

Code on Wages: Recipe for Chaos!

1. Introduction

Rationalizing and consolidating multitude of central labor legislations has been a key policymaking and legislative agenda for quite some time. The Code on Wages, 2019 (“**Code**”) is the first move and upon implementation will repeal the Minimum Wages, Payment of Wages, Payment of Bonus and Equal Remuneration Acts. The Code’s attempt to “*amalgamate, simplify and consolidate*” is rather superficial as substantial portions of the Code are lifted from the existing provisions of the 4 subsumed laws under one umbrella, and finer details will be fleshed out subsequently by the respective appropriate governments.¹ While the Code awaits its gazette publication, stakeholders have started speculating the modus, details and its ramifications.

PSA’s [August 2019 E-Newsline](#) provided an overview of the key changes under the Code. The Code mostly retains the extant requirements as is, but significantly changes certain fundamental concepts concerning covered employees, wages and its computation, and bonus threshold. This newsletter aims at further contextualizing and analyzing the potential impact of these changes for employers.

2. Eligible employees

2.1 Existing framework: Employees are classified as white-collar or blue-collar. Blue-collar is one who qualifies as a “workman” defined under the Industrial Disputes Act, 1948 (“**ID Act**”) and the practice followed in the gamut of labor laws. A workman is any person engaged to perform any manual, unskilled, skilled, technical, operational, clerical or supervisory work. It excludes those who perform managerial, administrative or supervisory duties with wages more than INR 15,000 (USD 209).² Others are white-collar. The ID Act does not explain what managerial, administrative or supervisory role is, and whether an employee is white-collar is specific to the facts of a case. The determination is primarily based on the core functions performed. Their employment conditions including remuneration, bonus and related disputes are governed by the terms of the contract.

2.2 Code’s scope: Section 2(k) of the Code defines “employee” as anyone performing any skilled, semi-skilled, unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work, except an apprentice. The explicit inclusion of managerial, administrative, and supervisory roles, irrespective the remuneration may be construed to cover white-collar employees, who have so far been outside the purview of the subsumed laws.³ The Code also defines “worker” akin to workman, under the ID Act. Additionally, it describes “contract labor” as a class of workers who are deemed employees of the principal employer when they are engaged for an

¹ Section 2(d) of the Code defines appropriate government as (i) central government for certain sectors like railways, mines, oil fields, major ports, and other entities owned or controlled by central government or set up through a central enactment, and (ii) state government for all private and other entities

² 1 USD = INR 71 and rounded off

³ Minimum Wages Act applied to employees in scheduled employments and typically, state specific notifications excluded white-collar employees. Employees earning upto INR 24,000 (USD 335) and INR 21,000 (USD 293) per month respectively were covered under the Payment of Wages and Payment of Bonus Acts. Equal Remuneration Act applied to workers

establishment's work by a contractor, with or without principal employer's knowledge. Further, some other provisions impose obligations on the employer *vis-à-vis* employees and not just workers.⁴ Thus, theoretically the Code may be interpreted to cover all direct and indirect employees i.e., white-collar, worker or contract labor.

2.3 Impact: If the purported intent is to include white-collar, this could cause unanticipated challenges for employers. Since such employees perform varied roles and, depending on the designation, are even in the top management, it is unfathomable how the Code will seek to cover them in every aspect. This appears to be a legislative oversight that must be clarified, failing which stakeholders may grapple with a regulated wage and bonus structure for white-collar employees.

On November 1, 2019, the central government published the draft Code on Wages (Central) Rules, 2019 (“**Draft CG rules**”) for public comments.⁵ Draft CG rules define “highly skilled occupation” which demands a specific level of perfection, and competence acquired through intensive technical or professional training or practical occupational experience for a considerable period. An employee is also required to assume full responsibility for his decision in the execution of the occupation. The meaning is wide and includes some elements from the jurisprudence on white-collar employees. But, white-collar employees are outside the purview of the list of highly skilled occupation in Schedule E of Draft CG rules, which supports the view that white-collar are intended to be excluded from the Code's purview. However, until such time appropriate governments notify rules, the uncertainty and ambiguity will linger.

3. Computing wages

3.1 Existing framework: Wages is defined differently in labor statutes with the aim to accommodate the scope of the relevant law. Under Minimum Wages Act, wages include basic pay and any other remuneration paid as allowances, overtime, commission, or termination payments. It specifically excludes variable components *de hors* the minimum rate.⁶ The underlying approach in defining wages is to exhaustively list out the excluded components. Accordingly, the Payment of Wages and Payment of Bonus Acts retained most elements from the minimum wages law, but further carved out commission, bonus and termination payments. Many other laws provided their own wages' definition to cater to their specific objectives. The lack of a uniform concept created ambiguity.

