Q & A

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We are looking forward to revising the Notice Period and Notice Pay clause for all the contracts for the new joining employees and also for the current employees, to remove the inconsistency and changing the Notice Period and Notice Pay requirement depending on employee grade. As an employer, are we now well within our rights to alter the terms of appointment even for the existing employees?

Please note that an employer may amend the terms of employment as contained in the appointment letter issued to an employee, or the service agreement executed with such employee, after obtaining prior consent or concurrence of the employee concerned. In other words, a unilateral action on the part of the employer cannot be binding since a contract can be amended only by the consent of the parties thereto.

Your company may consider informing the employees regarding the proposed changes in the notice period requirements and explaining them the reasons for the same. A letter / notice must be issued to all employees whose notice period requirements are proposed to be changed and their acceptance of the same should be obtained in writing. As stated earlier, since, the notice period is an express term in the employment contract; it may not be possible for your company to enforce a unilateral change in the contractual terms on the ground that your company is desirous of streamlining and making its employment contracts consistent for various grades of employees.

We are a commercial establishment registered in Bombay. Section 35(1)(a) of the Bombay Shops & Establishments Act provides that every employee who has been employed for not less than 3 months in any year, shall for every 60 days on which he has worked during the year be allowed leave, consecutive or otherwise, for a period of not more than 5 days. Does it mean that the employee cannot apply for earned leave during the current year before April?

The aforesaid provision should not be read to mean that an employee cannot apply for leave during the first 3 months of a year. An employee can apply and the employer may allow such leave. However, if the employment is terminated for any reason prior to completion of 3 months, the employer would be entitled to deduct pay against such leaves.

We are a private enterprise registered under Bombay Shops & Establishments Act. Kindly inform us as to how many compulsory holidays are required to be provided to our employees, and, whether we can ask the employees to work on those compulsory holidays?

The Bombay Shops & Establishment Act, 1948 provides for four (4) mandatory holidays i.e. 26th January (Republic Day), 1st May (Maharashtra Day), 15th August (Independence Day) and 2nd October (Gandhi Jayanti).

Further, it is permissible to make any employee work on the aforesaid compulsory holidays provided he or she is compensated with double the average wages, which he or she earns during the month in which such compulsory holiday falls.

However, it is customary for private enterprises to declare holidays on account of festivals depending on prevalent religious and linguistic demographics. HC

Rightful Interpretation of The BOCW Act

- BY **K.V.SINGH AND ANKITA RAI**

Employers having a factory or a manufacturing establishment had been interpreting Section 2(d) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("BOCW Act") to mean that the BOCW Act would not apply to construction work at the site of the factory. The employers had been interpreting the expression "...does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply" in Section 2(d) to mean an omnibus exclusion of an establishment, by merely obtaining a license under Section 6 of the Factories Act, 1948. However, concerned authorities under the BOCW Act had a different view, and, had been directing the establishments engaged in construction activities to get themselves registered under the provisions of BOCW Act.

Section 2(d) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("BOCW Act") defines the term "building or other construction work" to mean:

"the construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqua ducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply."

The issue was contested in various High Courts. The High Courts of Allahabad, Orissa, Madhya Pradesh and Karnataka held that in relation to an establishment, which is in the process of construction of civil works/ factory buildings, etc., and, has planned to set up a factory, the provisions of the BOCW Act, which is meant for the construction workers, would apply. In holding so, the High Court had observed that where an establishment undertakes the process of construction of premises which are to be ultimately used as factories, and no manufacturing operation for which the licence was obtained under the Factories Act has commenced, it could not be said that a factory has come into existence and, therefore, such establishment is not entitled to take advantage of mere registration under the Factories Act.

Special leave petitions (SLPs) were filed by several appellants against the decisions of the High Courts of Allahabad, Orissa, Madhya Pradesh and Karnataka referred to above. The Hon'ble Supreme Court passed an order dated 18.10.2016 in the matter of Lanco Anpara Power Limited v. State of Uttar Pradesh and Ors. [2016 SCC OnLine SC 1153] whereby it

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upheld the judgments of the High Courts and observed that a "factory is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these Appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of 'worker' under the Factories Act."

It was also observed that the 'superior purpose' contained in BOCW Act and the Welfare Cess Act has to be kept in mind when two enactments- the Factories Act on the one hand and BOCW Act/Welfare Cess Act on the other hand, are involved, both of which are welfare legislations. The Apex Court also placed reliance on the doctrine of Purposive Interpretation as explained in recent judgments of this Court including Shailesh Dhairyawan v. Mohan Balkrishna Lulla [(2016) 3 SCC 619] where Purposive interpretation was defined as follows:

"Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."

Thus, the Apex Court relied upon the doctrine of purposive interpretation to hold that the exclusion provided under BOCW Act in relation to building or other construction work to which the Factories Act applies, does not apply to construction work in relation to a factory. The Court relied on the said interpretation to ensure that the construction workers, who are engaged in the construction of buildings and not covered under the provisions of Factories Act, are not excluded from the benefits of BOCW Act as well.

The legal position, which emerges from the cases discussed above, is that the Factories Act, 1948 does not apply to construction workers. It needs to be understood that BOCW Act was promulgated as a comprehensive central legislation for regulating safety, health, welfare and other conditions of service of construction workers, most of whom belonging to the unorganized sector. Therefore, denying such benefits to construction workers engaged in construction of a factory building or other construction work within a factory amounts to a gross violation of the principles of natural justice as well as social welfare legislation, which cannot be countenanced in any manner. HC