PSA SUGGESTIONS ON DRAFT CODE ON OCCUPATIONL SAFETY, HEALTH AND WORKING CONDITIONS, 2018

1. Introduction: The Ministry of Labour and Employment ("**Ministry**") proposed the draft Code on Occupational Safety, Health and Working Conditions, 2018 (hereinafter referred as "**HSW Code**") on March 23, 2018 for the purpose of amalgamating 13 labor law relating to safety and health standards, health and working conditions, welfare provisions for the employees, and leave and hours of work. The 13 labor law sought to be repealed are (i) Factories, (ii) Mines, (iii) Dock Workers (Safety, Health and Welfare), (iv) Building and Other Construction Workers (Regulation of Employment and Conditions of Service), (v) Plantations Labor, (vi) Contract Labor (Regulations and Abolition), (vii) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service, (viii) Working Journalist and other News Paper Employees (Conditions of Service and Misc. Provision), (ix) Working Journalist (Fixation of rates of wages), (x) Motor Transport Workers, (xi) Sales Promotion Employees (Condition of Service), (xii) Beedi and Cigar Workers (Conditions of Employment), and (xiii) Cine Workers and Cinema Theatre Workers acts.

The key objectives are simplification, amalgamation and rationalization of the above central legislations. Similar to the approach followed under some of the labor legislations, the HWS Code contemplates respective State governments to act as "appropriate government" for covered establishments and implementing the HWS Code stipulations through State-specific rules. Further, rule making power is vested with the Central government in identified matters. PSA has reviewed the HSW Code to critically analyze some of the draft sections dealing with health, safety and welfare obligations and rights of employers and employees, and our suggestions are captured in paragraphs 2 & 3 below.

2. Suggestions on overall HSW Code: Legislating on labor related matters is covered under the Concurrent List of the Constitution, which means that both Central and State legislatures can enact on such matters. It cannot be stated with certainty that after simplification of Central law in 4 codes (HSW Code being one of them), the State governments will not promulgate specific law touching upon particular aspects, such as State specific labor welfare fund and holiday legislations. Thus, as such there could be overlapping and conflicting provisions, which makes it absolutely critical that the HSW Code specifically identifies the scope of its applicability on different kind of establishments, and the manner of interpreting its provisions *vis-à-vis* any State specific enactment that may contain any overlapping regulation. Based on our review of HSW Code draft, we notice fundamental loopholes that may lead to significant interpretation and implementation issues, defeating the very objective of HSW Code. They are as follows:

#	Issue	Analysis	Suggestion
1.	Impact on State specific Shops & Establishment acts	Section 2(1)(t) of HSW Code defines "establishment" to mean "*a place where any industry, trade, business, manufacture, dock work, or occupation is carried on including a factory, mine, motor transport, undertaking, newspaper establishment, plantation in which 10 or more workers are employed.* The said definition is extremely wide, inclusive and uses broad meaning terms like industry, trade, business and occupation, which means that even commercial establishments are covered within its ambit. Further, throughout the HSW Code, several	Since each State is empowered to make their own legislation concerning labor matter, the conflicting stipulations cannot be considered invalid or superseded, merely because the Central government enacted the HSW Code, unless there is any specific and express

