

FAQS

LIABILITY AND RISK MANAGEMENT DURING COVID 19

COVID 19 presents unique challenges to Directors and senior management. To avoid the spread of COVID-19 the Central Government has prescribed additional safety and security measures. These are in addition to pre-existing health and safety measures that apply at all times.

Under Indian laws, Directors, employers and upper management are required to provide a safe working environment in the workplace. Particularly in these unusual circumstances, it is vital for Directors and upper management to understand the legal risks they may face and the measure they can take to manage these.

We have created a rolling list of FAQs below based on current laws, Government notifications and clarifications. We will update these as things develop. Please do contact us at practicemanager@btg-legal.com if you have any specific questions that we can help you with.

The Indian Government's Notifications relating to management liability can be found [here](#).

1. What do the Government's lockdown COVID 19 guidelines say about management liability?

BTG Response: On April 15, 2020, the Ministry of Home Affairs, Government of India issued an order under Section 10(2) of the Disaster Management Act, 2005 ("**DMA**") setting out updated consolidated guidelines applicable across the country to contain the spread of COVID-19 ("**Consolidated Guidelines**").

As per these certain establishments (in non-containment zones) are allowed to open with effect from April 20, 2020, provided they comply with the safety and security standards prescribed.

Some of these safety requirements include:

1. **Disinfecting** all areas in the premises (including canteens, lifts, entrances, etc.) using user friendly disinfectant mediums;
2. Providing **special transportation** facility to workers to reduce dependency on public transport, and ensuring such vehicles operate 30-40% capacity;
3. Providing **medical insurance** to workers; and
4. **Seating at least 6 feet away** from others. **Staggering lunch breaks** of staff to ensure social distancing.

Non-compliance with the Consolidated Guidelines may result in fines and/ or penalties under the DMA and Indian Penal Code, 1860 ("**IPC**").

2. Has the government issued any clarification on management liability under the Consolidated Guidelines?

BTG Response: Following the Consolidated Guidelines, rumours circulated on social media about the actions that would be taken against entities for not complying with the Consolidated Guidelines. These included imprisonment of chief executive officers ("**CEOs**").

A clarification was issued by the office of the Home Secretary, Government of India on April 23, 2020, confirming that no such actions are provided in the Consolidated Guidelines ("**Clarification**").

The Clarification does not intend to absolve CEOs from any liability in case of non-compliances.

3. Besides the Consolidated Guidelines, do any other Indian laws make management liable for safety, etc.?

BTG Response: Yes. Indian laws contain fairly detailed mandates on health and safety (“HSE”) laws.

Below is a *non-exhaustive* list of Indian HSE regulations, and general laws under which management can be held liable for non-compliances:

- (i) **Factories Act:** The health and safety and welfare conditions of labour in “factories” is strictly monitored. This law requires employers to provide basic safety measures, including **protective equipment**, fire prevention, safe access, etc. Employers must provide **regular medical examinations**, amenities such as canteens, latrines, ventilation, drinking water, sufficient light etc.

The factory “**Occupier**” is made **primarily responsible** for day-to-day operations of the factory and has disclosure obligations to workers and local authority including on the handling, use, disposal, transport etc. of hazardous substances and worker protection measures.

Your management team member listed as “Occupier” on your factory license may face liability for any non-compliances.

- (ii) **(State Specific) Shops and Establishments Act:** The welfare and service conditions for commercial establishments conducting any business, trade or profession are regulated – **this law covers most business offices, showrooms, and workshops**. It mandates the workplace is **hygienic**, ventilated, well lit, and has toilets, drinking water etc., **prescribes first aid**, fire safety systems, and transportation requirements (particularly for women employees).

Some States require employers to constitute a HSE Committee, depending on office headcounts.

- (iii) **The Employees’ State Insurance Act, 1948:** Provides for disbursement of medical and cash benefits to employees and their families, including **disablement benefit** and family pension.

- (iv) **Employees’ Compensation Act, 1923:** Compensates employees and dependents for **injuries during the course of employment**.

- (v) **Environmental Safety and Waste Disposal:** Environmental protection laws and rules address safety issues for workers dealing with hazardous substances, including medical waste.

