



ELB E-BULLETIN

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Welcome to the first edition of the e-Bulletin (Volume V) 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 (with Gujarat, Karnataka, and Uttar Pradesh also releasing final rules under certain labour codes). 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.

West Bengal notifies a single window portal for various statutes

By way of a notification published on 27 December 2022 in the Official Gazette, the Government of West Bengal, in furtherance of its aim to provide all services exclusively through *Silpasathi* portal, notified about 13 services in *Silpasathi* including (a) license and auto renewal of license under the Factories Act, 1948, (b) approval of plan and permission to construct / extend / take into use any building as a factory under the Factories Act, 1948, (c) registration and renewal of registration of boiler manufactures under the Boilers Act, 1923, (d) license and auto renewal of license for contractors under the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA Act), (e) registration under the West Bengal Shops and Establishments Act, 1963, and (f) registration of principal employer under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.

Further, by way of a notification dated 2 January 2023, the Government of West Bengal included the facility of registration under the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979, on *Silpasathi* portal.

Puducherry mandates online filing under CLRA Act

By way of a notification published on 12 January 2023 in the Official Gazette, the Government of Puducherry has, with immediate effect, mandated online application for licences or renewal of licences by factories in Puducherry, Mahe, and Yanam regions for engaging contract labour under the CLRA Act. Hence, the submission of applications, the payment



of fees, and the tracking of status of the application can be done online. Once approved, the final certificate can be downloaded from the online portal anytime. The practice of issuing a signed copy of the certificate is no longer available, with the exception of applications already applied with the office.

Amendments introduced to Special Economic Zone Rules, 2006

By way of a notification published in the Official Gazette on 8 December 2022, the Government of India published the Special Economic Zones (Fifth Amendment) Rules, 2022 to further amend the Special Economic Zones Rules, 2006. These rules pertain to work from home arrangement for employees.

A unit may allow its employees to work from home or any place outside the SEZs. The kinds of employees in respect of whom such facility is available are (a) employees of the IT / ITES SEZs units, (b) temporarily incapacitated employees, (c) travelling employees and, (d) employees working offsite. The permission granted to work from home will be applicable up to 31 December 2023.

'Employee' is defined to include both direct employees as well as personnel deployed at the unit through another organisation. The amended rules provide that a unit permitting its employees to work from home needs to intimate the same to the Development Commissioner through an email on or before the date on such work from home is permitted.

The unit can provide an employee working from home duty-free goods, such as laptop, desktop, and other electronic equipment, and the same shall be allowed to be taken outside the special economic zone without payment of duty, subject to such goods being duly accounted for in the appropriate records.

EPFO releases circulars pursuant to Sunil Kumar case

By way of a circular dated 29 December 2022, the Employees' Provident Fund Organisation (EPFO) has, pursuant to the directions of the Supreme Court of India in the case of EPFO and Another v Sunil Kumar and Others [AIR 2022 SC 5634] (*Sunil Kumar*), set out the specific steps towards implementation of the said order. The circular has already drawn massive attention

from the industry given that several aspects continue to await clarity. In our [ERGO](#) dated 2 January 2023, we have examined the circular against the backdrop of the *Sunil Kumar* judgement.

Further, in its latest circular dated 25 January 2023, the EPFO has placed reliance on *Sunil Kumar* to initiate recovery actions in respect of the pension received by those employees who had not opted for higher contributions before their retirement prior to 1 September 2014. Leaving aside the practical challenges in terms of re-examination of such cases, it is important to note that in *Sunil Kumar*, the Supreme Court did not examine the aspect of overpayment to pre-2014 retired employees but instead dealt with a specific question of law as to the constitutional validity of the 2014 amendment to the Employees' Pension Scheme, 1995.

ESIC to perform Aadhaar authentication vis-à-vis members

By way of a notification published in the Official Gazette on 13 January 2023, the Government of India notified that the Employees' State Insurance Corporation (ESIC) is allowed to perform Aadhaar authentication vis-à-vis covered employees. This notification shall come into force on the date of its publication in the Official Gazette. The said authentication is required to be done on a voluntary basis for identification of beneficiaries, using 'yes' or 'no' option or e-KYC authentication facility. This is to provide social security benefits including medical and cash benefits as stipulated under the Employees' State Insurance Act, 1948.

