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Welcome to the fifth edition of the e-Bulletin (Volume III) 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.

01.

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.

Provisions that have been brought into force

Provisions relating to Central Advisory Board on minimum wages: The Government of India has, with effect from 19 December 2020 (the date on which the notification was published in the Official Gazette), brought into force the provisions relating to Central Advisory Board on minimum wages. The Central Government may, while fixing the floor wages under the Code on Wages, 2019, obtain the advice of the Central Advisory Board. Further, the board shall, from time to time, advise the Central Government on reference of issues *inter alia* relating to fixation and revision of minimum wages, and employment opportunities for women. These provisions, however, do not contain any specific obligations of the employers.

Identification of workers and beneficiaries through Aadhaar for social security benefits: The Government of India has brought Section 142 of the Code on Social Security, 2020 (SS Code) into effect from 3 May 2021. The provision requires establishment of one's identity by way of Aadhaar number *inter alia* seeking benefits as employee / unorganised worker / beneficiary under the SS Code. As such, there has been confusion if Aadhaar is a pre-condition to seeking benefits under the said code. However, the Ministry of Labour and Employment, Government of India, has recently

clarified in a press release that benefits to workers will not be denied in case they are bereft of Aadhaar and that Section 142 of the SS Code would be utilised primarily for collection of data of workers including migrant workers.

Draft rules relating to negotiating union and negotiating council

The Ministry of Labour and Employment, Government of India, has, by a notification dated 4 May 2021, released the draft Industrial Relations (Central) Recognition of Negotiating Union or Negotiating Council and Adjudication of Disputes of Trade Unions Rules, 2021 (Draft Negotiating Union / Council Rules).

In order to set the context, we note that the Industrial Relations Code, 2020 (IR Code) provides that there shall be a negotiating union or a negotiating council, as the case may be, in an industrial establishment for negotiating with the employer such matters as may be prescribed by the 'appropriate government' (which, for most private sector employers, would be the state government). The IR Code further provides that where there is only one registered trade union, the same shall be recognised as the sole negotiating union of the workers, subject to fulfilment of the criteria prescribed by the appropriate government in that regard. Where there is more than one registered trade unions, the one having the support of 51% or more workers of the establishment shall be recognised as the sole negotiating union of the workers after the workers' support to such union has been established in the manner prescribed by the appropriate government. Lastly, where there is more than one registered trade unions, none of which has 51% or more support from workers, there shall be a negotiating council consisting of representatives of such trade unions which have the support of 20% of the workers as established in the manner prescribed by the appropriate government.

Under the Draft Negotiating Union / Council Rules, the Central Government has come up with provisions regarding verification of worker support to a trade union in respect of establishments for which the Central Government is the 'appropriate government'. The salient provisions under these rules are

discussed below. It is likely that the state governments will follow suit.

Matters subject to negotiation: The Draft Negotiating Union / Council Rules provide that the matters in respect of which the negotiating union / negotiating council would be able to negotiate with the employer are classification of grades, wages (including bonus, increment and customary privileges), working hours, leaves, holidays, promotion, transfer policy, disciplinary procedure, and other matters pertaining to service conditions and terms of employment.

Recognition of the only registered trade union in the establishment: The Draft Negotiating Union / Council Rules provide that where the only registered trade union in the establishment has at least 30% of the workers of the establishment as its members, the same shall be recognised as the sole negotiating union.

Recognition of registered trade union(s) as negotiating union / council: The draft rules also provide that the employer shall appoint a verification officer for verifying the support of the workers to a trade union. At the outset, the registered trade unions will have to submit an application, along with supporting documents, to the employer for receiving the status of a negotiating union. Only the trade unions whose membership is confined to the workers of the relevant establishment will be eligible to submit the application. The documents submitted by the trade union will be forwarded to the verification officer. Thereafter, the workers whose names are on the muster roll of the establishment shall vote on the participating trade unions. The result shall be declared by the verification officer after final counting of votes, and basis the same, a verification report will be submitted by him / her to the employer. On the basis of the report, the employer shall grant recognition to a trade union as the negotiating union or the constituent of a negotiating council.

Draft rules released by state governments under the codes

The exercise of formulating the rules at the state government level has been slow *inter alia* on account of the ongoing COVID-19 pandemic. Only few state governments viz. Bihar, Gujarat, Jammu and Kashmir, Karnataka, Madhya Pradesh, Odisha, Punjab, Uttar Pradesh and

Uttarakhand have released draft rules under one or more of the 4 labour codes. In view of the same, it is not very likely that the labour codes will be implemented in the immediate future.

