

Code on Wages, 2019 – In Simplification, Confusion?

The Code on Wages, 2019 has been reintroduced in the Lok Sabha on 23.07.2019, after its first iteration from 2017 lapsed. In the meanwhile, the earlier draft of this proposed law was scrutinised by the Standing Committee on Labour, which provided its recommendations in December 2018 based on inputs from trade unions, organisations, and individuals. Does this new—and ‘improved’—Wage Code achieve its purpose to “amalgamate, simplify and rationalise” existing laws on the subjects of payment of wages, minimum wages, bonus, and equal remuneration? If passed into law, what would change for the common employer? This identifies areas of possible confusion, that need debate before the Code becomes law.

Defining ‘Wages’ Based on my experience as a practising labour and employment lawyer, I am aware that one of the most common complexities—dare I say, grouse—that organisations have to deal with is the varying definition of ‘wages’ from one law to another. In today’s economy, the concept of cost to company or CTC has become almost customary in terms of practice and implementation. It’s a simple concept, which seeks to identify the entire cost burden of an employer towards an employee as the CTC. Most commonly the CTC is split into a few of buckets:

1. Comprising the fixed or guaranteed wages an employee will earn;
2. Comprising the variable or conditional components—which may or may not exist based on the nature of job or industry—such as performance-linked incentives, commissions, etc.; and
3. Covering the employer’s cost of contribution towards social benefits like provident fund, employee’s state insurance, etc.

All these components cumulatively add up to the Cost To Company (CTC). Some organisations even include the cost of soft benefits or perks like medical insurance cover, club memberships, etc. within the CTC. Do note that other amounts may still be payable outside the CTC based on facts and circumstances – for example, bonus under the Payment of Bonus Act, leave encashment when an employee departs, or earnings for extra work.

When the question arises as to what components of this CTC an employer should take into account while determining various legal obligations (such as to pay wages every month, or whether it’s complying with minimum wage requirements, or to determine eligibility for statutory bonus), one needs to look at the law to examine how ‘wages’ are defined in relation to each of these obligations. There is some merit in the argument that different laws serve different purposes, and hence definitions can vary based on the objective of the law – for example, overtime payments should not be treated as part of the minimum wages of an employee but should be considered wages as far as the employer’s obligation to make timely payments goes. That said, if properly done, uniformity and simplicity help even more.

In the interest of achieving uniformity across the statutes, the Wage Code seems to be taking a complex approach, which appears to be creating some odd outcomes. For example, even though the current Minimum Wages Act expressly includes House Rent Allowance (HRA) within the meaning of wages, the Wage Code does not. It states that “all allowances” payable if the terms of employment are fulfilled are wages, but later the same definition excludes HRA from the scope of wages, without any explanation. Would HRA payments—which are guaranteed in nature—not be counted towards minimum wages due to this exclusion? That would be manifestly unfair to the employer. But more than that, such drafting creates ambiguity and legal uncertainty, resulting in more lawsuits and litigation.

Similarly, for some strange reason, the Wage Code also excludes “remuneration payable under any award or settlement between the parties” from the definition of wages. In a unionised environment, all wages are agreed under settlements between the employer and unionised workers, which often span two-three years or more. It is quite meaningless to say that none of these mutually negotiated and settled elements of pay would be treated as ‘wages’ for certain purposes.

A proviso towards the end goes on to clarify that this item (along with few others like HRA, overtime allowance and conveyance allowance) will be included for the purpose of payment of wages (and to determine equal wages to all genders). However, it's not clear why some of these components (like guaranteed HRA or remuneration agreed in a settlement) would be excluded from the ambit of minimum wages or wages for the purpose of determining bonus eligibility. As a compromise, the definition seems to say that if the sum-total of the excluded components exceeds 50% or such other prescribed percentage—of the total remuneration calculated under the definition, then the amount exceeding 50% would also be counted as 'wages'. Such an approach is not effective, at least in the context of the Wage Code. Therefore, in an attempt to simplify the law, the Wage Code seems poised to create some more confusion.

It must also be noted that this is only a half-measure. The issues arising from multiple definitions of wages is only partially being tackled, albeit not very elegantly, by this Wage Code. Organisations will still have to rely on the definition of wages under state-specific Shops and Establishments Acts to calculate leave entitlements, many of which continue to take different approaches to the definition of wages. Further, the definition of wages under the government's proposed Code on Social Security is also different. Rather than a lengthy definition with several inclusions, exclusions, provisos and explanations, a simpler approach may have been to tackle the definition of wages based on core principles (and if necessary, through illustrations and examples, as several other statutes do). In other words, any component that is fixed or guaranteed in nature is wages; anything which is conditional, contingent or discretionary is not; along with other obvious exclusions towards pension contributions, benefits in kind, expense reimbursements and end of service payments. A few components like overtime, which deserve to both be counted treated as wages and not based on context, as discussed earlier, could have been dealt with in the specific chapters dealing with payment of wages and minimum wages/payment of bonus, respectively.

