Exploring Force Majeure In Employment Relationships

BY ANSHUL PRAKASH, ABHINAV RASTOGI AND DEEKSHA MALIK | AUG 27 2020

If there is one thing that COVID-19 has reminded us, it is that we cannot predict everything. In its fullblown shape, the pandemic disrupted businesses, and several entrepreneurs made attempts to resort to *force majeure* clauses in their commercial arrangements with third parties to get some respite from their obligations.

Force Majeure has been defined in Black's Law Dictionary as an *"event or effect that can be neither anticipated nor controlled."* Generally speaking, a *force majeure* event is understood as one that presents unforeseeable circumstances wherein a party to a contract would be excused from performing its obligations. The concept is often distinguished from a mere hardship in performing one's contractual obligations, and it instead refers to an unexpected turn of events that frustrates the very basis of formation of a contract. In the context of the COVID-19 outbreak, there have been several discussions around the question whether the pandemic could be considered as a *force majeure* event. While some answer in the affirmative, it is imperative to note that from the judiciary's standpoint, this defence is not fool- proof. Several factors, including the intention of the parties, the purpose of engagement, the local situation, and the possible means of fulfilment of the terms of the contract would be examined by a court before allowing relief to a party.

Examining the Indian employment and labour laws

Perhaps, one concept under Indian employment and labour laws that can be considered closest to a *force majeure* event is lay-off. Lay-off is envisaged under the Industrial Disputes Act, 1947 (IDA) (a statute that covers every establishment wherein business or calling of employers is carried on) to mean a situation wherein the employer is unable to provide work to its employees for reasons beyond its control, such as shortage of raw materials, break-down of machinery or natural calamity. When such an event is triggered, the employer can prevent employees from reporting to work and can accordingly refuse to pay wages to them, for wages is paid only in return for the services rendered by the employee. However, the employer may be required to pay compensation to the employee for the loss of work. Where the establishment is a nonseasonal factory/mine/ plantation employing 50 or more workmen (nonmanagerial employees), the quantum of compensation and the period during which such compensation is to be paid is prescribed under the IDA. For other establishments, the compensation must be contractually agreed, or else the employer would be required to pay compensation up to the whole of the wages payable to the workmen.

The question often asked is whether an employer can suspend the contract of employment during a *force majeure* event (employers may not want to terminate the contract altogether, as they would want to reinstate the employees upon the situation returning to normalcy). Courts in India have usually answered in a cautious manner. In *Rajasthan Trade Union Kendra v JK Synthetics Kendra [(1996) IILLJ 347 Raj],* the court observed that there could be circumstances resulting in an employer's inability to provide work to its employees, but the result of the same is not cessation of employment relationship, but only a suspended animation for the time being, post which the employee is required to be reinstated at work. Similarly, in the case of *Auro Engineering Private Limited v RA Gadekar [(1992) IILLJ 693 Bom],* the Bombay High Court dealt with the issue of nonconsideration of annual increments for a period when the employer had laid off its employees (in particular, non-managerial employees) at the time of determining their retrenchment compensation. The court observed as follows:

"Time and tide would not cease to flow, [and] increments would not cease to be earned. The only consequence of the contract of employment being suspended, by way of layoff, strike or lock-out, would be that the employees would have no right to demand wages, nor would the employer be liable to make payment of wages during such period."

What emanates from these observations is that even if lay-off is considered as a temporary suspension in employment, the continuity of service (which assumes significance for the purpose of availing several benefits) under the contract of employment remains unaffected by a lay-off/*force majeure* event. Indeed, several statues recognise the continuity of service period of an employee even during break in work occasioned by a lay-off. Importantly, a person is deemed to be in continuous service for the purpose of receiving:

a) retrenchment compensation under IDA;

b) earned leave entitlements under several state-specific shops and establishments statutes (such as the one applicable in Maharashtra and Karnataka);
c) maternity benefit under the Maternity Benefit Act, 1961; and
d) bonus under the Payment of Bonus Act, 1965.

It is imperative to note that most of the labour laws (and consequently the entitlements based on continuous service) are aimed at benefitting nonmanagerial employees or lowpaid employees. For managerial employees or employees earning a fairly high remuneration, employers have the flexibility to determine how the employment relationship would be treated in a *force majeure* event in accordance with the contractual provisions.

Considerations while incorporating and using a *force majeure* clause in an employment contract

In view of the above legal position, a *force majeure* clause in an employment contract should be very carefully drafted. The first step should be to identify the target category of employees who would be governed by the terms of this clause, for, as mentioned above, the ability of the employer to enforce a *force majeure* clause to its fullest extent would depend on the applicable laws governing the relevant category of employees. If the targeted employees are those holding a managerial position, the relevance of a *force majeure* clause is of paramount importance as the relationship in an unforeseen event would be governed by such clause. Of course, an employer can draw guidance from the extant legal regime, even if not applicable to managerial employees, to ensure that the clause in question passes judicial scrutiny. Once the target category is identified, it would also be important to check if there is any other arrangement (such as a settlement agreement / collective bargaining agreement entered with a trade union) that may impact the operation of the *force majeure* clause or require the employer to notify before invoking the same.

