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Labour Codes- Current Status- Way Forward

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Labour Codes – Current Status

- Passed By Parliament
- Centre & States (Most of them) proposed the draft rules
  - Tripartite Stakeholder conference done
  - A Few have notified final rules – Guj
- Date of Implementation
  - IDK
- Way Forward - IWIK

- Employees Provident Fund
- Employees State Insurance
- Employees Compensation
- Employment Exchange
- Maternity Benefit
- Payment of Gratuity
- Building Workers
- Cine Workers
- Unorganized Sector

The Code on Social Security, 2020

- **Replicates almost all the existing Acts provisions**
  - EPF/ ESI /Maternity Benefit/ Gratuity/ Employee Compensation /BOCW - largely the same as they are now
- **Defines Gig worker**
  - Defines - Aggregator, Gig Worker, Platform Work/er
  - Recognizes " work arrangement outside of traditional employer-employee relationship"
  - Empowering Central the Govt to establish Social Security Schemes for Gig, Platform Workers, Self Employed and Unorganized Workers
- **Enablement of Govt. for universal Social Security**
  - New Definitions - Home Based Worker, Self Employed Worker, Un-organised sector, Un-organised worker, Wage Worker
  - Each state to set up – "Un-organised Workers Social Security Board"
- **Fixed term employment**
  - Concept recognized from Social Security perspective as well
  - Particularly Gratuity for FTE from one year of service

Commencement & Application

- **SS Code to come into force vide notification**
  - Central Govt. may specify different dates for different provisions of the Code to come into force
  - Sec 164 – Schemes (EPF/EPS/EDLI/ESIC) etc. to be valid as is for 1 year
- **Voluntary Coverage** –
  - PF- Employers may apply to Central Provident Fund Commissioner to come under/to come out of applicability of EPF
  - ESI Introduced for the first time
    - Employers may apply to Director-General to come under/to come out of applicability of ESIC
  - Option out of Voluntary Coverage – Employer and Majority of employees to apply
    - Only after 5 years of such voluntary coverage
    - Deemed approval – 60 days from date of application
    - Not possible if the threshold reached
- **Coverage to continue, even if the numbers fall below threshold**

Applicability - Schedule-I

Chapter Heading	Applicability of the Code	Erstwhile Act
EPF	• Every establishment in which 20 or more employees are employed	• 20 or more employees • Almost all Industries covered

ESIC	• Every establishment in which 10 or more persons are employed other than a seasonal factory
	• Hazardous Establishment
	    • In establishment carrying on hazardous/life threatening activity it shall apply even if 1 employee is employed
	• Plantations – Optional
	    • Employer of plantation given option to opt for application of Chapter if the benefits are better than those being provided
		• 20 or 10 depended upon the State Notifications post 2011 amendment

Gratuity	• Every factory, mine, oilfield, plantation, port and railway company • Every shop or establishment in which 10 or more employees are/were employed on any day in the preceding 12 months • and those that may be notified by appropriate Government	• 10 for shops • Even 1 for factories • Such other establishment empoying 10 or more – to be notified by Central Govt

Schedule-I (cont…)

Chapter Heading	Applicability
Employee’s Compensation	Subject to provisions of Second Schedule, it shall apply to employers and employees to whom ESI Chapter does not apply
Social Security for BoCW	Every establishment which carries out building and other construction work
Social Security for Unorganized Workers’	Unorganized sector, unorganized workers’, gig worker, platform worker
Employment Information and Monitoring	Career centres, vacancies, persons seeking service of career centres and employers

Schedule-I juxtaposed with Erstwhile Acts

Chapter Heading	Applicability of the Code	Erstwhile Act
EPF	• Every establishment in which 20 or more employees are employed	• Every establishment which is a factory under Schedule-I in which 20 or more persons are employed • Any other establishment employing 20 or more

ESIC	• Every establishment in which 10 or more persons are employed other than a seasonal factory
	• Hazardous Establishment
	    • In establishment carrying on hazardous/life threatening activity it shall apply even if 1 employee is employed
	• Plantations – Optional
	    • Employer of plantation given option to opt for application of Chapter if the benefits are better than those being provided
		• Shall apply in first instance to all factories (including Govt. factories) other than seasonal factories
		• Appropriate Govt. can extend by notification

Gratuity	• Every factory, mine, oilfield, plantation, port and railway company • Every shop or establishment in which 10 or more employees are/were employed on any day in the preceding 12 months • and those that may be notified by appropriate Government	• Every shop or establishment in which 10 or more persons are/were employed on any day in the preceding 12 months • Any other establishment or class thereof in which 10 or more persons are/were employed on any day in the preceding 12 months, as the Centre may specify vide notification • Every factory, mine, oilfield, plantation, port and railway company
MB	• Every establishment being a factory, mine or plantation and any such establishment belonging to Government • Every shop or establishment in which 10 or more employees are/were employed on any day in the preceding 12 months and those that may be notified by appropriate Government	• Every establishment being a factory, mine or plantation including those belonging to Govt. • Every establishment where persons are employed for exhibition of equestrian, acrobatic and other performances • Every shop and establishment in which 10 ore more employees are/were employed in preceding 12 months

