Cover Note

Overview of Labour Law Reforms

In 2019, the government introduced four labour Codes on wages, social security, occupational safety and industrial relations.

The Code on Wages has been passed. The Standing Committee on Labour has presented reports on the other Bills.

The government has replaced these Bills with new Bills in September 2020.

Related Legislative Briefs:

The Code on Social Security, 2019
September 10, 2020

The Industrial Relations Code, 2019
April 17, 2020

The Occupational Safety, Health and Working Conditions Code, 2019
December 9, 2019

The Code on Wages, 2017
February 20, 2018

Issues for Consideration: Three Codes of 2020
September 21, 2020

Roshni Sinha
roshni@prsindia.org

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- The central government proposes to replace 29 existing labour laws with four Codes. The objective is to simplify and modernise labour regulation.
- The major challenge in labour reforms is to facilitate employment growth while protecting workers' rights. Key debates relate to the coverage of small firms, deciding thresholds for prior permission for retrenchment, strengthening labour enforcement, allowing flexible forms of labour, and promoting collective bargaining.
- Further, with the passage of time, labour laws need an overhaul to ensure simplification and updation, along with provisions which can capture the needs of emerging forms of labour (e.g., gig work). This note discusses these challenges and the approaches taken by the four Codes.
- **Coverage**: Most labour laws apply to establishments over a certain size (typically 10 or above). Size-based thresholds may help firms in reducing compliance burden. However, one could argue that basic protections related to wages, social security, and working conditions should apply to all establishments. Certain Codes retain such size-based thresholds.
- **Retrenchment**: Establishments hiring 100 or more workers need government permission for closure, layoffs or retrenchments. It has been argued that this has created an exit barrier for firms and affected their ability to adjust workforce to production demands. The Industrial Relations Code raises this to 300, and allows the government to further increase this limit by notification.
- **Labour enforcement**: Multiplicity of labour laws has resulted in distinct compliances, increasing the compliance burden on firms. On the other hand, the labour enforcement machinery has been ineffective because of poor enforcement, inadequate penalties and rent-seeking behaviour of inspectors. The Codes address some of these aspects.
- **Contract labour**: Labour compliances and economic considerations have resulted in increased use of contract labour. However, contract labour have been denied basic protections such as assured wages. The Codes do not address these concerns fully. However, the Industrial Relations Code introduces a new form of short-term labour – fixed term employment.
- **Trade Unions**: There are several registered trade unions but no criteria to 'recognise' unions which can formally negotiate with employers. The Industrial Relations Code creates provisions for recognition of unions.
- **Simplification and updation**: The Codes simplify labour laws to a large extent but fall short in some respects. Further, the Code on Social Security creates enabling provisions to notify schemes for 'gig' and 'platform' workers; however, there is a lack of clarity in these definitions.
- **Delegated Legislation**: The Codes leave several key aspects, such as the applicability of social security schemes, and health and safety standards, to rule-making. The question is whether these questions should be determined by the legislature or be delegated to the government.

Context

Labour falls under the Concurrent List of the Constitution. Therefore, both Parliament and state legislatures can make laws regulating labour. The central government has stated that there are over 100 state and 40 central laws regulating various aspects of labour such as resolution of industrial disputes, working conditions, social security and wages.[1] The Second National Commission on Labour (2002) (NCL) found existing legislation to be complex, with archaic provisions and inconsistent definitions.[2] To improve ease of compliance and ensure uniformity in labour laws, the NCL recommended the consolidation of central labour laws into broader groups such as (i) industrial relations, (ii) wages, (iii) social security, (iv) safety, and (v) welfare and working conditions.

In 2019, the Ministry of Labour and Employment introduced four Bills on labour codes to consolidate 29 central laws. These Codes regulate: (i) Wages, (ii) Industrial Relations, (iii) Social Security, and (iv) Occupational Safety, Health and Working Conditions. While the Code on Wages, 2019 has been passed by Parliament, Bills on the other three areas were referred to the Standing Committee on Labour. The Standing Committee submitted its reports on all three Bills.[3] The government has replaced these Bills with new ones in September 2020. This note discusses some of the key issues related to labour laws and the provisions in the four new Codes. This note should be read in conjunction with our Legislative Briefs on the four Codes, and the note on the three new Bills.