3.2 Code's scope: The Code provides a singular definition of wages for payment and bonus matters. Wages means any remuneration payable by the employer in cash or kind **(i)** including basic pay, dearness and retaining allowance (*if any*), but **(ii)** excluding bonus, value of accommodation or utility or amenities or medical attendance or concessional value of food, social security contributions, house rent allowance, conveyance/travel allowance, overtime, commission, gratuity, payment towards special expenses, any amount paid under award or settlement and termination payments (“**Exclusions**”). However, where **(i)** Exclusions exceed 50%, or **(ii)** remuneration paid in kind exceeds 15% of the total remuneration, such additional % shall be

⁴ For example, section 14 mandates payment of overtime at two times to employees

⁵ The draft rules can be accessed at

https://labour.gov.in/sites/default/files/The%20Wages%28Central%29%20Rules_Preliminary_Draft_1_11_2019_WC.pdf (last accessed on November 12, 2019)

⁶ For example, value of house accommodation, travel allowance, social security contributions, gratuity

deemed as wages and added back. A uniform definition of wages is definitely essential, but the devil is in the details and only time will tell if a uniform application will be possible.

3.3 *Impact:* Compared with the subsumed laws, the Code enlarges the scope of excluded components. The assumption is employers will benefit from the certainty on the basis for wages computation. But, wage structuring aligned with the Code may have a cascading effect on how organizations compute bonus entitlements, overtime, leave encashment and social security contributions. Currently, there is no % threshold for wages computation and entities have the flexibility of allocating constituents in a cost-efficient manner. It is common practice to bifurcate a larger proportion towards allowances and variable pay as opposed to basic and fixed allowances. This enables employers to reduce costs towards overtime, leave encashment and bonus. Once implemented, organizations will have to revisit their current wages break-up and assess if base pay, dearness and retaining allowances account for at least 50% of the total. If not, they will be required to revise. Consequently, costs incurred towards overtime, leave encashment and bonus payments may escalate.

In addition, a company's wage structure has a direct bearing on employer's contribution to provident fund. Currently, employers have to statutorily contribute @12% of the monthly basic wages, dearness allowance, retaining allowance (*if any*) and cash value of any food concession. The provident fund law does not prescribe the % of total pay for contributory wages. Typically, employers apportion smaller % towards basic, which limits their contribution liability as well as helps employees with tax structuring. The Supreme Court⁷ questioned such practices and, in certain instances, regional provident fund offices served demand notices on employers for contribution arrears. On top, the government is contemplating consolidating 8 social security legislations including provident fund into a simplified Code on Social Security. This draft code defines wages akin to the Code. If enacted as is, employers may have to factor at least 50% of the total pay as contributory wages, which can result in potential added costs.

4. Bonus thresholds

4.1 *Existing framework:* The Payment of Bonus Act applies to factories and establishments engaging 20 or more employees in an accounting year and regulates bonus payment for employees earning upto INR 21,000 (*USD 293*) per month. The monetary threshold effectively meant that most white-collar employees were excluded. The Act requires employers to pay mandatory minimum bonus @8.33% of the aggregate yearly wages to covered employees irrespective of the allocable surplus. In case of allocable surplus, employer is obligated to pay proportionate bonus subject to maximum 20% of cumulative yearly wages.

Additionally, the Act prescribes that where a covered employee earns higher of INR 7,000 (*USD 98*) per month or the prescribed minimum wages by the government, the minimum and maximum bonus would be computed on INR 7,000 or the minimum wages, whichever is higher, and not on the actual wages earned. Consequently, employers determine if a covered employee's wages exceed INR 7,000 or the applicable minimum wages. Where the wages are below the above

⁷ Basic wages refers to all fixed components (irrespective of nomenclature) payable across all employment cadres. The Supreme Court in *Regional PF Commissioner, West Bengal vs. Viekananda Vidyamandir and Others* (Civil Appeal No. 6221 of 2011 and others decided on February 28, 2019) observed that amounts which are variable or paid as an incentive, and are paid to only certain employees will be excluded from basic wages

wages limit, bonus payable is calculated on actual wages and in other cases, it is computed on flat INR 7,000 or the respective minimum wages. Since the bonus act is administered by the central government, the wages criteria remain same for employers across India.

4.2 *Code's scope:* The Code seeks to apply payment of bonus provisions to all employees without any distinction on monthly wages. Section 26(1) states that the appropriate government will notify monthly wages and every employee earning below it shall be entitled to mandatory minimum bonus @8.33% of the total yearly wages. Section 26(2) dilutes the foregoing and provides that the appropriate government will notify monthly wages threshold, and employees earning beyond the threshold shall be entitled to minimum and maximum bonus determined on the basis of the prescribed monthly or minimum wages, whichever is higher. This means that every employee will be eligible for minimum and maximum bonus either on actual wages under Section 26(1) or on the government notified wages under Section 26(2). Regarding maximum bonus entitlement, the Code prescribes that where there is allocable surplus, all employees shall be entitled to maximum bonus proportionate to annual wages subject to cap of 20%.

4.3 *Impact:* Section 31(1) has been amended to clarify that the resolution plan approved by NCLT is binding on the Central or State Government or any local authority to whom statutory dues are owed by the corporate debtor. There was no such provision in IBC, as drafted originally or even in the two earlier amendments. Hopefully, this change will put an end to frivolous challenges to an approved resolution plan.

Conclusion

With the finer details missing, the wait has begun and only when states formulate the rules, organizations will have visibility on the Code's actual outreach and mandate. The prospective impact moves beyond record maintenance and compliances as employers may have to assess and revisit customary practices around computation of wages and payment of bonus. Until such time, employers have to navigate carefully and the time is ripe to reevaluate internal processes and remain prepared for a unified wage and bonus regime.

Author

Arya Tripathy