

CHAPTER VI

COVERAGE OF 'EMPLOYEE'

INTRODUCTION: The preceding chapters explained how to register the Factories and Establishments under the ESI Act and secure a code number for making compliance under the Act. The statute thereafter places the mandatory responsibility on the Employer to register all the employees. Section 38 postulates that all the employees should be insured in the manner prescribed.

Section 38: Subject to the provisions of this Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act.

L.6.1 The term 'employee' is defined under Section 2(9) as follows:

Any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies; and

(i) Who is directly employed by the Principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) Who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered in to a contract of service; and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment;

or any person engaged as an apprentice, not being an apprentice engaged under the Apprentice Act, 1961(52 of 1961), "and includes such person engaged as apprentice whose training period is extended to any length of time." (These words in inverted commas were substituted vide ESI (Amendment) Act, 2010 (No.18 of 2010) with effect from 1st June, 2010 for the words "or under the standing orders of the establishment")

But does not include—

a) any member of the Indian naval, military or air forces; or

b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

Provided that an employee whose wages excluding remuneration for overtime work exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

L.6.2 The Act mandates the Employer of the Unit to comply with all the provisions of the Act. Regulation 2(g) further amplifies that Employer means the Principal Employer as defined in the Act. The term 'Principal employer' and 'immediate employer' appearing in the above definition are explained below.

(i) PRINCIPAL EMPLOYER: (Section 2(17))

(A) In the case of a factory: (any of the following)

(i) Owner;

(ii) Occupier;

(iii) Managing Agent of the owner or occupier;

(iv) Legal representative of a deceased owner or occupier;

(v) Manager of the factory under the Factories Act, 1948 (63 of 1948) if any person is named as such.

(B) In the case of Establishments under the control of Government of India:

(i) The Authority appointed in this behalf.

(ii) The Head of the Department (In the absence of specified Authority).

(C) In the case of other establishments:

Any person responsible for the supervision and control of the establishment.

(ii) IMMEDIATE EMPLOYER: (Section 2(13))

Any or all of the following:-

(i) A person who undertakes to execute any work inside the premises of the principal employer of a factory or establishment;

(ii) A person who undertakes to execute any work of the principal employer of a factory or establishment which is ordinarily part of the work of the factory or establishment or is preliminary to the work carried on in, or incidental to the purpose of, such factory or establishment, outside the premises under the supervision of its principal employer or his agent;

- (iii) A person who lets on hire the services of his employees to the principal employer of a factory or establishment; and
- (iv) A contractor.

L.6.3 The wage limit to be prescribed by the Central Government under section 2(9)(b) of the Act for the purpose of coverage as an employee is fixed under Rule 50 of the ESI (Central) Rules, 1950 and this limit is raised from time to time as given below.

From 19th April 1948 to 27th Jan. 1968 Rs. 400/- a month;

From 28th Jan. 1968 to 29th Nov. 1975: Rs. 500/- a month.;

From 30th Nov. 1975 to 26th January 1985 Rs.1,000/-a month;

From 27th Jan. 1985 to 31st March 1992 Rs.1,600/- a month;

From 1st April 1992 to 31st December 1996 Rs. 3,000/- a month;

From 1st Jan.1997 to 31st March 2004 Rs. 6,500/- a month;

From 1st April 2004 to 30th Sept. 2006 Rs. 7,500/- a month;

From 1st October 2006 to 30th April 2010: Rs. 10,000/- a month; and

From 01-5-2010 onwards: Rs. 15,000/- a month.

Wage limit for coverage of employees with disability: (Second proviso to Rule 50 of the ESI (Central) Rules, 1950). This new provision has been introduced from 1-4-2008.

The wage limit for coverage of an employee with disability shall be Rs. 25,000/- a month. (Twenty five thousand rupees a month).

L.6.4 In order to qualify to be an 'employee' under the Act, a person should be employed in any of the following categories.

- 1) Those who are directly employed for wages by the Principal employer of a factory or establishment within the premises or outside; (thus, if he is directly employed by the principal employer the employee can be either working inside the Unit or anywhere outside)
- 2) Those employed for wages by or through an immediate employer in the premises of the principal employer of a the factory or establishment or when employed outside under the supervision of the principal employer or his agent; (if employed through an Immediate Employer outside the premises of the Factory there must be an element of identifiable supervision of the Principal Employer or his agent)
- 3) Employees whose services are temporarily lent or let on hire to the principal employer of a factory

or establishment by the person with whom the person whose services are so lent or let on hire has entered in to a contract of service; .

In all the three categories, they should be employed for wages in or in connection with the work of, or incidental or preliminary to or connected with the work of, the factory or establishment to which the Act applies.

The above provisions shows that for a person to be termed an employee, the following characteristics must exist qua his service conditions:-

- 1) He should be employed for wages;
- 2) Such employment must be in or in connection with the work of the factory or establishment to which the Act applies or incidental or preliminary to or connected with the work thereof.
- 3) He must be employed directly by the principal employer on the premises of the factory or outside; or through an immediate employer on the premises of the factory or establishment or outside under the supervision of the principal employer or his agent; or his services are lent or let on hire to the principal employer by a person with whom he entered in to a contract of service.

