

16.05.2017

From

To
Mr. S. K. Tripathi,
Under Secretary (LRC),
Ministry of Labour & Employment,
Room No. 14, Shram Shakti Bhavan,
Rafi Marg,
New Delhi – 110001
Email: labourlaws109@gmail.com

Sub: Draft Labour Code on Social Security & Welfare – defects and deficiencies - representation – submitted.

Ref: 1. Memo No. Z-13025/ 13 /2015-LRC dated 16.03.2017 of the Ministry of Labour & Employment, Government of India, New Delhi.
2. Letter No. M-13014/01/2017-LRC dated 25.04.2017 of the Ministry of Labour & Employment, Government of India, New Delhi (*Copy enclosed*).
3. Summary Record of the discussions held in the Consultation Workshop with the Secretaries of States and UTs on 02.05.2017 on the draft Labour Code.
4. “Full presentation on the Social Security Policy of India” by the Ministry of Labour & Employment on 02.05.2017.

Sir,

1. Inviting your kind attention to the references cited, I would like to state that the manner in which the Labour Code is being prepared is totally unfair and also unlawful. The draft Labour Code raises numerous doubts about the proposed set up with no clear-cut answers. The way it has been prepared and is rushed through is not in the interest of the working class or the nation. It is intended to benefit some middle-men. I submit herewith my observations on the issue and request you to kindly give proper and adequate consideration to them.

2. The basic procedure for preparing a Code of this kind, i.e., amalgamating various labour laws by omitting various provisions and including something different, is to provide footnote wherever additions, deletions and changes have been effected. That has not, at all, been done in this case. The Drafting Team has, on the other hand, thrown an open challenge to the reader to read, if possible, and understand, if he can, the intentions behind every sentence, every omission and every commission. It is very

sad that the Drafting Team has opted not to be fair and transparent at the draft stage itself and has chosen to adopt various tactics and tricks, with ulterior motive.

3. The procedure of drafting legislations require the rulers to entrust the Drafting Team with the 'legislative policy'. Mr. Justice. M. Jagannadha Rao, Chairman of the 17th Law Commission of India, has written a paper on Legislative Drafting. He says, **"The draftsman is not the author of the legislative policy, he merely tries to transform the legislative policy into words.** The legislative policy is made by the political executive which belongs to the political party which is ruling the legislature or by the monarch who reigns over the country. **The draftsman must, therefore, digest the legislative policy fully before he produces the instrument of legislation which can achieve the legislative purpose"**. The issue here, with the Labour Code, is why the Drafting Team does not make the concerned 'legislative policy' public.

4. The Powerpoint presentations made on 02.05.2017 do not show what the Ministry really wants to do through PPP and how they are going to do it and how the responsibility is going to be fixed on those private players. Without answering those issues, the Code is hurried through by the MOL&E for inexplicable reasons. Speed, surprise and suppression of facts are anti-thesis to democracy when discussing the welfare measures of the people of the nation. But, the Drafting Team has chosen to go only that way.

5. In the USA, when the Obamacare was introduced in 2009 and made law on 23.03.2010, through the Patient Protection and Affordable Care Act (ACA), there had been extensive public debate over it for more than three years (from 2009 to 2012) before it was, actually, enforced after the Supreme Court upheld it on June 28, 2012.

6. When the proposed Code is intended to replace the existing Acts, the draft Code must, necessarily, contain the 'Statement of Objects and Reasons', although the 'Financial Memorandum' is not required at this stage. But, this 'preliminary draft of the Code' does not fulfil even that preliminary requirement of having the 'Statement of Objects and Reasons'.

