



cyril amarchand mangaldas
ahead of the curve

the employment quarterly

July to September, 2020

Index

Legislative Updates

- 7 Central Legislative Changes
Page 02
- 7 State Legislative Changes
Page 03
- 7 Legislative Relaxations due to COVID-19
Page 03
- 7 Proposed Central Legislative Changes
Page 07
- 7 Proposed State Legislative Changes
Page 08

Judicial Precedents

- 7 Supreme Court
Page 09
- 7 Calcutta High Court
Page 09
- 7 Karnataka High Court
Page 10
- 7 Bombay High Court
Page 11
- 7 Himachal Pradesh High Court
Page 11

Welcome to The Employment Quarterly- our quarterly newsletter on key employment and labour updates.

A year after the Code on Wages, 2019 received the President's assent, India has moved a step closer towards consolidating and harmonising its central labour law legislations with the remaining three labour codes (namely, the Occupational Safety, Health and Working Conditions Code, 2020, the Industrial Relations Code, 2020 and the Code on Social Security, 2020) being passed by the Parliament on September 23, 2020 and consequently receiving the assent of the President on September 28, 2020. The introduction of the Labour Codes is being looked at as a historic overhauling of the current labour law regime and an instrument to facilitate Ease of Doing Business in India. A brief overview of the salient features of the Labour Codes is set out in this issue of the Employment Quarterly (along with the links to our detailed analysis on each of the Labour Codes).

Besides an overview of the Labour Codes, this issue also captures the various labour laws relaxations that have been granted at the Central and State level in light of the Covid-19 crisis. Many States have increased the threshold for the applicability of the Factories Act, 1948, the Industrial Disputes Act, 1947, the Contract Labour (Regulation and Abolition) Act, 1970. Some States have also extended the limit of working hours in factories. We have also discussed the decision of the Supreme Court in *Gujarat Mazdoor Sabha v. State of Gujarat (W.P.(C) No. 000708 of 2020)* wherein the notifications issued by the Government of Gujarat to exempt factories from daily working hour limits and rest intervals under the Factories Act, 1948 were quashed.

We hope you will find the above to be useful. Please feel free to send any feedback, suggestions or comments to cam.publications@cyrilshroff.com.

Regards,
Cyril Shroff

Managing Partner
Cyril Amarchand Mangaldas

India's
leading law
firm

LEGISLATIVE UPDATES

I. Central Legislative Changes

A. Labour Codes

On September 28, 2020 the President gave his assent to the remaining three Labour Codes; i.e. the Occupational Safety, Health and Working Conditions Code, 2020, the Industrial Relations Code, 2020 and the Code on Social Security, 2020 (collective, the **Labour Codes**) that were passed by the Parliament on September 23, 2020. These codes will come into force once they are notified in the official gazette. Please refer to our Client Alerts at (i) <http://www.cyrilshroff.com/wp-content/uploads/2020/10/The-Industrial-Relations-Code.pdf> (Industrial Relations Code, 2020); (ii) <http://www.cyrilshroff.com/wp-content/uploads/2020/10/The-Social-Security-Code.pdf> (Code on Social Security, 2020); and (iii) <http://www.cyrilshroff.com/wp-content/uploads/2020/10/Occupational-Safety-Health-and-Working-Conditions-Code.pdf> (Occupational Safety, Health and Working Conditions Code, 2020) on details of the three Labour Codes.

B. The Transgender Persons (Protection of Rights) Rules, 2020

The Transgender Persons (Protection of Rights) Act, 2019 (**TP Act**) came into effect from December 10, 2019. Pursuant to the TP Act, the Ministry of Social Justice and Empowerment through notification dated July 13, 2020, published the Draft Transgender Persons (Protection of Rights) Rules, 2020, inviting suggestions/ objections within 30 (thirty) days of publication. The Transgender Persons (Protection of Rights) Rules, 2020 (**TP Rules**) were subsequently published in the official gazette and came into effect on September 29, 2020. Some of the salient features of the TP Rules are set out below:

- (i) The TP Rules, *inter alia*, specify the process by which transgender persons may apply for a 'Certificate of Identity' (**Certificate**) and the manner in which such a Certificate is to be issued to them.
- (ii) These rules require every establishment to implement all measures for providing a safe working environment and to ensure that no transgender

person is discriminated in any matter relating to employment such as recruitment, employment benefits, promotion, etc.

