

# COVID-19 and Canceled Rental and Employment Contracts

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The onset of the COVID-19 pandemic in March 2020 created far reaching economic ramifications. As society went into extended lockdown in an unprecedented fashion, there were many canceled or postponed travel plans, institutional dinners, weddings, and the like. What does halacha say about a rental contract frustrated by a pandemic? If someone put down a deposit for a Pesach rental or program and was unable to reach the destination or the program was canceled, is he or she entitled to a refund? Would an employee be entitled to compensation for unperformed work during this period?

## I. RENTAL CONTRACTS

### 1. A Tenant Who Dies Mid-Lease

Halacha addresses various instances of how an unanticipated *ones* (extenuating circumstance) impacts previously agreed upon contractual obligations and which party bears the loss. In the case of a tenant who dies in the middle of a lease term, Rashba (*Shu"t* 1:1128) rules that the deceased's estate must pay out the remainder of the lease. Rashba views a property rental as a sale for the duration of the lease term (*sechirus le-yomei memkar hi*). Once the contract is entered into, an *ones* does not discharge the tenant (or his estate) from the agreement, just as a property sale cannot be invalidated because of an *ones* that arises after the sale has been executed.

Maharam (cited in Mordechai Bava Metzia 345) disagrees with Rashba's ruling and rules that the estate is exempt from paying out the rent for the remainder of the term. Maharam views a property rental as more analogous to an employment contract than to a sale, and therefore applies the principle of Bava Metzia 77b (see below) which exempts an employer from paying workers whose job was rendered unnecessary by an unanticipated event.

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Rema (*Choshen Mishpat* 334:1) favors the position of Maharam, although he quotes Rashba as an alternate position and concludes that if the landlord received the entire year's rent in advance he cannot be forced to refund it.<sup>2,3</sup>

## 2. The Case of Unexpected Rainfall

The Gemara in Bava Metzia 77b discusses the case of an employer who hired workers to irrigate his field only to have unexpected rainfall render their job unnecessary. The Gemara rules that, absent a contrary stipulation, and unless the employer alone (and not the workers) was expected to foresee the *ones*, the employer need not pay the workers for the work they did not perform.

The general principle that emerges from this Gemara (as codified by Rema 334:1) is that absent a contrary stipulation, if the *ones* should have been anticipated by both the employer and employee equally, or the *ones* was equally unanticipated, the worker is not entitled to compensation for labor not performed. If, however, the employer was aware of an impending *ones* at the time that he hired the worker, but the worker himself was unaware of the *ones*, the employer is at fault for not conditioning the employment on the non appearance of the *ones* and must therefore pay the worker.

## 3. The Boat that Sinks with a Client's Merchandise

The aforementioned Maharam distinguishes between the case of workers who need not be paid at all in the event of an *ones* that renders their job unnecessary and the case (Bava Metzia 79; see *Choshen Mishpat* 311:3) of a wine merchant who hired a boat to transport his wine across a river where the boat subsequently sank in transit. The Gemara there establishes the general principle that the party who is preventing performance is stuck with the loss of the contract value. If the merchant hired a specific boat (*sefnab zo*) to transport a non specific quantity of wine (*yayin stam*), and the boat sank together with the wine, the merchant is entitled to

<sup>2</sup> See *Terumas Hadesben* 329 and *Shach* 334:2. According to *Shach* (based on his understanding of *Terumas Hadesben*) the fact that the renter prepaid the year's rent indicated that he was willing to assume the risk and was prepared to part with the money in the event of an *ones*. This rationale appears in Tosafos (Bava Metzia 79b s.v. *iy atab*). According to Shach, Rema's distinction between whether the rent was prepaid is not predicated on a doubt as to whether to rule like Rashba or Maharam, as the simple reading of Rema would indicate.

<sup>3</sup> Regarding whether other forms of *ones* would absolve a tenant from rent payments see *Machaneh Efrayim Sechirus* 5, *Shu"t Avnei Nezer Choshen Mishpat* 25, *Pischei Choshen Sechirus* 6:8, and Rabbi Baruch Levin in *Landlord-Tenant in Halacha* (Feldheim 2019) *Miluim* 7.

a refund, as he still has other wine that he can provide for transport, whereas the boat that he rented is no longer functional. In this case the boat owner prevents fulfillment of the contract.

