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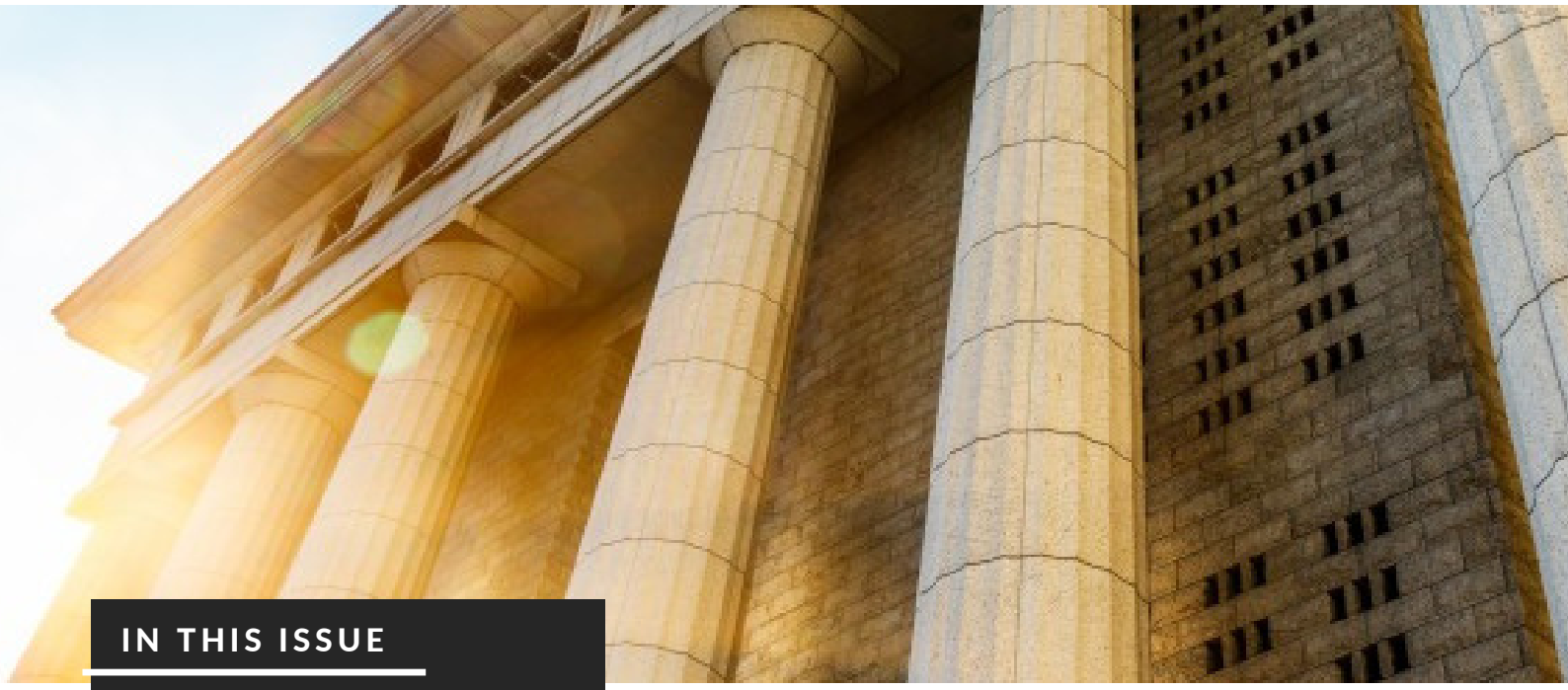

## IN THIS ISSUE



## UCS POV

**BALA HARISH**
**Associate Vice President**

There are many clarifications sought concerning the definition of International Workers under the EPF Act and the below note will bring more clarity regarding the same.

**Definition of International Worker under the EPF Act: International Worker**

An International Worker (IW) is an employee who is holding a non-Indian Passport working in India under an employer registered with the EPFO or an Indian employee who is working in a foreign country with which India has a Social Security Agreement (SSA).

