ELB E-BULLETIN

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KHAITAN &CO ADVOCATES SINCE 1911

Welcome to the eleventh edition of the e-Bulletin (Volume III) 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 thus far on the proposed 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.

In the previous edition, we discussed the status of the labour codes and the implementation framework being formulated by state governments through rules thereunder. While the status remains largely the same as on the date of preparation of this bulletin, we do note that the Government of Gujarat released a notification dated 16 November 2021, setting out the draft Code on Social Security (Gujarat) Rules, 2021. The said draft rules, available for public consultation for a period of 45 days, inter alia set out the time and manner of nomination by an employee for the purpose of availing gratuity (in the event of cessation of employment), application for recovery of gratuity, process of filing an appeal against the decision of the Inspector-cum-Facilitator in matters of maternity benefit, time limit for payment of building and other construction workers' welfare cess, maintenance of a register of women employees, and filing of a unified annual return.

02.

REGULATORY UPDATES

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

Haryana specifies the date for implementation of the local candidates' recruitment law

The Government of Haryana issued 2 notifications, each dated 6 November 2021, in connection with the Haryana State Employment of Local Candidates Act 2020. Through these notifications, the state government has notified (a) 15 January 2022 as the date of implementation of the statute, and (b) INR 30,000 as the monthly gross salary / wages for the purposes of registration. On the latter aspect, it may be noted that the law mandates covered employers (including companies and any person employing 10 or more persons) to register on the government's designated portal, such employees in their establishment who earn gross 'salary or wages' up to the specified threshold (which will be INR 30,000). The timeline provided for this registration process is 3 months from the commencement of the statute (which will be 15 January 2022). Thereafter, as noted in the state government's press release, the new recruitments to posts wherein the monthly gross 'salary or wages' are not more than INR 30,000 would be subject to the requirement of reserving 75% of such posts for persons domiciled in the state of Haryana. Notably, the term 'salary or wages' has not been defined in the statute.

Government of Maharashtra clarifies COVID-19 appropriate behaviour at the workplace and vaccination requirement

In its order dated 27 November 2021, the Government of Maharashtra has set out detailed requirements pertaining to COVID-19 appropriate behaviour and protocols at the workplace and the aspect of vaccination of employees. As per the said order, for establishments that are not ordinarily visited by the general public, there is no requirement of such premises being restricted in terms of entry only by fully vaccinated persons, although complete vaccination is "strongly advised".

It may be noted that as a general practice, establishments in Maharashtra are adopting a

cautious approach and advising their employees to get themselves vaccinated against COVID-19 virus so as to discharge their obligations under both common law and applicable statutory framework regarding exercise of reasonable care to ensure safety at the workplace.

Government of Delhi effectuates changes to shops and establishments rules

By way of a notification published in the Official Gazette on 15 November 2021, the Government of NCT of Delhi brought about amendments to the Delhi Shops and Establishments Rules, 1954, which amendments have come into effect from 15 November 2021. Pursuant to the amendments, the current process of physical submission of application for registration of the establishment has been replaced with an online mechanism whereby application can be submitted on the online shops and establishments portal of the Labour Department, Government of Delhi. It may be noted that the online mechanism was already in place but the rules continued to display the older physical mechanism. Any change in respect of any information furnished at the time of application for registration may also be filed online within 30 days after the change has taken place.

Notably, the Government of Delhi has done away with the requirement of submitting fees for application for registration, renewal of registration, and notification of change in the particulars of registration certificate.

Government of Delhi clarifies the timeline for deposit of building and other construction workers' welfare cess (BOCW cess)

In its order dated 1 November 2021, the Government of NCT of Delhi has clarified that while the usual timeline for deposit of BOCW cess is 30 days from completion of the construction project or 30 days from the date on which the assessment of BOCW cess is finalised (whichever is earlier), in cases where duration of the construction work is extended beyond one year, BOCW cess will be payable by employer within 30 days of completion of one year from commencement of the work and every year thereafter.

Employees' Provident Fund Organisation (EPFO) extends the deadline for Aadhaar-UAN seeding

By way of the circular dated 15 November 2021, the EPFO revised the deadline to 30 November 2021 for the purpose of seeding of employees' Aadhaar number with their Universal Account Number as a pre-condition to filing of electronic challan-cum-return by employers in respect of employees' provident fund contribution. Notably, much before the said circular, the Delhi High Court had directed that as regards employees in respect of whom the seeding exercise is yet to commence, the date for completion of the same would stand extended until 30 November 2021 (reference Association of Industries and Institutions v Union of India [Writ Petition (Civil) 5952/2021]).

03.

