



cyril amarchand mangaldas
ahead of the curve

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Welcome to the Employment Quarterly – our quarterly newsletter on key employment and labour updates.

This issue covers the key legislative developments in labour laws such as linking of universal account number with the employees' state insurance portal, notification of conveyance allowance not forming a part of wages under the Employees' State Insurance Act, 1948, notification of rules amending the Delhi shops and establishments rules, notification of the Haryana State Employment of Local Candidates Act, 2020, and clarification on timeline for payment of cess related to building and construction workers.

Additionally, this issue provides an update on the draft rules recently published by various State Governments under the Labour Codes and covers the key orders and notifications released by certain State Governments to deal with the third wave of COVID-19 pandemic.

Besides legislative updates, this issue also discusses key developments in labour laws brought forth by several judicial pronouncements of the Supreme Court of India as well as various High Courts pertaining to *inter alia* prior notice requirements under the Industrial Disputes Act, 1947, liability of directors in case of offences by companies, prevention of sexual harassment at the workplace and gratuity entitlement of employees.

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

Regards,
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LEGISLATIVE UPDATES

I. Key Central Legislative Changes

A. EPFO clarification on the status of Singapore citizens in India

By virtue of the Comprehensive Economic Cooperation Agreement signed by India and Singapore in 2005 (which is treated at par with the Social Security Agreement signed by India with other countries), read with the Employees' Provident Funds Scheme, 1952 (**EPF Scheme**), citizens of Singapore working in India, contributing to the social security scheme in Singapore, fall within the category of 'excluded employees' for the purposes of the EPF Scheme. In a circular dated March 14, 2017, the Employees' Provident Fund Organization (**EPFO**) had clarified that Singapore citizens who are rendering services in India temporarily and contributing to the social security scheme in Singapore are to be treated as 'excluded employees'¹ under the EPF Scheme. Employers are not required to make provident fund contributions in respect of excluded employees.

Further to the above, the EPFO, by way of a circular dated October 21, 2021, has noted that the authorities were facing certain difficulties in ascertaining a Singapore citizen's contribution to the social security scheme back home. To facilitate this ascertainment, a form (physical or electronic) in the nature of a certification that an employee is contributing to the social security scheme in the home country was finalised between India and Singapore in a bilateral meeting. In this regard, the EPFO has advised the regional offices and other authorities under it to take into consideration such certification received from the employer of the relevant employees, to determine whether such employees fall within the category of 'excluded employee' under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

B. Employers to enter UAN of employees in ESIC portal

The Employees' State Insurance Corporation (**ESIC**), by way of a circular dated December 9, 2021, has brought to the notice of covered establishments that pursuant to a decision of the Ministry of Labour and Employment, ESIC insurance numbers of insured persons (**IP**) are to be linked with the Universal Account Number (**UAN**) allotted by the EPFO, to such IPs.

In the way that the EPFO ensures easy withdrawals, settlements and transfers based on the UANs of the employees, a similar facility has now been made available through the Employees' State Insurance portal. An employer can now enter the UAN of IPs through the portal, following which it can be verified with the EPFO and eventually leading to easy access to various processes and benefits under the Employees' State Insurance Act, 1948 (**ESI Act**).

C. ESIC directs that conveyance allowance will not form part of 'wages' as per the judgment of the Supreme Court

By way of an internal circular dated November 1, 2021, the ESIC has instructed its officers to take into account the judgment of the Supreme Court of India in the case of *Employees State Insurance Corporation vs. Texmo Industries (SLP (C) No. 811/2021)*, wherein it was held that payment of conveyance allowance does not fall under the definition of the term 'wages' under the ESI Act, and also noted that the judgment would be implemented from the date on which it was delivered, i.e., March 8, 2021. The Supreme Court held that the definition of wages under the ESI Act excludes travelling allowance, which is not defined under the ESI Act or the Industrial Disputes Act, 1947. In the absence of a definition, the meaning of the same has to be construed as per its ordinary meaning, which would cover expenses

¹ As per Paragraph 2(f) under Paragraph 83 of the EPF Scheme, the definition of an 'Excluded Employee' covers "an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a bilateral comprehensive economic agreement containing a clause on social security prior to 1st October, 2008, which specifically exempts natural persons of either country to contribute to the social security fund of the host country."

for travel in connection with work, whether regular commute to and from work or other occasional travel for work. As long as conveyance allowance is being paid towards achieving a similar purpose, regardless of its nomenclature, it shall be excluded from the definition of 'wages' in the same way as travelling allowance.

