

This edition of the JSA Employment Newsletter provides a snapshot on key workplace compliances under the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 and applicable notified rules (collectively, “**HIV and AIDS Act**”). We also discuss some recent regulatory updates and judicial precedents across several employment legislations.

### Workplace compliances under the HIV and AIDS Act

The HIV and AIDS Act is a central legislation enacted to provide for prevention and control and of the spread of Human Immunodeficiency Virus (“**HIV**”) and Acquired Immune Deficiency Syndrome (“**AIDS**”) (collectively, “**HIV and AIDS**”) and for protection of human rights of persons affected by it. The HIV and AIDS Act prohibits discrimination of ‘protected persons’<sup>1</sup> on any ground<sup>2</sup>, including, *inter alia*, matters of employment such as denial or termination from employment<sup>3</sup>, unfair treatment in or in relation to employment or occupation<sup>4</sup>, denial or discontinuation of or unfair treatment in, the opportunity to stand for or hold public or private office<sup>5</sup>. The statute also prohibits HIV testing as a pre-requisite for obtaining employment or accessing healthcare services or education or for accessing or using any other service or facility<sup>6</sup> and also prohibits compelled disclosure of HIV-positive status of self or any other person<sup>7</sup>.

Employers and establishments<sup>8</sup> are generally required to ensure a conducive working environment devoid of stigma, discrimination and unfair treatment towards protected persons. Set out below are key obligations placed on employers and establishments under the HIV and AIDS Act:

1. **Dismissal from employment:** The HIV and AIDS Act prohibits termination from employment or occupation of a protected person who is otherwise qualified, except in cases where termination is supplemented with (a) a written assessment of a competent, qualified and independent healthcare provider that the protected person poses a significant risk of transmission of HIV to other person at the workplace, or is unfit to perform duties of the job; and (b) a written statement of the employer stating nature and extent of administrative or financial hardship for not providing the protected person with reasonable accommodation<sup>9</sup>.

<sup>1</sup> Defined under Section 2(s) of the HIV and AIDS Act as a person who is (a) HIV-positive; or (b) ordinarily living, residing or cohabiting with a person who is HIV-positive person; or (c) ordinarily lived, resided or cohabited with person who was HIV-positive.

<sup>2</sup> Section 3, HIV and AIDS Act.

<sup>3</sup> Section 3(a), HIV and AIDS Act.

<sup>4</sup> Section 3(b), HIV and AIDS Act.

<sup>5</sup> Section 3(h), HIV and AIDS Act.

<sup>6</sup> Section 3(l), HIV and AIDS Act.

<sup>7</sup> Section 8, HIV and AIDS Act.

<sup>8</sup> Defined under Section 2(f) of the HIV and AIDS Act, as a “a body corporate or co-operative society or any organisation or institution or 2 (two) or more persons jointly carrying out a systematic activity for a period of 12 (twelve) months or more at one or more places for consideration or otherwise, for the production, supply or distribution of goods or services”

<sup>9</sup> Section 3(a), HIV and AIDS Act.

2. **Adoption of data protection measures:** Every establishment keeping records of HIV-related information of protected persons is required to adopt adequate data protection measures to ensure protection of such information from disclosure. In addition to measures for protection of information disclosure, establishments should implement procedures for accessing information and provision for security systems<sup>10</sup>.
3. **Provision for safe working environment:** In the interest of ensuring a safe working environment, every establishment engaged in healthcare services with 20 (twenty) or more persons and other establishments with 100 (one hundred) or more persons, where there is a significant risk of occupational exposure to HIV (collectively, “**Specified Establishments**”), are required to provide prescribed universal precautions, training and post exposure prophylaxis to all persons working in such establishments<sup>11</sup>.
4. **Compliance and grievance redressal mechanism:** Persons in charge of a Specified Establishment are responsible for ensuring compliance of the HIV and AIDS Act. Further, every Specified Establishment is required to designate a person as it deems fit as a ‘complaints officer’ to dispose complaints relating to violations of the HIV and AIDS Act<sup>12</sup>.
5. **Adoption of HIV and AIDS Policy:** The Ministry of Health and Family Welfare, Government of India *vide* notification dated May 13, 2022, notified the ‘HIV and AIDS Policy for Establishments 2022’ (“**Model Policy**”) under the HIV and AIDS Act, which mandates employers to use this policy framework to implement an HIV and AIDS policy at their respective workplaces (“**HIV and AIDS Policy**”). Broadly, the Model Policy is aimed at generating awareness on HIV and AIDS amongst employees, prevention of transmission of HIV infection amongst employees, protection of rights of protected persons, ensuring a safe, non-stigmatised and non-discriminatory environment assuring equity and dignity at establishment, and maintaining confidentiality of HIV-related data for protected persons. The Model Policy additionally sets out a robust grievance redressal mechanism to be adopted at Specified Establishments for protected persons.

For more details on the Model Policy, please refer to [JSA Prism of July 20, 2022](#).