- (iii) These rules require every establishment to publish an equal opportunity policy for transgender persons providing for *inter alia* infrastructure facilities, amenities, measures for safety and security available to transgender persons employed in the establishment. Such policies are required to be published on the employers' website.
- (iv) The TP Rules also provide for a grievance redressal mechanism and require establishments to designate a complaint officer within 30 (thirty) days from the date of coming into force of the TP Rules.
- (v) The TP Rules, as a welfare measure, require the appropriate government to *inter alia*: (a) review all existing welfare schemes and legislations to include transgender persons with a view to protect their rights and interests, and (b) take adequate steps to prohibit discrimination in any Government or private organisation.

II. State Legislative Changes

A. Maharashtra Reduces Applicability Threshold under the Employees' State Insurance Act, 1948 ("ESI Act")

By way of a notification dated September 29, 2020, the Maharashtra government has provided that with effect from October 1, 2020, the ESI Act shall be applicable to shops, hotels, restaurants, road motor transport establishments, cinema halls, including review theatres, and newspaper establishments (as defined under Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1995) with an employee threshold of 10 (ten) or more. The earlier threshold of 20 (twenty) or more employees under the ESI Act for Maharashtra shall not be applicable to the aforementioned classes of establishments.

B. Introduction of Fixed-Term Employment

Bihar¹, Karnataka², Goa³, Punjab⁴ and Himachal Pradesh⁵ have amended their respective state-rules promulgated under the Industrial Employment (Standing Orders) Act, 1946 (**IESO Act**) to provide for fixed-term employment across all industries/ sectors. Further, these rules provide that (i) working conditions and benefits of fixed term employees (**FTEs**) cannot be less than that of a permanent employee; and that (ii) FTEs will be eligible to receive all statutory benefits available to a permanent employee in proportion to the period of service rendered by them even if such period does not extend to the qualifying period of employment required in the relevant statute. However, FTEs will not be entitled to any termination notice or pay in lieu thereof due to non-renewal of contract.

C. Rationalisation of Forms in Tamil Nadu

By way of a notification dated July 14, 2020, the Tamil Nadu government has notified the Tamil Nadu Rationalisation of Forms and Reports under Certain Labour Laws Rules, 2020, which provide for combined and simplified forms under the Tamil Nadu Contract Labour (Regulation and Abolition) Rules, 1975, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Services) (Tamil Nadu) Rules, 1983, and the Tamil Nadu Building and Other Construction Workers (Regulation of Employment and Condition of Services) Rules 2006, to facilitate ease of compliance.

D. Risk-Assessment based Inspection Scheme

To facilitate ease of doing business, Telangana and Puducherry have issued notifications dated July 14, 2020, and August 7, 2020, respectively, to implement risk based inspection schemes for various labour laws (such as the applicable Shops and Establishment Act, Payment of Wages Act, 1936, Minimum Wages Act, 1948, among others). Both Telangana and Puducherry have proposed to divide the units into (a) low risk (b) medium risk and (c) high risk categories and provide for certain exemptions from inspections on this basis (e.g. low risk establishments may opt for self-certification). While in Tamil Nadu, the category is decided based on the number of workers; Puducherry has provided some additional criteria such as nature of activity, complaints

from workers, trade unions, etc.

Additionally, through a notification published on May 21, 2020, the Government of Goa has introduced a 'Self-Certification Scheme' for factories. This scheme is voluntary in nature and factories joining this scheme will have the benefits of *inter alia*, reduced visits by inspectors, ability to file returns online and maintenance of certain registers electronically, etc.

E. Exemption under Punjab Industrial Establishment (National and Festival Holidays and Casual and Sick Leave) Act, 1965 ("NFH Act")

Through a notification dated August 6, 2020, the Government of Punjab has exempted industrial establishments engaged in 'continuous process industry' from the provisions of the NFH Act.

III. Legislative Relaxations due to Covid-19

Due to the subsisting pandemic, the central and state governments have continued to effectuate changes to various labour laws to provide an impetus to businesses and reduce their compliance burdens. Some of the key changes to labour laws are set out below:

A. Relaxations under Central Labour Legislations

1. Relaxation under Atal Beemit Vyakti Kalyan Yojana

The Employee State Insurance Corporation (**ESIC**), through a notification dated November 26, 2018, introduced the "Atal Beemit Vyakti Kalyan Yojana" (**Scheme**) as a pilot project for 2 (two) years, wherein employees covered under the ESI Act can claim cash compensation up to 90 (ninety) days, as a once in a life-time measure, if the individual has remained unemployed for 3 (three) months, subject to fulfilment of certain conditions.