If the merchant commissioned a non-specific boat (*sefnab stam*) to transport specified crates of wine (*yayin zeh*), the boat owner is entitled to full payment, as he has other boats that he can provide, but the merchant has no more wine to provide for transport. If the merchant commissioned a non specific boat (*sefnab stam*) to transport a non specific quantity of wine (*yayin stam*), since both parties retain the ability to provide the service and merchandise that they contracted for, they share the loss equally.<sup>4</sup>

#### 4. The Case of the Sharecropper and Makas Medinah

The Mishnayos in Bava Metzia (103b, 105b) introduce another principle of loss allocation for *ones* in the context of a sharecropper obligated to pay a fixed quota of produce to his landlord. The Mishnayos rule that even if the field was destroyed or became unusable (e.g. it was destroyed by a swarm of grasshoppers or an unanticipated storm, or the water source of the field dried up), the sharecropper is still responsible for providing the agreed upon amount of produce. Rashi (105b s.v. *eino menakeh*) explains that even though the sharecropper could not have reasonably anticipated the destructive event, and would likely not have entered into such a contract had he known that it would occur, the owner of the field can claim that the event was attributable to the sharecropper's bad *mazal*, and the sharecropper is still responsible to fulfill his contractual obligations. However, if the same events affected the majority of fields in the area (*makas medinah*),<sup>5</sup> the sharecropper may deduct his loss from his payments to the owner.

*Shulchan Aruch* invokes *makas medinah* in the aforementioned cases (*Choshen Mishpat* 321:1 and 322:1) as well as in the context of property rentals (Rema 312:17) and employee contracts (Rema 334:1).<sup>6</sup> Examples of *makas medinah* cited in *risbonim*

4 For further analysis see *Machaneh Efrayim Sechirus* 5.

5 There is a dispute in the Gemara (105b) as to the scope of damage necessary to qualify an *ones* as a *makas medinah*. *Shulchan Aruch* (*Choshen Mishpat* 322:1) rules that for fields an *ones* is a *makas medinah* when it affects the majority of fields in the city.

6 Rema (321:1) writes that there is no claim of *makas medinah* if one could overcome the impediment posed through *torach ve-tachbulos*, effort and strategies. In other words, one cannot hide behind a *makas medinah* exemption if an external factor makes it more difficult but not impossible to meet one's contractual obligations. The source of this qualification is *Shu"t Maharam Padua* (39) regarding an individual who acquired the exclusive right to lend money with interest

include a city that was consumed by a fire (*Teshuvos Maimoniyos Mishpatim* 27 cited in Rema 312:1), a garrison of non-Jews that take over the majority of Jewish homes in a city (*Machaneh Efrayim Sechirus* 6), and an epidemic (*Machaneh Efrayim Secherus* 7 in understanding *Shu"t Ra'avan* 98<sup>7</sup>).

## 5. Makas Medinah and Rental Properties

The *risbonim* debate whether a *makas medinah* that makes a rental property unusable would release the tenant from his rent obligation for the period it was unusable. Rema (*Choshen Mishpat* 312:17 citing *Teshuvos Maymoniyos Mishpatim* 47) rules that if a fire burns down an entire city, which he characterizes as a *makas medinah*, a landlord is not entitled to collect or keep rent for the days during which the property was uninhabitable.<sup>8</sup> Does the same apply to a situation in which the house is still standing but may not be easily accessed due to a war or epidemic?

### 5.1 Ra'avan's Position

Ra'avan (*Shu"t* 98) writes that in a situation where the majority of a city's residents are forced to flee and a tenant is unable to remain in his rented property, both parties share the loss equally such that the tenant pays only half of the rent for the period he is away. He suggests that the default rule for *makas medinah* is to

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to the local non-Jewish population. Subsequent to his entering into this contract, the local leader retracted the right of Jews to charge gentiles interest on loans lacking collateral, significantly compromising the viability of this person's contract. Over the course of nine months he made some attempts to have this decree overturned, and then petitioned to back out of his initial contract based on a *makas medinah* exemption. Maharam Paduah ruled that since the decree could have been overturned with more effort, the questioner remained obligated to abide by his contractual obligations.

<sup>7</sup> Ra'avan refers to Jews being forced to flee a city but does not cite a reason for their flight. *Machaneh Efrayim*, citing Ra'avan, presents the case as Jews fleeing because of an epidemic.

<sup>8</sup> This ruling is not a function of *makas medinah* per se, but emerges from the cases of more generic *ones* discussed above. *Teshuvos Maimoniyos* compares it to the case of the wine merchant who rented a specific boat (*sefinah zo*) to transport unspecified wine (*yayin stam*) that sank mid-journey, where the gemara rules that the merchant need not pay as the boat owner is considered to be the party withholding performance. In this case as well, the tenant may claim that he is willing and able to reside in the rental property, but the landlord is unable to provide that residence since it burned down. See Sema (312:34) and *Nesivos Hamishpat* (312:13). It emerges from Nesivos's analysis that according to Rema if a house burns down, even if it is not due to a *makas medinah*, the landlord bears the loss just as the Maharam ruled regarding the tenant who died in the middle of the term that the estate need not pay the balance of the rent. The only difference that *makas medinah* makes is that if the tenant prepaid the rental fees he is entitled to a full refund for the period in which he was unable to reside in the residence. See below regarding prepayment of rental fees.

