

31.03.2017

To
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Sub: Draft Labour Code on Social Security & Welfare – comments
and suggestions – Penalties- Letter No. 4 - suggestions -
sent.

Ref: Memo No. No. Z-13025/ 13 /2015-LRC dated 16.03.2017

Sir,

I send herewith my observations on the draft Labour Code as under:

Section/ Sub-section/ Clause/ Proviso of the Code	Issue / Problem identified in the clause	Proposed Change / correction that should be made	Reason for proposed change
1	2	3	4
Sec. 165.2 (liv)	Penalties for breach or violation of rules	These two Sections result in excessive delegation to the Executive, and are, therefore, unconstitutional.	These two sections are only enabling provisions. But, these sections clearly show that the government is in an unseemly hurry to bring in the Labour Code without having any idea of what it really wants to achieve through the proposed Labour Code.
Sec. 166.2 (xxxv)	Penalties for breach or violation of regulations	The upper limit of penalties must be provided for, beforehand in the proposed Act / Code itself. These two sections traverse, clearly, beyond Sec. 156 and the Sixth Schedule.	The government has not yet visualised what sorts of duties are going to be imposed on the employers and employees through the yet-to-be-born subordinate legislations. It does not know what procedures are to be put in place to make the new machinery work. But, it wants to have penal powers for breach or violation of

			<p>Rules as well as Regulations which are also going to be prepared only later.</p> <p>In essence, the government has made an attempt, through the Draft Code, to get excessive delegation to it by the Parliament, in the matter of penalties, without making the Parliament know the intricacies and the consequences of such a legislation.</p> <p>A legislation cannot leave it to the Executive to correct the situation which produces unexpected consequences.</p>
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2. Penalties, if any, which can be prescribed by the Executive through Subordinate Legislation, can, at best, be less than and within the limit of the penalty, already provided for by the Parliamentary legislation. The upper cap must be provided for in the Act itself by the Parliament. There should be no scope for delegated powers on penalties to traverse beyond the Act and extend to new areas. But, the proposed Sec. 165.2 (liv) and Sec.166.2 (xxxv) do not adhere to these norms in law-making. The proposed Act / Code confers unlimited jurisdiction to the Executive in imposing penalties and traverses beyond Sec.156 and the Sixth Schedule.

3. The following example is worth comparison in this regard. Sec. 97 (xvii), (xvii-a) and (xvii-b) of the ESI Act, 1948 provide for prescribing penalties through subordinate legislations with clear-cut limits. In regard to the Damages, which is also a measure of penalty, Reg. 31-C of the ESI (General) Regulations is only reducing the effect of the penalty permitted to be imposed by the Parliament under Sec. 85-B of the ESI Act, 1948. The maximum limit is, thus, already, provided for by the Parliament, in Sec.84 and 85 of the ESI Act, 1948 itself, safeguarding thus the people from the Executive. The Employees' Provident Fund Act, 1952 also does not confer penal power through subordinate legislations, vide its Sec. 21. But, the proposed Sec. 165.2 (liv) and Sec.166.2 (xxxv) do permit the Executive to invent new areas of duties and responsibilities for the employers and the workers and to impose any kind of penalty on them. The proposed Sec. 156 does not bar the Executive from doing so.

4. The Supreme Court has said, "Unlike Parliamentary legislation which is publicly made, delegated legislation or subordinate legislation is often made unobtrusively in the chambers of a minister, a secretary to the Governor or other official dignitary." (*ITC Bhadrachalam Paperboards Vs. Mandal Revenue Officer 1996 (6) SCC 634 and Harla Vs. State of Rajasthan*

AIR 1951 SC 467 and B.K. Srinivasan Vs. State of Karnataka AIR 1987 SC 1059). “**Blanket** discretionary power” has been held to be unconstitutional in (*State of Bihar Vs. K.K. Mishra 1969 3 SCC 337 and Khwaja Ahmed Abbas Vs. Union of India 1970 2 SCC 780*); “**Unguided** discretionary power” has been held to be unreasonable in (*Himat Lala K Shah Vs. Commissioner of Police 1973 1 SCC 227*); “**Wide** discretionary power” (*State of Madras Vs. V.G. Row 1952 AIR SC 1976*) is unconstitutional because it allows the administrative authority to exercise this discretion on subjective satisfaction without permitting the grounds to be judicially tested. “**Wide** discretion without procedural safeguards” had been held as unconstitutional in *State of M.P Vs. Bharat Singh AIR 1967 SC 1170*).

5. It is not proper for the government to acquire unbridled power of imposing penalties on the employers, employees and the members of the public who would be treated as defaulters of non-compliance with various provisions of the yet-to-be-born subordinate legislations. It is possible and appropriate to bring in all the subordinate legislations also together with this Code so that there would be no need for a carte-blanche in penal power to the authorities through Sec. 165.2 (liv) and Sec.166.2 (xxxv), without the knowledge of the Parliament.

6. It is possible to bring in, at the initial stage itself, a comprehensive Code covering all aspects of Social Security, as this is not a legislation in a field where there is no other law in force. The proposed Labour Code, is intended to replace the existing Social Security enactments and dismantle the established structure of those social security organisations.

7. It is, therefore, essential for the Executive to place a comprehensive Bill covering all aspects of the subject-matter, including the manner in which the delivery machinery would function, so that the area of defaults and the quantum of penalty can be identified and the approval of Parliament obtained beforehand, without any need for imposing new penalties in new areas not covered by the Code / Act. I, therefore, request you to kindly consider the suggestion made.

Yours faithfully,