The next consideration pertains to the kind of events the employer would like to specify *as force majeure*, and the consequences that would ensue from invocation of the same. The specific events to triggering a *force majeure* situation should be carefully set out with limited discretion accorded to the employer. A rather vague or allencompassing clause would be difficult to enforce, especially in a country like India where employers and employees are not considered to be in an equal bargaining position and employment laws are more often than not interpreted in a pro-employee manner. Similarly, the consequences ensuing from the *force majeure* clause should be carefully thought through and well negotiated in advance with the concerned employee. A suspension of employment resulting from a *force majeure* event may be subject to statutory stipulations, as discussed earlier. On the other hand, while termination of employment can be envisaged as a consequence, one may have to caveat its invocation with the prevailing legal position. For instance, when the COVID-19 outbreak reached India and the nationwide lockdown was announced, the government of Karnataka passed an order prohibiting termination of employment as a result of the lockdown (which was later withdrawn). Further, invocation of a vague *force majeure* clause to terminate the services of an employee may be regarded as an act bereft of good faith and a colourable exercise of the employer's rights.

In any event, invocation of a *force majeure* provision should be done cautiously. An examination of the event, the impact on the employer's industry, the job specifications of the concerned employees, any alternative means of fulfilling the terms of employment etc. should be assessed before resorting to the relevant clause.

In India, employment contracts rarely provide for a *force majure* clause. Given the limited industry practice and judicial approach in this regard, one needs to look to the future and carefully observe how the jurisprudence evolves on this front. Until then, employers are advised to take the cautious route and not treat employment contracts at par with commercial contracts as far as *force majeure* events are concerned.

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In furtherance of the lockdown orders in the backdrop of the COVID-19 pandemic, the Union Ministry of Home Affairs vide order dated 29 March 2020 (MHA Order), and various state governments issued advisories/ orders (State Advisories/ Orders) requesting employers to not terminate the employment of their employees or reduce their wages/salaries during the lockdown period. What is the status of these advisories/ orders vis-à-vis labour laws in India?

The Union and State governments have issued various advisories on aspects relating to termination, reduction in wages, leaves, etc. While it is suggested that these advisories issued mostly under the Disaster Management Act, 2005, must be adhered to, considering the exigency and unprecedented situations that we are encountering currently, these advisories cannot be said to supplant the applicable laws that specifically govern issues pertaining to employer-employee relationship.

The employers may still invoke the provisions such as lay-off and retrenchment. That said, establishments need to be mindful of the sensitivities involved and must avoid arbitrary actions as far as reduction in potential headcount is concerned.

Can employers reduce the salary of employees in the backdrop of MHA Order and State Advisories/Orders during the lockdown period?

Section 9-A of the Industrial Disputes Act 1947 (ID Act) read with Schedule IV of the ID Act provides that any reduction in wages will amount to change in conditions of service. As per the ID Act, no such change can be effected without furnishing the concerned workmen (non-managerial employees) with 21 days' notice prior to such a change. In West Bengal and Andhra Pradesh, the time limit is 42 days instead of 21. Such notice would be sent in the prescribed manner (the procedure for issue of a notice under Section 9-A of ID Act is prescribed under the Industrial Disputes Rules of the relevant state).

In cases where an employee is not a 'workman' under ID Act, the change in conditions of service would be guided by the terms of his/her employment agreement and the company policy. For any change in the terms of the employment agreement, consent of the employees will also be required to be obtained.

The employer should ensure that there is no unilateral/arbitrary action of change of employment conditions of workmen/nonworkmen to avoid any litigation or backlash by the employees.

Can employers reduce the headcount in the backdrop of MHA Order and State Advisories / Orders during the lockdown period?

Employers (manufacturing establishments with 50 or more but less than 100 workmen) may invoke the provisions of 'lay-off' as set out under ID Act without prior Government approval. For the period of inability to provide employment to certain sections of workmen, the company will be required to pay 50% of the basic wages and dearness allowance (if any) for a period of 45 days, if such workmen have completed at least 240 days of continuous service in the company. For the balance period, the company may enter into an agreement with the workmen and opt for unpaid leave of absence. However, such period should be reasonable (say a month), and if the company foresees a prolonged period of 'no work' situation, it may contemplate any of the following alternatives:

a) consider retrenchment of the workmen; or
b) have discussion with workmen to consider the option of voluntary resignation.

For managerial employees, the option of progressive rationalisation of salaries may be explored by taking such employees into confidence.

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