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This edition of the JSA Employment Newsletter provides a brief roundup of some key regulatory developments through amendments, notifications, orders and other updates in the labour and employment space in India. We also discuss some recent judicial precedents spread across several employment legislations.

Regulatory Updates

District Office, Gurugram issues POSH Act compliance checklist for government and non-government organizations

With the intent to promote and ensure compliance under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**POSH Act**”) by government and non-government organisations in Gurugram, the office of Additional Deputy Commissioner, Gurugram-cum-District Officer has issued a POSH Act compliance checklist on December 20, 2023 (“**POSH Checklist**”), on appropriate POSH Act compliances with respect to calendar year 2023, ahead of the deadline to submit the annual report by April 30, 2024.

The POSH Checklist provides a comprehensive list of compliances and requirements for preparing the annual report under the POSH Act including *inter alia* (a) formulation and implementation of prevention of sexual harassment policy, (b) display of notices informing employees about the organization’s stance on sexual harassment and consequences of indulging in such acts, (c) awareness programs to sensitize employees and provide assistance to the harassed individual, (d) constitution and composition of internal committee (“**IC**”), (e) compliance with IC’s recommendations in a timely manner, (f) statement under Rule 8 of Companies (Accounts) Rules, 2014 confirming compliance with the POSH Act.

ESIC rolls out circular for issuance of e-Pehchaan Card to all IPs

In its drive to digitize internal and external processes and ensure efficiency in operations, especially services to employers and Insured Persons (“**IPs**”), the Employees’ State Insurance Corporation (“**ESI**” or “**ESIC**”) launched project ‘Panchdeep’. Subsequently, pursuant to directions of the Ministry of Labour and Employment making it mandatory to issue e-Pehchaan card to all IPs immediately after registration, ESIC *vide* circular dated February 2, 2024 issued directions to all Regional Offices/Sub-Regional Offices to issue suitable directions to all employers under their respective jurisdictions to download and handover, to the respective employees and IPs, e-Pehchaan cards from the ESI portal, immediately after registration under the ESI scheme. Employers are also required to ensure that hard copy of e-Pehchaan card is given to all existing IPs.

EPFO issues circular removing Aadhaar from list of acceptable documents as a date of birth proof

Employees' Provident Fund Organisation ("EPFO") *vide* circular dated January 16, 2024, referring to Unique Identification Authority of India ("UIDAI") circular no. 08 of 2023, notified removal of Aadhaar from the list of documents as a date of birth proof (as mentioned in Table-B of Annexure-1 of Joint Declaration – Standard Operating Procedure). UIDAI, placing reliance on Aadhaar (Enrolment and Update) Regulations, 2016, Office Memorandum dated December 20, 2018 issued by Ministry of Electronics and Information Technology and the 2023 judgement of the Hon'ble High Court of Bombay in the case of *State of Maharashtra v. UIDAI and Ors*¹, concluded that Aadhaar number can be used to establish identity of an individual subject to authentication and thereby, *per se* cannot be a proof of birth. Thus, stated that it is required that use of Aadhaar, as a proof of date of birth needs to be deleted from the list of acceptable documents.

ESIC issues revised guidelines and SOP for home delivery of drugs

ESIC *vide* circular dated January 10, 2024 revised guidelines relating to home delivery of drugs to IPs and beneficiaries. ESIC medical colleges, on a pilot project basis, will provide the facility of home drug delivery to ESI beneficiaries, basis present revisions built upon the guidelines issued on November 3, 2023, following a standard operating procedure ("SOP"). These services are limited to the defined district as decided by the Dean/Medical Superintendent of the concerned hospitals.

Eligibility: (a) all senior citizens with chronic illness entitled for treatment with ESIC, receiving consultations from the hospital and prescribed for more than 30 (thirty) days, (b) all ESIC beneficiaries, ESIC employees and their dependents, pensioners seeking consultation through e-Sanjeevani; and (c) handicapped and bed ridden patients on medication for chronic disease.

Hospital's responsibility: Apart from other responsibilities, hospitals are required to float a bid on the Government e-Marketplace (GeM) portal for procuring doorstep delivery services for drugs, including packaging, collection and electronic notifications to the beneficiary *via* SMS/WhatsApp regarding dispatch and delivery confirmation. The medical stores' in-charge are to act as nodal officer to monitor smooth functioning of the delivery process. Further, each hospital is required to adopt its own SOPs basis the process flow requirement and local needs, guidance for the vendor, pharmacist, other stake holders and grievance redressal system.

Vendor responsibility: Apart from ensuring proof of service to be one time password (OTP) based/signature of the authorized recipient in a pre-defined format, vendors will be responsible to send a SMS/WhatsApp notification to the beneficiary intimating: (a) parcel tracking number along with the link of tracking webpage; and (b) delivery of drug packet information. Additionally, vendors are required to ensure maintenance of cold chain as and when required for certain drugs.

EPFO revises timeline for employers to update wage details regarding pension on higher wages

EPFO *vide* press release dated January 3, 2024 notified that in light of representations made by employers and employers' associations and more than 3.6 lakh (three lakh sixty thousand) pending applications for validation of option/joint options, extension of time is granted to employers to update wage details regarding pension on higher wages, up till May 31, 2024 (previously December 31, 2024).

¹ Criminal Writ Petition No. 3002 of 2022

EPFO imposes restrictions on deposit and credit transactions in Paytm Payment Bank Accounts

EPFO *vide* circular dated February 8, 2024 has advised all field offices to refrain from accepting claims associated with bank accounts in Paytm Payment Bank Limited (“PPBL”) with effect from February 23, 2024. EPFO issued this circular in light of Reserve Bank of India’s press release dated January 31, 2024 imposing restrictive actions against operations of PPBL due to persistent non-compliances and material supervision concerns, revealed by the Comprehensive System Audit report and subsequent compliance validation report of external auditors.

