The Code on Wages, 2019

The Industrial Relations Code, 2020

The Social Security Code, 2020

Occupational Safety, Health and Working Conditions Code, 2020

Stepping into a New Era of Labour Reforms

A perspective on the Labour Codes and the Challenges facing Indian Industry

March 2022

A Knowledge Paper by BCP Associates

© 2022 - BCP Associates LLP

Reform, like revolution, is not easy. Even when there is no bloodshed it still brings with it considerable pain while igniting the primal fear of widespread change. The emerging labour reforms in India are similar. Long overdue and therefore highly welcome, they will also bring some pain and protest.

Existing labour laws in India are archaic and have not helped the country industrialize rapidly to grow at its full potential. Many of these laws date back to over a century and do not take into consideration the changing face of business or how it is done today. Take for instance the need for a factory to maintain a limewashing register or keep a spittoon on premises or the emerging (or currently established) norm of work from home. While one is obsolete and irrelevant, the other is neither accounted for nor, by way of extension, brought into the ambit of "workplace". While one raises concerns about relevance, the other creates unregulated and grey areas. So how do strike the right balance?

The answers are not straightforward nor are they easy. What is indisputable is that there has been urgent need for change and modernization of the labour regime of the country and the new Labour Codes will, hopefully, usher us into that era.

Admittedly the Codes are not perfect; they have not accounted for and solved every labour problem that exists in the laws, nor have they brought about a shift in dimensions when it comes to the intent and objective. But they do provide hope of a change in mindset allowing for an escape from the tyranny of red tape and the drudgery of record-keeping. The Codes bring in digitization and transparency while seeking to put an end to the inspector raj, both laudable efforts.

In this paper we will examine in detail the major changes that are being envisioned by each of the Codes and the consequent impact on Industry. The objective is to help in the overall understanding of the Codes and facilitate preparation for their implementation.

The Code on Wages, 2019[1]

An ambitious attempt at taming a beast

The so-called beast in need of taming is the term "wages". With over 12 distinct definitions in labour statutes alone, this singular term has been the focus of over 100 judgments. The countless hours of court and lawyer time spent on interpreting and clarifying this term are just mind boggling.

Hence, the very objective of the Code on Wages is to consolidate laws relating to matters governing wages. In furtherance of this object, it introduces a new definition of "wages" that has been used across the four Labour Codes. This is no mean feat. To have achieved parity in the meaning of wages itself is laudable.

The Code on Wages brings about two major changes through revised definitions and a few more through substantive provisions themselves.

The new critical definitions are as follows:

a) A new definition of "Wages" that includes all remuneration paid to an employee but excludes certain fixed components like HRA, PF, Statutory Bonus etc.

b) A new definition of the word "Employee" which includes all persons employed in the establishment excluding the employer or the board of directors of the company.

The potential impact that these two changes could have on industry is multifold. Employers will now need to consider this new formula to arrive at wages for all statutory purposes including the payment of wages on time, contributing to the provident fund, paying overtime, contributing towards ESI, computing gratuity or paying retrenchment compensation. This will also mean rejigging their existing structure to reduce the impact on the outflow of the company which could be considerable. In examining wages payable of over $1.5 billion across a small cross section of the industry, we found that the Codes would result in an average increase

1 2589GI.p65 (egazette.nic.in)

© 2022 - BCP Associates LLP

of 6.5 percent (close to $100 million) in spending for companies if not handled astutely.

From actuarial evaluations to budgets for the next year of operations, employers are going to see a vast differential if they don't undertake this exercise before the roll out of the Codes. The costs may also not be prospective as gratuity seems to come with a retrospective implication, even though the law may operate prospectively. This is because, for every year of service prior to the enactment of the Codes, the computation would still be based on the definition provided under the Codes if the employee leaves once these are rolled out.

In the long run, a uniform wage definition brings about consistency, clarity and certainty, something that the current law does not provide. The plethora of disruptive judgments in the recent past like the Vidyamandir Judgment[2] on what constitutes "PFable wage" or the Texmo Judgment[3] excluding conveyance from ESI showed how the entire industry would need to keep altering its understanding and taking corrective steps in the absence of clarity as to the meaning of the term.

The new definition is not without ambiguity. Like all other terms used in a statute, it leaves room for interpretation. This is both a flaw and a strength. Too rigid a term may fail to account for variables while too flexible a definition might create excessive ambiguity. The effort has been to strive for the right balance, and it has been partially achieved. A great feature of this new definition has been the spillover provision which, in a sense, caps all exclusions at 50 percent while keeping inclusions unlimited.

