ELB E-BULLETIN

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Welcome to the fourth 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.

Tripura establishes a district employment exchange for notifying vacancies

By way of a notification dated 5 March 2024 in the Official Gazette, the Tripura State Government has established its district employment exchange, namely, District Employment Exchange, South Tripura. The district employment exchange is expected to commence functioning on the date of its opening. Accordingly, all eligible employers under the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (EE Act) are required to notify vacancies arising in their establishment located in South Tripura to this district employment exchange. The procedure for notifying vacancies will continue to remain the same as prescribed under the EE Act.

EPFO enhances the eligibility limit for processing of auto claim settlements

The Employees' Provident Fund Organisation (EPFO) has enhanced the eligibility limit for auto claims made under Paragraph 68J of the Employees' Provident Funds Scheme, 1952 (EPF Scheme), from INR 50,000 to INR 1,00,000, through a notification dated 16 April 2024. Paragraph 68J of the EPF Scheme lists down the instances, such as (i) hospitalisation lasting for one month or more; (ii) major surgical operation in a hospital; (iii) tuberculosis, leprosy, cancer, etc. where the employer has granted leave to the employee for treatment, in which cases a member *(for themselves or for their family members)* under the EPF Scheme can claim advances from the employees' provident fund. Accordingly, with this notification, the members can now auto claim settlement of medical expenses amounting to INR 1,00,000. This change has also been made effective on the application software from 10 April 2024.

Manipur introduces exemption to employers from renewal of registration / licenses under certain labour laws

Through a notification dated 13 March 2024 published in the Official Gazette, the Manipur State Government has enacted the Manipur Labour Laws (Exemption from Renewal of Registration and License by Establishments Act), 2024 (Manipur Act), which exempts employers from renewing their registrations / licenses, obtained under the (i) Contract Labour (Regulation and Abolition) Act, 1970; (ii) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; and (iii) Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996. However, this exemption is subject to the employer furnishing a self-certification in the form specified in the second schedule of the Manipur Act within January of every year or 30 days of the completion of the relevant work, business or operation.

Declaration of 'paid holiday' by employers on account of General Elections to the Lok Sabha

Per Section 135-B of the Representation of the People Act, 1951, every person employed in any establishment and entitled to vote at an election to the House of the People or the Legislative Assembly of a State in required to be granted a paid holiday on the day of the poll. In this regard, several states in India have released state-specific circulars wherein employees have been provided with a paid holiday to exercise their right to vote, in light of the General Elections to the Lok Sabha. These circulars also clarify that the employees will be granted a paid holiday even if they are on the electoral roll of constituencies other than the location of the office.

FTC of United States of America opines on the validity of non-compete restrictions

The Federal Trade Commission (FTC) of the United States of America (USA) has banned non-compete clauses, with the aim to recognise the employees' / workers' freedom to choose jobs and encourage competition in the market, such that there is a boost to innovation and new businesses. The FTC further has clarified in its ruling that non-compete clauses for all workers shall be deemed to be unenforceable and the employers are obligated to notify to these workers that any non-compete clause imposed on them will not be enforced. However, the non-compete obligation on the senior level employees will continue to remain in force, although, employers are required to not impose any new non-compete obligations upon these senior level employees.

Thus, this ruling can be deemed to be a landmark development vis-à-vis enforceability of non-compete restrictions in the USA, considering the varied opinion across different states in the USA (as previously only in California, non-compete restrictions were held invalid). However, Indian courts have had a very clear stance on the enforceability of such covenants, as they have ruled that non-compete clauses post cessation of employment are not valid.

03.

CASE UPDATES

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

Every violation of Section 25F of ID Act does not amount to automatic reinstatement of retrenched employee: Bombay High Court

In the case of Dattu Shankar Dhumal v M/s Shipping Services and Others [Writ Petition Number 10073 of 2019], the Bombay High Court held that the mere technical failure to provide notice under Section 25F(c) *(which provides for notice to be served on the appropriate government as a condition precedent for retrenchment of employees)* of the Industrial Disputes Act, 1947 (ID Act) to the appropriate government while effecting retrenchment will not set aside the order of retrenchment or provide relief of reinstatement to the concerned employee for such non-compliance.

The facts of the matter were that while terminating the service of an employee for non-availability of work, the employer did not service notice to the appropriate government as required under Section 25F(c) of the ID Act. The High Court reiterated that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not to be applied mechanically in all cases. Further, the High Court noted that the ex-employee was paid retrenchment

compensation and notice pay. The High Court held that an additional compensation for the technical violation of failure to provide notice under Section 25F(c) of the ID Act will be appropriate to meet justice, instead of an order of reinstatement.

Non-communication of resignation acceptance to employee does not invalidate the resignation: Supreme Court

In the case of Shriram Manohar Bande v Uktranti Mandal and Others [Special Leave Petition (Civil) Number 21401 of 2022], the Supreme Court observed that non-communication of resignation acceptance to an employee does not invalidate the submitted resignation.

