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India's New Labor Codes: Comparison of Employee v. Worker

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India's new labor codes are by far the biggest change to our labor laws in Indian history. Employers in India are quickly gearing up as the government prepares for the implementation of the new labor codes in 2022.

It is critical that the terms 'employee' and 'worker' as defined and used in the four new labor codes - Code on Wages, 2019 ("Wages Code"), Code on Social Security, 2020 ("SS Code"), Industrial Relations Code, 2020 ("IR Code") and Occupational Safety, Health and Working Conditions Code, 2020 ("OSH Code"), are well understood by employers in respect of determining the application of provisions thereto to specific classes of employed individuals.

Employee v. Worker

- **Employee:** While the SS Code uses the term 'employee', the Wages Code, IR Code and the OSH Code use both the terms "employee" and "worker" in different contexts. The definitions of 'employee' in the 4 labor codes are typically similar and fairly broad to include persons who are "employed on wages by an establishment 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".

An employee excludes an apprentice engaged under Apprentices Act, 1961, besides members of armed forces. The OSH Code qualifies 'employee' with a caveat with respect to mine workers for consistency with the provisions under the Mines Act, 1952. The SS Code in its definition of 'employee' provides for certain qualifications for application of provisions related to Employees' Provident Fund Scheme, Employees' State Insurance Corporation and employees' compensation, to maintain consistency with the currently applicable laws.

- **Worker:** The gender-neutral definition of 'worker' under the IR Code, OSH Code and Wages Code is largely similar to 'workman' under the Industrial Disputes Act, 1947. A worker is "any person (except an apprentice as defined under clause (aa) of section 2 of the Apprentices Act, 1961)¹ employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied"²with certain exceptions³, and for the purposes of any proceeding under a labor code⁴ in relation to an industrial dispute, the term 'worker' includes any person who has been dismissed, discharged or retrenched in connection with, or as a consequence of such dispute, or whose dismissal, discharge or retrenchment has led to such dispute. A worker however excludes a person who is employed mainly in a managerial⁵ or administrative capacity; or who, being employed in a supervisory capacity, draws wages exceeding INR 15,000 (approx. US\$ 200) per month. The INR 15,000 wage threshold for exclusion of supervisors from the definition of 'worker' under the Wages Code has been revised to INR 18,000 (approx. USD 240) under the IR Code and OSH Code. The definition of "worker" under the IR Code includes workers in unorganized sector for the purpose of application of trade union related provisions under the IR Code.

Standing Committee Recommendations and Treatment Thereof

In the parliamentary standing committee reports containing recommendations on the labor codes including the IR Code and the OSH Code, the respective standing committees have dealt with the multiplicity of expressions used to refer to different classes of employed individuals to which the provisions of the codes apply. While the Indian Ministry of Labour and Employment ("MoLE") has purported that the use of the terms 'employee' and 'worker' in the labor codes is in order to retain the limits of protection as applicable under the predecessor statutes to the labor codes, the Standing Committees for the labor codes have consistently proposed uniform use of one term for employed individuals, thereby extending labor law protections consistently to employees beyond workers, especially in case of OSH Code and IR Code. The labor codes, as were finally notified by the Union government continue to retain the use of the distinct terms 'employee' and 'worker'.

- **Standing Committee Report on Occupational Safety, Health and Working Conditions Code, 2019 (Bill)**⁶: The committee, considered it desirable to extend protection of the provisions of OSH Code to all employees without distinction between employees and workers. While the MoLE in relation to the OSH Code standing committee report noted that usage of distinct terms 'employee' and 'worker' is to maintain consistency with the provisions of Factories Act, 1948 and applicability thereof, the OSH Code permits the federal government to prescribe health and safety requirements for all employees (including workers) in establishments⁷ other than factories as well.
- **Standing Committee Report on the Industrial Relations Code, 2019 (Bill)**⁸: The IR Code standing committee expressed dissent with the argument forwarded by the MoLE for distinctive use of the terms employee and worker, and noted:

"As a matter of fact, every employee is a worker and vice-versa. Therefore, the industrial dispute mechanism and other rights like forming of Trade Unions, being office bearers of the Trade Unions, etc. should be made available to each and every employee/ worker, notwithstanding the relevant provisions contained in the Industrial Disputes Act, 1947 which was enacted as early as 1947."

The standing committee recommended exclusion of only persons “empowered with exercise of administrative responsibilities like granting service benefits to the workers, initiating disciplinary proceedings against them etc.” from definition of worker.

Implications on Differential Use of the Terms “Employee” and “Worker”⁹

The distinction between ‘employee’ and ‘worker’ is most well noted in the OSH Code. There are certain provisions under the OSH Code relating to working hours of employees, overtime payments, leave etc. which are applicable to workers in all establishments¹⁰. There are similar provisions in relation to commercial establishments under state specific shops and establishments statutes. To the extent OSH Code provisions are more beneficial, they may be applicable to only workers in commercial establishments with at least 10 employees. Since ‘worker’ excludes persons in managerial, administrative and certain supervisory positions, in case the applicable shops and establishments act does not make exception for such category of employees in application of their less beneficial overlapping provisions, such provisions with lesser benefits may be exclusively applicable to employees in such excluded positions, who are not covered as ‘worker’ under the OSH Code. These excluded categories of employees may include employees in leave administration and payroll functions with administrative powers, managers with control over a class of workers or an establishment or supervisors with teams reporting into them.

