



INFOLEX- EMPLOYMENT LAWS

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We bring to you a first new volume of INFOLEX, legal update from the legal point of view for India's employment laws. This is an indication of what we feel will become important developments in the foreseeable future. This volume covers recent legal updates.

SUPREME COURT

Primary burden to establish gainful employment post dismissal is on the employee in order to claim back wages

Allahabad Bank and Ors. v. Avtar Bhushan Bhartiya¹

It was observed that the primary obligation is upon the employee who is alleging wrongful dismissal and claiming back wages, to establish that such employee was not gainfully employed post the dismissal.

Employer cannot recover excess payments made to employees

Thomas Daniel vs State Of Kerala²

The Supreme Court has determined that an employer cannot recover the salary increment granted to an employee while she/ he was in services after her/his retirement/resignation from the services, on account of wrongful computation of such increment.

Employee dismissed pursuant to internal disciplinary proceedings cannot be reinstated merely because he was acquitted in a related criminal case

State of Rajasthan v. Phool Singh³

The Supreme Court has held that an employee who has been dismissed from employment pursuant to an internal disciplinary proceeding cannot be reinstated into services merely because he was acquitted in a related criminal case on technical grounds. The Court also observed that in case acquittal in a related criminal case is based on a finding of "not-guilty", reinstatement into services may be validly awarded criminal case.

Woman employee cannot be declined maternity leave for having availed childcare leave for her non-biological child

Deepika Singh v. Central Administrative Tribunal and Ors⁴

The Supreme Court held that a woman cannot be declined maternity leave for nursing her biological child on the ground that she had already availed childcare leave for taking care of her children from her previous marriage. The Court recognised that such families are also entitled to the protection of law.

HIGH COURTS

An employee in a transferable job has no vested right to remain posted in one place

Amarjeet Singh Dagar v. Union of India and Ors⁵

¹ *Special Leave Petition (Civil) No. 32554 of 2018*

² *civil appeal no. 7115 of 2010*

³ *Civil Appeal No.5930 of 2022*

⁴ *Civil Appeal No.5302 of 2022.*

⁵ *W.P.(C) 6311/2020*

It was determined by the Delhi High Court that an employee in a transferable job has no vested right to remain posted in one place and that the courts should not readily interfere with transfer orders issued by employers, especially issued for administrative reasons and/or in public interest.

Revocation of Early Retirement Acceptance in certain cases

Chanda Kochhar v ICICI Bank Limited

The Bombay High Court made important observations regarding revocation of retirement in its interim order concerning the issue whether the employer bank could treat employee's services as having been ended by way of termination for cause, especially when the bank had previously accepted request for an early retirement. The court accepted the contention of the employer bank that at the time of the request for early retirement (and the acceptance thereof), it did not have knowledge of all facts regarding the employee's misconduct and breaches. Therefore, the revocation of the early retirement acceptance by the employer was valid in the present case. The court placed reliance on the fact that since an inquiry was ongoing at the time early retirement was offered, the employer bank could not have asked the employee to resume her duties.

A related issue was whether employee could demand reinstatement of her ESOPs on the basis that her employment had ended by way of early retirement and not by way of termination for cause. The court observed that the ESOP contract and the employment contract are two separate contracts and the purpose of the ESOP contract, being an independent contract, is very specific, which is to reward good performance of employees and to give them a stake in the future success of the company. As such, it would not be proper to say that 'good conduct' is to be given a narrow meaning such that if the misconduct of an employee is discovered after their retirement, such employee would nevertheless be entitled to retain their ESOPs.

Ad-Hoc woman employee entitled to maternity benefits beyond the term of contract, for pregnancy occurring during contractual period

Dr. Baba Saheb Ambedkar Hospital and Ors. v. Krati Mehrotra⁶

The Delhi High Court observed that the Maternity Benefit Act, 1961 ("MB Act") does not have a provision which links the grant of maternity benefits to be provided to a female employee to her tenure of contract, as long as the employee is eligible to receive maternity benefits under the MB Act. The Court granted maternity benefits to an ad hoc employee for a period that extended beyond the tenure of her employment contract.

S.27 of the Indian Contract Act needs to be reconsidered in light of non-compete obligations under employment arrangements /engagement

Sudipta Banerjee and Ors. v LS Davar and Company and Ors⁷

The Calcutta High Court restrained the appellants from divulging confidential information they gathered during their association with the respondent organization, in any manner till the disposal of the matter. The Calcutta High Court also observed that "the time has possibly come to have a re-look at Section 27 of the Indian Contract Act since times have changed and there is a necessity to impose some restrictions and recognize negative covenants in service contracts especially where it involves specialized knowledge as it must live up to the present needs."

Termination of employment without holding domestic enquiry is violative of principles of natural justice and industrial jurisprudence

Vmware Software India Private Limited vs Ashis Kumar Nath⁸

The Karnataka High Court directed the employer to compensate a workman whose employment was terminated for refusing to undergo a performance improvement plan (PIP), without holding any domestic enquiry or serving a

⁶ *Writ Petition No. 1278 of 2020*

⁷ *FMAT 735 of 2021*

⁸ *Writ Petition No. 8149 of 2021*

chargesheet. The Court held that such termination was violative of the principles of natural justice and industrial jurisprudence.

