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CONTRACT LABOUR REGIME IN INDIA: THE PRESENT, THE FUTURE, AND ALL THINGS IN THE INTERREGNUM

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ABSTRACT

With an extensive contract labour market in India, the legal regime around regulation and prohibition of contract labour engagement is of crucial concern to industries. The upcoming labour code on working conditions, which is yet to be brought into force through an appropriate notification of the Central Government, will have notable ramifications for all establishments engaging contract labour beyond a certain threshold, considering that the same envisages a more regulated framework vis-à-vis the extant one. However, the lack of clarity on certain concepts, including that of 'core activity of an establishment', may pose some challenges for establishments in terms of aligning their current practices with the new requirements.

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TABLE OF CONTENTS

I. INTRODUCTION 3
II. PART A: THE CURRENT REGIME 4
A. UNDERSTANDING THE FUNDAMENTALS 4
B. STATUTORY AND JUDICIAL SCRUTINY OF CONTRACT LABOUR ARRANGEMENT 5
C. THE UNIQUE CASE OF ANDHRA PRADESH / TELANGANA 7
III. PART B: THE UPCOMING REGIME 8
A. PROHIBITION ON ENGAGEMENT OF CONTRACT LABOUR IN CORE ACTIVITY AND OTHER CHANGES 8
B. CORE V/S NON-CORE: PRELIMINARY ANALYSIS 9
IV. PART C: OUR OBSERVATIONS 12
A. BUILDING AN ADVISORY MECHANISM FOR DETERMINATION OF CORE ACTIVITY 12
B. OTHER OBSERVATIONS 13
V. PART D: CONCLUDING REMARKS 16

I. INTRODUCTION

India has a massive contract labour industry, and this is evident from the industrial data available in the public domain. Such data reveals that from the period 2001-02 to the period 2017-18, the number of direct workers (*i.e.*, those employed directly by an establishment on its payroll) per factory has been decreasing, while the number of contract workers (*i.e.*, those engaged through third-party manpower service providers) per factory has been rising.[1] Even in non-manufacturing establishments, there is a huge demand for contract labour, especially for miscellaneous operations such as housekeeping, facility management, catering, security, and the like. This demand can be explained by the labour protectionist regime in India, where benefits and protections to on-roll workforce are offered on every facet of employment from onboarding and remuneration to lay-offs and redundancies.

It is argued that the current legal regime does not do much to regulate the ever-increasing contract labour industry. This also forms the rationale for the prohibition on contract labour engagement in core activities under the upcoming Occupational Safety, Health and Working Conditions Code, 2020 [*hereinafter* "**OSH Code**"].[2] However, the prohibition, the exceptions thereof, and other provisions relating to contract labour engagement under the OSH Code do not, in their current

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[1] Ankur Bhardwaj, *India's Industrial Sector: The Rise of the Contract Worker*, CTR. FOR ECON. DATA & ANALYSIS (July 15, 2021) https://ceda.ashoka.edu.in/indias-industrial-sector-the-rise-of-the-contract-worker/.

[2] Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020 (India).

form, address several important factors that establishments need clarity on in order to manage their current/future arrangements with manpower service providers. In this paper, the authors navigate through the existing regime, explore the provisions under the OSH Code on contract labour engagement, and put forth the aspects that require clarity in the form of appropriate amendments, rules, and/or notifications.

II. THE CURRENT REGIME

A. UNDERSTANDING THE FUNDAMENTALS

Contract workers are workers who are on the payroll of an entity [*hereinafter* "**Contractor**"] but are deployed at the premises of another entity [*hereinafter* "**Principal Employer**"] to render services to such other entity.[3] The principal legislation governing engagement of contract labour is the Contract Labour (Regulation and Abolition) Act, 1970 [*hereinafter* "**CLRA Act**"],[4] which becomes applicable if the Principal Employer engages the specified threshold number of contract workers. However, this threshold varies from state to state; it is as low as 5 contract workers in Telangana[5] to as high as 50 contract workers in Maharashtra, Haryana, Uttar Pradesh, Gujarat, etc.[6] A bona fide contract labour arrangement is one where the Principal Employer merely gives direction or exercises ancillary supervision

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[3] Ashis Das and Dhananjay Pandey, *Contract Workers in India: Emerging Economic and Social Issues*, 40 INDIAN J. OF INDUS. REL. 242-265 (2004).

