Bulletin

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Employers' Federation of India

Promoting a Competitive, Fair and Inclusive Workplace….

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

The **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013** is a legislative act in India that seeks to protect women from sexual harassment at their place of work. It was passed by the Lok Sabha (the lower house of the Indian Parliament) on 3 September, 2012. It was passed by the Rajya Sabha (the upper house of the Indian Parliament) on 26 February, 2013.The Bill got the assent of the President on 23 April, 2013. The Act came into force from 9 December, 2013. This statute superseded the Vishakha Guidelines for prevention of sexual harassment introduced by the Supreme Court of India.

It was reported by the International Labour Organization that very few Indian employers were compliant to this statute. Most Indian employers have not implemented the law despite the legal requirement that any workplace with more than 10 employees need to implement it. According to a FICCI-EY November 2015 report, 36% of Indian companies and 25% among MNCs are not compliant with the Sexual Harassment Act, 2013. The government has threatened to take stern action against employers who fail to comply with this law.

An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.

Sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment;

The protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified on the 25th June, 1993 by the Government of India;

Major Features

- The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- The Act also covers concepts of 'quid pro quo harassment' and 'hostile work environment' as forms of sexual harassment if it occurs in connection with an act or behaviour of sexual harassment.
- The definition of "aggrieved woman", who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organised or unorganised sectors, public or private and covers clients, customers and domestic workers as well.
- While the "workplace" in the Vishaka Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include organisations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation. Even non-traditional workplaces which involve tele-commuting will get covered under this law.
- The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days.
- Every employer is required to constitute an Internal Complaints Committee at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level.
- The Complaints Committees have the powers of civil courts for gathering evidence.
- The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant.
- The inquiry process under the Act should be confidential and the Act lays down a penalty of Rs 5000 on the person who has breached confidentiality.
- The Act requires employers to conduct education and sensitisation programmes and develop policies against sexual harassment, among other obligations.
- Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to 50,000. Repeated violations may lead to higher penalties and cancellation of licence or registration to conduct business.
- Government can order an officer to inspect workplace and records related to sexual harassment in any organisation.

Naidu calls for solution to labour laws affecting investment flows

Vice President M. Venkaiah Naidu on 26th February drew attention to present labour laws that are coming in the way of increased investment flows and wanted that these should be examined and solutions found.

The Vice President asked the government and the private sector to address the concerns, needs and aspirations of the work force, by ensuring an appropriate eco-system.

"Our vast workforce is making huge contribution for the advancement of our nation. We cannot live with rules, which come in the way of creating more job opportunities and rules that make running of an enterprise difficult. These need to be re-looked at the picture that was emerging both fascinating and complex as our economy is fast expanding", the Vice President said.

The Vice President said that millions of workforces are working rond the clock to keep the weels of economy running as he complimented the winners of the Shram Awards.

Calling for improving the education level of labour force, he said improving a access to quality training was crucial. Better coordination among various stakeholders, strengthening skill delivery framework, strengthening private sector participation and augmenting financial resources and systemic reforms were also needed. ***Uniindia.com Dated : 26-02-2018***

Casual jobs in select sectors continue to decline; biggest dip in note-ban period

Casual jobs in eight sectors of the economy continued to shrink months after the demonetization, even as number of regular jobs climbed and contract jobs stayed steady, the latest Quarterly report on Employment scenario from the Labour Bureau show.

Contraction has slowed but the number of people employed on casual basis is more than 28 per cent lower than it was on April 1, 2016 and about 10 per cent lower than it was on January 1, 2017.

The report shows employment status in the eight sectors as on July 1, 2017. The sectors covered are manufacturing, construction, trade, transportation, hospitality, information technology and business process outsourcing, education and healthcare. The first quarterly employment scenario report of status as on April 1, 2016 estimated that 10.1 lakh people were employed on casual basis in the eight sectors, with the manufacturing sector alone employing 6.23 lakh. By July 1, 2017, the number of casual employees in these eight sectors were down to 7.25 lakh.

Significantly, the number of casual employees in all eight sectors have experienced continuous decline since April 1, 2016, when the Labour Bureau began tracking the numbers, and the biggest decline was seen in the quarter that witnessed demonetisation.

