Revised norms relating to PF and gratuity under the Code on Social Security, 2020

29 October 2020

First Notes on

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Sector

All

Banking and insurance

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Relevant to

All

Audit committee

CFO

Others

Transition

Immediately

Within the next three months

Post three months but within six months

Post six months

Forthcoming requirement

Background

With an aim to rationalise labour laws prevalent in India, the Second National Commission on Labour (the Commission)[1] in its report[2] recommended that the existing set of labour laws should be broadly categorised into the following groups:

a. Industrial relations

b. Wages

c. Social security

d. Safety and

e. Welfare and working conditions.

These labour codes relate to following topics:

The Code on Wages

The Code seeks to amend and consolidate the laws relating to wages and bonus and matters connected therewith or incidental thereto.

The Occupational Health, Safety and Working Conditions Code

The Code seeks to amend the laws regulating the occupational safety, health and working conditions of the persons employed in an establishment and related matters.

The Industrial Relations Code

The Code seeks to consolidate and amend the laws relating to trade unions, conditions of employment in industrial establishment or undertaking, investigation and settlement of industrial disputes and related matters.

The Code on Social Security

The Code seeks to amend and consolidate the laws relating to social security with the goal to extend social security to all employees and workers either in the organised, unorganised or any other sectors and related matters.

While the Code on Wages received the assent of the President of India on 8 August 2019, the other three codes were presented in the monsoon session of parliament held in September 2020.

1. Formed by the Government of India in 1999.
2. Report issued in 2002.

New development

Recently, the three labour codes i.e. the Occupational Health, Safety and Working Conditions Code, the Industrial Relations Code and the Code on Social Security have been passed by the parliament and have also received the assent of the President of India on 28 September 2020.

In this issue of First Notes, we aim to summarise key features of the Code on Social Security, 2020 (the Code) along with highlighting the key changes introduced vis-à-vis existing provisions under various laws.

Overview of the Code on Social Security, 2020

Acts replaced

The Code subsumes following nine central labour laws relating to social security:

i. The Employees' Compensation Act, 1923
ii. The Employees' State Insurance Act, 1948
iii. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
iv. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959
v. The Maternity Benefit Act, 1961
vi. The Payment of Gratuity Act, 1972
vii. The Cine Workers Welfare Fund Act, 1981
viii. The Building and Other Construction Workers Welfare Cess Act, 1996
ix. The Unorganised Workers' Social Security Act, 2008.

Coverage of ESI provisions

Currently, the Employees' State Insurance (ESI) provisions are applicable to all factories (other than seasonal factories) or can be extended to such establishments as the appropriate government may by notification in the official gazette deemed fit post approval from the Central Government (CG).

The Code extends the coverage of ESI provisions to all establishments employing 10 or more employees and can be voluntarily applied by an employer of a plantation. It also empowers the CG to notify the applicability of ESI provisions to establishments which carry on the hazardous or life-threatening occupation irrespective of the number of workers employed therein.

Definition of an 'employee'

As per the Code, an 'employee' would mean any person (other than an apprentice) employed on wages by an establishment, either directly or through a contractor, to do any skilled, semi-skilled or unskilled, manual, operational, supervisory managerial, administrative, technical, clerical or any other work, whether the terms of employment be express or implied. It 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.

Accordingly, contract labours would also be eligible to receive gratuity subject to the provisions of the Code.

Definition of 'wages'

The government has now standardised the definition of 'wages' in the four codes. The definition of term 'wages' is similar to the definition provided under the Code on Wages, 2019.

The definition now has three parts to it – (1) an inclusion part, (2) specified exclusions and (3) conditions which limit the quantum of exclusions. The definition includes basic pay, dearness allowance and retaining allowance. The Code provides a list of components which are excluded from the definition of wages. It is to be noted that the Code on Wages, 2019 has introduced a new concept of 'deemed wages'. The specified exclusions, however, may not exceed 50 per cent of all remuneration, and in the event it exceeds, such excess amount shall be deemed as remuneration and will be considered as 'wages'. According to it, if an employee receives payments from an employer in the form of allowances or other amounts that are not included in the definition of wages and such payments exceed one-half, or such other per cent as may be notified by the CG, of the total remuneration, such an excess amount would be deemed as remuneration to be added in wages for the purpose of computation of PF and ESI contributions.

Overview of the Code on Social Security, 2020 (cont.)

Applicability of PF and pension schemes

The Code empowers CG to frame Employees' Provident Fund (PF) Scheme, Employees' Pension Scheme, Employees' Deposit Linked Insurance Scheme and any other scheme for the purposes of providing social security benefits under the Code to self-employed workers or any other class of persons. The provisions of these schemes can take effect either prospectively or retrospectively on and from such date as may be specified in the scheme.