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		provisions impose obligations that all establishments must comply with. For instance, Sections 25, 26, 27, 29, 31, and 32 prescribe the weekly and daily working hours, overtime, weekly and compensatory holidays, extra wages for overtime, overlapping shifts, notice of periods of work and annual leave with wages for all establishments, without demarcation of factory, mines, plantation, dock or any other industrial premise. This will necessarily mean that all establishments including commercial establishments where any trade or business is carried on are covered and must comply, and not just those where manufacturing, mining, construction, plantation, dock work, or journalism are carried on. Such interpretation could lead to conflicting obligations and several disputes between employers, employees, and government. This is because every State has its own specific legislation for regulating working conditions of shops and commercial establishments, and without fail, each one of them define commercial establishment which are very similar to proposed "establishment" definition under the HSW Code. Generally, commercial establishment is defined under State specific Shops & Establishment acts as an establishment which carries on any business, trade or profession or any work connection therewith. Further, each one of them provide regulations for working hours, leave, overtime, wages, termination, night shift, working conditions for women employees during night shift, health and safety of the employees. Therefore, there is high likelihood that the HSW Code once implemented will be at loggerheads with the provisions of State Shops & Establishment legislations.	provision to that effect. It is imperative that HSW Code clearly states out the manner in which HSW Code will interplay with the State specific Shops & Establishment acts. For instance, if the intent of HSW Code is that it shall not apply to commercial establishment and shops, which should be the case, there should be a provision to state that anything contained in HSW Code shall not apply to them.
2.	Covered establishment	In addition to the definition of "establishment", HSW Code defines "industrial premise" under Section 2(1)(za). The definition of establishment is wide to cover all entities with 10 or more employees as discussed above, and specifically includes factories, mines, plantations, motor transport and newspaper undertakings. There is no rationale for separately defining	The HSW Code should delete the definition of industrial premise and consistently use establishment instead of work place or work premise. Further, wherever the legislative intent is to limit

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		industrial premises. Further, while these definitions exist under HSW Code, several Sections use terms such as "work place" and "work premises", without defining their scope and meaning; and this can pose potential interpretation issues as to what is work place, who is employer for such work place, whether an employee while travelling for work is in work place and others. For instance, Section 6 dealing with duties of employers, Section 8 providing duties and responsibilities of owners, agents and managers, and Section 13 stipulating duties of employees.	the application to specific kinds of establishment like factories, mines, docks, motor transport and newspaper undertakings, the same should be clearly stated out as opposed to using the wider definition of establishment.
3.	Covered employee	Section 2(1)(r) of HSW Code defines "employee" in respect of an establishment to mean " *a person, excluding an apprentice engaged under the Apprentices Act, 1961, employed on wages by such establishment to do any skilled, semi-skilled, unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied; and (ii) a person declared to be an employee by the appropriate government;..*" This definition is wide in its ambit and includes anyone who is in employment of the employer. At the same time, Section 2(1)(zzd) defines "worker" as "*any person (except an apprentice as defined under clause (aa) of Section 2 of Apprentice Act, 1961) 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, and includes working journalists and sales promotion employees for the purposes of any proceeding under this Code in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched or otherwise terminated in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has lead to that dispute, but does not include any such person- (i) who is subject o the Air Force Act, 1950, or the Army Act….. (iii) who is employed mainly in managerial or administrative capacity, or (iv) who is employed in supervisory capacity drawing wage of exceeding fifteen thousand rupees per month, or an amount as may be notified by the Central Government from time to time.*" As can be seen, the definition of "employee" is wide enough to cover a	The existing legal position as can be inferred from the definition of "workman" under Industrial Disputes Act, and decided jurisprudence is that white collar employees i.e. managerial, administrative and supervisory employees with INR 15,000 or more remuneration are to be regulated as per terms of their employment contract and Shops & Establishment Acts, removing them from the purview of labor regulations as contained in Factories Act, Industrial Disputes Act, and other acts meat for the benefit of workmen. Deviation from this settled position of law will cause practical difficulties for all involved parties and lead to disputes. Ideally, HSW should only provide for workers, and exclude white collar employees. To this effect, there is o need to define "employee", or refer to "employees" here and there in different sections with their complete exclusion in some other as highlighted in the

