PRIMER ON LABOUR CODES 2019 / 2020

Years 2019 and 2020 saw a major development in the Indian employment and labour law landscape with the President of India granting his assent to the four labour codes on wages, industrial relations, working conditions, and social security, respectively. The codes, which aim to consolidate and consequently replace 29 Central labour laws, are yet to be brought into force, barring provisions relating to (a) Central Advisory Board on minimum wages, and (b) identification of workers and beneficiaries through Aadhaar number for social security benefits. Initially slated to be brought into force in April 2021, the labour codes may see some delay in their implementation as several states are yet to formulate rules to build an appropriate implementation framework under the new regime.

The consolidation exercise in the form of the labour codes does bring with it certain changes in the existing labour law regime. The digitization of procedures (relating to registration and intimations) and the concept of deemed registration (in case authorities do not register the establishment within the specified timeline) may be seen as a positive impact on the ease of commencing business as well as the ease of doing business. Similarly, the substitution of prosecution-oriented framework with facilitation process, whereby an employer would be given an opportunity to rectify any non-compliance, heralds an important change in the approach of the government.

Having said that, current and potential employers may have to gear up for a relook at their workplace arrangements and workforce engagement structures. Fixed-term employments will see an important change in that employees engaged for a specified duration will also enjoy tenure-based benefits similar to permanent workforce (albeit on a pro-rated basis). Engagement of contract labour in an establishment's core activities would be barred except in certain situations. On the cost front, employers may see some impact on their expenses towards social security contributions, gratuity and severance compensation as these computations may have to be calculated on at least 50% of the total remuneration paid to an employee.

In this primer, we endeavour to briefly examine the important provisions of each of the labour codes. For a detailed advice on the implications of the codes, please reach out to the Employment Labour and Benefits team at Khaitan & Co.

PART I - CODE ON WAGES 2019

The Code on Wages 2019 (Wages Code) seeks to replace (a) Equal Remuneration Act 1976 (ER Act), (b) Minimum Wages Act 1948 (MW Act), (c) Payment of Bonus Act 1965 (Bonus Act), and (d) Payment of Wages Act 1936 (PW Act).

APPLICATION OF THE PROVISIONS

- *Equal remuneration*: The ER Act prohibits discrimination of employees on the basis of their sex. The Wages Code prohibits discrimination on the grounds of one's gender, thus allowing a third category of gender i.e., transgenders to also be protected from discrimination in matters of payment of remuneration.

- *Payment of wages*: The PW Act is applicable to employees earning not more than INR 24,000 per month. The threshold limit as under the PW Act has been done away with and all employees are covered irrespective of their monthly remuneration.

- *Payment of bonus*: The statutory threshold under the Bonus Act has not been incorporated in the Wages Code. It is now dependent on the discretion of the appropriate government to prescribe the wage ceiling for eligibility of payment of bonus.

APPROPRIATE GOVERNMENT

- Under the extant laws, the term 'appropriate government' is defined variously across statutes. Generally, for establishments under the control of Central Government, railways, major ports, mines and oilfields, appropriate government is the Central Government.

- Under the codes, the definition of 'appropriate government' has been made mostly uniform across the codes. For establishments under the authority of the Central Government, railways, mines, oilfields, major ports, air transport services, telecommunication entities, banking companies, insurance companies, or a corporation or other authority established by a Central statute or a central public sector undertaking or subsidiary companies set up by central public sector undertakings or autonomous bodies owned or controlled by the Central Government, the appropriate government is the Central Government.

CONCEPT OF 'WAGES'

- Under the extant laws, the term 'wages' has been defined differently across different statutes. It has been understood to include all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment. However, the inclusions and exclusions for components such as overtime allowance, dearness allowances, etc. have been different across different statutes.

- Under the codes, the definition of 'wages' has been consolidated and made uniform to mean all remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment (express or implied) were fulfilled, be payable to a person employed in respect of his employment, or of work done, and includes basic pay, dearness allowance and retaining allowance (if any). The exclusions have also been specified. The exclusions in this regard are bonus, the value of any housing accommodation, contribution towards pension and provident fund by the employer, conveyance allowance and travelling concession, sums paid to the employee to defray special expenses, house rent allowance, overtime allowance, any commission payable to the employee, gratuity, retrenchment compensation, other retirement benefits and ex-gratia payments made on termination of employment (if any).

- A significant addition to the definition of 'wages' is the inclusion of a proviso which states that if the expressly excluded components (other than end-of-service payments) exceed 50% of the overall remuneration (i.e., the 'wages' bucket + expressly excluded components), then some portion of these expressly excluded components will be taken out (notionally) and added to the 'wages' bucket, idea being to bring the 'wages' bucket to 50% level at the time of making various computations.

