ELB E-BULLETIN

VOL 1 | ISSUE 4

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Welcome to the fourth edition of the E-Bulletin (Volume I) brought to you by the Employment, Labour and Benefits practice group of Khaitan & Co. This E-Bulletin covers regulatory developments, case law updates and insights into industry practices that would impact businesses from a sector agnostic standpoint.

REGULATORY UPDATES

Factories to reserve at least 75% of employment for local candidates – Andhra Pradesh notifies the Andhra Pradesh Employment of Local Candidates in the Industries/Factories Rules, 2019

On 14 October 2019, the Government of Andhra Pradesh notified the Andhra Pradesh Employment of Local Candidates in the Industries / Factories Rules, 2019 (**AP Local Candidates Rules**) framed under the Andhra Pradesh Employment of Local Candidates in the Industries / Factories Act, 2019 (**AP Local Candidates Act**). The AP Local Candidates Rules have come into force with effect from 14 October 2019 (date of publication in the official gazette). The government has made it mandatory for existing and upcoming factories, industries, joint ventures and public-private partnership projects (**Covered Entities**) to reserve 75% of employment for local candidates. The term 'local candidate' has been defined to mean a candidate domiciled in Andhra Pradesh for more than 10 years, either himself / herself or through his / her family members.

In case of a new Covered Entity, every employer / occupier / owner / authorised person shall, at the time of applying for statutory permissions and clearances, intimate the manpower and skill requirements to the nodal agency. Upon receipt of the information, the nodal agency shall assess the availability of skilled manpower in the desired number. Where there is a shortfall vis-à-vis the requirement, a training and skill upgradation plan shall be prepared by the nodal agency in consultation with the employer / occupier / owner /

authorised person. The entity will have a 3 year window to train and engage local candidates in 'active collaboration' with the government (i.e. technical collaboration through initiatives such as establishment of skill development centres).

In case of an existing Covered Entity, the employer / occupier / owner / authorised person would be required to furnish details of its existing manpower, number of local candidates employed, shortfall in the manpower along with a proposed action plan to ensure compliance with the AP Local Candidates Act to the nodal agency within 30 days from the date of commencement of the AP Local Candidates Rules. The existing Covered Entities would be required to comply with the 75% local employment criterion within 3 years of the commencement of the AP Local Candidates Rules. For a complete assessment of the AP Local Candidates Act and the rules, please see our ERGO on this update.

Delhi gets the Supreme Court's nod for the mega hike in minimum wage rates

On 22 October 2019, the Government of New Delhi issued a notification revising the minimum rate of wages for all scheduled employments. The revised rates, fixed on the basis of the averages price of food and clothing, cost of housing, light and fuel, children education, medical treatment, minimum recreation and social obligation, would be as follows:

Schedule of employment	Category of worker	Minimum rate of wages per month (INR)	Minimum rate of wages per day (INR)
All scheduled employments	Unskilled	14,842	571
	Semi-skilled	16,341	629
	Skilled	17,991	692
	Clerical and supervisory staff		
	Non matriculate	16,341	629
	Matriculate but not graduate	17,991	692
	Graduate and above	19,572	753

It may be noted that the Supreme Court of India (**Supreme Court**) had, through an order dated 31 October 2018, directed the Labour Department, Government of Delhi, to start over the exercise of fixing the minimum rates of wages for scheduled employments as the rates were challenged by several employers' associations for being excessive. In terms of the order, the exercise was undertaken, and the rates were submitted before the Supreme Court. On 14 October 2019, the Supreme Court allowed the draft notification to reach its "logical conclusion", albeit giving an option to any aggrieved person to take recourse to the available legal remedies.

Payment of Wages Act, 1936 to apply to shops and commercial establishments in Karnataka

By way of a notification dated 17 October 2019, the Government of Karnataka has extended the application of the Payment of Wages Act, 1936 to establishments covered under the Karnataka Shops and Commercial Establishments Act, 1961 (**Karnataka S&E Act**). The notification has been issued under Section 21 of the Karnataka S&E Act, which provides that the state government may, by notification, direct that the Payment of Wages Act, 1936 shall apply to all or any class of employees and their employers, in establishments to which the Karnataka S&E Act applies.

