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CONSOLIDATION OR REFORM, YOU DECIDE – GOVERNMENT INTRODUCES CODE ON SOCIAL SECURITY, 2019 IN PARLIAMENT

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On 11 December 2019, the Government of India introduced the Code on Social Security, 2019 (Code) in the Lok Sabha. The Code proposes to consolidate the law on social security in India and replace the following extant statutes:

a. Employee's Compensation Act, 1923 (Employee's Compensation Act);

b. Employees' State Insurance Act, 1948 (ESI Act);

c. Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act);

d. Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (Employment Exchanges Act);

e. Maternity Benefit Act, 1961 (Maternity Benefit Act);

f. Payment of Gratuity Act, 1972 (Gratuity Act);

g. Cine-Workers Welfare Fund Act, 1981;

h. Building and Other Construction Workers' Welfare Cess Act, 1996;

i. Unorganised Workers Social Security Act, 2008 (Unorganised Workers Act).

The Code has had its own long journey – from its inception as the draft Labour Code on Social Security and Welfare 2017 to the present day, the Code met with criticism from several quarters – while some thought that the proposed law did not do enough to overhaul the existing regime in favour of the workers, others criticized it for being too onerous to comply with.

Set out below are the salient features of the Code:

- <u>Definition of 'wages'</u>

  The Code aligns the definition of 'wages' with the one under the Code on Wages, 2019. As per the Code, 'wages' shall mean all remuneration whether by way of salaries, allowances or otherwise, which would, if the terms of employment (express or implied) were fulfilled, be payable to a person employed in respect of his / her employment, and includes basic pay, dearness allowance and retaining allowance. The definition has now consolidated the exclusions from the definition of 'wages'.

  A significant change in the definition of 'wages' is the inclusion of a proviso which essentially provides that if the excluded components (other than retirement benefits such as gratuity) exceed 50% of all remuneration paid, then the amount in

excess of this 50% will be deemed to be 'wages' so that the wage portion remains at the 50% level.

- Explanation to the definition of 'factory'

The definition of 'factory' clarifies that mere fact that an electronic data processing unit or a computer unit is installed in any premises or part thereof shall not make the establishment a factory. This clarification probably comes in the wake of the judgment of the Bombay High Court in *Assistant Director, ESIC v Western Outdoor Interactive Private Limited [First Appeal Number 143 of 2012]*, wherein it was held that development, programming and application of software would amount to a 'manufacturing process' within the meaning of the ESI Act.

- Express provisions for fixed-term employment contract

Previously, fixed-term employment arrangements were largely contractually governed. However, by a notification dated 16 March 2018, the Ministry of Labour and Employment notified the Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 for the purpose of amending the Industrial Employment (Standing Orders) Central Rules, 1946 to allow fixed-term employment across all sectors. The notification also provided that as far as fixed-term 'workmen' (*i.e. workmen covered under the Industrial Disputes Act, 1947*) are concerned, their hours of work, wages, allowances and other benefits shall not be less than that of a permanent workman, and that they shall be eligible for all statutory benefits as are available to a permanent workman on a proportionate basis, even if their period of employment does not extend to the qualifying period of employment required in the statute.

Taking cue from the above-mentioned notification, the Code provides that fixed-term employees shall be entitled to the same benefits as the permanent employees, albeit proportionately. This is important from payment of gratuity standpoint as the fixed-term employee would be eligible to such defined benefit proportionately notwithstanding that he / she has not completed the requisite qualifying period of continuous service.

- 'Employee' to not include apprentices

Unlike the draft Code released by the Ministry of Labour and Employment earlier this year which included 'apprentices engaged under the Apprentices Act, 1961' within the ambit of 'employee', the Code clarifies such apprentices will not be considered as employees. This change could be the result of several representations made by stakeholders (including our Employment Labour and Benefits team) which argued that inclusion of apprentices would not only increase the financial burden of employers but would also digress from the intent and object of the Apprentices Act, 1961. As provided in Section 18 of the Apprentices Act, 1961 read with the recently amended Apprenticeship Rules, 1992, apprentices ought to be regarded as trainees and not workers, and the provisions of any law with respect to employees would not apply to apprentices.

