

JSA Newsletter Employment Law

May 2022

As discussed briefly in our previous edition, the upcoming Code on Wages, 2019 (“**Wage Code**”) subsumes four central labour legislations, namely, the Payment of Wages Act, 1936 (“**PWA**”), the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976 (“**ERA**”).

This edition of the JSA Employment Monthly Newsletter provides a brief overview and comparative analysis of the changes proposed under the Wage Code vis-à-vis ERA and the PWA and also discusses some of the recent interesting judicial precedents spread across several employment legislations.

Wage Code vis-à-vis the Equal Remuneration Act, 1976 and the Payment of Wages Act, 1936

The Wage Code is spread over 9 chapters with 69 sections. Section 3 and 4 of the Wage Code deals with prohibition of discrimination on the grounds of gender. Section 15 to 25 of the Wage Code deals with the payment of wages.

Comparative analysis

Summarised below are some of the key differences between the proposed provisions in the Wage Code and the ERA and the PWA:

ERA and the Wage Code		
Particulars	ERA	Wage Code
‘Worker’ vs ‘Employee’	Employer’s obligations and liabilities under the ERA extended to ‘workers’ – which excluded persons in managerial, supervisory and administrative positions.	Under the Wage Code, employer’s obligations and liabilities extend to ‘employee’ which includes persons in managerial, supervisory, administrative and operational persons, thereby extending the scope of its applicability.
Non-discrimination based on gender	The objective of the ERA was (a) to provide for equal remuneration to men and women workers; and (b) for prevention of discrimination, on the ground of sex, against women in the matter of employment.	Section 3(1) of the Wage Code provides that there will be no discrimination among employees relating to wages based on the gender of the employee in relation to the same work or work of similar nature done by any employee ¹ - thereby building on a

¹ As per Section 2(v) of the Wage Code, “same work or work of a similar nature” has been defined to mean work in respect of which the skill, effort, experience and responsibility required are the same, when performed under similar working conditions by employees and the difference if any, between the skill, effort, experience and responsibility required for employees of any gender, are not of practical importance in relation to the terms and conditions of employment.

		<p>construct of gender neutrality in its application.</p> <p>The applicability of ERA was limited to ‘men’ and ‘women’, whereas the Wage Code dispenses with such distinction and states that there must be equal remuneration and no discrimination amongst all the genders.</p>
PWA and the Wage Code		
Particulars	PWA	Wage Code
Applicability	Applicable only to employees drawing wages below Rs. 24,000 per month.	The payment of wages provisions in the Wage Code are applicable to all employees, other than for government establishments.
Definition of wages	<p>As we know, the term ‘wages’ is defined differently under different legislations.</p> <p>Under the PWA, wages means all remuneration whether, by way of salaries, allowances or otherwise, expressed in terms of money and includes (a) any remuneration payable under any award or settlement between the parties or order of a Court; (b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period; (c) any additional remuneration payable under the terms of employment; (d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument; (e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force.</p> <p>Excluding (the “PWA Exemptions”): (1) any bonus which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court; (2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenities; (3) contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon; (4) any travelling allowance or the value of any travelling concession; (5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or (6) any gratuity payable on</p>	<p>The definition of wages has now been subsumed under the Wage Code and the term ‘wages’ means all remuneration whether, by way of salaries, allowances or otherwise, expressed in terms of money and includes basic pay, dearness allowance, and retaining allowance if any.</p> <p>In addition to the PWA Exemptions, the Wage Code lays down the following exemptions: (1) house rent allowance; (2) remuneration payable under any award or settlement between the parties or order of a court or Tribunal; (3) any overtime allowance; (4) any commission payable to the employee; (5) any retrenchment compensation or other retirement benefit payable to the employee or any ex gratia payment made to him on the termination of employment.</p> <p>It is pertinent to note that the PWA includes the sub-clauses (2) and (3) as mentioned above in the computation of wages, whereas the Wage Code excludes the same.</p> <p>A significant introduction under the Wage Code is that in the event the quantum of exclusions (except gratuity, retrenchment, ex gratia, and retiral benefits) exceeds more than half or such other notified percentage (“Exclusion Limit”) of the remuneration paid to the employee, then the amount in excess of the Exclusion Limit will be treated as wages.</p> <p>Also, in cases where an employee is given remuneration in kind by his employer and the value of the same which does not exceed 15% of the total wages payable to him will be</p>