6. **Miscellaneous responsibilities:** Chapter VII of the Model Policy sets out additional roles and responsibilities of employers and employees, as set out below:
  - a) *Employer responsibilities:* Other than implementing guiding principles of the Model Policy, employers are required to ensure access by the broader public to the adopted HIV and AIDS Policy, by uploading it on their website, train employees on the basics of HIV and AIDS and related matters, train the designated complaints officer to carry out responsibilities under the policy (if applicable), organise workshops and awareness programs to sensitise employees on the HIV and AIDS Act and the HIV and AIDS Policy, and provide reasonable accommodations where minor adjustments at work would enable protected persons to enjoy equal benefits at work.
  - b) *Employee/co-worker responsibilities:* Employees have been encouraged to, *inter alia*, refrain from discriminating against colleagues based on HIV status, maintain confidentiality with respect to HIV-status and information in relation to HIV-positive persons, and advise persons to file complaints with the complaints officer if they witness any form of discrimination against persons on the basis of HIV-status.

In a recent case, **CPL Ashish Kumar Chauhan (Retd.) v. Commanding Officer & Ors.**<sup>13</sup> the Supreme Court outlined several directives to ensure effective implementation of the HIV and AIDS Act, and directed the Secretary, Department of Labour of every state to ensure collection of information and data relating to compliance of Specified Establishments with requirements of providing a safe working environment and grievance redressal mechanism under the HIV and AIDS Act within 10 (ten) weeks of the judgement (issued on September 26, 2023) to the Union Labour and Employment Secretary. Additionally, it has directed the Union Labour and Employment Secretary to file an affidavit of compliance with respect to implementation of provisions of the HIV and AIDS Act within 16 (sixteen) weeks of the

<sup>10</sup> Section 11, HIV and AIDS Act.

<sup>11</sup> Section 19, HIV and AIDS Act.

<sup>12</sup> Section 21, HIV and AIDS Act.

<sup>13</sup> CA 7175/2021 (SC)

judgement. In this judgement, the Supreme Court has also reiterated compliances to be observed by establishments under the HIV and AIDS Act. In light of this, going forward, employers can expect an increased scrutiny of compliances by establishments under the HIV and AIDS Act by the Indian government.

## Regulatory Updates

### Payment of minimum wages, maintenance of separate toilets and pay parity for male and female construction workers in Delhi mandated

The Labour Department, Government of National Capital Territory of Delhi *vide* its circular dated October 18, 2023, has directed that all employers/contractors/establishments of a construction site under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and Delhi Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2002 are required to (a) ensure payment of minimum wages to construction workers as notified from time to time by the Labour Department, GNCT of Delhi; (b) pay same wages to a female worker as paid to a male worker, as mandated under the Equal Remuneration Act, 1978; and (c) maintain separate toilets for male and female construction workers on a construction site.

### Standard Operating Procedure (“SOP”) notified for establishments exempted from the Employees’ Provident Fund Scheme, 1952 (“EPF Scheme”)

Establishments may, by way of government approval, be exempted from the EPF Scheme (“**Exempted Establishments**”) and allowed to operate a private trust for self-management of provident fund contributions made by employees and employers, subject to compliance with prescribed conditions. The Employees’ Provident Fund Organisation has, *vide* notification dated October 6, 2023, issued an SOP for management and regulation of provident fund contributions in Exempted Establishments, including the compliance process to be undertaken by Exempted Establishments in managing their own trust and regulations thereof. This SOP can be accessed [here](#).

### Enhancement of limit for non-claiming of interest amount payable on delayed payment of contributions Employees’ State Insurance Act, 1948 (“ESI Act”)

The Employees’ State Insurance Corporation, Government of India (“**ESI Corporation**”) *vide* notification dated October 10, 2023, has instructed that with effect from November 1, 2023, interest payable due to delayed contributions under the ESI Act for any reason in any contribution period (taken as a whole), where such contributions do not exceed INR 300 (Indian Rupees three hundred), may not be claimed by ESI Corporation field offices. The contribution threshold has been enhanced from the earlier notified amount of INR 100 (Indian Rupees one hundred).

### Paid holidays declared on account of state assembly elections in Rajasthan and Telangana

The Government of Rajasthan and Government of Telangana, *vide* notifications dated October 16, 2023, have declared November 25, 2023, and November 30, 2023, respectively, as paid holidays on account of upcoming state legislative assembly elections.

### Aadhar authentication a pre-requisite for availment of benefits under welfare schemes implemented by Delhi Building & Construction Workers Welfare Board

The Government of National Capital Territory of Delhi, Labour Department *vide* notification dated October 20, 2023 has notified that individuals desirous of availing benefits under welfare schemes implemented by the Delhi Building & Other Construction Workers Welfare Board, Government of National Capital Territory of Delhi (including maternity benefit, financial assistance in case of miscarriage, pension benefit and advance for purchase or construction of house)

are required to furnish proof of possession of Aadhar, or undergo Aadhar authentication for availment of such benefits. Those not in possession of Aadhar number are required to apply for Aadhar enrolment, by visiting any Aadhar enrolment centre.