**Status of a Person of Indian Origin (PIO) / Overseas Citizen of India (OCI) cardholders under the EPF scheme?**

As per the EPF Act, the IW status is determined based on the nationality printed on the passport. PIO / OCI status does not have any role under the EPF enactment. All employees holding a passport other than an Indian passport, employed in an establishment covered under the EPF Act, and who do not hold Certificate of Coverage will be considered as International Workers.

Establishments are required to be mindful on the below parameters in meeting the IW PF Compliances:

- The PF regulations will be relevant to the total salary for IWs irrespective of whether the salary is remunerated in India or outside India, split payroll or multiple country sources.
- Every eligible International Worker has to be registered from the first date of his/her employment in India. For existing International Workers, the accountability started from November 1, 2008.
- Collection of Passport copies and validating their nationality is a must.
- Remittance of PF and Pension on Gross wages without no cap is mandatory.
- IW-1 return is mandatory for all covered establishments for reporting details of IWs. The return has to be filed in case of any new IW in the particular month and NIL return to be filed every month in case no new IW joiners in the month.
- The PF ECR to be flagged under International Worker selection for the IW new joiners for the first time during the preceding month and declaration in Form 2 to be furnished by such qualifying International Workers (indicating distinctly the nationality of each International Worker).

**Contribution for IWs:**

The contribution in respect of all IWs is required to be remitted by the employer on Gross wages. The components of salary to be included for this purpose are same as applicable in the case of domestic Indian employees except that there is no salary cap. Effective from Sep 2010 onwards, the 8.33% portion to be diverted to the pension fund is to be calculated on full salary (i.e., not restricted to the ceiling of Rs. 15000 per month).

**Inoperative Account concept not applicable to IWs:**

The regulation of inoperative account will not be applicable in case of IWs. Thus, such employees would continue to earn interest on their PF balance.

**Operating SSA's:**

India has signed SSA agreements with 19 countries as on date and these are Belgium, Germany, Switzerland, Luxembourg, France, Denmark, Korea, Netherlands, Hungary, Finland, Sweden, Czech Republic, Norway, Austria, Canada, Australia, Japan, Portugal and Singapore (Bilateral Economic Agreement).

The Government of India has revisited the refund of PF clause of the International Workers in recent years. The expats who are covered under the SSA between India and any other nation can withdraw their PF accumulation dues on the separation of employment. For Non-SSA signed IWs, contributions may be withdrawn only on completion of 58 years of age. The IW's PF account will remain active even if they leave the country earlier. Pension will be paid based on the period of service.

## SC: Employer can justify dismissal of an employee without an enquiry by way of leading evidence

The Supreme Court on 20.01.2021 (Wednesday) comprising of a bench of J. L. Nageswara Rao, J. Navin Sinha and J. Indu Malhotra observed that dismissal of a workman by his/her employer cannot be interfered with merely on the ground that it did not conduct a disciplinary enquiry, if the latter could justify the action before the Labour Court. (State Of Uttarakhand Vs. Sureshwati)

Where an employer has failed to make an enquiry before dismissal or discharge of a workman, it is open for him to justify the action before the Labour Court by leading evidence before it, the Court said.

**Facts of the Case**

In the present case, the Respondent was engaged as an Assistant Teacher in Jai Bharat Junior High School, Haridwar (hereinafter referred to as "the School"). Thereafter, the Respondent worked as a Clerk. During this period, the School was an unaided Private Institution. From 2005 onwards the School started receiving grants-in-aid from the State, and came under the purview of Uttaranchal School Education Act, 2006. On 15-07-2006, the Respondent lodged a Complaint before the School alleging she had worked continuously till 07-03-2006 and that her services were illegally terminated on 08-03-2006 without granting her any opportunity of being heard or payment or retrenchment compensation.

On 21-08-2006, the Additional District Education Officer, was requested to conduct an inquiry. The Basic School Inspector conducted an inquiry on the Complaint made by the Respondent and submitted a detailed Report dated 24-08-2006 stating that while inspecting the records of the School in the presence of both the Parties, it was found that the Respondent had tampered and manipulated the date of her appointment, by mentioning two different dates. Further, the inquiry revealed that the employment of the Respondent was illegal and that she had not worked in the School from July 1997 onwards. The Respondent did not file any Complaint about her alleged termination till 2006; it was made only after the School started receiving grants-in-aid from the State and was declared a Government School.

