

## CONCEPT OF 'INTERNATIONAL WORKER' AND CURRENT COMPLIANCE LANDSCAPE

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### 1. Introduction

The introduction of the concept of 'international workers' in India was made by the Government of India in the year 2008. *Vide* its notification dated October 1, 2008, the Government of India introduced Paragraph 83 (*Special provision in respect of International Workers*) in the Employees' Provident Fund Scheme, 1952 ("**EPF Scheme**") and Paragraph 43A (*Special provisions in respect of International Workers*) in the Employees' Pension Scheme, 1995 ("**Pension Scheme**"), thereby creating special provisions in respect of the international workers.<sup>3</sup>

### 2. Legislative Framework

**Which establishments come under the ambit of compliance with the special provisions pertaining to 'international workers'?**

The special provisions related to 'international workers' apply to all establishments employing international workers and to which the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") applies.

**This brings us to the question as to who is an 'international worker'.**

As per the EPF Scheme and the Pension Scheme, an 'International Worker' is: (a) an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country by virtue of eligibility gained or going to gain, under the said agreement; or (b) an employee other than an Indian employee, holding other than an Indian passport, working

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<sup>3</sup> Hand Book on the Special Provisions and Social Security Agreements [https://www.epfindia.gov.in/site\\_docs/PDFs/Operating\\_SSAs\\_PDFs/Hand\\_Book.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Operating_SSAs_PDFs/Hand_Book.pdf) (last visited July 23, 2024).

for an establishment in India to which the EPF Act applies.<sup>4</sup> The Pension Scheme further provides that a worker who is a Nepalese national on account of Treaty of Peace and Friendship, 1950 and a worker who is a Bhutanese national on account of India-Bhutan Friendship Treaty, 2007, shall be deemed to be an Indian worker.<sup>5</sup>

The international workers are required to make provident fund (“PF”) and pension contributions in India, of 12% of the international workers’ total salary, with the exception of exclusions under social security agreements (“SSAs”) and bilateral economic partnership agreements (*that have been executed before October 1, 2008*). The employer has to make a matching contribution for each international worker. The total salary for the purpose of computing the contribution comprises of the following components actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis:

- (a) Basic wages (all emoluments paid or payable in cash while on duty or on leave/holiday except dearness allowance, house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable in respect of employment and any presents made by the employer);
- (b) Dearness allowance (i.e., a cash payment made to an employee on account of a rise in the cost of living) including the cash value of any food concession; and
- (c) Retaining allowance, if any.<sup>6</sup>

**There is also a category of ‘excluded employees’ (also termed as ‘detached workers’) within the special provisions. So, who is an ‘excluded employee’?**

As per the EPF Scheme, an ‘excluded employee’ is:

*“(i) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on reciprocity basis and enjoying the status of detached worker for the period and terms, as specified in such an agreement; or*

*(ii) an International Worker, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered into a bilateral comprehensive economic agreement*

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<sup>4</sup> Employees’ Provident Fund Scheme, 1952, Paragraph 83 and Employees’ Pension Scheme, 1995, Paragraph 43A.

<sup>5</sup> Employees’ Pension Scheme, 1995, Paragraph 43A.

<sup>6</sup> Hand Book on the Special Provisions and Social Security Agreements [https://www.epfindia.gov.in/site\\_docs/PDFs/Operating\\_SSAs\\_PDFs/Hand\\_Book.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Operating_SSAs_PDFs/Hand_Book.pdf) (last visited July 23, 2024).

*containing a clause on social security prior to 1st October, 2008, which specifically exempts natural persons of either country to contribute to the social security fund of the host country.”*

### **Retention of membership**

An international worker shall continue to be a member of the fund (*as provided under the EPF Scheme*) (“**Fund**”) until he withdraws the amount standing to his credit in the Fund under Paragraph 69 (*Circumstances in which accumulations in the Fund are payable to member*) of the EPF Scheme or is covered by a notification of exemption under Section 17 (*Power to exempt*) of the EPF Act or an order of exemption under Paragraphs 27 (*Exemption of an employee*) or 27-A (*Exemption of a class of employees*) of the EPF Scheme or the benefits are settled in terms of the relevant provisions under the SSA entered into between India and his country of origin.<sup>7</sup>

### **Is there a minimum period for which the employee can work in India without triggering PF compliance? <sup>8</sup>**

No, there is no minimum period of employment in India to be eligible for the membership. Every eligible international worker has to be enrolled from the first date of his employment in India.

### **We have made multiple references to an SSA. But what is an SSA?**

An SSA is a bi-lateral instrument to protect the interests of the workers in the host country. It being a reciprocal arrangement generally provides for avoidance of no coverage or double coverage and equality of treatment with the host country workers.