Meghalaya Labour Department issues corrigendum regarding written consent from female employees willing to work from office after work hours

Department of Labour, Employment & Skill Development, Meghalaya *vide* corrigendum dated January 10, 2024 amended its notification dated July 19, 2023 regarding exemption of all establishments from provision of Section 6 of the Meghalaya Shops and Establishment Act, 2003, permitting all registered establishments to remain open 365 (three hundred and sixty-five) days in a year, until further notice. Post amendment, the said notification provides that written consent from female employees should be procured in case they are required to work after 7 P.M. Further, adequate safety and security arrangements of female employee should be made during working hours and employers should ensure that they reach home safely after work.

Case Law Ratios

Preparation of vaccine status list by an employer w.r.t. the employees does not amount to circulating sensitive information under IT Act

In *Gopal Vittal, Bharti Airtel Ltd v. Kamatci Shankar Arumugam*², the Hon’ble High Court of Judicature of Madras noted an employer / organization must necessarily take into consideration welfare of majority of its employees and therefore, an individual not following the required Covid-19 norms could not be allowed access to public sphere. Therefore, termination on grounds of unauthorized absence, in light of the employee not getting vaccinated, cannot be construed as coercion or compulsion resulting in unlawful termination. Further, circulation of employee vaccination status does not amount to circulating sensitive personal data and will not become an offence *per se* under Section 43A of the Information Technology Act, 2000, (“IT Act”). It held that Section 43A of the IT Act is more in the nature of tort and the consequences of commission of such tort only leads to payment of damages or compensation and no such punishment has been prescribed under the IT Act.

Status alone of a person in-charge cannot qualify as ‘workman’

In *Rohit Dembiwal v. Tata Consultancy Services Ltd.*³, the Hon’ble High Court of Bombay held that an IT analyst in Grade C-II, handling, *inter alia*, financial matters, reimbursement of medical and travelling expenses of team members, appraisal review and having authority to initiate disciplinary enquiry against team members does not qualify as a “workman” under the Industrial Disputes Act, 1947 (“ID Act”). The court re-affirmed that the dominant nature of one’s duties need to fall within one of the stipulated categories to be classified as a ‘workman’ under the ID Act.

Calculation of gratuity to employee providing continuous service for multiple entities under the same management

In *Terna Polytechnic v. Ravi Bhadrappa Randale*⁴, the Hon’ble High Court of Bombay held that upon establishing continuity of service of an employee under 2 (two) different entities belonging to the same management, calculation for payment of gratuity is required to be done basis the last drawn salary as on the date of cessation. Further, the court

² Criminal Original Petition No.20928 of 2023

³ Writ Petition No. 10523 of 2023

⁴ Writ Petition No. 11864 of 2019

also mentioned that in such cases of continuing service for the same management, there should be no bifurcation of gratuity amount between the two entities and the same is to be paid by the last employer as on the date of cessation of employment.

An individual workman cannot raise dispute for absorption and regularization

In *Management of TATA Advance System Limited v. the Secretary to Department of Labour, Karnataka and Ors.*⁵, the Hon'ble High Court of Karnataka at Bengaluru answering a crucial question on whether an individual workman seeking absorption and regularization could raise an industrial dispute under Section 2(k) of the ID Act, placing reliance on Section 2A of the ID Act, affirmed that for a dispute to be considered an industrial dispute under the ID Act, it must be shown that it is connected with employment or non-employment of a workman, and where an individual workman can only raise a dispute for removal, termination or dismissal, seeking absorption and regularization can only be achieved by raising a dispute in this regard through a trade union, on behalf of the workman.

Contract wages cannot be reduced arbitrarily

In *Darvari Singh v. State of Madhya Pradesh*⁶, the Hon'ble High Court of Madhya Pradesh held that those engaged by a previous contractor, upon change in employer structure, are entitled to maintain the same wages as initially agreed upon with the previous contractor, including delegation or subsequent sub-delegation to any contractor. Any reduction in wages would be deemed illegal, and the court directed to make timely payment of deducted amounts.

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.

⁵ Writ Petition 7674/2023

⁶ Writ Petition No. 11632 of 2020

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<p>18 Practices and 25 Ranked Lawyers</p>	<p>13 Practices and 38 Ranked Lawyers</p>	<p>19 Practices and 19 Ranked Lawyers</p>
		
<p>12 Practices and 42 Ranked Partners IFLR1000 APAC Rankings 2023 ----- Banking & Finance Team of the Year ----- Fintech Team of the Year ----- Restructuring & Insolvency Team of the Year</p>	<p>Among Top 7 Best Overall Law Firms in India and 9 Ranked Practices ----- 11 winning Deals in IBLJ Deals of the Year ----- 12 A List Lawyers in IBLJ Top 100 Lawyer List</p>	<p>Innovative Technologies Law Firm of the Year 2023 ----- Banking & Financial Services Law Firm of the Year 2022 ----- Dispute Resolution Law Firm of the Year 2022 ----- Equity Market Deal of the Year (Premium) 2022 ----- Energy Law Firm of the Year 2021 ----- Employer of Choice 2021</p>

		
7 Practices and 2 Ranked Lawyers	Ranked #1 The Vahura Best Law Firms to Work Report, 2022 ----- Top 10 Best Law Firms for Women in 2022	

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