split the loss between the parties. He even interprets the Mishnah's ruling in the sharecropper case as holding that the sharecropper can deduct (*menakeb*) part of his losses in a *makas medinah*, as opposed to the standard interpretation according to which the sharecropper is *fully* released from his payment obligation. Ra'avan further argues that even if one accepts the standard interpretation of the sharecropper ruling, it is different from the case of the tenant who flees during a *makas medinah*. In the case of the sharecropper whose field flooded the *makas medinah* only affected the field, which is exclusively the property of the owner, and thus the sharecropper is not liable for his decreased production. By contrast, when a *makas medinah* causes the residents of a city to flee, both parties are equally affected. Ra'avan writes that "the houses were destined to be desolate and the tenants were destined to be exiled." However, Ra'avan's opinion does not appear to be accepted by later authorities.<sup>9 10</sup>

## 5.2. *Maharam of Tiktin's Position*

Shach (334:3) quotes Maharam of Tiktin<sup>11</sup> who rules that if one rented a house but was unable to use it because a plague had forced the residents of the town to flee, the landlord remains entitled to the rent, as he may claim that the house remained standing and technically inhabitable throughout the term. Maharam of Tiktin compares this to the case of the wine merchant who hired a non-specific boat to transport a specific set of wine barrels in which the merchant must still pay the boat owner since the owner is able to provide another boat and the wine merchant is the one preventing performance.

9 Sema (321:6 and 344:2) does accept the idea of loss-splitting for employment contracts affected by a *makas medinah*.

10 The first and last sections of Ra'avan's teshuva without the lengthier middle section appear almost verbatim in *Shu"t Maharam MiRottenberg* (Prague 388). Read by itself, Maharam's formulation of the teshuva implies that in principle the landlord bears the entire loss but in practice the loss should be split, since the landlord may claim that he could have found someone else to rent the property who would not have fled. However, it seems difficult to present the Maharam's version as an alternative legal position to that of Ra'avan, given that the language in the teshuva is otherwise almost exactly the same as Ra'avan and is just missing the middle section that sheds light on the conclusion.

11 Maharam of Tiktin was a student of Rema who wrote glosses on the Mordechai. This lengthy paragraph is printed on the last page of the classic printing of the Vilna Shas volume that includes Avodah Zarah, Horiyos, and Eduyos. In earlier printings, as referenced in the Shach, it was printed at the end of Seder Nashim or at the beginning of Seder Nezikin.

### 5.3. *Shach's Position*

Shach (ibid.) questions Maharam of Tiktin but does not explicitly articulate his own position. R. Asher Weiss (*Shu"t Minchas Asher* 2:120) assumes that Shach views the case of a rental property as analogous to the case of the sharecropper whose field flooded, in which case (according to the straightforward reading of the Gemara, albeit not that of Ra'avan) the landlord is not entitled to the rent. This also appears to be the position of the Taz (334:1).

### 6. Prepayment and Assumption of Risk

When a tenant is unable to reside in the rental property due to a *makas medinah*, does it matter, for the purpose of allocating the loss, whether the rental fees were prepaid or not? Regarding a rented house consumed by a city-ravaging fire, Rema holds that prepayment does not make a difference. Since the landlord failed to provide a residence, the tenant may recover his prepaid rent. This ruling stands in contrast to Rema's ruling in the case of a tenant who dies in the middle of the rental term where he rules that prepaid fees need not be refunded.

However, *Machaneh Efrayim* (*Sechirus* 7) quotes a Yerushalmi (Gittin 6:6) regarding a person who rented a boat to ferry him across the river and prepaid the fee. Before he was able to use the boat, the river dried up, rendering the boat service unnecessary. Rav Nachman ruled that the renter was not entitled to a refund. Machaneh Efrayim explains that here the boat remained intact and, in advancing the payment, which the renter was not required to do,<sup>12</sup> he implicitly accepted the risk of the proprietor retaining the funds.<sup>13</sup> *Machaneh Efrayim* views the Yerushalmi's conclusion as normative; such that even in a situation of *makas medinah*, if the rented property is still standing and technically inhabitable and the

<sup>12</sup> Jewish law holds that compensation for services need only be paid at the conclusion of the service—אין שכירות משתלמת אלא לבסוף—see Bava Metzia 56b.

<sup>13</sup> See Supra footnote 2. Along these lines, R. Zalman Nechemia Goldberg (*Shaari Zedek* Vol. 8 p. 123 et. seq.) suggests that there is a difference between a rental with a prepayment and a rental for which payment is only required at the conclusion of the rental period. It is questionable whether this analysis would be as relevant when prepayment is the industry standard, as is generally the case with property rentals. R. Meir Orlian (Business Halacha Weekly #580 Shavuot 5780) cites *Mabarach Obr Zarua* (66) as holding that when one demands prepayment, such prepayment does not indicate a willingness to forgo a refund in the event of an *ones*. Although *Mabarach Obr Zarua* writes this in the context of advanced wages, the logic would apply to rental payments as well.

renter prepaid the landlord, the renter is not entitled to any refund.<sup>14</sup> This is in contrast to a case where a fire burned down all the houses in a neighborhood, in which case the landlord must refund the payment since he is unable to provide a house to reside in.

