



The Code on Wages, 2019

The labour law regime in India has historically consisted of multiple Central and State legislations, each reflecting a set of compliances unique to the subject matter covered by that legislation. This has led to a system of governance whereby administration and compliance with labour laws, due to its inherent inconsistencies, has been cumbersome and taxing on employers.

The Code on Wages, 2019 (the “**Code**”) is the first step towards consolidating a set of Central labour legislations dealing with wages under a single legislation. The Code proposes to subsume four separate legislations, namely,

- (i) the Equal Remuneration Act, 1976 (“**ERA**”);
- (ii) the Minimum Wages Act, 1948 (“**MWA**”);
- (iii) the Payment of Wages Act, 1936 (“**PWA**”); and
- (iv) the Payment of Bonus Act, 1965 (“**PBA**”).

The stated objective of the Code is to amend and consolidate the laws relating to wages, bonus and related matters. The legislative intent behind the Code, that has been repeatedly communicated, is to create a uniform system of governance to ensure a compliance regime that can be easily and effectively implemented and enforced.

Though the Code received the President’s assent on August 8, 2019, it will be brought into force only once the appointed date for its implementation is notified by the Central Government. It may be noted that the Government is empowered to bring into force the various provisions of the Code in a staggered manner.

The key aspects of the Code have been summarized below.

A. Definitions

i. Definition of ‘wages’

The legislations that are now set to be replaced by the Code have different definitions (in the form of inclusions and exclusions) for the term ‘wages’. This has led to divergent views on what constitutes wages for the purpose of each legislation, causing hardship to both employers and employees in determining their rights under those laws.

In order to bring in consistency, the Code has provided for a uniform definition of the term ‘wages’ and includes all remuneration capable of being expressed in monetary

terms except those components that are specifically excluded such as (i) house rent allowance, conveyance allowance/ value of travel concession, overtime allowance and any remuneration payable under any award or settlement between the parties or order of a court or tribunal; (ii) any bonus paid in accordance with law or commission payable to the employee or sums paid to defray special expenses or social security contributions and interest earned thereon and value of certain amenities provided to employees; and (iii) gratuity, retrenchment compensation or retirement benefit or other similar ex-gratia amount.

In this regard, the Code has introduced the following new concepts: (a) in the event the quantum of the exclusions mentioned under (i) and (ii) above is more than half (or such other notified percentage) (“**Wage Threshold**”) of the remuneration paid to the employee, then the amount in excess of the Wage Threshold will be deemed to be wages; and (b) if any part of the remuneration is given in kind then the value of the said remuneration, which does not exceed 15% of the total wages payable to the employee, will also form part of the employee’s wages. Further, the exclusions mentioned in (i) above would still be considered while computing wages for the purpose of wage parity between genders and for payment of wages.

The key implication of the revised definition of wages will be in relation to the manner in which the salaries of employees, especially, higher level employees are structured. Some employers, in order to avoid the applicability of various legislations, keep the basic salaries of employees low, with a larger portion of the salary being categorised as other remuneration in the form of expenses for car, allowances etc. which has historically been

excluded from the definition of ‘wages’. With the advent of the Code, such structuring will no longer be possible. Given the various permutations that is engendered by the limits prescribed on the components of remuneration that fall within the exclusions that have been provided above, it would require employers to be well versed with the provisions of the Code in order to ensure they do not inadvertently commit any default while structuring remuneration packages.

ii. Definition of ‘employee’ and ‘worker’

The Code has broadened the definition of ‘employee’ and now includes any person employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, as well as those persons declared to be an employee by the appropriate Government.

The Code would consequently regulate the service conditions of managerial and supervisory employees including the manner of paying them their salary. It will also restrict the ability of the employer to set off any dues that the employees owe to it or the right to enforce a clawback since the Code regulates the manner in which an employer could make deductions to their salary and any payments made by employees to the employer is deemed to be a deduction made by the employer from their wages.