The definition of an employee, a seemingly inconspicuous tweak also results in a sea change by bringing workforce previously not covered under labour laws, within its fold. Managers and other senior executives have thus far only been regulated by the terms of their contract with the company. By including them within the definition of "employee" the law now extends them several rights which were only available to workmen earlier. This includes the right to receive overtime wages and the ability to go to court for violation of provisions governing payments. From an industry perspective, this will mean extending the application of policies to all employees, especially those policies that relate to working hours, date of payment and overtime. This impacts the way in which the industry functions. Managers and the company leadership play a pivotal role in any organisation and are hired and paid to put in far greater number of hours than the typical 8-hour day. They are also tasked with management and key decision making, a role that is not restricted to the working hours of the company. How these functions and their roles will align with the new legal requirement, only time will tell.

The Code on Wages also extends many of the provisions to all employees, without any cap on the maximum salary earned. This is a big shift and companies will need to change their thinking in respect of many provisions to comply with this change. For example, all salary payments will need to be made before the 7th of the subsequent month, irrespective of when the employee joins or how much the employee earns. The provision relating to equal remuneration or equal pay for equal work is extended to all employees.

It is important to note that overtime is one of the biggest issues for an IT company. We examined over 2,00,000 employees who are working in IT to see if they were eligible for overtime and what their working hours were, only to find that just 10 percent were time-based employees while over 90 percent enjoyed flexi-working with unmonitored hours.

The next big change under the Code on Wages, is the need to settle accounts within two working days of the exit of the employee. This is not a new requirement and is present today under the Payment of Wages Act,1936. However, this provision only applies to those drawing wages lower than ₹24,000/- per month. The Code allows for no such limitation and makes this provision applicable to all employees. By virtue of this provision, companies will need

2 The Regional Provident Fund ... vs Vivekananda Vidyamandir on 28 February, 2019 (indiankanoon.org)
3 Tdb78efb67a3b86b39695071ae02f5dd7.pdf (esic.nic.in)

© 2022 - BCP Associates LLP

to pay wages to all exiting employees (by way of resignation or termination) within two working days of their exit. This will necessitate systemic changes, process and policy changes and payroll changes. In this era of work from home, this will also pose challenges in terms of asset recovery and cases of job abandonment.

Deductions from wages have also been dealt with under the Payment of Wages Act and all deductions have been capped at 50 percent. This provision has also been retained under the Code and the same now applies to all employees. Companies will have to be cautious especially when they recover salary advances and seek to recover the cost of assets or damaged property.

The most dangerous change that this Code brings is the provision of criminal prosecution. Section 52 of the Code allows a Union, an employee or the inspector-cum-facilitator to approach a Criminal Court for a violation of the Code. This mainly applies to actions like the failure to pay wages, short payment of wages or delayed payment of wages. This provision is set to seriously increase the burden of Criminal Courts that are already overburdened. It will also put employers in a quandary about how much time they spend running their business versus defending actions brought by disgruntled employees. The saving grace is that these may be summary proceedings if the employer ensures compliance.

Additionally, the rules to the Code purport to make changes to forms, registers and filings, which will mean an overhaul of the compliance templates of a company. They also seek to make principal employers liable to pay their contractors before the 7th, to ensure they can pay wages on time. This will certainly mean a change in contractual terms for many, to comply.

Overall, the Code on Wages will call for a lot of changes from the industry though these may be for the best. A recent industry survey conducted by BCPA Associates shows4 that the overall intent of the Codes is not suspect, and companies clearly understand that change is needed, and that it will bring in transformation of a legal regime that has been languishing for decades.

The Code on Social Security, 2020[5]

Social Security for all in trying times

The Code on Social Security was notified in September 2020 and is aimed at consolidating legislations governing social security for the working population of the county. It subsumes important legislations like The Provident Fund Act, the Employees State Insurance Act, the Payment of Gratuity Act and six others governing social security.

The importance of social security cannot be overstated especially in times such as these. The uncertainty and volatility that Covid-19 has created globally is unprecedented and the protection of the working population of the country is critical to the overall wellbeing and stability of the nation. There is nothing more disturbing than a nation of unemployed and hungry people.

For the first time in our history, every segment of the working population is sought to be provided with social security. The organized sector has always enjoyed social security. The same was sought to be extended to the unorganized sector (unfortunately not too successfully) way back in 1996 with the passage of the Building and Other Constructions Workers (Regulation of Employment and Conditions of Service) Act, 1996. Further efforts were made in 2008 with the legislature enacting the Unorganised Workers Social Security Act, 2008. Unfortunately, for various reasons, mainly the lack of adequate mechanism and vigilance, these were not too successful. The Code not only addresses these lacunae but also identifies new age workers like gig and platform workers and extends social security to them as well.

