



ELB E-BULLETIN

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Welcome to the eighth edition of the e-Bulletin (Volume VI) brought to you by the Employment, Labour and Benefits (ELB) practice group of Khaitan & Co. This e-Bulletin covers regulatory developments (including those relating to the upcoming labour codes), case law updates and insights into industry practices that impact businesses from a sector agnostic standpoint.

Labour codes: story so far

In this section, we help you in understanding the developments that have taken thus far on the implementation of the 4 labour codes on wages, social security, industrial relations, and occupational safety, health and working conditions, which received the Presidential assent between the years 2019 and 2020.

Broadly speaking, the labour codes, which aim to consolidate and consequently replace 29 Central labour laws, are yet to be brought into force, barring provisions relating to



employees'
pension fund



Central Advisory Board
on minimum wages



identification of workers
and beneficiaries through
Aadhaar number for social
security benefits

Moreover, even if the codes are fully brought into effect, the same would require issuance of rules, schemes, and notifications of the relevant governments so as to have a comprehensive revised compliance regime.

Under the labour codes, the 'appropriate government' for an establishment can be the Central Government or the state government, depending on the nature of its operations or the existence of multi-state operations. Such appropriate government has the power to inter alia issue rules detailing some of the substantive aspects broadly set out under the codes and also prescribing procedural compliances such as filings, maintenance of registers, etc. In the past year, several key industrialised states such as Haryana, Delhi, Maharashtra, Gujarat, Andhra Pradesh, Telangana, Tamil Nadu, and Karnataka released draft rules under some or all of the labour codes for public consultation. Among the industrialised states, notably, West Bengal is yet to release their draft rules under any of the codes.

The Ministry of Labour and Employment, as a way ahead, has planned to conduct training workshops for state government labour officials in the coming months. These workshops are proposed to

facilitate the nationwide rollout of the new labour codes, ensuring readiness and addressing potential legal challenges. Additionally, the Central Government has urged the state of West Bengal to expedite the drafting of rules under the four labour codes, highlighting the benefits for all societal sections, including women and migrant workers.

Recently, the Union Government has sought the opinion of the Ministry of Law and Justice regarding the enforcement of the proposed labour codes without unanimous consent from all states, particularly in light of West Bengal's hesitation to adopt the reforms. The potential for legal challenges exists if the codes are enforced without complete state consensus.

Regulatory Updates

In this section, we bring to your attention, important regulatory developments in the form of notifications, orders, bills, amendments, etc. witnessed in the past one month in the context of employment and labour laws.

West Bengal launched the programme 'Rattirer Shaathi' for the safety of women working on night shifts

By way of a notification dated 19 August 2024, the Department of Health and Family Welfare, West Bengal, has introduced a 'Rattirer Shaathi' programme emphasizing upon the safety of women employees working on night shifts in government hospitals, colleges, hostels, and other institutions where women are employed during night-time, and has prescribed certain conditions to ensure such safety of the women workers. As per the notification, these institutions are required to ensure that

(i)

separate designated restrooms with attached toilets are set up

(ii)

female volunteers are present throughout the night shifts

(iii)

'safe zones' are set up with full CCTV coverage

(iv)

regular security checks and breathalyzer tests are undertaken at hospitals;

(v)

internal committees as prescribed under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are formulated at eligible institutions

(vi)

the work schedules at the institutions are formulated such that women employees work in pairs, during their night shifts.

Employees' Provident Fund Organization (EPFO) has formulated Standard Operation Procedure (SOP) for joint declaration for member profile updation

As per the notification dated 31 July 2024, the EPFO has formulated an SOP for joint declarations related to member profile updates, thereby superseding all previously issued SOPs in this regard. The purpose of this SOP is to minimize incompleteness and discrepancies arising from the paper-based processes and member transitions between establishments. These discrepancies often led to data mismatches in key parameters inter alia such as name, gender, date of birth and father's name, etc. Accordingly, this SOP has



been formulated to ensure the accuracy of member profiles, reduce the rejection rate of joint declarations and minimize the risk of fraud due to changes in Universal Account Number (UAN) identity.

The SOP outlines the process of submitting a joint declaration application by the member, the employer's approval of such applications, receipt of the application by the regional office, and the subsequent approval or rejection by the competent authority within a specified timeframe. Additionally, it provides a list of required documents for changes in various parameters when the member opts for modifications through the joint declaration application, along with the timeline for completing the joint declaration request.