7. The Powerpoint presentations made at the Secretaries meeting on 02.05.2017 does not explain the purpose and the proposed destination of the so-called 'preliminary draft' Code, in the absence of the "Statement of Objects and Reasons". The statement in the Ministry's letter dated 24.04.2017 that the draft Code has been prepared "in line with the recommendations of the 2nd National Commission on Labour" for "simplification, amalgamation and rationalization of Central Labour Laws" cannot be the substitute for the formal and essential "Statement of Objects and Reasons". Please do not remain under the impression that the formal "Statement of Objects and Reasons" will be prepared and placed before the Parliament when the formal Bill is placed before it. The stakeholders who are involved in the consultation process cannot be kept ignorant of the intent of the draftsmen of the present draft Code. The Parliamentarians cannot be asked to empower the Executive without knowing the extent and purpose of such power.

8. The stakeholders and the public do have the right know what the goal of the Government is and whether the draft Code will enable the Government to achieve that goal. But, the Government of India is trying to **keep its goal secret** but is indulging in the make-believe arrangement of fulfilling the process of consultation with the stakeholders, without enlightening them of the purpose of such consultation.

9. The persons who drafted the present “preliminary draft” had not been and could not have been unaware of the ultimate shape in which the Social Security Schemes would be in force in the nation, if their draft was managed to be made law. If they say so, their statement would only be an outright lie and their intention in having prepared such a truncated draft had been nothing but mala fide.

10. In the circumstances, more responsibility devolves on the shoulders of the stakeholders to prevent the Ministry from going ahead with such misadventure and to go deeper into the draft Labour Code to save the nation from chaos in the social security front. What has been circulated as the draft Labour Code is only truncated Code and cannot be placed by the MOL&E before the public and they asked to play only a role in rectifying the grammar mistakes in the draft Code, prepared by people who were, apparently, not competent, in law, to prepare it and did not, evidently, have the knowledge and competence to comprehend the issues involved.

11. It is a fact that some middlemen who were loitering in the corridors of power from 2015, had caused an unauthorized, false and unsubstantiated allegation levelled against the ESIC and EPFO in an improper manner, through Para 61 and 62 of the Budget Speech of the Hon’ble Minister of Finance on 28.02.2015, that these organisations had been holding the working population as “hostages, rather than clients”. There is an apparent link between that phrase, unlawfully inserted into the Budget speech and the contents of the present draft Labour Code. I, therefore, request you to kindly order an investigation into the insertion of the aforesaid unauthorized phrase in the Budget Speech of the Finance Minister on 28.02.2015.

12. In regard to the contents of the draft Labour Code, I concede that there is, always, room for improvement. It is nobody’s stand that the status quo is the best one and that there must be no change. But, changes should never be only for the sake of changes but only for the better. A duty is, therefore, cast on the Drafting Team or on the people who caused that Team to prepare this draft Labour Code to convince the stakeholders that the changes proposed would be only for the better and that those changes are proposed with honest intentions. The answers given by them to the following questions would show whether their intentions are, really, bona fide or, simply, mala fide. I, therefore, request you to kindly let the ‘Drafting Team’ give reply to the following questions:

- a.** What is the difficulty in enclosing a ‘draft Statement of Objects and Reasons’ to the draft Labour Code?
- b.** If it is claimed that no such ‘Statement of Objects and Reasons’ has been prepared, how, then, were the people who prepared the draft Labour Code, given

the legislative policy with which, i.e., the line of direction in which they should prepare it, the way they have prepared it? The explanation of the Drafting Team in this regard may please be obtained and forwarded to me please.