4 Labour Code Readiness Survey results released - BCP Associates LLP

5 Code On Social Security, 2020.pdf (prsindia.org)

© 2022 - BCP Associates LLP

© 2022 - BCP Associates LLP

The recognition of gig and platform workers as a separate class of workers who are distinct from employees is a landmark in jurisprudence globally. In the last few years, we have seen countries like France[6], UK[7], Denmark[8] and the State of California [9] uphold platform workers of companies like Uber and Lyft as employees, thereby disrupting the business model of Uber. India has taken a bold and clear step in recognizing them as a distinct class of workers while still ensuring they are covered under a State-run social security scheme. It has achieved the twin objectives of protecting industry and the workers by creating a new segment of workers who are not employees and yet affording them social security cover.

Apart from this, the Code also brings in flexibility to employers who have been providing their own provident fund and medical cover. They can now choose to opt out of the PF and ESI schemes with consent of the employees. This gives many large organisations the freedom to manage and run their own PF schemes and provide the employees with a benefit that is greater than that given by the PF department and medical insurance that provides better facilities than the ESI Scheme.

A major part of the Social Security Code continues with the current schemes and provision without too many changes. The Code uses the same definition of "Wages" as the Wage Code, thereby making this the basis for all computations. The industry impact of this is threefold:

a) Provident fund contribution will now be based on wages and not Basic+ DA+ allowances
b) A far greater number of employees will be covered under ESI since the eligibility and cut off will not be based on gross wage but on "wages" which is a percentage of gross wage.
c) Gratuity cost is set to go up since gratuity will be payable based on "Wages" as opposed to Basic and DA. The typical gratuity impact for companies is likely to be over 100 percent. For close to 50 companies that we examined, we found that this would add up to $262 million in additional payments if no steps were taken to check the impact.

There is also the question of the retrospective impact of the last of these, as past service will also attract gratuity payment based on the new formula. While all the Codes are prospective in their application, the impact of the changed wage definition will be retrospective in the cases of gratuity and a few other such computations.

The Social Security Code also changes the eligibility criterion for gratuity in case of Fixed Term Employees. They will now be eligible for gratuity upon completion of one year of continuous service as opposed to the five years that are required for regular employees.

In the light of the Covid-19 pandemic, the Code also allows the government to suspend the need for contribution and certain provisions of the Code under such unforeseen circumstances.

Overall, the Social Security Code is viewed by Industry and the unions alike, as a good step forward and a law that is forward thinking in its approach to social security and welfare of the employees. It is likely to be the least contested of the Codes and may be the first to be implemented.

The Occupational Safety, Health and Working Conditions Code, (OSH Code) 2020[10]

A hop, skip and jump towards reform

The OSH Code represents the largest of all the consolidation exercises undertaken by the ministry in this phase. It subsumes 13 legislations, most of which are critical and far-reaching. From the Factories Act to the Mines and Plantation Act, from Sales Promotion Employees to Working Journalists, from Contract Labour (regulation and abolition) to Motor Transport Workers, this Code is a "cover it all" law

6 CURIA - Documents (europa.eu)
7 Uber BV and others (Appellants) v Aslam and others (Respondents) (supremecourt.uk)
8 Uber drivers are employees, not contractors, says Dutch court | Reuters
9 https://law.justia.com/cases/california/court-of-appeal/2020/a160701.html

10 Occupational Safety, Health And Working Conditions Code, 2020.pdf (prsindia.org)

© 2022 - BCP Associates LLP

that applies to every business across the country with a minimum of 10 employees.

The Code brings many sweeping changes to the way companies operate and function today. Many of these will impact fundamental business operations. For example, the Code now sets the number of working hours per day at 8, exclusive of a 1-hour break. Many states have had this number at 9 hours per day and have been silent about whether this includes or excludes the break. This will mean a revision of the operating hours for companies, especially in the IT sector. Add this to the fact that the Code on Wages requires the payment of overtime for all employees and there is a real conundrum ahead for employers. This will also mean the need for realigning of shifts and a possible increase in headcount requirements. Overtime will end up being a big cost center if companies don't find quick solutions for its prevention/regulation.

The most important change being brought by the OSH Code is to the definition of Contract Labour. While the definition of Contractor remains the same as it is today under the CLRA Act, the term contract labour has been defined to include an exception which is an employee who is engaged by the contractor to do the "work of his establishment" in another establishment and gets paid all benefits including social security and periodic appraisals.

The implication of this seemingly small change is far reaching since any contractor who is willing to hire an employee on his rolls, for work related to his establishment, can effectively deploy him anywhere and the employee will not be considered contract labour.