Subsequently, the Respondent filed a Complaint before the Labour Commissioner, Haridwar. The Complaint was referred to the Additional Labour Commissioner in order to determine whether the alleged termination of the services of the workman was proper and valid. On 05-02-2010 an ex-parte award was passed by the Labour Court in favour of the employee. However, vide Writ Petition No. 1853 of 2010, the said Award was challenged before the High Court of Uttarakhand (High Court) and the High Court vide Order dated 16-09-2015 allowed the Writ Petition, and remanded the case to the Labour Court to decide the matter. The Labour Court vide Order, held that the Claimant /Respondent was not entitled to any relief as sufficient evidence was produced by the Management to prove the continued absence of Respondent from the service since 01-07-1997. It was further held that the Claimant/Respondent had not approached the Court with clean hands and had concealed material facts.

Aggrieved by the Judgment of the Labour Court, the Respondent filed Writ Petition before the High Court which was allowed on the ground that the employer had admitted to the fact that no inquiry or disciplinary proceedings were conducted regarding the abandonment of service by the employee. Thus, the High Court vide Order dated 28-08-2019 reversed the Judgment passed by the Labour Court, and directed the reinstatement of the Respondent. Thereafter, the Appellants filed a Special Leave Petition in the Hon'ble Supreme Court of India impugning the Judgment dated 28-08-2019 passed by the High Court.

**Contention of the Parties**
The respondent argued that she had been in employment of the School when she was illegally terminated, without holding any enquiry or granting her personal hearing. The Head Master of the School stated that the respondent had only filed a false complaint before the Labour Commissioner when the School became aided and that the allegations were baseless.

**Courts Observation & Judgment**
The Supreme Court firstly stated, relying on Workmen of the Motipur Sugar Factory Private Ltd. v. Motipur Sugar Factory [AIR 1965 SC 1803], that

"where an employer has failed to make an enquiry before dismissal or discharge of a workman,
it is open for him to justify the action before the Labour Court by leading evidence before it", which according to the SC, in this case was done by the employer. The Court added "The School has led sufficient evidence before the Labour Court to prove that the Respondent had abandoned her service from 01.07.1997 when she got married, and moved to another District, which was not denied by her in her evidence. The record of the School reveals that she was not in employment
of the School since July 1997".

Allowing the appeal and holding that the respondent had failed to discharge the onus of proof that she had be working continuously as claimed by her, the court, relying on Bhavnagar Municipal Corpn v. Jadega Govubha Chhanubha [(2014) 16 SCC 130], stated that -
"It is fairly well-settled that for an order of termination of the services of a workman to be held illegal on account of non-payment of retrenchment compensation, it is essential for the workman to establish that he was in continuous service of the employer within the meaning of Section 25-B of the Industrial Disputes Act, 1947. For the respondent to succeed in that attempt he was required to show that he was in service for 240 days in terms of Section 25-B(2)(a)(ii). The burden to prove that he was in actual and continuous service of the employer for the said period lay squarely on the workman".

*Source – latestlaws.com*

## Labour Ministry to upgrade Shram Suvidha Portal

India would soon move towards a single registration and return for compliance under 29 labour laws. The labour ministry has begun work on upgrading the Shram Suvidha portal, the singular platform for all labour law-related compliance. The move will bring down the total number of compliance forms to 3 from 21 now with one unified form for registration, licence and return. Currently, employers have to file four forms of registration, five for licence and 12 forms for returns.
“The single registration facility, as provided in the Code, will be available from the Day 1 of the roll out of the four labour Codes,” labour secretary Apurva Chandra told ET. “While Centre is working towards providing a single licence facility through the portal at the earliest, other unified services will only be available going forward.”

Currently, employers have to register their establishment separately under different labour laws including the Minimum Wage Act and the Factories Act. Even contractors and staffing firms have to seek multiple licences for operating at different locations while employers file separate returns on the social security and health coverage for the workers under the Employees Provident Fund Organisation and the Employees' State Insurance Corporation respectively. Under the first round of upgradation, which will be synced with the roll out of the labour Codes, employers will be able to go for one single registration under all labour laws. Next to be added to the portal will be a centrally-issued single national licence for staffing firms, which will be valid across India.