Definitions

Employer

"employer" means a person who employs, whether directly or through any person, or on his behalf or on behalf of any person, one or more employees in his establishment …(Govt)………., and includes,—

(i) in relation to an establishment which is a factory, the occupier of the factory
(ii) In relation a mine, the owner/agent/manager
(iii) In relation to any other establishment, the person who, or the authority which, has ultimate control over the affairs of the establishment and where the said affairs is entrusted to a manager or managing director, such manager or managing director;
(iv) contractor;
(v) legal representative of a deceased employer

EPF Act - 1952

"employer" means-

In relation to establishment which is factory, the owner/occupier including the agent, legal representative and manager

In relation to any other establishment, the person/authority having ultimate control over affairs-manager, managing director, managing agent

Gratuity Act - 1952

"employer" means in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop-

Person/Authority having ultimate control

ESI Act - 1952

"immediate employer" means-

In relation to employees employed by or through him, means a person on the premises of a factory/establishment or under the supervision of principal employer or agent

Includes a contractor and person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire

Contract Labour

Code on Social Security

"contract labour" means a worker who shall be deemed to be employed in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer **and includes inter-State migrant worker** but **does not include a worker (other than part-time employee) who —**

(i) is regularly employed by the contractor for any activity of his establishment and his employment is governed by mutually accepted standards of the conditions of employment (including engagement on permanent basis), and

(ii) gets periodical increment in the pay, social security coverage and other welfare benefits in accordance with the law for the time being in force in such employment;

Not defined in any of the subsumed Acts

Implications

1) Defined in each of the Codes, probably to emphasise the Contractor being Employer and the implication for PE

2) Exclusion of "Regularly Employed by the Contractor" significant because

3) Well Executed Contracts and Deployments can avoid being Contractor/Contract Labour

4) Contract labour under the Code includes inter-State migrant workers within its scope

Employee

Code on Social Security

“Employee" means, any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment, **either directly or through Contractor,** to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union;

Exempted employee defined as an employee to whom the schemes under Section-15 of Chapter-III (PF) would ordinarily apply but for the exemption granted under the Code, and, for the purpose of Chapter-IV **(ESIC)** means an employee whose wage is specified by notification and who is not liable to pay employee’s contribution

Proviso-1	**Proviso-2**	**Proviso-3**
For Chapters relating to EPF and ESI, *employee* shall mean those employees earning wages less than wage ceiling notified (Except for Provident Fund Scheme)	For counting employees for coverage under Chapters relating to EPF and ESI, *employee* shall include those whose wages are more than wage ceiling notified	For Chapter relating to employee compensation, the term *employee* shall mean only persons specified in the Second Schedule

Implications

- The term employee is used almost exclusively throughout the Code as the intention is to cover the largest number of employed persons.
- Proviso 1 – Means for
  - Provident Fund Scheme even the one drawing wages above threshold (15K) would be employees; Therefore contribution upto Threshold to be paid
  - For EPS, the ones above threshold are not “employees”
    - Supreme Court decision on EPS coverage for all
- **“Either directly or through Contractor” in the Employee definition**
  - No more doubts about Principal Employer and responsibility for Gratuity/Maternity Benefit/Employee Compensation

Establishment

"Establishment" means-

(a) Place where industry, trade, business, manufacture or occupation is carried on

(b) Factory, motor transport undertaking, newspaper establishment, audio-visual production, building and other construction work or plantation

(c) Mine, port, vicinity of port

Explanation : For the purposes of EPF Chapter departments/branches of an establishment shall be treated as part of the same establishment

"Factory" means any premises including the precincts thereof-

(a) Where 10 or more employees are/were working… manufacturing process carried on with aid of power

(b) Where 20 or more employees are/were working… manufacturing process carried on without aid of power

Does not include mines, railways running shed, hotel, restaurant, army mobile unit

<u>Exp-1</u>: For computing no. of employees, all employees in different groups and relays shall be taken into account

<u>Exp-2</u>: Mere fact that an electronic data processing unit/computing unit is installed on premises shall not lead to construction that an undertaking is factory if there is no manufacturing process being carried on

Manufacturing Process Means any process for:

(i) Making, altering, repairing, finishing, washing, cleaning, oiling, ornamenting, demolishing, refining, treating or adapting any article/substance with a view to its use, sale, transport, delivery or disposal;

(ii) Pumping oil, water, sewage or any other substance;

(iii) Generating, transforming or transmitting power;

(iv) Composing, offset printing, printing by letter press, lithography, photogravure screen printing, three or four dimensional printing, prototyping, flexography or other types of printing process or book binding;

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;

(vi) preserving or storing any article in cold storage; or

(vii) Such other activities as the Central Government may notify;

Implications

- Read with the Applicability Schedule
  - Even factories with 10 more employees will be covered for all benefits
- Employees in every sector would be entitled for All aspects of Social Security (Organised Sector)
- Extension of the concept of Establishment
  - To include Depts/Branches/ Depos
  - Significantly only for EPF
  - Applicability at Every office/ Store?