[4] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 10(2) (India).

[5] Government of Telangana, *FAQs*, Dept. Of Labour, https://labour.telangana.gov.in/Faqs.do (last accessed on 11 April 2022).

[6] Contract Labour, COMPLIANCE UNCOVERED, https://uncovered.complyindia.com/applicability/contract-labour/ (last accessed on 11 April 2022).

over the work of the contract labour while the ultimate control and supervision rests with the contractor (which is the employer of the contract labour).

As for contract labour, a Principal Employer has limited responsibilities as it is not the employer of such workers. A Principal Employer may be held liable to pay wages or deposit employees' provident fund / employees' state insurance fund contributions only when the Contractor fails to make these payment or contributions.[7] Even in such cases, the Principal Employer is entitled under the law to recover from the Contractor any payments or contributions that it had to make on behalf of the Contractor.[8]

B. STATUTORY AND JUDICIAL SCRUTINY OF CONTRACT LABOUR ARRANGEMENT

The statutory and judicial scrutiny of contract labour arrangement revolves around evaluation of the factual aspects of the arrangement, especially the integration of contract labour in the primary activities of the Principal Employer and/or its systems, controls, and procedures.

Speaking strictly from the perspective of the CLRA Act, contract worker engagement can be abolished only upon a notification to this effect by the government under Section 10(2) of the CLRA Act.[9] The

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[7] Employees' Provident Fund Organization, *FAQs,* Ministry of Labour & Employment, https://www.epfindia.gov.in/site_en/FAQ.php (last accessed 11 April 2022).
[8] Employers Provident Fund Scheme, 1952, No. 19, Acts of Parliament, 1952, § 32(A) (India).
[9] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 10(2) (India).

government, in turn, will look into several factors while proceeding to order for abolition of contract labour system, such as whether the work performed by them is incidental to or necessary for the business of the establishment, whether the work is of a perennial nature, whether the same is ordinarily carried out by the company's regular employees, etc.

Having said the above, it may be noted that the contract workers still have the option outside of the CLRA Act of raising an industrial dispute. In this regard, the Supreme Court of India [*hereinafter* "**Supreme Court**"] observed the following in *Gujarat Electricity Board v. Hind Mazdoor Sabha*:[10]

> "*[I]f the contract is sham or not genuine, the workmen of the so-called contractor can raise an industrial dispute for declaring that they were always the employees of the Principal Employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute.*"

Over a number of pronouncements, courts have developed several tests which they would employ to determine whether a permanency claim can be sustained. In *Balwant Rai Saluja v. Air India Limited*,[11] the Supreme Court was confronted with the question – whether the workmen engaged in statutory canteens, through a contractor, could be treated as employees

[10] Gujarat Electricity Board v. Hind Mazdoor Sabha, 1995 (5) SCC 27.
[11] Balwant Rai Saluja v Air India Limited, AIR 2015 SC 375.

of the principal establishment. The Supreme Court observed that it would look into whether the entity in question (i) pays salary to the claimants, controls, and supervises the work of the claimants, (ii) has a role in selection and appointment of the claimants, and/or (iii) acts as a disciplinary authority over the conduct and discipline of the claimants.

