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Welcome to the tenth 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.

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:

- Employees' pension fund
- Central Advisory Board on minimum wages
- 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 past 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.

The Ministry of Labour and Employment, as a way ahead, has planned to conduct training workshops for state government labour officials in the coming months. These workshops are proposed to facilitate the

nationwide rollout of the new labour codes, ensuring readiness and addressing potential legal challenges. Additionally, the Central Government has urged the state of West Bengal to expedite the drafting of rules under the four labour codes, highlighting the benefits for all societal sections, including women and migrant workers.

Further, the Ministry of Labour and Employment is in talks to convene a meeting with the labour ministers of all states and union territories by early December to understand the current status of the labour codes. Previously few states including West Bengal had raised concerns regarding the adoption of these proposed labour codes, however, they have now agreed to draft the necessary rules to enforce them. The states have been directed to prepare a comparative study of the rules drafted by the states and model rules framed by the Union Government in order to identify gaps and accordingly, fill such gaps, prior to the enforcement of the proposed labour codes.

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's (EPFO) circular on utilization of reserves and surplus by an exempted establishment

By way of a notification dated 7 October 2024, the EPFO has issued a circular pertaining to the guidelines for the utilization of reserves and surplus funds held by exempted establishments. The circular specifically addresses situations where these exempted establishments propose to use these funds to credit interest to the beneficiaries of the trust at a higher rate than that declared by the EPFO for its members. However, after multiple deliberations and basis the detailed reasoning provided in the circular, the EPFO has clarified that requests from exempted establishments to distribute these funds among current beneficiaries cannot be approved. We have made a detailed analysis in this regard in our ERGO dated 22 October 2024, accessible here.

Government of Haryana proposes to introduce an online dashboard for transparency in details of applications filed under various labour laws

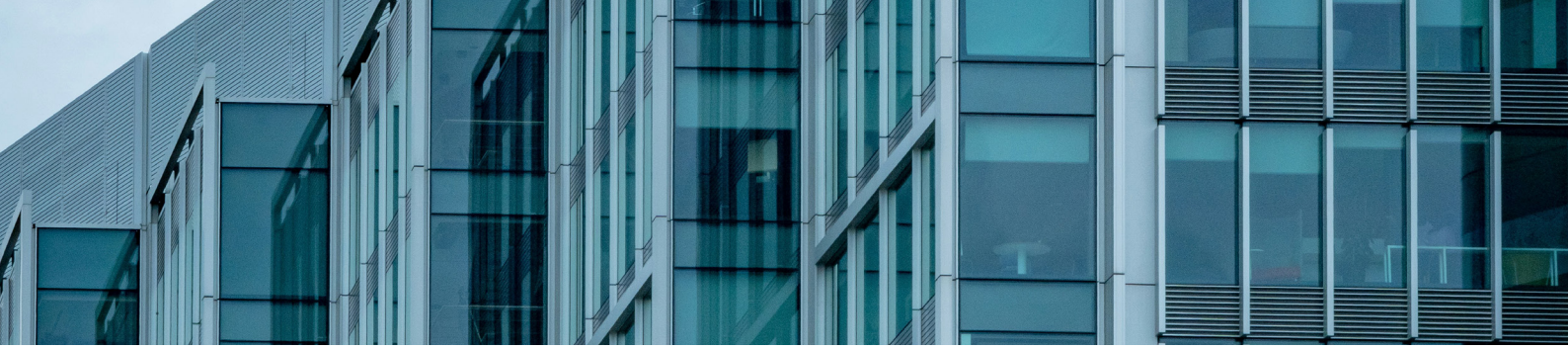
Through an office order dated 15 October 2024, the Government of Haryana as a part of the Business Reform Action Plan 2024 and with the objective of enhancing 'ease of doing business', has mandated the publication of an online dashboard in the public domain. This initiative aims to bring transparency and provide applicants with real-time information regarding details specific to applications under various labour laws, including:

(i) Anticipated timelines of the approval of the applications, registrations and renewals

(ii) Number of applications received, and

(iii) Statutory fees payable by applicants, etc.

The labour laws that are proposed to be covered on the dashboard are the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA Act), Punjab Shops and Commercial Establishments Act, 1958, Building and Other Construction Workers Act (Regulation of Employment and Conditions of Service) Act, 1996, the Inter State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 and Factories Act, 1948.



Government of Karnataka allows shops and commercial establishments to operate 24*7

Through a notification dated 27 September 2024, the Government of Karnataka has permitted all shops and commercial establishments employing 10 or more persons to be open 24*7 on all days of the year for a period of 3 years from the date of the publication of the said notification in the Official Gazette. Please note that we have not been able to locate a copy of this notification published in the Official Gazette.