This means that now, commercial establishments will be required to ensure certain additional compliances such as those relating to timely payment of wages (both during the term of employment and post termination of employment) and permissible deductions from the wages of the employees.

CASE UPDATES

Scope of enquiry by a labour court under Section 33(2)(b) of the Industrial Disputes Act, 1947 – Supreme Court explains in *John D'Souza v Karnataka State Road Transport Corporation*

In the case of *John D'souza v Karnataka State Road Transport Corporation [Civil Appeal Number 8042 of 2019]*, the Supreme Court ruled on the scope of inquiry to be conducted by a labour court / industrial tribunal while granting or refusing an application for discharge / dismissal of a workman made under Section 33(2)(b) of the Industrial Disputes Act, 1947 (**ID Act**), i.e. during pendency of proceedings in respect of an industrial dispute.

In this case, the respondent had dismissed the appellant on account of his unauthorized absence, pursuant to a domestic inquiry conducted into the same. The question before the Supreme Court was whether the Labour Court could permit the appellant to adduce additional evidence not produced in the domestic inquiry and invalidate the termination based on such evidence.

The Supreme Court categorically held that the proceedings under Section 33(2)(b) of the ID Act are summary in nature and observed that the scope of inquiry under the said provision is to be divided into 2 phases. In the first phase, the labour court / industrial tribunal would only examine the record of the domestic inquiry conducted by the employer to determine whether a *prima facie* case exists against the workman or not. If the inquiry is found to be proper, bona fide, and without any unfair labour practice or victimization of the workman, the labour court / industrial tribunal would grant approval of dismissal based on record of the inquiry itself. Only in a situation wherein the inquiry is found to have violated the principles of natural justice or suffers from any other defects, the labour court / industrial tribunal may permit parties to adduce additional evidence in order to decide whether the dismissal was justified or not. The Supreme Court also held that in the process of formation of a *prima facie* view, the labour court / industrial tribunal cannot dwell upon the proportionality of the punishment.

Further, the Supreme Court clarified that the scope of inquiry under Section 33(2)(b) is distinct from that under Section 10(i)(c) and 10(i)(d) of the ID Act, wherein the labour Court

/ industrial tribunal has the jurisdiction to adjudicate an industrial dispute. Therefore, an order of approval under Section 33(2)(b) does not prejudice the right of the workman to subsequently raise an industrial dispute and such an order has no binding effect on proceedings under Section 10, which shall be decided independently based on the evidence adduced therein.

Criminal liability of directors under the Bombay S&E Act – Bombay High Court clarifies the position in *Om Prakash Bhatt, Hindustan Unilever Limited and Others v State of Maharashtra*

In the case of *Om Prakash Bhatt, Hindustan Unilever Limited and Others v State of Maharashtra [Criminal Writ Petition Number 4069 of 2016]*, the Bombay High Court explained the legal position as regards criminal liability of directors under the erstwhile Bombay Shops and Establishments Act, 1948 (**Bombay S&E Act**).

Unlike other statutes, the Bombay S&E Act provides that for the purpose of the statute, the employer (in the case of a company) would be 'any one of the directors', unless the company has given a notice to the inspector that it has nominated a resident director to be the employer of the establishment. It is on this basis that the inspector proceeded against all the directors of Hindustan Unilever Limited including its independent directors. However, the Bombay High Court referred to another provision of the Bombay S&E Act (Section 2(7)) which defines 'employer' to mean a person *owning or having ultimate control over the affairs of an establishment*. The court attempted to resolve the anomaly between the provisions of the Bombay S&E Act by taking recourse to the judicial precedents on the subject. Accordingly, it held that in case of offences committed by a company, not every director but only the person having the ultimate responsibility and control over the affairs would be punishable (*normally, courts deem the managing director to be qualifying for the description*). For imposing any liability on a director, there must be a specific allegation in the complaint attributing a specific role played by him / her in the transaction and it must contain a clear and unambiguous allegation as to how the director is in-charge of and responsible for the conduct of the business of the company. In the absence of any such averment, the complaint cannot be entertained. Since there was no such averment in the instant case, the court held that the petitioners were not liable for prosecution under the Bombay S&E Act.

