

Labour & Employment – Legal Milestones Financial Year 2020-21 and a Look Ahead

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1 The Year that Was

With the pandemic flaring in India in 2020, the government's focus was directed more towards containing the spread of the virus. Several directions, orders, advisories and guidelines were issued (both at the Central and State government level) to employers to help them take preventive measures, apply for exemptions to continue business with skeletal staff, and obtain curfew passes for their employees to travel to work amidst the lockdown. Parallely, being cautious to avoid the negative business impact of COVID-19 trickling-down on employees, the government issued several orders and advisories against terminations, non-payment of salaries and leave adjustments. Labour authorities also closely scrutinised terminations by employers. As the efforts of the government were largely concentrated in this space, no significant legislative changes were introduced during this period. Meanwhile, work-from-home became the 'new normal' for several organisations - more so, for those operating in the information technology space and other service industries.

With COVID-19 disrupting business continuity in the first half and the new labour codes being passed in the second half, 2020 was an eventful and landmark year for employment laws in India. This update summarises some key developments witnessed in 2020 and provides a brief overview of what can be expected in 2021.

During the second half of 2020, just as the COVID-19 restrictions were eased, the government's long-concerted efforts to streamline and consolidate existing labour laws into four labour codes came to fruition. While one

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of the four codes had been passed in 2019, the other three codes were passed and granted Presidential assent in September 2020. These four codes will subsume and replace 29 existing labour laws.

2 Major Developments in the Financial Year 2020-2021

2.1 Introduction of four labour codes

The Indian government has almost completed the process of consolidating 29 existing central labour laws into four labour codes, namely Code on Wages, 2019; Industrial Relations Code, 2020; Code on Social Security, 2020; and Occupational Safety, Health and Working Conditions Code, 2020 (collectively, Labour Codes). The Labour Codes govern conditions of employment, social security, employee health, safety and welfare, industrial and labour disputes, payment of wages etc. The prime objective of this consolidation exercise is to facilitate the ease of doing business, rationalise penalties, digitise compliances, and to eliminate multiplicity and inconsistency of definitions across laws.

The Labour Codes have already been passed by the Parliament and have received President's assent. The Ministry of Labour and Employment had earlier announced that the Labour Codes were likely to come into effect from 1 April 2021. However, due to the delay in formulation of rules by most State governments, the implementation of the Labour Codes may be postponed by a few months.

One of the key changes under the Labour Codes is a uniform definition of 'wages' which will cover provisions on gratuity and provident fund computation, rules around deduction, etc. This definition can be bifurcated into three parts:

- a substantive part, as per which all guaranteed salary components will be considered as wages;
- an inclusion list comprising of 'basic pay,' 'dearness allowance,' and 'retaining allowance' - there is no ambiguity that these components will certainly be included as 'wages'; and
- an exclusion list, where certain components, such as conveyance allowance, house rent allowance (HRA), overtime wages, employer provident fund contributions, value of house accommodation, etc. are excluded.

The new definition also has two deeming provisions, (a) the value of exclusions exceeding 50% of the total remuneration will be deemed as 'wages'; and (b) the value of remuneration paid in kind (in lieu of whole or part of wages) which does not exceed 15% of the total wages will also be deemed as 'wages'. The new definition of 'wages' will have a significant cost impact on organisations since the computation of provident fund and gratuity payment will no longer be limited to basic wages.

Apart from this, changes have also been brought to various other definitions, including definitions of 'workman' and 'contract labour'. Some of the other key changes under the Labour Codes are:

- i. The Labour Codes introduce a five year limitation period for recovery of provident fund (PF) dues. The existing Employees' Provident Funds and Miscellaneous Provisions Act, 1952 does not prescribe a limitation period for initiation of proceedings and recovery of PF dues. There were therefore instances where PF authorities had initiated proceedings for shortfall in payments going back to 10-15 years. This is a welcome change.
- ii. The concept of minimum wages for 'scheduled employments,' (i.e. specific type of industries/employments) is being done away with and going forward the Central government will fix a 'floor wage' by factoring in the minimum standard of living of workers. These floor wages could be

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different for different geographical areas. State governments will then be required to fix a minimum wage that is at least equal to or higher than the floor wage.

- iii. The Labour Codes increase the applicability threshold for the provisions on engagement of contract labour. It is provided that the contract labour related obligations will apply to (a) establishments wherein 50 or more contract labour will be/were engaged in the preceding 12 months, and (b) to manpower supply vendors who will deploy/had deployed 50 or more contract labour in the preceding 12 months.

The Labour Codes also prohibit, at a pan-India level, the engagement of contract labour in an establishment's 'core activities' i.e., activities for which the establishment has been setup including its essential and necessary activities. Having said that, the definition of contract labour will be narrower – it will exclude workers who are regularly employed in the vendor's establishment upon mutually accepted conditions and who receive periodical increments in pay, social security, welfare benefits, etc. The intent is to cover arrangements where manpower/workers are deployed after making special recruitments for the client.

While the Labour Codes are yet to come into effect, some State governments like Bihar, Karnataka, Gujarat, Punjab, Madhya Pradesh and Goa have already increased the threshold for applicability of the current contract labour law (for both, principal employers and contractors/vendors) from 20 contract labour or more to 50 contract labour or more on any day in the preceding 12 months.

