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Welcome to the second edition of the E-Bulletin (Volume I) brought to you by the Employment, Labour and Benefits practice group of Khaitan & Co. This E-Bulletin covers regulatory developments, case law updates and insights into industry practices that would impact businesses from a sector agnostic standpoint.



REGULATORY UPDATES

President gives assent to the Code on Wages 2019

On 8 August 2019, the Code on Wages, 2019 ("**Wages Code**"), which seeks to replace the extant Minimum Wages Act, 1948, Payment of Wages Act,1936, Payment of Bonus Act, 1965 and Equal Remuneration Act, 1976, received the assent of the President of India. The Wages Code makes several changes to the existing statutory framework, some of the significant ones being:

i) extending the coverage of the Minimum Wages Act, 1948 to all employments, organised or unorganised;

ii) fixing of a minimum floor wage by the Central Government (which would vary across different geographical locations);

iii) extending the application of the provisions relating to payment of wages to all establishments (as opposed to the existing framework wherein such provisions mainly apply to industrial establishments);

iv) removing the wage ceiling for the application of the chapter on payment of wages (which currently stands at INR 24,000 (USD 348.74) per month);

v) introducing a provision for compounding of offences not punishable with imprisonment; and

vi) increasing the period of limitation for filing of claims in relation to payment of wages to 3 years.

Please note that the Wages Code has not come into force yet and is expected to come into effect on a date that the Central Government may appoint by way of a notification in the Official Gazette. Our detailed analysis of the Wages Code may be accessed here.

Ministry of Labour and Employment proposes amendments to the EPF Act

On 23 August 2019, the Ministry of Labour and Employment released a draft bill ("**Draft Bill**") to amend the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") and invited public comments on the same till 22 September 2019. In a significant move, the Draft Bill introduces a definition of 'wages' in the EPF Act which is identical with the one provided in the Wages Code and provides that where this wage bucket falls short of 50% of the total remuneration, then the components excluded from the wage bucket (such as house rent allowance) will also be treated as part of wages to the extent they exceed 50% of the overall remuneration.

The Draft Bill seeks to replace the current framework of calculation of the employees' provident fund contribution on 'basic wages' with one where calculation would be made on 'wages'. Further, while the current rate of contribution (12%) has been retained, the Draft Bill proposes to empower the Central Government to prescribe different rates of contribution for different classes of employees.

A crucial proposal in relation to inquiry under the EPF Act is the introduction of a limitation period for initiating inquiries of 5 years from the date the alleged amount is due. Other relevant proposed amendments are increasing the monetary penalties tenfold and introducing compounding of minor offences.

EPFO cautions PF Commissioners against roving inquiries

On 28 August 2019, the Employees' Provident Fund Organization ("**EPFO**") issued a notice ("**EPF Notice**") in relation to inquiries initiated / sought to be initiated by authorities under the EPF Act pursuant to the judgment of the Supreme Court of India ("**Supreme Court**") in *Regional Provident Fund Commissioner (II) West Bengal v Vivekananda Vidyamandir and Others [Civil Appeal Number 6221 of 2011]* ("***Vivekananda***").

As per Section 6 of the EPF Act, the employees' provident fund contribution shall be calculated on the basic wages, dearness allowance and retaining allowance, if any, payable to the employee. The term 'basic wages' has been defined under Section 2(b) of the EPF Act to mean all emoluments which are earned by an employee in accordance with the terms of the employment contract and which are paid or payable in cash to him / her, barring certain specific exclusions. On 28 February 2019, the Supreme Court in *Vivekananda* clarified that the ambit of such 'basic wages' extends to all allowances which are uniformly, necessarily and ordinarily paid to all employees generally or all employees in a particular category. The judgment triggered widespread inquiry notices issued by field officers, requiring establishments to produce past records for a period of 3-5 years or even since inception of operations to evaluate wage structures and determine any shortfall in contributions.

By virtue of the EPF Notice, the EPFO has directed that any notice issued without any *prima facie* evidence of non-compliance / arbitrary bifurcation of wages to avoid liability under the EPF Act should not be pursued further. Also, any inspection to be carried out in an establishment shall be subject to prior permission from the Central Analysis Intelligence Unit (CAIU) constituted by the EPFO.

Lok Sabha passes the Transgender Persons (Protection of Rights) Bill

On 5 August 2019, the Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2019 ("**Transgender Bill**"). The proposed law is yet to be passed by the Rajya Sabha.

Clause 2(k) of the Transgender Bill defines 'transgender person' to mean a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone a sex reassignment surgery or such other therapy), person(s) with intersex variations, and person(s) having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.