Between October 1, 2016 and January 1, 2017, 1.52 lakh casual jobs were lost, with the manufacturing sector alone experiencing a contraction of 1.13 lakh casual jobs. The construction sector too experienced a sharp contraction of casual jobs - but sector is more prone to seasonality than others.

The slide in contraction of casual jobs has slowed since January 2017, about 76,000 jobs were lost between January and July 1, 2017. About 7.25 lakh people were estimated to be employed on casual basis in the eight sectors as of July 1, 2017, the day the country moved to the Goods and Services Tax regime. The impact of the shift to GST on employment is expected to be seen in the next edition of the quarterly employment scenario report.

The contraction in the number of the casual workers has also led to a decline in their share in employment in the eight sectors while that of regular employees have risen.

Casual jobs accounted for 5.1 per cent of the jobs as of April 1, 2016 and it had declined to 3.6 per cent by July 1, 2017.

The share of regular jobs in contrast rose from 81.6 per cent in April 2016 to 82.9 per cent during the same period. The Labour Bureau estimates for the latest report are based on a sample of 11,179 units across eight sectors that employed at least 10 people. The first report was based on a smaller sample of 10,600 units. ***BL Dated : 23-02-2018***

Govt postpones Indian Labour Conference fearing boycott of Modi speech

The Union government has postponed the Indian Labour Conference, which was to be inaugurated by Prime Minister Narendra Modi. The decision was apparently taken to avoid an embarrassment, as central trade unions had threatened a boycott of the event.

At the 47th ILC, which was scheduled to be held on February 26 and 27 in the national capital, trade unions and employers were to discuss key issues related to employment and social security coverage to workers. The Rashtriya Swayamsevak Sangh-affiliated Bharatiya Mazdoor Sangh had earlier this month threatened to boycott the Indian Labour Conference, saying their demands had not been met in the Union Budget 2018-19. Other trade unions are also contemplating a similar action after the labour and employment ministry did not invite the Congress-affiliated Indian National Trade Union Congress (INTUC) for the conference, considered the highest tripartite forum of the country.

At the meeting of its executive committee earlier this month in Gujarat, the BMS had decided it would boycott the conference if its demands were not met by February 25. The trade union had asked the government to review the proposals announced in the Budget on February 1, and incorporate its demands, including social security benefits to Anganwadi workers, reimbursing cess to labour welfare boards affected by the goods and services tax (GST), and withdrawing "anti-labour" reform measures.

The BMS had also said it would hold a "huge demonstration" at the ILC venue "to mount pressure on the central government to resolve labour issues". ***BS Dated : 21-02-2018***

EPFO makes online claims must for PF withdrawals above Rs10 lakh

Retirement fund body EPFO has made it mandatory to file online claims for provident fund withdrawals above Rs10 lakh, taking another step towards becoming a paperless organisation. The Employees Provident Fund Organisation (EPFO) has also made it mandatory to file online claims for withdrawals of above Rs 5 lakh under the Employees Pension Scheme 1995. Under the pension scheme, there is a provision of part withdrawal of pension, commonly known as commutation of pension money.

At present, EPFO subscribers have the option of filing online as well as manual claims for provident fund withdrawal as also for pension. The decision was taken at a meeting chaired by Central Provident Fund Commissioner (CPFC) on 17 January 2018. The bank account of the subscriber has to be seeded and verified in the system before the online claims can be settled.

Moreover, the subscriber should have been issued a universal account number and same must be activated. All claims exceeding the said limits would not be accepted in the physical form now onwards.The EPFO has over six crore subscribers and manages a corpus of Rs 10 lakh crore.

Mint 27.2.2018

Firms with 10 workers might have to pay provident fund

The labour ministry has proposed easier provident fund rules for small establishments.Establishments with at least 10 workers might have to pay provident fund, with the employer contributing nine per cent of a worker's salary.

At present, provident fund is mandatory in establishments hiring 20 people or more, and employees and employers contribute 12 per cent each of a worker's salary.The ministry has proposed amending the Employees Provident Funds and Miscellaneous Provisions Act, 1952. The proposal had been sent for inter-ministerial consultation, and would likely be put up to the Cabinet in June. For factories employing up to 40 workers, rules might be eased for recovery of dues. Dues may be recovered from the movable assets of small factories and the rest from immovable property with permission of the Central Provident Fund Commissioner.

