

FAQs on Employment Issues during COVID-19

There are a number of employment-related issues facing employers in the wake of the COVID-19 lockdown. ***What are the obligations of employers re wages, hiring and termination? How to handle leave requests?*** These are sensitive matters during this very crucial time and employers should navigate these matters carefully.

To this end, we have created a rolling list of FAQs below based on employment issues that our clients have faced in the past month. We will update these answers as the issues evolve.

Please do contact us at practicemanager@btg-legal.com if you have any specific questions that we can help you with.

Leave	<p>Has the Government amended laws relating to employee leaves?</p> <p>Government advisories have been issued requiring employers to:</p> <ul style="list-style-type: none">(i) treat employees who are on leave (presumably due to the COVID-19 lockdown) as ‘on duty’, and(ii) treat employees as ‘on duty’ if their place of employment is rendered non-operational due to COVID-19. <p>In the ongoing lockdown, most non-essential industries are unable to operate. Some essential industries are running at reduced capacities.</p> <p>While ‘on duty’ is easier to implement in offices where operations are not impacted due to a work-from-home mode, operations of offices which are unable to work-from-home (such as retail store fronts, manufacturing plants, etc.) are impacted, as they will need to continue treating their employees as ‘on duty’ even if such employees are unable to attend work.</p> <p>Leave laws applicable to factories, local shops and establishments, and those related to maternity leaves, etc., are otherwise unchanged, subject to state-specific measures.</p> <p>It remains to be seen if courts will ultimately uphold the Government’s right to require employers to extend their employee’s leaves, etc.</p> <p>Click Here for the central advisory referred to above, and Click Here and Click Here for examples of the state-wise notifications which may affect leave entitlement of an employee.</p>
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	<p>Do we have to amend our internal Leave Policy?</p> <p>Only to the extent that it contravenes current applicable law. If you are providing leaves in line with, or better than, leaves available under applicable law, your policy will prevail.</p> <p>Any matters not covered under applicable local law (such as cancellation of pre-approved leave by employees, half-days, paternity leave, etc.) will be dealt with as per the terms of the employment contract and/or your company's policies. You should review your internal policies to make sure you have adequate leeway in matters that are not provided for under law.</p> <p>Our employees are asking to cancel/postpone their pre-approved leaves. Are we required to agree?</p> <p>No. Operational issues like these are not addressed in any Government notification so far. Your employment contract and/or the company policies will prevail here.</p> <p>Agreeing to postponement/cancellation of leaves, etc., may affect your operations in the second half of the year when the lockdown is lifted. Also consider the precedent you are setting here, by allowing modification to a leave application midway, and your policies relating to carry forward of leaves.</p> <p>Can we require our employees to utilise their pending leaves during the COVID-19 lockdown?</p> <p>No. You cannot force your employees to go on leave.</p> <p>Leave is an entitlement in favour of employees and cannot be enforced upon employees. However, you can mutually agree with employees for utilisation of their leave towards the period of lockdown (provided they agree to this).</p>
Wages	<p>Are our employees covered by any wage legislation?</p> <p>The Payment of Wages Act, 1936 is applicable to employees who are earning INR 24,000 or less per month. This law aims to ensure that wages are disbursed within prescribed time limits and no deductions (other than those authorised) are made. Similar obligations are specified under several state laws which are applicable to all/specific categories of employees. In some industries, a minimum wage is required to be paid. These laws apply independent of the COVID 19 situation.</p> <p>Even if these laws do not apply to you, as an employer, you continue to remain responsible for the payment of wages under the employment contract with your employees.</p>