- Application of provisions relating to employees' state insurance

At present, the ESI Act applies to every establishment where at least 10 (or at least 20 in Maharashtra and Chandigarh) covered employees (that is, employees earning up to INR 21,000) are employed. As regards factories, the Employees' State Insurance Corporation (ESIC) has taken the view that the ESI Act will apply, as soon as, 10 persons are employed, irrespective of whether they are covered under the statute. However, the Supreme Court of India (Supreme Court) held, in the case of *ESIC v MM Suri [(1998) 8 SCC 111]*, that when the scheme of the ESI Act is to provide certain benefits to 'employees' (as mentioned in the Preamble to the statute),

'persons' employed should only mean 'employees' who are such persons who fall within the wage ceiling. This difference in view taken by the ESIC and the Supreme Court had caused significant confusion among employers.

The Code takes care of this issue by clarifying that the chapter on employees' state insurance will apply only where there are 10 or more covered employees in the factory / establishment.

- Voluntary coverage under employees' state insurance framework

At present, the ESI Act does not provide for a voluntary coverage of employers and employees who are otherwise not covered therein. However, the Code provides that where the employer and the majority of employees have agreed that the chapter on employees' state insurance should be made applicable to the establishment, the Director General of the Corporation may apply the relevant provisions to such establishment by way of a notification to this effect.

- Provident fund contribution on 'wages'

The EPF Act provides that the employees' provident fund contribution will be calculated on basic wages, dearness allowance and retaining allowance. In February this year, the Supreme Court in *Regional Provident Fund Commissioner (II) West Bengal v Vivekananda Vidyamandir and Ors [Civil Appeal Number 6221 of 2011]* held that the allowances which are uniformly, necessarily and ordinarily payable to all employees in a particular category will also be included as part of 'basic wages'.

The Code goes a step further and provides that the employees' provident fund contribution will be calculated on the 'wages' of the employees. However, the impact of the change is likely to be limited to the employees drawing wages less than or equal to the wage ceiling to be notified by the Central Government under the Code.

- Differential rates for employees' share of provident fund contribution

In what is being considered as an important move, the Code provides that the Central Government may, by way of a notification, specify a different rate for the employees' share of provident and pension fund contribution than what is prescribed under the statute. It is anticipated that while the employer's share of contribution would continue to be 12%, the employees' share may be reduced by the Central Government, thus increasing their take home salary. However, much depends on the actual implementation of the provision.

- Payment of medical bonus

The Maternity Benefit Act, while providing for payment of medical bonus of up to INR 3,500, also stipulates that the Central Government may increase the amount of medical bonus subject to the maximum of INR 20,000. The Code, while mandating payment of medical bonus of INR 3,500, removes the upper limit of INR 20,000.

- Career centres and compulsory notification of vacancies

As opposed to 'employment exchanges' set up under the Employment Exchanges Act, the Code envisages setting up of career centres which would collect and furnish information relating not only to persons who seek to employ employees or persons who seek employment, but also to persons who seek vocational guidance or guidance to start their own ventures. Further, unlike the Employment Exchanges Act which applies to only such establishments in the private sector which employ

25 or more persons, the Code requires notification of vacancies to career centres by every establishment.

- Limitation period for inquiry and determination of dues in matters of contribution

  In a relief to employers, the Code introduces a limitation period for determination of amounts due and initiation of inquiries of 5 years from the date the alleged amount is due as regards the chapters on employees' provident fund and employees' state insurance fund. Under the current framework, there is no such limitation, allowing authorities to initiate inquiries for any duration retrospectively. Further, the Employees' Provident Fund Organisation had, through a circular bearing number LC-4(5)2017/PB/HC dated 3 July 2017, specified that the EPF Act is a special social welfare legislation and the authorities constituted therein are not courts of law - the provisions of the Limitation Act, 1963 would accordingly not apply to the EPF Act and the authorities thereunder.

- Recovery of employees' insurance fund contribution

  The Code inserts a new provision whereby if any employer fails or neglects to (a) insure an employee; or (b) pay any contribution in respect of an employee, the authority may pay the benefit to such employee and recover the benefit from the employer to the extent of the 'capitalised value of the benefit' net of any payment of principal amount, interest and damages paid by the employer.

- '*Aadhaar*', not '*adhikaar*'?

  The Code provides that an employee, worker or any other person will be required to produce his / her Aadhaar number for registering as a member or beneficiary, to avail benefits under the Code or receiving any payment as an insured person or his / her dependent.

- Provisions for 'gig workers' and 'platform workers'

  The Code has introduced the terms 'aggregator', 'gig worker' and 'platform worker'. An aggregator has been explained as a digital intermediary or a marketplace for a buyer or user of a service to connect with the seller or the service provider. The term 'gig worker' has been defined to mean a person who performs work and earns from such activities outside of the traditional employer-employee relationship. The Code does not, in this regard, clarify the expression 'outside of traditional employer-employee relationship'. The term 'platform worker' has been defined as a person engaged in an employment form where the organisation uses 'an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment.'

