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

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REGULATORY UPDATES

COVID-19 round-up: What employers should know

Against the backdrop of measures to contain COVID-19 outbreak, there have been continuing developments in India in the form of orders and notifications, both at the Central and the state levels. The firm has developed a dedicated portal on COVID-19 for sharing these developments with its clients and the public at large.

From an employment and labour law standpoint, a summary of important regulatory developments related to the containment of COVID-19 outbreak during the month of April 2020, are set out below:

- The extended lockdown: The nation-wide lockdown originally imposed until 14 April 2020 was first extended until 3 May 2020 and thereafter has been extended until 17 May 2020. However, gradual relaxations have been made through revised guidelines and exemptions. While earlier orders primarily permitted only essential activities to continue, the latest guidelines applicable currently (available here) provide for graded permissions applicable zone-wise, which will be designated weekly by the Ministry of Health and Family Welfare. Though there are limitations in red zones, both manufacturing establishments and private offices have largely been permitted to operate at full strength in orange zones (except in containment zones demarcated therein) and green zones. Further, some states have prolonged the lockdown for a longer period; for instance, Telangana has extended its restrictions until 29 May 2020.

- Mandatory social distancing measures: The Central guidelines provide that all establishments permitted to continue operations must strictly follow a set of social distancing and safety measures prescribed through the standard operating procedure (SOP) under Annexure I of the guidelines. While most states have adopted the Central SOP, some states have imposed additional requirements as well. To know more, you can refer to our detailed ERGO in this regard.

- Sweeping labour law reforms: In order to encourage businesses and promote investment, several states are now resorting to radical labour law relaxations, particularly for the manufacturing sector. The government of Madhya Pradesh has already issued an ordinance and *inter alia* notified temporary exemptions from the application of numerous provisions of the Factories Act, 1948 and Industrial Disputes Act, 1947. Please see our ERGO dated 8 May 2020 for an in-depth analysis. Further, the state of Uttar Pradesh has, through an ordinance, granted an exemption (for a period of 3 years for the date of publication of the ordinance in the Official Gazette) to all factories and manufacturing establishments from all labour laws except Minimum Wages Act, 1948, Factories Act, 1948 (provisions relating to safety), Bonded Labour System (Abolition) Act, 1976, Employees' Compensation Act, 1923, Building and Other Construction Workers (Regulation of Employment and Condition of Services) Act, 1996 (provisions relating to safety), and provisions relating to women and children. The gazette copy of the ordinance is awaited.

- Increased working hours: In an attempt to revive the manufacturing sector, several states, including Maharashtra, Punjab, Goa, Haryana, Gujarat, Madhya Pradesh, Rajasthan, Uttar Pradesh and Himachal Pradesh have temporarily increased the limits on working hours applicable under the Factories Act, 1948. The statutory daily and weekly limits of 9 hours and 48 hours has been increased to 12 hours and 72 hours, respectively in most of the aforesaid states. Further, while most of these states provide for overtime payments at double the rate of ordinary wages, a few of them, such as Gujarat and Uttar Pradesh have prescribed wages in proportion to the number of hours worked.

- Extended due dates for compliances: In view of the present situation, the Employees' State Insurance Corporation has extended the deadline for making contributions towards employees' state insurance funds for the month of February 2020 until 15 May 2020. Likewise, the Employees' Provident Fund Organisation has permitted filing of electronic challan cum returns in respect of the month of March 2020 until 15 May 2020. Similar procedural relaxations have also been made by a few states. For instance, Gujarat has granted relaxations in relation to the requirement of renewal of licenses for contractors under the Contract Labour (Regulation and Abolition) Act, 1970 which were due for renewal between March 2020 and May 2020.

- Other announcements: In addition to the above, the Finance Minister has, as part of the economic package touted as Atmanirbhar Bharat Scheme, announced that both employer's and employee's contributions towards the employees' provident fund set up under the Employees' Provident Funds and Miscellaneous Provisions Act 1952 shall each be reduced from 12% to 10% for a period of 3 months. We are awaiting an official notification in this regard to assess the change.