## Case Law Ratios

### Woman employed on contractual basis entitled to maternity benefits

In *Neelam Kumari v. The University of Delhi & Ors.*<sup>14</sup>, the petitioner was denied maternity rights by her employer under the Maternity Benefit Act, 1961 on grounds of being a contract worker, and was terminated without notice. Placing reliance on the Supreme Court's judgement in *Kavita Yadav v. Ministry of Health & Family Welfare Department*<sup>15</sup>, the Delhi High Court reiterated that female employees employed on a contractual basis are entitled to maternity benefits, even if it exceeds their contract period and noted that "*denial of the said benefits is inhumane and in violation of fundamental rights*". Taking note of the illegality of her termination, the court passed an order directing the respondent to reinstate the petitioner along-with payment of maternity benefits.

### Non-wilful and non-negligent absence from work, though unsanctioned does not amount to misconduct

In *Amrutamma v. Managing Director, APSRTC*<sup>16</sup>, the petitioner claimed inclusion of the period between her husband's (employee) dismissal from service till his death, in computation of attendant benefits. The employee was dismissed from service by his employer on account of his unauthorised absence from service prior to his demise. The Telangana High Court evaluating the petitioner's claim noted that though the employee's absence was unauthorised, absence was on account of "*severe health setback*" suffered by the employee and not "*wilful or by negligence*". Based on this, the court held that the employee's absence would not amount to misconduct warranting punishment of dismissal and upheld the petitioner's claim.

### ESI Act will continue to apply even after number of persons employed falls below specified limit

In *Beldih Club Jameshpur v. State of Jharkhand*<sup>17</sup>, the Jharkhand High Court while evaluating applicability of ESI Act provisions on the petitioner, relied on judgement of the Supreme Court in *ESI Corporation v. Radhika Theatre*<sup>18</sup> to reiterate that the "*ESI Act shall be applicable irrespective of the number of persons employed or notwithstanding that the number of persons employed at any time falls below the limit specified by or under the ESI Act*". The court noted that "*the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment*".

### Employer's duty to lead evidence during inquiry not absolved upon employee's failure to respond to charges

In *Devendra Prasad v. State of Bihar*<sup>19</sup>, the petitioner was dismissed by his employer without any evidence being adduced during disciplinary proceedings to find the employee's guilt. The Patna High Court held that the petitioner-employee's failure to respond to charges levelled against him did not absolve his employer from "*responsibility to lead evidence at the inquiry*". The court also noted that disciplinary inquiries are required to be held in "*strict compliance of principles of natural justice; affording ever opportunity to the delinquent employee to controvert his charges, if the*

<sup>14</sup> WP(C) 2959/2023 (Delhi HC)

<sup>15</sup> 2023 SCC OnLine SC 1067 (SC)

<sup>16</sup> 2023 SCC OnLine TS 3023 (Telangana HC)

<sup>17</sup> L.P.A. No. 187/2023 (Jharkhand HC)

<sup>18</sup> CA 312/2023 (SC)

<sup>19</sup> Civil Writ Jurisdiction Case No. 934/206 (Patna HC)

*delinquent employee does not cooperate, findings can be entered into on the evidence led”* and on account of failure thereof in the present case, set aside the disciplinary inquiry and punishment imposed on the petitioner-employee.

## Employment Practice

JSA has a team of experienced employment law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our key areas of advice include (a) advising on boardroom disputes including issues with directors, both executive and non-executive; (b) providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance; (c) providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals; (d) advising on compliance and investigations, including creating compliance programs and policy, compliance evaluation assessment, procedure development and providing support for conducting internal investigations into alleged wrongful conduct; (e) designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs; and (f) advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

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<p>17 Practices and 24 Ranked Lawyers</p>	<p>16 Practices and 11 Ranked Lawyers</p>	<p>19 Practices and 19 Ranked Lawyers</p>
		
<p>11 Practices and 39 Ranked Partners <b>IFLR1000 APAC Rankings 2022</b></p> <p>-----</p> <p>Banking &amp; Finance Team of the Year</p> <p>-----</p> <p>Fintech Team of the Year</p> <p>-----</p> <p>Restructuring &amp; Insolvency Team of the Year</p>	<p>Among Top 7 Best Overall Law Firms in India and 9 Ranked Practices</p> <p>-----</p> <p>11 winning Deals in IBLJ Deals of the Year</p> <p>-----</p> <p>10 A List Lawyers in IBLJ Top 100 Lawyer List</p>	<p>Banking &amp; Financial Services Law Firm of the Year 2022</p> <p>-----</p> <p>Dispute Resolution Law Firm of the Year 2022</p> <p>-----</p> <p>Equity Market Deal of the Year (Premium) 2022</p> <p>-----</p> <p>Energy Law Firm of the Year 2021</p>
		
<p>7 Practices and 2 Ranked Lawyers</p>	<p><b>Ranked #1</b> <b>The Vahura Best Law Firms to Work Report, 2022</b></p> <p>-----</p> <p>Top 10 Best Law Firms for Women in 2022</p>	

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