ELB E-BULLETIN

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- LABOUR CODES: STORY SO FAR
- REGULATORY UPDATES
- CASE UPDATES
- INDUSTRY INSIGHTS

Welcome to the first edition of the e-Bulletin (Volume VI) 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) employees' pension fund, (b) Central Advisory Board on minimum wages, and (c) 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.

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.

Employees' Provident Fund Organisation (EPFO) extends date for submission of wage details of higher pension applicants

By way of a press release dated 3 January 2024, the EPFO has extended the date for submission of wage details of the applicants who were allowed to opt for higher pension. The earlier timeline for this was 31 December 2023, which has now been extended to 31 May 2024.

EPFO removes Aadhaar as valid date of birth proof

By way of a circular dated 16 January 2024, the EPFO has removed Aadhaar from the list of acceptable documents for proof of date of birth.

The decision, sanctioned by the Central Provident Fund Commissioner, was carried out in compliance with a directive from the Unique Identification Authority of India (UIDAI). According to UIDAI's Circular Number 8 of 2023, Aadhaar had been considered as evidence of date of birth by numerous beneficiaries. However, despite being a unique identifier, Aadhaar was not acknowledged as valid proof of date of birth under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. UIDAI's directive expressly stated that Aadhaar served as proof of identity and not as proof of birth.

It is worth noting that the Bombay High Court, in the case of *State of Maharashtra v Unique Identification Authority of India and Others* [Criminal Writ Petition Number 3002 of 2022] underscored that Aadhaar should not be regarded as sufficient proof of date of birth.

Karnataka notifies Karnataka Compulsory Gratuity Insurance Rules, 2024 (Karnataka Gratuity Rules)

By way of a notification in the Official Gazette of the Government of Karnataka dated 10 January 2024, the Government of Karnataka has published the Karnataka Gratuity Rules, bringing the same in effect on the same day.

However, it is important to note that the Karnataka Gratuity Rules holds importance for employers exclusively operating within the state of Karnataka. For employers with physical establishments in multiple states, the relevant governing authority under the Payment of Gratuity Act, 1972 (Gratuity Act) remains the Central Government, and as such, unless there is a change in the statutory framework, the Karnataka Gratuity Rules may not hold relevance for such employers. We have examined the Karnataka Gratuity Rules in detail in our ERGO dated 16 January 2024.

03.

CASE UPDATES

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

Denying subsistence allowance for not recording attendance is illegal: Bombay High Court

In the case of *Hindustan Level Employees Union v Hindustan Unilever Limited* [Writ Petition Number (Civil) 8562 of 2015], the Bombay High Court held that a customary practice of requiring a suspended employee to mark his attendance is illegal.

In the present matter, the petitioner, who was an ex-employee of the respondent company, was denied subsistence allowance because he did not follow the condition stipulated in his suspension order which required him to mark his attendance every day at the factory gate register/muster. The employee, aggrieved by the same, approached the Labour Court which held the company's stance as affirmative.

The High Court in this regard analysed Section 10(a) of the Industrial Employment Standing Orders Act, 1946 (*which speaks about the payment of subsistence allowance to the employee)* along with the prerequisite condition of marking attendance laid down in the suspension order and held that the condition did not align with the said statute. The High Court further stated that Section 10(a) is a beneficial provision which exists to take care of employees who are placed under suspension, and thus, the respondent company cannot insist the employee to follow a customary practice that overrides a legal statute. The High Court finally directed the company to pay the petitioner employee his part of subsistence allowance along with delayed interest.

Workman is not eligible for payment of gratuity if he has contested his dismissal from service: Karnataka High Court

In the case of *Karnataka State Road Transport Corporation v The Assistant Labour Commissioner and Others* [Writ Petition Number 3649 of 2023], the Karnataka High Court held that a workman is not eligible for payment of gratuity if the order of dismissal from service has been questioned by the concerned workman.