A notable feature of the IR Code in this context is application of the trade union related provisions under IR Code to employees in unorganized sectors, the definition of ‘worker’ being expanded beyond the ambit of ‘workman’¹¹ under the Trade Unions Act, 1923 (“TUA”). To that extent, under the IR Code, a worker need not be employed in an organized trade or industry to enjoy the protection and benefits if TUA and unorganised sector workers, such as self-employed workers will also enjoy such legal advantage.

Contract Labor

An inadvertent aspect of the change or harmonization of the definition of ‘worker’ across labor codes is its impact on contract labor related provisions under the OSH Code. While the Contract Labour (Regulation and Abolition) Act, 1970 (“CLRA”) excluded out-workers¹² from its ambit, there is no such exclusion under the OSH Code¹³. This may potentially bring remote workers under manpower supply arrangements within the ambit of CLRA provisions under OSH Code. This is in addition to change in the threshold of applicability of CLRA related provisions of OSH Code, which will on notification of such provisions, be applicable to establishments and ‘manpower supply contractors’ engaging at least 50 contract workers (as opposed to erstwhile threshold of 20 contract workers)¹⁴.

Further, the definition of ‘contract labour’ under OSH Code excludes certain ‘workers’ who being employed in connection with work of an establishment through a contractor¹⁵ are otherwise regularly employed by the contractor for any activity of the contractor’s establishment and whose employment is governed by mutually accepted employment standards (including permanent employment) with periodic pay increments, social security coverage and provision of other statutory/ legal welfare benefits, as applicable. In view of the aforesaid, and specification of core-activities in which contract labor can be engaged by employers under the OSH Code¹⁶, there will be a considerable change in the coverage of the CLRA framework *vis-à-vis* the existing CLRA regime, with notification of the provisions of the OSH Code¹⁷

Conclusion

Whether a person is a workman has been the most litigated aspect of Indian labor laws. One of the main aims of the new labor codes is to ensure harmony and consistency across different labor legislations. This would help considerably reduce litigation in terms of understanding the application of the law. Unfortunately, this ambiguity is not quite addressed by the labor codes which progressively use the gender-neutral term ‘worker’

instead of 'workman'. In absence of a clear definition or guidance with respect to excluded classes of employees from the definition of 'worker', there will continue to remain confusion regarding application of the labor codes. Add to that the situation where both the terms 'employee' and 'worker' are used in the same law, such as OSH Code. And to top it all, the definition of 'employee' under each of the state-specific shops and establishments acts continues to apply to commercial offices, which laws will not be subsumed by the labor codes.

Pending notification on the effective date of the labor codes, it remains to be seen whether the lacunae in rights between 'worker' and 'employee' classes of employed individuals are bridged using legislative tools or are treated as purposeful legislative discretions. Employers will need to remain alert on the developments once the new labor codes are made effective.

FOOTNOTES

[1] There is no such exception as per Sec. 2 (z) of OSH Code.

[2] Sec. 2(z) of the IR Code and Sec. 2(z) of the Wages Code.

[3] As per Sec. 2 (z), OSH Code "worker" includes "working journalists and sales promotion employees", but does not include "any such person (i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who is employed in a supervisory capacity drawing wage exceeding eighteen thousand rupees per month or an amount as may be notified by the Central Government from time to time." There are similar exceptions under the IR Code and Wages Code.

[4] IR Code, OSH Code and Wages Code.

[5] Includes a person who, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

[6] Standing committee report published in February 2020 available at: <http://164.100.47.193/lsscommittee/Labour,%20Textiles%20and%20Skill%20De...>

[7] As per Sec. 2 (v) of the OSH Code "establishment" means—

(i) a place where any industry, trade, business, manufacturing or occupation is carried on in which ten or more workers are employed; or

(ii) motor transport undertaking, newspaper establishment, audio-video production, building and other construction work or plantation, in which ten or more workers are employed; or

(iii) factory, for the purpose of Chapter II, in which ten or more workers are employed, notwithstanding the threshold of workers provided in clause (w); or

(iv) a mine or port or vicinity of port where dock work is carried out.

[8] Standing Committee Report published in April 2020 available at: <http://164.100.47.193/lsscommittee/Labour,%20Textiles%20and%20Skill%20De...>

[9] Comparison table of definitions of 'employee' and 'worker' in labor codes available at: <https://docs.google.com/document/d/1tPOeFMsip8Z-B18Z4Wxl9q6S3SNovqhw/edi...>

[10] Ibid.

[11] “Workman” under the Trade Unions Act, 1926 means “all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises”.

[12] Under the Contract Labour (Regulation and Abolition) Act, 1970, out worker means “ a person to whom any articles and materials are given out by or on behalf of' the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the .trade or business of the principal employer and the process is to be carried out either in the home of the out-worker or in some other premises, not being premises under the control and management of the principal employer”.

[13] Sec. 2(m), OSH Code

[14] This may be subject to state specific amendments.

[15] “Contractor” under the OSH Code in relation to an establishment means “person, who—

(i) undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour; or

(ii) supplies contract labour for any work of the establishment as mere human resource, and includes a sub-contractor.”

[16] Sec. 2(p) read with Sec. 57 of OSH Code.

[17] Further reading: India: Proposed Changes on The Law on Employing Contract Labor: <https://www.natlawreview.com/article/india-proposed-changes-law-employin...>

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