AJC NEWSLETTER

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Introduction

We here at Agarwal Jetley & Co. (**AJC**) are happy to bring you a weekly newsletter capturing the important updates that have taken place in the legal world. These updates will not only provide the information but also try and delve into a point of view that effects all involved in the legal business in any manner.

We would be happy to hear from you about the 'AJC Newsletter', the hits and misses, inputs and any clarifications that you all require and deem necessary. We thank you in advance for your efforts and would be more than happy to continue this trend of keeping everyone *"Legally Up to Date"*.

Aspects covered in this issue

In this issue we look at cover the ongoing concerns regarding provident fund for employees, working hours in factories in Karnataka, donations and contributions related to PM-Cares Fund and various other relevant topics.

The name and communication of the contributors is provided along with the topics and updates covered in this AJC Newsletter. Please feel free to get in touch with them for any clarifications.

SEBI may allow listing of unlisted non-convertible debentures

Introduction

In an unprecedented move to ease the burden on Mutual Funds (**MFs**), Securities Exchange Board of India (**SEBI**) is contemplating to allow for the listing of many unlisted non-convertible debentures (**NCDs**) to be allowed a window for listing.

Prevailing laws

As per Section 71 of the Companies Act, 2013 ("**Companies Act**") a company may issue debentures with an option to convert into shares, wholly or partly, at the time of redemption but cannot issue debentures with voting rights. As far as SEBI guidelines are concerned, the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 ("**Regulations**") deals with same. Amongst other requirements the Regulations require the aforesaid debt securities to be rated.

Mutual funds and NCDs

The prime object of this change appears to be aid the existing mutual funds (**MFs**) who have been bearing the brunt of the COVID-19 fiasco. These MFs will be able to tap in the market of listed NCDs to fill in their losses. It was on September 23, 2019, SEBI amended the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 that restricted MFs from investing in unlisted debt instruments Later a circular issued by SEBI on October 1, 2019 investments in unlisted NCDs not exceeding 10% of the debt portfolio of the scheme is allowed only when such unlisted NCDs have a which among others has a fixed maturity period without any options and is fully paid up upfront.

Impact

The proposal plans to infuse greater credibility to MFs and prop up the nervous markets of bringing necessary investments. However, it will be interesting to note whether SEBI follows the whole elongated procedure for listing of unlisted NCDs or shortens the process, particularly in the process of rating.

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Changes in EPF due to COVID-19

Introduction

Due to COVID-19 pandemic and the lockdown being in force across the country and the Central Government after making necessary inquiry decided to provide liquidity in the hands of employers and employees. Hence, the Ministry of Labour and Employment issued a notification dated March 27, 2020 ("**Original Notification**"), providing statutory provident fund contribution under the Employees' Provident Funds and Miscellaneous Provident Act, 1952 ("**EPF Act**") by both employers and employees to be reduced to 10 percent (10%) of basic salary from the existing 12 percent (12%). The Original Notification also allowed a non-refundable advance from the Employee Provident Fund (**EPF**) account of a member not exceeding the basic salary and dearness allowances of that member for three (3) months or up to seventy five percent (75%) of the amount standing to their credit in the fund, whichever is less. The Finance Minister Nirmala Sitharaman announced on May 13, 2020 as a part of the COVID - 19 financial package extended the aforesaid aspects of the Original Notification till July, 2020 and the same was notified vide and amendment dated May 18, 2020 extended ("**Subsequent Notification**").

Eligibility and effect

The Subsequent Notification reiterated the stance of the Government that this reduction of the EPF contributions will be applicable for workers who are not eligible for twenty four percent (24%) EPF support under the Pradhan Mantri Garib Kalyan Yojana (**PMGKY**) for three (3) months. The Central Government would contribute the entire twenty four percent (24%) of EPF contributions till August, 2020 as was stated vide a Government order. The PMGKY includes those establishments that have up to hundred (100) employees and ninety percent (90%) of who earn up to fifteen thousand rupees (Rs. 15,000) monthly salary.

In case an employee is working in an exempted establishment, the Employees Provident Fund Scheme, 1952 ("**EPF Scheme**"), formulated under the EPF Act provides that any amendment to the EPF Scheme, 1952, which is more beneficial to the employees becomes applicable to exempted establishments. Therefore, the employees of an exempted establishment can withdraw from their EPF accounts maintained with the EPF Trust of the establishment by making application to the EPF Trust.