Fixed Term Employment

Code on Social Security

“Fixed term employment" means the engagement of an employee on the basis of a written contract of employment for a fixed period:

Provided that

(a) His hours of work, wages, allowances and other benefits shall not be less than permanent employee doing the same work or work of a similar nature;

(b) He shall be eligible for all benefits, under any law in force, available to a permanent employee proportionately according to period of service rendered by him if even if it does not extend to the qualifying period under the enactment

Implications

- Social security benefits like PF, ESI, gratuity etc. will have to be paid to FTEs
  - With Regards to Maternity Benefit, interesting questions
    - If FTE term expires during Pregnancy ?
- FTEs, roll and responsibility, experience shall be clear
  - Otherwise there is scope for comparison with permanent workmen and therefore provision of equal benefit
- Should be hired for activities that by nature require workmen that are not required on a permanent basis (For Eg: to cope with increased demand or to carry out task of intermittent nature)
- Impractical to hire FTEs for roles that require permanent workmen as the same could lead to increased liability towards

Inter-State Migrant Worker

Code on Social Security

“inter-State migrant worker” means a person who is employed in an establishment and who-

(i) **Recruited directly by employer or indirectly by contractor in one State for employment in another State**

(ii) **Has come on his own from one State and obtained employment in destination State or has subsequently changed employment in destination State**

Drawing wages not exceeding Rs. 18,000/- per month

Implications

- ISMW included under the definition of contract labour
- Contractors will have to be wary of the threshold specified and determine the type of work
- Maintaining data on a worker’s state of origin etc. is essential to avoid confusion

Aggregator/Platform work

Aggregator means a digital intermediary or a market place for a buyer or user of a service to connect with the seller or service provider

The Seventh Schedule List

1. Ride Sharing Services
2. Food and Grocery Delivery Services
3. Logistic Services
4. E-Market place (both marketplace and inventory model) for wholesale/retail sale of goods and/or services (B2B/B2C)
5. Professional services provider
6. Healthcare
7. Travel and Hospitality
8. Content and media services
9. Any other goods and services provider platform

"Platform Work" means a work arrangement outside the **traditional employer-employee relationship** in which organizations or individuals use an online platform to access others to solve specific problems or provide specific services or such other activities as may be notified by the Centre, in exchange for payment

Implications

- **Landmark change in Indian labour framework as individuals employed by aggregators are recognized by the law**
- **Recognition of Work Arrangements outside the normal Employer and Employee Relationships**
- Manifold increase in coverage of workers under social Security

Interesting Questions and Options

- Who can be a Platform/Gig Worker
    - Can every employer create a platform and engage platform workers?
- Social Security on contribution basis
- How can my organization utilize the benefits of the freelance economy?
- Can I hire gig workers in full time roles?

Platform Worker, Gig Worker

Gig Worker means A person who performs work and earns from such activities outside the traditional employer-employee relationship

Platform Worker means A person engaged in or undertaking platform work.

Implications

- Traditional employer-employee relationship gives employer control over how the work must be carried out
  - in the case of platform workers the employer merely connects the worker to those with task to be performed
- Platforms/Aggregators - require a particular task to be conducted or a solution/service to be provided
  - For example:- Urban Clap as a provider of platform work connects various individuals such as barbers, electricians, plumbers to people who require them
- Big steps towards embracing Industry 4.0 which is being driven by such types of work
- Freelance industry expected to grow to an estimated value of $20-30 billion by 2025
- Code recognizes such types of work and empowers the Govt. to provide adequate social security

Unorganised Sector

Home-Based Worker	A person engaged in production of goods or services for an employer in his home or other premises of his **choice other than the workplace of the employer,** for remuneration, irrespective of whether or not the employer provides the equipment, materials etc.
Self-Employed Worker	Any person who is not employed by an employer, but engages himself in any occupation in the unorganized sector subject to a **monthly earning of an amount notified by the Centre or State** as the case may be, **or holds cultivable land subject to such ceiling** as may be notified by the State
Wage Worker	• Employed for remuneration in the unorganized sector • Directly by an employer or through any contractor • Irrespective of place of work • Whether exclusively for one employer or for one or more employers • Whether in cash or in kind • Whether as a home-based worker, or as a temporary or casual worker, or as a migrant worker, or workers employed by households including domestic workers • With a monthly wage of an amount as may be notified by the Central Government and the State Government, as the case may be
Unorganised Worker	• Home-based worker • Self-employed worker • Wage worker in the unorganized sector • Worker in organized sector not covered by ID Act, 1947 or Chapter III to VII of Code
Unorganised Sector	"unorganised sector" means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten;

Implication	• Definitions of sector, types of workers, • Provision for Unorganised sector state level SSO, • Chapter IX empowering Govts • Universal Social Security – Base being set up

