

LEAVE AND LEAVE ENCASHMENT UNDER THE LABOUR CODES: STRIKING A BALANCE WITH THE SHOPS & ESTABLISHMENTS ACTS

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For employees falling under the “worker” category, the leave and leave encashment related provisions find themselves to be encapsulated under the Occupational Safety, Health and Working Conditions Code, 2020 (“**OSH Code**”, hereinafter). Out of all the aspects covered under the Codes, leave related provisions are one the few which are not, directly or indirectly, dependent upon the enforcement of Rules. While the provisions are themselves quite straightforward, the parallel existence of the State Shops & Establishments Acts (“**Shops Acts**”, hereinafter) is a cause of confusion in the HR circles.

ON LEAVES

As per Section 32 of the OSH Code, a worker is entitled to leaves in a calendar year (starting from 1st January and ending on 31st December) if he has worked for 180 days or more in that very calendar year. It may be noted that this provision is similar with Section 79 of the Factories Act, 1948. That Section required a worker to have worked for a period of 240 days or more in a factory during a calendar year, for which he would then be allowed paid leaves during the subsequent calendar year. Section 32 of the OSH Code not only reduces the eligibility threshold, but also does not require the worker to wait for reaping the benefit of leaves for the next year.

For a person who has crossed the 180-day threshold in an establishment other than a below ground mine, the Code provides for an entitlement of 1 day of leave for every 20 days of work. The entitlement for adolescent workers has been kept at one day of leave for every 15 days of work. Section 32, like its predecessor, clarifies that any period of layoff, maternity leave or annual leave availed by a worker in a calendar year will be counted for calculating the period of 180 days. This leeway has been supplied with the condition that the worker will not earn any leave in the

interregnum. It has further been clarified that any holidays falling between the leave availed by the worker (in a calendar year or prefixed or suffixed holiday) will be excluded from the period of leave so availed. This clarification will go on to negative the policy which many companies follow of treating intervening holidays as the availed earned leaves of the workers.

It has further been provided that for a worker whose service commences later than on 1st January of a calendar year, he will be entitled to paid leaves at the rate of 1 day leave per 20 days of work if he has worked for 1/4th of the total number of days in the remainder of the calendar year. This proportion was kept at 2/3rd of the total number of remaining days under the Factories Act. So, if a person joins on 1st March in 2026, he will have to work for approximately 77 days in the said calendar year. This will, of course, be inclusive of paid holidays, weekly offs and other granted leaves.

LEAVE ENCASHMENT AND CARRY FORWARD

With respect to leave carry-forward, the OSH Code lays down that if a worker has not taken the whole of the leave allowed to him in a calendar year, then the excess leaves will be added to leaves already available in the next calendar year subject to the total number of carry forward to the succeeding year not exceeding 30 days. If, however, the worker had applied for leave with wages but was not given the leave, he will be entitled to carry forward the leaves without any limit.

On the aspect of leave encashment, the OSH Code talks about leave encashment during employment and post-employment. For the former, workers would be entitled to leave encashment at the end on the calendar year on

their demand. The Code also goes on to say that a worker will be entitled to encash the exceeded amount of leaves when his total number of carry forward exceeds 30 days. Thus, Code introduces two sub-categories of leave encashment options for workers during the subsistence of employment. While the workers have the option of encashing leaves at the end of the year on their demand at the end of the calendar year, they can also encash excess leaves when the carry-forward number exceeds 30 leaves. What is interesting to note is that the OSH Code does not place any fetters on the amount which the workers can encash at the end of the calendar year. If the worker wishes, he can encash all the leaves standing to his account without any limitations or qualifications. This encashment option is not mandatory and is to only be exercised workers on their demand. However, if the worker decides to avail the second option, he can only encash the excess amount of leave carry-forward i.e. when the amount exceeds 30 leaves.

Coming on to the post-employment leave encashment, when a worker is discharged or dismissed from service or quits employment or is superannuated or dies while in service, during the course of a calendar year, then the worker or his heir or nominee, will be entitled to wages in lieu of the quantum of leave to which such worker was entitled immediately before cessation of employment. One may note that the leave encashment amount is to be calculated at the rate of 1 day of leave for every 20 days of work, even if the worker had not worked for the required period of 180 days making the worker eligible to avail such leave. What this essentially means is that even if a worker resigns in the middle of a calendar year and till then has not completed the mandatory eligibility working days of 180 days, he would still be entitled to encash leaves for that calendar year at the rate of 1 day of leave for every 20 days of work. The leaves already accumulated in his account will be separately encashed.

For the encashment which will be done post-employment, the payment will have to be made within 2 days from the date of the worker's discharge, dismissal or resignation. In cases of superannuation and death, the payment will have

to be made within 2 months from the date of the superannuation or death.