In its 182nd meeting held on August 20, 2020, the ESIC has decided to extend the Scheme till June 30, 2021, to provide relief to workers who have lost employment during Covid-19. The benefits under the Scheme shall be available with certain relaxed conditions for the period from March 24, 2020 to December 31, 2020 (**Period**). Thereafter, the Scheme will be available with the original

¹ Through notification dated May 20, 2020.
² Through notification dated June 30, 2020.
³ Through notification dated May 21, 2020.

⁴ Through notification dated August 6, 2020.
⁵ Through notification dated September 9, 2020.



eligibility conditions for the period starting from January 1, 2021 to June 30, 2021. The key relaxations under the Scheme for the Period are as follows:

- (i) The compensation amount has been enhanced to 50% (fifty percent) of the average of wages from the earlier 25% (twenty-five percent) of the average earning per day.
- (ii) The compensation amount shall become payable after 30 (thirty) days of unemployment as opposed to the earlier requirement of 90 (ninety) days of unemployment.
- (iii) The insured person should have contributed under the ESI Act for not less than 78 (seventy-eight) days in the contribution period immediately preceding unemployment and minimum 78 (seventy eight) days in one of the remaining 3 (three) contribution periods in 2 (two) years prior to unemployment (as opposed to making contributions for not less than 78 (seventy eight) days in each of the 4 (four) consecutive contribution periods, immediately prior to unemployment).
- (iv) The insured person can submit the claim directly to ESIC branch office instead of the claim being forwarded by the last employer and the payment shall be made directly in the bank account of the insured person.

2. Extension of Pradhan Mantri Garib Kalyan Yojna (“PMGKY”) Package

Through a memorandum dated July 10, 2020, the PMGKY package has been extended for the months of June, July and August, 2020. Under the PMGKY package (which was initially announced for the

months of March, April and May, 2020), the Central Government will bear the employer as well as the employee share of Employees’ Provident Fund (EPF) contributions for employees earning below INR 15,000 (Rupees Fifteen Thousand) per month, provided they are employed in establishments having up to 100 (one hundred) employees, with 90% (ninety percent) or more of such employees earning monthly wages less than INR 15000 (Rupees Fifteen Thousand).

3. Extension of time limit for filing return under ESI Act

Under the ESI Act (through a communication dated July 1, 2020 by the ESIC), the time period for filing of return of contribution under the Employee’s State Insurance (General) Regulations, 1950, for the contribution period October, 2019 to March, 2020, has been extended till July 15, 2020.

4. Virtual Hearings by Employees’ Provident Fund Organisation

Aimed at enhancing ease of doing business and keeping in mind the limitations and restrictions around physical hearings during the pandemic, the Employees’ Provident Fund Organisation has launched a new facility to virtually hear matters under Section 7A (determination of moneys due from employers) and Section 14B (power to recover damages) of the Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 (**EPF Act**).

B. Relaxations under State Labour Legislations

Many state governments have introduced relaxations in the hope of alleviating some of the hardships caused to employers due to the Covid -19, including change in applicability limit under Factories Act, 1948 (**Factories Act**), Contract Labour (Regulation and Abolition) Act, 1970 (**CLRA**) and Industrial Disputes Act, 1947 (**ID Act**), compounding of offence, allowing women workers in night shift, etc. Many of these relaxations have also been captured in the three Labour Codes that were recently passed.

1. Factories Act

(i) Increase in Applicability Threshold

Various states, including Haryana (through the Factories (Haryana Amendment) Act, 2018) and

Karnataka⁶, Gujarat⁷, Goa⁸, Assam⁹, Himachal Pradesh¹⁰ and Bihar¹¹ (through ordinances passed by the respective state legislature) have amended the definition of a 'factory' by increasing the threshold of applicability: (a) from 10 (ten) or more workers to 20 (twenty) or more in case manufacturing process is carried out with the aid of power, (b) from 20 (twenty) or more workers to 40 (forty) or more workers in case manufacturing process is carried out without power. Further, Madhya Pradesh (through an ordinance dated August 20, 2020) has amended the definition of a 'factory' by increasing the threshold of applicability from 10 (ten) or more workers to 50 (fifty) or more in case manufacturing process is carried out with the aid of power and has omitted the portion relating to manufacturing process being carried out without power.