The Employees Provident Fund Organization (**EPFO**) stated that this would increase the take home pay of 4.3 crore organised sector employees' and reduce the liability of six point five 6.5 lakh employees reeling under liquidity crunch under lockdown to contain COVID-19. The employees' take-home salaries would increase while the employers' liabilities would reduce for May, June and July of 2020 as the Labour Ministry had notified a two percent (2%) cut in the EPF contribution rate on May 18, 2020.

As of the reduction, the employer's liability reduced by two percent (2%) of salary of his employees so that they do not suffer a loss as a result of the continuing contribution towards the EPFO. For example, instead of the initial take home pay after a reduction in statutory rate of contributions of twelve percent (12%) from fifteen thousand rupees (INR 15,000) being thirteen thousand two hundred rupees (INR 13,200) it may be increased to thirteen thousand five hundred rupees (INR 13,500). The employer's liability to contribute to the employees' EPF has reduced from eight hundred rupees (INR 800) to five hundred rupees (INR 500).

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The Original Notification also amends the EPF Scheme, 1952 by inserting sub-para (3) under para 68L of the EPF Scheme, 1952 to provide for non-refundable advance to EPF members not exceeding the basic salary and dearness allowances for three (3) months or upto seventy five per cent (75%) of the amount standing to member's credit in the EPF account in the event of outbreak of epidemic or pandemic. The pandemic withdrawal adds to a select list of events under which subscribers are allowed non-refundable withdrawal. The request of withdrawal under the new pandemic rules of the pension fund will be honoured within three (3) days.

Additional changes

The EPFO has declared that they have released eight hundred and INR 868 crore pension along with INR 105 crore arrears on account of restoration of commuted value of pension. The higher pension benefit will be restored after fifteen (15) years from the date of receiving commuted pension at the time of retirement. This means an individual who retired on April 1, 2005, would be eligible to receive the benefit of higher pension after fifteen (15) years i.e. from April 1, 2020. The provision for pension commutation of pension was withdrawn by the EPFO. Now, the facility has been restored for all those who opted for it on or before September 25, 2008. An EPFO panel had recommended for amendment in Employees' Pension Scheme, 1995 (**EPS-95**) for restoration of commuted value of pension to pensioners after fifteen (15) years of drawing commutation. This is a historical step for the benefit of pensioners as prior to this under EPS-95, members were allowed to commute one-third (1/3) of their pension for ten (10) years, which was restored after fifteen (15) years.

As further bifurcation, the ten percent (10%) on the employer's side will be bifurcated as follows – (i) 8.33% of the contribution of the employer's contribution would go to the EPS-95; (ii) 1.67% EPF Scheme; (iii) 0.5% would be taken for Employees' Deposit Linked Insurance Scheme (**EDLI**) contribution; and (iv) 0.5% as administrative charges. All, of the ten percent (10%) of the employee's contribution would go towards the EPF Scheme.

Considering the difficulty faced by the establishments in the timely deposit of contributions or administrative charges due for any period during the lockdown, the EPFO has decided that such delays due to operational or economic reasons shall not be treated as default and penal damages should not be levied for such delay. They have also done away with any administrative charges for EDLI.

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Extension of working hours for factory employees in Karnataka

Introduction

The Karnataka State Government on May 22, 2020 issued a notification allowing factories to extend working hours up to ten (10) hours a day and sixty (60) hours a week till August 21, 2020. Therefore, for the next three (3) months, factories in Karnataka can ask their employees to work sixty (60) hours a week.

Current position

According to the Factories Act, 1948 ("**Act**") the number of working hours for an adult worker are limited to forty eight (48) hours a week. The Act limits the working hours of an adult worker to nine (9) hours (with breaks) a day and forty eight (48) hours in any week.

Change in the working hours

The Government has used its powers conferred under the Act, that is '*Power to exempt during public emergency'* and has ordered that all the factories registered under the Act shall be exempted from the provisions of earlier working hours of forty eight (48) per week/ 9 hours a day (with break). However, certain conditions have been laid down under which, no adult worker shall be allowed or required to work in a factory for more than ten (10) hours in any day and sixty (60) hours in any week.

Wages

The provisions of the Act regarding overtime wages shall continue to be applicable without any change. Therefore, in respect to overtime work, an adult worker shall be entitled to wages at the rate of twice his ordinary rate of wages.

