



Learnings from Khaitan & Co – General Counsel Roundtable 2021



UNDERSTANDING INDIA'S NEW LABOUR CODES: CHALLENGES IN IMPLEMENTATION

The Indian government's decision to consolidate 29 Central labour laws into 4 labour codes has been welcomed by several industry representatives, given that the move signalled a much-needed step towards reduced complexity and a simpler labour law regime which could benefit both employers and employees.

While the move was welcomed and the intent commended, in the months that followed, the process of implementation resulted in certain gaps and unanswered questions coming to the surface, with the industry voicing some concerns over particular aspects and awaiting greater clarity.

In an attempt to better understand the industry's sentiment when it comes to the implementation of these labour codes, Khaitan & Co organised a special roundtable on Friday, 30 April 2021, which was attended by HR and legal representatives from the top companies across sectors – IT, consumer goods, hospitality etc. and other experts.

Here we have presented a short summary covering the major points discussed during the roundtable. We hope you find this useful.

Introduction to the Labour Codes

The 4 labour codes - Code on Wages 2019, Code on Social Security 2020, Industrial Relations Code 2020 and Occupational Safety, Health and Working Conditions Code 2020 – received the Presidential assent between 2019 and 2020. However, barring the provisions relating to Central Advisory Board on minimum wages and identification of workers for social security benefits through Aadhaar, the Central Government is yet to bring the labour codes into effect. The implementation process is delayed as states are yet to finalise their rules under these codes, which rules would assume relevance for many employers in the private sector.

Below are some of the most noteworthy changes in the proposed codes when compared to the extant regime.

- Uniform definition of "wages" introduced; maintenance of "wages" at least at 50% level in the overall remuneration for computation of payments and benefits;
- Application of the chapter on payment of wages to all establishments and all employees irrespective of their wages;
- Compounding of certain offences (with certain conditions);
- Introduction of "fixed term employment" with pro-rated statutory benefits;
- Introduction of a limitation period for determination of the amounts due and initiation of inquiries of 5 years from date of alleged amount due (EPF, ESI);

- Negotiating union and negotiating council for negotiation of such matters with the employer as may be prescribed;
- Application of standing orders to all establishments with 300 or more workers;
- Contribution towards worker reskilling fund in case of retrenchment of a worker;
- Introduction of the concept of “core activity of establishment” as regards engagement of contract labour;
- Coverage of directly recruited employees from other states within the ambit of inter-state migrant workers.

True Reform or Mere Consolidation Exercise?

A central theme that emerged during the discussion was whether the implementation of these labour codes was actually a step towards true reforms or whether it is now being viewed as a consolidation exercise.

Many participants were of the view that while the intent that was communicated to the industry was one of simplifying the laws and reducing the complexities, as time passed, it began to seem like the complexity on-ground would remain the same, if not increase. For instance, the requirement of maintaining wages at least at 50% level in the overall remuneration structure for the purposes of various computations may cause certain financial and administrative concerns.

A few participants went on to say that life will probably not change for many employers when it comes to navigating the complex regulations and rules for compliance processes. This is because while the codes envisage the concept of an Inspector-cum-Facilitator, the approach and the mindset of the authorities on ground may not change overnight. This is discussed in further detail below.

Inspector cum Facilitator: Industry Concerns

The new codes have thrown light on the role of an “Inspector-cum-Facilitator” who has the responsibility of checking for compliance as well as facilitating businesses in achieving that compliance. However, this concept of an Inspector-cum-Facilitator has only left the industry with more questions than answers.

Participants emphasised on the need to ensure proper training and sensitisation of persons being appointed to such a role with their responsibilities as well as accountability clearly defined. The “facilitator” role seems to be a new element and this role could clash with the traditional responsibilities of an “inspector”. Worries about a return to the unfairness of a certain type of “Inspector Raj” were also voiced.

Wages and Remuneration: Clarity Required

While aspects such as recognition of “fixed term employees” and setting up of a worker reskilling fund were praised, the potential need for restructuring of the remuneration in view of the new definition of “wages” was called unnecessary.

The consensus seemed to be that greater clarity was required on matters such as distinction between workers and employees, payment of overtime (especially in a post-COVID remote working scenario) and the relationship between organisations and the gig economy, wherein workers seem to have merely been recognised for social security schemes but not as persons with whom the concerned organisation has an employer-employee relationship.

Industry representatives unanimously agreed that although things like overtime payments and gratuity will drive up costs, recognising and safeguarding the rights of employees, even those of a “fixed term” nature, is a step in the right direction. However, they maintained that more challenges may surface once the implementation process begins. Participants agreed that the two key parameters – cost to employers and take-home salary for employees – must remain untouched and not be negatively impacted in this process in order to ensure a smooth transition.

Other Challenges

A few other possible hurdles that could arise, according to participants, were

- No detailed provision to deal with employers’ obligations in pandemic-specific situations;
- Concerns that merely increasing the threshold for application of permission requirement for retrenchment to 300 workers is not enough of a change;

- Concerns regarding recognition and dealing with unions in sectors such as IT which have not had much experience on this front;
- No specific provisions for social security of employees in small startups, MSMEs;
- No specific steps to help increase job opportunities.

The Silver Lining...

Despite all the above-mentioned concerns and challenges foreseen, industry representatives who participated in the roundtable agreed that things will likely be much clearer 6-8 months after the rollout of these codes, once the on-ground realities are acknowledged and any issues addressed.

Moreover, with government sources saying that further clarifications from the government itself on the implementation and other aspects are likely to be released in the coming months, the participants concluded that although at the moment, the implementation seemed to be fragmented and disconnected from ground realities, with time, a few creases could perhaps be ironed out.

Khaitan & Co's Employment, Labour & Benefits (ELB) Practice

Khaitan's Employment, Labour & Benefits practice helps employers meet the myriad challenges posed by the modern Indian workplace with tenets of customary and regional practices across states in India. We are experienced in advising on all forms of employment and labour law matters; our expertise also lies in advising on complicated labour issues including trade union relations strategy and staff, and executive communications.

Our lawyers provide commercially oriented and practical advice on areas and events around business sale and acquisitions including employee transition and re-assignment, change of business ownership or management, employee benefits including equity-based incentive schemes and retention payouts, employment agreements and policies, workplace diversity and discrimination issues. We routinely conduct staff training on workplace ethics, workplace harassment and statutory compliance issues. We also work closely with our clients on CXO recruitment, exits and separation agreements, secondment and consultancy agreements, employee disputes related to wages, overtime and social security, disciplinary inquiries and investigations and situations arising out of complaints of sexual harassment at workplace. We also specialise in contract labour and alternate employment arrangements, whistle blower complaints, employee grievance redressal, workforce restructuring, staff re-classification and mobility, workplace health and safety issues, substantive immigration laws advisory as well as contributions towards advocacy efforts related to changes in legal regime.

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