Social Security for Unorganised Sector

a. Centre authorised to provide for
    i. Life and Disability Cover
    ii. Health & Maternity
    iii. Old Age Protection
    iv. Education
    v. Any other as deem fit

b. State for
    i. PF
    ii. Employment Injury Benefit
    iii. Housing
    iv. Educational Scheme for children
    v. Skill Upgradation
    vi. Funeral Benefits
    vii. Old Age Homes

c. Funding – Govts/Contribution from beneficiaries/Even CSR

d. Aadhar to be basis for Identification
    a. To be valid, there should be contribution from the Consolidated Fund of India

Social Security for Gig Workers

a. Only Centre for Gig and Platform workers

b. TO Provide for
    i. Life and Disability Cover
    ii. Accident Insurance
    iii. Health & Maternity
    iv. Old Age Protection
    v. Creche
    vi. Any other as deem fit

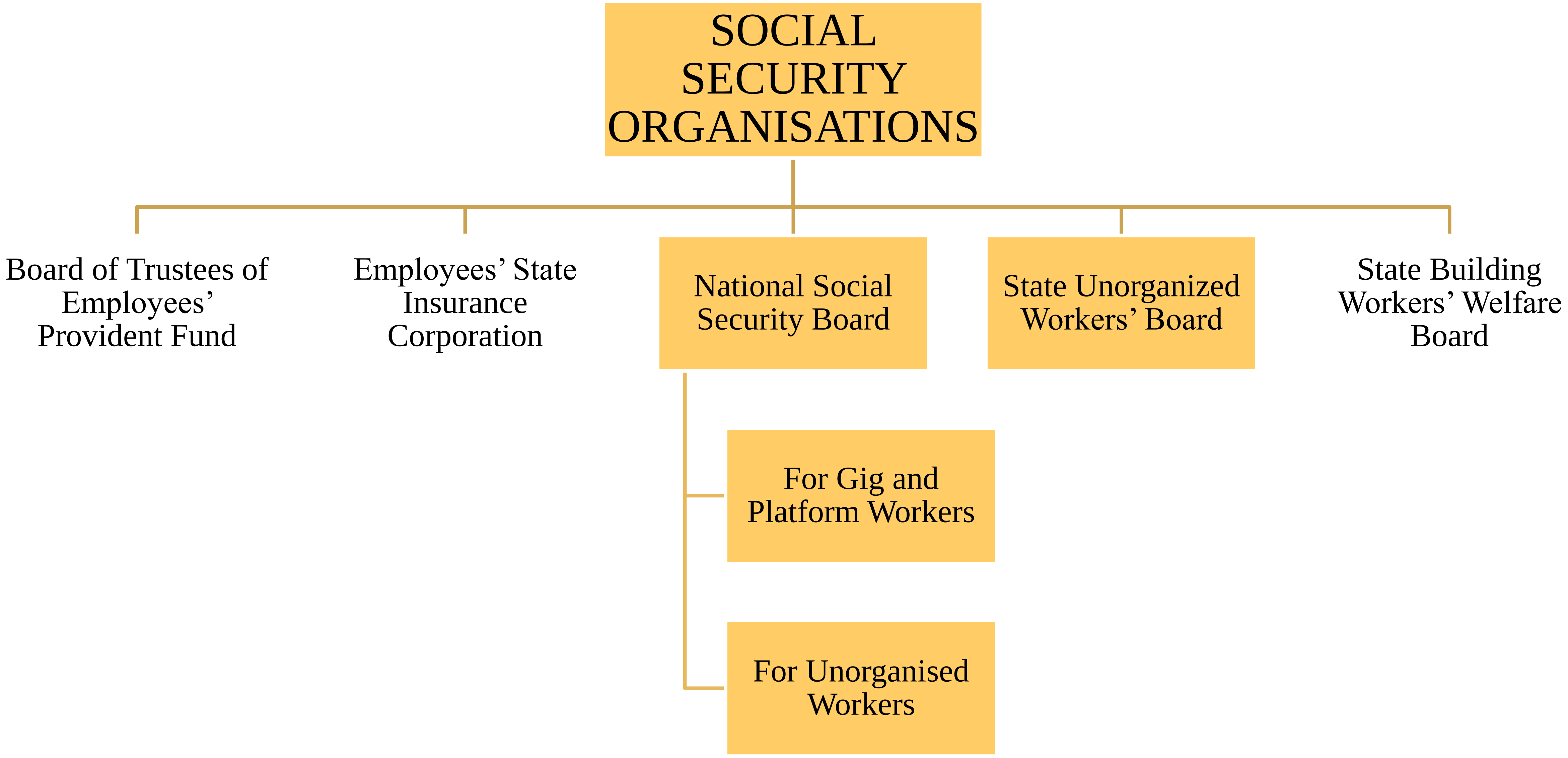
c. Contribution from Aggregators – 1% to 2% of Annual Turnover (excluding taxes/cess paid to govt)
    i. Not to exceed 5% of amount payble to GIG/PF Workers

d. Aadhar to be basis for Identification
    a. To be valid, there should be contribution from the Consolidated Fund of India