02.

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.

Government of Karnataka advises employers against termination of employment and reduction of wages

By way of a notification dated 28 April 2021, the Government of Karnataka made an appeal to all employers in the state of Karnataka to not terminate the employment of any of their employees. It also requested that the employers take cognizance of the ongoing pandemic and the state-wide curfew imposed in that regard and urged employers to not reduce wages of their employees.

Government of India introduces amendments to the Employees' Deposit-Linked Insurance Scheme, 1976 (EDLI Scheme)

By way of a notification published in the Official Gazette on 29 April 2021, the Ministry of Labour and Employment, Government of India, introduced amendments to the EDLI Scheme (EDLI Amendment). The EDLI Scheme *inter alia* provides that, on the death of an employee who is a member of the scheme and who has been employed with the relevant establishment for a continuous period of 12 months preceding the month in which he / she died, the nominee / eligible claimant would, in addition to the deceased employee's provident fund accumulations, be paid an assurance benefit of minimum INR 2,50,000 and up to a maximum of INR 6,00,000. Both the lower and the upper limits mentioned above were introduced by way of a notification by the Ministry of Labour and Employment, Government of India, which was published in the Official Gazette on 19



February 2018. However, the limits were applicable only for a period of 2 years (from 19 February 2018).

By way of the EDLI Amendment, the lower limit of INR 2,50,000 has been restored with effect from 15 February 2020. The upper limit of INR 6,00,000, however, has been increased to INR 7,00,000 with effect from 29 April 2021. The EDLI Amendment will operate for a period of 3 years, i.e., up to 28 April 2024.

Telangana extends the due date for furnishing integrated returns under various labour laws

By way of a notification dated 6 May 2021, the Government of Telangana has extended the due date for furnishing integrated returns under various labour laws and accordingly has fixed 30 June 2021 as the date on which such return would need to be filed by the employers. The labour laws under which the said return needs to be filed include *inter alia* the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Factories Act, 1948, the Payment of Gratuity Act, 1972, the Telangana Shops and Establishments Act, 1988, etc.

This step has been initiated by the Government of Telangana to ease off the burden caused due to the second wave of the COVID-19 pandemic and to keep up with the intent to facilitate the ease of doing business in the state.

Extension for the month of April 2021 for filing employees' state insurance (ESI) contributions

By way of a notice dated 12 May 2021, the Employees' State Insurance Corporation has provided one-time relief to employers and, in this regard, relaxed the provisions for filing of contributions under the Employees' State Insurance (General Regulations), 1950. The ESI contributions for the month of April 2021 can now be filed and paid up to 15 June 2021, instead of 15 May 2021.

Mandatory registration of inter-state migrant workers in Delhi

The Government of Delhi, by way of a circular dated 14 May 2021, directed all principal

employers engaging (or those who have engaged during last 12 months) workers through outsourcing, to mandatorily register such workers with the Labour Department via e-district portal of the Government of Delhi available [here](#). Contractors will be required to issue passbook to every inter-state migrant workers containing details of employment. Such workers will also be eligible for other benefits as provided under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. Non-compliance of obligations in this regard will attract appropriate action as specified under the said statute.

Maharashtra introduces temporary relaxations in relation to working hours in factories

By way of a notification dated 24 May 2021, the Government of Maharashtra has exempted factories in the state from the application of certain provisions, under the Factories Act, 1948, which include provisions pertaining to weekly hours, weekly holidays, daily hours and spread over. The exemptions are granted in light of the ongoing COVID-19 pandemic and will be in effect till 30 June 2021. Note that the grant of exemption is subject to certain conditions which *inter alia* include the following:

- a) Overtime wages are required to be paid at double the rate of normal wages and overtime hours will be fixed at 115 hours in a quarter.
- b) Working hours in a day will be a maximum of 13 hours, inclusive of 1 hour of rest time.
- c) Working hours in a week will be a maximum of 60 hours.
- d) Necessary precautions to be ensured and relevant protocols to be followed by the occupier to prevent the spread of COVID-19.

03. CASE UPDATES

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



The scope of the provisions of the Disaster Management Act, 2005 (DM Act) cannot be construed as an alternative and to override express provisions of any other statute – Supreme Court clarifies

In the case of *Indian School, Jodhpur and Another v State of Rajasthan and Others* [Civil Appeal Number 1724 of 2021], the Supreme Court of India clarified that governmental authorities cannot enforce and consider the provisions of the DM Act to quash the provisions of another statute applicable to an entity.

