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Welcome to the ninth edition of the e-Bulletin (Volume VI) 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.

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

employees' pension fund

Central Advisory Board on minimum wages

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 past 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. Among the industrialised states, notably, West Bengal is yet to release their draft rules under any of the codes.

The Ministry of Labour and Employment, as a way ahead, has planned to conduct training workshops for state government labour officials in the coming months. These workshops are proposed

to facilitate the nationwide rollout of the new labour codes, ensuring readiness and addressing potential legal challenges. Additionally, the Central Government has urged the state of West Bengal to expedite the drafting of rules under the four labour codes, highlighting the benefits for all societal sections, including women and migrant workers.

Recently, the Union Government has sought the opinion of the Ministry of Law and Justice regarding the enforcement of the proposed labour codes without unanimous consent from all states, particularly in light of West Bengal's hesitation to adopt the reforms. The potential for legal challenges exists if the codes are enforced without complete state consensus.

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.

West Bengal exempts all establishments in the information technology ("IT") sector from the provisions of working hours for employees

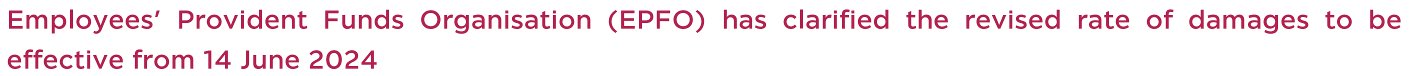
By way of a notification dated 1 July 2024, the Government of West Bengal has exempted establishments in the IT sector from the application of Section 7(2) (hours of work in establishments) of the West Bengal Shops and Establishments Act, 1963 (West Bengal S&E Act). Section 7(2) of the West Bengal S&E Act stipulates that the maximum permissible working hours shall not exceed 8 ½ hours per day and 48 hours per week. However, with an aim to provide for flexible working hours, such an exemption has been granted, as long as the establishments ensure that

(a) the normal working hours of employees do not exceed 9 hours per day and 48 hours per week; and

(b) compliance with all other relevant provisions of the West Bengal S&E Act is maintained, as applicable.

Central Government introduces the onboarding and registration of gig and platform-based workers on the e-Shram portal

Through a notification dated 16 September 2024, the Government of India, in its aim to make the e-Shram portal a comprehensive one-stop solution to support the unorganised / migrant workers, has called for the onboarding and registration of gig and platform-based workers. This initiative aims to provide these workers with access to various welfare schemes and bring the vast, unregulated workforce under the social security framework. Further, by recognizing the challenge of registering such a large workforce, the Central Government is also working on bringing platform aggregators on board to facilitate such registration of platform workers on the portal. As part of this effort, the Central Government has requested aggregators to actively participate in this venture, by registering both themselves and the platform-based workers engaged by them on the e-Shram portal. The notification also outlines the steps for registration on the e-Shram portal and provides additional details regarding the onboarding process.



Employees' Provident Funds Organisation (EPFO) has clarified the revised rate of damages to be effective from 14 June 2024

In a notification dated 28 August 2024, the EPFO has announced that the revised rates of damages as published in a series of notifications on 14 June 2024, will be applied prospectively from 14 June 2024 onwards. For any defaults related to the payment of contributions, charges payable, transfer of accumulations etc., made up to 13 June 2024, the damages will be imposed and recovered in accordance with the provisions that were in effect prior to the introduction of the revised rates. We have made a detailed analysis of the changes introduced by the EPFO in our ERGO dated 17 June 2024, which can be accessed here.

Case Updates

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

Mere entry in the balance sheet is insufficient to receive enhanced gratuity benefits in the absence of an underlying agreement or contract: Bombay High Court

In the case of Anil Govind Ganu and Ashwini Anil Ganu v Innovative Technomics Private Limited and Others [Writ Petition Numbers 160 and 161 of 2024], the Bombay High Court held that, as specified in Section 4(5) of the Payment of Gratuity Act 1972 (Gratuity Act), an employee will be entitled to receive better terms of gratuity than what is prescribed under the Gratuity Act, only if there is an underlying agreement or contract to that effect. The court clarified that mere acknowledgment of payment of gratuity in the company's balance sheet does not, by itself, prove the existence of the right of the petitioners to be entitled to gratuity and subsequently impose a corresponding liability on the company to make such gratuity payments to its employees.