Registration and Cancellation of an Establishment

- **Registration of every establishment**
  - Every establishment shall register *electronically or otherwise* within time prescribed
  - Shram Suvidha Portal – Online
    - Online verification of KYC – PAN or any unique number allotted
    - Certification of Registration within 7 days
      - Deemed registration if the application is complete, if not registered within 7 days
- **Continuation of Existing Registration**
  - Already registered (Central)– Deemed Registered
  - PF code or ESIC Code or CLRA
- **Cancellation of Registration**
  - Who Can apply –
    - Any establishment to which EPF/ESI chapter applies,
    - & whose business activities are closing down may apply for cancellation of registration
- **Periodic updating of particulars required**
  - Deemed Registered (Already Registered) To update
- **Display and Mention**
  - Registration certificate to be displayed at a conspicuous place
  - Employer shall quote the Registration Number on all documents prepared in connection with the Code/Scheme/Rules or Regulations

Chapter-II: Social Security Organizations


SOCIAL SECURITY ORGANISATIONS
Board of Trustees of Employees' Provident Fund
Employees' State Insurance Corporation
National Social Security Board
State Unorganized Workers' Board
State Building Workers' Welfare Board
For Gig and Platform Workers
For Unorganised Workers

Chapter-III: Employee Provident Fund

Salient Features and Changes

- **Status Quo?**
  - The broad framework and substantive provisions of the EPF Act as well as EPF, EPS and EDLI schemes have been retained under the Code
  - Applicable to all establishments having **20 or more workers** with others under the threshold given the option to voluntarily apply and come under scope of EPFO
  - Threshold 15K to Continue?
    - Central Govt. shall specify vide notification, the rates of employees' contribution to the EPF Scheme and the period for which the same shall be applicable along with wage ceiling
  - Draft Central Rules of the Code merely provide for matters relating to Central Board,
    - Schemes likely to be replicated
- **Wage Definition impact**
  - Addition of excess excluded allowances back to wages
  - No More Confusion between Wage definition and Operating Section (2(b) vs Section 6)

Provident Fund: Scenario Analysis

When the proviso is inapplicable

Components	INR
Basic and Dearness Allowance	7,000
Bonus	583
Conveyance Allowance	1,000
House Rent Allowance	2,000
Overtime Allowance	840
Sum paid to defray special expense	1,000
Sum total of allowances	**5,423**
Remuneration	**12,423**
PF Wages as per Vivekananda judgment (incl. allowances except HRA)	**9,000**
PF Wages under Code	**7,000**
PF Contribution as per Vivekananda	**1170**
PF Contribution under Code	**910**

When the proviso to *wages* applies

Components	INR
Basic and Dearness Allowance	7000
Bonus	583
Conveyance Allowance	1000
House Rent Allowance	3000
Overtime Allowance	1000
Sum paid to defray special expense	1000
Commission payable to employee	1000
Gratuity on termination	337
Sum total of allowances	**7760**
Remuneration	**14,760**
Deemed Wages (50% of remuneration-sum of allowances)	**380**
PF Wages as per Vivekananda judgment (incl. allowances except HRA)	**9000**
PF Wages under Code	**7380**
PF Contribution under Vivekananda	**1170**
PF Contribution under Code	**959**

Key Takeaways from PF Scenario Analysis

Employer’s Contribution

Chapter-IV: Employees’ State Insurance

Salient Features and Changes

- **Status Quo**
  - The broad framework and substantive provisions of the ESIC Act and benefits thereunder has been retained under the Code
- **Pan India Coverage**
  - Implemented/Non Implemented Area – NO Longer a problem
  - Pan-India coverage Vs current facility being provided to 566 districts only
    - Linkage with Ayushman Bharath
- **More Employees would be covered**
  - Biggest Impact of Wage Definition
  - Requires Employers to make a call

    GMC Vs ESIC, GMC Plus ESIC (Benefits comparable ?)

    Coverage and availability of facilities/ Employee Perception
- **Standardized Applicability**
  - To establishments with **10 or more employees**
  - Establishments engaged in hazardous activities would mandatorily have to be linked with ESIC irrespective of the number of workers engaged
- **Voluntary Coverage**
  - Establishments given the option to adopt ESI Act voluntarily even if they fall under the 10-employee applicability threshold

ESIC: Scenario Analysis 1

When the proviso is inapplicable

Components	INR
Basic and Dearness Allowance	7000
Bonus	583
Conveyance Allowance	1000
House Rent Allowance	2000
PF Contribution	840
Sum paid to defray special expense	1000
Sum total of allowances	**5423**
Remuneration	**12,423**
ESIC Wages (Gross as per the current Act)	**11,583**
Wages under Code	**7000**
ESIC Contribution as per Act	**376**
ESIC Contribution under Code	**228**

When the proviso to *wages* applies

Components	INR
Basic and Dearness Allowance	7000
Bonus	583
Conveyance Allowance	1000
House Rent Allowance	3000
Overtime Allowance	1000
Sum paid to defray special expense	1000
Commission payable to employee	1000
Gratuity on termination	337
Sum total of allowances	**7760**
Remuneration	**14,760**
Deemed Wages (50% of remuneration-sum of allowances)	**380**
ESIC Wages (Gross as per the current Act)	**13,920**
Wages under Code	**7380**
ESIC Contribution as per Act	**452**
ESIC Contribution under Code	**240**