FIXATION OF A FLOOR WAGE

- Under the MW Act, the respective state governments fix and notify the basic rate of wages for the workers employed in the scheduled establishments. While this discretion has been retained even under the Wages Code, there shall additionally be a floor wage to be fixed by the Central Government, considering the minimum living standards of workers. Different floor wages may be fixed for different geographical areas.

- The appropriate governments cannot fix minimum wages lower than the floor wages. In the case that the existing minimum rates of wages fixed by the appropriate government are higher than the floor wage which would be prescribed by the Central Government, such minimum rates would continue to apply and shall not be reduced.

COMPOUNDING OF OFFENCES

- Compounding of offences is allowed only under the MW Act in specific states which have made amendments in that regard.

- Compounding of offences which are not punishable with imprisonment has been provided for. The compounding may be allowed by the prescribed officer for a sum of 50% of the maximum fine provided for the relevant offence. However, such an opportunity is unavailable to an employer who commits an offence the second time or thereafter within a period of 5 years from the date of either (i) commission of a similar offence which was earlier compounded; or (ii) commission of a similar offence for which such person was earlier convicted.

PART II - CODE ON SOCIAL SECURITY 2020

The Code on Social Security 2020 (SS Code) attempts to amend and consolidate the laws in relation to social security in India while extending the coverage to more categories of workers. The law seeks to repeal 9 extant statutes *viz.* (a) Employee's Compensation Act 1923, (b) Employees' State Insurance Act 1948 (ESI Act), (c) Employees' Provident Funds and Miscellaneous Provisions Act 1952 (EPF Act), (d) Maternity Benefit Act 1961, (e) Payment of Gratuity Act 1972, (f) Cine Workers Welfare Fund Act 1981, (g) Employment Exchanges (Compulsory Notification of Vacancies) Act 1959, (h) Building and Other Construction Workers Cess Act 1996, and (i) Unorganised Workers' Social Security Act 2008.

APPROPRIATE GOVERNMENT

- While the definition of 'appropriate government' has been made uniform across the codes, under the SS Code, it is also provided that where an establishment has branches in more than one state, the 'appropriate government' would be the Central Government.

DEFINITION OF 'BUILDING OR OTHER CONSTRUCTION WORKER'

- The current regime excludes, from the definition of 'establishment', an individual who employs workers in any building or construction work in relation to his / her own residence, the total cost of such construction not being more than INR 10,00,000.

- SS Code excludes from the definition: (a) building or other construction work employing less than 10 workers in the preceding 12 months, or (b) building or other construction work related to 'own residential purposes of an individual or group of individuals for their own residence'. It is also provided that for exclusion from the definition, the total cost of such work should not exceed INR 50,00,000 (or a higher prescribed amount) and the number of workers engaged should not exceed such number as may be specified by the appropriate government.

DEFINITION OF 'EMPLOYEE' AND FIXED TERM EMPLOYMENT

- While EPF Act and ESI Act include contract workers in the definition of 'employee', they are not so included for the purposes of gratuity. Under the SS Code, however, the term 'employee' will include contract labour even for the purposes of gratuity.

- As regards fixed-term employees, their engagement is expressly recognised in the model standing orders contained in the Central rules of Industrial Employment (Standing Orders) Act 1946 (albeit with the requirement of treating fixed term employees at par with permanent employees). This statute applies mostly to industrial establishments such as factories. For commercial establishments, the engagement of fixed term employees is largely contractually governed.

- Under the SS Code, the express recognition accorded to fixed-term employee would apply to all establishments covered therein. The code mandates treatment in terms of wages and benefits at par with permanent employees doing the same work. The benefits ordinarily based on service tenure are required to be made available to fixed term employees on a pro-rated basis, without them completing the minimum service tenure (say 4 years and 240 days in case of gratuity).

INCLUSION OF CONCEPTS OF 'GIG WORKER', 'PLATFORM WORKER' AND 'AGGREGATOR'

- The term 'gig worker' has been defined to mean a person who performs work and earns from such activities outside of the traditional employer-employee relationship. The code does not, in this regard, clarify the expression 'outside of traditional employer-employee relationship'. The term 'platform worker' has been defined as a person engaged in a work arrangement wherein the organisation uses 'an online platform to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment.' The term 'aggregator' is defined to mean a 'digital intermediary or a marketplace for a buyer or user of a service to connect with the seller or the service provider'. SS Code also sets out categories of aggregators in the Seventh Schedule. This list includes ride sharing services and food delivery services.

