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COVID-19 | RETURN TO OFFICE: FAQs FOR EMPLOYERS

An employer's guidebook on return-to-office considerations in the context of COVID-19 pandemic

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PRELUDE

India has been one of the worst impacted nations in the world when it comes to the COVID-19 pandemic. After grappling with two waves of the pandemic, the country has been gearing itself to quell the pandemic. At this point, the Central and the state governments are making several attempts to revive the economy by relaxing the restrictions imposed earlier on conduct of business operations at the workplace. Accordingly, employers are gradually preparing themselves to call upon a larger number of workers at the work premises.

Through the following FAQs, the Employment Labour and Benefits practice group at Khaitan & Co aims to address, from an employment law standpoint, some of the commonly asked questions by employers while re-opening offices and / or transitioning from a largely remote working model to a cautious physical working model. These FAQs discuss various nuances and contours in relation to:

- Restrictions around resumption of work at the workplace;
- An emerging hybrid working model as a combination of remote working and working from office; and
- Compulsory workforce inoculation against COVID-19 virus.

PART I – RESTRICTIONS AROUND RETURNING TO OFFICE

Question 1: What is the current status of government restrictions in relation to resuming of work in person?

While the possibility of a third wave of the COVID-19 pandemic in certain parts (if not all) of the country cannot be completely negated, various state governments have been issuing orders relaxing the previously imposed restrictions against operations of establishments over the last few months. States such as Maharashtra (25% cap per shift in a shift-based working arrangement), Karnataka, Haryana, Delhi, Tamil Nadu, and Telangana have allowed establishments to operate with 100% staff capacity, subject to adherence to the conditions specified in the relevant COVID-19 containment orders. That said, considering the fluid situation of the pandemic that our country has been witnessing for some time now, it is advisable that businesses keep a track of and carefully assess the local orders / guidelines applicable to their establishments and, where necessary, contact the relevant authorities through state / district COVID-19 helpline numbers to obtain any clarifications.

Question 2: Are there any travel restrictions to be kept in mind by employers who are calling upon their employees to report to work location?

Speaking generally, while most state governments and local authorities have done away with the requirement of having a travel pass for commuting to and from the workplace, some state governments continue to have travel restrictions in place as regards persons travelling from other states. For instance, West Bengal made it mandatory for passengers arriving in the state of West Bengal from other states / union territories to carry a negative RT-PCR test report (obtained not earlier than 72 hours from an ICMR-approved laboratory) or the final vaccination certificate. Similarly, Karnataka imposed special travel restrictions on persons travelling from Maharashtra and Kerala, requiring them to produce a negative RT-PCR test report which is not older than 72 hours.

Employers should adopt a two-pronged approach in relation to such restrictions. *First*, consider having a policy / standard operating procedure in place whereby employees are instructed to follow the travel guidelines. *Second*, to demonstrate that every reasonable effort is made to align the workforce with the local requirements, consider educating the employees and apprising them of the possible sources from where they can verify the travel protocols. Apart from reaching out to government officials via state / district COVID-19 helpline numbers, Thomas Cook's [travel guide](#), IndiGo's state-wise [compilation](#), etc. could also be few sources from where the most recent updates can be obtained.

Question 3: Are there any considerations to be factored in by the employers allowing 100% physical attendance, subject to government guidelines?

Certainly. It must be remembered that while the economy is opening up, the pandemic is, unfortunately, subsisting in India and other parts of the world. Moreover, there are frequent reports about emergence of new COVID-19 variants from which people might not be fully protected even after complete vaccination. Therefore, subject to any specific requirements that the state / local level orders might entail, employers should, to the extent feasible in line with the nature of the business, could have staggered working arrangements wherein the workforce strength (including the attendance of contract labour, if any) is strictly monitored and a minimum physical distance of 6 feet is ensured between personnel at workplaces. Some other suggestions are set out below.

- ***Infrastructural adjustments:*** Employers may also have to explore certain infrastructural modifications and other workplace arrangements as the staff returns to the workplace. For instance, medical experts have [highlighted](#) the role of ventilation at the work premises to keep a check on contagion, as the same can dilute the indoor air with fresh air. For entrance to the workplace, using reliable facial recognition technology or a specialised smartphone app to access such areas is increasingly being explored by employers as an alternative to biometric scanners. This is for the reason that even if the establishment has adopted thermal screening to check the body temperature of

employees and third parties at the entrance of the premises, the same would not ensure complete safety as several infected persons may even be asymptomatic.

Apart from regular disinfection and sanitisation, employers should consider installing touchless hand sanitisation machines instead of merely placing sanitiser bottles at different places which would be touched by multiple persons (hence ultimately defeating the purpose). Further, in cafeterias, employers may make provision for disposable supplies and automatic soap dispensers, again to ensure minimal physical contact, and / or restrict the use of cafeteria to only limited number of employees at any given point of time to ensure compliance with social distancing norms. Employees may be advised to bring their own food to the extent possible.