Accordingly, the ESIC has instructed all of its regional and sub-regional offices to follow and ensure strict compliance with the above decision when determining which salary components constitute 'wages' for the purpose of computation of contributions under the ESI Act. The aforesaid exclusion of a component from the definition of wages cannot be done merely based on nomenclature; instead it will have to be done on a case-by-case basis by relying on an analysis of the real nature of the component.

II. KEY STATE LEGISLATIVE CHANGES

A. Amendment to Delhi Shops and Establishments Rules

On November 15, 2021, the Labour Department of Delhi notified the Delhi Shops and Establishments (Amendment) Rules, 2021 (**Delhi Rules**) to amend certain provisions under the Delhi Shops and Establishments Rules, 1954.

The key changes under the Delhi Rules relate to implementation of an online system (i.e., on the Shop & Establishment portal of the Labour Department) for the following:

- (a) application for registration of establishment;
- (b) generation of registration certificate in Form C; and
- (c) notification of any changes in respect of any information specified under Section 5(1) of the Delhi Shops and Establishments Act, 1954, such as name of the establishment and/or the employer, address of the establishment, number of employees, or any other prescribed information.

In addition to the above, the Delhi Rules have substituted Form G under the old rules with a new form, which



includes details such as date of termination, reasons for termination, leaves rejected etc. Further, the Delhi Rules have deleted Form H (Register of Employment and Remuneration of Employees) and Form I (Register of Leaves), which are no longer required to be maintained by employers.

B. Haryana State Employment of Local Candidates Act, 2020

The Government of Haryana, by way of a notification dated November 6, 2021, has notified the Haryana State Employment of Local Candidates Act, 2020 (**Haryana Local Candidates Act**). The Haryana Local Candidates Act will come into effect from January 15, 2022 and will be effective for a period of 10 years from the effective date.

The Haryana Local Candidates Act is applicable to: (a) all private companies, societies, partnership firms, trusts, any person employing 10 or more persons in Haryana; or (b) any other entity as may be notified by the Government. The Haryana Local Candidates Act requires private sector employers to reserve 75% of job posts that offer a salary of less than INR 30,000 to local candidates in Haryana, as defined under the Haryana Local Candidates Act.

The Government of Haryana, by way of a notification dated January 10, 2022, has published the Haryana State Employment of Local Candidates Rules, 2021, and the same will come into effect from January 15, 2022.

III. STATUS OF LABOUR CODES

A. Rules released under the Industrial Relations Code, 2020 by various states

During the period starting from October 1, 2021 until December 31, 2021, the rules under the Industrial Relations Code, 2020 (**IR Code**) were released by Governments of Gujarat, Assam, Goa, Puducherry and Manipur, and were open for objections and suggestions.

The state rules under the IR Code will come into force from the date of commencement of the IR Code.

B. Rules released under the Code on Wages, 2019 by various states

During the period starting from October 1, 2021 until December 31, 2021, the rules under the Code on Wages, 2019 (**Wages Code**) were released by the Governments of Gujarat, Assam, Delhi, Kerala, Puducherry and Manipur, and the same were open for objections and suggestions.

The state rules under the Wages Code will come into force from the date of commencement of the Wages Code.

C. Rules released under the Code on Social Security, 2020 by various states

During the period starting from October 1, 2021 until December 31, 2021, the rules under the Code on Social Security, 2020 (**SS Code**) were released by the Governments of Gujarat, Assam, Goa, Himachal Pradesh, Kerala and Manipur, and the same were open for objections and suggestions.

The state rules under the SS Code will come into force from the date of commencement of the SS Code.