Exclusions are:

(1) An Apprentice engaged under the Apprentice Act 1961. Consequent to the Amendment to the Act in 2010, only the Apprentices covered under Apprentice Act 1961 are not coverable as employees under the Act. Apprentices engaged under Apprentice Act whose training period is extended to any length of time and all other trainees working under the Standing Orders of the companies are coverable as employees.

(2) Any member of the Naval, Military or Air forces and

(3) any person whose wages exceeds R.15,000/- a month (from 1-5-2010) or Rs. 25,000/- a month in respect of an employee with disability (from 1-4-2008).

The most crucial part of the Statute “on any work of or ordinarily part of the work of the factory or establishment or connected with the work of, or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment has been examined and analysed at great length by several Courts including the Supreme Court and in a land-mark judgement i.e. in the famous Royal Talkies case it was opined that the expressions used are so far reaching and all embracing that they are designed to cover all the persons who are employed on any work even if it is remotely or loosely connected with the purpose or objective of the factory . It was emphatically highlighted that the philosophy and the intent of the Statute was to provide the benefits of the Social Security Legislation to all sections of

workers. Taking Cue from this historical judgment several Courts have upheld the coverage of vast sections of workers and some of them are illustrated in the foregoing paras.

Here are the excerpts of the judgement:

“The expression {in connection with the work of an establishment} ropes in a wide variety of workmen who may not be employed in the establishment but may be engaged only in connection with the work of the establishment. Some nexus must exist between the establishment and the work of the employee but it may be a loose connection. The expression only postulates some connection between what the employee does and the work of the establishment. He may not do anything which is primary or necessary for the survival or smooth running of the establishment or integral to the adventure. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment.....

The language used extensive and diffusive, imaginatively embracing all possible alternatives of employment by or through an independent employer.”

Some nexus must exist between the establishment and the work of the employee, however loose the connection may beA thing is incidental to another if it merely appertains to something else as primary and not as extraneous or contrary to the main purpose

Sec.2(9) (i) covers cases of employees who are directly employed by the principal employer .The language used in this clause and expressions used therein also include employees other than traditionally so regarded” *Bhopal Motors V ESIC 1983 LIC 282 (MP)DB:1982II LLN 837.*

These illustrations show the Courts’ views about the liberal interpretation of the statute in holding that all cross sections of employees whether directly employed or by an Immediate Employer are to be provided with all the benefits of the Act.

L.6.5 Thus, all categories of employees, regular, casual, Badli, substitute, temporary; contract etc. come under the covered category. Employees engaged on loading, unloading, movement of material, gardening, Guest house maintenance, house-keeping, watch & ward, security, cleaning, civil constructions, repairs and maintenance of Factory buildings, machinery, plant, furniture and other equipment, etc., either engaged directly by the principal employer or by or through a contractor/immediate employer stand covered. Part-time employees on contract of service also stand covered.

L.6.6 If the contractor/immediate employer’s employees are engaged on any work of the factory or establishment outside its premises, the supervision of the Principal employer or his agent must be established, while in the premises, it is implied. The onus of establishing the element of supervision squarely rests on the Corporation . It has been the experience of the Corporation that several Courts have upheld the coverage wherever the element of supervision was reasonably established and wherever it was vague and not logically linked the courts had ruled against it.

L.6.7 Even the paid Directors of a Company drawing remuneration within the wage ceiling limits are employees. The Hon'ble Supreme Court while allowing the appeal in *C.A. No. 3411 of 1996 held on 6th November 1997 in the case of M/s Apex Engineering Pvt. Ltd.*, that the Managing Director who was entrusted with the work of Managing the affairs of the Company on a remuneration of 12,000 p.a. i.e. Rs. 1000/- p.m. is an employee. This judgment was communicated by Hqrs. Office vide letter No. T-11/13/23/20/75-Ins.IV dated 4-3-1998. (1997(77) FLR.878)

However, a proprietor, a contractor, and the partners of a firm are excluded from the coverage even if they are in receipt of any remuneration. (It was held by the Supreme Court that a partner of a firm even drawing remuneration cannot be termed as an employee.- *M/s Ramanuja Match Industries-1985 AIR S.C.278, 1985(1) LLJ 69, 1985(66) FJR. 108*)

L.6.8 In all these cases, the wages of an employee should not exceed Rs. 15,000/- a month (from 1-5-2010) and in case of an employee with disability, Rs. 25000/- a month (from 1-4-2008).

Computation of wages for the purpose of wage ceiling is done as follows:

1. Time rated employees:

- a) Monthly rated: - The amount of wages (excluding remuneration for over time work) fixed by the employer as monthly rate be reckoned as the wages for a month.
- b) Other categories of time rated employees: i.e. fortnightly, weekly or daily rated employees:
- c) The average daily wages** may first be worked out and then multiplied it by 26 to get the monthly wages.