- c. When the ESI Act provides about 90% of the wages of an employee to his dependant family as “Dependants Benefit” in the event of **death of that employee due to employment injury**, how did the draft Labour Code reduce it to 50%? Who was the person in the Drafting Team, who took such a liberty with the benefit given to the workforce, while working for the so-called “amalgamation” and “rationalization” of the labour laws? Did the Secretary, MOL&E, accept this proposition? If so, is he empowered to do so, anyway?
- d. The ESI Act provides about 80% of the wages to the insured person for about 730 days, if he suffers from 34 long term sickness. He and his family members can get medical benefit for 3 years, in such cases. How did the Drafting Team of the MOL&E decide to do away with the provisions of the **Extended Sickness Benefit** altogether? Who authorized them to do so? Did they make such intentions public on any occasion, before coming up with the draft Labour Code? If so, when? If not, did the Drafting Team remain under the belief that it was left to the people to pore through the draft Labour Code and find out for themselves, if they could? If the Drafting Team was led by any clever person who persuaded the Team that these benefits can be taken care of while formulating subordinate legislations, kindly intimate whether the fact of such an advice has been recorded in any official document. And, if so, please supply a copy of the said document, duly authenticated.
- e. Has the Drafting Team recorded any reason, anywhere, for having totally omitted the benefits provided to the employees under **Sections 51-B, 51-C, 51-D and 51-E** of the ESI Act, 1948 dealing with disablement benefit? Or, has that Team chosen to drop these benefit provisions, in an imperiously arbitrary manner, on its own?
- f. How did the Drafting Team decide to drop the very important word “**substantially**” in Part L of the draft Labour Code dealing with Exemptions, without recording anywhere the reason why that Team chose to delete it? Was it a mala fide mischief or bona fide and reasoned decision? Why did they not discuss such propositions anywhere else in any public fora? Is it left to the people to pore through the draft Code and find out for themselves all these commissions and omissions which act against the working population? *(Please refer to MOL&E reply dated 25.04.2017 under the RTI Act).*
- g. There is no provision analogous to Sec. 89 of the ESI Act in the proposed Labour Code, necessitating consultation with the Social Security Organisation before granting exemption. It means, the proposed Social Security Organisation is not the monitoring agency of the Social Security net stated to be provided to the working population. So, the Social Security Organisation created by the Code

will have **no say in the matter of exemption** sought by the employers. At whose instance, has the Code been worded thus?

- h.** Sec. 89 ensures that the ESIC carries out the Constitutional mandate as per Art. 41. Reasonable opportunity was there for the ESIC to represent its case. But, the present Code makes the S S Organisation a helpless spectator. Sec. 17 (2) of the EPF Act was also similar to it and it uses the phrase “not less favourable” instead of “substantial” in the ESI Act. **Why were these provisions diluted and dispensed with in the Code?** Who was the brainchild behind such a proposition?
- i.** The present Labour Code is an attempt to amalgamate 15 labour laws. There have been various representative bodies to enforce those laws. The supreme bodies of these organizations do have in all not less than 59 employers’ representatives and 59 employees’ representatives. When all of them are brought together under a single umbrella body, the National Council under the Labour Code, there must, at least, be **15 representatives each for employers and employees**. But, the draft Labour Code shows that there would be only 3 representatives each.

Sl. No.	Name of the Organisation	Supreme Body	No. of employers’ and employees’ representatives.
1	ESI Act, 1948	ESI Corporation	10 + 10
2	EPF Act, 1952	Central Board	10 + 10
3	UWSS Act, 2008	National Board	7 + 7
4	Gratuity Act, 1972	Trust	
5	Cine Workers Act, 1981 (Rule 3)	Central Advisory Committee	7 + 7
6	Mica Mines Labour Welfare Fund Act, 1946	Central Advisory Committee	6 + 6
7	Limestone and Dolomite Mines Labour Welfare Fund Act, 1972	Central Advisory Committee	6 + 6
8	Iron Ore Mines, Manganese Ore Mines, Chrome Ore Mines Labour Welfare Fund Act, 1976	Central Advisory Committee	6 + 6

9	Beedi Workers Welfare Fund Act, 1976	Central Advisory Committee	7 + 7
	Total Members representing all these categories of employees		59 + 59
	No. of representatives proposed for the National Council under the Labour Code (Sec. 3.3)		3 + 3

Democracy means more noise and less problems. But, who advised the Drafting Team to prepare the Labour Code in such a manner that it would throttle and choke the voice of the stakeholders in this manner?

Whose idea was it to have only 3 representatives each for employers and employees in the Supreme Body? Please provide only the designations of such an authority, whose arbitrary decision is attempted to be made the law of the land.