Differential rates of employees' PF

The Code empowers CG to specify different rates for employees' contributions to the PF and the period for which such rates would apply for any class of employee.

Right to recover payment from employer

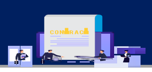
In case an employer fails to register an employee with the Employees' State Insurance Corporation (ESIC) or fails to pay any contribution which the employer is liable to pay consequent to which the benefits are being paid by the ESIC to the employee, then ESIC has a right to recover from the employer the capitalised value of the benefit paid to the employee, to be calculated in such manner as may be prescribed by the CG.

The capitalised value may be adjusted for the payment of any contribution and interest or damages that the employer is liable to pay for delay in the payment of or non-payment of such contribution.

Power to reduce or defer contribution

As per the Code, in the event of pandemic, endemic or national disaster, CG may by order defer or reduce employer's contribution, employee's contribution, or both payable with respect to PF and ESI for a period of three months at a time.

Priority in payment of contributions



As per the Code, money due towards employees' PF/amount due to ESIC would be a charge on the assets of the establishment to which it relates and should be paid in priority in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016.

Voluntary opting out

The Code enables an employer to make an application to the Central PF Commissioner/Director General of the ESIC for opting out of the provisions governing PF/ESI under the Code subject to an agreement between the employer and majority of the employees to this effect.

Gratuity period

Currently, gratuity is payable to an employee after a continuous service of not less than five years upon his/her superannuation, retirement/resignation or death or disablement due to accident or disease. Completion of five years is not mandatory where termination of employment is due to death or disablement.

In addition to the current requirement, the Code now provides that the completion of continuous service of five years will not be necessary where the termination of the employment of any employee is due to expiration of fixed term employment or happening of any such event as may be notified by the CG. Gratuity would be payable on a pro-rata basis, in case of an employee employed on fixed-term employment or a deceased employee.

Further, working journalist will be eligible for gratuity after a continuous service of three years.

Gratuity insurance

Currently, an employer (other than an employer or an establishment belonging to, or under the control of, the CG or a SG) is mandatorily required to obtain an insurance in respect of liability for payment of gratuity from Life Insurance Corporation of India.

The Code has now prescribed that such an insurance can be taken from any insurance company regulated by the Insurance Regulatory and Development Authority of India (IRDAI).

Overview of the Code on Social Security, 2020 (cont.)

Compensation for accident

As per the Code, an accident occurring to an employee while commuting from his/her residence to the place of employment for duty or from the place of employment to his/her residence after performing duty, would be deemed to have arisen out of and in the course of employment if nexus between the circumstances, time and place in which the accident occurred and his/her employment is established. Accordingly, in such a case, an employer will be required to compensate the employee.

Schemes for gig workers and platform workers

The Code empowers CG and SG to frame suitable social security schemes for different sections of unorganised workers[3], gig workers[4] and platform workers[5] on matters such as life and disability, health and maternity benefits and old age protection. These schemes may be funded wholly by the CG, partly by CG and State Government (SG) and also can be funded from Corporate Social Responsibility (CSR) fund within the meaning of the Companies Act, 2013.

A special purpose vehicle may also be constituted by the CG for the purpose of implementation of any such scheme.

Social security of building workers

The Code levies a cess to be collected from an employer engaged in building or other construction work for the purpose of social security and welfare of building workers at a rate not exceeding two per cent (minimum one per cent) of the cost of construction incurred by an employer. The Code also provides for self-assessment of cess by an employer in a specified manner.

Maintenance of records electronically

The Code requires employers of an establishment to maintain records and registers, electronically or otherwise, containing particulars and details with respect to persons employed, muster roll, wages and such other particulars and details, in such manner, as may be prescribed by the appropriate Government. These details may include, employees' identification number, number of dangerous occurrences/accidents in respect of which compensation has been paid by the employer and occupational details of the employees.

The Code also requires employers to file a return in electronic form or otherwise to such officer or authority in such manner and during such periods as may be prescribed by the appropriate Government.

Compliance with the Code

The CG may appoint Inspector-cum-Facilitators who will inspect the establishments as assigned to them and may also advice the employers and employees relating to compliance with the provisions of the Code. The Inspector-cum-Facilitators would be empowered to search, seize or take copies of such register, record of wages or notices or portions thereof as they may consider relevant in respect of an offence under this Code.

Offences by companies

As per the Code, in case of an offence committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, would be deemed to be guilty of the offence and would be liable to be proceeded against and punished accordingly.