### **What are the provisions covered in an SSA?**

As per the handbook<sup>9</sup>, an SSA will by and large cover the following provisions:

#### **a) Detachment**

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<sup>7</sup> Paragraph 26-A of the Employees’ Provident Fund Scheme, 1952.

<sup>8</sup> [https://www.epfindia.gov.in/site\\_en/FAQ.php](https://www.epfindia.gov.in/site_en/FAQ.php) (last visited July 22, 2024).

<sup>9</sup> Hand Book on the Special Provisions and Social Security Agreements [https://www.epfindia.gov.in/site\\_docs/PDFs/Operating\\_SSAs\\_PDFs/Hand\\_Book.pdf](https://www.epfindia.gov.in/site_docs/PDFs/Operating_SSAs_PDFs/Hand_Book.pdf) (last visited July 23, 2024).

Provides that employees sent on posting in the host country need not comply with social security system of the host country, provided he/she is complying under the social security system of the home country.

**b) Exportability of Pension**

Provision for allowing an employee, who is sent on assignment to another country and who is making social security contributions under that country's system, to export the benefits to their home country directly without any reduction or to a beneficiary in the territory of a third country, in accordance with the respective SSA.

**c) Totalisation of Benefits**

Service rendered in the SSA country is added to the service rendered in India to determine the eligibility for pension.

**How many operating SSAs are currently there?**

Currently there are SSAs with 20 countries: Belgium, Germany, Switzerland, Grand Duchy of Luxembourg, France, Denmark, Republic of Korea, Netherlands, Hungary, Finland, Sweden, Czech Republic, Norway, Austria, Canada, Australia, Japan, Portugal, Brazil, and Quebec.

**Certificate of Coverage**

A certificate of coverage (“**COC**”) is a mandatory document which is to be obtained by an international worker in order to avail the benefits under the applicable SSA. A COC is issued in the employee's home country by the social security authority in accordance with the provisions of the relevant SSA. The COC acts as a proof of detachment, pursuant to which, exemptions from the applicable social security compliances are allowed in the host country.

**Is there any wage limit?**

In case of an ‘international worker’, the wage limit is not prescribed. Accordingly, employers were mandated to contribute to the PF with no ceiling limit on the total salary, i.e., the wage limit was not applicable to such employees, causing a higher contribution to be matched by employers of such workers.

**3. Judicial Intervention**

In view of the special provisions introduced for international workers, a petition was filed in the Bombay High Court in the case of *Sachin Vijay Desai vs. Union of India & Ors.*,<sup>10</sup> challenging the provisions for international workers as arbitrary and discriminatory. The Bombay High Court had dismissed the petition and held that provision of ‘international workers’ are constitutionally valid. The court had held that international workers form a separate and distinct class by themselves. Special provisions were sought to be made for such class of employees which would include the Indian workers going to work abroad and non-Indian workers coming to work in India.

However, the Karnataka High Court, *vide* its order dated April 25, 2024, has now struck down the provisions of Paragraph 83 of the EPF Scheme and Paragraph 43A of the Pension Scheme which are pertaining to contributions for international workers without any ceiling as to the wages and held these provisions to be unconstitutional and arbitrary. Further the Karnataka High Court also directed that all orders that have been passed in this regard are unenforceable. This was in the case of *Stone Hill Education Foundation vs. Union of India and Others*<sup>11</sup> (“**Stone Hill Case**”), the facts of which are as under:

Several writ petitions were filed by the employees as well as the employers (“**Petitioners**”) in the Karnataka High Court and other High Courts, wherein the Petitioners questioned the vires of Paragraph 83 of the EPF Scheme and Paragraph 43A of the Pension Scheme which was introduced by the Union of India (“**Respondent No. 1**”), *vide* its notification dated October 1, 2008, thereby enacting special provisions for the international workers. The said paragraphs of the EPF Scheme and the Pension Scheme were challenged on the grounds of being arbitrary, unconstitutional and opposed to the EPF Act since the employees other than the international workers, who draw salary exceeding INR 15,000 per month, are outside the purview of the EPF Scheme.

The Petitioners also sought the orders passed by the Regional Provident Fund Commissioner-I, Bangalore (“**Respondent No. 2**”), seeking payment of contributions by the companies under the EPF Scheme and the Pension Scheme and in default to pay charges under the EPF Act, to be quashed. The Karnataka High Court in the instant case took into consideration all the writ petitions concerning the same issue.

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<sup>10</sup> Sachin Vijay Desai vs. Union of India & Ors., Writ Petition No. 1846 of 2018.

<sup>11</sup> Stone Hill Education Foundation vs. Union of India and Others, W.P. No. 18486/2012.