  Without going further into the above-mentioned work arrangements, the Code provides that the Central Government may formulate a scheme for the benefit of such workers and provide for the role of the aggregators in this regard.

- Enhanced penalties for violations

  The existing legislations proposed to be repealed by the Code prescribe varied penalties for violations. While most of the legislations provide for fine as well as imprisonment, some legislations (such as the Employee's Compensation Act) only prescribe fines. Further, the range of fines that may be imposed also varies, ranging from maximum of INR 5,000 under the Maternity Benefit Act to a maximum of INR 1,00,000 under the Employee's Compensation Act.

  The Code imposes stringent penalties in case of a contravention of any provision thereof. Further, in respect of a subsequent offence of failure to pay contributions,

charges, cess, maternity benefit, gratuity or compensation committed by an employer, the employer is punishable with a minimum imprisonment of 2 years which may extend to 5 years and also a fine of INR 3,00,000.

- Provisions for compounding of offences

  None of the existing legislations sought to be repealed by the Code provide for an option of compounding of offences. Although few state-specific amendments have introduced compounding of offences under some of the said legislations (for instance, Gujarat allows for compounding of certain offences under the Gratuity Act), an option for compounding that is applicable across states does not exist in the provisions of the Central legislations.

  The Code has introduced an option of compounding of any offence which is not punishable with imprisonment only / imprisonment and fine. Further, it may be noted that an application for compounding can be made before or after the initiation of prosecution in relation to the offence committed. Such compounding may be allowed by the officer authorised by the government in this regard, and it can be made before or after the initiation of prosecution in relation to the offence committed. However, such an opportunity for compounding is not available to an employer for the second time or thereafter within a period of 5 years from the date of either (i) commission of a similar offence which was earlier compounded; or (ii) commission of a similar offence for which such person was earlier convicted.

- Funding of schemes through corporate social responsibility fund

  Under the Unorganized Workers Act, a scheme for the benefit of unorganised workers may be funded wholly by the Central / state government, or funded partly by the Central Government and partly by the state government, or funded partly by the Central / state government and partly through contributions from beneficiaries / employers. In addition to these, the Code allows such schemes to be funded by the corporate social responsibility fund within the meaning of the Companies Act, 2013.

Comment

Certain provisions of the Code are welcome. The provision of voluntary coverage for the purpose of employees' state insurance may allow some employers to register under the employees' state insurance scheme as a matter of good practice or as part of their employee benefit measures. Similarly, the concept of career centres may, if implemented effectively on ground, boost employment and entrepreneurship in the country.

Having said so, some provisions of the Code may have an impact on employers and employees. Further, the Code presents a missed opportunity in certain respects. Some of these concerns are briefly discussed below:

- Requiring 'wages' to be at least 50% of the remuneration and making the same as the basis for calculation of the employees' provident fund and employees' insurance contributions would not only increase the financial burden on employers but also reduce the take-home salary of employees (especially those earning up to the wage ceiling), although the impact may be mitigated in the event the Central Government prescribes a lower rate of contribution for employees. A recent study on compensation and benefits in India has revealed that most employees across generations prefer a higher in-hand component in their remuneration structure on account of the rising inflation and cost of living.

- The provision of production of Aadhaar for the purpose of availing benefits under the Code may be challenged by employees. This is in view of the judgment of the

Supreme Court in *KS Puttaswamy v Union of India [Writ Petition (Civil) Number 494 of 2012]*, wherein it was held that Section 7 (*proof of Aadhaar number necessary for receipt of certain subsidies, benefits and services*) of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 cannot be applied to benefits earned by an employee on account of his / her services.

- There has been a long-standing demand for a provision that would allow employers from unconnected establishments to share crèche facilities or to outsource the same to a third party. The Code could have provided for such option to employers (especially in case of multi-storeyed buildings wherein there is a need to have shared facilities) subject to the state governments defining the responsibilities of the employer(s) and the third-party providing the crèche facility. Similarly, there could have been a provision allowing state government to examine the extent to which such facilities may be provided free of cost to the eligible employers.

- As regards workers forming part of the increasingly evolving gig economy in India, the Code could have cleared the ambiguity in respect of the relationship between gig workers and aggregation platforms which utilize their services.

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