At present, recovery officers have powers to sell moveable and immovable assets and arrest employers.Around 70 per cent of the factories in the country employ less than 40 workers, according to official estimates.The draft rules say plant and machinery used in manufacture cannot be touched by the recovery officer within three months of issuing a notice. Owners of small factories may also receive immunity from imprisonment.

Regional commissioners have been proposed to help employers appeal against court orders. Employers elsewhere now find it inconvenient to approach the provident fund tribunal in Delhi. Apprentices, contract workers, and staff of trusts and self-help groups may also become eligible for provident fund. Employees will have the option to switch to the National Pension System as proposed in the Budget.The Centre might also have the power to reduce the employer's contribution of a certain class of establishments to the EPFO based on their financial conditions.

What the amendments to the Employees Provident Funds and Miscellaneous Provisions Act, 1952, propose:

- Factories with at least 10 workers will be covered under the Employees Provident Fund Organisation (EPFO), from 20 now
- Govt will have the power to reduce contribution of employers in factories with 10-20 workers from 12% to 9% towards EPFO
- In factories with up to 40 workers, penalty and recovery norms will be relaxed
- An appellate officer for employers so they don't have to come to Delhi to file appeal against order. **BS 21.2.2018**

Salary income of employees deputed abroad can't be taxed in India

The Authority for Advance Ruling (AAR) has recently concluded that employers are not required to withhold tax from salary paid in India for non-residents working overseas. The AAR also confirmed that for resident employees where the employer continues to withhold taxes, a credit in respect of taxes paid overseas may be provided by the employer.

This ruling provides the much-awaited relief and clarity in respect of employees being deputed overseas where the payroll is continued in India. Such employees are generally subject to initial double taxation since taxes are withheld from salary paid in India and the salary is taxable in the overseas jurisdiction as well. Relief under the Double Taxation Avoidance Agreements (Treaty) were claimed in the tax return. The outcome had significant cash flow issues and administrative challenges in tracking the tax refunds which arose in the tax return.

Impact on non-residents

The AAR ruled that as long as the non-resident employee renders services overseas, the income does not accrue in India and hence is not taxable in India. Accordingly no tax withholding is required by the Indian employer. Hence, the relief is available not only for cases covered under a tax treaty but also in situations where no treaty is available, or where the employee does not meet the specific conditions under the treaty (e.g. where the employee does not meet the conditions of residency in the overseas country as per treaty). To sum up, for a non-resident the requirement to withhold taxes on salary paid in India does not arise if services are rendered overseas.

Impact on residents

Residents and ordinarily residents in India are taxable on their global income. Hence the employer is mandated to withhold taxes on the salary paid in India. Further, where any benefit or allowance is paid overseas, the same is required to be considered in estimating the salary income. However, the AAR has held that in such cases the employer may consider the credit for foreign taxes paid at the time of withholding the taxes, thereby minimizing the impact of double taxation.

How does it impact the employer?

Many companies "tax equalize" their employees, meaning that any additional tax cost or benefit on account of the deputation does not impact the employee. The employer picks up the additional tax cost arising on account of deputation. Employers may leverage on the principles arising out of this ruling and put in place suitable processes that will require their employees to continue "bear the stay at home taxes". With no requirement to follow up for tax refunds, employers can save significantly on the cash flow costs and minimise administrative hassles.

On the other hand, where employees are not tax equalized, the benefit of cash flow will be to the employee, resulting in a higher take home pay.

While the AAR ruling is binding only on the applicant, it does have a persuasive value to others. Hence, companies with outbound mobile population need to revisit their tax payment and settlement mechanisms for their employees.

FE Dated : 19-02-2018

India needs to put in place appropriate safeguards to prevent misuse of FTE

Much of the burden for India's dismal job creation performance has been attributed to its rigid employment protection legislations, which make dismissal of permanent workers very onerous.

Over the past 15 years, India has seen a sharp increase in contract workers, as firms have increasingly hired them to circumvent labour market rigidities. However, this has resulted in significant informalisation of the workforce, as contract workers can be fired easily, do not enjoy benefits such as health, safety, welfare and social security, and receive significantly lower wages than permanent workers.