Expected impact

The move is expected to boost manufacturing and supply of essential goods and services without violating the Home Ministry's guidelines on working with reduced staff to maintain social distancing to curb the spread of COVID 19. The decision will also help workers earn more while they are confined to the factory premises and would also help reduce the labour shortage.

Opposition

The decision was met with stern opposition by trade union leaders around the country. The Centre of Indian Trade Unions (**CITU**) opposed it and threatened to hit the streets in protest stating that during the tri-party meetings between labourers, factory owners and the Government, they hadn't sought an extension of working hours and claimed it to be a unilateral decision by the chief minister of Karnataka. Some argued that this move would aggravate the exploitation of workers in factories and also reduce employment opportunities due to increased working hours of existing employees. Few claimed the move would be similar to legalizing bonded labour.

Conclusion

This move is being seen as another step by the Government to liberalize labour laws and further amendments of the Industrial Disputes Act, 1947 and the Contract Labour (Regulation and Abolition) Act, 1970 are also expected by respective state governments. There are also deliberations taking place regarding increasing overtime in factories from seventy five (75) hours per quarter to one hundred (100) hours. The Karnataka Employers' Association has further sought relaxation from the provisions under the Industrial Disputes Act, 1947 which require industrial establishments employing one hundred (100) or more workmen to seek government permission to layoff or retrench employees or in order to close down.

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IT sector presses for major labour reforms

Introduction

India's information technology (**IT**) sector is seeking revisions in the country's labour law policy to absorb the effects of the COVID-19 disaster on its business. These reforms primarily pertain to - (i) terminations and layoffs; (ii) working conditions for women; (iii) policy change; and (iv) relaxation from compulsorily engaging apprentices. The National Association of Software and Service Companies (**NASSCOM**) wrote to various state governments seeking changes in labour laws to help IT firms cut expenditure during the COVID 19 crisis and also after it. Hence, they suggested that the aforementioned steps be taken in the same direction.

The proposed changes

The first and foremost change the IT sector is looking for is to allow for furloughs, temporary lay-offs and permission to allow terminating the services of surplus employees. Generally, as per the Industrial Disputes Act, 1947 ("**ID Act**") employees who are laid off from their employment have to be paid a minimum of fifty percent (50%) of their salary. Further, in certain cases, IT companies face problems in temporarily laying off surplus employees wherein salary cuts calls generally leads to disputes.

Many states in India have allowed night shift for women. However, certain onerous responsibilities are place on the employers wherein apart from safety and security, they spend a large sum on organizing transportation for them. Certain states under their respective shops and establishments also require the IT employers to take permission to run night shifts. Hence, the proposed change calls for a self declaration by women employees working in night shift thereby placing the onus on the employee itself.

IT companies also feel burdened by the provision of the ID Act, which requires them to provide a notice of twenty one (21) days to workmen in case they are changing their working conditions. Not only does this delay the implication of the change, it also forces It employers to sometimes suffer because the changes in policy till the time they become effective causes damage – e.g. change in working hours which in no way effects employees significantly in the IT sector. Hence, the IT employers have asked for the same to be done away with.

The IT sector has also asked for relaxation under the Apprentice Act, 1961 ("**Apprentices Act**") which requires them to train certain apprentices in craft and skills so that they are ready to be a part of the workforce. The IT sector feels that such training of the workforce has increases their cost without having desired effect on their revenues.

The way forward

While labour law reforms in the IT sector are important, the same has to be obtained via a balance approach. Hence, benefits of reforms should not be entirely in favour of either IT employers or the employees. Firstly, the Government may consider having certain specific provisions regarding IT sector employees in the ID Act. As the debate still rages whether IT sector employees are covered under the ID Act, taking the beneficial view, IT companies usually follow the principles of the ID Act. Keeping the same in mind the Government may consider allowing furlough or temporarily laying off employees during a lean period. As an innovative mechanism, IT employers may consider such employees

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working at an alternate place on their own volition (i.e. without the company providing them alternate employment in a different place) and their employment still being counted as employment with their actual employer.

As with regard to night shift for women and self declarations, it may be a very prudent decision to only have this if absolutely necessary. Women should be allowed to clock in their night shifts as a policy of 'work from home' in as far as possible and their presence in office should only be sought if very necessary.