ESIC: Scenario Analysis 2

Increased Coverage

- More employees come under the coverage as "Wage" reduces

For example:- where HRA is a component that is pushing the wages above 21K

Liability Under Code

Components	INR
Basic and Dearness Allowance	7,500
Conveyance Allowance	800
House Rent Allowance	10,000
Commission	2,500
Sum paid to defray special expense	1000
Sum total of allowances	**14,300**
Remuneration	**21,800**
Deemed Wages	**3,400**
Wages under Code	**10,900**
ESIC Contribution under Code	**354.25**

Liability Under Act

Components	INR
Basic and Dearness Allowance	7,500
Conveyance Allowance	800
House Rent Allowance	10,000
Commission	2,500
Sum paid to defray special expense	1000
Sum total of allowances	**14,300**
Remuneration	**21,800**
Deemed Wages	**N/A**
Wages under Code	**7000**
ESIC Contribution under Act	**Above threshold N/A**

Chapter-V: Gratuity

Payment of Gratuity

Gratuity payable to an employee on termination of employment after continuous service of not less than 5 years on-

(a) Superannuation
(b) Retirement/Resignation
(c) Death/Disablement
(d) Termination of contract period under FTE (Proviso to 53(1) - Expiration of FTE)
(e) On happening of such event as maybe notified by Centre

- **For working journalists the 5-year requirement reduced to 3 years**

- **Continuous service requirement of 5 years**
  - Except - FTEs - Are they eligible after 1 Year?
    - IR Code by definition "After 1 Year"
    - Rule 35 (1)(a) – Proviso "an employee on fixed term employment shall be eligible for gratuity, if he renders service under the contract for a period of one year ……………, for every completed year of service or part thereof in excess of six months.
  - Except for termination is due to death, disablement
  - Such events as may be notified

- **In case of death of an employee gratuity shall be paid**
  - His nominee/His Heirs (in case no nomination is made)
  - Competent Authority to be notified by appropriate Govt. (Where nominees/heirs are minors)
    - Money to be kept in bank/financial institution to be kept in bank or financial institution till minor attains age of majority

- **Forfeiture of Gratuity**
  - If terminated for act/willful omission, negligence, causing damage/loss, destruction of property
    - To the extent of loss / Principle of Natural Justice
  - If terminated for riotous/disorderly conduct/violence/offence involving moral turpitude
    - shall be wholly/partially forfeited

Calculation of Gratuity

For every completed year of service or part thereof in excess of 6 months, the employer shall pay gratuity to an employee at the rate of-

15 days wages or such number as may be notified

Based on last drawn wages
Formula remains unchanged
Monthly rate of wages divided by 26 multiplied by 15

- For piece-rated employees, daily wages to be computed on the average of total wages received for period of 3 months preceding termination of employment
  (i) Wages for overtime shall not be taken into account
- For employees in seasonal establishment who are not employed throughout the year, the employer shall pay at the rate of 7 days' wages for each season
- **FTEs to be paid gratuity on *pro rata basis***
  - ***Proviso to 53(2) – Vis a Vis Proviso 53(1)(a), Proviso to Rule 35(1), IR code defintion***
- Maximum amount of gratuity to be capped by Central Govt. (Will current 20L cap remain?)
- In case of gratuity for employees employed after disablement on reduced wages, his wages subsequent to disablement shall be taken into consideration for calculation

Continuous Service

Continuous service:

- Uninterrupted service
- Including absence on account of sickness, accident, leave, absence from duty without leave, lay-off, strike, lockout or cessation of work due to no fault of employee
- Whether such uninterrupted or interrupted service was rendered before or after the commencement of the Code

- Where employee (not being seasonal employee) is not in continuous service as specified for a period of 1 year or 6 months, he shall be deemed to be so if-

  (a) 1 year period, if he has actually worked for at least:
    - 190 days in case of employee in mine/establishment underground working less than 6 days a week
    - 240 days in any other case

  (b) 6 month period, if he has worked for at least:
    - 95 days in case of employee in mine/establishment underground working less than 6 days a week
    - 120 days in any other case
- For the above number of days worked includes lay-off under ID Act, leave with full wages, absence due to temporary disablement in course of employment and maternity leave of 26 weeks
- Employee in seasonal establishment not in service for 1 year/6 month, shall be deemed to be in continuous service if he has actually worked for at least 75% of number of days the establishment was in operation
- **New KA HC Decision**

Gratuity vis-à-vis wages

The scenarios depict the change in gratuity liability attributed to two different interpretations of wage definition.