What is the reason recorded in the file that just 3 persons each would be sufficient to represent the cases of employers and employees on the issues connected with all the 15 legislations?

What were the **difficulties felt by the Central Government** when there were ten representatives each for employers and employees, both in the ESIC and in the EPFO?

- j.** Why has the **Permanent Disablement Benefit reduced** to 60% and Temporary Disablement Benefit reduced to 50% in the Code, when the ESIC provides about 90% in all?
- k.** When the ESIC provides about 70% of the wages as Sickness Benefit for 91 days in two consequent contribution periods, the present Sec. 63 (1) (a) and (b) of the Labour Code maintains **total silence about the period and quantum of Sickness benefits** and left it for the decision through Subordinate Legislation. How can the people know whether this Code is meant to improve the benefit or reduce the benefit already available to the insured persons covered under the ESI Act?
- l.** What is the intention of the Drafting Team behind Sec. 78.1 of the Labour Code? At present, Sickness Benefit is given to the insured persons covered under the ESI Act, on the basis of certificates issued by the Insurance Medical Officers. But, the Code permits acceptance of certificates issued by the Recognised medical practitioner, Registered medical practitioner or Authorised medical practitioner. Does it not imply that the **ESI dispensaries would have to close**

down? What about the monitoring arrangement of the certification process? How did the Drafting Team examine the issues involved in it? Has it arrived at any findings on the issue on the basis of any study? Or, has the Drafting Team been advised to go about it, without caring for the consequences? And, if so, who advised the Team thus? If not, can the Team go about it in such a manner on its own?

- m.** Why has the Enhanced Sickness Benefit for 7 / 14 days (For **Family Welfare** operations) equivalent to the total wages of the employee, been dropped from the Code in toto? When the ESIC assumes social responsibility through it, why does the **Code abdicate that responsibility?**
- n.** When the ESIC provides **medical benefit to an insured person and his family right from the day of his entry** into insurable employment, why does the Code not assure any such benefit?
- o.** Why does the Code ignore Reg. 103-B (1) of the ESI Act, that enables the Permanently Disabled Persons to get **medical benefit until his superannuation** for him and his wife?
- p.** Why does the Code not have any provision similar to Reg. 103 (B) (2) to enable a **retired insured person and his spouse to have medical cover** forever on payment of Rs. 120 pm?
- q.** When ESIC provides attractive **unemployment allowance** of about 50% of wages for 12 months, why does Sec. 24 (5) (i) of the **Code does not give any such assurance?**
- r.** Sec. 22.6 of the Code paves way for an enabling provision for providing “**subsidy**” to “**the employer**” under Sec. 22.6 (b) **from** the Welfare Funds, by the State Board and to provide for “**defraying the cost**” of “**provision of cost of transportation to and from work**” for the employees under Sec. 22.6 (d) (vi). What are the circumstances under which payment of “subsidy” is contemplated in these cases when it is totally contrary to Sec. **51-C. which provides benefits for Accidents happening while travelling in employer’s transport?**
- s.** Who mooted the idea of subsidy to the employers, the drafting Team or any outside force? This is the moot question the Drafting Team is duty-bound to reply. This provision clearly proves that the Drafting Team does, actually, have some working paper hidden from public access, to enable it to prepare the Code in the direction mentioned in that working paper. The reply given by the MOL&E under the RTI Act, on 25.04.2017 also pleads ignorance of any document, other than the Code made public. It becomes evident that either the Drafting Team is conspiring against the entire nation by colluding with some power-brokers or is held hostage by those power brokers who use the Team to achieve their nefarious ends, through the Code. Kindly intimate the circumstances under which payment of subsidy was contemplated by the Drafting Team and a provision was inserted on the sly.

