandatory

The popular misconception is that the Union Home Secretary has passed the orders and advisories for lockdown and associated guidelines. A closer examination would reveal that many of them are not mere executive fiats, but statutory orders passed on behalf of the National Authority (NA) and National Executive Committee (NEC) constituted under the NDMA.

The ones ordering lockdown in two phases and the one dated March 29, 2020 mandating payment of wages to workmen during the lockdown period are statutory orders under Section 10(2)(I). So, violation of these statutory orders is not a moral wrong, but an offence inviting penalty and punishment both under the NDMA and the Indian Penal Code, 1860.

The Union Home Ministry, by a communication containing a comprehensive list of penal provisions, has asked the states to widely publicise it and create awareness among the stakeholders.

The lockdown ordered under the NDMA and the mandatory directions for payment of wages are inseparable, for the lockdown divorced from the mandate of wage payment will be nothing but the suspension of the right to life guaranteed under Article 21. One may, therefore, say that the constitutionality of the lockdown order hangs on the thread of the mandate of making payment of wages during the period of lockdown.

Amid this unprecedented calamity, the payment of wages cannot be viewed from the narrow compass of employment law. Payment of wages during the lockdown is nothing but a translation of the constitutional mandate into action. Payment of wages is nothing but protecting life. It is also a disaster management measure primarily aimed at containing migration and resultant aggravation of pandemic.

So, all arguments or actions aimed against payment of wages tantamount to questioning or rather defying the decision of lockdown. Moreover, Section 2 of Epidemic Diseases Act, 1897 (EDA) empowers the authorities to determine in what manner and by whom expenses incurred necessary to prevent the outbreak of such disease or the spread thereof shall be defrayed.

### **Special vs. General**

Labour legislation is devised for the business as usual scenarios, whereas NDMA and EDA are special laws which override all generic legislation including the labour laws. The principle expressed in the maxims *Generalia specialibus non derogant* and *Generalibus specialia* - meaning special law overrides general law - is a well-settled legal principle across all jurisdictions including India. Moreover, the NDMA per Section 72, has an overriding effect over all other laws.

### **Ultra vires?**

Those arguing that there is no power vested under the NDMA to mandate payment of wages conveniently forgets that lockdown or closure of undertakings have been ordered under the NDMA. If this argument is to be accepted, then the very action of closure of the undertakings pursuant to the NDMA has to be termed as illegal.

But no employer opposing the payment of wages seems to be questioning the statutory order of lockdown. Having accepted the lockdown order under NDMA, the undertakings are obligated to obey the associated mandate for payment of wages, which is inseparable component thereof.

### **Legality of lay-offs?**

COVID-19 has been notified to be a disaster under the NDMA. A disaster has to be contradistinguished from a natural calamity. The Industrial Disputes Act (ID Act) provides for layoffs specifically in case of natural calamities and not man-made disasters.

## **Making Corporate India Comply**

Hence, employers may not be entitled to invoke Section 25M of the ID Act. Moreover, when the statutory order of March 29 specifically mandates payment of wages, any action aimed at defeating this direction, including layoff, will be seen as a violation.

### **Law vs. FAQ**

Employers are not absolved from their legal obligation to pay wages under the Code on Wages, 2019 (CoW) when both employees and employers are obeying statutory orders.

However, an interesting argument is being advanced citing clarifications (in the form of Frequently Asked Questions) dated April 11, issued by the Ministry of Corporate Affairs (MCA) on the eligibility of CSR expenditure related to COVID-19 activities. The MCA says payment of salary/wages to employees and workers even during the lockdown period is a moral obligation of the employers.

At the outset, MCA is not an authority prescribing the legal mandate on payment of wages. It is not FAQs or press statements, but CoW and the statutory order having the force of law that decide the legal obligations of both employees and employers.

### **Obedience punished**

A specious argument of unjust enrichment is being advanced to say that employees cannot insist on wages without working in the first place. It is argued that it is against the national interest to insist on wages without contributing to the nation's economy.

Those advancing this argument must first question the statutory decision of lockdown rather than blaming workers for merely obeying it. Workers have neither abandoned nor absented themselves from work. They are merely obeying the statutory directions for which they must not be penalised.

### **Let's team up together**

This pandemic is a great leveller and hence an unprecedented opportunity to foster industrial relations. It throws an opportunity both for capital and labour to act in mutual interest by exploring ingenious methods to sustain.

Given the symbiotic relationship of the capital and the labour, it is time to traverse beyond predictable conflict and evolve a synergic model for the future.

[The author is an Advocate practising before the Karnataka High Court. He wishes to acknowledge the valuable guidance rendered by Prof. Babu Mathew, Director, Centre for Labour Studies, NLSIU, Bengaluru]