(Hqrs. Instruction No. 1/99 under letter No. P-11/14/96-Ins.IV dated 02-2-1999, and Rule 2 (1-B) of the ESI (Central) Rules read with rule 50 thereof)

**Average daily wages: The amount of wages which would have been payable to him for the complete wage period had he worked on all the working days in that wage period divided by 13 if he is fortnightly rated, 6 if he is weekly rated and by 1 if he is daily rated. (Rule2 (1-B) of ESI (Central) Rules, 1950.

2. Other basis: (Piece rated): The amount of wages earned during the complete wage period divided by the number of days in full or part for which he worked for wages in that wage period and then multiplied by 26 to get the monthly wages.

In both the cases, if the average daily wages exceeds Rs. 576.92 (15000 divided by 26) he is not coverable.

L.6.9 Continuance of coverage during the currency of the contribution period:

If the wages of an employee (excluding remuneration for overtime work) exceeds the wage limit prescribed by the Central Government in the middle of Contribution Period after April or October i.e not

at the beginning of the contribution period but in the middle of the Contribution Period he continues to be an employee till the end of that contribution period i.e. September and March respectively and contribution is payable during this period on the total wages including the remuneration for overtime work.

L.6.10 Effect of retrospective increase of wages: In case the wages of an employee is increased from a retrospective date resulting in his crossing the wage limit prescribed, the employee will not go out of coverage till the end of Contribution Period in which such increase are announced. In other words, he continues to be an employee even though his wages has crossed the ceiling limits for coverage till the contribution period ends. The contribution on enhanced wages is however, payable from the month in which such increase is announced/declared/wage settlement made. There is no need to pay the contribution on the arrears prior to the month of declaration/announcement

L.6.11 Excluding overtime for determining the wage ceiling for coverage of an employee under the proviso to Section 2(9) of the Act.

Overtime wage is not a regular type of payment as it does not conform to any fixed pattern and quantum of payment, but it is of an incidental nature. If overtime is also taken for wage limit for coverage of an employee, he may be going out of coverage for some time and again coming within the orbit of the scheme, when overtime is not there. This frequent interruption from the scheme deprives him of the benefits admissible under the scheme even after making payment of contribution for part of a contribution period. To ensure continued security and protection, overtime is excluded for determining the wage ceiling for coverage of an employee. However, it is included for payment of contribution to cover the risk during the period he was on overtime work, and to enable him to draw the cash benefits at the rates corresponding to his wages and the OT Wages on which contributions were paid.

L.6.12 CONTRACT OF SERVICE AND CONTRACT FOR SERVICE:

The broad principles recognized by the Courts are: 'Master and Servant relationship'. The servant is one who is subject to the command of the master as to the manner in which he should do his work. This implies-

- i) He is bound by the discipline and managerial controls of the employer;
- ii) The master has the right to direct the method or manner of work and to control and supervise his work ;
- iii) The master's right to choose the person;
- iv) The payment of wages and other remuneration; and
- v) Master's right to disciplinary control like suspension, dismissal or any other punishment.

Case law: Master-servant significance:

1. 'Whether in a given case the relationship of master and servant exists is a question of fact which may be determined on a consideration of all materials and relevant circumstances having a bearing on that question. In general, selection by the employer coupled with payment by him of remuneration or wages, the right to control the method of work and power to suspend or remove from employment are indicative of the relation of master and servant. But coexistence of all these indicia is not predicated in every case to make the relation of master and servant. In special classes of employment a contract of employment may exist, even in the absence of one or more of these indicia. But ordinarily the right of the employer to control the method of doing the work and the power of superintendence and control may be treated as strongly indicative of the relation of master and servant, for that relation imports the power not only to direct the doing of the work but also the power to direct the manner in which the work is to be done. If the employer has this power, prima facie; the relation is that of a master and servant. (*Supreme Court's decision dated 9th March, 1964 in civil Appeal No. 120 of 1963 between U.P.Govt. and Audh Narain Singh and another- Vol. 5 of Supreme Court Judgments 1950-67 pages 3163 to 3169*)
2. The distinguishing characteristics of contract of service against a contract for service are (1) The existence of relationship of master and servant and (2) Applicability of Labour laws. (*Judgment of Madras High court in A.A.O. No. 2 of 1976 dated 29th June, 1978 between Sagsons Chemical Co. and ESIC, Tamilnadu*)
3. There may be engagements which may not amount to service and so long as it is not service by one under another, there is no question of a relationship of a master and servant calling for coverage under the Act. (*Kerala High court between ESIC Trichur and The Ayurvedic Industrial Co-operative pharmacy, Phuturu- 1980(1_ LIC 557; 56 FJR, 53. There was a similar judgment in ESIC v. United electricl Industries Ltd., -49 FJR.453*)

Employment and engagement- Comparison:

The Delhi High Court held that 'employment' denotes a larger concept than what is denoted by