The issue involved in the case was whether the introduction of Paragraph 83 of EPF Scheme and Paragraph 43A of Pension Scheme is unconstitutional and opposed to Article 14 (*Equality before law*) of the Constitution of India.

The arguments advanced by both sides were as follows:

(a) Contentions raised by the Petitioners:

The Petitioners submitted that as per Paragraph 83 of the EPF Scheme, 'international workers' are covered under the EPF Act and the EPF Scheme, irrespective of the salary drawn by them. It was contended by the Petitioners that the insertion of Paragraph 83 to the EPF Scheme and Paragraph 43A to the Pension Scheme violates Article 14 of the Constitution of India.

The Petitioners also submitted that the said paragraphs are arbitrary, illegal and oppose the object and intent of the EPF Act since there is no ceiling limit on the wages of the international workers on which the contribution is payable by both the employer and the international worker, unlike INR 15,000 per month ceiling prescribed under the EPF Act for the excluded employee (that is, who are not international workers).

The Petitioners contended that the object of the legislature is to ensure compulsory institution of contributory provident funds for weaker sections of the workers working in industrial undertakings and at no point of time, had the EPF Act intended to cover high-ranking officials. The Petitioners also argued that the international workers work merely for a limited period and not till their retirement and the employer has to incur a huge financial burden as they have to make payment towards the PF contributions on the international workers' global salary.

The Petitioners also submitted that no intelligible differentia exists between an Indian employee and an international worker who is not covered under an SSA or a Bilateral Comprehensive Economic Agreement ("BCEA"). Further, there is no nexus between the object sought to be achieved under the EPF Act and the EPF Scheme framed in relation to international workers and the classification made thereto. The Petitioners submitted that a separate statute should be enacted for an international worker who is not covered under an SSA or BCEA, containing a clause on social security prior to October 1, 2008.

(b) Contentions raised by the Respondents:

The Respondents contended that Respondent No. 1 has effected several changes to the EPF Act by introducing special provisions for different types of workers from time to time, such as insertion of: (i) Paragraph 80 (*Special provisions in the case of newspaper establishments and newspaper employees*) in the EPF Scheme with effect from December 31, 1956; (ii) Paragraph 81 (*Special provisions in the case of cine-workers*) in the EPF Scheme in 1981; and (iii) Paragraph 82 (*Special provisions in respect of certain employees*) in the EPF Scheme in 1999 to make special provisions in respect of an employee with a disability. Similarly, the EPF Act was amended in 2008, as a result of which Paragraph 83 was inserted in the EPF Scheme to extend the coverage of international workers under the EPF Scheme and further introduced Paragraph 43A under the Pension Scheme and the EPF Scheme was given effect from September 11, 2010, insofar as it relates to international workers.

According to the Respondents, bilateral SSAs were finalised by the Government of India with several countries and these SSAs were effective on several dates respectively. In order to honour the said bilateral agreements with the respective foreign countries, as a measure of reciprocity as well as for the welfare of the international workers, the provisions of the EPF Act and the EPF Scheme were amended and extended by Respondent No. 1 to the international workers.

The Respondents also contended that the intention of the Parliament behind amending the EPF Scheme was that no worker should be deprived of social security benefits and similarly no Indian workers who are posted to work in the foreign countries should be deprived of the said social security benefits.

It was further contended by the Respondents that the Indian workers were required to make mandatory social security contributions in accordance with the laws of the countries where they were deputed for a limited period. As per the Respondents, such contributions were a loss for every worker as the benefits are generally payable on completion of a minimum qualifying period of contribution or residence (generally ten years or more), according to the laws of the countries where the said workers were deputed, and an Indian worker deputed for a limited period of five years or so generally falls short of the minimum qualifying period.

It was also contended by the Respondents that the reason behind amending the EPF Scheme was because the Indian workers, even after the remittance of social security contribution in the host

countries, are not entitled to any social security benefits and in order to protect the rights of such workers, the amendment was introduced which provides that an international worker from an SSA country is entitled to withdraw his PF accumulation on ceasing to be an employee in an establishment covered under the EPF Act.

The Respondents submitted that the said amendment to the EPF Scheme is not violative of Article 14 of the Constitution of India as it only applies to Indian citizens and not to foreigners in general and by the process of classification, the State has the power to determine who should be regarded as a class for the purpose of legislation and in relation to law enacted on a particular subject. It was also submitted by the Respondents that the said amendment has resulted in creation of international workers as a special class which is distinct from other employees under the EPF Act. The said classification is rational and not arbitrary, and has been made on the basis of certain qualities and characteristics found in persons grouped together and not in others who are left out. Additionally, there is a nexus between the differentia which is the basis of classification and the object of the EPF Act.