From an employment and labour law perspective, a few provisions of the Transgender Bill are important. For instance, Clause 3 provides that no establishment shall discriminate against a transgender person resulting in an unfair treatment in employment, or a denial of, or termination from employment. Further, Clause 9 provides that no establishment shall discriminate against any transgender person in any matter relating to employment, including but not limited to, recruitment, promotion and other related issues.

The Transgender Bill mandates every establishment to ensure compliance with the provisions thereof and provide such facilities to transgender persons as may be prescribed by the appropriate government. Further, every establishment shall designate a person to be a complaint officer to deal with complaints relating to violation of the provisions of the Transgender Bill.

Government of India releases the Framework for Implementation of Social Audit under the BOCW Act

On 20 August 2019, the Government of India released the Framework for Implementation of Social Audit ("**Social Audit Framework**") under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("**BOCW Act**"). This comes after the Supreme Court, on 19 March 2018, delivered a judgment in *National Campaign Committee v Union of India and Others [(2018) 5 SCC 607]* directing the Ministry of Labour and Employment to constitute a sub-committee to conduct social audit of Building and Other Construction Workers Welfare Boards ("**BOCW Boards**"). Pursuant to this, several pilot social audits were conducted. The results of these social audits indicated that many building and other construction workers were not aware of the benefits available to them under the BOCW Act. It was then that the authorities in certain states began actively pursuing the occupiers of leased spaces in commercial buildings in Gurugram and adjacent localities and sending them assessment notices for payment of cess.

Now, the Framework provides that the social audit teams will visit, for primary verification, (a) sites where construction is taking place; (b) sites where workers working in construction activities are residing – either temporarily or permanently; and (c) offices of the BOCW Boards at the state and district level. As part of the social audit exercise, the audit team

will *inter alia* identify citizens eligible for benefits but not registered and facilitate workers in filing grievances. The state governments and the BOCW Boards shall be responsible for taking follow-up action on the findings of the social audit.

CASE UPDATES

Payment of full back wages in case of wrongful termination – Supreme Court reiterates the law in *Jayantibhai Raojibhai Patel v Municipal Council, Narkhed*

In *Jayantibhai Raojibhai Patel v Municipal Council, Narkhed & Others. [Civil Appeal No. 6188 of 2019]*, the Supreme Court reiterated the position that in a situation of wrongful dismissal, reinstatement and payment of back wages for the period of absence of work on account of such dismissal is the normal rule.

In this case, the appellant was accused of misappropriation pursuant to which an inquiry was initiated by the respondent. The first inquiry absolved him of guilt, however, the respondent ordered a second inquiry in which the appellant was found guilty and consequently dismissed. When such dismissal was challenged, the High Court held that rejection of the first report and ordering of a *de novo* inquiry without providing reasons constituted wrongful termination. While the High Court granted retiral benefits to the appellant, it rejected the plea for payment of full back wages. Such order was challenged before the Supreme Court.

The Supreme Court set aside the order of the High Court and awarded back wages to the appellant. The Supreme Court referred to its earlier decisions and relied on the principle that payment of back wages in case of wrongful termination is the normal rule, expect in circumstances when the employer proves that the employee was gainfully employed elsewhere and was getting paid similar wages. However, the court has discretion in this aspect and in making such an order, it may consider other factors such as the nature of misconduct, the degree of illegality in the inquiry process, the length of service and the financial condition of the employer.

No forfeiture of gratuity until issuance of termination order – Bombay High Court reiterates in *Shankar Dadoba Naik v Maharashtra State Road Transport Corporation*

In *Shankar Daboda Naik v Maharashtra State Road Transport Corporation, Palghar Division [W.P. No. 9349 of 2012],* the Bombay High Court delved into the question of whether the issuance of a termination order to an employee is necessary for forfeiture of gratuity under Section 4(6) of the Payment of Gratuity Act, 1972 ("**Gratuity Act**"). In this case, the petitioner was served with a show-cause notice by the respondent proposing his termination on account of misconduct. However, such notice was stayed in a writ petition before the Bombay High Court requiring the respondent to maintain status quo of his employment. Before the petitioner's superannuation in 2011, the respondent served an order on him forfeiting his gratuity.