The petition was filed by the former promoter and director of the respondent company, who alleged non-payment of gratuity by the respondent company in accordance with the Payment of Gratuity Act 1972. The petitioners argued that it had been agreed between the petitioners and the respondent company that the petitioners will be entitled to better terms of gratuity, with the maximum statutory cap of INR 20,00,000 not being applicable to them. However, there has been no written agreement or contract that existed to this effect which indicated such understanding between the parties for enhanced gratuity payments and accordingly, the petitioners argued that the fact that the company has provisioned for gratuity through entries in the company's balance sheet is valid grounds for the petitioners to be entitled to payment of gratuity.

The court held that mere reflection of an entry in the liability section of the balance sheet does not create a right that did not previously exist. Such rights must be independently established either through a transaction or documented in the form of a contract. In the present case, beyond the entry in the balance sheet, there was no supporting document in the form of a contract between the petitioners and the company. Further, the court also noted that in the extant case since the petitioners were in complete control of the affairs of the respondent company, they cannot be deemed to be "employees" of the company. Accordingly, the court dismissed the appeal and concluded that a mere entry in the balance sheet does not give rise to a liability under Section 4(5) of the Gratuity Act.

In cases of illegal termination, awarding compensation in lieu of reinstatement is justifiable considering the past conduct of the workman: Madras High Court

In the case of S C Srinivasan v the Presiding Officer, II Additional Labour Court and Others [Writ Petition Numbers 27391 of 2012 and 9533 of 2013], the Madras High Court held that when retrenchment of a workman is not conducted in accordance with the provisions of the Industrial Disputes Act, 1947 (ID Act), the termination will be deemed to be illegal, thereby entitling the workman for reinstatement of his services. However, in cases where the past conduct of the workman raises concerns or has not been professional, awarding compensation in lieu of the demand for reinstatement of services may be justified.

In the present case, the employment of the petitioner, who was employed as a bus driver, was terminated orally by the employer after an accident occurred of the bus that he was driving. The petitioner challenged the termination on the grounds that it was conducted without adhering to the procedures laid down in the ID Act, and was, therefore, illegal. He sought reinstatement with continuity of service and back wages.

The court observed that the workman's request for reinstatement conflicted with his previous conduct. Considering the illegal nature of retrenchment, the fact that the petitioner has contested the case for 11 years without gainful employment, and the overall balance of justice in the given circumstances, the court deemed it appropriate to award compensation instead of ordering reinstatement.

No unilateral changes to leave encashment calculation under Section 9A of the ID Act: Madras High Court

In the case of General Manager, Bharat Heavy Electrical Limited v BHEL Mazdoor Sangam / BMS and Others [Writ Petition Numbers 4673 and 7413 of 2015], the Madras High Court ruled that any change in the calculation methodology for leave encashment constitutes a change in the conditions of service. Therefore, such a change cannot be made unilaterally, and the employer is required to issue a notice of change as required under Section 9A of the ID Act.

In the present case, the key issue was whether a fresh notice under Section 9A of the ID Act was necessary, to implement the change in the number of days used to calculate leave encashment, from 26 days to 30 days. The court held that the petitioner's decision to change the calculation from 26 to 30 days clearly amounted to a modification of the workmen's service conditions, which could not be unilaterally

changed. Consequently, the petitioner was required to issue a notice of change in accordance with the ID Act. The court, while dismissing the petition, directed the petitioner to disburse the differential amount of leave encashment within four weeks from the date of the order.

Courts can examine the factual background of a case to ascertain the nature of the order of termination: Supreme Court

In the case of Swati Priyadarshini v the State of Madhya Pradesh and Others [Civil Appeal Number 9758 of 2024], the Supreme Court of India held that courts can ascertain and examine the underlying reasons and true nature of an employment termination, to determine whether the termination order is in the nature of termination simpliciter or stigmatic termination.

In the present case, the appellant was issued two show-cause notices alleging negligence in her duties. The appellant contended that these notices were issued against her for trivial matters and were an attempt to unjustly remove her from her position with the company. She further claimed to have faced non-cooperation from other officers and experienced mental harassment. Additionally, the appellant argued that the termination of her employment was stigmatic, as she was not given an opportunity for a hearing or any inquiry prior to the termination.