An order passed under the DM Act which, on the face of it, is not in conformity with the express statutory provisions governing the subject matter (in this case, the school fees), cannot be sustained.

The provisions of the DM Act are limited to providing effective management of disasters. *"The manner and method of addressing such disaster and in particular 'disaster management' as defined in Section 2(e) of the Act of 2005 is by preparation of a plan for disaster management by the authority concerned under that Act...It is the direct effect of disaster that is required to be mitigated and not indirect hardship caused to individuals much less in respect of contractual matters."*

The order passed by the court makes it clear that the actions initiated during the lockdown phase (in the context of the COVID-19 pandemic) were nothing but a ruse in the name of law. Whilst various authorities took recourse to the DM Act and issued orders / notices / directives pertaining to mandatory payment of wages, restriction on termination of employment during the period of lockdown, such aspects were, in fact, required to be statutorily and / or contractually governed in view of the relevant labour laws.

Supply of material not to be considered to determine 'cost of construction' for cess payment: Supreme Court rules

In the case of *Uttar Pradesh Power Transmission Corporation Limited v CG Power*

and Industrial Solutions Limited [Special Leave Petition (Civil) Number 8630 of 2020], the Supreme Court of India examined a framework agreement for construction of substations. Under the said agreement, the work was split into 4 contracts. The first contract was for design, engineering, testing, and supply of the requisite material. The purpose of executing the second one was to carry out installation, testing and commissioning at site. The third contract covered all civil works, while the fourth one dealt with operations and maintenance for a certain period of time. One of the clauses of the agreement provided that the *"contract shall be a 'Divisible Contract' with single point responsibility, hence no works contract tax shall be payable and the Purchaser shall not bear any liability on this account"*.

The court examined the above for the purpose of determining *inter alia* what the 'cost of construction' would be, as the cess under the Building and Other Construction Workers' Welfare Cess Act, 1996 (BOCW Cess Act) is calculated on the 'cost of construction'. It observed that the cess under the BOCW Cess Act is leviable in respect of building and other construction work. As such, in the present case, the cess was payable only in respect of the third contract (that pertained to all civil works). The court observed that the 4 contracts did not constitute a composite agreement for all purposes such that the costs associated with all of them would be totalled up to determine the 'cost of construction'; they amounted to a singular contract only for the purpose of responsibility for timely execution. It may be noted that certain High Courts have, in the past, similarly emphasised on the aspect of existence / absence of a composite agreement to assess whether the indirect costs relating to construction work would also be brought within the purview of 'cost of construction'.

04. INDUSTRY INSIGHTS

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

Summing up India Inc.'s care and wellness measures for employees



during the second wave of the global pandemic

Compared to the first wave of the COVID-19 pandemic in India, the second wave has seen India Inc. to be more focused and conscious towards the wellness of their workforce, more so because the younger population in the country has been particularly affected in the second wave. The current trends across industries *vis-a-vis* the employee-benefit initiatives undertaken by the employers are set out below:

Facilitating vaccination or subsidizing vaccination cost: There are reports to suggest that a significant percentage (~80%) of the employers surveyed (more than 150) have tied up or are planning to tie up with third party clinics or hospitals to facilitate vaccination of their employees. Some employers are also extending such facility to employees who are currently working from their native places. Further, around 97% of the employers surveyed intend to cover or subsidize the inoculation / vaccination cost incurred by their employees (and, in certain cases, the employees' spouse and / or parents).

Additional vaccination-related leave: As per a survey conducted by the global advisory and broking firm Willis Towers Watson, while 27% of

the employers surveyed have already notified additional leave for sickness or reaction arising out of COVID-19 vaccination, there is an additional 30% (of the employers surveyed) that may implement similar leaves in the coming days or weeks.

Additional sick leave: In view of the raging pandemic, it is not uncommon for employers in India to come up with 14-21 days of additional sick or special leave. To the extent, the employer is not bound by local requirements around additional sick leave, employers are taking a call if the benefit should be limited to one-time infection or even to rare instances of repeated infections.

Guidance to employees: Other than the above, companies are setting up portals or help-lines to help employees get answers to certain frequently asked questions relevant to the second wave of COVID-19 or to share information regarding availability of medical supplies, COVID-19 dedicated hospital beds, etc.

Other measures: Other interesting trend noticed in a few companies is delivery of cooked meals to infected employees by collaborating with vendors. Employers are also bearing the associated costs partially or completely.

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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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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