Such shops and commercial establishments operating 24*7 are subject to certain conditions such as a) providing every employee one day of holiday in a week on a rotation basis and exhibiting such details at conspicuous places within the establishment; b) paying the employees wages along with overtime directly in their bank accounts; c) ensuring that no employee works for more than 8 hours per day and 48 hours per week and the total working hours, including overtime, does not extend beyond 10 hours per day and 50 hours per week; d) ensuring that no employees are working on holidays or performing overtime as per the applicable requirements, otherwise penal action will be initiated against employers / managers as per Karnataka Shops and Commercial Establishments Act, 1961 and rules framed thereunder; and e) imposing adequate safety measures for women employees and seeking written consent from the women employees to work on a night shift, i.e., after 8 PM on any day.

Karnataka Government has notified the Karnataka Cine and Cultural Activists (Welfare) Act, 2024 (Karnataka Cine Activists Act)

Through a notification dated 24 September 2024 published in the Official Gazette, the Karnataka Government has notified the Karnataka Cine Activists Act which is aimed at extending social security benefits to cine and cultural activists in the state of Karnataka. The Karnataka Cine Activists Act seeks to establish a welfare board dedicated to the welfare of the concerned community, facilitating the creation and administration of social security schemes specifically designed for their unique needs.

The Karnataka Cine Activists Act also includes provisions for the registration of cine and cultural activists, such that they qualify for the proposed benefits as set out in the Karnataka Cine Activists Act. To support the funding of these welfare initiatives, the Karnataka Cine Activists Act proposes a welfare cess ranging between 1-2% on cinema tickets, subscription fees, and other revenue streams from related establishments including stand-alone cinema theatres, multiplex halls and other establishments as notified by the government etc. This cess is to be collected by the government and subsequently transferred to the welfare board within a specified timeframe to ensure timely disbursement of benefits.

Additionally, the Karnataka Cine Activists Act introduces a grievance redressal mechanism that enables cine and cultural activists to raise concerns regarding entitlements, payments and other benefits. It also includes an appeal mechanism for redressal of grievances to higher authorities when necessary. To enforce compliance, the Karnataka Cine Activists Act provides for penalties in case of non-compliance, with fines ranging from INR 10,000 for the first offence to a maximum of INR 1,00,000 for repeated violations.

Case Updates

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

Division bench of Karnataka High Court stays single bench's order noting the existence of an employment relationship between OLA and its drivers: Karnataka High Court

In the case of Ms (X) v ICC, Ani Technologies Private Limited [Writ Petition Number 8127 of 2019], the Karnataka High Court examined the scope of the term 'employee' under Section 2(f) of the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act). The court clarified that the term 'employee' under the POSH Act intends to cover all possible modes of engagement of a person as an 'employee' by an employer, therefore, extending the definition of 'employee' to include individuals such as driver-subscribers of OLA.

In this case, the driver of the taxi sexually harassed the petitioner who had booked a taxi through the OLA app. Consequently, she issued a legal notice to OLA, requiring the internal committee (IC) of OLA to inquire into her complaint as per the provisions of the POSH Act. OLA in this regard, responded with an assertion that since its drivers are independent contractors, and not employees, the IC lacked jurisdiction to inquire into the matter. This aggrieved the petitioner thereby resulting in the petitioner filing the present writ petition before the Karnataka High Court.

In its reasoning, the court noted that OLA exercises extensive supervision and control over its drivers in relation to services provided through the platform. The drivers do not have discretion in setting fares, managing bookings, deciding routes or using personal mobile devices, since all such activities are regulated by OLA. Additionally, OLA controls the revenue generated by drivers and determines the incentive received by them. While the engagement contract between OLA and its drivers designates them as independent contractors, the court observed that the drivers exhibit no actual independence in their professional duties. Therefore, the court concluded that an employer-employee relationship exists between OLA and its drivers. Consequently, the court directed OLA to conduct an inquiry as required under the POSH Act and to thereby pay compensation to the petitioner.

However, the division bench of Karnataka High Court in an order dated 4 October 2024 has stayed the above passed single bench's order.

Contract labourers have the right to be consulted prior to the implementation of any significant changes to their executed contracts: Karnataka High Court

In the case of Hindustan Aeronautics Limited and Others v Hindustan Aeronautics Contract Workers Association [Writ Appeal Number 1122 of 2021], the Karnataka High Court held that the representatives of the contract labourers must be informed if any significant changes are made to their contractual terms. The court further held that even if there is no direct employer-employee relationship between the principal employer and the contract labourers are engaged by a contractor, this does not preclude the existence of a jural relationship, particularly when contract labourers have been engaged continuously for extended periods.