C. THE UNIQUE CASE OF ANDHRA PRADESH AND TELANGANA

It can be said that under the present Central legal regime, there is no automatic abolition of contract labour arrangement in a certain activity of the Principal Employer. The limited exception to this aspect, however, comes in the form of state-specific amendments to the CLRA Act made by the states of Andhra Pradesh and Telangana. These states introduced the concept of 'core activity of an establishment' and prohibited engagement of contract labour in such activities.[12]

The expression 'core activity of an establishment' is defined to mean any activity for which the establishment is set up, and it is inclusive of any activity which is essential or necessary to the core activity.[13] The amendment, however, clarifies that certain activities would be deemed to be non-core unless an establishment is set up to predominantly carry out such activities. These activities include sanitation, security, loading and unloading, catering, and courier services. Further, an activity will be deemed as non-core despite actually being core, if it is intermittent in nature.

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[12] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 2(1)(dd) (India).
[13] *Id.*

Interestingly, the state amendments as referred to above also allow some exceptions to the prohibition on engagement of contract labour in core activity. These permitted situations are: (i) normal functioning of the establishment being such that the activity is ordinarily carried out through contract labour; (ii) the relevant activity being such that it does not require full-time workers for the major portion of the working hours in a day; and (iii) sudden increase in the volume of work that needs to be completed in a specific timeframe.

III. THE UPCOMING REGIME

A. PROHIBITION ON ENGAGEMENT OF CONTRACT LABOUR IN CORE ACTIVITY AND OTHER CHANGES

The OSH Code reiterates the state amendments to the CLRA Act by Andhra Pradesh and Telangana, as discussed above. Unfortunately, similar to the current position in these states, there are no guidelines set out under the OSH Code or the draft state rules thereunder as regards determination of an activity as core or non-core.

In addition to the above, under the OSH Code, every Contractor is required to intimate the designated authority regarding any work order received by it from an establishment for deployment of contract labour. Under the draft rules released by various state governments, the Contractor is required to intimate about the contract work order within 15 days of its receipt. The intimation will contain details such as the name of the Principal Employer, the address of the Principal Employer's premises, the date of commencement of the work, the number of contract workers deployed,

and the duration of the work order. The intimation would be sent electronically to the licensing authority or submitted on the official portal designated for this purpose. Notably, such intimation requirements are not present under the extant regime, thus allowing flexibility to Principal Employers and Contractors to negotiate on the specifications in the work order from time to time without having to notify any authority.

Another a positive change brought about under the OSH Code is streamlining of the applicability threshold for the chapter relating to contract labour. The CLRA Act applies to establishments engaging 20 or more contract workers and contractors engaging 20 or more workmen, and certain states have varied these thresholds which range from 5 or more workers to 50 or more workers. The OSH Code, while increasing the threshold to 50 or more contract workers, does not contain an express provision unlike the current regime whereby the state government can reduce the threshold for application of the chapter on contract labour.

B. CORE V. NON-CORE: PRELIMINARY ANALYSIS

The jurisprudence around what would be deemed as a core or a non-core activity from the standpoint of contract labour engagement is extremely limited at present. However, the authors' understanding is that in order to assess whether an activity can be considered as a 'core activity', it may have to be seen whether the absence of the same would directly impact the principal activity being carried on by an establishment. For instance, continued manning and supervision of operations is necessary for a

seamless manufacturing process and would, therefore, be covered 'core activity'.[14]

Close integration with the main activity is also an important determinant. For instance, if an establishment has been set up for crushing oil cakes and oil seeds for the purpose of extraction of oil, feeding of cake in the hopper (which would feed the solvent extraction plant) would be a 'core activity' as well.[15] As the authors understand, the test here is the extent to which an activity is directly associated with the basic function of an undertaking. In the words of the Calcutta High Court in the case of *Divisional Railway Manager, Eastern Railway, Asansol Division and Others v. Satyajit Majumdar*:[16]

> "*In case of a railway, it must relate to running of trains and welfare of passengers; in case of telephone authorities, it must relate to the telephone networks themselves or some such other essential item; in case of…industry, the activity must relate to the actual production of the industrial product itself, or to something equally fundamental to the basic organisation of the industry*."

