



ELB E-BULLETIN

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Welcome to the eighth edition of the e-Bulletin (Volume IV) 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.

Broadly speaking, the labour codes, which aim to consolidate and consequently replace 29 Central labour laws, are yet to be brought into force, barring provisions relating to (a) Central Advisory Board on minimum wages, and (b) identification of workers and beneficiaries through Aadhaar number for social security benefits. Moreover, even if the codes are fully brought into effect, the same would require issuance of rules, schemes, and notifications of the relevant governments so as to have a comprehensive revised compliance regime.

As a development towards notification of the new Codes, a two-day [meeting](#) between the labour ministers and labour secretaries of state and Union Territories was held on 25 August 2022- 26 August 2022 in Tirupati, Andhra Pradesh to discuss issues regards implementation of the new codes and create consensus for its notification.

Under the labour codes, the 'appropriate government' for an establishment can be the Central Government or the state government, depending on the nature of its operations or the existence of multi-state operations. Such appropriate government has the power to *inter alia* issue rules detailing some of the substantive aspects broadly set out under the codes and also prescribing procedural compliances such as filings, maintenance of

registers, etc. In the last one year, several key industrialised states such as Haryana, Delhi, Maharashtra, Gujarat, Andhra Pradesh, Telangana, Tamil Nadu, and Karnataka released draft rules under some or all of the labour codes for public consultation. Among the industrialised states, notably, West Bengal is yet to release their draft rules under any of the codes.

## 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.

#### EPFO re-clarifies the status of student-trainees

By way of a [circular](#) dated 27 July 2022 (New Circular), the Employees' Provident Fund Organisation (EPFO) issued a clarification on the status of student-trainees under any scheme vis-à-vis the applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act). This circular has been issued in furtherance of EPFO's [circular](#) dated 12 October 2015 (Old Circular), wherein a distinction was made as regards student-trainees and their coverage under the EPF Act.

The Old Circular had clarified that no employer-employee relationship exists in respect of student-trainees who return to their respective institutions for completion of their academic course post the industrial / practical training received by them as trainees, and as such, the stipend payable to such trainees will not attract the provisions of the EPF Act including the obligation of the relevant establishment to deposit employees' provident fund contributions in respect of them. The New Circular prescribes further guidelines to determine the status of student-trainees under any scheme.

In our [ERGO](#) dated 3 August 2022, we have set out the key takeaways from the New Circular and also examined its impact, if any.



### Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period is not taxable

By way of a circular published in the Official Gazette on 3 August 2022, the Ministry of Finance, Government of India clarified on the applicability of goods and services tax on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law. The circular also clarified on the forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period.

The circular acknowledged that there is some expenditure undertaken by an employer while recruiting and training an employee with an expectation of some minimum employment period from the employee. The provisions for forfeiture of salary or recovery of bond amount in situations of an employee leaving before the minimum agreed period are incorporated to discourage premature attrition which results in disruption of work.

Without commenting on the validity of such clause in the employment agreement, more popularly known as employment bond, the circular clarified that the said recovery of amount is a penalty to discourage non-serious applicants instead of a consideration for the act of early exit itself and that, therefore, amounts recovered in this manner shall not be taxable as consideration for the service of agreement to endure the act.

### Uttar Pradesh notifies Uttar Pradesh Shops and Commercial establishments (Ninth Amendment) Rules, 2022

By way of a notification published in the Official Gazette dated 3 August 2022, the Government of Uttar Pradesh has notified Uttar Pradesh Shops and Commercial Establishments (Ninth Amendment) Rules, 2022. The new rules amend the Uttar Pradesh Shops and Commercial Establishment Rules, 1963.

The rules introduce few changes including, (a) aligning the fees for renewal of the registration currently obtained by a commercial establishment with the number of employees employed by the commercial establishment, (b) one-time registration of

commercial establishments instead of renewal every five to ten years under the old rules (with a one-time renewal of registration in case of existing commercial establishments), and (c) omission of the provisions related to renewal of registration.

### Madhya Pradesh allows women employees to work at night in shops and establishments

By way of a notification published in the Official Gazette dated 1 August 2022, the Government of Madhya Pradesh has exempted establishments covered under the Madhya Pradesh Shops and Establishments Act, 1958 from the provisions of Section 25 of the statute, which deals with working hours of women employees. It has allowed women employees to work at night shifts i.e., 9 PM to 7 AM in shops and commercial establishments.

The exemption has been made subject to certain conditions, including (a) taking requisite measures for prevention of sexual harassment of women at workplace and redressal of complaints in this regard, (b) providing appropriate working conditions in respect of work, health etc, (c) providing proper lighting inside the establishment as well as around the establishment where female employees visit as per work requirement, (d) ensuring that women employees are employed in batches with at least 10 women employees in any batch, (e) ensuring the presence of at least one-third women employees in the supervisory staff during night shift, (f) providing women security during night time at entry/exit points, along with transport facility for travel to and from workplace, (g) creating a separate canteen facility for women employees, (h) appointment of at least two warden in the night shift as special welfare assistants, (i) providing medical facilities and an additional menstruation leave for night time, (j) monthly meeting of female employees through their representatives with the principal employer once in eight weeks, (k) submission of a monthly report to the jurisdictional Assistant Labour Commissioner with details of employees engaged in night shifts and, (l) submission of a report on any untoward incident to the concerned authorities and the local police station.