'Loss of confidence' in the employee as a ground of termination of services – Delhi High Court explains the concept in *Delhi State Civil Supply Corporation Limited v Badan Singh*

Termination of the services of an employee on the basis of loss of confidence is a special case of termination which is effected because an employee, holding a position of trust or confidence, breaches the same, and the suspicion of the employer is so well-founded that it may not like to investigate or take the risk of continuing with a dubious employee.

It is this concept of loss of confidence which was deliberated upon by the Delhi High Court in the case of *Delhi State Civil Supply Corporation Limited v Badan Singh [Writ Petition (Civil) 1632/2010]*. In this case, the petitioner challenged the award of a labour court that had ordered for reinstatement of an employee with 40% back wages. The petitioner argued that the termination was not invalid as the same was made on a well-recognised ground of loss of confidence in the employee. The court referred to a few cases to hold that

reinstatement cannot be ordered when an employee's services are terminated on the ground of loss of confidence because it would be neither desirable nor expedient to continue the employee in service when the management has lost faith in the employee and the relationship between the employer and the employee has strained. At best, compensation can be awarded depending on the facts and circumstances of the case.

As mentioned above, any termination on the ground of loss of confidence ought to be based on a reasonable and well-founded suspicion that the continuation of the services of the employee would be detrimental to the interests of the company. If that is the case, the employer is not required to conduct a disciplinary inquiry against the employee and may proceed to terminate his / her employment.

Pilot is a 'workman' under the ID Act – Delhi High Court takes the view in *Rama Krishna Sareen and Others v Pawan Hans Helicopters Limited*

In *Rama Krishna Sareen and others v Pawan Hans Helicopters Limited [Writ Petition (Civil) 4041/2014]*, the Delhi High Court decided the question of whether a pilot falls within the ambit of the definition of 'workman' under the ID Act.

In this case, the petitioner, employed as a pilot with the respondent, entered into an accident on a mission, pursuant to which he was required to undergo a refresher training and a test. On account of unsatisfactory performance in the test, the respondent asked him to undergo a retest which the petitioner refused to appear for. On the basis of such willful disobedience of an official order, the petitioner's past performance and the flying needs of the respondent, the services of the petitioner were terminated. The petitioner raised an industrial dispute challenging the said termination, wherein the question whether he is a 'workman' under the ID Act was raised.

In interpreting the definition of 'workman' under Section 2(s) of the ID Act, the court observed that the petitioner was employed to do skilled work for hire, and thus fell within the main part of the definition. With respect to the exclusion of persons employed in a managerial / administrative / supervisory capacity, the court referred to previous decisions and observed that managerial / administrative / supervisory functions require a person to control the work of others and a pilot who has assistants to help him in performing his flying duties and who also incidentally supervises the work of such assistants cannot be said to working in a supervisory capacity. The court opined that a pilot, in driving an aircraft, performs highly skilled technical work. Further, the onus was on the respondent to prove by leading evidence that the petitioner was engaged in a managerial / administrative / supervisory capacity and bring him within the ambit of the exception, which it failed to do. The Delhi High Court thus held the petitioner to be a 'workman' under the ID Act. On merits, however, the court found the termination of the employment of the petitioner to be justified and thus refused the petitioner's claim for reinstatement.

No absorption of the worker of an unlicensed contractor – Karnataka High Court reiterates in *HV Subramani v Management, Ram Flex India Private Limited*

In *HV Subramani v Management, Ram Flex India Private Limited [2019 LLR 1093]*, the Karnataka High Court delved into the question of whether a principal employer is required to absorb contract labour appointed through a contractor as its regular employees, by

reason of the contractor not having obtained a valid license under Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970 (**CLRA**).

In this case, the contention of the appellant was that he was directly employed by the respondent whereas the respondent refuted it by arguing that he had been engaged through a contractor who was impleaded as the second respondent. On the basis of the evidence adduced, the court noted that the appellant had failed to prove that he was directly employed by the respondent and took into account other evidence proving that the muster roll, wage register, employees' provident fund contributions and pay slips of the appellant were maintained and issued by the contractor.