In practice there does not appear to be a clear consensus as to how to assess the payment of a renter who is unable to benefit from a rental property due to a *makas medinah*, especially where money was prepaid. In his *Emek Hamishpat* (*Sechirus* 50), R. Yaakov Cohen ruled regarding summer rentals in the North of Israel during the Second Lebanon War (2006) that if the renter did not prepay he could not be obligated to pay, as he may rely on the opinions that even though the house was intact, the war situation created a *makas medinah* exemption.<sup>15</sup> If, however, the renter did pay upfront, the landlord cannot be forced to refund the money, as he has the right to claim (*kim li*)<sup>16</sup> that he holds like the *Machaneh Efrayim*.<sup>17</sup> Nevertheless, he concludes that it may be appropriate to reach some sort of compromise and refund a portion of the advanced funds, especially as one could argue that a house in a war zone that could be impacted by a rocket at any moment is like a house that burned down such that the landlord is not in a position to provide the house that he was contractually obligated to provide.<sup>18</sup>

<sup>14</sup> *Ketzos Hachoshen* (322:1) appears to accept this approach in practice, albeit for a different reason, as does *Nesivos Hamishpat* (312:13).

<sup>15</sup> See Rav Ovadia Yosef Toledano, a grandson of Rav Ovadia Yosef and a member of Rav Asher Weiss's beis din, in *Shu"t Meishiv Mishpat* (1:47), for an analysis of whether *umdina*, a presumption that no one would enter into a contract under such circumstances, plays a role in such determinations.

<sup>16</sup> The principle of *kim li* allows an individual holding on to disputed money (*muchzak*) to retain that money when there is an unresolved dispute among authorities as to which party prevails. See *Shu"t Chasam Sofer* (*Choshen Mishpat* 95) who explains that *kim li* is predicated on the principle of *ein holchin be-mammon achar barov* - when it comes to monetary matters we do not necessarily follow the majority, and therefore one can claim to follow a minority opinion.

<sup>17</sup> R. Toledano as well concludes that the landlord may keep any advanced payments. The context of his responsum is a wedding hall rental that was canceled due to Operation Cast Lead (Dec. 2008 - Jan. 2009). R. Cohen does raise the possibility that a short term rental is different from a long term rental. With a short term rental the landlord could not argue that he could have rented the property to someone else, as no one would enter into a short term rental in a war zone. Regarding a long term rental the Maharam of Tiktin would hold that the renter would have to pay the entire rental fee. One could argue, however, that if the rented house is inhabitable, even in a war zone, there may be individuals in need of a place to stay who would rent such a house for lack of a better alternative and therefore the Maharam of Tiktin would obligate the renter to pay in that case as well.

<sup>18</sup> A recently published collection from the ledger of R. Zvi Pesach Frank's beis din (*Pinkas Beis Hadin Bichurvas Rebbe Yebuda HaChassid* Vol. 2) contains a ruling (625) of the beis din regarding

While the aforementioned R. Yaakov Cohen and R. Ovadia Yosef Toledano (*Shu"t Meishiv Mishpat* 1:47) give significant weight to the Machaneh Efrayim's position, R. Asher Weiss believes that the halacha follows Shach and Taz, and therefore not only may we not compel the renter to pay for the rental period affected by a *makas medinah*, but even if a down payment was previously advanced, the landlord must refund it in totality.

## 7. Conclusion

In light of the range of opinions that we have explored, how are we to resolve the cases we raised at the outset? If someone rented a house in Florida for Pesach 2020 and was unable to use it because of fear of contagion, interstate travel restrictions, or a ban on short term rentals, the renter presumably could not be held liable for unpaid funds, as per the Shach and Taz.