	the termination of employment in cases other than those specified in sub-clause (d).	deemed to form part of the wages of such employee.
Mode of payment of wages	<p>Wages under the PWA were to be paid in current coin or currency notes or by cheque or by crediting the wages in the bank account of the employee.</p> <p>The Government had the power, by notification, to specify that a particular establishment may pay wages only through cheque or by crediting wages directly into the bank account.</p>	In addition to the wage's disbursement incidences under the PWA, the Wage Code provides that wages may also be paid through electronic mode.
Fixation of wage period	The PWA only provided that a person responsible for payment of wages under the PWA is to fix the applicable 'wage-period' in respect of which such wages are payable, and that, no wage period is to exceed one month.	The Wage Code requires an employer to fix the wage period for employees either as daily or weekly or fortnightly or monthly, subject to the condition that no wage period in respect of any employee must be more than a month, provided that different wage periods may be fixed for different establishments.
Time limit for payment of wages	<p>Time limit for payment of wages is ascertained based on the number of persons employed in an establishment.</p> <p>There is no separate mention of time limits for daily, weekly, fortnightly wage period.</p>	The Wage Code prescribes the timeline for payment of wages based on the applicable wage-period, i.e., (a) for daily wage period, at the end of the shift; (b) for weekly wage period, on the last working day of the week; (c) for fortnightly wage period, by the end of the second day after expiry of fortnight; and (d) for monthly wage period, by the seventh day of the succeeding month.
Deductions and fines	The penalty provisions prescribed for offences have lower thresholds ² .	The penalty provisions prescribed for offences have higher thresholds ³ .

Distinctive features

Summarised below are some of the distinctive features of the Wage Code vis-à-vis ERA and PWA:

- Floor wage:** The concept of floor wage has been introduced in the Wage Code. According to the Wage Code, the central government will fix a floor wage, taking into account living standards of workers. Further, it may set different floor wages for different geographical areas – all, with the advice of the Central Advisory Board and consultations with state governments, if needed. The minimum wages decided by the central or state governments must be higher than the floor wage. In case the existing minimum wages fixed by the central or state governments are higher than the floor wage, the minimum wages cannot be reduced.
- Inspector cum facilitator:** The erstwhile enactments had the concept of inspectors to carry out inspections and examinations to ensure compliance of the enactments.⁴ Now, under the Wage Code, the inspector regime is replaced with 'Inspector-cum-Facilitator' who will be a facilitator towards compliance and not just an inspecting

² Fine not less than INR 1,500 and which may extend to INR 7,500 for not paying wages timely or making unnecessary deductions. Fine not less than INR 1,500 which may extend to INR 7,500 for non-maintenance or improper maintenance of records. Fine which may extend to INR 3,750 for other offences.

³ Fine which may extend to INR 50,000 for paying wages less than amount due. Fine which may extend to INR 10,000 for non-maintenance or improper maintenance of records. Fine which may extend to INR 25,000 for other offences.

⁴ S 14, Payment of Wages Act, 1936; S 9 Employee Remuneration Act, 1976; S 27 Payment of Bonus Act; S 19, Minimum Wages Act, 1948

authority. The Inspector-cum-Facilitator is required to provide the employer an opportunity to rectify the non-compliance within a specified time before initiating any prosecution proceedings. This would benefit contraventions which are unintentional or due to genuine lack of knowledge on the part of the employer. The appropriate government may lay down an inspection scheme which may also provide for generation of a web-based inspection and calling of information relating to the inspection.