In the present case, the petitioner unilaterally revised the contract terms for contract labourers, resulting in the engagement of contract labourers in additional non-core activities due to increased work demands. The respondent challenged these revisions, contending that they were illegal, void and in violation of Articles 14 (right to equality before law), 21 (right to life and personal liberty), 23 (prohibitions of traffic in human beings and forced labour), 39 (directive principles of state policy), 42 (provision for just and humane conditions of work and maternity relief) and 43 (living wage for workers) of the Constitution of India, as well as provisions under CLRA Act and various memorandum of settlements.

In its ruling favouring the respondent, the court emphasized that although no employer-employee relationship exists between the petitioner and contract labourers, this does not eliminate the jural relationship between them. Consequently, the court held that contract labourers are entitled to be heard prior to any unilateral changes to the terms of their service.

For forfeiture of gratuity, an employee must be convicted by a court of law for establishing an offence involving moral turpitude: Delhi High Court

In the case of Punjab National Bank v Shri Niraj Gupta and Another [Civil Miscellaneous Application Numbers 52155 and 52157 of 2024], the Delhi High Court clarified the conditions under which an employee's gratuity may be forfeited. The court held that two specific conditions must be met to forfeit gratuity: a) the terminated employee must have been convicted of an offence punishable under the applicable laws, and b) the offence in question must involve moral turpitude.

In the present case, the respondent was accused of sexual harassment of a colleague, leading to an inquiry under the POSH Act. Following this inquiry, the respondent was found guilty of the allegations regarding sexual harassment, by IC established by the appellant. Consequently, the respondent's employment was terminated and served a show cause notice regarding forfeiture of gratuity on grounds of 'moral turpitude'.

However, the court dismissed the appeal, stating that the determination of whether an act constituted "moral turpitude" lies within the exclusive jurisdiction of a court of law, and no competent court had as such convicted the respondent of such an offence. Therefore, the court ruled that the respondent remains eligible to receive his gratuity.

Recovery proceedings cannot be initiated under the Employees' State Insurance Act, 1948 (ESI Act) during the corporate insolvency resolution process (CIRP): National Company Law Tribunal (Allahabad Bench) (NCLT)

In the case of Saurabh Chawla v Employee State Insurance Corporation [Interlocutory Application Number 438 of 2023 In Corporate Petition (Insolvency and Bankruptcy) Number 81 / ALD of 2019], the NCLT, held that as per Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC), once a moratorium is declared, any recovery of contributions as mandated as per Section 45A of the ESI Act is strictly prohibited.

In this case, Harig Crankshaft Limited initiated insolvency proceedings on 3 March 2023. During the CIRP process, the respondent commenced proceedings under Section 45A of the ESI Act to recover unpaid contributions and require submission of returns for the period from April 2018 to March 2023. Additional notices were issued, demanding contributions under the ESI Act, and an order of recovery was issued by the respondent despite being notified of the ongoing CIRP process and the moratorium.

The NCLT emphasized that the provisions of the IBC take precedence over conflicting provisions in other laws. Specially, NCLT noted that as per Section 14 of the IBC, once a moratorium is declared, no suits or proceedings may be initiated or continued against the corporate debtor, nor may any judgments, decrees, or orders be executed by any court, tribunal, arbitration panel or other authority. Accordingly, the respondents' recovery order under Section 45A of the ESI Act contravened Section 14 of IBC and was thus deemed unenforceable.

Contract labourers are entitled to receive gratuity from the principal employer if they have worked on the employer's premises for an extended period with minimal involvement from the contractor: Bombay High Court

In Indian Institute of Technology, Bombay v Tanaji Babaji Lad and Others [Writ Petition Number 12746 of 2024], the Bombay High Court held that, for the purpose of gratuity payments, the respondents, who were contract labourers, should be considered employees of the petitioners.

In this case, the respondents, who were contract labourers engaged through third-party contractors, filed an application regarding the non-payment of gratuity by the petitioners. The petitioners argued that it was not liable to pay gratuity to the respondent workers, citing the absence of an employer-employee relationship. However, the court held that, due to the continuous nature of the respondents' service to the petitioner at its own premises and on account of the lack of termination of such engagement at the conclusion of each contractor's term, the workers had no occasion to claim gratuity from multiple contractors.

Further, the court observed that the petitioner's engineers and officials exercised substantial supervision and control over these contract labourers, with some respondents initially engaged directly by the

petitioner before being converted to formal contract workers. While the workers' salaries were processed through the contractors, the contract labourers never worked outside the petitioner's premises. The court found it challenging to conclude that the respondents were employed by the contractors rather than by the petitioners, particularly given that the labourers' services continued uninterrupted across multiple contractor changes, and no contractual agreement guaranteed continued service for the same workers by successive contractors.