If the renter advanced most or all of the funds before the onset of the pandemic, is he entitled to a full or partial refund? Some would argue, as per R. Yaakov Cohen above, that the proprietor could claim *kim li* like the Machaneh Efrayim (or the Maharam of Tiktin) and keep all the money that he already received. However, R. Moshe Williger, in an article in *Kovetz Beis Abaron V'Yisroel*, (Vol. 208, Nissa Iyyar 5780) claims that all the *rishonim* who discuss a *makas medinah* that affects a rented property address a situation in which the *makas medinah* began after the tenant already moved into the property. It is possible that even those authorities who pin the loss on the tenant would agree that if the *makas medinah* began before the tenant ever stepped foot on the property, the tenant would be released from payment. Furthermore, if there were state or local restrictions on short term rentals that prevented renting the property to anyone, then even *Machaneh Efrayim* may agree that the proprietor must refund payment that had been advanced.<sup>19</sup> Even if

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the claim of a landlord for full rent from a tenant forced to flee from an apartment in Hebron following the 1929 massacre. The beis din awarded the landlord two-thirds of the money that he was owed for the period in which the tenant was unable to reside in the dwelling. While the reasoning for the ruling is not stated, presumably it was based on some sort of *psbaha* (compromise).  
 19 What is the status of a post-dated check that is dated after the onset of a *makas medinah*? Is that considered pre-payment that the proprietor cannot be forced to relinquish? May the renter cancel the check? R. Zvi Ben Yaakov, currently a senior dayan on the Tel Aviv beis din (*Shu"t Mishpatecha L'Yaakov* 1:11:13-15), in the context of day care teachers who were paid in advance and could not provide any service during the Gulf War (1991), assumes that such checks are fully the possession of the recipient. However, his analysis likely only applies in Israel, where one may not legally cancel such a check. See R. Baruch Meir Levin in *Landlord-Tenant in Halacha* (2019), *Miluim* 7, who makes this point. He cites a teshuva from the Debriciner (R. Moshe Stern) who assumes that the possessor of a post dated check is not considered *muchzak*.



one does not accept R. Williger's observation and there were no legal restrictions to renting out the property<sup>20</sup> but the risk of contagion impeded people's mobility, a partial refund of money that had been advanced would be advisable - probably in the range of 50 to 75 percent - and it requires further analysis to determine whether a future credit would be sufficient.

The obligation to pay for a wedding hall rented for a reception canceled due to the coronavirus may be different from the case of a home rental in two ways. On the one hand, once state and local governments banned gatherings of more than a few people, in many situations wedding halls were unable to provide the services that they were contracted for and no one else could have rented the facility instead. That set of facts would make the case more analogous to the case of a burned down house such that even the *Machaneh Efrayim* and Maharam of Tiktin would presumably agree that the proprietor must refund any prepayment. However, if the wedding hall rental fee covered the salaries of multiple employees and service providers, that portion of the fee may be subject to the rules of *makas medinab* as they apply to employees.<sup>21</sup> The same should apply to a canceled Pesach hotel program.<sup>22</sup> In all of these situations it may be proper to arrive at a reasonable compromise.<sup>23</sup>

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20 Even if one were to accept the above argument that the Maharam of Tiktin's position would not apply in the middle of a war zone, where no one would rent a property, it is possible that amidst a pandemic with travel restrictions there may still be local residents in need of a place to live who would rent a property, especially when no other location is necessarily any safer. See also R. Y. Blau, *Pischei Choshen, Sechirus* 6:10 and R. Ovadia Yosef Toledano, *Mishpat HaSechirus* 23:13.

21 In a monograph published by a R. Yaakov Risner (available at [http://beinenu.com/sites/default/files/alonim/408\\_69\\_80.5.pdf](http://beinenu.com/sites/default/files/alonim/408_69_80.5.pdf)), the author entertains such a distinction between rental property cases and wedding hall cases where the hall must pay its employees but concludes that since one could argue that everything is packaged together, if the wedding party had not paid in advance, it could not be compelled to pay anything. R. Hershel Schachter in a brief letter (available at <http://www.torahweb.org/torah/docs/rsch/RavSchachter-Corona-22-April-08-2020.pdf>) regarding Pesach programs does accept this distinction, subject to further qualification of what compensation employees may receive through unemployment or other government stimulus programs. He notes as well that even if someone is not obligated to pay for certain services, if he has the means to afford it and the proprietor is in a compromised financial situation, it would be commendable to not demand the full refund that he may be entitled to, as a form of *tzedakab*.

22 R. Yitzchak Zilberstein (*Vavei HaAmudim Pesach* 5780 pp. 57-58) rules that in pandemic situations the wedding hall is not entitled to any compensation.

23 Many quote a comment of the Chasam Sofer (*Sefer Zikaron Pressberg* 1879 p. 37) who advocated a compromise in compensating employees who were unable to perform their duties due to war. However, the same may not necessarily be true of property rentals, as the Chasam Sofer indicates that the impetus for compromise was his belief that in principle the loss in a *makas medinab* employment situation should be split between the parties, which is not the case in practice with a rental dispute.

## II. II. COMPENSATING EMPLOYEES FOR UNPERFORMED WORK

### A. The Halachic Framework

Generally, in Jewish law an employee is only entitled to payment for work that he or she actually performed. However, when an unanticipated *ones* (extenuating circumstance) prevents the employee from performing the work that was agreed upon, a different standard may apply. What calculus does the onset of a *makas medinah* create for such evaluations?

