To Change Your Salary Structure Or Not To Change

The Shakespearean Legal Quandary Around The Definition Of **Wages** Under The Labour Codes

Gaurav Kumar, Advocate, Supreme Court of India
Editor : Labour Law Reporter

The definition of "wages", which is uniform across all the four Labour Codes, is uncharacteristic of labour statutes. While the definition is pretty standard insofar as inclusion of certain components and exclusion of the others is concerned (and similar to the definitions under the erstwhile laws), the common definition of "wages" under the new regime introduces a conditional qualifier in the form of the first proviso. The effect of the qualifier is such that in case the exclusions were to cross the threshold provided for therein, the excess thereof would no longer be regarded as "exclusion" but would be included for the purposes of calculating "wages" under the Codes. It appears that a sense of alarm has been created and managements across the board are running about in despair and clamor to tweak or alter their salary structures for insulating themselves from the infamous "50% clause". The question of whether at all the same is possible or will yield any positive results is a vexed one. It would be imperative to start off by analyzing the definition of "wages" as a whole :

FIRST PART: THE INCLUSIONS

Remuneration

It is clear from the bare reading of the first part of the definition that "wages" is primarily "remuneration". The expression "remuneration" in its ordinary connotation means 'reward, recompense, pay, "wages" or salary for service rendered', as held by the Gujarat High Court in ***Employees' State Insurance Corporation v. New Asarwa Manufacturing Company Ltd.***[1] .

Salaries

The term "salary" conceptually is same as wages as both are a recompense for work done or services rendered, though ordinarily the former expression is used in connection with services of non-manual type while the latter is used in connection with manual services. [See, ***Gestetner Duplicators Pvt. Ltd. v. Commissioner of Income Tax, West Bengal***[2]]

Allowances

Since the term "allowances" has been used along with "salaries" and in connection to "remuneration". An extensive meaning is to be extended to the term "allowances" to include almost all kinds of payments to the employee in connection with his employment. [See, ***Universal Aviation Services v. The Presiding Officer***[3]].

Otherwise

The term "otherwise", it is no longer *res integra*, is to be read *ejusdem generis* or similarly/ in tandem to the terms preceding it i.e. "remuneration", "salaries" and "allowances". Such a construction of the term "otherwise" was adopted by the Punjab & Haryana High Court in ***Punjab Agro Industries Corporation Ltd. v. District Judge, Chandigarh and Ors.***[4], in which the definition of "wages" under the Payment of Wages Act, 1936, which is *pari materia* to the first part of the definition of "wages" under the Codes, was under consideration.

If the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment

The following remuneration would be included under the ambit of this part of the definition:

---

1. *1983 (2) LLN 861 (Guj. HC).*
2. *1979 (38) FLR 315 (SC).*
3. *WP No. 9852/2011 dated 31.08.2021 (Mad. HC).*
4. *2014 (140) FLR 1968 (P&H HC).*

1. If the same is provided under the terms of employment i.e. in the appointment letter or service conditions.

2. If it is not explicitly mentioned in the appointment letter or service conditions but has been paid for a long time. It would then assume the characteristic of implied term of employment.

3. In case of a scheme of payment (such as incentives) which is voluntarily introduced by the employer and can be withdrawn at any time without assigning any reason, the same would not be "remuneration".

Further, components such as basic pay, DA and retaining allowance have specially made part of "wages".

SECOND PART : THE EXCLUSIONS

The second part of the definition of "wages" lists down the exclusions. Such payments are not included in the part of the definition of wages. The major exclusions are statutory bonus, employer's PF contributions, conveyance/travel allowance, special costs to be paid to the employees considering the nature of their employment (such as washing allowance, meal allowance and uniform allowance), house rent allowance, overtime allowance, commission, gratuity and ex-gratia paid at the time of termination.

THIRD PART: CONDITIONAL INCLUSIONS (1ST PROVISO)

There are two ways to interpret the first proviso. The first way to interpret the first proviso is that if the specified exclusions are more than 50% of all the payments (inclusions + exclusions), then the excess is to be considered as part of wages. As per the second interpretation, however, if the specified exclusions exceed 50% of the inclusions (Basic + DA + Retaining Allowance + All other components which are a part of remuneration), the excess part is to be considered as "wages". The second interpretation stems from the fact that the last part of the proviso states that the excess part of the payments made as exclusions will be "*deemed as remuneration*" and will be added as wages. This solidifies the stance that the exclusions were not "remuneration" to begin with. It appears that the Government has officially recognized the first interpretation as it accords the term "all remuneration" the status of "all payments". This is conspicuous from the illustration released by the Ministry of Labour and Employment on 10.12.2025.