KEY ISSUES IN LABOUR REFORMS

Simplification of labour laws

The 2nd National Commission on Labour (NCL) recommended consolidation of central labour laws. It observed that there are numerous labour laws, both at the centre and in states. Further, labour laws have been added in a piecemeal manner, which has resulted in these laws being ad-hoc, complicated, mutually inconsistent with varying definitions, and containing outdated clauses.[2] For example, there are multiple laws each on wages, industrial safety, industrial relations, and social security; some of these laws cater to different categories of workers, such as contract labour and migrant workers, and others are focused on protection of workers in specific industries, such as cine workers, construction workers, sales promotion employees, and journalists. Further, several laws have differing definitions of common terms such as "appropriate government", "worker", "employee", "establishment", and "wages", resulting in varied interpretation. Also, some laws contain archaic provisions and detailed instructions (e.g, the Factories Act, 1948 contains provisions for maintaining spittoons and frequency of white-washing walls).

The Commission emphasised the need to simplify and consolidate labour laws for the sake of transparency, and uniformity in definitions and approach. Since various labour laws apply to different categories of employees and across various thresholds, their consolidation would also allow for greater coverage of labour. Following the recommendations of NCL, the four Codes on wages, industrial relations, social security, and occupational safety were introduced in Parliament.

While the Codes consolidate and simplify existing laws to some extent, they fall short in some respects. For example, the Codes on occupational safety and social security continue to retain distinct provisions of each of the laws that these Codes subsume. For example, while the Occupational Safety Code contains provisions on leaves for all employees, it continues to retain additional leave entitlements for sales promotion employees (e.g. earned medical leave for 1/18th of time on duty). Similarly, while the Codes rationalise definitions of different terms to a large extent, they are not uniform in all respects. For example, while the Codes on wages, occupational safety and social security contain the same definition of "contractor", the code on industrial relations does not define the term. Finally, while the government stated that 40 central labour laws would be subsumed, the four Codes only replace 29 laws. The Annexure to this note lists the laws which are being subsumed by each of the Codes.

Facilitating job creation while protecting work

The 6th Economic Census (2013-14) reported that there were 5.9 crore establishments in India employing 13.1 crore people (of which 72% were self-employed and 28% hired at least one worker).[4] A total of 79% workers were in establishments with less than ten workers. The central challenge to labour regulation is to provide sufficient rights to workers while creating an enabling environment that can facilitate firm output and growth, leading to job creation. Firms should find it easy to adapt to changing business environment and be able to change their output (and employment) levels accordingly. At the same time, workers need protection of assured minimum wages, social security, reduction in job insecurity, health and safety standards, and a mechanism for ensuring collective bargaining rights. This would also require a labour administration that effectively manages conflicts and ensures the enforcement of rights.

It has been argued that firm sizes have remained small in India because of: (i) labour rigidity arising from the fear of having to take prior permission for retrenchment/closure even if businesses are not viable (lack of an easy exit option), and (ii) high administrative burden since multiplicity of labour laws has resulted in multiple inspections, returns and registers.[5] This has constrained growth of firms.[5] Amongst registered factories, the Annual Survey of

Industries (2017-18) indicates that 47% factories employ less than 20 workers, but provide only 5% of employment, and 4% of output.[6] Further, high administrative burden has resulted in corruption and rent-seeking.[5]

In order to get around the rigidities in hiring and firing that constrain the ability to adjust to production demands, businesses have increasingly used contract labour.[5] The share of contract workers in factories among total workers increased from 26% in 2004-05 to 36% in 2017-18, while the share of directly hired workers fell from 74% to 64% over the same period.[7,8]

Table 1: Attributes of registered factories by worker size (ASI 2017-18)

Feature	0-19	20-99	100-499	500-4999	At least 5000
% of total factories	47.1%	33.8%	14.3%	4.4%	0.3%
Fixed capital utilised	3.5%	8.2%	19.6%	44.7%	24.1%
Persons engaged	5.0%	18.4%	32.1%	35.9%	8.6%
Output produced	4.1%	15.3%	25.8%	40.1%	14.6%
Net value added	2.2%	11.7%	25.0%	47.5%	13.6%

Sources: Annual Survey of Industries (2017-18); PRS.