As a part of the labour reforms, it is firmly believed that the requirement of twenty (21) days of notice of change under the ID Act should be done away with not only in the IT sector but all other sectors. The labour authorities should be intimated about the same and only in case of any change that has adverse effect due to such change should any entity be called for by the labour authorities for an inquiry.

However, the IT sector cannot and should not look at only short term goals. Apprentices and training requirements are some of the major reasons that many IT companies are given various relaxations viz. IT Zones, relaxation from applicability of certain laws like Industrial Employment (Standing Orders) Act, 1946 etc. To encourage the same, the Government should probably have only those apprentices under the Apprentices Act be allowed in IT companies whom they want to absorb as part of their workforce. Further, employment bonds for these employees for a reasonable period may boost the confidence of the IT employers. This would help It employers see the exercise of hiring IT employees as positive one and not a cost burden.

Donation to PM CARES fund to be accounted as a corporate's CSR

Introduction

Donations and contributions to the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (**PM-CARES**) will be counted towards a company's mandatory Corporate Social Responsibility (**CSR**) under the Companies Act, 2013 ("**Act**") according to a notification issued by the Ministry of Corporate Affairs (**MCA**). This was notified on May 26, 2020 ("**Notification**")

Existing laws

CSR is mandatory for companies with net worth with five hundred crore rupees (Rs. 500 crores) and more, or companies with a turnover of more than one thousand crore rupees (Rs. 1,000 crores) or greater, or companies with a net profit of five crore rupees (Rs. 5 crores) or more. Generally, as per the Act, companies can fulfill their CSR responsibility through – (i) waste and pollution reduction processes; (ii) by contributing educational and social programs; (iii) by being environmentally friendly; and (iv) by undertaking activities of similar nature.

Stipulation prior to the Notification

Prior to the Notification, as per Schedule VII of the Act, companies can utilise the funds set aside for CSR in broad categories of programmes stipulated by the government to ensure their accountability like eradicating extreme hunger and poverty, promotion of education etc. Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds were also considered for CSR.

Amendment pursuant to the Notification

Through the new Notification, the Government has added PM-CARES fund as an eligible beneficiary of CSR funds. Section 135 of Act and Schedule VII of Companies (Corporate Social Responsibility) Rules, 2014 ("**Rules**") prescribe mandatory provisions for companies to fulfill their CSR responsibility. With this Notification, Schedule VII of the Rules now specifically mentions contributions to the PM-CARES Fund as a separate category towards a company's CSR obligations. Hence, Sub-section (1) of section 467 of the Act has been amended to make PM-CARES fund eligible to receive CSR funding from corporates.

Incentives

Apart from CSR funding, donations to the PM CARES fund will qualify for benefits and exemptions under Section 80G of the Income Tax Act, 1961 and the Foreign Contribution (Regulation) Act, 2010.

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India's ambitious plans to move defence manufacturing to India

Introduction

With the change of times and disarray that COVID- 19 spectrum has put the country into, the Finance Minister recently tried to boost the morale by announcing several changes vis-a-vis various economic packages and structural reform announcements. Certain reforms have been proposed for the defence sector also. The aim of such proposals is to mainly promote domestic defence manufacturing. In fact, just before such announcements, the Chief of Defence Staff of India General Bipin Rawat made a statement on May 17, 2020 emphasizing on the need to promote domestic defence manufacturing and reducing imports.

General - change in tender process

It is proposed that for tenders for supply up to a value of Rs. 200 crores (USD 30 million approx.), global players would not be eligible and only domestic manufacturers would be allowed. This may well apply to defence tenders, although not specified as of now.

Primarily, the requirements of the armed forces are often formulated based on weapon systems available with the United States, Russia and others. The domestic defence industry such as the Defence Research and Development Organisation (**DRDO**) and Ordinance Factory Board (**OFB**) do not have the same capability and technology to start manufacturing the standard quality of weapons or ammunition. Although, some major arms and artillery like aircraft, missiles etc. may be procured through government agreements or through international procurement, certain short and small tendering requirements would prove to be a major boost to domestic manufactures.

However, clarification with regard to this would only be available once detailed regulations regarding procurement are released and to what extent defence tenders are included in the same.

Proposed direct changes in the defence sector

The Government proposes to notify a list of weapons/platforms which cannot be imported at all, i.e. there will be a complete ban on their imports. The said list will be finalized in consultation with the Department of Military Affairs. This list will be revised every year by recognizing the annual capacity increase.