- SS Code provides that a scheme formulated by the Central Government for gig workers and platform workers for matters relating to life and disability cover, accident insurance, health and maternity benefit etc. may be wholly funded by the contributions of aggregators, which shall be between 1-2% of the annual turnover as determined by the Central Government.

VOLUNTARY OPTING IN AND OPTING OUT

- The EPF Act contains an option of voluntary coverage for establishments which are otherwise not covered if the employer and the majority of employees have agreed to the same.

- SS Code introduces voluntary coverage of establishments under Chapter III (employees' provident fund contribution) and Chapter IV (contribution towards employees' state insurance fund) in the event the employer and the majority of employees in the relevant establishment agreed for such coverage. It is also provided that the employer of an establishment covered voluntarily under the relevant chapters may make an application to the Director General of Employees' State Insurance Corporation / Central Provident Fund Commissioner for opting out of such coverage (where there is an agreement between the employer and the majority of the employees to this effect).

AVAILING COMMON CRÈCHE FACILITY

- SS Code allows employers to avail common crèche facility of government, municipality, non-governmental organisation, or private entity. A group of establishments may also pool in their resources for setting up a common crèche in the manner mutually agreed by them.

LIMITATION PERIOD FOR INQUIRY AND DETERMINATION OF DUES IN MATTERS OF CONTRIBUTION

- Under EPF Act, there is no limitation period for initiation of inquiries, allowing authorities to initiate inquiries for any duration retrospectively. Under ESI Act, however, there is an embargo on ESIC from passing order of determination of dues in respect of the period beyond 5 years from the date on which the contribution became payable.

- SS Code introduces a limitation period for determination of amounts due and initiation of inquiries of 5 years from the date the alleged amount is due as regards the chapters on employees' provident fund and employees' state insurance fund.

COMPOUNDING OF OFFENCES

- None of the existing legislations to be repealed by the code provide for an option of compounding of offences (barring a few state-specific amendments).

- The code introduces compounding of offences in the following manner (albeit with certain restrictions):

  - Composition amount for offences punishable with fine only: Half of the maximum fine; and

  - Composition amount for offences punishable with imprisonment up to one year and fine: Three-fourth of the maximum fine.

PART III – INDUSTRIAL RELATIONS CODE 2020

The Industrial Relations Code 2020 (IR Code) attempts to amend and consolidate the laws in relation to trade unions, conditions of employment in industrial establishments, investigation and settlement of industrial disputes, and other connected matters. Once implemented, the law will repeal certain extant statutes *viz.* (a) Trade Unions Act 1926, (b) Industrial Employment (Standing Orders) Act 1946 (IESO Act), and (c) Industrial Disputes Act 1947 (ID Act).

APPLICATION OF THE PROVISIONS

- The IESO Act applies to industrial establishments with 100 or more workmen i.e., non-managerial employees (50 or more workmen in certain states). The term 'industrial establishments' here largely refers to factories, mines, railways, air transport services, and plantations. Few states, however, have extended the application of the statute to commercial establishments.

- The chapter on standing orders applies to establishments engaged in any 'industry', thus covering all commercial establishments.

DEFINITION OF 'INDUSTRY'

- Under the ID Act, the term 'industry' is widely defined to mean any business, trade, undertaking, manufacture or calling of employers.

- Much of the definition flows from case law on the subject, which emphasizes that 'industry' is any systematic cooperation between employer and employee, irrespective of the profit motive. The notable difference, however, is the two exclusions from the definition - organisations which are wholly or substantially engaged in any charitable, social or philanthropic service, and 'any other activity as may be notified by the Central Government'. We are yet to see which other kind of establishments would be excluded.

DEFINITION OF 'WORKER'

- Under the ID Act, a person who is engaged in a supervisory capacity and drawing wages exceeding INR 10,000 per month will not be considered as a 'workman'.

- Under the IR Code, the threshold amount of wages for exclusion of persons in supervisory capacity has been raised to INR 18,000 per month.

RECOGNITION OF TRADE UNION

- Under the extant regime, the concept of recognition of trade union is largely absent, barring certain states such as Maharashtra and Telangana.

- Based on the recommendations of the Second National Commission on Labour, the IR Code provides that there shall be a negotiating union or negotiating council, as the case may be, in an industrial establishment for negotiating with the employer such matters as may be prescribed.