In the context of the term 'manufacturing process' under the Factories Act, 1948, courts have explained that when a manufacturing process is being carried on, everything that is necessary before or after to

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[14] Reference Order of the Government of Andhra Pradesh, G.O.Ms. No. 5 of 2011, Dated 24 January 2011.
[15] Vegoils Pvt. Ltd. v. The Workmen, AIR 1972 SC 1942.
[16] Divisional Ry. Manager, E. Ry., Asansol Div. and Ors. v. Satyajit Majumdar, 1990 SCC OnLine Cal 279.

complete the process would be included within the ambit of 'manufacturing process', as would be the case in the paper printing process where, prior to printing, the types are set on a block prepared for this purpose.[17] These decisions may help establishments in determining what may be deemed as their core activity by authorities.

Another factor that may assume relevance here is that the analysis in relation to what amounts to 'core activity' needs to be establishment specific. Under the labour laws, each branch/unit/office is generally treated to be a separate establishment unless there is a clear functional integrity between two or more branches/units/offices.[18] Courts look into a number of factors to examine if two or more branches can be treated part of the same establishment. These include manner of maintenance of accounts (joint or independent), geographical proximity, community of manpower and of its control, recruitment and discipline, and unity of purpose and functional integrity.[19] Of these, the test that is relied upon the most is the 'functional integrity test'. Functional integrity has been explained by the courts to mean, *inter alia*, such functional inter-dependence that one unit cannot exist conveniently and reasonably without the other.[20]

Accordingly, what may be a non-core activity for one branch/unit/office could be a core activity for another. For instance, while administrative functions may be a non-core activity for a manufacturing

[17] Vishwamitra Karyalaya Press v. Auth., AIR 1955 All 702.
[18] L. N. Gadodia & Sons & Anr. v. Regional Provident Fund Commissioner, (2011) 13 SCC 517.
[19] The Associated Cement Co. v. Its Workmen & Anr., 1959 AIR 967.
[20] Mgmt. of Pratap Press v. Sec'y, Delhi Press Workers' Union, AIR 1960 SC 1213.

unit, the same may be a core activity for an office set up for those very functions. The above understanding, however, is based on the jurisprudence around how a unit can be perceived as an establishment in itself from the standpoint of application of various labour law compliances. Therefore, the possibility of authorities taking a different approach while specifically evaluating the 'core activity of an establishment' cannot be ruled out.

IV. AUTHORS' OBSERVATIONS

A. BUILDING AN ADVISORY MECHANISM FOR DETERMINATION OF CORE ACTIVITY

It cannot be gainsaid that the lack of adequate guidelines under the OSH Code as regards determination of 'core activity of an establishment' may act as an initial roadblock for organisations as they gear up for transition from a relatively flexible regime to a more regulated one. The OSH Code does have a mechanism whereby a question as to whether any activity of an establishment is a core activity or otherwise can be referred to the appropriate government for decision. However, this appears to be a long-drawn process, at least *prima facie*, as the appropriate government may further refer any such question to a designated authority which, on the basis of the material available on record and/or any enquiry conducted for this purpose, shall provide its report to the appropriate government, after which the appropriate government shall decide the question and notify the same to the concerned party.

Interestingly, if one looks at the draft state rules released under the OSH Code for public consultation, it would be noticed that not all states have specified timelines for deciding on the application. Few states, such as Haryana, have also gone on to state that the decision they will provide on the application shall be final.[21] This is, for instance, unlike the advisory mechanism under the Securities and Exchange Board of India (Informal Guidance) Scheme, 2003, wherein the letter issued by a department of the Securities and Exchange Board of India in the form of an advisory is specified as not being a "conclusive decision or determination of any question of law or fact" by the regulatory authority.[22] The finality accorded to the decision of the appropriate government under the OSH Code may deter organisations from reaching out to the relevant authorities.