	<p>We hear that the Government has instructed businesses not to stop paying wages during the COVID-19 lockdown. Is this a binding order?</p> <p>The legal validity of Government notifications <i>vis-à-vis</i> payment of wages during the lockdown is not clear (Click Here for the notification). In fact, this notification has been challenged before the Supreme Court of India. The constitutional soundness of the Government’s powers under the Disaster Management law in requiring employers to continue paying full wages is disputed.</p> <p>Certain states (such as Telangana) have required employers to provide additional paid leave to employees. There have been instances of state authorities taking up delayed or unpaid wages with private employers. At one extreme, Uttar Pradesh has said that criminal charges may be brought against employers of factories, shops or establishments for non-payment of wages.</p> <p>Not paying wages may expose you to regulatory action in the immediate future, and any relief in court will take some time. Even if you win, the damage (financial but also reputational) may have been done already. Therefore, from a practical point of view, treat these orders as binding for now. Similar to the case mentioned above, there are cases that are gradually making their way to the High Courts and the Supreme Court that challenge these orders, but there is no likelihood of a decision anytime soon. We will keep track of this issue and update this group as and when this becomes available.</p> <p>The current lockdown is adversely impacting our cash flow. Is a negotiated solution possible?</p> <p>You can always agree to an amendment to your employee’s employment contract, and mutually modify their compensation (provided they agree to this). Make sure you do not force or oblige your employees to agree to this. Also, it’s worth noting that the obligation is to continue paying <i>wages</i>, not discretionary bonus, allowances or perquisites. Contractual provisions will continue to govern such discretionary benefits.</p>
<p>Terminations</p>	<p>Can we terminate employees during COVID-19 lockdown?</p> <p>Government notifications have ‘advised’ employers not to terminate their employees. The enforcement and legal effect of this advisory is still unclear. Like with the notification <i>vis-à-vis</i> wages which is being challenged in court, the validity of these advisories too, may be challenged on grounds of its constitutionality and whether the Government is empowered to prohibit employers from terminating their employees, which is an employer’s right available under law (subject to statutory process being followed).</p> <p>There have been instances where regional labour authorities have taken up terminations with employers. At the same time, it is difficult to argue that the Government has a right to determine employment in private sector on account of an epidemic. Please see our analysis above for the second response under “Wages” which applies in this instance too.</p> <p>As with the leaves and wages, do keep in mind the reputational impact and regulatory reaction to <i>en masse</i> reductions in workforce, given that civil courts are not available.</p>

So, we cannot terminate employees during the lockdown for any reason whatsoever?

Not necessarily. **If you are terminating employees for reasons unconnected with the COVID-19 lockdown, while keeping all legal safeguards in mind, your acts will likely be defensible.** Terminations ‘for cause’, that arise out of an employee’s misconduct or actions (such as proven sexual harassment at workplace, theft, etc.) are the clearest cases where termination of employees can still be done.

There is no specific advisory/order preventing termination of employees for cause such as proven misconduct or sexual harassment, so long as this is done in line with applicable law. While terminating as a result of a sexual harassment inquiry, make sure you’ve complied with all statutory requirements and safeguards such as notices, opportunity to be heard being given, etc.

OK, but can we terminate our employees on the first day after the COVID-19 lockdown / emergency ends?

Yes, in theory (pending any future Government notification) - but keep in mind that **terminating different categories of employees involves different considerations:**

- (i) Retrenching or laying-off a ‘*Workman*’ involves the most compliances. A workman is any employee who does any manual, clerical, technical or skilled or unskilled work, except anyone who is mainly in a managerial or administrative role, or acting in a supervisory capacity and having a salary of more than INR 10,000 per month. Terminating Workmen requires providing notice or wages *in lieu*, obtaining permissions from or notifying labour authorities, and paying severance compensation subject to statutory thresholds.
- (ii) For non-Workmen employees, state-specific shops and establishments laws may prescribe notice periods and/or payment *in lieu* of notice. Thresholds of applicability, salary, employee coverage and termination requirements vary from state to state.
- (iii) Finally, other personnel such as consultants, contract employees, etc., can be terminated more easily. These are governed by the terms of their contract only.

However, the Government and labour courts will likely take a measured view on immediate terminations post the lockdown and may come up with advisories/guidelines/temporary tribunals to deal with this and other lockdown-related labour issues.

This is not intended to be legal advice. Your obligations as an employer will vary from state to state, and depending on your local laws and contracts. Consult your lawyers before taking any actions.

[BTG maintains a rolling database of materials on the ongoing COVID-19 crisis. Please click here to access.](#)