However, it has been observed that rights of contract labour to wages and social security dues have not been enforced to the same extent as that of permanent workmen and they face precarious working conditions.[2] Further, various studies have observed that labour enforcement in India has been weak and has not protected workers adequately, the success of collective bargaining has been low because of lack of recognition to bargaining agents, and the coverage of labour laws has been inadequate.[5,9] The Periodic Labour Force Survey Report (2018-19) indicates that 70% of regular wage/salaried employees in the non-agricultural sector did not have a written contract, 54% were not eligible for paid leave and 52% did not have any social security benefit.[10]

Note that studies have shown that ultimately firm growth and job creation may also depend on several other key factors, which include infrastructure development, access to finance, availability of skilled manpower, boost in skill upgradation, and reduction in overall corruption.[11,12] However, one could argue that current laws have neither benefited industries (as they have constrained firm growth) nor workers (due to lack of formalization and weak enforcement). Expert committees have made recommendations to address this issue. We discuss below various aspects of these recommendations, and the provisions in the four new labour codes.

Coverage of establishments under labour laws

***Context**: Most labour laws apply to establishments over a certain size (typically 10 or over). Low numeric thresholds may create adverse incentives for establishments sizes to remain small, in order to avoid complying with labour regulation. Further, these laws only cover the organised sector (around 7% of the workforce).*[9]

Reforms proposed: It has been argued that small firms may be exempted from application of various labour laws in order to reduce the compliance burden on infant industries and to promote their economic growth.[13,14] However, low numeric thresholds may create adverse incentives for establishments sizes to remain small, in order to avoid complying with labour regulation.[13,14] To promote the growth of smaller establishments, some states have amended their labour laws to increase the threshold of their application. For instance, Rajasthan increased the threshold of applicability of the Factories Act, 1948, from 10 workers to 20 workers (if power is used), and from 20 workers to 40 workers (if power is not used). The Economic Survey (2018-19) noted that increased thresholds for certain labour laws in Rajasthan resulted in an increase in growth of total output in the state and total output per factory.[9]

On the other hand, some have argued that basic provisions for enforcement of wages, provision of social security, safety at the workplace, and decent working conditions, should apply to all establishments, regardless of size.[2,13] In this regard, the NCL had recommended a separate law for small scale units (having less than 20 workers) with less stringent provisions for conditions such as payment of wages, welfare facilities, social security, retrenchment and closure, and resolution of disputes. Further, for unorganised sector establishments (which fall outside the purview of labour laws), the National Commission for Enterprises in the Unorganised Sector (NCEUS) made a number of recommendations to address the social security and minimum conditions of work for both agricultural and non-agricultural workers and suggested two Bills – one for each sector.[15] Note that the Economic Survey (2018-19) estimates that almost 93% of the total workforce is informal.[9]

The ILO (2005) notes that only 10% of its member states had exempted small enterprises from labour regulation altogether.[16] Most countries adopt a mixed approach to labour regulation. For instance, health and safety laws in the US, UK, South Africa and Philippines provide universal coverage to all workers (except for domestic help in the US and UK).[17] However, certain obligations under these laws are only applicable to enterprises with employees over a certain threshold. For example, record-keeping obligations for work-related accidents in the US do not apply to establishments with less than 10 employees or in "low hazard" industries.

Provisions of the Codes: The labour codes on wages and industrial relations apply to all establishments, with limited exceptions. The codes on social security and occupational safety continue to apply to establishments over a certain size (typically, above 10 or 20 workers). However, the Occupational Safety Code states that the applicability thresholds (of 10 or above) will not apply in those establishments in which hazardous activities are being carried out. Further, it makes provisions to notify a separate social security fund for unorganised workers. That said, the code increases the thresholds for factories from 10 to 20 (with power) and 20 to 40 (without power).

