

Welcome to the fourth edition of the E-Bulletin (Volume II) brought to you by the Employment, Labour and Benefits (ELB) practice group of Khaitan & Co. This e-Bulletin covers regulatory developments, case law updates and insights into industry practices that would impact businesses from a sector agnostic standpoint.



## REGULATORY UPDATES

### COVID-19 round-up: What employers should know

In the past few weeks, the regulatory environment in India has seen several developments in the form of advisories and orders at the Central and the state levels. The firm has developed a dedicated [portal](#) on COVID-19 for sharing these developments with its clients and the public at large.

From an employment and labour law standpoint, a summary of important regulatory developments related to COVID-19 outbreak is set out below:

- Lockdown of shops, commercial establishments and industrial units: On 24 March 2020, a nationwide lockdown was announced in India up to 14 April 2020 (such lockdown has reportedly been extended till 30 April 2020 by the governments of Maharashtra, Punjab, Tamil Nadu, Telangana, West Bengal and Odisha in their respective states). Pursuant to the same, the Ministry of Home Affairs, Government of India, issued guidelines on closure of all shops and commercial establishments except those engaged in 'essential services' as explained therein (such as media, banking companies, insurance companies, private security services etc.). As for factories, the guidelines provide an exception in case of manufacturing operations requiring continuous process if permission for continuing with such operations has

been obtained from the competent authority. Several states such as Maharashtra and Haryana have issued individual orders directing compliance with the said Central guidelines.

- Central government's order on payment of wages to migrant workers: In order to mitigate economic hardship caused to migrant workers in the backdrop of COVID-19 outbreak, the Ministry of Home Affairs, Government of India, issued an order dated 29 March 2020 under the Disaster Management Act, 2005. The order mandates payment of wages to such workers by their employers during the period of closure of establishments. The order, however, does not explain the meaning of 'migrant workers' as used therein.
- State orders and advisories on payment of wages: Some states such as Karnataka and Gujarat have released advisories urging employers to not reduce salaries of their employees during the period of lockdown occasioned by COVID-19 outbreak. However, states such as Maharashtra and Delhi have directed payment of wages to employees during the period of closure when they are not provided work.
- Provisions relating to infected persons: The Labour Department, Karnataka, issued a circular dated 5 March 2020 directing employees showing symptoms of COVID-19 to immediately visit the nearest Employees' State Insurance Hospital for testing / treatment. If the employee is infected, he must obtain a certificate from the medical officer in this regard and submit the same to the employer. Upon receipt of such certificate, the employer would be required to grant 28 days of paid sick leave to the employee. Where the Employees' State Insurance Act, 1948 (ESI Act) is not applicable, employers would be required to provide 28 days of mandatory paid leave under the Karnataka Shops and Commercial Establishments Act, 1961.

Likewise, the government of Uttar Pradesh issued a notification dated 20 March 2020 providing that employees / workmen affected by COVID-19 or suspected to be so affected will be provided 28 days of paid leave by their employers, subject to such employees / workmen producing a medical certificate in this regard to their employers.

On 21 March 2020, the Labour Department, Gujarat, directed that if there is any suspected or infected worker and he is unable to report to work till 15 April 2020, the employer shall not deduct their wages or remove them from services. Such worker should be considered on duty.

- Relaxation on compliance with labour laws: In view of the present situation, the government has relaxed certain labour law compliances such as filing of unified annual return for the year 2019 (extension made up to 30 April 2020). Likewise, the Employees' State Insurance Corporation has allowed making contributions towards employees' state insurance fund for the months of February 2020 and March 2020 on or before 15 April 2020 and 15 May 2020, respectively.
- Finance Minister's relief package: On 26 March 2020, the Finance Minister announced a number of relief measures, targeted largely at the unorganised workforce in the country, to enable people to deal with the COVID-19 crisis. For the organised workforce, the Finance Minister announced that the Government of India shall pay 24% (12% each on behalf of employers and employees) towards the employees' provident fund for the next 3 months. This facility would be applicable to all

establishments which have up to 100 employees, 90% of whom earn under INR 15,000 per month. This has been crystallised in the form of Pradhan Mantri Garib Kalyan Yojana.

The Finance Minister also allowed advance withdrawal provision to employees in the context of COVID-19. Pursuant to the same, the Ministry of Labour and Employment, Government of India, issued a notification dated 27 March 2020, providing that the Provident Fund Commissioner may, on an application from a member of the Employees' Provident Funds Scheme 1952 who is working in a factory or establishment located in an epidemic-affected area, permit a non-refundable advance from the provident fund account of such member. Such advance would not exceed the employee's basic wages and dearness allowance or 75% of the amount standing to his credit in the fund, whichever is lower.

### **Karnataka extends period of factory license to 10 years**

By way of a notification dated 7 March 2020, the Government of Karnataka has amended Rule 5(2) of the Karnataka Factories Rules, 1969, providing that a license may be granted or renewed for a period of 10 years or more but not exceeding 15 years at a time, upon payment of the required fees. At present, the state rules provide that a licence may be granted or renewed for a period not exceeding 3 years at a time.