D. Rules released under the Occupational Safety, Health and Working Conditions Code, 2020 by various states

During the period starting from October 1, 2021 until December 31, 2021, the rules under the Occupational Safety, Health and Working Conditions Code, 2020 (**OSH Code**) were released by Governments of Bihar, Kerala, Puducherry and Manipur, and the same were open for objections and suggestions.

The state rules under the OSH Code will come into force from the date of commencement of the OSH Code.

IV. ORDERS/ ADVISORIES/ GUIDELINES ISSUED BY STATE GOVERNMENTS

In light of the subsisting pandemic and the sharp rise in the number of COVID-19 positive cases in India, several State Governments have issued orders, advisories and guidelines to curb its rapid spread. While this newsletter aims to cover the key employment law updates for the period October 1 to December 31, 2021, we have also covered certain recent employment updates (post December 31, 2021) that pertain to the captioned matter. Given that the situation is evolving fast, it is advisable to refer to the latest notifications that may be issued in this regard. The key updates in this regard are set out below.

A. Karnataka

The Government of Karnataka has issued orders dated January 4, 2022 and January 11, 2022 (together, **Karnataka Order**), which will remain in effect till January 31, 2022, imposing restrictions in addition to the previous COVID-19 orders issued by the Government of Karnataka, including the order dated July 3, 2021 which *inter alia* provides that all offices and establishments are required to strictly follow COVID-19 appropriate behaviour (such as social distancing, wearing masks, sanitisation etc.).

The Karnataka Order *inter alia* provides that:

- (a) all offices will function five days a week from Monday to Friday during the period of continuation of the Karnataka Order;
- (b) there shall be curfew on all weekends, from Friday 10 pm to Monday 5 am across Karnataka (**Weekend Curfew**); and
- (c) during the Weekend Curfew, all the industries including those in the IT sector are exempted from the restriction of Weekend Curfew, and their employees are allowed to-and-fro movement upon producing a valid identity card issued by their employer.

The Karnataka Order has been supplemented by an order dated January 5, 2022, whereby the Labour Department of Karnataka has been directed to ensure that the employees working in industries/factories, including IT industries, are double vaccinated and strictly follow COVID-19 appropriate behaviour at their workplace. Further, the local labour officer along with a Health Department official are required to verify: (a) the vaccination status of the employees working in the said establishments; and (b) employer's compliance with COVID-19 appropriate behaviour at the workplace.

B. Maharashtra

The Government of Maharashtra has issued an order dated January 8, 2022 (**Maharashtra Order**) enforcing certain emergency measures to prevent and contain the spread of COVID-19, especially the Omicron variant. The Maharashtra Order imposes various restrictions in relation to public movement, government and private offices, social gatherings etc. The Maharashtra Order has come into effect on January 10, 2022 and will continue to remain in force until the issuance of a new order.

The Maharashtra Order provides the following in relation to private offices:

- (a) Office management are required to rationalise the number of employees by way of work from home and by staggering working hours.
- (b) It is advised not to exceed the 50% attendance mark in office. In this regard, the management may consider flexible hours for employees as well as keeping offices open for 24 hours and working in shifts.

- (c) If an office has staggered timings and is working at odd hours, then travelling for office purposes is to be considered as movement for essential purposes on production of ID cards by employees. For such travel, safety and convenience of women employees must be taken into consideration.
- (d) Only fully vaccinated employees should attend office physically. Non-vaccinated employees must be encouraged to go for full vaccination.
- (e) Office management shall ensure that COVID-19 appropriate behaviour (as prescribed under the Maharashtra Order) is strictly adhered to in the workplace at all times.
- (f) Office management should provide for thermal scanners and hand sanitisers.
- (g) Any organisation or establishment that fails to follow COVID-19 appropriate behaviour or any standard operating procedures shall be liable to be punished with a fine of INR 50,000 for each such incidence of failures. Repeated failure may lead to closure of organisation or establishment until the notification of COVID-19 as a disaster remains in force.

C. Delhi

The Government of Delhi has issued an order dated January 11, 2022, directing closure of all unexempted private offices and requiring employees of such offices to work from home. The order will continue to remain in force until the issuance of further orders.