Parliament Standing Committee releases report on Industrial Relations Code, 2019

The draft Industrial Relations Code, 2019 (IR Code), which was introduced in the Lok Sabha in November 2019, had been referred to the Parliamentary Standing Committee on Labour (Committee) for their comments and suggestions. In April 2020, the Committee released their report which will be presented before the Parliament on the first day of the monsoon session 2020. Some of the key recommendations of the Committee are set out below:

- More streamlined definitions: The Committee has recommended that the definition of 'wages' should include bonus, conveyance allowance and house rent allowance as well. The report also highlights the confusing and interchangeable use of 'employee' and 'worker' in the IR Code and recommends the usage of one consistent term, which includes gig workers and workers engaged in the unorganised sector as well. Further, the Committee has also suggested that in case of an establishment operating in multiple states, the definition of 'appropriate government' should be streamlined to provide for only one appropriate government on the basis of the situs of employment to avoid difference in applicability of laws by states.

- Special provisions relating to lay-off and retrenchment: The Committee has recommended that the threshold of 100 workers for the application of special provisions relating to lay-off and retrenchment be increased in the IR Code itself instead of being left to be notified by the appropriate government.

- More robust protective mechanism for fixed term employees: The Committee is of the view that there continues to be flexibility offered to employers to hire fixed term employees at their whims and resort to a 'hire and fire' policy. It is recommended that the IR Code clearly specifies that fixed term employment should be resorted to on an objective basis. The report suggests that the IR Code should further specify cases in which fixed term employment may be adopted and provide a minimum tenure for such kind of arrangements (with a cap on the number of renewals allowed).

- Notice of change: The Committee has recommended that there should be no requirement of advance notice in the conditions of the service of an employee if any change is effectuated as per the orders of the appropriate government or in pursuance of any settlement or award.

- Excessive delegated legislation: The Committee has taken note of the extensive delegation of powers to the 'appropriate government' under various provisions of the IR Code. The Committee is of the view that such wide rule making power may be detrimental to the respective legislations and the said provisions should be revisited and modified to ensure certainty and uniformity in their implementation.

CASE UPDATES

There must be an alternative gratuity benefit available to choose from: Supreme Court

Section 4(5) of the Payment of Gratuity Act, 1972 (Gratuity Act) provides that the statute shall not affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. It was on this basis that the respondent in the matter (*BCH Electric Limited v Pradeep Mehra [Civil Appeal Number 2379 of 2020]*) claimed benefit under the gratuity scheme formulated by its employer, the appellant in this case.

Note that the appellant's gratuity scheme expressly provided that notwithstanding the said scheme, if any member was covered by the Gratuity Act (the Gratuity Act earlier had a threshold for coverage of employees), the amount of gratuity shall be calculated in accordance with the provisions of the Gratuity Act. The respondent, who was covered under the Gratuity Act, wanted to claim the scheme benefits nonetheless and argued that he was entitled to the same as the scheme offered better terms (such as no cap on the amount of gratuity which could be paid to the employee post termination of employment). The court rejected the respondent's plea, observing that:

"The scheme on which heavy reliance was placed to submit that it afforded and made available better terms of gratuity itself emphasizes that in case of the employees who are covered under the Act, the amount payable as gratuity shall be in terms of the provisions of the Act. The Scheme does not therefore offer to the employees covered by the Act any

other alternative apart from what is payable under the Act. The idea was not to afford to the employees who are covered by the provisions of the Act, a package better than what was made available by the Act, but it was to extend similar benefit to those who would not be covered by the Act."

The court, therefore, allowed the appeal of the employer.

Employer's discretion to take appropriate action if the employee does not report to work during the COVID-19 outbreak: Bombay High Court

In *Align Components Private Limited v Union of India [Writ Petition 10569 of 2020]*, the petitioner challenged the validity of the order dated 29 March 2020 issued by the Ministry of Home Affairs, Government of India, whereby it ordered all establishments to pay wages to their workers (presumably migrant workers) during the nationwide lockdown. While the court did not opine on the same given that a similar challenge has been made before the Supreme Court of India, it noted that in the event workers of industries permitted to carry on activities during lockdown voluntarily remain absent, the management would be at a liberty to deduct their wages for their absence subject to the procedure laid down in law while initiating such action.

It may be noted that a bunch of petitions currently before the Supreme Court of India have challenged the Central notification, arguing that such mandate on payment of wages is not only outside the powers given to the government by the Disaster Management Act, 2005, but also onerous and unreasonable as companies impacted by the lockdown are not seeing any revenue generation during this period.

