

Impact of Covid-19 On Construction Sector Payment of Wages while under Lockdown



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INTRODUCTION

CONSTRUCTION INDUSTRY : FAMOUSLY KNOWN AS "OPEN AIR INDUSTRY"

Construction Industry is dependent more on external factors beyond the control of management / documented contracts and is driven by inputs that tend to vary on practically on daily basis unlike other Industry sectors which run like a fixed assembly line with predefined inputs that have full control with the management with minimal or no external interference therefore this Industry is famously labeled as an open air industry.

SOCIAL IMPACT OF COVID-19 ON THE CONSTRUCTION INDUSTRY

*An unprecedented situation because of "Covid-19 / CORONA Virus", which being more serious than an Epidemic has taken the form of a **PANDEMIC at a global level** therefore causing a major **disruption** in the Construction Sector as of March 2020. The Pandemic has warranted Emergency steps by Central Government to declare a **LOCK-DOWN at a National level** till April 14th 2020 which now stands extended up to May 17th 2020 at-least to contain the Pandemic from further outspread and consequentially arrest any further economic meltdown.*

In an effort to arrest the Pandemic, by way of 'flattening the curve' of the number of infected cases, from causing damaging concerns in India, our honorable Prime Minister has on **23rd March, 2020** announced a nationwide **LOCKDOWN**.

The Pandemic has resulted in a risk of a financial meltdown even in countries with low number of infected cases.

Construction Industry is the backbone of any economy engaging over 70% of the daily wagers / laborer's at a national level which now stands most vulnerable to external forces like Force Majeure being one of them presently

The Government has asked all public and private companies to ensure that they do not cut salaries of their staff or resort to layoffs of their employees amid the lockdowns imposed to curtail the spread of COVID-19

All major services like the Railways, Flights, Hotel, Sports Events and Restaurants etc have all been cancelled while imposing Section 144 CrPC so as to promote social distancing and break the chain of the VIRUS spread. Further even the schools, colleges, offices and business houses have been shut and only essential services and goods are in circulation. Millions of staffers, daily wagers cum laborers are forced to go without their daily earnings and therefore spend their lives in anguish till such time the crisis is over.

In view of the pandemic and a situation of uncertainty the government has advised public and private enterprises to not terminate the services or reduce the wages of their employees, particularly casual or contractual workers..

“The termination of an employee from the job or reduction in wages in this scenario would further deepen the crises and will not only weaken the financial condition of the employee but also hamper their morale to combat their fight with this epidemic,”

Labour engagement in the construction sector at PAN India level has been growing at an **average of 9.3%**.

It may not be out of place to say over 70% of the total labour force in India is engaged by the construction sector, may be directly or indirectly, in urban or rural India.

Table 1: Growth in Construction Employment 1999-00 to 2011-12, by major states

	Rural	Urban	Total
Andhra Pradesh	9.8	4.2	7.0
Assam	13.3	6.7	11.8
Bihar	17.0	10.3	15.8
Gujarat	4.1	1.1	2.6
Haryana	8.4	9.4	8.7
Himachal Pradesh	6.2	-0.3	5.9
J & K	11.3	6.3	10.1
Karnataka	9.4	3.0	5.3
Kerala	3.6	8.9	5.4
Madhya Pradesh	16.7	8.2	13.3
Maharashtra	8.2	3.1	5.2
Orissa	13.2	4.3	11.4
Punjab	10.7	4.2	8.9
Rajasthan	9.7	5.5	8.9
Tamil Nadu	12.2	3.9	8.8
Uttar Pradesh	14.2	7.5	12.6
West Bengal	14.1	3.8	9.9
All India	11.7	4.9	9.3

Source: NSS Employment and Unemployment Surveys (published reports).
 Note: The growth rates represent compound annual average growth rates (CAGR). Figures for Bihar, Madhya Pradesh and Uttar Pradesh include figures of Jharkhand, Chhattisgarh and Uttarakhand respectively.

AREAS OF CONCERN FOR THE INDUSTRY

It is an admitted fact that the government has ordered all to pay full wages & salaries to the entire work force during the declared lockdown even though the labour force may not have been deployed at work

Following are the areas of concern for the Industry :

1. Pandemic / Epidemic stricken emergency situation declared by the government of India at national level has caused a major setback to the construction sector affecting all of the following :
 - a. Entire Work force
 - b. Material Supply Chain
 - c. Utilization & Regular Maintenance of the Tools, Plant & Equipments at sites
 - d. Payment of wages while no work happening, more so on the statutory liability being incurred without work (*basis govt directive*).
2. Owing to government announcing a complete lockdown & none in India having ever experienced such a situation like this in last over 100 years apparently caused a panic in the labour force at all India

level and therefore causing the labour force to return to their villages even resorting to by way of walking back to the village as all transport was shut.