Case Law Ratios

General foreman empowered to sanctioning of leave and assigning of duties to subordinates will not be construed as a 'workman'

In the case of *Dewa Singh vs. The State of Jharkhand & Anr*⁵, the petitioner/workman claimed that he was unjustly dismissed/retrenched at the age of 55 years, contrary to the company service rules where the age for superannuation was 60 years. Respondent/employer contended that, (i) the petitioner had in fact been employed in a 'supervisory role' and thereby excluded from the definition of workman under section 2 (s)(iv) of the Industrial Disputes Act, 1947 ("ID Act") and (ii) according to the company service rules, the age of superannuation was 55 years and the petitioner was accordingly retired from the job.

The Jharkhand High Court decided in favour of the respondents while observing: (i) that an industrial dispute could only be raised if it is a case of dismissal, discharge or retrenchment to a 'workman', who comes under the definition of section 2 (s) of the ID Act, (ii) that as per the evidence provided, the petitioner had been employed as General Foreman tasked with supervising, guiding and instructing the workmen working under him and was empowered to grant leave, assign jobs, distribute the work of the factory to the workmen – therefore, fell under the exception of 2 (s) (iv) of the ID Act and did not classify as a 'workman' and (iii) that even then this was not a case of dismissal, retrenchment or removal from the service but of superannuation as per rules of the company and the evidence supported the respondent's claim that the age of superannuation was indeed 55 years and the petitioner was retired accordingly.

Driver dying of strain for driving vehicle continuously for 18 days, his dependents entitled to accident compensation

In the case of *Smt. Harvinder Kaur Vishakha Singh vs. Tarvinder Singh K. Singh and Anr*⁶, the deceased/employee, a truck driver, succumbed to coronary artery heart disease while driving back from Ranchi to Mumbai. The family claimed that the deceased had been driving continuously for a period of 18 days before the incident and had died due to the stress and strain of employment and accordingly filed for compensation under section 3 of the Employee's Compensation Act, 1923 ("EC Act"). The Labour Court dismissed the claim and held that there was no evidence to connect his demise to his job as a driver and concluded the driver to have died of natural causes. Aggrieved by which, the deceased's family appealed the Labour Court's decision before the Bombay High Court.

The High Court held in favour of the deceased's family while observing that it was undeniable that the deceased's death had been accelerated on account of the stress and strain associated with the long-distance driving for extended periods of time and that the beneficial object of section 3 of the EC Act would stand defeated if a view to the contrary is taken. Accordingly, the appeal was allowed and the employer and insurance company were directed to pay appropriate compensation.

Two establishments with a common bill counter and entrance rightly clubbed for ESI coverage

In the case of *Balaji Grand Bazaar vs. Dy. Director, ESI Corp., Hyderabad*⁷, the primary issue before the court was to assess whether the appellant/employer is to be seen as a distinct entity to that of Balaji House of Child Care for the

⁵ 2022 LLR 271 (Jhar. HC)

⁶ 2022 LLR 254

⁷ 2021 LLR 1174 (Telan. HC)

purposes of Employees' State Insurance Act, 1948 ("ESI Act"). The Appellant contended that the two were separate and distinct entities with both of them employing 10 persons each and 9 persons working in the godown. That the authorities were wrong to club them all together and conclude that a total of 29 persons had been employed by the appellant firm which would bring them under the purview of the ESI Act.

The Telangana High Court held in favour of the respondent/ESI Corporation while observing the following, (i) that the two entities were located in the same building with one of them being situated on the ground floor and the second being situated on the first floor. The entrance for both being one and the same; (ii) that both entities were operating under the same phone number and had a common bill counter and lastly; (iii) that the ESI Act is enacted with a view to ensuring social welfare and has to be construed in its correct perspective so as to achieve its beneficial purpose. Accordingly, the appeal was dismissed.

Did you know?!

Recently, the Supreme Court of India, in the case of *Jacob Puliyel vs. Union of India and Ors*⁸, dated May 02, 2022, held that no person can be coerced to get vaccinated in view of the COVID-19 pandemic. The judgment does not hold the requirement of mandatory vaccination as unconstitutional, it instead advises all authorities (including private organisations) to review and re-assess the relevant orders imposing restrictions on unvaccinated individuals in terms of access to public places, if not already recalled.

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⁸ MANU/SC/0566/2022