The argument of the petitioner was that, by virtue of the status quo order, his employment was not terminated until his superannuation. On the other hand, the respondent contended that the petitioner had been found guilty in an inquiry and the issuance of termination order

was a mere formality, which the court must disregard while deciding on forfeiture. However, the court rejected the respondent's contention and held that the requirement of termination is mandatory for forfeiture of gratuity under Section 4(6) of the Gratuity Act. It was held that in the absence of a termination order, the termination was not effected and the respondent was, thus, required to pay gratuity to the employee.

IC's recommendations to the employer in the presence of service rules - whether binding? Calcutta High Court decides in *Debjani Sengupta v The Institute of Cost Accountants of India*

In the case of *Debjani Sengupta v The Institute of Cost Accountants of India [W.P. No. 4806 (W) of 2019]*, the Calcutta High Court was confronted with the question whether the recommendations of the internal committee ("**IC**") constituted under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**PoSH Act**") would be binding on the employer at all times.

The court observed that while Section 13 of the PoSH Act provides that the employer *shall* act upon the recommendations of the IC within 60 days of its receipt by him, as per Rule 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules 2013, such recommendation can be given by the IC only when there are no service rules applicable to the establishment. Therefore, where service rules existed, the report of the IC was a *fact-finding report* or a preliminary report with regard to the allegation of sexual harassment and the employer was bound to then proceed under the service rules before imposing any penalty.

INDUSTRY INSIGHTS

EPFO may soon launch an e-inspection system

The EPFO has, in the past, made consistent endeavours towards digitization of its procedures in order to achieve better administrative convenience. It has been reported that as its next move, the EPFO may introduce an e-inspection system in order to reduce, to the extent possible, the cumbersome physical inspection processes in checking for statutory compliances. The Central Provident Fund Commissioner also noted that the EPFO is developing a speedy online settlement procedure for KYC-compliant beneficiaries to ensure that the dues of an employee are settled within a period of 3 days.

Further, it may be noted that for the purposes of contributions, an employee is allotted a unique Universal Account Number ("**UAN**") which he / she can use to avail online services through the EPFO Portal. Currently, an employee switching establishments is required to file transfer claims under his / her UAN with the EPFO. In this regard, the EPFO is testing, on a pilot basis, an automated system wherein at the time the new employer files a monthly return, the contributions made by previous employers automatically stand imported and credited under the employee's UAN.

EPF Act to extend to the union territories of J&K and Ladakh

Recently, the Central Board of Trustees of the EPFO approved the proposal to bring establishments based in the union territories of Jammu and Kashmir and Ladakh within the ambit of the EPF Act. At present, such establishments are covered under a specific legislation *viz.* Jammu and Kashmir Employees' Provident Funds and Miscellaneous

Provisions Act, 1961. The move comes after the abrogation of Article 370 of the Constitution of India, which had granted a special status to the State of Jammu and Kashmir.

EPFO's Central Board of Trustees approves proposal to recommend an amendment to the Employees' Pension Scheme

As per a notification published by the Press Information Bureau, the Central Board of Trustees of the EPFO, has, in a meeting held on 21 August 2019, approved the proposal of an amendment to The Employees' Pension Scheme, 1995 ("**EPS**") to restore commutation of pension that is due to an employee after a period of 15 years of availing the commutation. If such a proposal were to be accepted, a pensioner would be permitted to withdraw a portion of his / her dues as an advance lump-sum and future pension payments will be made on the reduced sum. However, after a period of 15 years, the quantum of pension would be restored to the original pension amount i.e. the sum due had the pensioner not opted for commutation. It may be noted that the EPS formerly contained such a provision, but it was withdrawn by the EPFO in 2009 citing a considerable deficit in the valuation of the fund at the time.

Workplace transformation through AI: ITC Infotech to give digital bots to every employee

In an effort towards technological innovation, ITC Infotech India Limited ("**ITC Infotech**"), an IT services management company, is reportedly planning to provide to each of its employees a software digital bot to perform routine tasks, in order for them to be able to focus on the more creative facets of work. The digital bot will be able to complete a varied set of functions in different roles, such as technical assistance towards data extraction, testing of algorithms and logistics help such as creation of automated schedules and updation of databases. ITC Infotech expects the bots to significantly lift employee productivity. The company is one of the several companies which are resorting to greater use of artificial intelligence ("**AI**"). Kotak Mahindra Bank recently launched Keya 2.0, its voicebot that supports conversational banking and resolves customers' queries independently by using its database and employing AI-based business logic.

Further, as per a study conducted by Microsoft, the employee productivity gains in India are expected to double at organizations using AI-powered technology by 2021. The survey brought forth the primary benefits that AI offers, such as higher competitiveness, improved customer engagement, fast-tracked innovation and also greater margins of returns. However, the study also noted that most Indian companies are yet to set up adequate infrastructure and investment to introduce AI models into their core development strategy.