- Following are the criteria for such recognition of trade union(s), in addition to any other criteria that may be prescribed under the rules:

  - where there is only 1 registered trade union, the same shall be recognised as sole negotiating union of the workers;

  - where there are more than 1 registered trade unions, the one having 51% or more workers of the establishment shall be recognised as sole negotiating union of the worker; and

  - where there are more than 1 registered trade unions, none of which has 51% or more worker representation, there shall be a negotiating council consisting of representatives of such trade unions which have the support of 20% of the workers.

DISPUTE RESOLUTION MECHANISMS

- Under the ID Act, there are various, sometimes overlapping, modes of dispute resolution, such as reference of industrial dispute by the appropriate government to the labour court or the industrial tribunal, and adjudication by labour court of certain matters where the industrial tribunal already had jurisdiction (such as unlawful dismissal).

- Under IR Code, the number of modes has been cut short by abolishing labour courts, courts of inquiry, and conciliation boards.

- Further, under ID Act, a workman can raise a dispute before the industrial tribunal after a cooling off period of 45 days from the date of making an application to the conciliation officer. That provision has been retained under the IR Code, and additionally, there is another route under the code whereby after conclusion of conciliation proceedings, the aggrieved party may approach the industrial tribunal for matters not settled by the conciliation officer, within 90 days of receiving the report of the conciliation officer.

RESTRICTIONS ON STRIKES AND LOCKOUTS

- Under the ID Act, the restriction on strikes and lockouts applies to establishments engaged in public utility services.
- The restriction on strikes and lockouts applies to all establishments.
- There are two pre-requisites under the IR Code before a strike could be actioned, as is the case under the ID Act:
  - giving a notice within 60 days (not at least 60 days) before the strike; and
  - maintaining a cooling off period of 14 days from the date of notice about the strike.
- The second condition is necessary because had there been only the first condition, then the workers could give a notice of only one day before the strike (which falls within the 60-day period).

CONTRIBUTION TO WORKER RE-SKILLING FUND

- Under the extant framework, there is no concept of a worker re-skilling fund. At the time of severance, a 'workman' is, in addition to other statutory and contractual dues, entitled to retrenchment compensation as calculated under the ID Act.
- Under the IR Code, every employer retrenching its workers will additionally be required to contribute to the worker re-skilling fund of an amount equal to 15 days' wages last drawn by every impacted worker.

COMPOUNDING OF OFFENCES

- The code introduces compounding of offences in the following manner (albeit with certain restrictions):
  - Composition amount for offences punishable with fine only: Half of the maximum fine; and
  - Composition amount for offences punishable with imprisonment up to one year or fine: Three-fourth of the maximum fine.

PART IV – OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE 2020

The Occupational Safety, Health and Working Conditions Code 2020 (OSH Code) attempts to amend and consolidate the laws relating to occupational safety and health, welfare facilities and working conditions in respect of employees engaged at various kinds of establishments. Once implemented, the law will repeal 13 extant statutes *viz.* (a) Factories Act 1948 (Factories Act), (b) Contract Labour (Regulation and Abolition) Act 1970 (CLRA), (c) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 (ISMW Act), (d) Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996, (e) Mines Act 1952, (f) Dock Workers (Safety, Health and Welfare) Act 1986, (g) Plantations Labour Act 1951, (h) Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955, (i) Working Journalists (Fixation of Rates of Wages) Act 1958, (j) Motor Transport Workers Act 1961, (k) Sales Promotion Employees (Conditions of Service) Act 1976, (l) Beedi and Cigar Workers (Conditions of Employment) Act 1966, and (m) Cine Workers and Cinema Theatre Workers (Regulation of Employment) Act 1981.

APPLICATION OF THE PROVISIONS

- *Factories*: Factories Act applies to factories engaging 10 or more workers, if running with the aid of power, and 20 or more workers otherwise (certain states have increased these thresholds to 20 or more workers and 40 or more workers respectively). Under the OSH Code, the applicability threshold for factories has been increased to 20 or more workers, if running with the aid of power, and 40 or more workers otherwise. However, this threshold shall be 10 or more workers for the purposes of Chapter II relating to registration.

- *Contract labour*: CLRA applies to establishments engaging 20 or more contract workers and contractors engaging 20 or more workmen (certain states have varied these thresholds which range from 5 or more workers to 50 or more workers). Under the OSH Code, the applicability threshold for Chapter XI relating to contract labour has been increased to 50 or more contract workers.

- The general scope of application of OSH Code covers all establishments i.e., 'a place where any industry, trade, business, manufacturing or occupation is carried on in which 10 or more workers are employed.' However, there is no applicability threshold for provisions relating to mines and dock work.