SCENARIO FACED BY THE EMPLOYERS IN CONSTRUCTION SECTOR:

Owing to government direction to pay labour while LOCK-DOWN there are primarily two situations that the industry may be staring at

1. **ENGAGE** : Continue to engage his labour force & continue to pay them their wages while the employer’s revenue stream is blocked and **therefore account for a direct loss** while availing an advantage thereafter of having the labour force available when the work is resumed.

2. **DISENGAGE** : Disengage his labour force & let them go back to their homes / villages with no source of income to them and **therefore save on the immediate / direct loss** however he may have to incur a partial loss in terms of re-mobilization costs to bring the labour back from their homes or even face the consequences of labour not returning / not being in required numbers thus effecting the project timelines.

IS IT A CATCH “22” FOR THE EMPLOYERS IN THE CONSTRUCTION SECTOR : Let us Analyze

DETAIL	ENGAGE	DISENGAGE
Direct Loss	The Employer will <u>incur a direct loss</u> in terms of the wages , watch & ward & insurance costs that he will incur for continuing to keep his labour engaged even while his revenue stream closed	The Employer will <u>SAVE on direct loss</u> in terms of the wages , watch & ward & insurance costs that he may have incurred for continuing to keep his labour engaged even while his revenue stream closed
Labour Availability	Available	Not Available

DETAIL	ENGAGE	DISENGAGE
Work Resumption	Possible immediately	Not possible immediately
Work Schedules	Labour being available the work can be resumed immediately upon opening up of the LOCK-DOWN	Labour not being available the work cannot be resumed immediately upon opening up of the LOCK-DOWN
Force Majeure	<p>1. Post Force Majeure period the work can be resumed without loss of time for Labour arrangement.</p> <p>2. Keeping the Labour engaged at site by paying them even without work will be a reason for the industry to demonstrate their action taken to protect the possible time loss arising out of the force majeure</p>	<p>1. Post Force Majeure period the work cannot be resumed without loss of time for Labour arrangement.</p> <p>2. Not having the Labour engaged at site the industry may attract damages from clients for not taking enough measures to protect the project from possible effects arising out of force majeure.</p>
Re-Mobilization of Labour	If the Labour is available at site then it will be saved harmless of the delays in re-mobilizing the labour force in addition to the extra expense	It is placed on record and informed that under the present circumstances and situation of national crisis once the same is normalized from the effects of COVID-19, it may take 1 or 2 months (depending on the native place of the labour) to remobilize the labour force causing not only an extra unprecedented expense but also extra time.

DETAIL	ENGAGE	DISENGAGE
Damages	Contractor may be entitled to claim damages arising out of Force Majeure	Client may be entitled to claim damages arising out of Force Majeure
Winners Sign	Any company that manages to retain the labour force during this time of Pandemic <u>may enjoy a chance of being called upon by many clients to do works of other contractors</u> who are unable to mobilize labour after the LOCK-DOWN is open.	Any company that are not able to manage to retain the labour force during this time of Pandemic <u>may LOOSE their works to other capable contractors</u> who are unable to mobilize labour after the LOCK-DOWN is open.

Under such scenarios, each party to the contract will have to factually weigh the favorable & the not favorable situations before letting his labour force go away to save themselves HARMLESS OF THE CONSEQUENTIAL LOSSES and from legal implications / actions thereof.

It is important to know that under the mitigation of **damages doctrine**, a person who has suffered an injury or loss should take reasonable action, where possible, to avoid additional injury or loss. The failure of a Plaintiff to take protective steps after suffering an injury or loss can reduce the amount of the Plaintiff's recovery.

GOVERNMENT CONSIDERATION & DIRECTION

The Procurement Policy Division of Department of Expenditure, Government of India has issued an Office Memorandum dated 19.02.2020 wherein the MOF has clarified the doubt raised by the captains of the industry in regards to the 'Manual for Procurement of Goods, 2017', wherein the Government has clarified that the disruption of the supply chains due to COVID-19 shall be considered as a case of natural calamity and (FMC) force majeure clause may be invoked following the due procedure.

However, due & timely application of mind is a must for any company or an individual to apply the above mentioned Office Memorandum and that the same cannot be made applicable for every contract as the clause needs to be interpreted based on different circumstances

CONCLUSION

Upon perusal of the above mentioned details one may find it prudent to suggest that the Construction Sector may evaluate and find it beneficial to incur the extra costs & implications of retaining the labour force at site by paying them for the time of LOCK-DOWN without having any revenue at all.

Further, it may be worth a while that the companies who have retained the labour force at sites are not only in a stronger position to resume / complete their contractual obligations but also are in a stronger position to secure a well reasoned sanction of escalation, price adjustment, damages and such so as to avoid the suffocation of the amount involved in commercial contracts and get the amount in circulation while keeping the labour at site fully mobilized.

It is crucial that businesses and contractors are aware of their rights under the contracts they have entered into, under the common law and under statute so that they are prepared when confronted with an inability to perform their contractual obligations as a result of COVID-19. It is always advisable to seek the advice of an EXPERT in such circumstances.

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NOTE : Views are personal. (The author is practicing Technical Arbitration Expert cum Consultant).