The Government also proposes large scale indigenization of imported spares by local manufacturing.

Another important proposal is to have a separate budget provision for domestic capital procurement to help reduce the defence import bill and promote domestic manufacturing.

The most important proposal is to increase FDI in defence production through automatic route from forty-nine per cent (49%) to seventy-four percent (74%). Once, approved, the said change may bring in a slew of foreign companies to invest in various defence production activities in India, which has primarily remained elusive for a long time to foreign entities.

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The Finance Minister also announced the long-pending measure to corporatize the OFB to give it autonomy and also improve performance and eventually listing on the stock market to improve their autonomy, efficiency and accountability, emphasizing, however, that they would not be privatized.

AJC comments

The thrust behind these structural reform proposals appears to be two-fold – one, to enhance domestic production and second, reduce the large defence import bill. However, it is important to understand that any immediate swift move to shift production of hi-tech arms and ammunition for the defence sector locally may not be immediately practical because of the technology and standards involved.

Restrictions in tendering process may also act as a disincentive to foreign investors in the event they feel that by not being able to take part in certain tenders, their business options in India gets limited. The Government could make certain exceptions with regard to important defence products at the time of finalizing this proposal. Defence goods are also technologically advanced and to find a sectoral hub in India with adequate logistical support including adept manpower could also be difficult. Hence, certain exemptions may be afforded to foreign defence manufacturers to import and sell their products in India provided they establish a production unit later on, after having a trained workforce.

Government should also look to liberalize the defence market where freedom could be afforded to foreign defence manufacturers to produce defence products in India and sell to third countries. Certain barriers with regard to selling to conflicting nations like Pakistan and China may be introduced.

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COVID-19 IMPACT: SUSPENSION OF INSOLVENCY CODE

In an attempt to mollify the devastating impact on the India's financial market and economy consequent of the lockdown announced by the Government of India since March 25, 2020 for curbing the spread of the deadly coronavirus (**Covid-19**). The Govt., on June 5 2020, promulgated an Ordinance effectively immediately suspending the invocation of the Insolvency and Bankruptcy Code, 2016 ("**Code**") for six (6) months which is extendable upto one (1) year. The Insolvency and Bankruptcy (Amendment) Ordinance, 2020 ("**Ordinance**") inserts Section 10A which bars the filing of insolvency application under Section 7, 9 and 10 to initiate corporate insolvency resolution process (**CIRP**) against Corporate Debtor who committed default on or after March 25, 2020. Interestingly, the Section 10A contains a *Proviso* completing barring initiation of CIRP against the Corporate Debtor for the default occurring in the suspended period. Consequently, default during the suspended period is outside the purview of the Code, hence no application to initiate CIRP can be filed against the Corporate Debtor who has defaulted during the suspended period, even after the resumption of filing under Section 7, 9 and 10 under the Code although being within the limitation period of three (3) years.

Additionally, the Ordinance has also provided relief to the ex/suspended directors or partners of the Corporate Debtor by introducing sub-section (3) to Section 66 which restrains the Resolution Professional from making application under sub-section (2) of Section 66 to the Adjudicating Authority seeking directions against the ex/suspended directors or partners to make contribution to the assets of the Corporate Debtor. However, the same is limited only in respect of default against which CIRP is suspended.

The Ordinance comes as a breather for the businesses who are stressed out, *especially* MSMEs who have been adversely impacted considering their low cash reserve, due to the lockdown resulting in closing down of business activities for almost prolonged sixty (60) days. As the recitals of the Ordinance states that the possibilities of getting an effective resolution plan from a potential resolution applicant are dim as they themselves are entangled in getting their house in order and stabilize their businesses to survive post lockdown. Continuation with invocation of the Code would have further jeopardized the already bleeding economy due to lockdown and prolonged the process of revival.

Seemingly, with the temporary suspension of the Code and further restriction to invoke the same post suspension may compel the Creditors to revert to the traditional method of recovery of the default amount *i.e.* approach the Court by way of commercial suit against the Corporate Debtor. But, the Creditors and the Corporate Debtors are more likely negotiate and enter into new arrangements for making payments considering the practical difficult in re-generation of revenue and bringing stability to the businesses amidst the distressful situation global financial market including India's is into due to the Covid-19 pandemic.

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