(ii) Increase in Working Hours

Gujarat¹², Himachal Pradesh¹³ and Assam¹⁴ (in relation to tea factories) have provided an exemption to factories from the application of provisions, inter alia regarding daily hours, weekly hours and spread over under the Factories Act, till October 2020. However, the working hours for any worker/ employee working in a factory in the abovementioned States is not permitted to exceed 12 (twelve) hours per day. Please note that the Supreme Court in *Gujarat Mazdoor Sabha v. State of Gujarat (W.P.(C) No. 000708 of 2020)* has quashed the notification dated July 20, 2020, issued by the Gujarat government to increase working hours in factories (details of this judgment are set out below).

(iii) Overtime

Haryana (through the Factories (Haryana Amendment) Act, 2018) and Himachal Pradesh (through an ordinance dated July 7, 2020) have increased the maximum hours of overtime work in a quarter that can be permitted by the respective state governments (through an order of exemption) from 75 (seventy five) hours to 115 (one

hundred and fifteen) hours. Karnataka (through an ordinance dated July 31, 2020) has increased this limit to 125 (one hundred and twenty-five) hours.

(iv) Women employees in night shift

By way of Factories (Haryana Amendment) Act, 2018 (notified on July 20, 2020), the Haryana government has permitted factories, which provide adequate safety and security measures, to employ women between 7:00 PM to 6:00 AM, subject to obtaining an exemption from the state government in this regard.

(v) Compounding of Offences

Haryana (through the Factories (Haryana Amendment) Act, 2018) and Himachal Pradesh and Gujarat (through ordinances) have introduced Section 106B (Compounding of Offences) for allowing compounding of certain offences under the Factories Act, subject to the conditions mentioned thereunder.

Please note that the aforesaid relaxations are no longer applicable in Karnataka as the Industrial Disputes and Certain Other Laws (Karnataka Amendment) Bill, 2020 (which proposed to extend the Karnataka ordinance dated July 31, 2020) was defeated by the Legislative Council of the state. However, it is unclear if the aforesaid ordinances for the states of Gujarat, Goa, Assam, Himachal Pradesh, Bihar and Madhya Pradesh have been extended.

2. CLRA

(i) Increase in Applicability Threshold

(a) Goa (through the Contract Labour (Regulation and Abolition) (Goa Amendment) Act, 2020), Punjab (through the Contract Labour (Regulation and Abolition) (Punjab Amendment) Act, 2020), Bihar¹⁵, Gujarat¹⁶ and Madhya Pradesh¹⁷ (through ordinances passed by the respective state governments) have extended the threshold for the scope and applicability of the CLRA to principal employers and contractors to 50 (fifty) or more

⁶ Through an ordinance dated July 31, 2020
⁷ Through an ordinance dated July 3, 2020
⁸ Through an ordinance dated July 10, 2020
⁹ Through an ordinance dated June 30, 2020
¹⁰ Through an ordinance dated July 7, 2020
¹¹ Through an ordinance dated July 2, 2020

¹² Through a notification dated July 20, 2020
¹³ Through a notification dated August 13, 2020
¹⁴ Exemption Order dated August 18, 2020
¹⁵ Through an ordinance dated July 2, 2020
¹⁶ Through an ordinance dated July 20, 2020
¹⁷ Through an ordinance dated August 20, 2020

workmen, as opposed to the earlier limit of 20 (twenty) or more workmen; (b) Tripura (by way of a notification dated July 3, 2020) has also implemented this change under the CLRA, which will be effective for 1,000 (one thousand) days or till such further orders, whichever is earlier; (c) Karnataka, (through an ordinance dated July 31, 2020¹⁸), has also extended the applicability threshold limit of the CLRA to 50 (fifty) or more workers from the earlier limit of 20 (twenty) or more workers only in relation to principal employers and not contractors; (d) Himachal Pradesh (through an ordinance dated July 9, 2020) has extended the applicability threshold for both principal employers and contractors to engaging 30 (thirty) or more contract workers.

(ii) Compounding of Offence

Goa, through the Contract Labour (Regulation and Abolition) (Goa Amendment) Act, 2020, has introduced Section 25A in the CLRA for compounding of offences punishable under section 22 (penalty for obstructions) and section 24 (penalty for other offences (for which no penalty has been prescribed)) of the CLRA, either before or after the institution of the prosecution, for the first three offences of similar nature.

3. ID Act

(i) Increase in Applicability Threshold

Punjab (through the Industrial Disputes (Punjab Amendment) Act, 2020) and Karnataka¹⁹, Gujarat²⁰, Bihar²¹ and Goa²² (through ordinances passed by the respective state governments) have increased the threshold limit for applicability of Chapter V-B (*Special Provisions relating to Lay-off, Retrenchment and Closure in Certain Establishments*) under the ID Act from 100 (one hundred) workmen to 300 (three hundred) workmen. Himachal Pradesh (through an ordinance dated July 9, 2020) has increased this limit to 200 (two hundred) workmen. Chapter V-B of the ID Act requires industrial establishments relating to factories, mines and plantations to obtain prior



permission from the appropriate government for lay-off, retrenchment or closure.