- **Rolling out a standard operating procedure and making amendments to the internal code of conduct:** Employees should be made aware of the expected COVID-19 appropriate behaviour that they need to follow while working in the premises. To avoid any ambiguity in this regard, a standard operating procedure is the need of the hour. Such standard operating procedure may have provisions relating to commuting to office, signing any self-declaration form in relation to health status at regular intervals, interacting with colleagues at the workplace, conducting meetings, using common areas, reporting the occurrence of any COVID-19-like symptoms, etc. Having such standard operating procedure in place helps demonstrate that the employer took reasonable care to keep the workplace safe, and its relevance increases in view of the random inspections that the local authorities have been [conducting](#) on several businesses.

To make the standard operating procedure effective on ground, a liaison officer or a monitoring team should be appointed to keep a check on the conduct of the employees at the workplace. The administration department / team should continue to review and assess government orders regarding preventive measures at regular intervals and disseminate the necessary information among employees. Further, appropriate amendments should be made to the organisation's code of conduct or disciplinary policy so that employees are also aware of the consequences of non-compliance in respect of the standard operating procedure.

Question 4: Whether non-adherence to COVID-19 protocols at workplace would amount to misconduct?

Speaking generally, the labour and employment laws in India recognise an employee's failure to comply with lawful and reasonable orders of the employer as an act of misconduct. As regards COVID-19-specific preventive measures, the employer's ask would not only be considered as reasonable but also be regarded as lawful in view of the Central guidelines and the state / local level orders that emphasise on the requirement of maintaining social distancing and following COVID-19 appropriate behaviour. However, when taking appropriate disciplinary action on a proven misconduct, the employer must follow the principle of proportionately in that the employer has duly considered the gravity of the misconduct, the past record of the employee, and other aggravating and mitigating circumstances when deciding the penalty to be imposed on the delinquent employee. As mentioned in our previous response, appropriate amendments may also be required to the code of conduct or internal human resource / personnel policy handbook formulated by the employer.

Question 5: Does an employer have the right to ask about the health history of employees prior to them reporting at the workplace?

As discussed more elaborately in *Part III – COVID-19 Vaccination*, the employer has a duty to take all reasonable measures to ensure the health and safety of its workforce. Towards this end, requiring the employee to produce his / her health or medical records may be considered justifiable. However, the employer should ensure that while collecting, processing, disclosing, or transferring such information, the information technology laws in India are complied with, which regulate the handling of sensitive personal data or information including the medical records of the information provider.

Question 6: Can an employer be penalized in case of a cluster of COVID-19 cases having developed on its premises?

As early as 23 April 2020, the Home Secretary, Government of India, issued a clarification that so long as the employers are enforcing COVID-19 related preventive measures at their workplaces, no adverse action would be taken against them. Accordingly, mere development of a cluster of COVID-19 positive cases at the workplace would not entail penal action. However, it cannot be negated that the local authorities may inspect the premises to assess if COVID-19-appropriate behaviour at workplaces is being strictly observed and adhered to.

PART II – HYBRID MODEL OF WORKING

Question 1: What is the general industry trend regarding the appropriate model of working in the context of COVID-19?

Please refer to the [sixth edition](#) of our Employment Labour and Benefits e-Bulletin where we discuss why hybrid model of working is being explored by many organisations in India. In essence, in heavily industrialized states such as Maharashtra, there is a significant space crunch problem, and employers may find it difficult to accommodate their workforce in the fullest capacity while continuing to maintain social distancing. On the other hand, several employees are experiencing difficulties while contributing to the business in a complete remote working arrangement. In that sense, a hybrid model seems to offer the right balance. This, of course, is not always achievable; for instance, in manufacturing establishments, physical working model is likely to be the predominant mode of working.

Question 2: Can an employee claim work from home / office as a matter of right, especially against the backdrop of COVID-19?

When examining the facets of employer-employee relationship, courts have noted that an employer not only has the authority to determine what work needs to be done but also the manner in which the work ought to be performed. Therefore, depending on the requirements of the business, the employer may determine which mode of working needs to be adopted by the employee. That said, the answer to this question may not be straightforward, and in certain circumstances against the backdrop of COVID-19, a refusal on the part of the employee to come to office may not be held against him / her and before considering any affirmative administrative action against an employee for refusal to work in person, any specific concerns of the employee may need to be looked into and addressed.

Question 3: From an employment law standpoint, are there any considerations for the employer to keep in mind which require few employees to work in offices and others to work from home?

The employment and labour law regime in India largely does not deal with situations where the employer comes up with a hybrid model of working. That said, one of the most fundamental principles that is enshrined in the statutory framework and the judicial precedent on industrial harmony is similarity or uniformity of the terms and conditions of service among the same category of workers in a particular location. Accordingly, while requiring some employees to work from office and other to work from home, the employer must ensure that neither of the two sets of workers is prejudiced with respect to their benefits, pay, or other aspects of their employment. Further, by way of abundant caution and to allay any apprehensions around the practices being adopted by the employer, a general communication should be made to employees explaining the broad guidelines that the establishment is considering while identifying the employees who would adopt either of the modes of working. It should be clarified that extraneous elements such as the gender of the employee have no bearing in determining the appropriate model of working for an individual.