In this backdrop, the proposal to introduce fix-term employment (FTE) in all sectors is indeed a welcome step. It attempts to create additional jobs by imparting flexibility to enterprises to adjust their workforce and at the same time enhances workers' job security. According to the draft ETF notification put out by the Ministry of Labour and Employment contractual workers are entitled to all statutory benefits available to their permanent counterparts in the same factory.

These workers are ensured same work hours, wages, allowances, and other benefits as that of permanent workers, along with all statutory benefits available according to period of service. Further, employers can directly hire fixed-term workers from the market without mediation by a middleman i.e. contractor and start disbursing wages and enforce social security themselves.

However, employers are not mandated to give notice to fixed-term worker on non-renewal or expiry of his or her contract. Nor are employers required to provide retrenchment benefits to workers hired on fixed-term contracts. Thus, by making it easier for firms to lay-off workers, this move is expected to trigger job creation.

Over recent decades, many countries, particularly in Europe, facing sluggish job creation due to high level of employment protection for permanent employees, have taken recourse to FTE. Besides reducing firing costs and providing firms with a buffer during seasonal and cyclical functions, the underlying idea behind FTE contract is to serve as stepping stone to a permanent job.

Firstly, by facilitating transition from unemployment to a temporary job (FTE), and secondly, by increasing the chances of a movement from FTE to a permanent job. The latter progression is enabled by the fact that the initial temporary employment protection, as firms want to minimize the risk of a mismatch with workers.

FTE has tremendous potential to transform labour markets but empirical research has shown that its impact can be ambiguous. Liberalisation of FTE contracts in countries with strong employment protection for permanent employees can create a deep segmentation of labour markets, with FTE representing the majority of employment contracts used in new hires and a significant share in total employment.

This happens as employers remain reluctant to convert FTE jobs into permanent ones, and consequently, the share of FTE rises rapidly, while fewer workers are hired as permanent employees. The case of the Spanish labour market, which has one of the highest rate of FTE in the EU is striking. Around 90 per cent of all entries into employment start as FTE, and these workers either end up getting stuck in FTE or, more frequently, become either unemployed or self employed rather employed on a permanent basis.

Such a segmentation of the labour market can have adverse effects on permanent workers too. The availability of separate competing pool of workers (i.e. fixed-term workers) may result in firms' management using them to their strategic advantage to suppress the bargaining power of their permanent workers. The rising use of contract workers in India has enabled firms to curb the bargaining power and consequently wages of their existing regular workforce. That the real wages of directly

hired workers in the organized manufacturing sector has remained virtually stagnant over the last 15 years is suggestive of this behaviour.

Amongst the OECD countries, France has one of the strictest norms. It bars the use of FTE for permanent tasks. FTE contracts can be entered only for a limited period for temporary assignment, renewal is permissible only once and the maximum duration allowed is 18 months. Brazil regulates FTE reasonably, permitting one extension with the cumulative duration of the contract not exceeding two years.

In China there is no restriction on the type of work for which FTE may be used but after two fixed term contracts or after working in succession for 10 years, the worker gets the right to enter into an open ended contract. India, too needs to put in place appropriate safeguards vis-à-vis limitations on cumulative duration and number of successive FTE contracts to prevent their misuse. This is necessary to ensure that FTE does not simply foster employment growth in the short run, but also serve as a pathway to productive and permanent employment in the long run. **By Radhicka kapoor - *BS Dated : 21-02-2018***

Select Case Laws

2018 I CLR 406
In The Supreme Court of India
October 12, 2017
CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 4160 OF 2008
PRESENT
The Honourable Mr. Justice R. K. Agrawal
The Honourable Mr. Justice Abhay Manohar Sapre
P. Karupaiah (D) Thr. Lrs. ..... Appellant
v.
General Manager, Thruuvalluvar Transport Corporation Ltd. Respondent

