



ELB E-BULLETIN

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Welcome to the ninth 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.

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. Having said that, the state governments of Karnataka, Gujarat and Uttar

Pradesh have notified their final rules under the new labour codes which await implementation in view of non-implementation 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 issues a circular on withdrawal of prosecutions emanating from non-submission of KYC](#)

By way of a circular dated 26 September 2022, the Employees' Provident Fund Organisation (EPFO) has authorised Regional Provident Fund Commissioners to consider applications for withdrawal of prosecution initiated against employers on account of non-submission of KYC documents by members / covered employees. This is a significant development in respect of employers who were unable to adequately and duly deposit employees' provident fund contributions on account of technical issues such as failure on the part of their employees to link their Universal Account Number with KYC details such as Aadhaar number, PAN, etc.

[ESIC relaxes the timeline for deposit of contributions](#)

By way of a notification dated 15 September 2022, the Employees' State Insurance Corporation (ESIC) has extended the timeline for deposit of employees' state insurance fund contribution for the month of August 2022 from 15 September 2022 to 22 September 2022. This relaxation has been given in view of the problems being faced by certain employers in deposition of contribution for the month of August 2022.

[EPFO backs removal of wage ceiling](#)

The EPFO has [suggested](#) removal of the employee headcount threshold and the wage ceiling as regards applicability of the



Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) and coverage of employees in its regime (as the case may be). The intent of the proposal appears to be coverage of all formal / organised workers in the social security framework. This proposal is in discussion stages with the stakeholders. Presently, the wage ceiling for mandatory coverage of employees under the EPF Act is INR 15,000 per month, and the employee headcount threshold for application of the law to an establishment is 20 or more employees.

[Gujarat notifies amendment rules under the law on building and construction workers](#)

By way of a notification dated 17 September 2022, the government of Gujarat has amended the Gujarat Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2003. Pursuant to the amendment, the registering officer appointed under the rules shall, after receiving application for registration of an establishment, register the establishment and issue a certificate of registration to the applicant within 30 days of receipt of the application (instead of the earlier timeline of 15 days) subject to compliance with other requirements.

Further, a proviso has been added to the state rules which provides that the permission applied for by the registration applicant shall be deemed to have been granted if no order is communicated to the applicant within 30 days from the date of receipt of the registration application.

03.

CASE UPDATES

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

[Teachers eligible to get gratuity retrospectively in terms of notification dated 3 April 1997: Supreme Court](#)

In the case of Independent Schools' Federation of India (Regd.) v Union of India and Another [Civil Appeal Number 8162 of

2012], the Supreme court directed the private schools to make payment to their teachers along with the interest in accordance with the provisions of the Payment of Gratuity Act, 1972 (Gratuity Act) in terms of the notification dated 3 April 1997. By way of this notification, the provisions of the Gratuity Act were made applicable to the educational institutions with 10 or more employees. This was contended on the ground that teachers did not fulfil the description of the employees, who are skilled, semi-skilled or unskilled persons employed on wages. Later, the definition of employee was amended by the Payment of Gratuity (Amendment) Act, 2009 which included teachers in its realm.

The court noted that it is clear that the Parliament has passed and enacted the Payment of Gratuity (Amendment) Act, 2009 to confer with retrospective effect from the date of the notification on 3 April 1997, the benefit of gratuity to the teachers subject to the other provisions of the Gratuity Act. It further clarified that the retrospective amendments would apply only to those teachers who were in service as on 3 April 1997.

[Departmental proceeding is different from a criminal proceeding: Supreme Court](#)

In the case of State of Rajasthan and Others v Phool Singh [Civil Appeal Number 5930 of 2022], the Supreme Court considered the question that if an employee can be reinstated in service because they have been acquitted by a criminal court on the same set of charges.

The employee had challenged his dismissal from service after acquittal from the court on the same charges. The court noted that a departmental proceeding is different from a criminal proceeding. The fundamental difference between the two is that "preponderance of probabilities" can be used to hold an employee guilty in a departmental proceeding, but in a criminal court, the evidence needs to be established "beyond reasonable doubt". The distinction among the two proceedings is in the nature of evidence and the degree of its scrutiny. The two forums consequently run at different levels.

For this reason, the court observed that merely because a person has been acquitted in a criminal trial, they cannot be *ipso facto* reinstated in service.



Woman's biological child v/s children of spouse: Supreme Court

In the case of *Deepika Singh v Central Administrative Tribunal and Others* [Civil Appeal Number 5308 of 2022], the Supreme Court reiterated that the rule of purposive interpretation should be adopted while giving effect to the provisions of social welfare legislations. In line with this principle, the court held that a woman shall be eligible for maternity benefit related to the birth of her first biological child even though she is already a mother to her spouse's two biological children from his first marriage. In our [ERGO](#) dated 30 August 2022, we have outlined the court's analysis and discussion in this case along with its relevance to the private sector.