Further, the Code also provides for compounding of offences committed for the first time, punishable with fine or punishable with imprisonment for a term which is not more than one year and also with fine.

3. A home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by the Industrial Disputes Act, 1947 or Chapters III to VII of the Code.
4. A person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship.
5. Person engaged in a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the CG, in exchange for payment.

Overview of the Code on Social Security, 2020 (cont.)

Appeal to the appellate authority

In case an order has been issued with respect to applicability of the PF and ESI provisions to an establishment or determination of related amount due from any employer and the employer is not satisfied with the order, it may appeal to the appellate authority within 60 days from the date of such order after depositing 25 per cent of the contribution so ordered or the contribution as per own calculation, whichever is higher, with the ESIC.

Power to exempt establishment

The Code empowers CG to grant exemption to an establishment or class of establishments (including factory or other establishments under the control of CG, SG or local bodies) or employees or class of employees, from any or all of the provisions of the Code or the scheme framed thereunder.

Effective date

The Code will come into force on such date as the CG may, by notification in the Official Gazette, appoint. Different dates may be appointed for different provisions of the Code.

Our comments

The code is expected to benefit employees in varied sectors in particular, those working in unorganised sectors, gig workers and platform workers as it empowers CG and SG to frame suitable schemes aimed to providing social security to these workers (which were not covered under any such schemes earlier). The Code requires companies engaged in employing gig and platform workers to contribute an amount of two per cent (maximum five per cent) of their annual turnover for the purpose of funding of these schemes. It is expected to increase the costs of company's operations and there is an ambiguity as to whether these costs would be passed on to the workers in the form of deductions from wages. This might get clear, once final rules corresponding to the Code are notified.

Some of the other key areas of consideration are as follows:

- **Gratuity for fixed-term contractual employees:** The Code extends gratuity entitlement to fixed-term contractual employees. Gratuity would be payable on a pro-rata basis to these employees, even if the contract is for less than five years. The companies would need to assess their existing contracts with contractual workers and initiate processes for the purpose of applicability of gratuity provisions as provided under the Code.

- **Flexibility in PF and ESI norms:** The Code permits an employer to voluntarily opt out from the PF and ESI provisions as prescribed under the Code subject to an agreement between the employer and majority of the employees to this effect.

- **Maintenance of records:** As the Code introduces various new requirements such as inclusion of contractual employees under gratuity norms, revised wage computation for the purpose of PF and ESI, these may require companies to maintain adequate records for the purpose of ensuring compliance with the provisions of the Code.

- **Offences and penalties:** The Code specifies stringent penal provisions for various offences. For instance, if an employer fails to pay any contribution to be paid under the Code, reduces the wages or any privilege or benefits admissible to an employee or fails to pay any amount of gratuity/maternity benefit, then it could be punishable with an imprisonment for a term up to three years.

  Further, in case an offence has been committed by a company, then every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, would be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Companies would need to understand various compliance requirements as prescribed under the Code so as to avoid incurring any penal provision.

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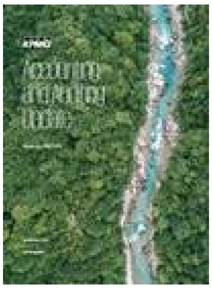

Issue no. 50 – September 2020

The topics covered in this issue are:

- Revised conceptual framework for financial reporting under Ind AS
- CARO 2020: Loans and investments and repayment of dues
- Regulatory updates

SEBI issues amendments for listed companies including disclosure of forensic audit

28 October 2020

On 8 October 2020, SEBI has issued another set of amendments to the Securities and Exchange Board of India (SEBI) (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) through the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2020. The amendments primarily relate to companies which have listed their NCDS/ NCRPS on the recognised stock exchange(s).

Additionally, related amendments have been made to the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (Debt Listing Regulations) and SEBI (Debenture Trustees) Regulations, 1993 (Debenture Trustees Regulations).

In this issue of First Notes, we aim to provide an overview of the key amendments made by SEBI.

Voices on Reporting

KPMG in India is pleased to present Voices on Reporting (VOR) – a series of knowledge sharing calls to discuss current and emerging issues relating to financial reporting.

On 19 October 2020, KPMG in India released the Voices on Reporting – quarterly updates publication (for the quarter ended 30 September 2020). The publication provides a summary of key updates from the Securities and Exchange Board of India (SEBI), the Ministry of Corporate Affairs (MCA), the Institute of Chartered Accountants of India (ICAI) and the Reserve Bank of India (RBI).

To access the publication, please click here.

Feedback/queries can be sent to aaupdate@kpmg.com

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