JUDICIAL UPDATES

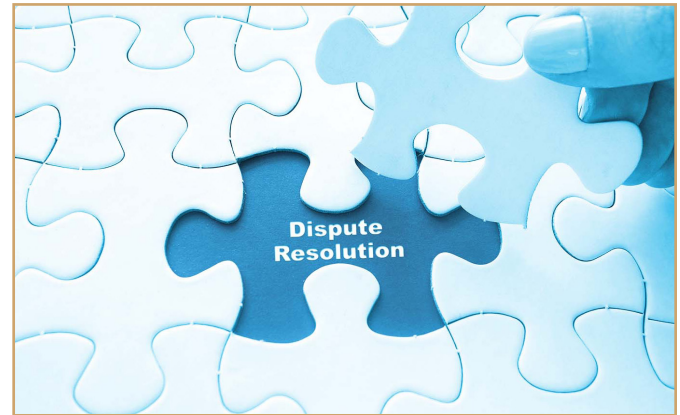
Supreme Court of India

A. Section 9A of the Industrial Disputes Act, 1947 is attracted when there is a transfer of employment for reasons within an employer's control

In **Caparo Engineering India Ltd. v. Ummed Singh Lodhi and Ors. (2021 SCC OnLine SC 973)**, the Supreme Court of India held that if there is a transfer of employment from one unit to another for reasons that are not outside the employer's control, the employer would be required to provide prior notice of change under Section 9A of the Industrial Disputes Act, 1947 (**ID Act**).

In this case, the respondent employees were employed in the capacity of 'workmen' within the meaning of the ID Act at the appellant's factory in Dewas and were subsequently transferred to Chopanki in the capacity of supervisors. The workmen raised this issue as an industrial dispute through their union with the Labour Court and claimed that their transfer was in violation of Section 9A of the ID Act. Against this, the appellant employer argued that the transfer was implemented since the production had reduced in Dewas and the workmen had become surplus, and transfer in such situations was permitted under their existing conditions of employment. Accordingly, the employer claimed that there was no change in the service conditions necessitating compliance with Section 9A of the ID Act.

The Labour Court held that the employer could not prove reduction in production or that the workmen had become surplus, and the transfer was affected to reduce the number of workmen employed in Dewas, for which prior notice must be provided as per Section 9A read with Schedule IV (specifically Clause 11) of the ID Act. It has further observed that the workmen had been transferred to Chopanki in the role of supervisors, taking them outside the purview of the ID Act (which only applies to 'workmen'), and the same was also a change of condition of service under Schedule IV of the ID Act, for which the employer was required to provide notice of change under Section 9A of the ID Act, which it failed to do.



In appeals of the employer, the High Court of Madhya Pradesh and the Supreme Court of India upheld the decision of the Labour Court.

B. Liability is attributable to directors of a company only if the crime was committed with their knowledge or if they failed to exercise due diligence

In **Dayle De'souza v. Government of India through Deputy Chief Labour Commissioner (C) and Ors. (Crim. Appeal No. 1319 of 2021)**, the Supreme Court held that a person cannot be held liable under Section 22C of the Minimum Wages Act, 1948 (**MW Act**) (which pertains to offences by companies) merely because of his/her status or position as a director, manager, secretary or other officer of a company, unless the offence has been committed with his/her consent or negligence. It has been further held that the company has to be necessarily accused or summoned to be tried for the offence along with the director, in order to hold the director liable under Section 22C of the MW Act, since this Section pertains to 'offences by companies'.

In the present case, a company had entered into a contract for the maintenance and upkeep of ATMs of State Bank of India in certain locations. On inspection of one such ATM, a Labour Enforcement Officer identified certain non-compliances with the provisions of the MW Act (in relation maintenance of registers and display of notices) and accordingly, issued a notice to the director of the company. The director responded to the notice clarifying that he was not responsible for managing

the concerned establishment in respect of which the non-compliance was identified. However, the Labour Enforcement Officer disregarding the clarification provided by the director, filed a criminal complaint before the Chief Judicial Magistrate, who issued a bailable warrant against the director. Against this, the director filed a petition before the Madhya Pradesh High Court for quashing of the complaint, which was dismissed.