2nd Proviso: Certain exclusions to be considered as part of "wages" for equal remuneration and payment of wages

The second proviso states that for the purposes of payment of wages, the excluded emoluments including travelling concession, house rent allowance, remuneration payable under any award or settlement between the parties or order of a court or Tribunal and overtime allowance will be taken into consideration for computation of wages. The same would be true for equal remuneration for all genders as well.

Explanation: threshold of remuneration in kind

The explanation to the definition says that if an employee is given any remuneration in kind by the employer in lieu of the whole or part of wages paid to him (an example can be meal coupons in lieu/instead of meal allowance), then the value or part of the remuneration in kind, which does not exceed 15% of all wages, will be deemed as "wages". Please note that the explanation does not cover remuneration in kind which is deliberately/consciously given as "wages". It only includes such amount that though originally is not "wages", but paid as a replacement or substitution of the wages to be paid as money.

The effect of the definition on different types of payments/contributions is as under :

1. Employees' Provident Fund : For the employees whose basic component of wages and/ or the other inclusive components are Rs.15,000/- or more and PF was being remitted on the same, there would be no difference. The employer may even restrict the PF contribution back to the statutory limit, in accordance with the ratio laid

down by the Supreme Court in ***Marathwada Gramin Bank Karamchari Sanghatana and Another vs. Management of Marathwada Gramin Bank and others***[5]. Even otherwise, the definition of basic wages u/s 2(b) of the EPF Act was such that it took into account all those components/ allowances which were being paid ordinarily, universally and necessarily to employees. For the employees whose wages are less, their PF might increase by some amount depending upon the salary structure of the organization.

2. Employees' State Insurance : The definition of "wages" under the ESI Act differs from that of the Code. While the threshold of Rs.21,000/- will continue to remain by virtue of section 164(2) of the CoSS, allowances which were previously included such as HRA will now not be taken into consideration while calculating wages for the purposes of ESI benefits. As a result, many employees may come under the ambit of ESI for the first time. The ESI authorities have been steadfast in directing the employers to enroll the newly covered employees with the ESIC. However, the third proviso to item no.II of the First Schedule of the CoSS provides that ESI contributions as per "wages" under the code will have to be made on and from the date as may be notified by the Central Government. No such notification has been issued by the Central Government till date.

3. Gratuity : As is common knowledge, under the erstwhile regime, gratuity was being calculated only on basic & DA components. Owing to the expansive definition of wages under the Codes, gratuity will have to be calculated on other components as well. Contrary to the popular perception, such payment of gratuity is not retrospective but retroactive as gratuity is to be calculated on the last drawn wages of an employee.

4. Minimum Wages : The definition of wages under the Minimum Wages Act was inclusive of HRA as well. As a result, minimum wages were often bifurcated between basic pay and HRA, in accordance with the principles laid down under ***Airfreight Ltd. v. State of Karnataka & Ors.***[6]. While bifurcation of minimum wages would still be allowed only amongst the inclusive components, the question of whether minimum wages can be paid as HRA as well will require one to analyze the second proviso to the definition of wages. HRA, conveyance allowance and overtime allowance have been considered as inclusions for "*the purposes of payment of wages*". Minimum wages, or any kind of wages, will have to be paid as per the chapter of payment of wages under the Code on Wages. This aspect therefore needs to be clarified by the Government.

5. Statutory Bonus : The actual calculation of bonus, as it was earlier done on Rs.7,000/- or the applicable minimum wages (which ever higher), will continue to be carried as it is in the absence of any contrary notification by the Government.

6. Maternity Benefit : Calculation of maternity benefits will no longer be carried out on HRA and conveyance allowance. Chances, therefore, are that the maternity benefit amount will reduce.

Can salary be restructured?

As per section 124 of the Code on Social Security, 2020, an employer cannot, directly or indirectly, reduce the wages of an employee only for evading his liability of payment of any contributions or charges under the Code or such that the total quantum of benefits that the employee is entitled to under his terms of employment are reduced. Therefore, any reduction in wages, which is not backed by some defensible justification for the reduction (like business restructuring or exigencies, which should be well documented), will be treated as a violation of section 124.

Email : info@labourlawreporter.com

---

5. 2011 LLR 1130 (SC).
6. 1999 LLR 1008 (SC).