- t. Why is Sec. 165.3 left incomplete? Are the Secretaries of the State Governments going to specify the areas in which they need power and are going to fill up the gap? Is that the proper mode of legislative drafting, when the Secretaries have not been given any information except the one called draft Labour Code?
- u. Sec. 88.2 of the Code says, that “the intermediate agency, for grant of license, shall satisfy the eligibility norms as may be stipulated, including minimum capital requirement, past track record, ability to provide guaranteed returns, cost and fees, geographical reach, customer base, information technology capability, human resources and such other matters as may be stipulated.” Is it not clear from this provision that the intention is to allow private players to have a field day in the matter of social security? Will the MOL&E, inform the country in which such action has been taken earlier and found to be successful? Will the MOL&E reveal the **model documents and the Master Plan on the method of functioning of these Agencies**, at least to the Secretaries, especially when the Code envisages a lot of interaction with the Intermediate Agencies by the State Boards?
- v. The Public must be informed of the concept and intricacies of these **Agencies**-system, and the contents of the **Schemes** proposed on all the Social Security benefits. Because, that alone would provide a holistic view of the ‘reforms’ proposed. That alone would make the people know about the real and consequential effect of the proposed Code. Sec. 88.1 of the Code says that the “Director General may, by granting a License under this Code, permit any organization or person to act as an intermediate agency for all or any of the purposes” mentioned against each of the six agencies enumerated therein. Sec, 88.3 of the Code says that “an intermediate agency shall function in accordance with the terms of its License and the Regulations”. Sec. 88.4 implies that the terms and conditions of such a license will be “in accordance with the provisions of this Code and the Regulations”. Sec. 88. 5 says that the application for such a license will be in a specified form. But, the MOL&E, in its reply dated 25.04.2017 under the RTI Act, says that it does not have any format of **license**. How can the Drafting Team ensure proper functioning of the Intermediate Agencies unless and until they visualize all the pros and cons and remedial measure at the time of preparing initial Code itself? Do they have any **model License format** used in any other nation, for study and guidance?
- w. Will the Drafting Team explain **whether these Intermediate Agencies will be public authorities amenable to the provisions of the Right to Information Act, 2005**, the way the authorities under all the 15 enactments have become answerable under the RTI Act?
- x. Will the Drafting Team explain whether its action is in consonance with **Art. 41 of the Constitution**? Does the Drafting Team know the fundamental difference between social insurance, social assistance and commercial insurance?

- y. The draft Code **does not contain the definitions** of various terms like, Commission and piece rate worker (Sec. 2.21), Monthly income (Sec. 2.84), Part-time worker (Sec. 2.96) (*Definition is not clear. Some words are, obviously, missing between the word 'government' and the phrase 'of work'*). Are the Secretaries of States required to be called at this incomplete stage for discussion, in such circumstances?
- z. Moreover, Sec. 74.9 contains four question marks, indicating incomplete spade work, before posting in public domain calling for the opinion of the public.

74.9	was final ;	The provisions of section ???? shall apply to an application for review under this section and to a decision of a medical board in connection with such application as they apply to a case for disablement benefit under that section and to a decision of the medical board in connection with such case.
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What do those question marks stand for? What is the hurry, at all, to come up with such incomplete draft code?

- aa. Hon'ble High Court of Madras has observed, "Public Interest means an act beneficial to the general public. Means of concern or advantage to the public, should be the test. Public interest in relation to public administration, includes **honest discharge of services of those engaged in public duty**. To ensure proper discharge of public functions and the duties, and for the purpose of maintaining transparency, it is always **open to a person interested to seek for information** under the Right to Information Act, 2005" (*The Registrar, Thiyagarajar College of Engineering, Madurai Vs. The Registrar, Tamilnadu Information Commission – 30.04.2013*). Has the Drafting Team prepared the draft Labour Code keeping in view public interest? Why does it not reveal the forces behind the terminology and phraseology in the Code **allegedly** prepared by it?
- bb. In regard to the penalties for breach or violation of rules, Sec. 165.2 (liv) & Sec. 166.2 (xxxv) of the Code provide for excessive delegation to the Executive, and are, therefore, unconstitutional. 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 visualized what sorts of duties are going to be imposed on the employers and employees through the yet-to-be-born subordinate legislations. The Drafting Team 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 Rules as well as Regulations which are also going to be prepared only later. 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. **A legislation cannot leave it to the Executive to correct the situation which produces unexpected consequences.** Hon'ble 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*). But, does the Drafting Team know of these niceties?

cc. Has the Department of Law vetted the draft Labour Code or not, before making it public on 16.03.2017?

dd. 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 new 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. 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.