Separately, by way of a notification published in the Official Gazette dated 12 August





2022, the Government of Himachal Pradesh has also allowed women employees to work in night shifts (i.e., 7 PM to 6 AM) in factories. This exemption will be available for a period of 3 years.

#### [ESIC clarifies on the judgment of Supreme Court of India related to treatment of 'conveyance allowance'](#)

By way of a clarification published in the Official Gazette dated 16 August 2022, the Employees' State Insurance Corporation (ESIC) has shared its observations on the judgment of the Supreme Court of India in *ESIC v M/s Texmo Industries* [Special Leave Petition (C) Number 811/2021] which had held that conveyance allowance is not to be considered as part of 'wages' for the purpose of employees' state insurance fund contribution.

In view of queries raised by employers in relation to the above judgement, ESIC obtained a legal opinion which clarified that the judgement holds good with effect from 8 March 2021. Further clarification is provided wherein any decision related to a request for refund on account of excess contribution attributable to inclusion of 'conveyance allowance' in wages will be taken by arranging inspection (after due approval from the competent authority) on a case-to-case basis.

#### [Andhra Pradesh releases draft amendment rules in respect of Andhra Pradesh Maternity Benefit Rules, 1966](#)

By way of a notification published in the Official Gazette dated 19 July 2022, the Government of Andhra Pradesh released draft rules to amend Andhra Pradesh Maternity Benefit Rules, 1966, for objections or suggestions. It is important to note that the draft amendment introduces rules regards maintenance of crèche facility in the establishment.

The draft rules introduce few changes including, (a) substitution of two nursing breaks (as set out under the Maternity Benefit Act, 1961) with four nursing breaks, (b) establishing conveniently accessible crèche within 250 meters from the place of work in every establishment with 50 or more employees, (c) ensuring seating accommodation for each mother while

breastfeeding/attending to her child, (d) ensuring one cradle for every 30 women employees subject to minimum 6 cradles, and (e) submission of Form Q by the woman to the employer for the purpose of working from home, and Form P by the woman to the employer for giving notice to claim maternity benefit in case she is a commissioning mother / adopting mother.

## 03.

### CASE UPDATES

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

#### [No relationship of master and servant or principal employer and contract labourer between the employees and the successor-in-interest of the employer: Odisha High Court](#)

In the case of *Oswal Sarakarakhana Shramika Sangha Trade Union v State of Odisha and Others* [Writ Petition (Civil) Number 17546 of 2011], the Odisha High Court addressed important aspects in relation to liability of a successor-in-interest under labour laws. A claim for permanency was filed by contract workers against OSWAL Chemical and Fertilizers Limited (OCFL) when their services were terminated (upon expiry of manpower services contract) effective 31 August 2001. During the pendency of the proceedings, the ownership of the fertilizer plant of OCFL was transferred from OCFL to Indian Farmers Fertilizer Co-operative Limited (IFFCO) on an as-is-where-is basis. IFFCO was then impleaded in the proceedings by the contract workers (on the basis that IFFCO was a successor-in-interest of OCFL). Notably, under the agreement between OCFL and IFFCO, it was agreed that (a) any liability arising out of the litigations, shall be the liability of OCFL, and (b) OCFL shall indemnify IFFCO against every cost, claim, or liability relating to or arising out of any act or omission by OCFL prior to 1 October 2005 and which IFFCO may incur in relation to any contract of employment or pursuant to the regulations or any collective agreements concerning the employees.





When the question came as to whether IFFCO was rightfully impleaded and should be held liable in the case, the Odisha High Court noted that there could not have been any presumption by the petitioner-union that the claim against OCFL would hold good against IFFCO as well and that in the case of IFFCO, it merely stepped into the shoes of OCFL. In the light of the written statement filed by IFFCO before the tribunal, it ought to have been evident to the petitioner-union that the clauses of the agreement (between OCFL and IFFCO) absolved IFFCO of any liability whatsoever and it was not possible for the union to simply contend that IFFCO should absorb all 1,139 workmen. This is particularly so since there was no relationship of master and servant or of principal employer and contract labour between the members of the petitioner-union and IFFCO.

Interestingly, the Odisha High Court left a caveat that the petitioner could have argued that the agreement between OCFL and IFFCO is against public policy but did not delve into this aspect as this was not contended.

to help individuals in their professional and personal development. The company has, however, allowed such parallel engagements subject to certain requirements, such as (a) the engagement being undertake outside office hours or on weekends, (b) such engagement not affecting employee's productivity, and (c) the engagement not conflicting with the company's business. The company also notably allowed a permanent work-from-anywhere policy recently.