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		"worker" and the two are very similar, except on 2 counts (i) worker will not include managerial, administrative or supervisory personnel earning INR 15,000 or more, and (ii) there is reference to industrial dispute of workers. This means that every worker is an employee, but vice versa is not true. There are several Sections under the HSW Code which make reference only to worker and not employees, such as (i) Section 6(3) states that a letter of appointment has to be furnished to a worker, and does not mention an employee, (ii) Section 13(e) prohibits the worker from willfully neglect safety measures, and this also does not mention employees, (iii) Sections 24(1) and (2) dealing with welfare facilities are only for workers and not employees, and (iv) Sections 25, 26, 27, 29 and 31 describing conditions around working hours, wages, overtime, etc are for workers and not employees. It is not clear if the HSW Code is seeking to regulate health, safety, welfare and working conditions of workers or all employees, and this can lead to uncertainty and ambiguity for employers, employees, regulators, as well as judiciary.	preceding column. If the intent is to also include white collar employees, the definition of employee must be retained, within specific mention that workers are included within its ambit. Further, several provisions dealing with duties and rights of employers and employees as discussed aside, must use employees instead of referring to workers.

3. Specific suggestions on particular sections of HSW Code:

#	Section/Sub-section /Clause/Proviso of the Code	Issue/Problem identified in the relevant clause	Proposed change/correction that is suggested	Reason for the proposed change
1.	Section 6(3)	The letter of appointment needs to be issued to workers only and not to all employees	The letter of appointment should be issued to all employees and not just workers	Without an obligation for issuance of letter of appointment to all employees, employer may opt not to issue one, thereby leaving the terms of employment for non-worker category of employees, i.e. administrative, managerial and supervisory personnel earning INR 15,000 or more subject to inferences and implications. If HSW Code seeks to cover white-collar employees

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				as discussed in #2.3 above, worker needs to be replaced with employees.
2.	Section 8(1) and 8(2)	Section 8(1) does not empower Central Government to make regulations for manufacturing of any article in a factory, and is limited to use of any article in factory. However, Section 8(2)(a) states that central Government can make regulations for any article that is constructed in a factory.	All throughout Sections 8(1), 8(2)(a), 8(2)(c)(i) reference must be done to "use and/or manufacture" in any factory.	These are conflicting terms, where the general power in 8(1) is limited and the specific power in 8(2) exceeds the scope in 8(1). Without specific mention of "use and/or manufacture" in suggested clauses, scope for ambiguous interpretation is created.
3.	Section 8(1) and 8(2)	The section does not explain the term "article". It further uses the term "substance" without any explanation. Additionally, Section 8(1) does only mention "article" while 8(2) also mentions "substance"	Both Sections must refer to "articles and substances". Add an explanation clause similar to that of Section 7B of Factories Act stating that "*for the purpose of this Section, "article" shall include plant and machinery*". To this, more illustrations need to be added as well. Furthermore, an illustrative explanation has to be drafted for "substance".	Since this section deals with the duties of a manufacturer, it is pertinent to explain the meaning or scope of the term "article" and "substance".

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4.	Section 10(1)	There is no need to provide employer scope in 10(1)(i) to (v)	Delete sub-clauses (i) to (v). Thus, Section 10(1) should read "*Where at any place in an establishment, and accident occurs which causes death, or which cause any bodily injury by reason of which the person injured is prevented from working for a period of forty-eight hours or more immediately following the accident or which is of such nature as may be prescribed the employer shall send notice to such authorities, in such manner and within such time, as may be prescribed.*"	Employer is already defined term in Section 2(1)(s) and sub-clauses (i) to (v) are only repetition in different language and can leave scope for interpretation.
5.	Section 40(3)(d) and (e)	There are obligations on medial officer for examination and certification of young persons in any factory, mine, plantation, motor transport undertakings or any other establishments. This is without explaining the meaning of "young persons" or any provision akin to Sections 68 & 69 of the Factories Act that allows adolescent to work in a factory on being certified by a certifying surgeon about his fitness to undertake the work in the concerned factory. Such absence	Define young person as per Section 2(d) of Factories Act. Add provisions akin to Sections 68 and 69 of the Factories Act,	These provisions would regulate the provisions for health, safety and welfare of adolescents working in factories or other establishment and also prevent unwarranted exploitation of adolescents in the hands of the employer.

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		will allow employers to employ adolescent workers without necessary check-up conducted by certifying surgeon as a pre-requisite		