13. Already, the ILO has, in November 2010, had blasted India for its notorious informal labour practices. “India has performed poorly in providing social security protection to its people until recently with ‘very high vulnerability’ to poverty and informal labour practices in the world, according to a report released by the International Labour Office (ILO) today” Times of India - 16.11.2010. In its first comprehensive 'World Social Security Report', the ILO has suggested that India has not done enough in the arena of social security protection, which is reckoned as the "human face of globalisation, in line with its fiscal status".

14. In fact, the only thing that the proposed Labour Code can be made use of is to use it to demonstrate before the world how a Welfare Law should not be made. Art. 22 of the Universal Declaration of Human Rights says, “Everyone, as a member of society, has the right to social security”. The High Court of Madras has said, “the object of the (ESI) Act is ... to give effect to Art. 1 of the Universal Declaration of Human Rights, 1948, which assures human sensitivity of moral responsibility of every State that all human beings are born free and equal in dignity and rights” (*C. Indira Vs. Senthil & Co. – 2009 (2) LLN. 302*). The same court has said of the ESI Act, that “the object of the legislation is to protect the weaker section with a view to do social justice” (*Chandramathi Vs. ESIC – 2003 (4) LLN. 1143*).

15. Distributive justice which is essential to achieve social and economic democracy has been made available to the citizens of all the civilized nations only through social security schemes. It is only the nations, which implement the social security schemes, which top the list of International Human Development Index. Hon’ble Supreme Court has, in *Samatha Vs. State of Andhra Pradesh (1997) 8 SCC 191 (Para 75)*, observed that “The core constitutional objective of ‘social and economic democracy’ in other words, just social order, cannot be established without removing the inequalities in income

and making endeavour to eliminate inequalities in status through the rule of law. The mandate for social and economic retransformation requires that the material resources or their ownership and control should be so distributed as to subserve the common good. **A new social order, therefore, would emerge, out of the old unequal or hierarchical social order.** The legislative or executive measures, therefore, should be necessary for the reconstruction of the unequal social order by **corrective and distributive justice** through the rule of law”.

16. Art. 41 of the Constitution of India says that “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”. The Constitution thus, gives direction to the State that in cases of Sickness, disablement and in other cases of undeserved want, the State is to provide “public assistance”. The State cannot, therefore, make provisions for “private assistance” and absolve itself of its Constitutional responsibility.

17. The PPP concept mentioned in the Full Powerpoint presentation on the Social Security Policy of India” by the Ministry of Labour & Employment on 02.05.2017, does not answer how the proposed system would deliver the benefit better than the present scheme of things. Please, therefore, make public all the subordinate legislations to facilitate comparison and understanding by the stake holders, taking holistic view of the proposed changes.

18. Please intimate how the disciplinary and penal powers to regulate the private agencies, have been chosen to be vested in the State Board and Central Board, as bodies, as per Sec. 90 and 93 of the Labour Code, and not in the Director General or the Commissioners of the respective states.

I request you to kindly examine these aspects and enlighten the public of the facts connected with these issues. I submit herewith the copies of the following articles published in the website ‘flourishingesic.info’ for better understanding of the issues:

- i. Labour Code: The fine art of poor bashing – Part 1
(<https://flourishingesic.info/2017/04/06/labour-code-the-fine-art-of-poor-bashing-part-1/>)
- ii. Slave Labour Code: Review by Lord Yama Dharma Raja – Episode 1
(<https://flourishingesic.info/2017/05/08/slave-labour-code-review-by-lord-yama-dharma-raja-episode-1/>)

Yours faithfully,

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