ESIC informs employers to not file contribution for employees during sickness benefit period

By way of a letter dated 19 January 2023, the ESIC has informed the employers that the ESIC's audit authority recommends recovery of payment given by ESIC during the leave period of the employee (in order to compensate for the loss of wages) basis the rationale that the employer has already paid the wages to the employees during such leave period.

The ESIC has highlighted that once an employer files contribution in respect of any employee by entering certain number of days and corresponding wages, it means that these employees have been paid the amount of



salary for the corresponding number of days in that month which have been furnished against their names while filing monthly contributions. Accordingly, if the members are to avail sickness benefits from the ESIC, employers should not file contributions for their employees during the relevant period.

[Tamil Nadu notifies Transgender Persons Rules, 2022](#)

By way of a notification dated 26 December 2022 published in the Official Gazette, the Governor of Tamil Nadu notified the Tamil Nadu Transgender Persons (Protection of Rights) Rules, 2022. The rules detail various aspects of the Transgender Persons (Protection of Rights) Act, 2019 including (a) manner of making application for issue of certificate of identity, (b) procedure for issuance of certificate of identity, (c) provisions to prohibit discrimination, (d) formulation of an equal opportunity policy by establishments, and (e) setting up of a grievance redressal mechanism and appointment of a complaint officer by establishments.

03.

CASE UPDATES

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

[Compensation cannot be determined by inspectors under Kerala Holidays Act: Kerala High Court](#)

In the case of Lieutenant Colonel EV Krishnan and Another v State of Kerala and Others [Writ Petition (Civil) Number 22622 of 2012], the Kerala High Court considered the issue whether the Inspector appointed under the Kerala Industrial Establishments (National and Festival Holidays) Act, 1958 (Kerala Holidays Act) can adjudicate and determine compensation as per the provisions of the Kerala Holidays Act.

The petitioners, which included the Chairman and Managing Director of the company, had approached the court against a compensation amount imposed on them by the jurisdictional Assistant Labour Inspector due to alleged non-payment of double wages to the employees

working on national and festival holidays. Revenue recovery proceedings were also initiated to recover the compensation amount from the properties of the petitioners personally. It was argued by the respondent that they had the power to do all that is required under the Kerala Holidays Act and as the directed payment was not paid, the revenue recovery proceedings were initiated.

The court discussed the 'doctrine of implied powers' and observed that only a fair and reasonable power can be implied in a statute by resorting to the doctrine. Further, such a power can be implied only when the statute becomes incapable of compliance. Liberal reliance upon the doctrine to confer adjudicatory or any other power upon the authority can lead to severe outcomes. Hence, the Inspector appointed under the Kerala Holidays Act is not conferred with the power of adjudication. The court observed that an employee has the option to approach the labour court or the civil court in accordance with law for non-payment of wages. The court also held that the Managing Director cannot be personally proceeded against for the alleged liability of the company.

[Failure to complete inquiry within stipulated timeframe is not a ground to quash sexual harassment complaint: Delhi High Court](#)

In the case of CA Nitesh Parashar v Institute of Chartered Accountants of India ICAI and Others [Writ Petition (Civil) Number 88 of 2023], the Delhi High Court observed that the complaint of sexual harassment and the inquiry proceedings conducted in the complaint cannot be quashed merely for the reasons that the internal committee failed to complete the inquiry within the timeframe of 90 days stipulated in Section 11(4) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act).

The court opined that such complaints alleging sexual harassment merits serious and responsible treatment and accordingly, the inquiry and the findings have to be logical to protect the interest of both parties, i.e., the complainant as well as the respondent.

[COVID-19 vaccination cannot be insisted upon by an employer: Delhi High Court](#)



In the case of *Isha v State* (NCT of Delhi) and Others [Writ Petition (Civil) 12985 of 2021 and Civil Miscellaneous Appeal 4912 of 2022], the Delhi High Court observed that bodily integrity is protected under Article 21 (*protection of life and liberty*) of the Constitution of India and no individual can be forced to be vaccinated. Further, among the protections guaranteed under Article 21, a recognised aspect is the personal autonomy of an individual, which incorporates the right to refuse to undergo any medical treatment in the sphere of individual health.

