ELB E-BULLETIN

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Welcome to the tenth 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.

In the previous edition, we discussed the status of the labour codes and the implementation framework being built by state governments in the form of rules thereunder. While the status remains largely the same as on the date of preparation of this bulletin, we do note that the Government of Gujarat released a notification dated 5 September 2021, setting out the final version of the Industrial Relations (Gujarat) Rules, 2021 and the Code on Wages (Gujarat) Rules, 2021. The former state rules *inter alia* set out the manner of choosing members from the employers and the workers for constitution of the grievance redressal committee, and criteria of recognition of a trade union as a sole negotiating union / member of the negotiating council, while the latter state rules discuss various procedural aspects relating to payment of wages, including maintenance of registers and issuance of wage slips. Both state rules are slated to come into effect upon the commencement of the Industrial Relations Code, 2020 and the Code on Wages 2019, respectively.

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.

Singapore citizens working in India on a temporary basis to be considered as excluded employee

By way of a circular dated 21 October 2021, the Employees' Provident Fund Organization (EPFO) reiterated and clarified that the Singapore citizens who are rendering services in India temporarily and the ones who do not hold the status of permanent residents in India are to be treated as 'excluded employee' under the provisions of the Employees' Provident Funds Scheme, 1952.

Against the backdrop of the challenges faced in ascertaining the status of contributions to a social security programme by the incoming employees, a form was finalised between the two countries. The form accords certification to an employee as regards contributions to the social security system of their home country. In view of this development, the EPFO advised to regulate the receipt of contributions taking into consideration this certification, received through the employer of such employees, either in physical or electronic form. Such certificates can be issued by any of the authorities, namely, the High Commission of the Republic of Singapore in India, Consulates-General of the Republic of Singapore in India and Singapore's Ministry of Trade and Industry.

To provide a background in the context of this section, as per Employees' Provident Funds and Miscellaneous Provisions Act, 1952, an 'international worker' is an employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the said statute applies. Having said that, international workers who are contributing to a social security programme of their country of origin with whom India has entered into a bilateral comprehensive economic agreement seeking to specifically exempt natural persons of either country to contribute to the social security fund of the host country, shall be considered as an 'excluded employee'. India has a bilateral economic agreement with Singapore, as per which natural persons (nationals of a party or persons having a permanent residence therein) of either party who are granted temporary entry into the territory of the other party shall not be required

to make contributions to social security funds in the host country.

Government of Maharashtra issues order regarding expedited vaccination of employees

By way of its order dated 26 October 2021, the Government of Maharashtra has released instructions regarding mandatory use of masks in private establishments and expeditious completion of COVID-19 vaccination by employees. As per the order, officials and employees working in private establishments are required to wear masks at all times and in a manner that their nose and mouth are completely covered. Heads of the offices / establishments are required to ensure that all officers / employees working therein have completed both doses of the vaccination and have obtained certificate from the authorities in this regard. Vaccination drives should be organised for all officers and employees to ensure that all of them are vaccinated. The order also requires an officer to be nominated in the organisation to ensure that employees wear proper masks during working hours and that everyone is vaccinated.

Principal employer to ensure payment of bonus by contractors to contract workers

On 14 October 2021, the Labour Department of Delhi issued an advisory note (Note) requiring all the contractors, engaging 20 or more contract workers, to ensure compliance as regards payment of statutory bonus to all its employees, i.e., contract workers, in accordance with the provisions of the Payment of Bonus Act, 1965. Any non-compliance in this regard will attract penal implications under the said statute. Additionally, any amounts due towards statutory bonus may be recovered as arrears of land revenue in accordance with the provisions of the Industrial Disputes Act, 1947 (ID Act).

The Note further obligates the principal employer of an establishment to ensure that the contractors are complying with the provisions of all applicable labour laws and, more specifically, ensure payments of statutory bonus to all eligible contract workers engaged by such contractors.

03.

Case Updates

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

Jurisdiction of civil courts not available to adjudicate on matters passed by disciplinary authority: Supreme Court rules

In the case of Milkhi Ram v Himachal Pradesh State Electricity Board [Civil Appeal 1346/2010], the Supreme Court of India was dealing with a challenge against the judgment of the High Court of Himachal Pradesh that had observed the civil court's lack of jurisdiction to adjudicate a claim arising out of matters under the ID Act. Notably, the civil court had decreed that the plaintiff was wrongfully terminated from his services in the absence of compliance with the requirements under the said statute. The court also went ahead to order reinstatement of the services of the plaintiff with back wages.

The Supreme Court affirmed the ruling of the High Court, observing that if any decision is passed by a court of law without jurisdiction, the same does not have an effect in law. Accordingly, it was observed that jurisdiction of civil courts will not be available on matters passed by a disciplinary authority, duly constituted in accordance with the provisions of the prevailing law.