Question 4: In a hybrid work setup, which documents should be formulated / amended by an employer?

Employers should be meticulous about documentation when it comes to a hybrid model of working. Employment contracts should be reviewed to ensure that they clearly bring out the location which would determine the applicable laws as regards the employee's terms and conditions of service. For instance, the employment contract may clarify that the location of the office to which an employee functionally and administratively reports would determine which laws would apply on different aspects of employment (such as working hours and leave entitlements), notwithstanding his / her actual place of work. Another provision that must be assessed is one regarding dual employment, the occurrence

of which in a work-from-home setup cannot be ruled out. Other clauses such as confidentiality, conflict of interest, handling of company property (including asset verification), information security, etc. must also be reviewed.

Likewise, as mentioned above, the code of conduct / disciplinary policy of the company must account for acts / omissions which are likely to emanate from either (a) remote working arrangement (such as data security breach or sexual harassment through an internet-based mode of communication), or (b) physical working arrangement (such as breach of contagion prevention protocol). Any procedure set out for conducting disciplinary inquiries / proceedings should factor in conduct of hearings through audio-video means and prohibition on recording of proceedings by the concerned employee, among other things.

PART III – COVID-19 VACCINATION

Question 1: Can an employer require an employee to get vaccinated and initiate a disciplinary action against him / her in case of refusal?

The statutory framework in certain states and the common law enjoin employers to take all such measures as are reasonably necessary to promote safety of their workers. Moreover, under their recent orders to contain the spread of COVID-19 virus, governments / local authorities in Maharashtra, Tamil Nadu, West Bengal, and Karnataka have required employers to ensure that their employees are fully vaccinated. In view of these aspects, employers may consider (and, in certain locations, would be required to consider) mandating their employees to get themselves vaccinated. That said, employers should adopt a cautious approach in terms of determining the measures to be taken in the event an employee refuses vaccination, primarily because the Government of India has maintained the stance of the COVID-19 vaccination being [voluntary](#). Further, there may be genuine cases where vaccination cannot be imposed on an employee, such as the existence of a medical condition confirmed by a registered medical practitioner.

Question 2: What is the general industry trend in terms of mandating employees to get the COVID-19 vaccination?

Thus far, the approach of the employers in India has largely been to [organize](#) vaccination camps in association with hospitals and health centres and encourage employees to avail the facility. Vaccination was not mandated for a major part of this year (2021) on account of shortage of vaccines supplies in several states. However, given the current normalcy in the availability of vaccines coupled with the recent orders of state governments and local authorities requiring vaccination of employees as a pre-condition to their attendance at workplaces, employers are exploring different avenues to align themselves with the requirement. While some employers are [mandating](#) vaccination as a matter of policy through periodical missives, many others are offering [incentives](#) (in the form of cash payouts, for instance) to the employees who get vaccinated against COVID-19.

Question 3: If mandating COVID-19 vaccination is not permissible under applicable law, what are the other measures that an employer may undertake to ensure safety at the workplace?

It cannot be said that mandating employees to get themselves vaccinated is not permissible, more so when recent orders of competent authorities have placed the responsibility on employers to ensure that the workforce present at the work premises is vaccinated against COVID-19. However, as mentioned above, there is no commonly observed industry practice to take disciplinary action against employees who refuse to get themselves vaccinated. Some employers are going for a purely incentive-based approach to reward employees who have been administered COVID-19 vaccine. In other cases, instead of imposing disciplinary sanctions on any employee who refuses to get himself / herself vaccinated, employers are assessing if the presence of a particular employee at the workplace is even necessary, and if the answer is in the negative, the employers are asking the concerned employee to continue working from home.

Question 4: What are the steps that an employer should take before requiring employees to get vaccinated?

While mandating employees to get themselves vaccinated may be necessary, it may be equally important to demonstrate that the employer took all reasonable steps to sensitize employees about the significance of COVID-19 vaccination before / while imposing such requirement. We have been advising employers to achieve the same by sending one or more emails to employees, (a) apprising them about the high degree of efficacy that the double dose of the currently available vaccines pan-India may achieve, and (b) sharing FAQs with them from reliable / official sources to debunk existing myths around inoculation.

The contributors to the FAQs are Anshul Prakash (Partner), Abhinav Rastogi (Counsel) and Deeksha Malik (Associate) of our Employment Labour & Benefits Practice Group. For all queries on the subject, please contact them at: elbebulletin@khaitanco.com. For our previous guidebook on COVID-19 and workplace management, please click [here](#).

This document provides some basic information pertaining to the issues and should not be construed as a legal opinion or legal advice. It may neither be relied upon by any person for any purpose, nor is it to be quoted or referred to in any public document or shown to, or filed with any government authority, agency or other official body.



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