DEFINITION OF 'INTER-STATE MIGRANT WORKMAN'

- Under ISMW Act, the term 'inter-state migrant workman' covers only a person recruited by or through a contractor in one state for an establishment in another state.

- Under the OSH Code, the ambit of the term has been widened to also include any person recruited directly by an employer in one state for employment in an establishment situated in another state, or who has come on his own from one state and obtained employment in an establishment of another state. Further, a wage threshold of INR 18,000 per month has also been introduced.

- The ISMW Act requires the contractor to *inter alia* provide and maintain suitable residential accommodation and free medical facilities to inter-state migrant workers. Code does away with the requirement of suitable residential accommodation and displacement allowance. As regards payment of journey allowance, the manner thereof would be determined by rules of appropriate government.

CONCEPT OF 'CORE ACTIVITY OF AN ESTABLISHMENT'

- CLRA only has an enabling provision which gives the appropriate government the power to prohibit engaging of contract labour in specific processes / operations. That said, Andhra Pradesh and Telangana have introduced the concept of 'core activity of the establishment' and prohibited engagement of contract labour in such activities (unless certain specified conditions have been met with).

- Under the OSH Code, the engagement of contract labour in 'core activity of an establishment' (as defined thereunder) is prohibited, barring certain exceptions. The definition also sets out certain kinds of activities which would not be considered as core activities, such as housekeeping, transport services, loading and unloading, sanitation etc.

- The limited exceptions recognised by the OSH Code as regards engagement of contract labour in core activity are as follows: (a) the normal functioning of the concerned establishment itself being such that the activity in question is ordinarily done through contractors; (b) the activities are such that full-time employees are not required for the major part of the working day; or (c) there is a sudden increase in the volume of core activity that needs to be completed within a stipulated time, thereby making it necessary to hire contract labour instead of onboarding a permanent workforce.

DEEMED REGISTRATION

- The extant laws largely do not provide for a mechanism of deemed registration.

- Under the OSH Code, a concept of 'deemed registration' has been introduced whereby if the registering officer fails to register an employer within the time prescribed by the appropriate government, the establishment shall be deemed to have been registered immediately on the expiration of the prescribed period and the electronic registration certificate shall be auto generated.

ISSUANCE OF AN APPOINTMENT LETTER

- Currently, it is largely on the employer to have a written appointment letter. Few state-specific shops and establishments statutes, however, do prescribe a format in which the appointment letter ought to be issued to an employee.

- As per the code, every employee shall be issued a letter of appointment stating such particulars as would be prescribed by the appropriate government.

WORKING HOURS AND RELATED PROVISIONS

- Under Factories Act, maximum number of daily hours is fixed at 9 hours. The statute also has related stipulations in terms of minimum rest intervals, limit on spread over etc. For commercial establishments, the state-specific shops and establishments statutes specify the working hour limits and the associated requirements.

- Under the OSH Code, the maximum number of daily hours has been set as 8 hours. Other stipulations for rest intervals, spread over etc. have been left to be prescribed by the appropriate government. Note that while factories would be governed only by these requirements once these are brought into effect, for commercial establishments, there would be an overlap as regards the working hour requirements set out under the OSH Code and those provided under the state-specific shops and establishments statutes.

- As for overtime, under the Factories Act, overtime work can be required to be done only in case of an exemption under rules / orders of the state government / Chief Inspector which extends the normal working hours. As regards commercial establishments, the overtime limits and the payment in relation to overtime work are discussed under the state-specific shops and establishments statutes. In either case, there is no express requirement to obtain consent from the worker before requiring him / her to undertake overtime work. Under the OSH Code, a worker may be required to work overtime upon his / her consent for such work. Further, the appropriate government may prescribe the maximum number of hours of such overtime.

EMPLOYMENT OF WOMEN IN NIGHT SHIFTS

- Under Factories Act, no woman worker shall be required or allowed to work between the hours of 7 pm and 6 am. Further, the state government has limited power to extend such limits to 10 pm and 5 am.

- Under the OSH Code, women workers have, upon their consent, been allowed to work between the hours of 7 pm and 6 am, subject to such conditions as may be prescribed by the appropriate government.

COMPOUNDING OF OFFENCES

- While certain states have introduced composition provisions under few statutes, the extant laws largely do not provide an option to compound offences.

- The OSH Code enumerates specific provisions and violations which may be compounded, for a sum of 50% of the maximum stipulated fine in case of a 'penalty' and 75% of the maximum stipulated fine for an 'offence'. It has been clarified that composition is not possible for a repeated offence committed with 3 years of the first violation.

For all queries on the subject, please contact us at: elbebulletin@khaitanco.com