The Code on Social Security enables the government to formulate schemes for the benefit of unorganised workers, and gig and platform workers. The codes on industrial relations and occupational safety allow the government to exempt any new establishment from their provisions in public interest. We have summarised the detailed recommendations of the NCL on providing universal social security coverage to all workers in our Legislative Brief on the Code on Social Security.

Thresholds for lay-off, closure and retrenchment

***Context**: The Industrial Disputes Act (IDA) 1947, requires factories, mines and plantations employing 100 or more workers to obtain prior permission of the government before closing down, or laying off or retrenching workers. It has been argued that the requirement of prior permission has created an exit barrier for firms and hindered their ability to adjust labour workforce to production demands.*

Reforms proposed: The Standing Committee on Labour (2009) recommended that the government consider amendments to include provisions of prior notice, adequate compensation, and other benefits for retrenched workers to balance the need for economic efficiency of businesses.[18] NCL noted that unviable firms should be allowed to close while also ensuring prior scrutiny of grounds of closure and reasons for loss of viability. Therefore, it recommended that the requirement of prior permission may be retained for closure of establishments which hire 300 or more workers and be made applicable to all types of establishments. However, the requirement for prior permission should be removed for lay off and retrenchment. To balance the interests of workers, adequate notice and compensation must be provided, there must be consultation with the representatives of the workers and judicial recourse must be provided against the closure. It also recommended that the government consider a contribution-based unemployment insurance (in establishments covered by the Employees' Provident Fund Act) to take care of retrenched workers or those whose establishments have been closed. The benefit would be payable for one year or till re-employment, whichever is earlier.

The recommendations of NCL on retrenchment, closure and lay-offs are summarized below:

Table 2: Comparison of IDA provisions and changes proposed by NCL for lay-offs, retrenchment and closure

Feature	ID Act 1947	NCL Recommendations
Prior Permission	▪ Required for lay-offs, closure and retrenchment in establishments with 100 or more workers.	▪ Not required for lay-offs and retrenchment. ▪ Required for closure in establishments with 300 or more workers
Clearance of dues as a pre-condition	▪ No	▪ Yes
Notice period	▪ One month	▪ Two months
Compensation	▪ At the rate of 15 days (for closure and retrenchment) ▪ 50% of wages for lay offs	▪ Based on whether enterprise is profitable or loss making: ▪ Closure for establishments with more than 100 workers: 30 days (for sick enterprises with three years' losses and filed for bankruptcy/winding up) and 45 days (for profit making enterprises) ▪ Retrenchment for establishments with more than 100 workers: 45 days (for sick enterprises looking to become viable by retrenching) and 60 days (for profit making one enterprises) ▪ 50% of above to be paid for enterprises with 100 or less workers. ▪ 50% of wages for lay-offs. Government approval to be obtained in establishments with 300 or more workers if lay-off exceeds one month.

Sources: Industrial Disputes Act, 1947; 2nd NCL Report; PRS.

Some states have amended the threshold provision of the IDA 1947. For example, Rajasthan amended the Act in 2014 to increase the threshold from 100 workers to 300 workers. A report of the ILO (2020) suggested that only 22 countries (including India, Pakistan and Thailand) require collective dismissals to be authorized by public authorities.[19] Of these, seven countries (including India, Sri Lanka and Colombia) do not require consultation with workers' representatives. On the other hand, most countries require notification to both workers' representatives and competent authorities, but no prior permission.

Provisions of the Code: The Industrial Relations Code increases the threshold to 300 workers while retaining the notice and compensation requirements specified under the IDA 1947. It allows the government to further increase the threshold by notification.