#### 1. Mordechai and Rema

Mordechai (Bava Metzia 343) writes that if a *rebbe* is unable to teach Torah because, subsequent to his hiring, the government promulgated an edict forbidding teaching Torah, then the *rebbe* remains entitled to compensation from his employer. While there are two variant texts of the Mordechai that may differ as to whether he is entitled to full compensation,<sup>24</sup> *Hagabos Asbri* (Bava Metzia 6:60) explicitly holds that the *rebbe* is entitled to the entirety of his wages. Rema appears to rule this way (*Choshen Mishpat* 321:1 and see 334:1),<sup>25</sup> and this approach is accepted by Shach (334:2) and Taz (334:1).<sup>26</sup>

<sup>24</sup> Mordechai writes:

ואם הביטול של המלמד מחמת גזירת המושל שבעיר וא"א למלמד ללמוד הוי מכת מדינה ויהא הפסד (ההפסד) של בעל הבית

"If the unemployment of the instructor is due to an edict of the ruler in the city and the instructor cannot teach, it is a *makas medinah* and loss (the loss) is of the employer." If the correct text is הפסד —the loss— that implies that the employee is entitled to full wages. If the text is הפסד —loss— it is possible that while the employer must pay the employee, he need not pay the entirety of the wages. See Sema 321:6 and R. Asher Weiss, *Shu"t Minchas Asher* 2:120.

<sup>25</sup> See Nesivos below who understands Mordechai and by extension Rema to be limited to a *rebbe*. R. Yosef Fleishman (*Alon Mishpat* 119 Tamuz 5780), Rosh Kollel of Kollel Choshen Mishpat in Yerushalayim, suggests a variant novel reading of Mordechai and Rema that would render their rulings of limited contemporary relevance. In the times of the *rishonim* the common practice was that a *rebbe* would travel and hire himself out to teach in a town far from his residence (see, for example, Mordechai Bava Metzia 459 and Tosafos Kiddushin 59a s.v. ani). If a *rebbe* found employment in a specific town and then the local authorities restricted his ability to teach, that development could be attributed solely to the *mazal* of his local employer, as the *rebbe* could just as well travel to any other town where he could teach freely. In such a case the employer would be responsible for the full wages of the *rebbe*, but in a case in which a *makas medinah* affects an entire region, not just a single city, perhaps the loss would be split.

<sup>26</sup> See R. J. David Bleich, *Coronavirus Queries Part 2*, Tradition Winter 2021, pp. 101-103, for a suggestion as to the logic of this position.

## 2. Sema

However, Sema (321:6 and see 334:2) strongly disagrees with Rema and argues that there is no basis for an employee to receive full wages for unperformed work. In fact, Sema considers the possibility that the employee would be barred from collecting any unpaid wages, under the principle of *ba-motzi me-chaveiro alav barayab*—i.e., that the burden of proof is upon the party looking to collect money. Ultimately, however, Sema does not go this far. Instead, he concludes that the loss should be split, and the employee would be entitled to half of the lost wages. Sema contends that this was actually the position of Mordechai as well.

The rationale for Sema's approach is grounded in the halachic principle that when neither party is withholding performance, and both parties are equally affected by the *ones*, they are to share the loss equally. This principle is demonstrated by the wine-shipping case (Bava Metzia 79; see *Choshen Mishpat* 311:3) discussed above. If a wine merchant hired a boat to transport his wine across a river and the boat sank in transit, we assign the loss of the value of the contract to the party withholding performance. Thus, if neither party is withholding performance, such as when both parties can technically still perform (e.g. the merchant commissioned a non specific boat (*sefinab stam*) to transport a non specific quantity of wine (*yayin stam*) such that the wine merchant can still perform by shipping other barrels of wine and the shipper can still perform by sending a different vessel) but neither party is interested in continuing performance, they share the loss of the value of the contract equally.

Sema argues that the case of the *rebbe* is analogous to this one. The employer is willing to provide the children to be taught and the employee is willing to teach them. It is a third party that prevents both parties from performing their contractual duties. Both parties are thus equally blameless for the inability to perform, and thus, should split the loss.

## 3. Nesivos HaMishpat

Like Sema, *Nesivos HaMishpat* (334:1) takes issue with Rema entitling a non-performing employee to collect full wages in a situation of *makas medinab*. Nesivos argues that the opinion of the Mordechai which serves as the basis for Rema's ruling applies only to the specific facts of the case Mordechai addressed: that of a *rebbe* teaching Torah. Why should the case of a Torah teacher be different?