In the present matter, the workman raised a dispute before the Labour Court after he was dismissed from service for an act of misconduct. Further, the workman filed another application before the Controlling Authority seeking payment of gratuity. The Controlling Authority determined the gratuity amount and directed payment by the employer.

The High Court emphasized that employees qualify for gratuity payments upon superannuation, retirement, resignation, or in the unfortunate events of death or total disablement due to accidents. However, in the current scenario, the High Court noted that the workman, whose services were terminated, did not accept the dismissal order and instead contested it before the Labour Court. Consequently, the High Court concluded that the workman is not eligible to file an application seeking gratuity payment.

Gratuity is determined by the last drawn salary even when an employee is transferred among institutes with the same management: Bombay High Court.

In the case of *Terna Polytechnic v Ravi Bhadrappa Randale* [Writ Petition Number 11864 of 2019], the Bombay High Court held that when an employee is transferred among institutes under the same management with

continuity in service, gratuity should be calculated based on the last drawn salary at the time of the final cessation of service.

In the present matter, the respondent worked for two different institutions under the same management in two distinct periods. The respondent filed an application seeking gratuity for services rendered in both institutions. The management argued for dividing the gratuity payments based on separate service periods, whereas the respondent advocated for a unified calculation covering his entire service.

The High Court, relying on Section 2(a) (*which defines 'continuous service'*) of the Gratuity Act, highlighted the consistent employment under the same management. The High Court emphasized the absence of a new recruitment process and lack of any gap between the period of services, which established continuity of employment. The High Court concluded that the gratuity amount should not be split for individual service periods in separate institutes, but it should be calculated in respect of the entire service period under the same management.

Section 14(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) does not mandate imposition of 100 % damages on employer as penalty: Kerala High Court

In the case of *Central Board of Trustees v Bake N Joy Hot Bakery* [Writ Petition (Civil) Number 35163 of 2019], the Kerala High Court held that Section 14(b) of the EPF Act does not expressly mandate a 100% penalty imposition.

In the present matter, the petitioners challenged the Industrial Tribunal's order wherein the penalty was lowered from 100% to 50% without any cause or reason. The High Court observed that the Tribunal had given an apt explanation for reducing the penalty amount in its order. Citing a catena of Supreme Court decisions, the High Court highlighted that there is no requirement to impose a 100% penalty in all cases regardless of the presence of *mens rea*.

Possible unemployment of workers no ground to continue business: Bombay High Court

In the case of *General Motors Employees Union v General Motors India Private Limited* [Writ Petition Number 9311 of 2023], the Bombay High Court allowed an automotive manufacturing company to close its plant, after noting significant accumulated loss.

The High Court observed that the decision to shut down the plant was made after various unsuccessful attempts to overcome financial difficulties. The High Court emphasized that the company in question was neither a public limited company nor involved in public utility, making it incapable of being compelled to continue operations despite accruing losses. Furthermore, the High Court clarified that when a company seeks closure of its establishment due to accumulated losses in accordance with the law, the potential unemployment of workers cannot be a valid reason to reject the closure of the company.

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.

Gig workers in demand across companies

With changing times, companies are opening up to various forms of workforce relationships that are different from traditional employer-employee relationships. A recent report reveals that various organizations are exploring gig work models and are actively hiring gig workers, with startups being the front-runners here.

Various young employees prefer a gig role / work model as it allows them job flexibility with a focus on tailored roles with specialized skills. While gig-industry is growing at a fast pace, certain employers are not flexible enough to adopt such models. Their major concerns relate to data protection and client inclinations.

The report also notably highlights the increasing emphasis of organisations in India on inclusive hiring practices, with women, LGBTQIA+ individuals and persons with disabilities remaining in focus.

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.

The contributors to this edition of the e-Bulletin are *Anshul Prakash (Partner), Deeksha Malik (Senior Associate), Ajeta Anand (Associate) and Sidheswar Sahoo (Associate).*

For any queries in relation to the e-Bulletin, please email to us at elbebulletin@khaitanco.com

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