

Countries and businesses around the world are grappling with challenges posed by the COVID-19 pandemic. So far, India has moved to reduce international travel, close down some public spaces like cinemas, manage the supply of essential commodities and drugs, and placed limits on large gatherings in some places. A number of Indian companies have instituted remote-working protocols and shuttered offices.

COVID-19 is primarily a public health and humanitarian issue, but you should be mindful of the legal, HR and commercial challenges that you may face as a result of it. We've set out below some matters that your Indian operations should consider over the coming days and weeks.

If you have any questions or need any clarifications, please get in touch with us at practicemanager@btg-legal.com.



WORKPLACE SAFETY

An Indian employer is responsible for providing its employees with a safe working environment. This position is being reinforced by various state governments via circulars that 'advise' and not mandate that employers should create flexible working environment to prevent the spread of COVID-19. If an employee contracts a contagious disease like COVID-19 at the workplace, there is a risk that this is treated as a "workplace accident" with liability on you for treatment, compensation, etc.

POINTS TO CONSIDER:

- » Has the local state government where your business operates 'advised' or 'mandated' flexible working?
- » Are you up to date with local, municipal and other governmental orders regarding COVID-19?
- » What measures have you put in place in connection with employees who may or suffer from COVID-19 like symptoms?
- » If working from home is not an option for your business, what is your potential liability and what measures can you take to mitigate this liability?



WORK FROM HOME

There are various COVID-19 related measures which the Indian government is putting in place as the situation develops. If there are government directives which require mandatory absence from work, then the employees would be entitled to receive full wages in such cases (in the absence of the government specifically saying anything to the contrary). This is an evolving area and it is to be seen how the courts will react to such legal challenges especially considering that this may be viewed as a force majeure event which is beyond the reasonable control of an employer. If employees who cannot work from home or telecommute are directed by the employer not to attend work, then the employer would remain obliged to continue paying such employees their full wages as they will be doing so under the employer's directions.

POINTS TO CONSIDER:

- » If working from home affects your business operations, how do you deal with employee costs and management?
- » Does your working from home policy have sufficient security measures built in to ensure data security and IT security when employees work from home?



ABSENTEEISM AND TERMINATION

Be alert to potential misuses. If employees are absent from work for long periods, then you must consider your rights carefully. Your employment contracts may deal with unauthorised absenteeism but you must also consider that terminating employment on account of contracting COVID-19 may be open to challenge as unlawful termination¹. While considering termination of employment you must be mindful that the processes, remedies and financial obligations for termination differ based on the type of employees and their tenure with the company. Employment can usually be terminated for reasonable cause, and termination without cause may backfire.

POINTS TO CONSIDER:

- » How do you record attendance at your India office – email, biometric, physical register, etc.? Will this change now if you have a work from home policy?
- » How do you build up proof and what do you do if you discover abuse of your company's policies in a developing and chaotic environment that is currently forming?

¹An indication of the government's stand to protect employees who may be affected by COVID-19 can be seen from the March 05, 2020 notification issued by the Government of Karnataka directing employers to grant employees affected by COVID-19 an additional 28 days of paid sick leave. Other state governments may also likely issue similar notifications.



WORKING FROM NON-OFFICE LOCATIONS

If working from home or telecommuting are viable options, then these could be considered as alternatives to working from office after you consider the appropriate safety and technical measures you may need to put in place to permit this. You may need to review your IT access and security policies to ensure that your employees can work from home effectively. Also, check if there are any activities that cannot, by law (e.g., matters requiring physical meetings under companies laws), or by contract (e.g., high security and sensitive data processing) be carried out from a non-office location.

POINTS TO CONSIDER:

- » Do your IT access and security policies enable employees to work from home effectively?
- » Do your contracts allow working from home in all circumstances?



FORCE MAJEURE AND FRUSTRATION

Indian law mandates that a contract to do an impossible act is void. In general use, force majeure refers to situations that obstruct the performance of a lawful contract. The Indian Government has clarified that COVID-19 constitutes a force majeure event in its procurement contracts. While this only applies to government procurement contracts, this circular by the government will have persuasive value in Indian courts for other private contracts (but subject to the force majeure clause in the relevant contract). If a contract becomes incapable of being performed, or frustrated, an Indian court will usually decline to enforce it, which discharges parties from performance (e.g., a government quarantine or travel restrictions may frustrate a transport contract). The important question here is whether you should declare force majeure which might have other commercial implications depending on the consequences of such a declaration. While the ground level situation is evolving, good faith amendments may be proposed with clients whose contracts may get affected by these circumstances as an alternative to declaring force majeure.

POINTS TO PONDER:

- » Examine your vendor and customer contracts – does COVID-19 affect their performance in a major way?
- » Should you declare force majeure or is there a better way (by way of a good faith amendment) to deal with the situation?
- » Will staff shortages affect your business and do you have a business continuity plan to deal with such shortages or the general impact of COVID-19 on your business?
- » Should you inform your clients about the impact of COVID-19 on your business and take them into confidence by actively involving them in your business continuity planning?



M&A TRANSACTIONS

Most M&A contracts under Indian law allow the buyer to refuse to move to completion if the target has suffered a 'Material Adverse Effect' ("MAE"). MAE definitions mostly relate to the target's business prospects being affected in a way that is material - they typically exclude general market downturns. You should check to see if your definitions exclude 'epidemic', 'pandemic' or the like. Apart from deal documentation, if you are at the due diligence stage it may be useful to think though the affect COVID-19 would have on your target's business.

POINTS TO CONSIDER:

- » What stage of the M&A are you at – Due Diligence, Signing, between Signing and Closing, Post Closing?
- » Does the COVID-19 pandemic affect your target's business adversely (e.g., a travel company) or positively (e.g., a life sciences major)?



PRIVACY AND HEALTH DATA

Testing your employees and visitors for COVID-19 may seem like an obvious fix, but be mindful of the data you collect. Health data is subject to a higher degree of protection – even your employees' temperature, etc., qualifies. This issue will become even more important in the coming weeks and months, after India adopts a new data protection bill that heavily penalizes illegal collection and misuses of data. Your run-of-the-mill privacy policy may not be enough in addressing this risk.

POINTS TO CONSIDER:

- » Do you have a consent or release from your employees and visitors for monitoring and collecting their data?
- » How are you using this data – is this stored locally, sent overseas, given to any vendors – and is your use legal?