Typically, for key employees a large proportion of their remuneration is in the form of variable pay. More recently, many employers are seeking to include clawback provisions in certain specified instances as a matter of good governance. It would be interesting to see how the Courts would interpret these measures while adjudicating

on rights of an employer to effect a set-off/ clawback, especially if these rights are also enshrined under other laws (such as Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/ Other Risk Takers issued by the Reserve Bank of India which provides for clawback provisions).

Employers should also be cognizant of the fact that under the Code even senior managerial employees will be able to avail the benefit of the dispute mechanism under the Code to resolve any issues that they may face in relation to payment of wages.

The Code also introduces the concept of 'worker' as a subset of the definition of 'employee'. It covers those individuals who are captured within the scope of the term 'employee' but excludes (i) supervisors whose monthly salary is INR 15,000 or more; and (ii) those employed in managerial and administrative capacity. Working journalists and sales promotion employees are also brought within the scope of worker definition.

The applicability of the Code to workers is limited to certain provisions such as in determining parameters while fixing the floor wage and minimum wages, or for assessing whether they fall within the definition of contract labour.

iii. Definition of 'employer' and 'contractor'

Under the Code, the definition of the term 'employer' has been broadened to specifically include contractors. Therefore, under the Code, contractors would also become responsible for compliance with applicable provisions of the Code in relation to their employees who may be deployed to client sites as contract labour.

This is aimed at protecting the interest of the workforce by ensuring that both sets of employers are liable to comply with the provisions of the Code in relation to third party workers who are deployed at the client's establishment. Therefore, employers should ensure that contractors are at all times compliant with the provisions of the Code as otherwise the authorities could proceed against the employers for defaults committed by such contractors. However, unlike certain laws that allow the principal employer to recoup such costs from the contractors, the Code does not provide for such a recourse against the contractor. This is a glaring omission as even the draft Occupational Safety, Health and Working Conditions Code, 2019 provides for right of the principal employer to recoup such costs. Therefore, while engaging contractors, principal employers should ensure they have water tight clauses in their agreements that would allow them to recoup such costs from them.

A welcome measure though is the clarification provided as to who would not be considered as contract labour. While the Contract Labour (Regulation and Abolition Act), 1970 did not distinguish between regular employees and those who were hired by the contractor for the work of an establishment, the Code specifically excludes those who are in the regular employment of a contractor and receive increments, social security coverage and welfare benefits from the definition of contract labour. This clarification is a step in the right direction in ensuring that principal employers are not made liable for defaults of other employers merely because the latter provides them services with the assistance of their regular workforce.

B. Right to Equal Treatment

i. Prohibition of gender discrimination

Unlike the ERA, which ensured pay parity for female employees, the Code mandates that pay parity should be ensured for all genders. The Code does not define the term gender. However, since the Supreme Court has recognized transgenders as forming the third gender, the Code ensures protection now to not only female employees and male employees, but also to transgender employees.

As per the Code, experience, too, would have to be considered while determining the question of pay parity and conditions of service for work which is same or of similar nature. Therefore, the Code recognizes that experience and expertise, too, could be a reasonable differentiator when answering questions as to whether an employer is involved in any discriminatory practices.

C. Minimum Wage

i. Applicability of minimum wages

Under the MWA, minimum wages have been fixed for scheduled employment and for categories of employees as have been covered in the various notifications issued by the relevant Government. Under the Code, however, the appropriate Government is required to fix minimum rates of wages for all the employees irrespective of the industry they are employed in.

ii. Fixation of floor wage

Under the Code, the Central Government can fix the floor wage based on the living standard of the workers and their geographical location (“**Floor Wage**”). The minimum rates of wages fixed by the Central or State Governments cannot be lower than

the prescribed Floor Wage. Further, if the minimum rates of wages fixed prior to the Floor Wage being implemented is higher than the Floor Wage, then the relevant Government is prohibited from reducing those rates.

iii. Working hours and overtime

Similar to the MWA, under the Code the appropriate Government has the power to determine the normal working hours and for payment of overtime wages for hours worked in excess of the normal working hours so fixed, at a rate of twice the normal rate of wages.