A major shift in approach and operations comes in the form of the prohibition of engagement of Contract Labour in Core Employment. The term Core Activity has been defined to mean the main reason for which the establishment has been set up. This is the first time that a central definition of Core Activity has been attempted and undertaken. Before this, only Telangana had defined Core Activity and the Code

© 2022 - BCP Associates LLP

takes the same definition. The definition is critical as the Code goes on to prohibit the engagement of Contract Labour in Core Activity of an establishment.

A long overdue goal that was set way back in 1971 through the Contract Labour (Regulation and Abolition) Act is finally sought to be achieved by this Code. The prohibition is more or less of blanket nature but comes with exceptions. All ancillary functions like Housekeeping, Security, Loading and unloading and Transport can be carried out though Contract Labour but the main activity of the Establishment, be it production or service, cannot be done using Contract Labour.

Today, many companies including public sector undertakings have anywhere between 30 percent and 70 percent of the total manpower engaged though contractors. At least 50 percent of them are engaged in Core Activity. To disengage them will be practically impossible and to take them on the rolls will be financially and procedurally impermissible. This Catch 22 situation is rife for agitations, protests and industrial discord and must be nipped in the bud.

A combined reading of the definition of Contract Labour and the prohibition on their engagement in core activity suggests that the optimal approach is for contractors to ensure that the contract labourers are fulltime employees who are provided all the benefits. In addition, they need to be correctly registered and compliant. This, along with the exceptions provided may prove to be the only way out of this paradox.

But this code spans many other areas including adding the requirement of safety for all establishments and not, as in the past, just factories or hazardous processes. Other changes include an overhaul of the provisions related to leave and a mandatory carryover of earned leave with a cap at 30 days. All earned leave, in addition, will need to be encashed and will not lapse, which will benefit employees. The Code has also mandated medical check-up for all and free annual check-up for those above 45, a move that was pushed by the pandemic and its fallout.

In trying to formalize employment and provide every employee with proof of employment, the Code makes it mandatory for the employer to issue a standard appointment letter for all employees. The letter is detailed and contains critical information about the employee including his designation, role, Aadhaar number and salary. Minor as this provision seems, it is vital since as of now the biggest gaps in documentation have been found in the contents of Appointment letters. Many companies only issue offer letter and the contents of these are very informal and not anywhere near the requirements of the OSH Code which mandates all kinds of employment to be governed by an employment letter. This is in line with other developed markets like Portugal which made employment contracts mandatory for temporary employment and deemed any employment without a contract as an open-ended or permanent employment.

To achieve its goal of improving the ease of doing business, the Code puts forth the requirement of only one registration for all the 13 legislations it has subsumed. This is a big ease of compliance for factories, mines, plantations and large establishments.

One of the pain points for industry has been the Contractor license under CLRA and establishment registration, both of which are tied at the hip today. Recognizing this, the Code decouples the two and makes the Contractor independently liable for a license, thus reducing the oversight burden of the Company.

Industrial Relations Code 2020

Placing industry and workers on an equal footing11

For nearly 75 years, the Industrial Disputes Act has governed the relationship between employers and employees. The process of moving from "dispute" to "relations" begins right in the nomenclature of the new law and runs through the entire Code which attempts to finally put employers and workers on

11 Industrial Relations Code, 2020.pdf (prsindia.org)

© 2022 - BCP Associates LLP

an equal footing and reduce untoward incidents of strikes and lockouts by mandating prior notice, enabling dialogue and compromise. The Code subsumes three key legislations governing the relationship between employers and employees, the Industrial Disputes Act, 1947, The Trade Unions Act, 1926 and the Industrial Employment (Standing Orders) Act, 1946. It aims at becoming a single point of governance for all matters related to the terms and conditions of employment, the cessation of employment and collective bargaining.

While the union and collective of the workers has been given its due place, the Code has also kept into consideration the interests of the employers and provided for ease of negotiation and dialogue by introducing concepts like the Negotiating Union and Council. Employees have also been given a clear recourse to remedy through a mandatory Grievance Redressal Committee in every establishment.

Some the major changes that the Code has brought about are as follows:

A revised definition of "industry" which imbibes judicial precedent on the subject over the last 75 years has been set out. That is on par with the Supreme Court judgment in A. Rajappa12 and additionally excludes not-for-profits and charities for the definition of Industry. New terms such as Negotiating Council and Negotiating Union also follow.

