



ELB E-BULLETIN

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01.

REGULATORY UPDATES

Maharashtra Government notifies Industrial Courts as Appellate Authority under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act)

By way of a notification in the Official Gazette dated 31 March 2021, the Industries, Energy and Labour Department, Government of Maharashtra, appointed Industrial Courts constituted under Section 10 of the Maharashtra Industrial Relations Act, 1947, as the Appellate Authority under the PoSH Act.

This development comes against the backdrop of the order of a Division Bench of the Bombay High Court in the case of *Dasharath Kallappa Bhosale v State of Maharashtra & Others [Writ Petition Number 786 of 2021]*, wherein the petitioner challenged an order passed by the Local Complaints Committee, Pune, imposing penalty on the petitioner under the PoSH Act. An appeal was preferred before the Industrial Court, Pune, which was rejected on the ground that no notification had been issued as per Rule 11 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (PoSH Rules), appointing the Industrial Court as the Appellate Authority, and therefore, the court lacked jurisdiction to try and dispose of the appeal.

Rule 11 of the PoSH Rules requires an Appellate Authority to be notified under Section 2(a) of the Industrial Employment (Standing Orders) Act, 1946. No such notification had been issued, and the absence of a notified Appellate Authority rendered the petitioner devoid of an appropriate appellate forum. The Bombay High Court granted a stay on the operation of the impugned order dated 3 December 2020 and directed the Assistant Government Pleader to file an affidavit addressed to the concerned officer to clarify whether a notification had been issued to notify the Appellate Authority as stipulated by law, and if not, the time frame within which the notification would be issued.

In response to the same, the Government of Maharashtra ultimately appointed 20 Industrial Courts for the respective specified areas to exercise the functions of an Appellate Authority under the PoSH Act in respect of industrial establishments in relation to which the State Government is the appropriate government.

Tamil Nadu notifies amendments to the Tamil Nadu Factories Rules, 1950

By way of a notification in the Official Gazette dated 24 March 2021, the Government of Tamil Nadu issued certain amendments to the Tamil Nadu Factories Rules, 1950 (Rules).

As per the Rules, the manager of the factory is required to maintain a muster roll of all the workers employed in the factory, and entries are required to be made at the commencement of each period of work. While the extant regime stipulated that if the daily attendance is noted in the register of adult workers, or the particulars required under the rule are noted in any other register, a separate muster roll need not be maintained, the amendment has proceeded to set out a more detailed approach. The register of adult workers and young persons as set out in Form No. 12, the register of leave with wages as set out in Form No. 15, and the muster roll and register of compensatory holidays as set out in Form No. 25 are now to be considered to serve the purposes of the list of registers and muster roll as specified under the amended Rule 103(3).

The amendment has revamped the register of adult workers and young persons (Form No. 12) to include additional particulars such as the worker's Aadhaar number, Universal Account Number, ESI Number, date when the worker was made permanent in the organisation, etc. The register of leave with wages (Form No. 15) has been classified into two parts. The muster roll and register of compensatory holidays (Form No. 25) has been amended *inter alia* to include daily hours of work including overtime.



Uttar Pradesh announces a 28-day paid leave for employees who are quarantined as suspected or confirmed COVID-19 patients

By way of a notification, the Government of Uttar Pradesh announced that employees or workmen who are quarantined as suspected or confirmed COVID-19 patients will be entitled to a 28-day paid leave subject to submission of a medical

certificate to their employer or authorised person at the time of joining duty. Further, employees of commercial establishments and factories which have temporarily been shut on account of the District Magistrate's order are required to be paid wages by their employer for such period of closure. It is to be noted that we are yet to locate an official copy of the notification as on the date of preparation of this e-Bulletin and that this update is based on some [news articles](#) as well as our discussions with the state labour department officials.

02. CASE UPDATES

A Managing Director is an employee under the Employees' State Insurance Act, 1948 (ESI Act) - Kerala High Court clarifies in *The Regional Director, ESI Corporation and Others v National Agencies (Cochin) Private Limited*

In the case of *The Regional Director, ESI Corporation and Others v National Agencies (Cochin) Private Limited [Insurance Appeal Number 16 of 2015]*, the Kerala High Court clarified the judicial position on whether a Managing Director is an employee under the ESI Act.

The respondent in the present case challenged the order of the Insurance Inspector directing the respondent to pay contribution in respect of the Managing Director of the respondent, and the amount accounted towards handling charges during the period 2002-2003 to 2004-2005. The Employees' State Insurance Court allowed the application in part by affirming the assessment of the Insurance Inspector with regard to the handling charges but exempting the respondent herein from paying contribution in respect of the Managing Director. The rationale applied by the court was that, since the Managing Director is the principal employer of the respondent, he / she cannot be treated as an employee.

The substantial question of law that arose for consideration in the appeal before the Kerala High

Court was whether the Managing Director of a company falls within the definition of an 'employee' as defined under Section 2(9), or a 'principal employer' as defined under Section 2(17) of the ESI Act. The High Court referred to the judicial precedents governing the issue in question and held that a principal employer is one who is an owner or occupier of a company and has ultimate control over the affairs of a company. It was noted that there is a vast difference between a person having *ultimate* control over the affairs of a factory and a person having *immediate* or *day-to-day* control over the affairs of a factory, and the Managing Director does not fall within the ambit of the former. In view of the same, the Kerala High Court held that the Managing Director of the respondent is an employee who is liable to pay contribution. Accordingly, the appeal was allowed.

Women should not be denied employment on the grounds of night shift - Kerala High Court holds in *Treasa Josfine v State of Kerala*

In the case of *Treasa Josfine v State of Kerala [Civil Writ Petition Number 25092 of 2020]*, the Kerala High Court was faced with the question whether the provisions contained in Section 66(1)(b) of the Factories Act, 1948 would stand in the way of the second respondent considering the application of the petitioner for the post of Safety Officer.