In this factual background, the court referred to previous decisions and held that mere failure to obtain a valid license by the contractor or even the absence of a legitimate agreement between the principal employer and the contractor would not by itself create an employer-employee relationship between the principal employer and the contract worker. The court observed that under the provisions of the CLRA, there is no compulsion on the principal employer to engage workers only through licensed contractors, and thus, the scope of provisions of the CLRA cannot be enlarged to make the principal employer responsible for a contractor's failure to obtain a license. Therefore, the court held that the respondent was not liable to absorb the appellant as a regular employee and rejected the appellant's claim for reinstatement and back wages.

No continuance of maternity benefits after expiry of the employment contract: Delhi High Court rules in *Dr Kavita Yadav v Secretary, Ministry of Health and Family Welfare Department*

In *Dr Kavita Yadav v Secretary, Ministry of Health and Family Welfare Department [Writ Petition (Civil) Number 8884/2019]*, the Delhi High Court dealt with the petition filed by a woman employee engaged on a fixed-term contract basis who sought directions to the respondent to grant her maternity benefits. The petitioner was appointed by the respondent for a period of 1 year which could be extended further up to a maximum period of 3 years until 11 June 2017. On 24 May 2017, the petitioner applied for maternity leave starting from 1 June 2017. However, the respondents communicated to the petitioner that as per the terms and conditions of the offer of appointment, her contract would end on 11 June 2017, which could not be extended further; accordingly, the petitioner was entitled to maternity leave only up to 11 June 2017.

Before the Delhi High Court, the petitioner argued that prior to expiry of her employment contract, she met all the conditions required for claiming maternity benefit. Therefore, even though the expected date of delivery was after the termination of her employment, she should be entitled to complete maternity benefit. This contention did not find favour with the Delhi High Court. It was observed that as per the Maternity Benefit Act, 1961, every woman is entitled to the payment of maternity benefit at the rate of average daily wage *for the period of her actual absence* – this period of actual absence could only be construed as absence during the period her employment with the company subsists. Therefore, where the outer limit of the employee's contract is stipulated in the appointment letter and the same has not been waived by the employer, the employee cannot insist that her contract be continued beyond the said period so as to avail the maternity benefit for the period after the expiry of the contractual period.

INDUSTRY INSIGHTS

Survey indicates employers' readiness for the gig workforce

As per the 'Gig Readiness Survey of Corporate India' conducted by Noble House Consulting India Private Limited, more than 50% of employers that were surveyed absorbed gig workers ranging from 5-20% of the workforce into their organisations in the last 2 years. Such workers were engaged particularly for the departments of marketing, technology and the human resources. While around 30% of the employers employed gig workers through third-party agencies, nearly 25% of employers used online gig platforms to engage workers.

According to the survey, more than half of the employers favour flexible work arrangements such as work-from-home policies and consider the work location of employees to be irrelevant, so long as work is completed. Further, some employers also expressed their willingness to extend benefits such as partial medical coverage and training to gig workers. This is particularly relevant given that the draft Code on Social Security, 2019 circulated by the Ministry of Labour and Employment on 17 September 2019 seeks to introduce a provision for the Central Government to formulate suitable social security schemes such as life and disability covers, health and maternity benefits, and old age protection specifically for gig workers and platform workers.

Companies take innovative measures towards improving employees' well-being

As per a recent report, surveys conducted into employees' well-being indicated that nearly 40% of employees working in Indian companies suffer from sleep disorders emanating from job related stress and excessive burden of work. To address such problems, several companies such as GoWork and Razorpay have made the provision of nap rooms akin to Japanese capsule hotels at their workplaces. Further, towards improving mental health, companies such as OYO and Zomato have introduced free counselling services, behavioural therapy programmes and meditation classes for their employees. Zomato also carries out a 'happiness survey' every 6 months that is aimed at assessing their employees' mental health.

In respect of financial well-being of employees, a recent report indicates that more than 60% of employers are taking measures geared towards improving financial well-being of their employees. Companies such as Myntra, NoBroker and BigBasket have introduced financial literacy programmes and engaged external experts in asset and wealth management to assist and educate employees with regards to their financial planning and investment options.

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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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