Distinction between resignation and voluntary retirement; latter not available in the absence of fulfilment of eligibility criteria: Supreme Court clarifies

In the case of Union of India v Abhiram Verma [Civil Appeal Number 1027 of 2020], the Supreme Court has highlighted the distinction between 'resignation' and 'voluntary retirement' in view of terminal and pensionary benefits under Pension Regulations, 1961. Emphasising on the threshold limit of 'years of service' by an officer, the court observed that a person could resign at any time during his service; however, an officer could not ask for voluntary retirement unless the requisite eligibility criteria were met. On the same rationale, the court rejected the respondent's plea of 'voluntary retirement' since he had not met the prescribed period of qualifying

service. The apex court further noted that 'lack of career prospects' was not a valid ground for premature retirement, as a consequence of which, the concerned officer was not entitled to terminal/pensionary benefits thereof. Relying on other notable judgments, it was further observed that such issues relating to beneficial provisions were to be resolved solely on the basis of fulfilment of the eligibility criteria and not by relying on any principle of charity.

Similarly, on the question of pensionary benefits as a 'late-entrant', the court reiterated that it was imperative to fulfil the prerequisite of meeting the threshold number of years of service. Therefore, owing to the fact that the eligibility criteria were not fulfilled in the present matter, the retirement benefits were denied, incidental to which, the distinction between 'resignation' and 'voluntary retirement' was put forth.

Labour Court cannot overturn the decision of the management ipse dixit: Supreme Court reiterates

In the case of Standard Chartered Bank v RC Srivastava [Civil Appeal Number 6092 of 2021], the Supreme Court was dealing with a challenge against the order of the High Court of Judicature at Allahabad upholding the reinstatement of an employee's services with full back wages awarded by the Tribunal. As far as the facts are concerned, the employee was accused of gross misconduct on account of assaulting three officials. This was followed by an internal disciplinary inquiry wherein an opportunity of hearing was afforded to the accused-employee. The enquiry officer and the disciplinary authority held the charges proved against the employee, and the said employee was accordingly dismissal from service.

When the decision was challenged before the Tribunal constituted under the ID Act, the Tribunal, after observing the inquiry to be fair and proper, re-appreciated the evidence on record and observed that notwithstanding the evidence of the three officials who were the victims in the case, the disciplinary authority ought to have taken into account the statements of the watchman and a former employee of the company who had deposed that the incident had not occurred.

The Supreme Court, setting aside the order of the High Court that had affirmed the findings of the Tribunal, observed that the scope of judicial review under Section 11-A of the ID Act has certain limitations and that a Tribunal cannot sit in appeal to re-examine the evidence if (a) the inquiry was held in accordance with the principles of natural justice, and (b) there was no perversity in the finding of guilt basis the material available on record. The court also noted that the Tribunal and the High Court failed to appreciate that, in disciplinary inquiries, the standard of proof is not of establishment of guilt beyond reasonable doubt but is rather of preponderance of probabilities, which standard was met by appreciating the evidence of the three victim-officials.

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.

Exploring a 'no-questions-asked' menstrual leave for women

While employers in India may have evolved in dealing with various facets of workplace dynamics including that of technology, finance, accounts, data privacy, health, safety, diversity, etc., one aspect, which is yet to be explored extensively by them, is the topic of 'menstruation'. In the era of modernization and peak of globalization, menstruation, or what in common parlance is known as 'monthly period', is still considered to be a matter of taboo. Despite the improved literacy rates and general awareness, a woman discussing or even mentioning about the discomfort experienced during her period seems to trigger judgments of all kinds. The reason why, till today, the women workforce hesitates to seek period leave from their employer is the prevalence of several factors, including the stigma attached to menstruation, fear of facing discrimination as regards pay and benefits, professional opportunities, promotions, etc.

Recently, to combat the supposed inhibitions around menstruation, delivery partner Swiggy introduced a 'no questions asked' period time-off for all its women delivery partners, wherein it has announced the roll-out of a monthly 2 days' time off policy during periods for its women workforce. In addition to the grant of such leaves, the women delivery partners

will also be entitled to minimum earnings. Note that other companies in the past have also taken the positive plunge and implemented paid time-off for their women personnel during their menstrual cycle.

Gradually, the idea of Indian companies realising the importance of embracing the natural phenomenon of menstruation by formulating and implementing policies to accelerate its acceptance in itself is a progressive approach. However, notably, the extant labour laws in India do not envisage a specific bucket of paid leave on account of menstruation. As such, while organizations are free to unilaterally take a decision and provide more beneficial terms of employment than those provided under the applicable legal provisions, the lack of a statutory force behind the concept of paid menstrual leave may have a bearing on its widespread adoption by India Inc.

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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