The second respondent in the present case had published a notification, inviting applications for the post of Safety Officer. The petitioner was not considered for the post since a provision in the notification stated that only male candidates were eligible for the post. The petitioner challenged the provision in the notification and Section 66(1)(b) of the Factories Act, 1948 to be violative of the rights guaranteed under Articles 14, 15 and 16 of the Constitution of India. Meanwhile, the main contention of the respondent was that the post of Safety Officer is a round-the-clock post and Section 66(1)(b), which stipulates that women employees are prohibited from working before 6 am and beyond 7 pm, is beneficial in nature.

The High Court was of the view that the Factories Act, 1948 was enacted at a time when requiring a woman to undertake night shift in a factory was considered to be exploitative and violative of her rights. Times have changed, and women have been engaged in various professions requiring round the clock labour and have proved themselves capable of facing all challenges. Although the High Court agreed that the provisions of Section 66(1)(b) are only protective in nature, in a progressive move, it held that such protective provisions cannot stand in the way of a woman being considered for employment for which she is otherwise eligible. Accordingly, the court set aside the impugned provision in the notification and directed the second respondent to consider the application submitted by the petitioner for appointment to the post of Safety Officer, notwithstanding the provisions of Section 66(1)(b) of the Factories Act, 1948.

It is to be noted that the Occupational Safety, Health and Working Conditions Code, 2020, which is yet to be implemented, has amended the provisions relating to employment of women wherein they will be permitted, with their consent, to work before 6 am and beyond 7 pm subject to such conditions relating to safety and other aspects as may be prescribed.

The ESI Act is a beneficial piece of legislation that has to be construed in its correct perspective – Telangana High Court opines in *Balaji Grand Bazar v The Deputy Director AP Employees State Insurance Corporation*

In the case of *Balaji Grand Bazar v The Deputy Director AP Employees State Insurance Corporation* [Civil Miscellaneous Appeal Number 17 of 2007], the issue for consideration before the Telangana High Court was whether the appellant was an establishment that was covered under the ESI Act.

The Andhra Pradesh Employees' State Insurance Corporation i.e., the respondent in the present case directed the appellant to pay contribution and submit a return of contribution as envisaged under the ESI Act read with the ESI (General) Regulations, 1950, after having afforded the appellant with adequate opportunity to represent its case. The Chairman, Industrial Tribunal-I, Hyderabad (Tribunal), affirmed the decision taken by the Andhra Pradesh Employees' State Insurance Corporation. One of the claims of the appellant was that it could not be brought under the purview of the ESI Act since "Balaji Grand Bazar" and "Balaji House of Child Care" were 2 separate and distinct entities, and the appellant had not engaged more than 10 employees at any point of time.

The Telangana High Court highlighted the fact the ESI Act is a beneficial piece of legislation that has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. The court noted that "Balaji Grand Bazar" and "Balaji House of Child Care" were functioning in the same premises, with a common bill counter and common entrance, and that the Tribunal had considered all the crucial facts. On a careful perusal of the impugned judgment passed by the Tribunal, the order passed by the respondent and the oral and documentary evidence available on record, the Telangana High Court concluded that the ESI Act was applicable to the appellant and the order under challenge did not suffer from any illegality. Accordingly, the appeal was dismissed.



03.

INDUSTRY INSIGHTS

Demand for office spaces to remain robust in 2021

Despite the onset of the second wave of the COVID-19 pandemic and the continuing work from home scenario, the demand for office spaces is expected to remain resilient in the coming years. As per the latest Colliers-FICCI [report](#), in the first quarter (Q1) of 2021, the total gross absorption for the top 6 Indian cities experienced a decline of 49.8% year-over-year (YOY). However, the report forecasts a gradual recovery in the second half, in light of the ongoing rollout of vaccines. Net absorption of office spaces is expected to remain stable at 20 million square feet, similar to 2020, as occupiers continue to focus on their commercial real estate (CRE) portfolio optimisation. On the supply front, while Q1 of 2021 recorded a decline of 48.1% YOY, a steady supply is projected for the future. The report reflects a positive outlook towards the growth of technology, engineering and manufacturing sectors. Given the increasing significance of artificial intelligence, machine learning and robotics, it is expected that demand will continue to be driven by these sectors significantly. Although the demand for flexible workspaces is expected to remain solid in 2021, according to the report, 2022 will mark a considerable increase in demand for well-located,

high quality and efficient flexible workspaces. The report also indicates investors' growing interest in the Indian real estate sector despite the current scenario and predicts approximately 15% higher inflows YOY in investment.

The report examines the dynamics of the evolving concept of workspace, and believes that, with most occupiers opting for a hybrid working model, office spaces will cease to be mere working spaces and will fructify into places for collaboration. Further, 78% of all green buildings in India are office buildings, making sustainability a key consideration for the future. As per the [World Green Buildings Council](#), green buildings certified by the Indian Green Building Council (IGBC) consume 40% to 50% less energy and 20% to 30% less water compared to conventional buildings in India. The Colliers-FICCI report highlights the fact that Indian commercial real estate has the third highest green building growth rate in the world, and a steady growth in commercial green buildings is expected in the coming years. It is safe to say that office spaces will remain an integral part of the corporate culture, while undergoing significant changes and evolving for the better.

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.

The contributors to this edition of the e-Bulletin are Anshul Prakash (Partner), Deepak Kumar (Partner) and Deeksha Malik (Associate), who worked with the assistance of Shreya Sukhtankar (Intern).

For any queries in relation to the e-Bulletin or the workforce related issues occasioned by COVID-19 outbreak, please email to us at elbebulletin@khaitanco.com.



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