While there is no limitation on the overtime hours under the Code, employers should be mindful of the fact that some local shops and establishments legislations may nonetheless prescribe weekly/monthly/quarterly limits on overtime.

The Code does not clarify whether the working hour limits and overtime rates fixed under the Code would apply to those employees who are being paid salaries which are substantially higher than the minimum rates fixed under the Code and if so, whether the overtime wage would have to be calculated based on their actual salary or the minimum rate of wage fixed by the appropriate Government.

It is also not clear whether the provisions of the Code will override the existing exemptions granted by State Governments under some local shops and establishments legislations (such as exemptions granted to senior managerial functionaries).

There is a real risk of these issues leading to avoidable disputes between employers and employees and therefore, the Government

should work on addressing them by providing much needed clarity so that these do not become roadblocks in employers' efforts to optimally utilize their workforce.

D. Payment of Wages

i. Applicability of the chapter on payment of wages

The PWA, which regulates *inter alia* the manner and mode of payment of wages to employees, is only applicable to employees whose monthly salary does not exceed INR 24,000. Further, it only applies to "industrial or other establishments" which includes establishments like docks, wharfs, mines, quarries, oilfields, plantations, factories, or those which are notified by the appropriate Government. The Code has done away with these restrictions and the relevant provisions of the Code, in relation to the payment of wages, now apply to all employees, across industries.

ii. Fixation of wage period

Similar to the PWA, the Code also provides that the employer must fix the wage period and the same should not exceed 1 month. A wage period is the period of work for which wages are paid on a regular basis. However, the Code provides flexibility to employers to fix the wage periods on a daily, weekly, fortnightly or monthly basis.

iii. Mode of payment

As per the PWA, wages are to be paid by way of current coin, currency, cheque or by crediting wages to the bank account of the employee. In keeping with the times, the Code has now provided for an additional method of payment through electronic modes. However, as done under the PWA, the Code also reserves the right of the

appropriate Government to notify certain establishments where the employer must only pay wages by cheque or by crediting to the bank account of the employee.

iv. Deductions from wages

Under the PWA, an employer can make deductions from the wages of an employee only under certain limited circumstances. Similarly, the Code permits deductions on similar grounds including towards fines, absence from duty, amenities provided by the employer, recovery of certain advances to the employee or for contributions to social welfare schemes etc. The Code also provides that the deductions being made from an employee's wages cannot be greater than 50% of his total wages for a wage period (i.e., either daily, weekly, fortnightly or monthly). Any deductions over this limit will have to be recovered in the manner prescribed.

Further, under the Code, should an employer fail to deposit any deductions into a trust or to government funds or other accounts, as required by law, the responsibility for such a lapse would solely vest with the employer. This is a welcome step to ensure employers do not hold back amounts withheld from employees towards not just statutory benefits but also in relation to any contractual benefits.

E. Payment of Bonus

i. Applicability of the bonus provisions

The PBA applies to: (i) establishments employing 20 or more employees; or (ii) factories as defined under the Factories Act, 1948. However, the bonus provisions under the Code apply to an establishment (including factories) that employs or employed, on any day during an accounting year, 20 or more employees. That said, just as was done under

the PBA, certain identified industries are specifically excluded from the applicability of the provisions of bonus under the Code.

ii. Eligibility for bonus

Under the PBA, every eligible employee is entitled to receive a statutory bonus ranging from 8.33% to 20% of the wages, and similar rates have been reflected in the Code, too.