(ii) Increase in Compensation for Retrenchment and Closure

- (a) The Goa government (through an ordinance dated June 26, 2020) has increased the quantum of compensation payable to workman at the time of retrenchment or closure, from 15 (fifteen) days' of average pay to 45 (forty five) days' of average pay for every completed year of service or part thereof in excess of 6 (six) months.
- (b) Himachal Pradesh (through an ordinance dated July 9, 2020) has increased the quantum of compensation payable at the time of retrenchment under Section 25F (*Conditions Precedent to Retrenchment of Workmen*) to 60 (sixty) days' of average pay for every completed year of service or part thereof in excess of 6 (six) months.
- (c) Punjab (through the Industrial Disputes (Punjab Amendment) Act, 2020) and Gujarat (through an ordinance dated July 3, 2020) have made it mandatory for industrial establishments covered under Chapter V-B of the ID Act to provide 3 (three) months' notice to workmen in case of retrenchment. Further, in addition to the compensation equivalent to 15 (fifteen) days' of average pay for every completed year

¹⁸ Through an ordinance dated July 31, 2020
¹⁹ Through an ordinance dated July 31, 2020
²⁰ Through an ordinance dated July 3, 2020

²¹ Through an ordinance dated July 2, 2020
²² Through an ordinance dated June 26, 2020



of service or part thereof in excess of 6 (six) months, payment of an amount equivalent to 3 (three) months' average pay of a workman has been mandatory for retrenchment and closure under Chapter V-B of the ID Act.

(iii) Time Period for Raising Industrial Disputes

Goa and Tripura (through ordinances) have reduced the time limit for raising individual industrial disputes to 1 year (instead of the current limitation of 3 years) from the date of discharge, dismissal, retrenchment or termination of a workman.

(iv) Compounding of Offences

The Goa government (through an ordinance dated June 26, 2020) has inserted a new section 31A for allowing compounding of certain offences under the ID Act.

Please note that the aforesaid relaxations are no longer applicable in Karnataka for the reasons as stated above. However, it is unclear if the aforesaid ordinances for the states of Goa, Tripura, Bihar, Gujarat and Himachal Pradesh have been extended.

4. Extension of Time-Limit for Contributions under the Maharashtra Labour Welfare Fund Act, 1953 ("LWF Act")

In Maharashtra, covered establishments are required to make bi-annual contributions under the LWF Act on June 30th and December 31st. However, on account of the lockdown, the Maharashtra Labour Welfare

Board has extended the payment time-limit under this statute to September 30, 2020, in respect of contribution period ending June 30, 2020.

5. Automatic Renewal of License/ Registration

- (i) Karnataka (through a government order dated September 26, 2020) has also introduced an auto renewal system in relation to certificates/ registration/ licences under Factories Act, CLRA, Karnataka Shops and Commercial Establishments Act, 1961 and Inter State Migrant Workmen (Regulation of Employment Condition of Service) Act, 1979 (**ISMW Act**).
- (ii) Telangana (through a notification dated September 21, 2020) has implemented an automatic, deemed renewal of the contractor license (subject to payment of prescribed fee) until further orders are passed.
- (iii) Himachal Pradesh (through a notification dated July 30, 2020) has provided for automatic deemed renewal of registration/licences under the Factories Act, CLRA, Himachal Pradesh Shops and Commercial Establishments Act, 1969 and ISMW Act, subject to payment of the prescribed fee.
- (iv) Arunachal Pradesh (through a notification dated August 18, 2020) has provided for the deemed renewal of factory licence under the Factories Act and contractor licence CLRA for a period from April 1, 2020 to December 31, 2020.

IV. Proposed Central Legislative Changes

A. Draft Code on Wages (Central) Rules, 2020

The Code on Wages, 2019 (**Wage Code**), received Presidential assent on August 8, 2019, however, it is yet to be notified by the Central Government. Further to the Wage Code, the Central Government published the Draft Code on Wages (Central) Rules, 2020 (**Draft Central Rules**), on July 7, 2020, inviting objections/suggestions within 45 (forty five) days of its access in the public domain. Some of the salient features of the Draft Central Rules are set out below:

(i) Minimum Wage Calculation

The Draft Central Rules provide the criteria based on which the minimum rate of wages shall be fixed. Different minimum wages may be fixed for different geographical locations.