Constitution of India, 1950 – Art. 226 – Back wages – Whether the appellant is entitled to claim bank wages for the period in question, i.e. 21.7.1994 to 31.8.1999? – Their Lordship answered this question in the negative in the background of these facts – (i) Being found involved in one murder case and prosecuted and convicted by the Sessions Court for the said offence, appellant was dismissed from service for the period from 21.7.1994 to 31.8.1999. (ii) On being acquitted by the High Court for Offence of murder, appellant on his request, was taken back in service by the respondent-management, but without any back wages. (iii) Writ petition filed by appellant, seeking back wages, was rejected by learned Single Judge and his writ Appeal was also rejected by the Division Bench of the High Court. (iv) In this background the appellant cannot claim his back wages, as of right. Moreover, he had not approached the Industrial Tribunal or Labour Court, seeking back wages. (v) In such circumstances, the Court and appellate Court having examined this issue have rightly declined him back wages. He should have been content with what he has got. **(Paras 1 to 16), Civil Appeal dismissed.**

2018 I CLR 416
In The Supreme Court of India
December 13, 2017
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 21848-21850 AND 21851 OF 2017
(ARISING FROM SLP (C) NOS. 1842-18444 OF 2017)
PRESENT
The Honourable Mr. Justice Kurian Joseph
The Honourable Mr. Justice Amitava Roy
Manish Kathuruia and Others Etc. Etc. .. Appellants
v.
State of Punjab and Others Etc. Etc. Respondents

Constitution of india, 1950 – Art. 226 – Appointments – A challenge is from the appellants to the judgment of the High Court, declining them any relief, with a conclusion that their claim is highly belated. Their Lordships conclude that on a special query made by this Court, a written instruction was made before this Court that there are 12 vacancies as against the Notification, as of now, to accommodate in service, in view of the fact that appellants have been found otherwise qualified by the Committee appointed by the High Court, this is a fit case for invocation of this Court's jurisdiction under Article 142 of the Constitution of India, for doing complete justice. It will be open to the appointing authority, to verify their qualifications at the time of appointments.

This judgment is rendered in the peculiar factrs of this case, and it should not be quoted as a precedent. **(Paras 1 to 13)**

2018 I CLR 545
In The High Court of Patna
September 14, 2017
CIVIL WRIT JURISDICTION CASE NO. 905 OF 2015
PRESENT
The Honourable Mr. Justice Jyoti Saran
Ajay Kumar, S/o Late Rajendra Prasad, Patna
Petitioner
v.
General Manager, State Bank of India & Ors
Respondents

Constitution of India, 1950 – Art.226 – Memorandum of Settlement on Disciplinary Action and Procedure – Misconduct, disciplinary enquiry, removal from service – A challenge is from the petitioner – Assistant with the respondent – Bank to the inquiry held against him, culminating into an Order of his removal from service of the Bank.

The Court concluded that (i) in the absence of any evidence of the Branch Manager or the Bank Officers and definite statement of the petitioner that at each level, he had overdrawn the cash from his Current Account with permission of the Bank Manager, there is no evidence to substantiate the Charge No. 1 in support of claim of the Bank that petitioner had overdrawn the money on 21 occasions by adopting wrongful procedure.

There is no finding of the Enquiry Officer that the with drawals were made without due permission or by adopting irregular means. (ii) A plain reading of paragraph 1(i) of Annexure 19.2 would show that it is an advice given to employees of the Bank, not to borrow any money amongst others, from any person, a form or Company dealing with the Bank.

As such action of petitioner in borrowing money from two account holders of the Bank, is a mere irregularity. Any such action in the absence of consequences which are disastrous or the action complained is backed with ulterior motive, or has been done for unjust gains, cannot be termed as a 'misconduct'. (iii) The charge No. 3 of alleged 'failure of the petitioner to disclose the source of his deposit' is itself thoroughly misconceived, for it constitutes no charge.

When no loanee is required to disclose the source of his deposit, nor the rules mandate any such disclosure and production of receipt, to hold enquiry on source of such deposit, is beyond the scope of a disciplinary proceeding. (iv) In conclusion the entire proceedings beginning with issue of chargesheet to the petitioner, the disciplinary inquiry itself, resulting into removal of petitioner from service and impugned order passed by disciplinary authority are held illegal and dehors the statutory prescriptions and are accordingly quashed and set aside. **(Paras 1 to 4, 11 to 15, 19 to 30)**

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