How will you practically ensure that all employees download Aarogya Setu? Kerala High Court asks the Centre

In its latest lockdown guidelines, the Union Ministry of Home Affairs mandated employers to comply with the standard operating procedure (as set out therein) while resuming operations. As part of the standard operating procedure, the government has mandated all employers, public and private, to make use of the *Aarogya Setu* app by all employees mandatory.

For the uninitiated, the *Aarogya Setu* app is a mobile application created by the Central government to *inter alia* alert its users of possible COVID-19 cases around them. The app recently became the world's fastest application to reach the 50 million subscriber mark (in 13 days).

Notwithstanding the noble attempt of the government, the app has received criticism for possible privacy and security breach related concerns. In a writ petition before the Kerala High Court, the petitioner challenged the requirement of downloading the app by employees. While posting the matter to 18 May 2020, the Kerala High Court expressed its opinion on the requirement, calling it problematic and impractical. It observed that not all employees may have smartphones and, therefore, the government will have to clarify how it proposes to implement the condition. It is yet to be seen how the court will opine on the privacy issue as well as the power of the government to mandate such use of the contact tracing application under the Disaster Management Act, 2005.

Internal committee's recommendation in a PoSH inquiry not binding on the employer: Calcutta High Court

In its judgment in *Institute of Hotel Management, Catering Technology and Applied Nutrition v Suddhasil Dey [WPCT 137 of 2019]*, the Calcutta High Court clarified a number of issues as regards a complaint of sexual harassment at workplace under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act). These are briefly set out below.

- *Veracity of a complaint*: The court observed that while absence of date(s) of incident(s) etc. in the compliant(s) does / do not lead to an inference that the allegations are frivolous, the same is a material factor to be considered by the internal committee (IC) before proceeding with the complaint(s). Only if the complaint is *prima facie* found to have substance and worthy of being inquired into should the committee call upon the respondent and explain to him what the allegations against him are.

- *Cross-examination in sexual harassment cases*: On the question of protecting the identity of the complainant and her witnesses, the court observed that cross-examination of the complainant by the respondent not having been excluded by express provision or by necessary implication, the right of cross-examination has to be read into the PoSH Act and the rules. There is, however, no provision empowering the IC to keep the identity of the aggrieved woman and/or her witnesses undisclosed to the respondent.

- *Nature of IC recommendations*: The court noted that the language employed in Section 13 of the PoSH Act does not make it imperative for the disciplinary authority to act on the recommendations of the IC by accepting it. The expression 'act upon the recommendation' would mean either accept or reject the recommendation, for reasons to be recorded in writing. If the recommendations were binding, it would cease to be a recommendation and partake the character of a command which is not the legislative intent. The court concluded that the recommendation of the IC has to be seen and understood as a recommendation alone.

INDUSTRY INSIGHTS

Fixed wage cost becomes a cause of worry for India Inc.

As the nationwide lockdown has been extended twice since the initial 21-day period, companies in India are staring at huge and prolonged losses. The few relaxations being given by certain state governments are not doing much for industries, which are looking for several ways to contain losses and keep businesses afloat.

While the initial period of the lockdown saw companies adopting a wait-and-watch approach before resorting to cost-cutting measures, the third phase of the nationwide lockdown is seeing companies resorting to several measures ranging from salary cuts to even termination of employment. As the report of The Economic Times notes, such measures are only to become more prevalent especially among startups in the coming months due to the severe financial crisis that has ensued. Similarly, another report of the

New Indian Express cited the Husys Industry Pulse Survey to highlight that the percentage of companies that have been unable to disburse salary to their employees has increased from 5.26% in March 2020 to 13.3% in April 2020 and finally to 24.5% in May 2020.

Over the past few weeks, employers' associations have been attempting to put forth their concerns before the Ministry of Labour and Employment, Government of India. As per a Press Information Bureau release, such associations have suggested measures ranging from relaxation in the lay-off requirements under the Industrial Disputes Act, 1947 to suspension of labour laws for 2-3 years (except the provisions relating to minimum wages, bonus and statutory dues). The ministry has not expressly accorded to any of the proposals, but it has stated that all help would be offered to employers.

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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For any queries in relation to the E-Bulletin or the workforce related issues occasioned by COVID-19 outbreak, please email to us at elbebulletin@khaitanco.com.

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