Special Allowance Included

Components	INR
Basic	21,960
Dearness Allowance (LTA)	3294
Special Allowance	36,966
Sum of Included Components	62,220
Bonus	1800
House Rent Allowance	10,980
Sum paid to defray special expense (Not considered special allowance)	0
Sum total of allowances	12,780
Remuneration	75,000
Proviso Applicable	No
Wages for Gratuity Calculation	62,220

Special Allowance Excluded

Components	INR
Basic	21,960
Dearness Allowance	0
Special Allowance	15,540
Sum of Included Components	37,500
Bonus	1800
Conveyance Allowance (LTA)	3294
Sum paid to defray special expense (Partly)	21,426
House Rent Allowance	10,980
Sum total of allowances	37,500
Remuneration	75,000
Proviso Applicable	No
Wages for Gratuity Calculation	37,500

The scenarios depict the change in gratuity liability attributed to two different ways of structuring wages

Special Allowance Included

Components	INR
Basic	21,960
Dearness Allowance	3294
Special Allowance	36,966
Sum of Included Components	62,220
Bonus	1800
House Rent Allowance	10,980
Sum paid to defray special expense - Not considered special allowance	
Sum total of allowances	12,780
Remuneration	75,000
Proviso Applicable	No

Special Allowance readjusted/ Partially Excluded

Components	INR
Basic	21,960
Dearness Allowance	3294
Special Allowance - Considered part of SA under the exclusions	12,246
Sum of Included Components	37,500
Bonus	1800
House Rent Allowance	10,980
Sum paid to defray special expense	24.720
Sum total of allowances	37,500
Remuneration	75,000
Proviso Applicable	Yes
Deemed Wages	00

Appeal and Compulsory Insurance

Appeal

- Aggrieved person to apply within 60 days
- Sufficient cause→ Extension
- No appeal without Certificate showing amount of gratuity deposited/deposits such amount
- App. Govt./Appellate Authority may modify/confirm/revers decision after hearing

Compulsory Insurance

- App. Govt. to notify date from which every employer other than State/Centre
- obtain an insurance in the manner prescribed by **the Central Government**, for his liability for payment towards the gratuity under this Chapter
- From any insurance company regulated under Section-2(1) of IRDA Act
- Employer to register with Competent Authority within period specified
- No registration without insurance
- Board of Trustees for gratuity fund will recover amount from insurer
- Failure to pay premium/contribution to an approved gratuity fund shall entail liability
- To pay amount of gratuity+interest on delayed payment

Gratuity for FTEs

Section-53(1)(d) r/w second proviso

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Section-53(2) r/w second proviso

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Definition of FTE under IR Code u/S.2(o)

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Proviso to Rule 35(1)

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Gratuity payable to FTE on pro rata basis, no continuous service of 5 years. Eligibility arises after one year of service.

IMPACT

- FTEs – Flexibility Vs Cost
- Contracts and agreements to be drafted carefully
- Drafting and HR Policy alignment is essential as requisite changes to company processes need to be made
- Novation/Renewal/Extension of contract will each have their own set of implications on gratuity liability
- Need to be provided benefits on par with permanent workmen if they are doing same work or work of similar natue

Chapter-VI: Maternity Benefit

General Principles

No employer to knowingly employ a woman in any establishment during 6 weeks immediately following day of delivery/miscarriage/medical termination of pregnancy

Arduous work/working for long hours while standing/work likely to interfere with development of child/cause miscarriage prohibited during period specified

- Period specified refers to:-
  - (a) One month preceding the period of 6 weeks before day of delivery
  - (b) Any period during the 6 weeks where the woman does not avail of leave of absence
- Every woman entitled to payment of maternity benefit notwithstanding application of ESI Chapter shall continue to be entitled until she becomes qualified to claim MB, under ESIC

Right to Payment of Maternity Benefit

Every woman entitled to, and employee liable for, payment of maternity benefit at the rate of average daily wage for the period of her actual absence

Section 62(5) – When to Pay

For Prior Period

in ADVANCE once proof pregnancy produced &

For Post delivery

within 48 hours of proof of delivery

- Period of actual absence:- period immediately preceding day of her delivery and any period immediately following that day
- Average Daily Wage:- **(Wage as Wages definition?)**
    - a) Average of woman's wages payable for the days on which she has worked
    - b) During 3 calendars months preceding date from which she absents herself on account of maternity
    - c) Subject to minimum wage rate under Code on Wages
- Entitlement for maternity benefit:-
    - a) Actually worked in establishment of employer
    - b) For a period of not less than 80 days in 12 months preceding date of delivery
- MB entitlement - **Maximum Period** 26 weeks - 8 weeks may precede expected date of delivery
    - a) For woman having 2 or more surviving children - 12/6
    - b) Death & MB
        - a) During MB period, MB only for the days up to and including day of her death
        - b) During delivery/immediately after, leaving behind child the employer
            - a) MB for entire period including any days up to and including death of child
- Child includes stillborn child
- WFH after Delivery –
    - Work is such that she may WFH, the employer may allow, on conditions to be mutually agreed on

Maternity Benefit In Case of Death/Medical Bonus/Leave for Miscarriage

Death

- In cases where woman entitled to MB dies
- Before receiving MB/amount/MB up to day of death
- Employer shall pay benefit/amount to nominee/legal representative

Medical Bonus

- Every woman entitled to MB
- Also entitled to medical bonus of Rs.3500/-
- Or such amount as may be notified
- If no pre-natal/post-natal care was provided by employer for free
- Medical (GMC) Insurance?