Nesivos explains that in principle a *rebbe* may not be compensated for teaching Torah, as the Talmud prohibits payments in exchange for Torah teaching (Nedarim 37a). Thus, payments to a *rebbe* are structured not as compensation for his teaching, but rather as compensation for the more basic role of watching and entertaining the children. If the government forbids Torah teaching, this decree does not technically affect the source of his livelihood. The *rebbe* essentially gets paid for babysitting, and the decree does not impede him from continuing to watch and entertain the children in his class, which he is ready, willing, and able to do. If the *rebbe's* employer is unwilling to pay the *rebbe* merely to watch the children, then it is the *employer* who has frustrated their agreement.<sup>27</sup> As such, Nesivos concludes, there is no special standard for compensating a regular employee impacted by a *makas medinah* than for a conventional *ones*.<sup>28</sup>

## B. Contemporary Applications

How does the above analysis apply to employment agreements that were frustrated due to the COVID-19 pandemic? In the United States, employment is generally at-will unless otherwise contracted. This means that an employer may dismiss an employee without cause.<sup>29</sup> While halacha would anyway typically defer to common practice regarding the default term of employment, Jewish law independently recognizes the notion of at-will employment. *Chazon Ish* (Bava Kamma 23:2) discusses whether absent a contrary common practice, the implied duration of the contracted term is day by day or for thirty days at a time (at least when thirty days is the normal payment period).<sup>30</sup>

<sup>27</sup> This understanding of Nesivos serves to answer an apparent contradiction in the rulings of Rema. Rema (334:1) rules that if the residents of a city flee due to an epidemic, a worker or a *rebbe* who is unable to continue working is not entitled to compensation. This appears inconsistent with the ruling about the *rebbe* who cannot teach Torah due to a governmental decree. Nesivos explains that when the residents of a town flee, none of the workers are able to perform any of their normal tasks and are therefore not entitled to compensation. In the case of the governmental decree the *rebbe* is still available to babysit and he is entitled to be paid for that even if he is unable to teach Torah. See Shach (334:3) and *Aruch HaShulchan* (334:10) for alternative resolutions to this discrepancy in Rema.

<sup>28</sup> This may be the same position as that of the Vilna Gaon (321:7-8).

If the government shuts down not only yeshivos but child care facilities as well, as was the case during the first months of the COVID-19 pandemic, then according to the Nesivos even a *rebbe* would not be treated differently than any other worker, as the *rebbe* could not even function as a babysitter.

<sup>29</sup> See <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>

<sup>30</sup> See, however, R. Moshe Feinstein (*Igros Moshe Choshen Mishpat* 1:75) who argues that the default presumption is that an employee may not be terminated without cause so long as his services are still needed by the employer.

Where employment is at-will, the analysis of *makas medinah* is largely moot, since the employer can simply terminate the employee immediately, absolving himself of any future obligation toward the employee. In practice, then, our discussion is limited to employees with contracts that stipulate a term of employment or vendors hired for specific events that were unable to take place due to the pandemic.

In addition, our discussion is presumably limited to situations where halacha would award remuneration in excess of what the worker may collect from unemployment or other government benefits.<sup>31</sup>

## 1. Party in Possession of Funds Prevails

As we have seen, there is no clear consensus among halachik authorities regarding how much to award an employee in a situation of *makas medinah*. For this reason, R. Yosef Rosner (*Mishpat HaPoalim* 2007 p. 163) writes that the *muchzak* (the party currently in possession of the disputed funds) can successfully assert a claim of *kim li*—namely, that he holds the *halachik* view which favors his side, even if it is the minority view, and that he cannot be forced to relinquish those funds without compelling evidence that the minority opinion is incorrect. According to this approach, the party currently in possession of the disputed funds always prevails. Thus, if the salary was paid in advance then the worker need not return the money for any unperformed work; if the salary was not yet paid then the employer need not pay for any unperformed work.<sup>32</sup> However, R. Asher Weiss (*Minchas Asher Corona Telisa'ah* 16) argues that one may invoke *kim li* only in the context of an individual dispute, but not when the issue at hand involves policy for a whole community.

## 2. Employer Pays Half Wages

A different approach requires the employer to pay half-wages for unperformed work, regardless of who currently possesses the funds. To that end, many quote

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<sup>31</sup> If an employee receives unemployment benefits he should not be entitled to “double dip” and receive additional compensation beyond what he would be entitled to halachically. See, for example, R. Fleishman (*ibid.*), R. Yitzchak Zilberstein, (*Vavei HaAmudim* 79 Nissan 5780, 8), R. Yona Reiss (*Sappirim* Issue 31 July 2020), R. Zvi Landman (*Heviani Chadarav* (Yerushalayim 2020) p. 405 in the name of R. Mendel Shafran). R. Avraham Derbarmdriker, Av Beis Din Hayashar V'hatov Yerushalayim (*Heviani Chadarav* p. 357) writes that if such an employee receives more than 50% of his expected wages from governmental compensation he would be entitled to no further remuneration from his employer. The Lakewood batei din, in a document approved by R. Yaakov Forchheimer, issued similar instructions.