Intuit India: Employees to get gender affirmation-related support benefits

In a move geared towards diversity and inclusion, Intuit India Product Development Centre Private Limited ("**Intuit**"), a fully owned subsidiary of Intuit Inc. USA, has introduced certain gender affirmation-related support benefits for its employees, beginning 1 August 2019. Intuit has committed to provide INR 5,00,000 (USD 6,969.50) each as reimbursement to employees who undergo a gender affirmation surgery, and INR 60,000 (USD 836.34) per year towards their hormone replacement therapy, both provided as part of the employees' insurance coverage. Intuit also provides several other benefits to its LGBTQ employees such as group medical insurance covering employees' same sex partners, gender-neutral washrooms as well as specialized counselling services for its LBTQ employees.

Professional bodies and employers in gig industry may soon have to file data on jobs

According to a report, the government may soon lay down a framework that would require professional bodies such as the Institute of Chartered Accountants of India, bar councils and medical associations, as well as companies operating in the gig economy, to submit data regarding job creation and the number of registrations with them. Such data will be handled by the Labour Bureau under the Ministry of Labour and Employment or the Ministry of Statistics and Programme Implementation and will contribute towards more accurate overall job data in the country. Other sources currently used for such job estimates include the number of enrollments under the Employees' Provident Fund Scheme, Employees' State Insurance Scheme, General Provident Fund and enterprise surveys.

Nifty 50 companies' annual reports disclose an increasing number of complaints of sexual harassment

The Nifty 50 companies – comprising of corporate giants such as Infosys Limited, Tech Mahindra Limited, Housing and Development Finance Corporation Limited and Larsen and Toubro Limited – have reportedly disclosed receiving a total of 741 complaints of sexual harassment in their annual reports for the year ended 31 March 2019. It may be noted that under the PoSH Act, every employer is required to disclose, in its annual report, the number of cases filed, if any, and the disposal thereof. Several factors could be attributed to this development, including an increasing awareness of the law relating to sexual harassment and the sensitization measures undertaken by establishments as part of their duties under the PoSH Act.

A similar report was published last year, wherein it was stated that the data from BSE 100 companies indicated a 15% increase in reporting of alleged acts of sexual harassment in the financial year 2018. However, it was also highlighted that despite the increasing awareness, the number of cases that had gone unredressed increased by 28% over a year.

Overall, an effective implementation of the PoSH Act remains a challenging task. For instance, several startups still show "NIL" complaints in their annual reports. Similarly, private establishments have disclosed a higher number of complaints under the PoSH Act than the public sector undertakings, possibly because the constitution of an IC in these establishments is still underway.

Microfinance institutions take recourse to background screening

A recent report indicates that microfinance institutions have begun taking recourse to background screening of candidates as part of their recruitment process. The microfinance industry, which currently has around 80,000-85,000 employees, did not as a practice undertake detailed verification of candidates. However, considering the legal and reputational risks involved, some companies in the industry are now tying up with independent data repositories which undertake detailed employee verification.

According to a report released by HireRight (a background screening firm) last year, 80% of the employers interviewed said that background checks helped them uncover issues which might have gone unnoticed otherwise. These issues largely relate to previous employment discrepancies and educational credentials. Background checks through such databases and third-party agencies assume significance in the case of recruitment of key

managerial personnel. For instance, the recruitment of a whole-time director convicted of an offence with 6 months' imprisonment may attract penalty under the Companies Act. Similarly, appointment of a key executive who, in the previous organisation, faced action pursuant to a sexual harassment complaint may attract reputational risks for the new employer.

A peep into Hero MotoCorp's Project Tejaswani aimed at gender equality

Hero MotoCorp Limited ("**Hero**") has reported that under its Project Tejaswani, an initiative aimed at generating equitable employment opportunities for women, the company has employed more than 1,000 women employees. Under the project, Hero has made efforts towards improving women representation at all levels in theorganization, including ground level jobs in assembling facilities at various locations as well as positions in the senior management. Hero also runs other similar initiatives such as an Alternate Career Programme catering to women who wish to re-enter the profession after a break and a Women in Leadership Programme to encourage and assist women in taking up senior leadership roles.

At the same time, however, it may be noted that currently, female representation, particularly in the automobile manufacturing sector in India, is far from satisfactory. For instance, Tata Steel Limited recently reported that women compose about 5% of their total shop-floor workforce across plants, a number it aims to double by the year 2025.

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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