INTERPLAY WITH SHOPS ACTS

There indeed exists similarity of subject matter vis-a-vis leaves between the OSH Code and the State Shops Acts. As stated above, under the OSH Code, workers are entitled to leaves @1 day for every 20 days of work provided that the worker has worked for atleast 180 days in that calendar year. The criteria for the eligibility and the rate for rate for availing earned leaves varies from State to State. Under the Delhi Shops Act, employees are entitled to leaves after every 12 months' of continuous service for a total period of 15 days. The maximum amount of leave accumulation has been prescribed to 45 days. Also, if an employee has completed 4 months of continuous employment, he will be entitled to 5 days of privilege leave and one day leave for one month of continuous service. No leave encashment related provisions have been prescribed by the Delhi Shops Act. In Maharashtra, a person get dayd days of leaves for having worked 240 days in a year and 5 days of leaves for 60 days of work. The maximum leave accumulation has been kept to 45 days. Option of leave encashment is available to workers in Maharashtra if the employer refuses to sanction leave when applied for 15 days in advance. In Karnataka, one day of leave for every twenty days of working is to be provided to the employees without any precondition. The maximum carry forward has been kept to 20 days of leaves.

Depending of the state, the provisions of the OSH Code may seem to be either more beneficial or less beneficial than the ones provided under the Shops Acts. The course of action to be followed in such a situation has been spelt out under Section 120 of the OSH Code, which reads as follows:

120. Effect of law and agreements inconsistent with Code .- (1) The provisions of this Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement or contract of service whether made before or after the commencement of this Code:

Provided that where under any such award, agreement, contract of service or otherwise an employee is entitled to benefits in respect of any matters which are more favourable to him than those to which he will be entitled to under this Code, the employee shall continue to get the former notwithstanding that he receives benefits in respect of other matters under this Code.

(2) Nothing contained in this Code shall be construed as precluding any employee from entering into an agreement with an employer for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under this Code.

A bare reading of this Section would show that the Code will prevail over the inconsistent provisions covered under all other laws and even award, agreement or contract of service whether made before or after the commencement of the Code. However, if under any award, agreement, contract of service or otherwise an employee is entitled to benefits in respect of any matters which are more favourable to him than those to which he will be entitled to under this Code, he will continue to get the former notwithstanding that he receives benefits in respect of other matters under the Code. What becomes clear is that for the leave related provisions of the Shops Acts which are less beneficial to the workers than those provided under the Code, the Code will prevail. However, if the shops related provisions are more beneficial, a balanced approach is to be followed. The OSH Code uses the term “any such award, agreement, contract of service or otherwise”. The question of whether the term “otherwise” would include a law would be a vexed one. It would be necessary to apply *eiusdem generis*, which is a tool of interpretation. The *eiusdem generis* rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (1) the statute contains an enumeration of specific words; (2) the subjects, of the enumeration constitute a class or category; (3) that class or category is not exhausted by the enumeration; (4) the general term follows the enumeration; and (5) there is no indication of a different legislative intent. [See, **Amar Chandra Chakraborty v.**

Collector of Excise, Government of Tripura and Ors.^{1]}

The terms “award, agreement, contract of service” cannot form a single class or category. There are no uniting of uniform elements between them, except the fact that they are binding in nature. If being binding in nature forms a class, then law would obviously form a part of the class. Obviously, it cannot be possible to provide workers with benefits under both statutes. It is trite that law cannot be read in such a manner that it brings about absurd results. [See, **Padma Sundara Rao (Dead) and Others v. State of T.N. and Others**²). What can, therefore, be said is that leave related benefits under the Shops Act, which are more beneficial to a worker can be severed from the less beneficial provision, will continue to apply to the workers. It has been held by the Supreme Court in **Pepsico India Holding P. Ltd v. Grocery Market & Shops Board & Ors.**,³ that if the workers/employees employed in an establishment are entitled to more favourable benefits under the State law than those entitled to under the Central Law, they will continue to be entitled to more favourable benefits, notwithstanding that they also receive benefits in respect of the other matters under the Central Act.

Insofar as leave encashment during employment is concerned, most of the Shops Acts do not provide for such facilities except Telangana. The employers can divide the employees’ leave into two buckets: the leaves availed under the Shops Act before the commencement of the OSH Code and the leaves earned by the virtue of the OSH Code. Both buckets will receive different treatment as per the applicable laws.

One may also note that leave related provisions under the OSH Code are only applicable with respect to workers and not employees. Employees will still be governed by the Shops Acts. For sick and casual leaves, which do not find any mention under the OSH Code, the Shops Acts will continue to apply.

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1. AIR 1972 SC 1863.
2. AIR 2002 SC 1334.
3. (2016) 150 FLR 129 (SC).