The court held that the absence of explicit reasons for the termination or details regarding the show-cause notices did not automatically render the employment termination to be in the nature of termination simpliciter. It emphasized that courts have the capability to 'lift the veil' and uncover the true reasons leading to termination of employment. The court while setting aside the termination order issued to the petitioner, also ruled that the termination was the result of two show cause notices issued against the appellant, and it constituted a stigmatic termination rather than a mere non-renewal of the contract. The court further concluded that the mere lack of specifying the background situation or the show cause notices could not solely determine the nature of the termination order. Therefore, such a termination order should not be considered as the final determinant, as the court can lift the veil and identify the real reason and true character behind the termination or removal of an employee.

Without direct evidence of sexual connotations, sexual harassment under the Indian Penal Code, 1860 (IPC) is not established: Telangana High Court

In the case of Prasadam Raghu and Another v the State of Telangana and Others [Criminal Petition Number 3348 of 2024], the Telangana High Court held that Section 354 of the IPC (provisions on sexual harassment) is not applicable unless there is direct evidence demonstrating that the alleged remarks carried sexual connotations.

In the present case, the complainant alleged that the petitioners informed her of her selection for the show Big Boss 3 and had her sign certain documents related to it. Subsequently, she was informed that she could not take up any other project for 3 months. During an in-person meeting to discuss this further,

the petitioners allegedly used abusive language and made remarks such as "satisfy our boss". Following this incident, the complainant experienced mental distress and filed a complaint against the petitioners.

It was argued by the petitioners that in the absence of any material evidence, it cannot be concluded that a specific offence was committed solely based on the preponderance of probabilities, and the allegations by the complainant appeared to have been made solely due to the complainant's non-selection for the Big Boss 3 show.

The court held that the contents of the complaint did not constitute an offence under Section 354 of IPC. Additionally, the court noted that there was an unjustified delay in filing the complaint and since there was no physical attack, demand or request for sexual favour, the discussions did not attract the provisions of Section 354 of IPC. Consequently, the court held that the continuation of such proceedings against the petitioners was deemed an abuse of process, and the case was ordered to be quashed.

Secret ballot system should be used for recognizing the trade unions: Kerala High Court

In the case of Fact United Employees Liberation v the Fertilisers and Chemicals Travancore Limited and Others [Writ Petition (Civil) 1071 of 2024], the Kerala High Court held that in situations involving multiple registered trade unions, the determination of the sole bargaining agent must be conducted through a secret ballot system.

The petitioner filed the petition after its request to conduct a referendum for the Cochin division was rejected. The respondents argued that the petitioner did not have the legal standing to demand a statutory duty by the respondents, and further noted that 5 trade unions had already been recognized for the Cochin division. The court noted that when there are multiple registered trade unions, it becomes crucial to determine with whom the employer should negotiate or enter into collective bargaining. If the employer settles with a union representing a minority of workers, such agreements may not be acceptable to the majority, thereby, jeopardizing industrial harmony.

The court also acknowledged that the secret ballot system is increasingly being accepted as a fair method for such determinations. Accordingly, the court directed the respondents to conduct a referendum for the Cochin division also as was conducted for the Udyogamandal divisions of the Company, using the secret ballot to determine the recognised trade union.

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.

Indian Inc's evolving to focus on the employee health and holistic well-being of employee

In India, companies are increasingly implementing a range of programs aimed at enhancing the holistic well-being of their employees, encompassing both physical and mental health, while simultaneously improving productivity and reducing attrition rates. Recognizing that employees are placing greater emphasis on health and well-being alongside professional success, many organizations are integrating health-related objectives into the key performance areas of performance evaluations.

Employers are also providing various facilities to support employee well-being, such as offering diet plans, access to nutrition consultants, and organizing wellness sessions focused on mental health. Additionally, they are actively monitoring health metrics to ensure ongoing employee wellness. Regular discussions are scheduled with team members to review health goals, with employee health being tracked through a combination of tests and digital evaluation. Furthermore, several companies are launching dedicated portals to monitor and promote the physical well-being of their workforce.

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 practic landscape.

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