Labour Administration

***Context**: All labour laws have distinct compliance requirements for employing units. Multiplicity of labour laws has resulted in multiple inspections, returns and registers. One private study reported that states have 423 labour-related Acts, 31,605 compliances and 2,913 related filings.[20] On the other hand, it has been argued that the labour enforcement machinery has been ineffective because of poor enforcement, inadequate penalties and rent-seeking behaviour of inspectors. Further, dispute resolution processes need reform to make them more effective.*

Reforms proposed: Various committees have proposed reforms to tackle three types of issues: compliance burden, enforcement of laws, and resolution of disputes.

Reduce compliance burden: NCL recommended moving towards a regime of self-certification with selective inspections based on returns submitted by the employing units (with the exception of routine inspections where conditions of safety are concerned).[2] However, routine inspections may be retained in the unorganised sector to protect worker interests. To make the enforcement machinery accountable, at least 10% check of all inspections should be done by superior officers at all levels. Certain states such as Gujarat, Punjab and Haryana have already moved to self-certification for certain laws. One Committee (Chair: Anwarul Hoda, Member, Planning Commission) endorsed a regime of third-party inspections, with regulatory compliances certified by external and recognized agencies, accompanied with a system of joint inspections and annual calendars of inspections.[21] Note however that India has ratified ILO Convention No. 81 which emphasises on the labour inspector's right to enter premises freely without prior notice to ensure compliance of labour laws. In view of this, a Working Group constituted under the Planning Commission (for 2012-17) recommended that complaint-based inspections and self-certification can complement the present system without substituting it.[22]

A 1988 Act allows establishments with up to 19 workers and up to 40 workers to submit combined annual returns and a unified register under 16 central laws (including laws which cover wages, factories and contract labour); NCL recommended extending its application to all establishments in order to simplify registers and returns required to be maintained/filed under different laws.[23] Further, offences of a technical nature, such as failure to maintain registers or file returns may provide for compounding (i.e. settlement) instead of prosecution.

Improve enforcement of laws: Various Committees have recommended strengthening the enforcement machinery by increasing manpower and improving labour enforcement infrastructure.[22,24] The NCL recommended upgradation of the infrastructure, training and facilities available to the enforcement machinery to improve their efficiency. Further, in the context of the state labour machinery, it recommended that the central government determine norms for improving the inspector ratio and infrastructure of labour departments. Various committees have also noted that existing penalties for offences are inadequate and do not act a deterrent.[2,22] They have recommended that the penalties for various offences may be graded based on the seriousness of offence, the number of times the offence has been committed, and the capacity to pay.

Strengthen peaceful resolution of disputes: The NCL recommended a system of labour courts, lok adalats and Labour Relations Commissions (LRCs) as the integrated adjudicatory system in all labour matters (including wages, social security and welfare). LRCs would act as appellate bodies to hear appeals against the decisions of the labour courts. They will be headed by judges (or lawyers qualified to be judges), and include representatives of employers, workers, economists, as members.

In a performance audit (2001-2006) conducted by the Comptroller and Auditor General of India (CAG) in central establishments and establishments in Delhi, Kolkata, Mumbai and Chennai, the CAG noted that the effectiveness of the adjudication process was diluted by various factors, such as (i) routine delays by the government in referring labour disputes for adjudication, (ii) delay in disposal of cases (35-57% of the cases taken up by the labour courts between 2001 and 2006 in the four metros were pending as of 2007), (iii) delay in publication of court awards in the gazette and (iv) delay in implementation of awards.[25] In this context, the CAG and NCL recommended that: (i) the precondition of requiring the government to refer disputes to the labour courts should be dispensed with, (ii) cases should be decided within three hearings (with extensions thereafter for recorded reasons), (iii) the award should become enforceable without waiting for its publication in the official gazette, and (iv) a mechanism for timely implementation of awards should be set up in both central and state sphere. The NCL also noted that several laws (e.g., payment of gratuity) only permit the inspector to file a complaint. It recommended that any aggrieved person (or his trade union) should also be empowered to file a complaint directly.