Employee not entitled to initiate criminal proceedings against an employer after termination of employment

Samiulla B. vs. the State of Karnataka

The Karnataka High Court held that an employee cannot initiate criminal proceedings against an employer as a way of challenging the termination of service. Grievances pertaining to termination of services must be brought before the appropriate forum.

Mere emails and Form 16A not sufficient to establish employer-employee relationship.

Kaushak Kishor Singh v. M/S Sita Kuoni World⁹

The Delhi High Court has held that a freelancer cannot raise a claim for wrongful termination of employment by attempting to establish an employer-employee relationship through emails and Form 16A of the Income Tax Act, 1961. The Court also observed that a freelancer is a person who acts independently without being affiliated with or authorised by an organisation, and is hence distinguishable from part-time, full-time, or contractual employees.

Deceased employee's gratuity to be disbursed amongst heirs including 'illegitimate sons'

Anil Singh and Ors. v. State of Assam and Ors¹⁰

The Gauhati High Court has held that the term "legal heirs" under the Payment of Gratuity Act, 1972 also includes illegitimate sons. This conclusion was derived from a conjunctive reading of the definition of "legal heirs" under the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956, both of which include illegitimate sons.

Non-renewal of contract during probation does not amount to "retrenchment" under the Industrial Disputes Act, 1947

Chief Executive & Ors. v. Vanjibhai Laljibhai Chaudhary¹¹

The Gujarat High Court has held that when an appointment has been made on probation/ad hoc basis for a specific period of time, and such appointment comes to an end by the efflux of time, the person holding such post cannot claim any right to continue in that post. The Court therefore noted that such termination on account of efflux of time does not amount to retrenchment under the Industrial Disputes Act, 1947.

STATUTORY UPDATES

Uttar Pradesh implements new rules for women working at nights

The Government of Uttar Pradesh, vide a notification dated May 27, 2022, has amended the Factories Act, 1948, which imposes a blanket restriction on women to work between 7 PM and 6 AM in factories. As per the notification, women workers in Uttar Pradesh shall not be bound to work before 6 AM or after 7 PM without their written consent, and the services of such women cannot be terminated if they deny providing their consent. For women workers, who have consented to work during the night shift, the employer is required to provide them with free transportation, food and ensure adequate supervision during their working hours and journey to and from the factory. The employer is also required to intimate the Factory Inspector of such arrangements made for its women employees.

⁹ WP(C) 11631/2018.

¹⁰ WP(C)/2770/2016

¹¹ C/SCA/10361/2008.

The Government of Goa lays down conditions for employing women at night and introduces other changes

The Government of Goa, vide a notification dated May 05, 2022 has notified 02 May 2022 as the effective date for the Goa Shops and Establishments (Amendment) Act 2021. The amendment act inter alia provides for autorenewal of registration, obtaining electronic certificate of renewed registration, enhanced penalties for non-compliances, and imposes a restriction on women employees to work in any shop or establishment between 7 PM and 6 AM. The Government has the power to allow women to work at night if it is satisfied that adequate protection is being provided for them by the employer or if such women have consented to work during night shifts.

Amendment to Tamil Nadu Shops and Establishment Rules, 1948

The Government of Tamil Nadu, vide a notification dated March 30, 2022, has introduced certain amendments to the Tamil Nadu Shops and Establishments Rules, 1948. The amendment, inter alia, has given the flexibility to employers to maintain their statutory registers in an electronic form. Prior to the amendment, only manual maintenance of registers was permitted.

Withdrawal of provident fund accumulation by international workers

The Employees' Provident Fund Organization ("EPFO"), vide a letter dated April 27, 2022, has clarified that employees who qualify as 'international workers under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act"), from countries which do not have a social security agreement with India, are eligible for full withdrawal of their provident fund (PF) accumulation after they attain the age of 58 years, provided they have ceased to be in employment by the establishment covered under the EPF Act.

ESIC provides exceptions to contribution period for claiming sickness benefit to women receiving maternity benefit

The Ministry of Labour and employment, vide a notification dated March 07, 2022, has allowed an insured woman receiving maternity benefit to claim sickness benefit in the corresponding benefit period, even if her contribution period falls short of the required contribution period (of 78 days) under the Employees' State Insurance Act, 1948 ("ESI Act"). This exemption is allowed as long as the insured woman has paid her contributions for half the number of available working days.

LABOUR CODES: STORY SO FAR

Broadly speaking, the labour codes, which aim to consolidate and consequently replace 29 Central labour laws, are yet to be brought into force, barring provisions relating to (a) Central Advisory Board on minimum wages, and (b) identification of workers and beneficiaries through Aadhaar number for social security benefits. Moreover, even if the codes are fully brought into effect, the same would require issuance of rules, schemes, and notifications of the relevant governments so as to have a comprehensive revised compliance regime under the labour codes, the 'appropriate government' for an establishment can be the Central Government or the state government, depending on the nature of its operations or the existence of multi-state operations. Such appropriate government has the power to inter alia issue rules detailing some of the substantive aspects broadly set out under the codes and also prescribing procedural compliances such as filings, maintenance of registers, etc. In the last one year, several key industrialised states such as Haryana, Delhi, Maharashtra, Gujarat, Andhra Pradesh, Telangana, Tamil Nadu, and Karnataka released draft rules under some or all of the labour codes for public consultation (with Gujarat, Karnataka, and Uttar Pradesh also releasing final rules under certain labour codes).

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