The case concerned a lecturer employed in a government school in Delhi, who had approached the court to attend the school and teach without getting vaccinated. The court held that COVID-19 vaccination could not be insisted upon by the employer.

Section 1(6) of the ESI Act shall be applicable irrespective of the establishment's commencement date: Supreme Court

In the case of *ESI Corporation v M/s Radhika Theatre* [Civil Appeal Number 312 of 2023 (Special Leave Petition (Civil) Number 12520 of 2022)], the Supreme Court had two questions for consideration. The first issue was whether, with respect to the demand notices dated post 20 October 1989, a factory or an establishment established prior to 20 October 1989 will be governed by the ESI Act notwithstanding that the number of persons employed therein at any time fell below the limit specified by or under the Employees' State Insurance Act, 1948 (ESI Act). The second issue was whether the demand notices for the period after 20 October 1989 i.e., from the date by which Section 1(6) of the ESI Act was incorporated, could be applied retrospectively.

To provide context, Section 1(6) was incorporated in the ESI Act by Employees' State Insurance (Amendment) Act, 1989. Prior to insertion of Section 1(6) in the ESI Act, only the establishments engaging a certain number of employees were governed by the ESI Act. However, under the amended provision, an establishment already covered under the ESI Act would continue to be governed by the ESI Act notwithstanding the number of persons employed at any time falling below the limit specified under the ESI Act.

The court acknowledged that the ESI Act is a social welfare legislation, and any interpretation

which would lean in favour of the beneficiary should be preferred. Hence, the court held that Section 1(6) of the ESI Act shall be applicable even to those establishments which were established prior to 20 October 1989 and the ESI Act shall be applicable irrespective of the number of persons employed, notwithstanding that the number of persons employed at any time falls below the limit specified under the ESI Act.

Supreme Court refers to larger bench the issue that whether the bar should operate against an insured employee under the ESI Act to claim compensation under the Motor Vehicles Act.

In the case of *Rajkumar Agrawal v Vehicle Tata Venture* through its Director Sanskar Gupta and Others [Civil Appeal Number 4941 / 2022], the Supreme Court considered whether Section 53 or Section 61 of the ESI Act can be considered as a bar when a claim by an insured employee is made either under Section 163(A) (*liability of owner of a motor vehicle to pay in the case of death or permanent disablement due to accident*) or under Section 166 (*application of compensation*) of the Motor Vehicles Act, 1988 (Motor Vehicles Act).

Section 53 of the ESI Act provides that an insured person is not entitled to receive any compensation or damages under the Employee's Compensation Act, 1923 (EC Act) or any other law in respect of an employment injury sustained by the insured person as an employee under the ESI Act. Similarly, Section 61 of the ESI Act provides that a person who is entitled to any of the benefits provided by the ESI Act, shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment.

The court held that regarding the provision in Section 61 of the ESI Act, there is no authoritative pronouncement as to whether the insurance amount paid under the ESI Act is a "similar benefit" as the compensation which is claimed in a case where there is a motor vehicle accident. Further, the appellant contended that since the Motor Vehicles Act was a subsequent statute and the provisions in Section 163(A) and Section 167 (*a person entitled can claim compensation under either Motor Vehicles Act or EC Act*) in the Motor Vehicles Act begin with a non-obstante clause, the bar should not operate against the insured employee under the ESI Act to claim compensation



under the Motor Vehicles Act. The court accordingly opined that the above contentions required an authoritative pronouncement by a larger bench.

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.

India Inc. helps employees in second-innings

Often, a prolonged break in career culminates into the end of an individual's profession in the workplace. Employers are wary of according a

second chance to applicants who have a significant gap in their resumes. This gap can result from several factors such as health issues, personal exigencies, marriage, childbirth, etc. Women employees are unfortunately more susceptible to taking a long break in view of their perceived role as caregivers in society.

However, in a welcome move, several Indian companies are offering [return-to-work](#) program for people with a significant break in resume who aim to re-start their professional life and can add value to the company through their personal insights and experiences. Companies have also started second-career programs (some of which are specifically aimed for female employees while few others are gender-neutral) for candidates willing to return to work. Under these kinds of programs, emphasis is placed on a candidate's qualifications and not the duration of his / her / their career gap.

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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