The court, therefore, rejected the petitioner's argument and directed them to pay the entire gratuity owed to the respondents, thereby upholding the claim of these contract workers for gratuity payment.

Failure of the contractor to obtain a license under the CLRA Act does not result in the contract labourers being recognized as employees of the principal employer: Guwahati High Court

In the case of Jatin Rajkonwar and Others v Union of India and Others [Writ Petition (Civil) No. 3871 of 2020], the Guwahati High Court held that the failure of a contractor to obtain a license under the CLRA Act does not result in the contract labourers being recognized as employees of the principal employer.

In this case, the petitioners sought regularization and reinstatement as employees of the respondent company, Oil and Natural Gas Corporation Limited (ONGC), claiming that they were initially employed directly by ONGC in 1985. According to the petitioners, from 1987 onward, ONGC shifted their engagement through a contractor as a mere pretence to disguise an employer-employee relationship. The petitioners further asserted that, in the initial years, the contractor did not possess a valid license under the CLRA Act, rendering the contractual arrangement invalid and making ONGC their direct employer.

The court held that the petitioners did not present sufficient evidence to demonstrate that they were directly engaged by ONGC rather than by the contractor. Additionally, they failed to establish that ONGC exercised control over their employment to support an employer-employee relationship. While dismissing the petition, the court noted that substantial evidence was provided by the respondent to show that no such relationship existed between the petitioners and ONGC, as the contractor paid regular wages to the petitioners, maintained appropriate records and ultimately disengaged their services.

Burden of proof is on the employer to disprove the worker's claim of continuous service under the Industrial Disputes Act, 1947 (ID Act): Madhya Pradesh High Court

In the case of Govardhan v Chief Municipal Officer [Miscellaneous Petition Number 6329 of 2022], the Madhya Pradesh High Court held that the verbal termination of an employee without prior notice or retrenchment compensation contravenes Section 25F of the ID Act, particularly in instances where the employer fails to provide substantial evidence to counter the claims made by the workman.

In this case, the petitioner, who had served the respondent from 1 October 2011 to 1 February 2019, alleged that his employment was terminated orally without notice, opportunity for a hearing or retrenchment compensation. However, when the petitioner was unable to produce sufficient evidence before the labour court to demonstrate continuous service of at least 240 days within a calendar year, the labour court ruled that the termination did not breach Section 25F of the ID Act. Consequently, the labour court dismissed the petitioner's claims, resulting in the present petition.

The court, in the present case, reiterated the settled legal principle that the initial burden to prove 240 days of continuous service rests with the workman, and once the worker deposes about the completion of 240 days of service, the burden shifts to the employer to produce cogent documentary evidence

rebutting the oral evidence of the worker. In the present case, the respondent failed to provide such evidence rebutting the claims of the worker, therefore, the court overturned the labour court's order and directed the reinstatement of the petitioner with 50% back wages and payment of consequential benefits by the respondent.

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.

Indian Inc's advancing diversity, equity, inclusion and belonging (DEIB) strategies: Impact on organizational success and societal progress

Basis the 2024 report of Great Place To Work on DEIB, an analysis has been conducted linking DEIB strategies to organizational success. The report indicates that when employees experience a workplace where diversity, equity, inclusion and a sense of belonging are deeply embedded, they are more likely to feel enthusiastic about coming to work. Further, the report emphasizes that employers today are proactively advancing DEIB initiatives, thereby directly contributing to the sustainable development goals (SDGs). These efforts promote inclusive economic growth, generate employment opportunities, and help reduce inequalities, among other positive outcomes.

The report also underscores the additional societal benefits of DEIB initiatives, which extend beyond the workplace. Such initiatives foster social, economic and political inclusion, enhance community outreach, and create a broader positive impact on society.

However, the report also highlights that certain stereotypes and stigmas regarding gender roles, the LGBTQIA+ community, and persons with disabilities remain prevalent in many workplaces. These issues often result in employees perceiving limited progress in DEIB efforts and experiencing a lack of confidence in their organization's commitment to meaningful change.

Balancing remote work flexibility with productivity: Challenges for India Inc

Indian companies are increasingly scaling back or imposing stricter controls on remote working policies by introducing rigorous attendance and monitoring systems. This shift is attributed to various challenges employers have encountered, such as the misuse of flexible working arrangements, including practices like "coffee badging", as well as concerns over reduced productivity and engagement.

However, these measures may face resistance from employees, who could perceive them as short-sighted actions potentially detrimental to workplace equality, trust, and culture over the long term. Consequently, the key challenge for organizations will be to strike a balance between addressing employee expectations for flexibility and, at the same time, managing productivity concerns effectively.

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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