Provisions of the Codes: The Codes create enabling provisions for web-based inspections (which may be accompanied by randomized inspections) in some cases and third-party certification (for notified classes of establishments in some cases) and create some provisions for common registers and returns. However, details have been left to delegated legislation. Further, in certain cases, such as Code on Social Security, compliance reporting on different aspects (such as provident fund and insurance) may continue to be required to be made to different authorities. The Codes also increase the quantum of fines and imprisonment in several cases and allows for compounding of offences in certain cases. With regard to dispute resolution, the Industrial Relations Code removes the requirement for reference to the government and publication of award in the gazette and replaces industrial courts/tribunals with two-member labour tribunals (with one judicial and one administrative member).

Contract Labour

***Context**: It has been argued that labour compliances and economic considerations have resulted in increased use of contract labour. The share of contract workers in factories among total workers increased from 26% in 2004-05 to 36% in 2017-18, while the share of directly hired workers fell from 74% to 64% over the same period.[7,8] This flexibility has come at a cost of increase vulnerability since contract labour have been denied basic protections (such as assured wages) and are not entitled to be regularized in cases where contract labour is prohibited by the government.[26]*

Reforms proposed: The NCL noted that organisations must have the flexibility to adjust their workforce based on economic efficiency. Currently, the Contract Labour (Regulation and Abolition) Act, 1970 empowers the government to prohibit employment of contract labour in some cases including where: (i) the work is of a perennial nature, or (ii) the work performed by contract workers is necessary for the business carried out by the establishment, or (iii) the same work is carried out by regular workmen in the establishment. In 2001, the Supreme Court held that even if the use of contract labour is prohibited in an establishment, contract workers do not have the right to be regularized automatically in the workforce.[26] This has resulted in employers being able to hire contract labour more freely. To provide further flexibility, the NCL recommended allowing contract labour to be used in core work of the establishment if there is sporadic seasonal demand. Further, it recommended delineating between core and non-core work in an establishment and defining the type of work for which contract labour may be hired. Note that Andhra Pradesh passed amendments to the law in 2003 which prohibited contract labour in core activities and specified a list of non-core activities where the prohibition would not apply (such as sanitation and security services). It also permitted employment of contract labour for any sudden increase in work in the core activities of a firm (to be completed in a specified period). As per ILO (2016), countries such as Indonesia and Brazil also limit the use of contract workers in core activities.[27] Further, China restricts the use of contract workers in the total workforce to a limit fixed by regulation (fixed at 10% of workforce as of 2014).

However, the NCL also recognized that contract labour suffers from lack of job security and social security, low wages and suppression of collective bargaining rights. For example, in a compliance audit (2017) of contract labour working for the railways, the CAG noted that in a significant number of selected cases, the Railways did not furnish the requested records which suggested poor compliance.[28] Of the cases where records were shared, it was observed that licenses were not obtained by contractors in 37% cases, minimum wages were not paid in 28% cases, ESI registration was only obtained in 75% cases, and no inspections were conducted. The CAG recommendations included: (i) awarding contracts to agencies which are registered with the labour department, EPFO or ESIC, etc, and (ii) prescribing a comprehensive compliance checklist before clearing contractor bills.

To protect the rights of contract workers, NCL recommended: (i) remunerating contract workers at the same rate as regular workers for similar work (and if such worker does not exist, at the lowest salary of workers in a comparable skill grade), (ii) ensuring responsibility of the principal employer to extend social security and other benefits to contract workers, and (iii) not hiring workers as casual or temporary workers against permanent posts for more than two years. Note that the central rules notified under the Act have always required wage parity between regular and contract workers for similar work. However, the Supreme Court (2009) interpreted this to mean that the employer can consider various factors such as skill, nature of work, reliability and responsibility of workers in deciding whether similar work is done by the two categories of workers.[29]

Since 2018, the central government has also introduced provisions for fixed term employment in central sphere establishments.[30] Fixed term employment refers to workers employed for a fixed duration based on a contract signed between the worker and the employer. This allows employers to manage variations in production to cater to a short spike in demand (for example, in response to a contract to supply goods) without committing to a higher level of labour force. This also provides a greater level of job security to workers than contract workers, though such security would be lower than that of the permanent employees. However, fear that the fixed term contract may not be renewed may deter them from raising issues with the management. We have summarized the detailed pros and cons of hiring fixed term labour in our Legislative Brief on the Industrial Relations Code, 2019.