However, returns under EPFO and ESIC would be filed separately as long as the government does not provide one universal number to all employees registered under different organisations. The aim is to significantly improve the ease of doing business by reducing compliance.

Experts and industry are, however, apprehensive about the robustness of the portal to handle such data. “I am extremely doubtful about the preparedness of both the Centre and the state governments with regard to handling voluminous electronic transactions in one go,” said KR Shyam Sundar, labour expert and professor at XLRI. According to Sundar, the centralised process will create problems in data verification, data cleaning and statistics generation. The number of establishments under the states’ sphere across various labour laws are far more than under the Central sphere and hence experts feel the challenge is bigger at the state level.

Rituraj Sinha, group managing director of SIS India, said there is no clarity from the government yet on how employers should go about unified filings under the Code. “Companies will have to upgrade and align their IT systems to adapt to the new changes under the Code and this will take time,” Sinha added. The government intends to implement the four labour Codes from April 1, 2021 as the labour ministry finalises the rules for the four Codes by the end of this month. The four Codes include the Code on Wages, the Social Security Code, the Industrial Relations Code and the Code on Occupational Safety, Health and Working Conditions. Out of the 44 labour laws, 29 have been amalgamated under the four Codes while rest have been repealed.

*Source: The Economics Times*

# EPF: Supreme Court withdraws order approving pension in accordance to salary

The Supreme Court on Friday withdrew its order that upheld the Kerala High Court verdict approving pension in accordance to salary. The decision by the three member bench led by Justice U. U. Lalit comes after a review petition filed by the Employees Provident Fund Organisation (EPFO).

However, the apex court has not stayed the Kerala HC order which approved pension in accordance to salary. The preliminary hearing on appeals filed by the Union Ministry of Labour and Employment and EPFO against the HC order will take place on February 25. The withdrawal of the SC order will disappoint lakhs of EPF pensioners. But at the same time, the apex court not staying the HC order is a relief. The HC had pronounced the verdict approving pension in accordance to salary on 12 October 2018. Representing the central government, Attorney General K. K. Venugopal urged the Supreme Court to stay the HC order.

But, Justice Lalit clarified that the HC order cannot be stayed and that the appeals against it will be shifted for preliminary hearing. Otherwise, a notice will have to be issued over the review petition, the bench added. The HC in its order had removed the Rs 15,000 ceiling to calculate the EPF contribution from employees. This in turn made it possible to avail pension in accordance with the total salary.  On April 1, 2019, the Supreme Court had approved this HC order. Now, the apex court has withdrawn the order issued by former Chief Justice Ranjan Gogoi.

**Centre strongly objects pension in accordance to salary**

The central government had demanded a stay on the Kerala HC order approving pension in accordance to salary. The Union Ministry of Labour & Employment clarified that pension in accordance to salary was not practical.

The ceiling of Rs 15,000 was fixed targeting the economically and socially backward class. If the ceiling is removed, the EPS will have a shortage of Rs 15, 28,519.47. Since the HC order, the EPFO was handed over Rs 839.76 crore. If the appeal from the Ministry of Labour & Employment is approved, recovery of pension will not be possible. Due to the court verdict, pension increased by up to 50 percent. Such significant increase cannot be recovered during the superannuation of a person, the Centre pointed out.

*Source: mathrubhumi.com*

## Labour Codes: Government Will Stick to New Definition of Wages - Exclusive

The Indian government will not change the definition of wages despite concerns from industry over the impact of the new labour law regime on wage bills, a top government official said on Wednesday. “The definition of wages is a part of the Codes and that cannot be addressed through the rules,” Labour and Employment Secretary Apurva Chandra told BloombergQuint in an interview on Wednesday evening while replying to a question on whether the government will bring any changes to the new definition of wages following concerns raised by the industry. The secretary said that during the recent consultations on the new labour codes, which will likely be implemented from or before the next fiscal, “the major issue” flagged by the industry was on the definition of wages and “how it will impact the take-home salary of workers and lead to a higher outgo on PF and gratuity.”