Confusion over 'Workers' & Other 'Employees' Continues

The Wage Code prescribes two separate definitions of 'employees' and 'workers'. The definition of employees includes individuals in supervisory and managerial roles too, whereas the definition of workers excludes such individuals, while specifically including sales promotion employees and working journalists. Therefore, the definition of workers seems to be a subset of the definition of employees. These overlapping definitions have sometimes been used interchangeably, creating confusion. For example, Clause 5 requires all employers to pay minimum wages notified by the appropriate government to "any employee" and Clause 6 states that the appropriate government will fix minimum rate of wages "payable to employees". This indicates that the obligation to pay minimum wage has nothing to do with the employee's stature or designation in the organisation. However, Clause 6(6) (which lays down some criteria for the government to fix minimum wages) talks only of the skill, and working conditions and geographic area of "workers" while fixing minimum wages, which appears to be at odds with the earlier stated intent.

Does the government intend to fix minimum wages for management-level employees?

What would be the guiding criteria?

Would such senior employees be entitled to overtime wages under Clause 14, which states that "where an employee whose minimum rate of wages has been fixed under this Code.... works in excess of.... a normal working day.... the employer shall pay him overtime"?

Lack of a Wage Threshold

Obligations relating to payment of wages, deductions from wages, etc. have been extended to all 'employees', i.e. even individuals in supervisory and managerial roles, without any wage threshold. In comparison, the existing Payment of Wages Act currently only extends to individuals whose wages don't exceed Rs 24,000 per month.

Since no such wage limit has been contemplated by the Wage Code, these provisions would apply even to senior employees, including the c-suite CEO or MD of an organisation. This makes matters extremely cumbersome and onerous for employers, especially when it comes to structuring pay and benefits agreements with senior employees. Such arrangements increasingly involve claw back and other deduction provisions, which may fall afoul of this law. It is absolutely critical to either re-introduce a wage threshold or, at the very least, limit the application of these sections of the Wage Code only to 'workers'.

Payroll Deductions

The Wage Code has not made any material changes or improvements in an employer's ability to make payroll deductions, ignoring market realities and practices. Making deductions from employees who receive large joining /retention bonuses and quit, or other similar circumstances remain illegal under the Wage Code, which is harmful to employers and allows employees to capitalise on their own defaults. Any contracting out of such provisions is expressly prohibited under Clause 60.

Guaranteed Bonuses, a Bone of Contention?

Guaranteed bonuses, that aren't linked to individual performance, under the Payment of Bonus Act, currently only, extend to employees earning up to Rs 21,000 per month. The Wage Code also refers to stipulation of a wage threshold by the appropriate government, and employees whose wages don't exceed this amount would be entitled to a guaranteed bonus ranging from 8.33% to 20%, based on the amount of allocable surplus in the organisation. However, the Wage Code further seems to suggest in Clause 26(2), that employees who earn above this threshold as well, would be entitled to receive a bonus (in the same percentage range) based on their minimum wages or such other wage amount determined by the government, whichever is higher. Effectively, such a provision covers each and every employee of the company, adding significantly to an organisation's cost burden. It further dilutes meritocracy by guaranteeing bonus pay-outs irrespective of individual performance, which every organisation in a growing economy wants to avoid, especially for mid-to-senior-level staff.

Claim Handling Procedure – The Perception Game

The claim handling procedure under the Wage Code permits a single application to be filed "on behalf or in respect of any number of employees employed in an establishment", subject to such rules as may be made. This suggests a move towards class-action disputes, where similarly placed aggrieved employees can join hands and tag their claims together for greater force and persuasiveness before the adjudicating authority appointed under the Wage Code. This, coupled with the fact that the onus to demonstrate compliance has expressly been shifted onto the employer in case of any dispute (which is very employee-friendly and one-sided), may result in a significant change in how organisations currently perceive the risk associated with certain non-compliances associated with the payment of wages, minimum wages, overtime, etc. It would be important for lawmakers to address these issues first, rather than push through legislation simply to demonstrate progress on the labour reform agenda.