- (a) Under the **Hazardous and Other Wastes Rules, 2016** such wastes (including nitrate, cyanide, ammonia, chloroform etc.) cannot be stored for over 90 days and persons handling the waste must be provided training and equipment necessary to ensure safety.
- (b) **Workers handling bio-medical waste must be immunized**, provided protective equipment, annual training etc. per the **Bio-Medical Waste Rules, 1998**.
- (c) Similar rules apply in respect of radio-active waste, wastewater, and exhaust gases, etc.

(vi) **Insecticides Act, 1968:** Employers manufacturing insecticides must provide the necessary **protective clothing and equipment** to be used by workers during the manufacture, formulation, transport, distribution and application of insecticides.

(vii) **IPC:** Criminal liability can attach for **negligently spreading an infectious disease**, disobeying orders issued by a public servant, causing public danger by not duly handling any property in their possession, etc.

(viii) **Tortious Liability:** Victims could make claims against a non-compliant entity and its officers for gross negligence, manslaughter and/or willful misconduct.

Courts in India have sometimes applied the rationale of “strict liability” to inherently dangerous activities (on a case to case basis). For instance, in **MC Mehta v. Union of India** (Supreme Court 1987) it was held that an enterprise engaged in a **hazardous or inherently dangerous activity** would be liable to compensate all those affected for harm caused to them on account of an accident caused in the operation of such activity resulting, for example, in escape of toxic gas. This **jurisprudence may evolve with the reality of COVID 19** sinking in.

4. Who can be held liable for non-compliances under the Consolidated Guidelines and other Indian HSE laws?

BTG Response: In most cases, every **officer in-charge of and responsible for conducting the company’s business** is deemed to be guilty of the offence alleged. Such officers could include **directors, CEOs, managers, secretaries** or any officer of the company.

A **statutory defense** against such liability is available in most cases. You can claim that the offence was committed without your knowledge, or that you exercised all due diligence to prevent the commission of such offence. This is question of fact that you have to prove on evidence.

5. Can non-executive directors of the Indian entity be held liable for non-compliances under the Consolidated Guidelines and other health and safety laws? If so, how can this risk be mitigated?

BTG Response: Depends on the director’s involvement in the daily operations and designation.

For e.g., an overseas director may not be as involved as the resident wholtime director. A director will a designated responsibility (e.g., COO in charge of production) will likely he held liable.

It is not impossible that a non-executive director is held liable for the operations of a company. In such circumstances, non-executive directors will have to show (through e-mail communications, board meeting minutes, etc.) that despite their due diligence and best efforts they were not able to prevent the non-compliance from occurring.

6. Can the management of the Indian entity’s parent company be held liable for a breach by their subsidiary under the Consolidated Guidelines and other health and safety laws?

BTG Response: No. Usually, management of the parent entity does not have any legal duties under Indian laws, and are not responsible for breaches by their Indian subsidiaries or JVs.

However, if any of the directors/employees of parent company are **also** directors/employees of the Indian subsidiary, they may be held liable (in their capacity of directors/employees of the Indian entity) if any applicable law is breached by the Indian subsidiary.

7. What is the likelihood of prosecution proceedings being initiated under the Consolidated Guidelines and other health and safety laws?

BTG Response: In practice, defaulting officers are usually prosecuted when the offence/non-compliance is egregious. **Since COVID-19 is a pandemic, an Indian court may be more likely to fine/ convict a senior officer if it is convinced that such officer has been negligent or complicit in spreading the disease, unless the officer can prove otherwise.** In the past Indian courts have held that the management would not be liable if they are able to show that they were not involved in the commission of the offence.

8. How can management minimise legal risks?

BTG Response: Besides tracking compliance with applicable laws and mandatory guidelines, you may consider the following actions to reduce legal risks -

- (i) Appoint an **in-house safety team** to remotely track compliance with safety regulations.
- (ii) Developing **risk management compliance manuals and checklists**, and conduct **regular internal audits** to check compliance.
- (iii) Get adequate **D&O insurance** for your directors and officers.
- (iv) Prepare a **Standard Operating Procedure (“SOP”) for Breaches**, outlining steps to be taken in case of a safety breach. This SOP could contain legal, technical and public relations responses.
- (v) Maintain records of **internal communications/ MIS/ instructions** provided to local staff to document proof of compliance.

[You can read BTG’s collateral on operational procedures here.](#)

This is not intended to be legal advice. Your obligations as management 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.](#)