Once the new labour codes kick in, the way companies structure employee salaries will undergo a significant change. According to the new law, the salaries will have to be structured in a manner so that all the monetary allowances — house rent, leave travel, overtime, conveyance, among others — are capped at 50% of the wage of an employee, which will include the basic pay, dearness allowance and retention pay. Higher basic pay would mean increased costs towards provident fund and gratuity which are calculated on the former. Earlier this month, a top government official had said that the government was planning to issue a clarification to ‘grandfather’ the gratuity payments. This is because gratuity is calculated on the last drawn salary of a worker and is equivalent to 15 days of their salary for every year worked in an organization. Employees are entitled to receive gratuity from their employers on completion of five years of continuous service in an organization.

Asked whether the ministry is planning for a ‘grandfathering’ clause to limit the gratuity outgo for industry, Chandra said “I cannot comment on it. What’s there in the code is there in the code.” “It (gratuity payments) won’t go up immediately. In a year, not more than 3-4% of employees avail of it. So, there will be no immediate impact (for the industry). We are examining with the industry bodies but what’s there in the code is there in the code,” the secretary said. Last year, Parliament passed four labour codes, one each on wages, industrial relations, occupational safety health and working conditions and social security to usher in key changes to India’s labour laws, some of which were framed during the British rule. Chandra said that the provident fund costs of firms would not be impacted as contribution towards the Employees’ Provident Fund schemes is mandatory for only those earning below Rs 15,000 a month. “Once a worker’s wage limit crosses Rs 15,000, companies are not required to pay EPF towards them,” he said.

*Source: Bloomberg Quint*

## Employees Provident Fund Wage Ceiling Likely to be hiked to Rs 21,000 from Rs 15,000: Report

Various media reports on Saturday suggested that the Centre is likely to increase the monthly wage ceiling of mandatory EPF soon and it will be hiked from Rs 15,000 to RS 21,000. The development comes as the discussion to raise monthly wage ceiling of mandatory Employees' Provident Fund cover has been going on for a while now. According to reports, a meeting between officials of labour ministry and the representatives of corporate sector was held on Wednesday to discuss the matter. The Centre has not yet anything on the development. However, if all goes well, the EPF monthly wage ceiling will be increased soon. Apparently, the Bharatiya Mazdoor Sangh (BMS) has recently urged the Centre not to deduct PF of those persons whose monthly salary is Rs 15,000. As per updates, the union said the deduction as per Employees Provident Fund (EPF) should be done for those persons receiving Rs 21,000 as monthly salary. Earlier, the Bhartiya Mazdoor Sangh has also asked the government to make provisions of leave for different class of workers as per the nature of their job.

In January last year, the BMS had demanded an increase in the cap on earned leaves to 300 days, from the 240 days proposed in the new rules of labour codes. The labour union had raised the demand during the consultation meeting held by the Union Ministry of Labour and Employment on Tuesday on the draft rules on two labour codes — namely Social Security Code, and Occupational Safety Health and Working Conditions Code (OSH). Once it is made reality, the EPF wage ceiling move could inflate the government's annual Employees' Pension Scheme (EPS) outflow by 50% to Rs 3,000 crore.

*Source: india.com*

### Same-Gender Sexual Harassment Complaints Maintainable under POSH Act: Calcutta High Court

In a significant verdict, the Calcutta High Court has held that same-gender complaints are maintainable under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, commonly referred to as the POSH Act. The Court observed that Section 2(m) of the 2013 Act shows that the term "respondent" brings within its fold "a person", thereby including persons of all genders.

The verdict was given by a single bench of Justice Sabyasachi Bhattacharyya in the case Dr. Malabika Bhattacharjee v Internal Complaints Committee, Vivekananda College and others. The case was a writ petition which challenged the action of the Internal Complaints Committee of an institution to accept a complaint under the Act as without jurisdiction on the ground that both the complainant and the respondent belonged to the same gender. The petitioner's counsel, Advocate Soumya Majumder, argued that the Act was not conceived to address same-gender complaints. On the other hand, the private respondent's counsel, Advocate Kallol Basu, referred to the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 to argue that the regulations are broad enough to cover even allegations of same-gender sexual harassment. Taking a cue from the UGC regulations, the respondent's counsel submitted that such complaints are maintainable under the POSH Act as well.