(ii) Fixing of Floor Wages

The Central Government shall consult with the Central Advisory Board and the State Governments to fix the floor wages, which shall be fixed after taking into account the minimum living standard. The floor wages shall ordinarily be revised by the Central Government at an interval not exceeding 5 (five) years.

(iii) Normal Working Day and Weekly Rest Day

A normal working day shall comprise 8 (eight) hours with rest intervals of at least 1 (one hour) and the spread-over (including rest interval) shall not exceed 12 (twelve) hours. If an employee is made to work on the rest day, he/ she shall be provided with a substituted rest-day, but no employee can be made to work for more than 10 (ten) consecutive days.

(iv) Deductions from Wages

When the authorised deductions (listed in the Wage Code) from an employee's wages exceed 50% (fifty percent) of his/her wages, the excess shall be carried-forward and recovered from the next wage period(s) in a manner that the recovery never exceeds 50% (fifty percent) of the employee's monthly wages.

(v) Wage slip

Every employer is required to issue wage slips, either electronically or otherwise, to employees on or before the payment of wages.

V. Proposed State Legislative Changes

A. Karnataka Industrial Policy (2020-2025)

The Karnataka government has introduced the New Industrial Policy (**NIP**) with an objective to ensure well-balanced and sustainable industrial development in the state. It came into effect on August 13, 2020, and will be valid for 5 (five) years or till a new policy is announced. The NIP proposes various labour-related reforms which, *inter alia*, include:

(i) Procedural Reforms

The NIP proposes various procedural reforms, including (i) creation of a labour manual with a compendium of orders and notifications to document and standardise the operations and practices; (ii) introduction of a self-certification scheme for labour laws, including factories; (iii) exemption for Micro, Small & Medium Enterprises employing up to 50 (fifty) employees from maintaining cumbersome records, registers and filing; (iii) interlinking of approvals of labour/ factories/ boilers with all related approvals; (iv) approval requirement for making employees do overtime work from the Department of Factories to be substituted with periodical submission of overtime reports. These proposals are broad in nature and specific details are not provided under the NIP as of now.

(ii) Minimum Wage Stabilisation

The periodicity of stipulating minimum wages is proposed to be fixed under the Minimum Wages Act, 1948, and such minimum wages shall be linked to factors like inflation and consumer price index.

(iii) Skill Development Measures

The NIP proposes the formulation of a scheme to provide on-the-job training to 2000 (two thousand) candidates who pass from the Industrial Training Institute each year, as a measure of enhancing their employability.

JUDICIAL PRECEDENTS

SUPREME COURT

A. Economic burden caused by Covid-19 does not qualify as a 'public emergency' under the Factories Act

In **Gujarat Mazdoor Sabha & Anr. v. State of Gujarat (W.P.(C) No. 708 of 2020, decided on October 1, 2020**, notifications dated April 17, 2020, and July 20, 2020, issued by the Gujarat government under Section 5 (*Power to Exempt during Public Emergency*) of the Factories Act to exempt all factories from the provisions of Sections 51 (*Weekly Hours*), 54 (*Daily Hours*), 55 (*Intervals for Rest*) and 56 (*Spread Over*) under the Factories Act, were challenged before the Supreme Court (SC). Before the SC, the petitioners-union, *inter alia*, contended that these notifications were passed on the grounds of economic chaos and were being used to extract more work from the workers without paying overtime wages as per Section 59 (*Extra Wages for Overtime*) of the Factories Act. The respondent-state, *inter alia*, contended that Covid-19 is a 'public emergency' as defined in Section 5 of the Factories Act and emergency measures were required to be adopted to protect the existence of the State of Gujarat.

The SC observed that an exemption under Section 5 of the Factories Act can be granted only in case of a 'public emergency' if the following elements are satisfied: (i) there must exist a "grave emergency"; (ii) the security of India or of any part of its territory is "threatened" by such an emergency; and (iii) the cause of the threat must be war, external aggression or internal disturbance.

The SC held that the economic slowdown created by Covid-19 did not qualify as a 'public emergency' and that "Section 5 of the Factories Act could not have been invoked to issue a blanket notification that exempted all factories from complying with humane working conditions and adequate compensation for overtime, as a response to a pandemic that did not result in an 'internal disturbance' of a nature that posed a 'grave emergency' whereby the security of India is threatened". The SC further held that the impugned notifications did not serve any purpose, apart from reducing the overhead costs of all factories in the State of Gujarat, without

regard to the nature of products manufactured by these factories while denying overtime to the workers, and thus, are "indicative of the intention to capitalise on the pandemic to force an already worn-down class of society, into the chains of servitude". The SC thus allowed the writ petition by quashing the impugned notifications and directing payment of overtime wages to all eligible workers since issuance of the impugned notifications.