The concept of "Negotiating Union" has been introduced for the first time. This allows the union, where it has a democratic majority, to be the sole point of negotiation and thereby brings a great deal of order into collective bargaining. It also accounts a for situation where there is no such majority union and asks for the formation of a "Negotiating Council" in such cases. This will be a collective body with proportional representation that can then be the single point of collective bargaining in that industry. This measure deserves appreciation since it brings about much needed efficiency in an otherwise disparate system and helps reinforce the true spirit and purpose of collective bargaining. This change also provides the employer with much needed clarity on the impact and extent of settlements and negotiations. Further, this ensures that the right people are at the table for all negotiations.

The next big change comes in the form of prior notice for strikes and lockouts, both of which are an antithesis to business and productivity, where either the workers or the employer refuse to produce or work even though resources are available. While this kind of right is enshrined in the Constitution of India itself as a form of protest, it has remained largely unregulated and its methods unruly. Only essential service industries were brought into a system of order that required prior notice and publication. The Code extends this discipline to all industries covered under the Code. We believe this is a welcome measure that will allow for compromise and mediation in issues and thereby prevent critical loss of production.

In addition, the overall process of dispute resolution has undergone a metamorphic change under the Code. A Grievance Redressal Committee (GRC) has been mandated for all industries employing over 20 workers. This will become the first point of grievance redressal and help prevent its escalation into a dispute. Additionally, the GRC's decision becomes final unless a union backs the appeal to a Conciliating Officer and only upon failed conciliation can it go to a Tribunal. Currently, only seven of the 50 plus companies we examined have a GRC that is in line with what the Industrial Relations Code will require.

With Labour Courts eliminated, the executive wing has been charged with conciliation and mitigation of disputes though facilitation. The first "courts" within the system will be the Industrial Tribunals, which will now consist of both a Judicial member and an Administrative Member. This will bring a new perspective to the adjudication of disputes and hopefully fast track the process.

12 Bangalore Water-Supply & ... vs R. Rajappa & Others on 21 February, 1978 (indiankanoon.org)

© 2022 - BCP Associates LLP

Conclusion

The changes mandated by the new codes may seem onerous at first sight but with proper planning and execution they are exactly what a modern industrial state needs. With as many as 22 different compliance points reduced to a single point of compliance, they will be the biggest contributors to the ease of doing business in the country. Already, India is late to the global party with several countries taking the lead in reforming their employment landscape. Thus, in 2020 Portugal made major amendments to its labour laws bringing down the working hours to 8 per day, just as the OSH Code in India proposes to do. But even while we wait for it to be rolled out in India, Portugal has already gone a little beyond in 2021, making it illegal for the employer to contact the employee after work hours.

Similarly, Canada recently adopted the concept of Negotiating Union with membership capped at 40 percent. The IR Code in India also adopts this concept while capping membership at 50 percent. But the law in Canada goes further, also mandating mediation for dispute resolution. The IR Code has moved forward but with Conciliation as the first step.

China too brought about labour reforms in 2020 and 2021. This included the mandating of a contract of employment, fixation of probation periods, severance packages and requiring employee consent to amend terms of appointment.

Significantly, all of these facets are covered by the new Codes proposed for India and therein lies their significance, for they give Indian industry a real shot at operating in an environment where the rules are on par with the best in the world. The adversarial relationship fraught with tensions and always on the verge of descending into conflict, is sought to be replaced with a more congenial environment with rights and responsibilities well defined, articulated and understood.

With the Codes ushering in a considerable change in approach, mindset and requirements for businesses, the Indian environment will become increasingly conducive for global companies. The four new codes will make the legal regime more flexible and the workforce even more manageable. The new regime fixes two major drawbacks, ease of compliance and transparency in oversight. While setting up the processes to ensure 100 percent compliance will test most companies, eventually it will lead to a new way of doing business in the country, one in which employers and employees are joint partners in their progress.

© 2022 - BCP Associates LLP

Our Services

Labour Code Services

Wage restructuring & realignment of HR Policies and Processes to comply with the new Labour Codes: from hiring to separation – including expert legal & HR support during implementation.

Advisory

Advisory is Designed to provide practical advice & solutions that enable a company to strictly adhere to legal requirements while overcoming hurdles of daily operations or handling strategic matters.

Legal Audit

End-to-end evidence-based Employment Law Audits that help organisations understand and mitigate risk exposure. Deep-rooted legal expertise coupled with best-in-class technology.

POSH

Your Strategic Partner for POSH- Assisting you in creating a respectful work environment with zero-tolerance to sexual harassment.

People Services

Designing the best-in-class HR practices in tune with contemporary legal aspects that create an Impactful Organization.

Technology

Intelligent digital solutions & tools which enable Legal & HR teams with Audit Analytics, Document Management & E-Learning.