Consequently, the matter was appealed before the Supreme Court. Upon consideration of all the issues and facts, the Supreme Court noted that the complaint against the director was under Section 22C of the MW Act, which pertains to offence by companies. It further noted that the proviso of Section 22C (2) states that when an offence is committed by a company, and it is proven that it was committed with the knowledge or consent of or in connivance with or attributable to any neglect by a director, only then the director shall be deemed to be guilty.

Based on the above, the Supreme Court observed that since the director was not in-charge of or responsible for the conduct of the business at the time of commission of the offence, it cannot be said that the offence was committed with the knowledge/consent of or in connivance with the director. Accordingly, the Supreme Court, while quashing the order of the Chief Judicial Magistrate, held that a person cannot be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. It has further held that the director can be held liable under Section 22C of the MW Act, only if the company has been accused or summoned to be tried for the offence, which was not the case in the present situation.

C. Extension of retirement age does not lead to the employee losing entitlement to gratuity

In **G. B. Pant University of Agriculture and Technology v. Damodar Mathpal (SLP No. 1803 of 2018)**, the appellant university allowed its employees to extend their age of retirement to 60 years. Subsequently, the university withdrew the gratuity benefits extended to such employees who chose to extend their retirement age to 60 years, which was challenged by the employees

before the Uttarakhand High Court. The High Court held in favour of the employees and consequently, an appeal was filed by the university before the Supreme Court.

The Supreme Court while upholding the decision of the High Court, held that the mere exercise of the option by an employee to avail the benefit of extension of age of retirement to 60 years cannot operate against his/her entitlement to gratuity. The exercise of such an option will not deprive the employee of his/her right to gratuity, unless and until the university has been exempted from the provisions of the Payment of Gratuity Act, 1972 in strict compliance of Section 5 of the Payment of Gratuity Act, 1972, with prior approval of the relevant state government.

DELHI HIGH COURT

A. Internal Committee does not have the jurisdiction to hear complaints against the employer as the jurisdiction lies with the Local Committee.

In **A v. B (W.P. (C) 1103/2020)**, the aggrieved woman, an editor in the Akademi (*for the purposes of confidentiality, full name of the organisation is not disclosed in the judgment*), filed a complaint of sexual harassment with the local committee against the secretary of the Akademi, who was in-charge of day-to-day affairs, responsible for managing funds and property, and was also the custodian of its records. However, the Akademi, disregarding the complaint lying with the local committee, also assumed jurisdiction and constituted an internal committee to investigate into the complaint.

The question before the Delhi High Court was whether the internal committee of an organisation had the jurisdiction to hear the complaint of sexual harassment against an employee who would qualify as an 'employer' under the Sexual Harassment of Women at Workplace (Prevention Prohibition and Redressal) Act, 2013 (**POSH Act**).

The High Court considered the definition of 'employer' under Section 2 (g) of POSH Act and held that the scope of the definition was wide enough to include the secretary within its fold as he was in-charge of the day-to-day affairs of the Akademi and was also managing the properties and funds of the Akademi.

Accordingly, the High Court held that the complaint of sexual harassment against the secretary could only be entertained by the local committee, in accordance with the POSH Act and the internal committee constituted by the Akademi did not have the jurisdiction to investigate the complaint. It further held that the findings of the internal committee are void for lack of jurisdiction.

TELANGANA HIGH COURT

A. An educational institute will not fall under the purview of the Telangana Shops and Establishments Act, 1988.

In *The St. Anns College for Women v. State of Telangana (W.A. No. 747 of 2019)*, the primary

question before the High Court was whether an educational institute would fall within the meaning of 'establishment' under Section 2 (10) of the Telangana Shops and Establishments Act, 1988.

The High Court referred to the judgment of the Supreme Court in *Ruth Soren v. Managing Committee* (2001 2 SCC 115), wherein it was held that an educational institution does not fall under the scope of an 'establishment' as defined under the Bihar Shops and Establishments Act, 1953. The High Court observed that the definition of 'establishment' under both the aforementioned local shops and establishment acts is similar and accordingly, held that an educational institute would not fall within the meaning of 'establishment' under Section 2(10) of the Telangana Shops and Establishments Act, 1988.

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