## **CASE UPDATES**

### **Orders issued under the Disaster Management Act mandatory: Supreme Court observes in its interim order on COVID-19 petition**

In an interim order dated 31 March 2020, the Supreme Court of India (Supreme Court), in *Alakh Ashok Srivastava v Union of India* [Writ Petition (Civil) Number 469/2020], examined the issues being faced by migrant workers in the backdrop of COVID-19. The court observed that the Ministry of Home Affairs, Government of India, had issued an order dated 29 March 2020 which directs states and union territories to ensure adequate arrangements of food and shelter for migrant workers (the said order also directs payment of wages by employers to such workers). It noted the averment of the Government of India that the said order and other advisories were being complied with by the competent authorities.

Adjourning the matter for further hearing, the court observed that:

*"We are satisfied with the steps taken by the Union of India for preventing the spread of coronavirus (COVID-19) at this stage...[Disobedience of] an advisory which is in the nature of an order made by the public authority attracts Section 188 of the Indian Penal Code. We trust and expect that all concerned...will faithfully comply with the directives, advisories and orders issued by the Union of India in letter and spirit in the interest of public safety."*

### **Beneficiaries of a statutory scheme shall be consumers: Supreme Court opines**

In an important judgment of the Supreme Court (*Joint Labour Commissioner v Kesar Lal* [Civil Appeal Number 2014 of 2020]), the question for determination was whether a construction worker registered under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act), would be

considered as a 'consumer' of the scheme formulated thereunder by virtue of the provisions of Consumer Protection Act 1986 (CPA).

The court reviewed the provisions of BOCW Act and observed that every registered worker is entitled to receive benefits from the welfare board from out of the fund constituted thereunder. Further, every registered worker is required to make a contribution to the said fund. Therefore, the services rendered by the welfare board under the statute are not services which are free of charge. Accordingly, any deficiency in service on the part of the welfare board would entitle the registered work to claim relief under CPA.

### **Encashment of earned leave not a benefit consequential to reinstatement: Karnataka High Court determines**

In *General Manager, Vijay Bank v Jayaprakash* [2020 LLR 414 (Karnataka High Court)], the Karnataka High Court dealt with a situation wherein an employee was removed from services by the employer. Pursuant to the employee's challenge against such removal, the same was held to be illegal, and the employer was required to reinstate the workman with all consequential benefits.

While such payments were made, the employee was denied encashment of 240 days of earned leave. The employee sought recovery of such leave encashment under the Industrial Disputes Act, 1947. The Central Government Industrial Tribunal-cum-Labour Court allowed encashment of the earned leave. The matter ultimately reached the Karnataka High Court.

The court opined that while an employee is entitled to all such benefits upon reinstatement as would have entailed on him *in the normal course* had he continued to work in the establishment, he is not entitled to those payments "*which would accrue only if he worked in the conditions entitling him to draw the allowances.*" Earned leave, in the court's view, is a privilege which a workman receives only upon actually working in the establishment – the same "*cannot be earned as a matter of right even if he did not work.*" Therefore, consequential benefits will typically not include earned leave cash-outs.

### **Mens rea important in assessing damages regarding employees' state insurance contributions:**

The case of *Professional Management Consultants (P) Limited v Employees State Insurance Corporation* [C.M.A. No. 1203 of 2011 and M.P. No. 1 of 2011] pertained to a notice issued to the appellants to show cause as to why damages to the extent determined by the competent authority should not be imposed on account of delay in making contributions towards the employees' state insurance fund. Pursuant to the said notice, the appellants submitted that they were under an impression that they were exempted from the provisions of the ESI Act. It was only when the competent authority under the ESI Act visited their establishment did they realise that contributions were to be made, and they accordingly commenced remitting contributions. However, their contention was not accepted by the respondents, and damages were imposed.

Before the Madras High Court, the appellants requested for a waiver of damages imposed by the respondents. The court set aside the order of the respondents, observing that it failed to establish and record in its order any *mens rea* on the part of the appellants. The court further observed that merely stating that there was delay in making the required contributions is not a ground to impose damages under the ESI Act.

## INDUSTRY INSIGHTS

### Employers respond in a myriad of ways to nationwide lockdown

The 21-day nationwide lockdown imposed by the Government of India has caused quite a stir among employers, who are exploring ways to manage their workforce related issues arising from complete or partial shutdown of their operations.

As per the [report](#) of The Economic Times, several employers, especially startups, are announcing salary cuts, while few have resorted to immediate termination of certain sections of their staff.

However, as per a [report](#) of Business Today, the larger organisations, which have a significant business presence in their respective sectors, are adopting a more lenient approach for the time being. While some of these companies are withholding increments and not touching the fixed remuneration of their employees, others are allowing their employees to utilise their paid leaves. A similar observation has been made by the Business Standard in its [recent](#) report on establishments in the information technology sector.

Based on our experience, some companies are adopting a wait-and-watch approach during the initial lockdown period, which will last till 14 April 2020. The extension of lockdown may prompt employers to revisit their workforce related strategies. Further, few companies are exploring proposals for restoration and continuity of their business activities once lockdown restrictions are eased.

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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For any queries in relation to the E-Bulletin or the workforce related issues occasioned by COVID-19 outbreak, please email to us at [elbebulletin@khaitanco.com](mailto:elbebulletin@khaitanco.com).

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