This has sparked a [discussion](#) within the industry where some other companies have supported this for their employees while few others are apprehensive of this practice as it might take off the focus from the ongoing full-time job. Moonlighting is not generally prohibited under Indian employment and labour laws, although there are restrictions in certain laws as to the total number of hours an employee can work in a day while being dually employed. As such, the ambit of moonlighting depends largely on the terms agreed between the employer and the employees, whether by way of employment contract or under organisational policies.

## 04.

### INDUSTRY INSIGHTS

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

#### Emerging moonlighting policy

The COVID-19 pandemic brought various challenges for the employer as well as the employee. Moonlighting was seen as a challenge faced by employers frequently in the work from home model which was increasingly adopted in view of the nationwide lockdown followed by a continuing need to ensure safety at the workplace. Moonlighting refers to the action of an employee of taking up another job, or project / assignment, while being actively employed in another organisation.

Recently, a food delivery company [allowed](#) its employees to work on external assignments for remuneration and introduced a moonlighting policy with a goal

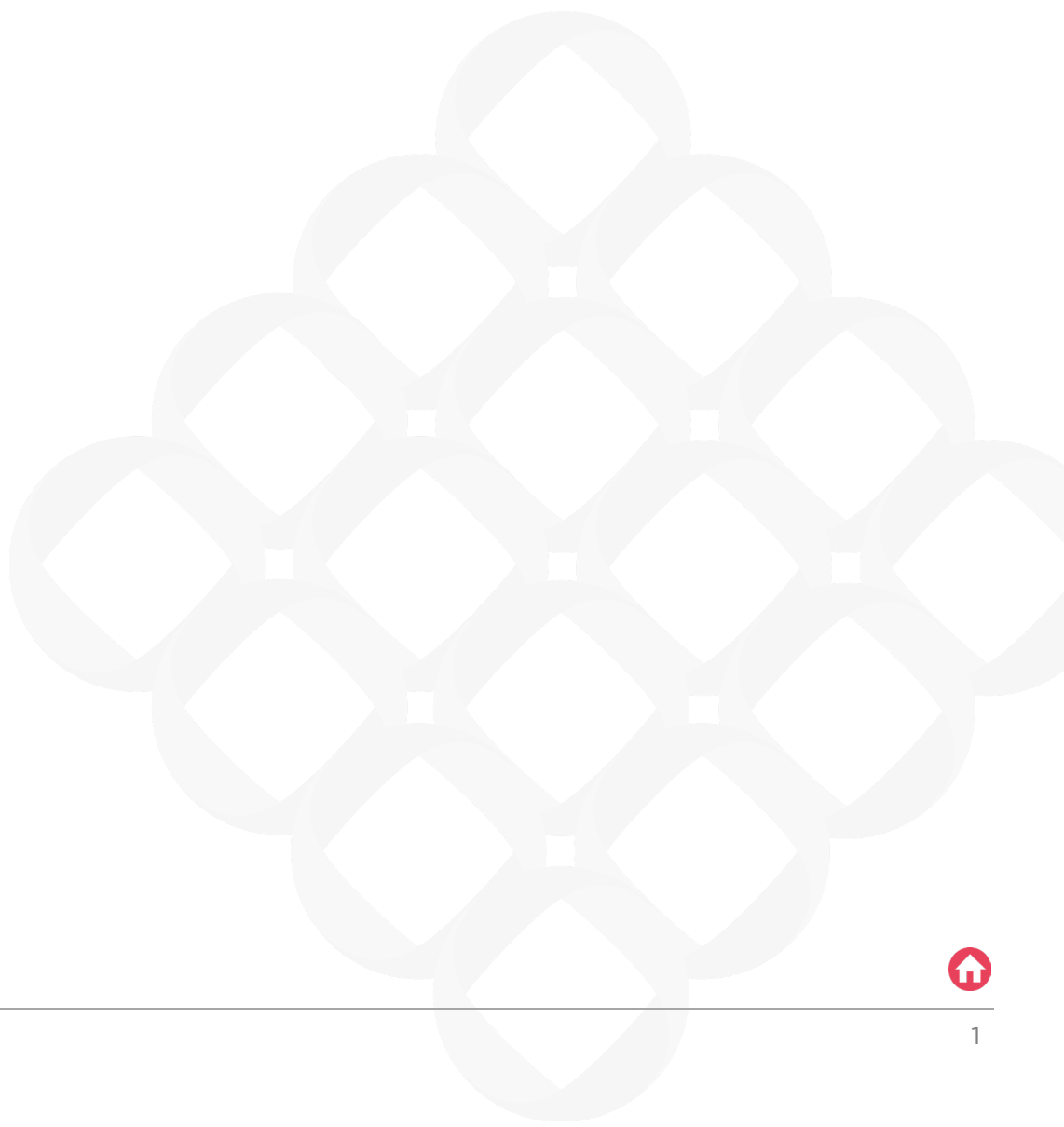




We hope the e-Bulletin enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the employment and labour law and practice landscape.

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