



ELB E-BULLETIN

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Welcome to the second edition of the e-Bulletin (Volume V) brought to you by the Employment Labour and Benefits (ELB) practice group of Khaitan & Co. This e-Bulletin covers regulatory developments (including those relating to the upcoming labour codes), case law updates and insights into industry practices that impact businesses from a sector agnostic standpoint.

01.

LABOUR CODES: STORY SO FAR

In this section, we help you in understanding the developments that have taken thus far on the implementation of the 4 labour codes on wages, social security, industrial relations, and occupational safety, health and working conditions, which received the Presidential assent between the years 2019 and 2020.

Broadly speaking, the labour codes, which aim to consolidate and consequently replace 29 Central labour laws, are yet to be brought into force, barring provisions relating to (a) Central Advisory Board on minimum wages, and (b) identification of workers and beneficiaries through Aadhaar number for social security benefits. Moreover, even if the codes are fully brought into effect, the same would require issuance of rules, schemes, and notifications of the relevant governments so as to have a comprehensive revised compliance regime.

Under the labour codes, the 'appropriate government' for an establishment can be the Central Government or the state government, depending on the nature of its operations or the existence of multi-state operations. Such appropriate government has the power to inter alia issue rules detailing some of the substantive aspects broadly set out under the codes and also prescribing procedural compliances such as filings, maintenance of registers, etc. In the last one year, several key industrialised states such as Haryana, Delhi, Maharashtra, Gujarat, Andhra Pradesh, Telangana, Tamil Nadu, and Karnataka released draft rules under some or all of the labour codes for public consultation (with Gujarat, Karnataka, and Uttar Pradesh also releasing final rules under certain labour codes). Among the industrialised states, notably, West Bengal is yet to release their draft rules under any of the codes.

02.

REGULATORY UPDATES

In this section, we bring to your attention, important regulatory developments in the form of notifications, orders, bills, amendments, etc. witnessed in the past one month in the context of employment and labour laws.

[Himachal Pradesh amends its rules relating to building and construction workers](#)

By way of notification dated 8 February 2023, the Governor of Himachal Pradesh notified Himachal Pradesh Building and Other Construction Workers (Regulation of Employment and Conditions of Service) First Amendment Rules, 2023 to amend Himachal Pradesh Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008 (BOCW Rules 2008). The amended rules shall come into force from the date of publication of the notification in Rajpatra (e-gazette website of the Government of Himachal Pradesh), which is also 8 February 2023.

The amendment brings about a change in Rule 266 (membership to the welfare fund) of the BOCW Rules 2008 by incorporating that the application for registration needs to be accompanied with appropriate documents from the employer / contractor (subject to the applicant having worked at least 90 days in the preceding 12 months), such as wage slips, copy of muster roll or attendance register, etc., certifying that the applicant is a construction worker. The aforesaid document should contain prescribed particulars of the construction worker, and information about the employer / contractor, the nature of work, and the cess paid by employer / contractor for the work executed.



Karnataka passes amendment bill to effectuate changes to Factories Act, 1948

The Karnataka legislature passed the Factories (Karnataka Amendment) Bill, 2023 (2023 Bill) on 24 February 2023 to amend the Factories Act, 1948 in its application to the state of Karnataka.

The 2023 Bill amends various provisions of the Factories Act, starting with Section 54, in respect of which the Karnataka government has been conferred with the power to extend the daily maximum working hours from 9 hours to 12 hours inclusive of the rest interval, subject to the maximum weekly hours remaining the same (48 hours).

The 2023 Bill also amends Section 59 regarding overtime hours wherein any worker is entitled to receive overtime, if such worker works for more than 9 hours in a day or 48 hours in a week, if he / she / they work for 6 days in a week. Similar entitlement now exists for workers who are employed on a 5-day working week basis and who work for more than 10 hours in a day or 48 hours in a week. In case of a 4-day working week, overtime will be available to a worker if he / she / they work for more than 11.5 hours in a day. The overtime will be calculated at the rate of twice the ordinary wage rate. Section 65 is also amended to increase the limit of permissible overtime hours in a quarter from 75 hours to 145 hours.

Lastly, Section 66 of the Factories Act, 1948, has been substituted to allow women to work between the hours of 7 PM and 6 AM subject to compliance by the employer with certain conditions including (i) prohibition, prevention, deterrence of acts of sexual harassment and maintenance of a complaint resolution mechanism, (ii) appropriate working conditions regarding hygiene and health such as restrooms, (iii) providing sufficient security, proper lighting and CCTV coverage in and as well as surrounding the factory premises, (iv) transportation facilities with female security guards and pre-employment screening of all drivers, and (v) obtaining consent of women workers in writing.

EPFO issues further instructions for compliance with Sunil Kumar judgement

By way of a circular dated 20 February 2023, the Employees' Provident Fund Organisation (EPFO), in compliance with the Supreme Court judgment in EPFO and Another v Sunil Kumar and Others [AIR 2022 SC 5634], instructed all field offices to implement the directions contained in paragraphs 44 (iii), 44 (iv) and 44 (v) of the aforesaid judgment. In our [ERGO](#) dated 9 November 2022, we have analysed the ruling and set out the key takeaways from the judgement.