B. OTHER OBSERVATIONS

Under the CLRA Act, the responsibility to provide welfare facilities, such as canteen to contract workers, is upon the Contractor.[23] It is only when the Contractor fails to provide the welfare facilities that the Principal Employer becomes responsible, and in such a case, the Principal Employer can recover the expenses incurred in providing the amenities from the Contractor.[24] However, the responsibility for providing welfare facilities to contract labour has been placed directly upon the Principal Employer under

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[21] Haryana Occupational Safety, Health and Working Conditions Rules, 2021, Notification No. 02/11/2021-2Lab (India).
[22] Securities and Exchange Board of India (Informal Guidance) Scheme, 2003, § 13.
[23] Contract Labour (Regulation & Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 16 (India).
[24] *Id.* § 20.

the OSH Code.[25] Arguably, this may be deemed as moving away from the essential difference between direct employment and engagement of contract labour. When courts assess the genuineness of contract labour engagement, one of the factors they typically assess is whether there is any direct nexus between contract labour and the Principal Employer in terms of payment of wages, provision of work equipment and facilities, etc.[26] In that sense, imposing the responsibility of provision of facilities to contract labour directly on the Principal Employer, without any express provision to recover the expenses thereof from the Contractor, may be deemed onerous by Principal Employers even in situations where the engagement of contract labour is otherwise genuine under the new requirements set out under the OSH Code.

Similar concerns have also been expressed in respect of other upcoming labour codes on the anvil. For instance, under the Code on Social Security, 2020, the term 'employee' includes contract labour even for the purposes of gratuity (contrary to the current regime).[27] Therefore, a bare reading of the provisions indicates the possibility for contract workers to claim unpaid gratuity from the Principal Employer, even though the essence of the provision of gratuity is rewarding an employee for a long period of service in the organisation. Notably, unlike the chapters on employees' provident fund and employees' state insurance fund under the Code on Social Security that contain provisions for recovery of dues from

[25] Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020, § 24 (India).
[26] Food Corp. of India v. Pala Ram & Ors., (2008) 14 SCC 32.
[27] Code on Social Security, 2020, No. 36, Acts of Parliament, 2020, § 2(26) (India).

the Contractor in the event the Principal Employer has to bear the responsibility for contributions, the chapter on gratuity does not have a similar provision. Likewise, the draft of the Code on Wages (Central) Rules, 2020 and similar draft state rules provide that where the Contractor fails to pay minimum bonus to the contract workers, the Principal Employer shall, on the written information of such failure given by the contract workers, pay minimum bonus to such contract workers, without any provision for recovery of the amount so paid from the Contractor.[28] It is argued that these provisions are incorporated on the assumption that contractors are dubious middlemen who may shirk away from their responsibilities under the law, whereas in reality, several contractors are reputed organisations with large business presence in various parts of the country and financial capacity as significant as that of the Principal Employers procuring their services.

What is also important to note is that while the said direct linkages are being established between contract labour and the Principal Employer, some other provisions under the codes are now excluding contract labour from the applicable regime. For instance, while the definition of 'worker' under the extant Factories Act, 1948 includes contract workers, the OSH Code (which will replace the regime of occupational safety, health and working conditions under the Factories Act, 1948 upon implementation) excludes contract labour from the ambit of 'worker'.[29]

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[28] Code on Wages (Central) Rules, 2020, § 57 (India).
[29] Factories Act, 1948, No. 63, Acts of Parliament, 1926, § 2(l) (India); Occupational Safety, Health and Working Conditions Code, No. 37, Acts of Parliament, 2020, § 2(zzl) (India).

V. CONCLUDING REMARKS

The OSH Code presented a great opportunity to the Central Government and the state governments to build a legal regime that is more in sync with the ground realities, and which does not *prima facie* see contract labour arrangements in negative light. Through this paper, the authors have identified areas which call for a re-look through an appropriate consultative process with all stakeholders. As the Central Government is undertaking discussions with industry associations/representatives on revisiting some of the provisions in the upcoming labour codes, it is hoped that the above concerns are also taken note of, and the upcoming regime is streamlined in terms of coverage/non-coverage of contract labour *vis-à-vis* various provisions.[30]

[30] The authors have made a representation to the Central Government and the state governments on some of the recommendations set out in this article.