Provisions of the Code: Currently, contract labour provisions apply to establishments/contractors hiring at least 20 workers. The Code on Occupational Safety and Health increases this threshold to 50 workers. Further, it prohibits contract labour in core activities except in certain circumstances (which includes any sudden demand in work). It also specifies a list of non-core activities where the prohibition would not apply. This includes: (i) sanitation works, (ii) security services, and (iii) any activity of an intermittent nature even if that constitutes a core activity of an establishment.

As regards liability of the contractor, the Code leaves the conditions for grant of contractor license to rules. Further, it shifts the primary responsibility of providing welfare facilities from the contractor to the principal employer. ~~It also provides for automatic absorption of contract workers into the establishment of the principal employer where they are engaged through an unlicensed contractor~~ (deleted on September 25, 2020 as the 2020 Bill omits this). The Industrial Relations Code introduces provisions to employ fixed term labour.

Trade Unions

Context: *There are a large number of registered trade unions, including several within an establishment. There are no criteria to determine which unions can formally negotiate with the management. Settlements made with unions are only binding on the participating unions. This has affected collective bargaining rights of workers. Further, questions have been raised on the extent to which non-employees may be permitted in trade unions.*

Reforms proposed: As of 2015, there were 12,420 registered trade unions in India with an average membership of 1,883 persons per union.[31] A large number of unions within an establishment hampers the process of collective bargaining as it is difficult to reach a settlement with all of them. Employers may also seek legitimacy for a favourable settlement by reaching an agreement with a compliant union though it may not have the support of a

majority of workers. The NCL recommended giving 'recognition' to a union with the support of 66% members. If no union has 66% support, then unions that have the support of more than 25% should be given proportionate representation on a negotiation college. The vote for recognition may be cast on the basis of a regular subscription to a union through deduction from the wages of a worker – this system of regular payment of subscription would verify relative strength of different unions on a continuing basis. In establishments with less than 300 workers, the mode of identifying the negotiating union may be determined by Labour Relations Commissions (which may include secret ballot) to mitigate any possibility of victimisation by the management of the company. The Standing Committee on Labour (2009) also endorsed compulsory recognition of trade unions.[18]

Further, to counter low unionization in the unorganised sector, the recommended that a specific provision may be made to enable workers in the unorganised sector to form trade unions (with any number of workers) and get them registered even where an employer- employee relationship does not exist or is difficult to establish. On the question of participation of outsider, the NCL noted that it would have been desirable if the Trade Unions Act had provided for a ceiling on the total number of trade unions of which an 'outsider' can be a member.

Provisions of the Code: The Industrial Relations Code makes provisions for recognition of a negotiation union with 51% membership. In the absence of such support, a negotiation council may be formed. However, the Code does not clarify how the vote will take place. Further, no changes have been made to the extent of participation of outsiders (up to 33%, subject to a maximum of five members). Up to 50% may be outsiders in unorganised sector unions. However, the Code weakens collective bargaining rights by requiring a two-week notice for strikes.

Delegated Legislation

Under the Constitution, the legislature has the power to make laws and the government is responsible for implementing them. Often, the legislature enacts a law covering the general principles and policies, and delegates detailed rule-making to the government to allow for expediency and flexibility. However, certain functions and powers should not be delegated to the government. These include framing the legislative policy to determine the principles of the law. Any Rule should also remain within the scope of the delegating Act. The question is which matters should be retained by the legislature and which of these could be delegated to the government.

The labour Codes delegate various essential aspects of the laws to the government through rule-making. These include: (i) increasing the threshold for lay-offs, retrenchment, and closure, (ii) setting thresholds for applicability of different social security schemes to establishments, (iii) specifying safety standards and working conditions to be provided and maintained by establishments, and (iii) deciding the norms for fixation of minimum wages.