Miscarriage

- Miscarriage/MTP-woman shall be entitled to MB for 6 weeks preceding delivery
- Tubectomy-woman shall be entitled to 2 weeks following day of operation
- Illness arising out of pregnancy/delivery/premature birth/miscarriage/MTP entitled to additional leave up to 1 month

Nursing Breaks & Crèche Facilities

Nursing Breaks

Every woman delivered of a child who returns to duty shall be provided with

- 2 breaks of such duration as may be notified
  - For Nursing the child till age of 15 months
  - To be provided in addition to interval of rest
- 15 mins under Draft Rule

Eligibility

Chapter-VII: Employee’s Compensation

Salient Features & Overview

- By and large the provisions of the Employees' Compensation Act, 1923 have been retained
- Third Schedule specifies occupational diseases and scheme of compensation remains the same
- General principles and method for calculation of wages has been retained
- Notice and claim as well as dispute resolution and appeal through Competent Authority has been vested with Appropriate Government
- Shops & Establishments Act has made the EC Act applicable to those working in such establishments
- Will the same continue to apply?

Specific Changes

- Definition of wages under EC Act included benefit/privilege capable of being estimated in money. Excludes traveling allowance; contribution to provident fund; sum paid to defray special expenses entailed
- Contractor is employer as per the definition under EC Act
- Infirm dependents/dependents wholly liable on earning of employee are considered dependent till age 25, earlier the same was 18
- Definitions altered to *permanent partial disablement* and *permanent total disablement*, mere change in nomenclature

Chapter-VIII: Social Security for BoCW

Definition and Levy of Cess

Definition

Substantive portion of the definition remains unchanged

Change brought in wrt. Construction work threshold

Increased value for building work relating to residential purposes of 50 lakh or more

Excludes factory/mine or BoCW employing less than 10 workers

Levy

- Rate of cess to be notified by Centre
- Between 1% & 2% of cost of construction of employer
- Shall be collected from every employer either by deduction at source/in advance as may be prescribed
- Cess to be deposited with authority specified by State Govt. to Building Workers' Welfare Board

Chapter-XII: Offences and Penalties

Scheme of Penalties for Various Offences

Offence	**Fine**	**Imprisonment**
Employer fails to pay Contribution	INR 1,00,000/- Or INR 50,000/-	Term may extend to 3 years. Not less than one year in case of failure to pay employee contribution. Not less than 2 months in any other case
Deducts/Attempts to deduct employer contribution from employee wages	INR 50,000/-	Not applicable
Contravenes Chapter-IV or VI or rules/regulations/scheme thereunder dismisses/reduces rank/otherwise penalizes woman employee	INR 50,000/-	Not applicable
Fails/Refuses to submit report/return/statement or information under Code/Rules/Regulations/Schemes	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Obstructs Inspector-cum-Facilitator/Staff of Central Board/Corporation/Social Security Org/Competent Authority	INR 50,000/-	Not applicable
Fails to pay amount of gratuity	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Fails to pay compensation under Code	INR 50,000/-	Imprisonment for a term of 1 year; Or Both
Fails to provide maternity benefit	INR 50,000/-	Not applicable

Scheme of Penalties for Various Offences contd..

Offence	**Fine**	**Imprisonment**
Fails to send statement to competent authority under Chapter-VII	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Fails to produce register/document before Inspector-cum-Facilitator	INR 50,000/-	Not applicable
Fails to pay BoCW cess	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Guilty of contravention/non-compliance with Code/Rule/Regulation/Scheme of which no penalty is provided hereunder	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Obstructs Executive Officer under Chapter-XIII	INR 50,000/-	
Dishonestly makes false return, report, statement or information	INR 50,000/-	Imprisonment which may extend to 6 months; Or Both
Fails/Defaults in compliance with condition subject to which exemption u/S.143 was granted	INR 50,000/-	
Fails to pay administrative/inspection charges under any scheme of Chapter-III	INR 50,000/-	

Chapter-XIV: Miscellaneous

Liability in Case of Transfer of Establishment

Where an employer

transfers his establishment

in whole or in part by:-

- Sale
- Gift
- Lease
- License
- Other manner

Employer and other person to whom the establishment was transferred shall jointly and severally be liable to pay amount due in respect of any liabilities or any other amount in respect of period up to date of transfer

Important from an M&A perspective

Transitional Provisions

Notwithstanding anything contained in the Code, following organizations:-

(i) Central Board u/S.5A of EPF Act

(ii) Executive Committee u/S.5AA of EPF Act

(iii) Corporation u/S.3A of ESI Act

(iv) Medical Benefit Council u/S.10 of ESI Act

(v) Standing Committee of Corp u/S.8 of ESI Act

(vi) Board u/S.18(1) of BoCW (Regulation) Act

Shall after commencement of Code:

- Continue to exercise powers and functions of corresponding organizations under the Code
- Central Board of Trustees for EPF u/S.4; Executive Committee for ESI u/S.4(3) etc.
- As if such organizations established under repealed enactments had been constituted under respective provisions of the Code
- Till their respective time period under repealed enactments expire/Till such corresponding organizations are constituted under the Code