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SUNIL KUMAR RULING AND IMPLEMENTATION OF PENSION PROVISIONS UNDER SOCIAL SECURITY CODE

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Until this month, there appeared to be limited visibility as regards the implementation of the labour code regime. While the Code on Social Security, 2020 (SS Code) received the assent of the President of India on 28 September 2020, the enforcement of the new legislative framework remained uncertain, barring the provision for identifying the beneficiaries under the SS Code through Aadhaar. However, on 3 May 2023, by way of notifications in the Official Gazette (collectively, Notification), the Ministry of Labour and Employment, Government of India, brought few more provisions of the SS Code into force. In this update, we navigate through the Notification (available here and here) in some detail.

Enforcement of certain provisions

(a) Provisions for formulation of a pension scheme: Section 15 of the SS Code empowers the Central Government to frame a pensions scheme that would envisage *inter alia* superannuation / retirement pension, widow or widower pension, and nominee pension. Pursuant to Section 15(3) of the SS Code read with the Notification, the Central Government has brought within the realm of the SS Code, the Employees' Pension Scheme, 1995 (1995 Scheme) with effect from 3 May 2023 (Effective Date). On and from the Effective Date, the Central Government has also enforced clauses (a) and (b) of Section 16(1) of the SS Code, as per which (i) the employer would be required to contribute to the employees' pension fund at the rate of 8.33% of wages, unless a different rate has been notified by the Central Government; and (ii) the employer of an exempted establishment would be required to make contributions towards pensionary benefits of employees in the manner specified under Section 143 of the SS Code. Section 143, in turn, has been brought into from the Effective Date, and it makes enabling provisions for the government to specify the conditions subject to which an establishment may be exempted *inter alia* from the pension-related provisions of the SS Code.

(b) Provision for transitory application of existing regime: Section 164(2)(b) of the SS Code *inter alia* provides that notwithstanding the repeal of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act), the 1995 Scheme shall remain in force, to the extent not inconsistent with the SS Code, for a period of one year from the date of commencement of the code. To this extent, Section 164(2)(b) has been brought into force from the Effective Date such that the 1995 Scheme will continue to operate *mutatis mutandis* under the SS Code.

Implementation of apex court ruling

It may be recalled that in the case of Employees' Provident Fund Organisation (EPFO) and Another v Sunil Kumar and Others [AIR 2022 SC 5634] (SC Ruling), the Supreme Court of India had, while upholding the constitutional validity of the Employees' Pension (Amendment) Scheme, 2014 (EPS Amendment), also ruled that the part of the EPS Amendment that required employees opting for higher pensionary benefits to make additional contribution at the rate of 1.16% of the monthly wages exceeding INR 15,000 towards the pension fund, was *ultra vires* the EPF Act. While declaring so, the Supreme Court, however, also acknowledged that the EPFO may require alternative sources to generate funds so as to disburse higher pensionary benefits to those opting for the same, and therefore, it suspended for 6 months, the operation of the part of its order declaring additional contribution by employees to be invalid, leaving it to EPFO to identify alternative sources to build fund corpus in the interim.

It is on account of these directions under the SC Ruling, the Notification provides that in the case of employees who have been members of the 1995 Scheme as of 1 September 2014 and exercised a joint option with their employers to make contributions on wages exceeding INR 15,000 per month (so as to receive higher pensionary benefits), the employer's share towards the pension fund account of such employees (Eligible Employees) shall be 9.49% of the wages exceeding INR 15,000 per month instead of 8.33% of such wages, with effect from 1 September 2014. As per the clarification issued on the Press Information Bureau's website, the Notification does not intend to increase the overall rate of contribution to be made by the employers under the law (which is 12% of wages); rather, it intends to readjust the contributions to be made by the employer between the employees' provident fund and the employees' pension fund accounts, such that for employees opting for higher pensionary benefits, a higher share of contribution by the employer would be routed to employees' pension fund account (resulting in proportionate decrease in the contribution towards employees' provident fund account).

Comment

The Notification, in part, brings the ambiguity around implementation of the SC Ruling to rest by clarifying the manner in which the EPFO would generate additional funds to disburse higher pensionary benefits to the employees who choose to receive such higher benefit. Few questions, however, remain unanswered / subject to further clarity. For instance, by implementing Section 164(2)(b) of the SS Code insofar as it relates to the 1995 Scheme, one may infer, although not with absolute certainty, that the 1995 Scheme is being integrated into the SS Code only for the period of one year. Further, and more importantly, the definition of 'wages' under the SS Code is different from the one under the EPF Act, and one waits clarity as to whether Section 16(1)(b) of the SS Code, which has been brought into force vis-à-vis the 1995 Scheme, would require contributions under the 1995 Scheme to be calculated as per the new definition of 'wages', especially when the contributions under the Employees' Provident Funds Scheme, 1952, which has <u>not</u> been integrated into the SS Code pursuant to the Notification, will continue to be calculated as per the older definition of 'wages' (i.e., the one under the EPF Act).

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