EPFO issued SOP for transaction-less and inoperative accounts registered with EPFO

Through a notification dated 2 August 2024, EPFO has introduced an SOP aimed at tightening controls over inactive and inoperative accounts to prevent fraud and unauthorized withdrawals. The SOP prescribes stricter verification processes for accounts with no transactions for an extended period and mandates the generation of UANs for dormant accounts along with requiring biometric verification for those accounts without UANs. The SOP also establishes a systematic approval process for unblocking requests, with higher-value claims requiring more stringent scrutiny. Special cases, such as claims by nominees or legal heirs of deceased members, will necessitate additional documentation and verification. To ensure compliance, the EPFO is developing dashboards to monitor UAN generation, KYC seeding, unblocking requests and claim settlements, with regular audits mandated at various levels.

Case Updates

In this section, we share important judicial decisions rendered in the past one month from an employment and labour law standpoint.

Termination of employee cannot be applied retrospectively: Punjab and Haryana High Court

In the case of *Bahadur Singh v PRTC and Others* [Civil Writ Petition Number 15609 of 1999 (Own Motion)], the Punjab and Haryana High Court held that the termination of employment of an employee cannot be applied retrospectively to an earlier date and rather such termination can take effect from the date of order of termination with immediate effect or a future date specified in the order.

The decision arose from a petition filed by the petitioner, working as a bus driver with PRTC, Patiala, who was retired by a termination order in 1995 with effect from 1994 on account of an incorrect assumption of his date of birth to be in December 1936, as opposed to the date stated in the birth certificate of the petitioner which clarified such date to be in May 1938. The court while setting aside the order of dismissal of the petitioner held that the rights and benefits accrued by an employee during their service should be protected and the employer cannot deprive employees of such benefits by terminating their services retrospectively.



Unfair to deny benefits of employment to a wrongfully terminated employee: Jharkhand High Court

In the case of *Umesh Kumar Singh v the State of Jharkhand and Others* [Writ Petition Number 6054 of 2022], the Jharkhand High Court held that where an employee was terminated wrongfully or illegally, it is unfair to deny the benefits of employment to such an employee which he would have generally received if his services had not been terminated.

The petition was filed for the regularization of services of the employee working as a clerk in JKRR High School, Dhanbad, whose services were allegedly illegally terminated on 23 July 1992 on the ground that the sanction for his appointment was not obtained from the competent authority. Upon a challenge of such illegal termination before the Jharkhand High Court, at the first instance, the court ruled in favour of the petitioner and ordered for his reinstatement to the original post in a regular vacancy. The court also clarified that such reinstatement must be accompanied with payment of retiral benefits by considering his tenure of his services with effect only from 30 November 2009, and thereby not including the period of illegal termination i.e., from 23 July 1992 to 30 November 2009. However, aggrieved by the first order of the court on account of not including the period of illegal termination for computation of retiral benefits, the petitioner filed the extant petition at the court, seeking grant of all consequential benefits for the period of illegal termination, as well.

The court, in the second instance, held that the termination of the petitioner was not in accordance with the law and therefore, it was unfair on the part of employer to deny such benefits to the employee for the period of his illegal termination and directed the employer to pay the employee all the consequential benefits including retiral benefits for the said period of illegal termination.

Occupier having ultimate control over the affairs of the company is not personally liable to pay Employees State Insurance Corporation (ESIC) dues: Bombay High Court

In the case of *the ESIC v Dinendra Ratansi and Others* [First Appeal Number 731 of 1992], the Bombay High Court held that the liability to pay the dues levied by the ESIC is of the company, and the occupier having ultimate control over the affairs of the company is not personally liable to pay such dues.

The appeal was filed against the decision of the ESIC court that set aside the order passed by the ESIC directing the recovery of the employees' state insurance (ESI) dues personally from the occupier of the company. The court held that such ESI dues are of the company and should be recovered directly from the company or the assets of the company and therefore, the occupier having ultimate control over the affairs of the company cannot be made personally liable to pay such dues.



Damages under the Employee's Provident Funds and Miscellaneous Provisions, 1952 Act (EPF Act) during the corporate insolvency resolution process (CIRP) are classified as government dues: National Company Law Tribunal (NCLT)

In the case of Regional Provident Fund Commissioner - II (Legal), Regional Office, Pune - II v Milind B Kasodekar [Company Appeal (Insolvency and Bankruptcy) / 35 / MB / C-III / 2023 in Civil Petition (Insolvency and Bankruptcy) Number 3806 of 2018], the NCLT Mumbai ruled that during the CIRP process, damages imposed under Section 14B of the EPF Act (damages imposed on failure to pay required contributions under the EPF Act), are classified as government dues. Consequently, these dues are to be paid according to the order of priority for the distribution of proceeds from the sale of liquidation assets of a corporate debtor, as outlined in Section 53 of the Insolvency and Bankruptcy Code, 2016 (IBC).