<sup>32</sup> See also R. Ovadia Yosef Toledano, *Shu"t Meishiv Mishpat* 1:47.

a comment of the Chasam Sofer (*Sefer Zikaron Pressberg* 1879 p. 37 cited above, footnote 23) addressing the compensation of *rebbeim* who were unable to teach due to a war. Chasam Sofer writes that he himself was inclined to the ruling of Rema and Shach, according to which the *rebbeim* are entitled to their full wages in such scenarios (see also *Shu"t Chasam Sofer Choshen Mishpat* 161). However, he also recognized the compelling argument for splitting the loss evenly between the parties and that it was difficult to require employers to pay the full wages. Therefore, Chasam Sofer ultimately recommended that people pay half of the lost wages.<sup>33</sup>

A number of contemporary authorities have used this suggestion as the starting point for evaluating COVID-19 related employment termination claims.<sup>34</sup> If, for example, a babysitter or playgroup teacher was unable to provide the contracted services—either because of government restrictions or because parents were unwilling to have their children watched by others due to contagion concerns—and if the employee was unable to collect governmental unemployment benefits, then, these authorities suggest, the employee should receive half of his wages.

### 3. Employer Pays Less Than Half Wages: Po'el Batel

However, an additional consideration may further reduce the amount of money that the employee is entitled to recoup under the forgoing analysis. Although an employee may be entitled to compensation for work left unperformed due to *ones* or termination, *halachah* also recognizes that the employee receives some benefit from not having to work. In light of this benefit, the compensation to which he is actually entitled should be that of a *po'el batel*.<sup>35</sup> This means that the employer may deduct from his wage that amount of money which the employee would be willing to forgo in exchange for not needing to work (see Shulchan Aruch 333:1 and 335:1; Sema 333:7;

33 R. J. David Bleich (Contemporary Halachic Problems Vol. 4 p. 367) understands that Chasam Sofer's ruling is based on the principle of *kim li*, namely that since there is a dispute between Rema and Sema, the employers can claim that they hold like the Sema and only pay half of the wages. However, R. Yosef Fleishman (ibid.) and R. Asher Weiss (ibid.) understand that Chasam Sofer's conclusion was in the realm of *psbaha* (compromise) and not because he allowed the employers to claim to hold like the Sema.

34 See R. Yosef Fleishman (ibid.), R. Yitzchak Zilberstein (ibid. 7), and R. Yona Reiss (ibid.).

35 For a discussion of the *po'el batel* rule, see Rabbi Itamar Rosensweig and Tzirel Klein, "Depriving a Worker of Employment Opportunities," *JewishPrudence* (October 2020), Section II, B.

and Shach 333:8).<sup>36</sup> Taz (333:1) quotes earlier sources as indicating that *po'el batel* wages are half of normal wages.

According to this analysis, one might argue that if a worker is only entitled to half of his wages to begin with, the *po'el batal* consideration may knock that down to 25%. However, there may be other considerations that would limit the applicability of *po'el batal* to our situation. R. Rosner (Chapter 13 footnote 13) suggests that the context of the Taz may be limited to a day or week laborer who may prefer to receive a lower salary and not have to show up to work for an already limited period of employment. However, a regular full time employee would always prefer to remain employed and salaried at a higher rate than to stay home and make much less money. R. Asher Weiss (*Shu"t Minchas Asher Corona Telisa'ab* 16) further argues that if the starting point is already a 50% deduction in salary no one would agree to a further deduction in compensation, even in exchange for not having to work. This argument may either eliminate the relevance of *po'el batal* or significantly limit the amount of the deduction.<sup>37</sup>

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36 Not all workers are subject to a *po'el batel* deduction. The Gemara (Bava Metzia 77a) tells us about *ochlushei de-Mechuza*, individuals in the town of Mechuza who carried heavy loads for a living. Such people get weaker from not working and thus receive no benefit from unemployment. Similarly, Rema (334:3 and 335:1) rules that *rebbeim* become intellectually weaker from not teaching Torah and therefore are not subject to a *po'el batel* calculation (see Sema 335:4). In practice, even during the initial height of the pandemic, virtually all yeshivos and schools provided remote instruction while they were physically closed, and therefore *rebbeim* were entitled to their salaries anyway, as they may have invested as much total preparation and teaching time as they normally would, if not more.

37 The aforementioned Lakewood document indicated the *po'el batel* should be taken into consideration when calculating compensation for playgroup teachers but did not indicate an amount. A directive from a beis din in Neve Yaakov (*Heviani Chadarav* p. 369) recommended a *po'el batel* deduction of 16%. A directive from a beis din in Bnai Brak (*ibid.* p. 431) had a more complex calculation with a higher percentage but also suggested that there should be a lower *po'el batel* rate for playgroup teachers in the weeks before Pesach, since they would be more appreciative of having time off during those weeks.