Existence of employer-employee relationship must be presented by primary evidence: Delhi High Court

The Delhi High Court in the case of *Kaushal Kishor Singh v Sita Kuoni World Travel India Limited* [Writ Petition (Civil) 11631/2018] examined the evidentiary aspects of determining a case of employer-employee relationship. In this case, the individual in question was a part-time foreign language linguist guide, who alleged that his services were illegally terminated without any inquiry, valid reason or notice by the management. While examining if there existed an employer-employee relationship between the parties, the court noted that the burden of proving the employer-employee relationship lies on the individual alleging the same. Further, this relationship has to be inferred from circumstances in each case and no general view can be taken in such matters.

The court made an attempt at defining the concept of 'freelancing', in the following words:

"Freelance as per the term itself implies a person who acts independently without being affiliated with or authorized by an organization and is distinguishable from part-time, full-time or contractual employees...Freelancer or freelancing thus are terms currently used to mean a person who is self-employed or an independent contractor in the business of selling their services and skills to different employers for a specified time period...In freelance, therefore, there is no master-servant relationship, as the servant is his own master and has the ability to pick and choose his

assignments, the duration of such assignments and is enabled to work for himself as well as other multiple [entities]."

From an evidentiary standpoint, the court held that the documents presented as evidence such as emails were of value only if there was some primary evidence of employment relationship such as provision of statutory / contractual benefits, leaves taken / refused, etc.

Client database is not necessarily confidential information: Delhi High Court

In the case of *Manipal Business Solutions Private Limited v Aurigain Consultants Private Limited and Others* [CS(OS) 190/2022], the Delhi High Court discussed that a competitor, even after knowing which entity / customer is currently in business with its competitor, can approach such entity / customer to canvas about itself. It is for the customer to decide which business / entity to choose. Making a database of clients / customers and thereafter claiming confidentiality on the same would not create a monopoly over such customers. The dispute in this case was in relation to utilization of an entity's client database to secure clients and violation of non-disclosure agreements by the former employees of such entity who were now employed by the other party in the case. The court noted that not every customer/client database would qualify as confidential information or trade secret; the party claiming relief must establish that the confidentiality of such database was of economic / business / commercial value.

Applicability of IESO Act is establishment-specific and not entity-specific: Karnataka High Court

In the case of *Stumpp Schuele and Somappa Private Limited v Basavaraja M* [Writ Petition Number 58467 of 2013 (L-RES)], the Karnataka High Court discussed if the certified standing orders are applicable to all the units/industrial establishments of a company or whether the application of the Industrial Employment (Standing Orders) Act, 1946 (IESO Act) is specific to a particular industrial establishment.

The court noted that the employer is defined only for the purposes of the industrial establishment and not for the organization as a whole. In Section 13-B of the IESO Act, stress is laid on 'industrial establishment' and not



'company'. Therefore, the applicability or non-applicability of the IESO Act is based on the headcount of non-managerial employees in an industrial establishment / business unit and not in the employer-entity on an overall basis. The court in conclusion held that each industrial establishment needs to have certified standing orders of its own, although, subject to the agreement between the employer and the workmen, different industrial establishments can have the same certified standing orders.

The court also analysed if a company can have different ages of retirement for its different industrial establishments. The court noted that as there is a possibility of having different standing orders for different industrial establishments, the contents of the standing orders with regard to each of the different industrial establishments can also be different. This implies that the company can have different ages of retirement for its different industrial establishments.

04.

INDUSTRY INSIGHTS

In this section, we delve into interesting human resources related practices and / or

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 any contentious or non-contentious employment matters, please email to us at elbebulletin@khaitanco.com.

initiatives as well as industry trends across various sectors in the past one month.

Emerging role of artificial intelligence at the workplace

The use of artificial intelligence (AI) is steadily increasing in several workplaces. The human resources departments in several organisations are also witnessing the inculcation of AI for various aspects of employment including onboarding of employees, regular job-related procedures, etc.

Interestingly, a [report](#) noted that around 68% of companies which were surveyed by the human solutions provider Genius Consultants believe that the implementation of AI in the human resource process increases overall job accuracy. One such example is the use of AI based chatbots in the recruitment process to interact with applicants or new hires initially or during induction process. Most establishments have started using AI in various areas both before and after recruitment of a candidate. This includes identification of suitable profiles, client management, payroll services, etc.



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