Case Updates

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

Transfer of employees, when resulting in change in conditions of service, attracts advance notice: Supreme Court clarifies

In its judgment in Caparo Engineering India Limited v Ummed Singh Lodhi and Others [Civil Appeal Numbers 5829-5830 of 2021], the Supreme Court of India observed when, as part of transfer of services from one unit to another, the nature of the services rendered by the employees and their conditions of service change, the said change would trigger the requirement of prior notice under Section 9-A of the Industrial Disputes Act, 1947 (ID Act). In the present case, the employees, when employed at the Dewas plant of the employer, were rendering services as a 'workman' within the meaning of the ID Act. However, when the said employees were transferred to the employer's Chopanki plant, they were working in the capacity of a 'supervisor' and were, therefore, deprived the benefits of the ID Act (as the statute does not apply to supervisory employees earning monthly wages more than INR 10,000). Moreover,

the transfer led to reduction of employees at the Dewas factory, which again is an event that triggers the prior notification requirement in view of Section 9-A read with the Fourth Schedule of the ID Act.

A person cannot be prosecuted merely because of their position as director, manager, secretary, or any other officer: Supreme Court reiterates

In the case of Dayle De'Souza v Government of India [Criminal Appeal Number 001319 of 2021], the appellant was a director of a company and was issued a notice by the Labour Enforcement Officer (Central) in relation to alleged non-compliance by the company with the requirements under the Minimum Wages Act, 1948 (MW Act). The notice was responded to with an affirmation that the appellant was not managing the work of the relevant establishment. Nevertheless, the Labour Enforcement Officer (Central) filed a criminal complaint against him before the court of the Chief Judicial Magistrate, Sagar, Madhya Pradesh, which became the subject matter of contention.

The Supreme Court noted that, under the MW Act, the liability, at the first instance, is imposed on the company and the person in charge of and responsible to the company for its business. The liability is imposed on any other director, manager, secretary, or other officer of the company only when there is proof that the offence was committed with their consent / connivance or neglect. Accordingly, the court noted the following:

"[I]t is clear from a reading of sub-section (2) to Section 22C of the Act 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. The onus under sub-section (2) to Section 22C is on the prosecution and not on the person being prosecuted…[Also,] it is crystal clear that the complaint does not satisfy the mandate of sub-section (1) to Section 22C of the Act as there are no assertions or averments that the appellant before this Court was in-charge of and responsible to the company…Resultantly, and for the reasons stated above, we would allow the present appeal and quash the summoning order and the proceedings against the present appellant."

Jurisdiction assumed by internal committee in a sexual harassment complaint against employer is non est: Delhi High Court rules

In the case of A v B and Others [Writ Petition (Civil) Number 1103 of 2020], the Delhi High Court ruled that an internal committee does not have any jurisdiction to entertain a complaint alleging sexual harassment at the workplace against the employer himself and that, therefore, any finding returned by the committee would be void for want of jurisdiction.

The complaint was filed against the Secretary of the Akademi (full name of the organisation not disclosed in the judgment for reasons of confidentiality), who was appointed by the Executive Board of the Akademi and had several key responsibilities vested in him including being the custodian of records of the Akademi and managing the property and funds of the Akademi. The Delhi High Court ruled that even though the President of the Akademi oversaw all its offices, he was not based in the Delhi office, the day-to-day affairs of which office were in the hands of the Secretary. Accordingly, the Secretary was an 'employer' for the purpose of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, and the internal committee constituted to look into complaints of sexual harassment at the workplace did not have any jurisdiction to entertain a complaint against him.

Notably, the court passed the above ruling while noting that the woman-complainant had in fact repeatedly registered her protest about the lack of jurisdiction of the internal committee to inquire into her complaint.

04.

Industry Insights

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

Companies on an ESOP share-buyback spree

This year, an interesting trend is being noticed in the form of several companies buying back the shares that their employees received pursuant to exercise of the employee stock options granted to them. A report of The Economic Times indicates that several companies announced liquidity programmes aimed at creation of cash-in-hand for employees as part of their employee stock option plans. This is interesting considering that, thus far, liquidity events were triggered usually upon the occurrence of a corporate action in the form of mergers, share acquisitions, initial public offer, etc.

Multiple and frequent buyback programmes of this nature may have several benefits. At a time when attrition is at an all-time high, such plan may incentivise employees to continue rendering services to the organisation for a significant period, as they would be able to realise real value out of their employee stock options rather than wait for a major corporate milestone to trigger the vesting and exercise of their options. Further, such plan may facilitate employers to design the compensation structure in a manner that the cash element thereof is not significant at the outset. A seamless implementation of such buyback programme, however, may require appropriate amendments to the employee stock options scheme / plan to which it relates and awareness drives for employees to help them understand the benefits they can derive therefrom.

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.

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