Calcutta High Court

B. Transferee is liable to pay damages under the ESI Act

In **Premchand Jute & Industries (P) Ltd. v. Employees' State Insurance Corporation (2020 (3) LLN 384 (Cal))**, the petitioner and Premchand Jute Mills Limited entered into an agreement dated August 31, 2005, under which the petitioner-company was allowed to manufacture jute products at Premchand Jute Mills. On March 23, 2011, a notice was issued to the Petitioner-company under the ESI Act for levy of penal damages for the period from September 2002 to March 2010, for the delay in making contributions under the ESI Act. The petitioner-company contended that damages could not be imposed for such an old period (i.e. for 8 (eight) years) and that the damages were also levied for period when the petitioner-company was not in control of the establishment and thus, it could not be held liable to pay the same. Rejecting the contentions of the petitioner-company, the ESIC passed an order dated September 13, 2011, holding the petitioner-company liable for damages for the delayed contributions for the period from September 2002 to March 2010. The ESIC's order was challenged by the petitioner-company before the Calcutta High Court.

Relying on the SC's judgment in the case of *ESI v. C.C. Santhakumar ((2007) 1 SCC 584)*, the Calcutta High Court held that "there is no provision in the Act whereby there has been any limitation which has been imposed for levy of penalty under Section 85B of the Act". Hence, the petitioner-company's contention of delay in levy of

damages was rejected. It was further held that as per Section 93A of the ESI Act, the employer and the person to whom the factory establishment is transferred are jointly or severally liable to pay the amounts due under the ESI Act in respect of the period up to the date of such transfer. Therefore, the petitioner-company was held liable to pay damages under the ESI Act and the writ petition was, accordingly, dismissed.

Karnataka High Court

C. Trainees are workmen under the ID Act if no training is being imparted to them

In **Management of Recipharm Pharma Services Pvt. Ltd. v. G. Vasanth Kumar (2020 LLR 744)**, services of the respondent-workmen, who were working in the establishment of the petitioner-management as trainees, were terminated without assigning any reasons. The respondent-workmen filed applications under the ID Act, for reinstatement with back-wages and consequential benefits. The Labour Court allowed the application filed by respondent-workmen and directed the petitioner-management to reinstate all the workmen to their original posts with continuity of service, along with back-wages from the date of their termination till the date of reinstatement with all other consequential benefits. The Labour Court's order was challenged before the Karnataka High Court.

The Karnataka High Court held that “*designation of an employee is not of importance and it is the real nature of the duties being performed by the employee which would decide as to whether an employee is a workman under Section 2(s) of the Act. The determinative factor is the work/duties performed by the employee which depends upon the facts of the case. The nomenclature and the period of the appointment are immaterial*”. It was concluded that the relationship of employer and employee was established between the parties on the basis of the following: (i) there was no training scheme for the respondent-workmen nor was there any evidence to indicate that any training was imparted to the respondent-workmen; (ii) respondent-workmen were entitled to leave encashment and bonus under their appointment orders, similar to regular employees; (iii) respondent-workmen were working like regular employees and were identified by employment numbers; (iv) ‘trainees’ were included as a category of workmen under the certified standing orders of the petitioner-



company. Accordingly, the writ petition was dismissed and the respondent workmen were reinstated to their original posts.

D. Nomenclature of designation and salary are not relevant to determine if an employee is ‘workman’ under ID Act

In **A.S. Raghavendra v. Bharati Airtel Limited (2020 LLR 527)**, a writ petition was filed by the petitioner-employee, who was employed with the respondent company on the position of ‘Senior Manager’ with a CTC of INR 22,00,000 (Rupee Twenty Two Lakhs) per annum, after being aggrieved by the award of the Labour Court wherein the Labour Court declined relief to him on the sole ground that he did not fall within the definition of ‘workman’ under the ID Act.