The appeal was initiated following an order issued by the EPFO against Asmi Metal Products Private Limited for delay in depositing employees' provident fund (EPF) contributions which subsequently imposed damages and interest of a total of INR 18,12,971, of which INR 12,20,976 was recovered by the EPFO. The NCLT admitted the company into CIRP and subsequently ordered its liquidation, appointing a liquidator (Liquidator). The appellant argued that EPF dues, being worker assets, should be excluded from the liquidation estate and given priority over other debts, in accordance with the EPF Act and the IBC. However, the Liquidator contended that no priority could be granted to EPF dues because the claim of the secured creditor exceeded the available liquidation assets.

The central issue before the NCLT was whether the damages amounting to INR 5,91,996 under Section 14B of the EPF Act, should be prioritized for payment to the EPFO over secured financial creditors. The appellant argued for the exclusion of these dues from the liquidation estate under Section 36(4)(a) (iii) of the IBC (sums due to any workman or employee from the provident fund, pension fund and gratuity fund), advocating for their payment before other creditors. However, the NCLT, held that damages under Section 14B are government dues rather than employee dues and must be paid according to the priority established under Section 53 of the IBC, which does not allow these dues to be prioritized over secured creditors.

Definition of 'employee' under Section 2(9) of the Employees State Insurance Act, 1948 (ESI Act) includes distant categories of employees engaged in primary as well as cognate activities: Karnataka High Court

In the case of the Employees State Insurance Corporation v Bala Tourist Service [Civil Miscellaneous Appeal Number 1813, 2020 and 2042 of 2021], the Karnataka High Court held that the definition of 'employee' under Section 2(9) of the ESI Act is given wide interpretation to cover distant categories of employees employed in primary work as well as cognate activities i.e., doing work which is ancillary, incidental or has relevance to or link with the object of the establishment.



The respondent was engaged in the business of operating tourist vehicles on hire to various customers in Chennai and had engaged owner-cum-drivers to attend its business and operation of tourist vehicles. The ESIC after examining the accounts of the respondent passed an order fixing the liability of the deposit of ESI contributions in respect of the owner-cum drivers, on the respondent. The said order of the ESIC was challenged before the ESI court and, the ESI court held that the owner-cum-drivers were not rendering any service to the respondent, but to the customers of the respondent and further, the respondent did not exercise control over the owner-cum-drivers as they had the liberty to refuse work if not willing to. Therefore, the ESI court ordered in favour of the respondent in the present case, stating that they are not liable to pay any contributions as ordered by the ESIC, which led to the appeal of the ESIC.

The court held that the respondent was engaging owner-cum-drivers full time, who did not have the independence to fix charges for customers and were paid as per the directions of the respondent. Further, the court emphasised that the respondent without utilizing the services of the owner-cum-drivers cannot run their business. Therefore, the court held that even if owners-cum-drivers have their own cars and maintain expenses on their own, they are dependent and are continuously engaged by the respondent as their regular employees. Further, the court stated that the owner-cum-drivers were not accorded the status of a regular employees as per their mutual agreement, yet they are entitled for protection under the ESI Act as it is a social welfare legislation. Hence, the court classified the relationship between the respondent and owner-cum-drivers as employer-employee and directed the respondent to make contributions as required under the ESI Act in respect of such owner-cum-drivers.

Industry Insights

In this section, we delve into interesting human resources related practices and/or initiatives as well as industry trends across various sectors in the past one month.

Evolving employee rewards: Embracing digitalization for Gen Z in Indian companies

With the entry of the **Gen Z** workforce into the market, Indian companies are transforming their approach to employee rewards and recognition by introducing digitalized rewards, thereby moving away from conventional methods. Companies are developing innovative strategies to cater to the younger generation's preference for social media engagement. Digital badges, which recognise employee achievements and talents, have become particularly popular within organizations and are designed to be shared on social media platforms. Additionally, gamification is gaining traction as an effective method to facilitate employee recognition and a tool to promote team bonding.



We hope the e-Bulletin enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the employment and labour law and practice landscape.

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