- **Nothing in the POSH Act precludes same gender complaint**

Though the High Court said that there was 'some substance' in the petitioner's argument that the definition of 'respondent' has to be read in conjunction with the rest of the statute, it said that "there is nothing in Section 9 of the 2013 Act to preclude a same-gender complaint under the Act".

Although it might seem a bit odd at the first blush that people of the same gender complain of sexual harassment against each other, it is not improbable, particularly in the context of the dynamic mode which the Indian society is adopting currently, even debating the issue as to whether same-gender marriages may be legalized", the High Court said.

- **'Sexual Harassment' cannot be a static concept**

The Court further observed that the definition of "sexual harassment" in Section 2(n) cannot be a static concept but has to be interpreted against the back-drop of the social perspective.

Sexual harassment, as contemplated in the2013 Act, thus, has to pertain to the dignity of a person, which relates to her/his gender and sexuality; which does not mean that any person of the same-gender cannot hurt the modesty or dignity as envisaged by the 2013 Act. A person of any gender may feel threatened and sexually harassed when her/his modesty or dignity as a member of the said gender is offended by any of the acts, as contemplated in Section2(n), irrespective of the sexuality and gender of the perpetrator of the act", the Court added. The Court further said: "If Section 3(2) is looked into, it is seen that the acts contemplated therein can be perpetrated by the members of any gender, even inter se"

*Source: livelaw.in*


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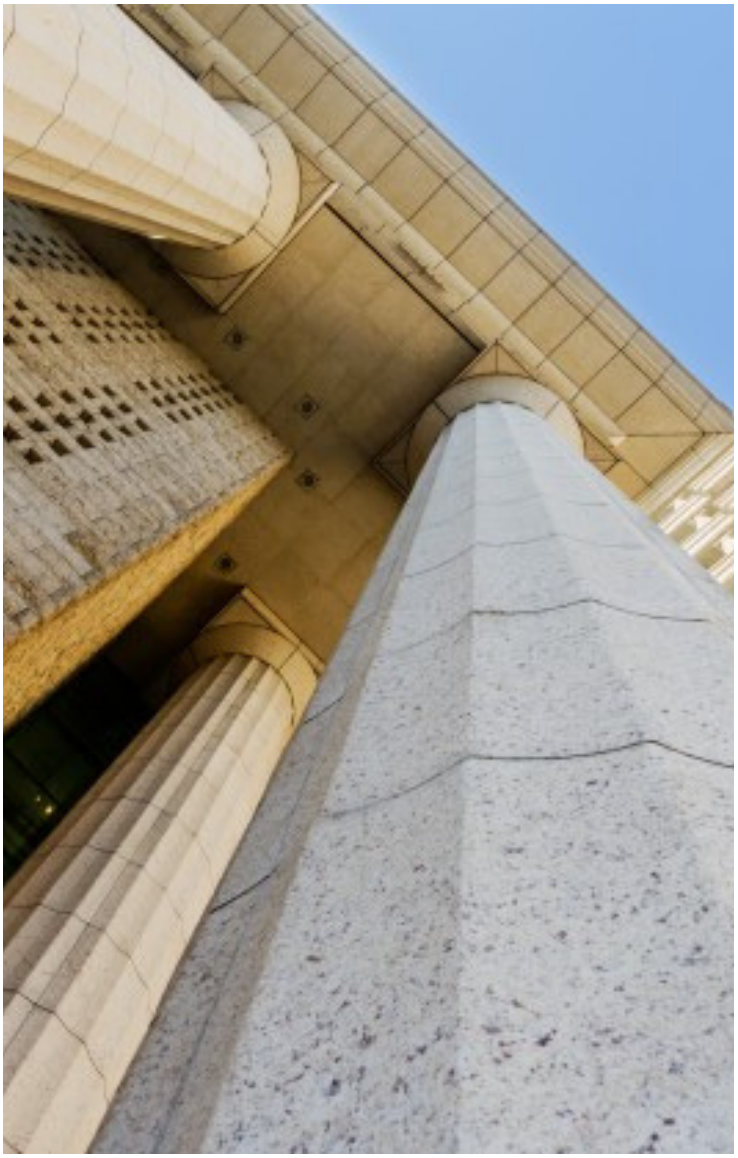

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