The applicability of the PBA was however, limited to employees drawing wages not exceeding INR 21,000 per month. Under the Code, the wage threshold is to be fixed by the appropriate Government in relation to establishments over which they have jurisdiction. This does grant flexibility to governments to revise such wage threshold without requiring amendment of the Code itself, however, granting power to each State Government to fix such threshold could lead to various wage thresholds being fixed in different States which could invariably lead to cumbersome compliance norms for an employer in situations where the employer has branches in more than one State. It is also not clear whether the employee's eligibility to qualify for the bonus would be pegged to the lowest wage threshold fixed in any State where the employer has a branch or would the eligibility be limited to wage threshold fixed by the Government of the State where the employee is located. The Government would need to bring in clarity on these points in order to ensure this does not lead to disputes being raised between employers and employees.

iii. Disqualification for bonus

Under the PBA, bonus can be withheld in certain specific situations such as fraud, riotous or violent behaviour or theft, misappropriation or sabotage of any property of the establishment. In addition

to the specific situations mentioned in the PBA, the Code also includes an express provision whereby employee would stand disqualified to receive statutory bonus in case the employee is dismissed from service on account of conviction for committing sexual harassment.

iv. Amount of allocable surplus for payment of bonus.

The bonus under the PBA is to be paid out of the allocable surplus. While the Code also prescribes payment of bonus out of the allocable surplus, there is a small change in the manner of computing the same. Under the PBA, allocable surplus was treated as 60% of the available surplus for majority industries, while under the Code, the allocable surplus is treated as 67% of the available surplus for all establishments except banking companies for which the allocable surplus would be 60% of the available surplus.

v. Time limit and mode of payment

Under the PBA, bonus is to be paid to employees in cash within a period of 8 months from the close of the accounting year. The time period for payment of bonus under the Code remains the same, however, the Code specifies that bonus is to be credited into the bank account of the employee (as opposed to being paid in cash).

Further, under the PBA, the payment of bonus could have been delayed if there was a dispute pending. However, the Code clarifies that if the dispute relates to payment of bonus at a higher rate, then the employer is still required to pay 8.33% of the wages earned by the employee within a period of 8 months from the close of the accounting year and the excess, if any, within 1 month of the date of the award or settlement arrived

at during the adjudication.

F. Other salient features

i. Emphasis on ensuring compliance and not on penalizing an employer

The thrust of the Code is to ensure compliance and various measures have been introduced to achieve this objective, which are unique to this Code:

a. Inspector-cum-Facilitator

The Code provides for the appointment of an Inspector-cum-Facilitator, whose role is enlarged to encompass not just inspection but also to advise the employers and workers with regard to the various compliances prescribed under the Code.

b. Inspection regime

The appropriate Government can frame an inspection scheme that may provision for web based information and calling for information electronically as well as assign duties to carry out such inspections based on a random selection. If properly framed, it could cut down on abuses that are rampant in the inspection regime currently in place.

c. Right to rectify

Under the current legislations sought to be subsumed by the Code, action taken by the authorities is unilateral without the employer being given a chance to rectify non-compliances. The Code, in keeping with the principle of being a legislation that seeks to promote compliance rather than penalise employers, prescribes that in the event an employer violates a provision of the Code, the Inspector-cum-Facilitator shall not initiate action unless the employer has been given an opportunity to rectify the non-compliance within a specified period

of time. However, no such opportunity is to be afforded to an employer if a violation of the same nature is repeated within a period of 5 years from the date on which the first violation had occurred.

d. Compounding of first offence

Unlike the current legislations, the Code permits compounding of the first offence committed under the Code by paying 50% of the maximum fine provided for such offence. However, if the violation of a similar nature is repeated within a period of 5 years from the date on which the first violation was committed, the subsequent offence cannot be compounded.

e. Penalties

In a significant departure from the current legislations which provide for a maximum penalty of INR 20,000 and imprisonment up to 1 year, imprisonment is limited to instances of repeat offences. However, the amount of fine has been substantially enhanced and for the first offence, the fine imposed could go up to INR 50,000 and for subsequent offences, the fine may extend upto INR 1,00,000 along with imprisonment upto 3 months in case of subsequent offence of a similar nature committed within a period of 5 years of the first offence.