In addition to earlier instructions dated 29 December 2022 and 5 January 2023, by way of the present circular, EPFO has now reiterated that employees who did not exercise option as contemplated in the unamended Employees' Pension Scheme, 1995 (EPS Scheme) nor did so under the EPS Scheme as it stood pursuant to 2014 amendment would be entitled to exercise joint option within the extended period of 4 months i.e., until 3 May 2023.


Further, the manner in which employees are required to apply to the concerned regional office is also outlined including request being made in the prescribed form and manner, and consent of the employee being given in the joint option form, and the joint option containing proof of remittance of employees' provident fund contributions on higher wages exceeding the prevalent wage ceiling.

03.

CASE UPDATES

In this section, we share important judicial decisions rendered in the past one month from an employment and labour law standpoint.

[FIR can be quashed in a criminal sexual harassment matter when internal committee could not establish a case of sexual harassment in the inquiry: Delhi High Court](#)

In the case of Ashish Chauhan v State (Government of NCT of Delhi) and Another [Writ Petition (Criminal) 2802 of 2019], 

the Delhi High Court considered a matter regarding sexual harassment wherein the respondent, a trainee at the organization, had withdrawn her complaint against the petitioner, an employee of the organization, from the internal committee of the organization, but had later progressed to file an FIR against the petitioner. The internal committee had, however, proceeded with the inquiry and concluded that the respondent had not been able to establish any case of sexual harassment against the petitioner and others. Later, the respondent registered a first information report (FIR) under Sections 354A (sexual harassment) and 506 (punishment for criminal intimidation) of Indian Penal Code, 1860 against the petitioner.

The court observed that the internal committee had initiated the necessary inquiry process under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, but the respondent refused to give her cooperation in the inquiry process and did not produce any witnesses and evidence to establish sexual harassment or criminal intimidation by the petitioner. The court then observed that Section 482 of the Code of Criminal Procedure, 1973 (CrPC) envisions 3 situations under which any High Court may exercise inherent jurisdiction, namely, (i) to give effect to an order under CrPC, (ii) to prevent an abuse of the process of court, and (iii) to otherwise secure the ends of justice. It further noted that while the said power is wide, it has to be exercised with caution in the interest of justice.

As regards the facts of the present case, the court opined that the proceedings under the FIR would amount to misuse of power and abuse of the process of law. Accordingly, the FIR was held to be unsustainable under law and quashed. The court also factored in the identical nature of internal committee's proceedings (which were held to have been duly conducted) and the criminal prosecution in hand.

[Payment of all outstanding employees' provident and gratuity dues of the corporate debtor is necessary for a resolution plan to be compliant: Supreme Court](#)

In the case of *Jalan Fritsch Consortium v Regional Provident Fund Commissioner and Another* [Civil Appeal Number 407 of 2023], the Supreme Court upheld the order of the National Company Law Appellate Tribunal

(NCLAT), which had directed the successful applicant to disburse gratuity and employees' provident fund dues of the workmen in entirety. The background of the matter related to a corporate insolvency resolution process, wherein the successful applicant submitted a resolution plan which was approved by the committee of creditors and the National Company Law Tribunal, Mumbai, pursuant to which the workers of the corporate debtor approached the NCLAT.

The corporate debtor's workers contended that they were entitled to their dues towards employees' provident fund and gratuity. The workers of the corporate debtor relied on Section 36 of the Insolvency and Bankruptcy Code, 2016 (IBC), which provides that all sums due to any workman or employee under the provident fund or the gratuity fund should neither be included in the liquidation estate nor be used for recovery in the liquidation process. The workers accordingly alleged that the successful applicant's resolution plan was not in accordance with the law as it did not account for these payments in full.

The NCLAT based its view on Section 30(2)(e) of the IBC, which provides that resolution professional must ensure that the resolution plan is aligned with the applicable laws, and since non-disbursement of dues towards employees' provident fund and gratuity would amount to breach of applicable labour laws, the plan in question would not be legally sustainable.

04.

INDUSTRY INSIGHTS

In this section, we delve into interesting human resources related practices and / or initiatives as well as industry trends across various sectors in the past one month.

[India Inc. implements inclusive benefits for employees](#)

As more and more offices resume normalcy in the aftermath of COVID-19, employers are trying to incorporate [benefits](#) which are a notch above the conventional parameter and the bare minimum standards set out under the applicable labour laws, to attract and retain a diverse workforce. Some of these



benefits include pet adoption leave, menstrual leave, medical assistance directed towards mental health, fertility / surrogacy adoption assistance, sabbaticals, etc.

Companies have started including programmes for their employees who require focused benefits such as medical benefits covering gender reassignment surgery for LGBTQIA+ employees and their partners, and early

preventive care and treatment for employees' children who have specific neurodevelopmental, cognitive, behavioural or physical impairments.

Experts have weighed in that this has been a result of hiring new talent groups such as transgender persons, and persons with disabilities, along with a high percentage of younger generation in the employee pool.

We hope the e-Bulletin enables you to assess internal practices and procedures in view of recent legal developments and emerging industry trends in the employment and labour law and practice landscape.

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