The employee (assistant teacher) in the present case had withdrawn his resignation after 15 days of tendering the same. However, when he went to the school to resume his duties, he was granted a letter stating that he was relieved from his duties. This was challenged on the basis that the employee did not receive a formal communication of resignation acceptance by the school. The school countered by submitting that a resolution accepting the resignation was passed by the school management, which was countered by the employee as being fabricated.

The Supreme Court reiterated that the resolution documents cannot be said to be manufactured without any appropriate reasons or sufficient evidence to the said effect. Further, the Supreme Court observed that the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 does not impose an obligation upon the management to communicate acceptance of resignation to an employee for such resignation to be effective. The Supreme Court further held that a resignation would be effective when it is accepted, notwithstanding that such acceptance is not communicated to the employee *(unless there are specific service guidelines mandating communication of resignation acceptance)*.

'Women professionals' are not eligible to maternity benefits: Delhi High Court

In the case of Delhi State Legal Services Authority v Annwesha Deb [Letters Patent Appeal 701 of 2023], the Delhi High Court held that engagement of professionals cannot be equated to that of employment of individuals with the employer, and thus, such women professionals are not eligible to such maternity benefits under the Maternity Benefit Act 1961.

We have examined this case in detail in our ERGO dated 3 May 2024, available here.

Employers have a right to transfer employee basis appointment terms: Supreme Court

In the case of M/s Divgi Metal Wares Limited v M/s Divgi Metal Wares Employees Association and Other [Civil Appeal Number 2032 of 2011], the Supreme Court was hearing a dispute pertaining to the transfer of employees from one factory to another factory, which was challenged by the employees. The challenge emanated from amendment of the standing order of the establishment wherein a clause which allowed transfer from the unit/factory/office in which the employee is working, to any other unit/factory/office of the establishment located anywhere in India was modified.

In this regard, the Supreme Court held that even if the standing orders applicable to the establishment did not properly outline the right of the employer to transfer an employee, the appointment terms of the employees gave the right to the employer to transfer an employee to any works or offices of the establishment. Further, the standing orders did not expressly prohibit the transfer of an employee from one unit to another.

The Supreme Court also, reiterated that "*nothing contained in the Standing Order shall operate in derogation of any law for the time being in force or cause prejudice to any right under contract of service, custom or usage or an agreement, settlement or award applicable to the establishment.*"

Appropriate Government under the ID Act for a leading private hospital is the Central Government: Bombay High Court

In the case of Tata Memorial Centre and Others v Tata Memorial Hospital Workers Union and Others [Writ Petition Numbers 9956, 9960, 9961 and 9962 of 2023], the Bombay High Court held that the appropriate government for a leading private hospital is the central government under the ID Act. The High Court while acknowledging that the hospital is not 'under the control and management' of the Government of India, noted that it will be wrongful to say that the hospital is completely free from the control of the central government.

The High Court held that 'under the control of the central government' and 'controlled by central government' are different concepts. The expression 'under the control' demonstrates absolute control by the central government whereas 'controlled by' would mean some control by the central government. Therefore, it is not necessary to delve if the hospital was 'owned' by the central government, and even 'controlled' by the central government would satisfy the test for determination of central government as its appropriate government.

The above rationale was supported by the fact that the hospital received grants from the central government which were used for carrying out most of its operations. Further, its accounts were audited by the Comptroller and Auditor General of India and many decisions with respect to the conditions of employees were taken by the central government through the presence of its officials in the governing council of the hospital.

Wage structure needs to be determined in consonance with financial ability of an employer: Supreme Court

The case of VVF Limited Employees Union v M/s VVF India Limited and Another [Civil Appeal Numbers 2744-2745 of 2023 with Civil Appeal Number 2754 of 2023], related to a charter of demands by the employees for revision in wages and employee benefits. In this regard, the Supreme Court held that the financial capacity of an employer is an important factor that cannot be ignored in fixing wage structure.

The Supreme Court further observed that for wages and other facility revision, the industrial adjudicator applies the industry-cum-region test, wherein the prevailing payments are compared with the industrial units that are similarly placed in the same region. Further, the financial capacity of the employer is a strong factor in determining the comparability of units under the said test.

Courts are not obligated to hear substantially delayed claims under ID Act: Rajasthan High Court

In the case of Udai Singh v Executive Engineer, Irrigation Division Dholpur and Others [Civil Writ Petition Number 17821 of 2019], the Rajasthan High Court held that the statutory absence of any limitation period in the ID Act should not be interpreted as an obligation on the courts to hear all stale or substantially delayed claims. The High Court opined this while commenting on the prolonged delay on the part of the ex-employee which was approximately 15 years and commented that ignorance of the law and lethargy in realising one's own grievances reflects a callous attitude.

The High Court also held that any claim with substantial delay should only be entertained after examining the explanation offered in connection with the delay and acceptability of the same.

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 increases and widens employee insurance plans

According to an article in ET, companies are adopting insurance plans for employees that can be customized by employees. Further, employers are offering an increase in other welfare premiums including maternity benefits and healthcare including LGBTQ+ health coverage. This is reflected in the increase in the insurance sum in various companies.

The above-mentioned increased benefits are being offered to employees even with budgetary constraints with a targeted focus on sustainability. This can be attributed to the employer's desire to prevent employee attrition by keeping employee well-being at the forefront.

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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