- iv. All industrial establishments (which includes commercial establishments) having 300 or more workers now need to obtain certified standing orders (i.e. service rules) after consultation process with the workers.
- v. The threshold for obtaining government permission/approval for retrenchment, lay-off and closure of factories, mines and plantations is increased to 300 or more workers across India (earlier threshold being 100).
- vi. The Labour Codes impose an obligation on employers with 20 or more workers to constitute a grievance redressal committee (GRC) for resolution of individual grievances. The GRC can have up to ten members and will need to have equal representation from the workers.
- vii. Employees on fixed term contracts will now be eligible for gratuity payment even if the qualifying period of five continuous years of service is not met. Hence, organisations will have to be mindful of the increased costs associated with engagement of fixed term employees (FTE), specifically, in case of international deputation and secondments (where FTE models are popularly adopted).
- viii. The Labour Codes lay the ground for extension of social security benefits to 'gig workers' and 'platform workers' (which could include drivers associated with cab aggregators, delivery agents, etc.). They envisage beneficial welfare schemes to be framed for gig and platform workers, under which the government and aggregators would be required to make contributions in respect of such workers.
- ix. Currently only very few States such as Maharashtra mandate recognition of trade unions. However, the Labour Codes make it mandatory to recognise a trade union as the sole negotiating union or a group of unions if they meet the prescribed conditions (details of which will be set out in the rules).
- x. The Labour Codes allow establishments with less than ten employees to voluntarily register and de-register from the applicability of the chapter on Employees' State Insurance contributions.

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- xi. Compared to existing labour laws, the Labour Codes significantly increase the penalties for non-compliance. Penalties under the Labour Codes are in the range of INR 50,000 to INR 10,00,000 (USD 700 to USD 13,500). The Labour Codes also introduce provisions for compounding of offenses (subject to payment of prescribed fine).

2.2 Increase in the annual leave carry forward limit under the Karnataka Shops and Commercial Establishments Act, 1961 (Karnataka S&E Act)

The Karnataka S&E Act provides for carry forward of up to 30 days' unused annual leave to the succeeding year. By an amendment in February 2021, the Karnataka State government has increased this limit to 45 days. Given this, employees in shops and commercial establishments (S&E) in Karnataka will be able to carry forward up to 45 days of unused annual leave.

This change is aligned with the limits prescribed in recent years under the S&E laws in other states (such as, Maharashtra and Tamil Nadu). This change to the Karnataka S&E Act is also aligned with the limit that was proposed under the Model Shops and Establishments Bill, 2016.

The term 'year' under the Karnataka S&E Act is defined as a year commencing on 1 January. Given this, the impact would become relevant when employees carry forward annual leaves from 2021 to 2022. Having said that, organisations for which the leave calendar operates on a financial year (April to March) basis would need to be mindful that the increased threshold applies from February 2021.

2.3 Some relaxation in the prohibition on employing women at night in Karnataka

The S&E Act generally prohibits the employment of women at night (specifically, between 8 p.m. to 6 a.m.). However, IT/ITeS establishments could apply to authorities to seek an exemption from this prohibition.

By way of an amendment in October 2020, the State government removed this prohibition and has allowed *all* commercial establishments to employ female employees in shops and commercial establishments, subject to obtaining their written consent, providing free transport facility (GPS tracking facilities), employment of women at night on a rotation basis, bearing cost of creche facilities, etc. Consequently, all commercial establishments (and not just those establishments in the IT or ITeS sector) are permitted to employ women at night (subject to compliance with the prescribed conditions), without the requirement to obtain/apply for any exemption from the authorities. Non-compliance with the prescribed conditions can however lead to cancellation of registration certificate granted to such shop or commercial establishment.

2.4 Haryana Local Candidate Act, 2020 (Local Candidates Act)

The Local Candidates Act, 2020 which provides for State specific reservation for local candidates, received the Governor's assent on 2 March 2021. However, it is currently not in force and will come into effect on a date notified by the State government of Haryana in the Official Gazette.

Once the Local Candidates Act, 2020 is notified, it will apply to private companies, partnership firms, limited liability partnerships, etc. in Haryana which employ ten or more employees. Such covered employers would be required to provide 75% quota to locally domiciled candidates in posts where the gross monthly salary is INR 50,000 or less (or such other amount that may be notified by the State government).

Employers would also have the ability to claim an exemption from the reservation requirement if adequate local candidates of the required skill, qualification or proficiency are unavailable. Non-compliance with this

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reservation obligation could be penalised with a monetary fine in the range between INR 50,000 to INR 2,00,000 (USD 700 to USD 2800) in the first instance.

3 Looking Ahead

The implementation of the Labour Codes will take centerstage in 2021, as they are expected to be brought into effect in 2021. While the date for public/stakeholders' comments on the Central rules under all the Labour Codes has expired, most State governments are yet to publish their draft rules under all the Labour Codes as of date. Therefore, compliances and obligations on employers under all the Labour Codes will need to be revisited once the relevant rules are finalised and published.

Given the significant cost impact the new definition of 'wages' would have on employers, they should re-look at their existing compensation structures and statutory contribution practices to assess if any changes could be made to minimise the impact. Similarly, with the restrictions on contract labour arrangements being introduced at a pan-India level, employers should reconsider the roles in which third-party vendor employees are engaged and assess if they could fall within any exceptions to the prohibition. Effective mechanisms should be put in place to comply with the other obligations as well, such as adhering to restrictions and limits on salary deductions, constitution of a GRC, recognition of unions, etc.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed [here](#).

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