ii. Protection provided to employees

The Code prescribes certain measures which aim to better protect the interest of employees such as:

a. Burden of proof

In case of claims in relation to failure to pay the correct remuneration or bonus or unauthorized deductions, the burden of proof would be on the employer to prove that dues have been paid.

b. Limitation period for filing claims

Under the existing legislations the maximum limitation period was restricted to 1 year. The period of limitation for filing claims by an employee under the Code is higher, at 3 years from the date on which the claim arises. Similar to the PBA, the Code provides that any dispute regarding fixation of bonus or eligibility for payment of bonus under the provisions of the Code shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947 (“**ID Act**”). It may be noted that ID Act does not provide for a limitation period.

c. Time bound decision and appeal process

Under the Code, the authorities hearing such claims (other than in relation to bonus) are required to put reasonable efforts to decide the claim within a period of 3 months. Parties aggrieved by such an order can now file an appeal against such an order within 90 days from the date of the order.

d. Compensation

Authorities deciding aforementioned claims could, in addition to granting the claim sought, award compensation which could extend to ten times of the claim determined. If an employer fails to pay the claim determined and compensation awarded, the same could be recovered as arrears of land revenue.

iii. Other salient features**a. Records, Registers and Notice**

The Code provides that every employer should maintain registers containing details as to persons employed, wages paid to such employees, muster rolls and such other details in such a manner as may be prescribed. While the manner in which such records are

to be maintained is yet to be prescribed, the expectation is that this process will be more efficient than the current process whereby such registers are required to be maintained and returns required to be filed under each of the legislations.

Further, the Code mandates that every employer is required to display a notice on the notice board at a prominent place in the establishment containing the abstract of the Code, category-wise wage rates of employees, wage periods, time for payment of wages etc. The employer is also required to issue a wage slip in such form and manner as would be prescribed.

b. Overriding effect

The provisions of this Code will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement or contract of service. Any contract or agreement whereby an employee relinquishes the right to any amount or the right to bonus due to the employee under this Code will not be enforced.

c. Preservation of actions taken under existing laws

Once the Code is notified, the corresponding legislations will stand repealed. However, any actions taken under those enactments or any notification, nomination, appointment, order or direction made thereunder or any amount of wages provided in any provision of such enactments will be deemed to have been done or taken or provided for such purpose under the corresponding provisions of this Code and will be in force to the extent they are not contrary to the provisions of this Code or until they are repealed.

Conclusion

The Code is an essential step towards streamlining labour laws in India. The Code encourages an environment of co-operation between the administrative bodies and the employers by emphasizing on compliance rather than imposition of penal action. With the reduction in multitude of regulators, the inspection environment can also be expected to become simpler, with faster resolution of issues in relation to compliance.

The Code also covers both the organized and the unorganized sector, thus paving the way for a large proportion of the workforce being afforded protection from any discriminatory practices and for ensuring that a fair wage is paid to all.

The Code is expected to not only reduce employer-employee disputes, but also disputes between the implementing agencies and the employers. That said, there are issues that need urgent attention of the Government including in relation to wage

threshold that could be imposed across India in respect of qualification norms for bonus payouts, diverse parameters being set for wage computation, restrictions that may be imposed on structuring the salary of highly remunerated employees and conflicting provisions regarding overtime wages, lest it reverses the benefits that the Code had set out to achieve.

One of the stated objectives of the Code, as reflected in its statement of objects and reasons, is to bring the use of technology in its enforcement and to bring in transparency and accountability. A lot would therefore, depend on how the rules and regulations are framed and whether the Government goes the extra mile to ensure consistency and certainty in the implementation of the various provisions of the Code, including in ensuring that the inspection regime is truly employer-identity agnostic.

Any measure that facilitates ease of compliance of labour laws will stimulate growth, and will hopefully act as a catalyst in boosting employment in India.

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