The Karnataka High Court gave due consideration to the contentions raised by both parties, and accordingly formed its observations.

The Karnataka High Court observed that the EPF Act is a social welfare legislation meant for the protection of industrial workers to enable them to have an alternative to pension. The EPF Act was enacted with a view to see that those in lower salary brackets get retirement benefits and by no stretch of imagination, could it be said that the employees who draw lakhs of rupees per month should be given the benefit under it. The Karnataka High Court also highlighted the object of introducing Paragraph 83 of the EPF Scheme which is to protect the Indian employees, going abroad to work, from being subjected to the social security and the retirement clause of their host-country which are prejudicial to their interest and to motivate these countries for entering into such agreements with India and to provide for reciprocal treatment to the nationals of these countries while they work in India.

The Karnataka High Court noted that the EPF Scheme is a subordinate legislation which cannot run beyond the scope and object of the mother Act. Therefore, Paragraph 83 of the EPF Scheme cannot transcend the parameters of the principal legislation, that is, EPF Act which sets forth the wage limit for the Indian employees to be INR 15,000 per month. Therefore, Paragraph 83 of the



EPF Scheme ought not to have an unlimited threshold for international workers while denying the same benefit to Indian workers.

The Karnataka High Court noted that an Indian employee working in a foreign country with an SSA, who is a member under the EPF Act continues to contribute on lower amount of salary, that is, INR 15,000 and on the other hand, a foreign worker from SSA country, without having a COC, is required to contribute PF on his entire salary although both are international workers as per the definition of international workers. Therefore, the distinction in the contribution amount between an employee going to a non-SSA country and an employee from a non-SSA country coming to India is clearly discriminatory and violative of Article 14 of the Constitution of India. The Karnataka High Court also observed that the demand for contribution on global salary (that is, salary earned by an international worker or remuneration received by an international worker from some other country or in home country) is on the face of it, arbitrary and hit by Article 14 of the Constitution of India.

The Karnataka High Court observed that:

*“An international worker from a non-SSA country is not allowed to withdraw accumulation until he reaches the age of 58 years. Therefore, para 83 eventually applies to international workers from countries with which the Government of India does not have SSA, and therefore, the claim of reciprocity does not arise and thus the claim of the Government that the obligation of reciprocity has made the Government of India to enact para 83 is unsustainable.”*

The Karnataka High Court observed that as of the date of the present order, only 20 countries have entered into an SSA with India and there exists no material which depicts what is the social security scheme which is available for such international workers whose country of origin has not entered into a bilateral agreement with the Government of India. It was also observed by the Karnataka High Court that Paragraph 83 of the EPF Scheme and Paragraph 43A of the Pension Scheme has been enacted by the legislature arbitrarily and unreasonably and defeats the very intent of the EPF Act.

It was also observed by the Karnataka High Court that there exists no commonality of interest of the aims and objectives of the EPF Act and Paragraph 83 of the EPF Scheme. Further, in the

absence of parity and reciprocity, there is no justification to demand a contribution on the entire pay of a foreign employee from a non-SSA country.

In line with the abovementioned observations, the Karnataka High Court allowed the writ petition and struck down the introduction of Paragraph 83 of EPF Scheme and Paragraph 43A of Pension Scheme on the grounds of being unconstitutional and arbitrary and consequently all orders passed under the said provisions of the schemes were held to be unenforceable.

#### **4. Current Position**

The Ministry of Labour & Employment in its statement on May 7, 2024 said that the Employees' Provident Fund Organisation (“**EPFO**”) (*which is the statutory body constituted by the Central Government under the provisions the EPF Act*) is actively evaluating the future course of action in response to this judgement.<sup>12</sup> As per media reports, EPFO will most likely challenge the judgement of the Karnataka High Court. However, at this point, no clarity has been provided as to how such settlements will be made and necessary instructions from the EPFO are awaited. Another aspect to consider is how the EPFO will handle potential refund of PF accumulations in relation to international workers which have been previously remitted by an employer (*specifically where the employers have made demand for such refund and no appeal has been filed by the concerned employer*). However, the companies covered under the EPF Act in the state of Karnataka should be able to treat international workers equivalent to domestic workers to the extent that PF contributions under the EPF Act are concerned, until such time that the judgment in the Stone Hill Case is either stayed or is set aside by a higher judge bench of the Karnataka High Court or the Supreme Court.

Considering that similar petitions are pending adjudication in various courts, it will also be interesting to see whether courts in other Indian States will follow suit.

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<sup>12</sup> <https://pib.gov.in/PressReleasePage.aspx?PRID=2019888> (last visited July 23, 2024).