Relying on the SC’s judgment in the case of *Veda Prakash Gupta v. Delton Cable India Private Ltd. (1984 SCR (3) 169)*, the Karnataka High Court held that “*absence of power to appoint or dismiss or hold disciplinary enquiry against other workmen is one of the indicators that he does not belong to the managerial category*”. It was further held that nomenclature of the post and salary are not relevant to determine if an employee is a workman under the ID Act. It was observed that although the petitioner-employee was designated as ‘Senior Manager’, he had no managerial and supervisory powers, he did not have any authority to make appointment and nobody was working under him. Therefore, the impugned award of the Labour Court was quashed, holding that the petitioner-employee was a workman under the ID Act and the matter was

remanded back to the Labour Court. Accordingly, the writ petition was allowed.

Bombay High Court

E. Clubbing of 2 (two) establishments for applicability of ESI Act is justified when partners are common and the place of work is the same

In ***New Power Supply v. The Deputy Regional Director, Employees State Insurance Corporation and Ors. (2020 LLR 659)***, based on an inspection, the ESIC (i.e. respondent no. 1 in the case) directed the appellant-entity to pay contributions under the ESI Act after coming to the conclusion that the appellant-entity and Russian Electricals (i.e. respondent no. 2 in the case) are internally connected and they are the same undertaking having more than 16 (sixteen) employees. Therefore, they are covered under the ESI Act. This was challenged by the appellant-entity before the Industrial Court. However, the same was dismissed. Against this dismissal order of the Industrial Court, an appeal was filed before the Bombay High Court. Before the Bombay High Court, the appellant contended that the number of employees in the appellant-entity and Russian Electricals is less than 10 (ten). Further, there is no functional interconnectivity between these entities, and hence, the provisions of the ESI Act could not be made applicable to them by combining the employees of both the entities.

The Bombay High Court held that there is functional unity and common management of the appellant-entity and Russian Electricals as: (a) both the entities have common partners, (b) maintain a common attendance register, (c) function from the same premises and had common machinery, (d) have common employees, (d)

the nature of work of both the entities is also same, and (e) did not maintain separate muster roll and the muster roll did not show the name of the employer. Therefore, it could not be said the appellant and the respondent no. 2 are separate establishments. Accordingly, the writ petition was dismissed by the Bombay High Court, upholding the impugned order of the Industrial Court.

Himachal Pradesh High Court

F. Contract workers are entitled to maternity benefit under the MB Act

In ***Mandeep Kaur v. Union of India and Ors., (CWP No. 1400 of 2018 decided on 15 July 2020)***, the petitioner was a medical officer employed on a contractual basis and was being denied her claim of maternity leave on the ground that her contract did not contain any provision with respect to grant of maternity leave. In the writ petition before the Himachal Pradesh High Court (**HPHC**), the respondent-employer contended that a contractual employee would not be entitled to claim maternity benefits under the MB Act.

Relying on the SC's judgment in the case of *Municipal Corporation of Delhi versus Female Workers and Anr. (2000 (3) (SCC) 224)*, the HPHC held that women employees, who were engaged on daily wages, or on casual basis/ contractual basis would be entitled to maternity leave under the MB Act. It was further held that "even though, she was engaged on a contractual basis, yet, denial, of, benefit of maternity leave to her, would, tantamount, to infringement, being visited, vis-a-vis, the salutary purpose, behind Article 21, of the Constitution of India". Accordingly, the writ petition was allowed.

Contributors to this edition

Rashmi Pradeep
Partner

Richa Mohanty Rao
Partner

Ankita Sharma
Consultant

Akash Mishra
Consultant

Faiza Khan
Associate

Disclaimer

This newsletter has been sent to you for informational purposes only and is intended merely to highlight issues. The information and/or observations contained in this newsletter do not constitute legal advice and should not be acted upon in any specific situation without appropriate legal advice.

The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas on the issues reported herein and should you have any queries in relation to any of the issues reported herein or on other areas of law, please feel free to contact at cam.publications@cyrilshroff.com.

This newsletter is provided free of charge to subscribers. If you or anybody you know would like to subscribe to Insight please send an e-mail to cam.publications@cyrilshroff.com, include the name, title, organization or company, e-mail address, postal address, telephone and fax numbers of the interested person.

If you are already a recipient of this service and would like to discontinue it or have any suggestions and comments on how we can make the newsletter more useful for your business, please email us at unsubscribe@cyrilshroff.com.

Cyril Amarchand Mangaldas
Advocates & Solicitors

100+ years of legacy

750+ Lawyers

137+ Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai 400 013, India
T +91 22 2496 4455 F +91 22 2496 3666 E cam.mumbai@cyrilshroff.com W www.cyrilshroff.com
Offices in Mumbai | New Delhi | Bengaluru | Hyderabad | Chennai | Ahmedabad