Emerging challenges

Based on government statistics, McKinsey Global Institute (2016) estimates that 10-15% of working age adults in the US and European Union earn their primary living from "independent work".[32] In addition to traditional freelance work, independent work would include emerging digital platforms which provide opportunities for task-based "crowd-work" (e.g., freelance work over digital platforms) and "on-demand work" (e.g., taxi and restaurant aggregators). One of the questions the Codes need to address is whether any distinction must be drawn between self-employed persons (e.g., freelancers) who exercise independent control over their work (including terms of service, scheduling and payment terms), and self-employed persons who predominantly work with a single platform which may exert some degree of control over the terms of their work (e.g. aggregators). If so, the Codes will also need to consider the extent to which various provisions that provide rights to employees should be extended to the latter category.

Note that workers in the gig economy are typically classified as independent contractors and thus are not provided the protection of various labour laws, including social security benefits.[33] Globally, some regions have defined principles by which to identify employer-employee relationships which may be mis-classified as independent contract work. For example, California passed a Bill in 2019 which classifies certain independent contractors as employees and entitles them to certain benefits such as health insurance, if the hiring company fails to prove that: (i) the tasks performed by the person fall outside the usual course of the company's business, (ii) the company does not exercise control over the manner in which the person performs their tasks, and (iii) the person is customarily engaged in a trade or occupation of the same nature as that involved in the work performed.[34]

The Code on Social Security introduces definitions for 'gig worker' and 'platform worker'. Gig workers refer to workers outside the "traditional employer-employee relationship". Platform workers are those who are outside the "traditional employer-employee relationship" and access organisations or individuals through an online platform and provide services. The Code also defines unorganised workers which include self-employed persons. The Code creates provisions for different schemes for all these categories of workers (and defines the role that aggregators may be expected to play in some of these schemes). However, there may be some overlap between these three definitions which may result in lack of clarity on the applicability of social security schemes to these different categories of workers. We have illustrated this issue in our Legislative Brief on the Code.

ANNEXURES: DETAILS OF LABOUR LAWS

The Bill replace the following 29 central Acts. Table 3 lists the Acts which are being subsumed by the four labour codes. Table 4 lists some Acts which regulate some aspects of labour but have not been subsumed by the Codes.

Table 3: Details of Acts which are being subsumed by the four labour codes

Labour Codes	Acts being subsumed
Code on Wages, 2019	▪ Payment of Wages Act, 1936; ▪ Minimum Wages Act, 1948; ▪ Payment of Bonus Act, 1965; and ▪ Equal Remuneration Act, 1976
Occupational Safety, Health and Working Conditions Code, 2020	▪ Factories Act, 1948; ▪ Mines Act, 1952; ▪ Dock Workers (Safety, Health and Welfare) Act, 1986; ▪ Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; ▪ Plantations Labour Act, 1951; ▪ Contract Labour (Regulation and Abolition) Act, 1970; ▪ Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; ▪ Working Journalist and other Newspaper Employees (Conditions of Service and Miscellaneous Provision) Act, 1955; ▪ Working Journalist (Fixation of Rates of Wages) Act, 1958; ▪ Motor Transport Workers Act, 1961; ▪ Sales Promotion Employees (Condition of Service) Act, 1976; ▪ Beedi and Cigar Workers (Conditions of Employment) Act, 1966; and ▪ Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
Industrial Relations Code, 2020	▪ Trade Unions Act, 1926; ▪ Industrial Employment (Standing Orders) Act, 1946, and ▪ Industrial Disputes Act, 1947
Code on Social Security, 2020	▪ Employees' Provident Funds and Miscellaneous Provisions Act, 1952; ▪ Employees' State Insurance Act, 1948; ▪ Employees' Compensation Act, 1923; ▪ Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959; ▪ Maternity Benefit Act, 1961; ▪ Payment of Gratuity Act, 1972; ▪ Cine-workers Welfare Fund Act, 1981; ▪ Building and Other Construction Workers' Welfare Cess Act, 1996; and ▪ Unorganised Workers Social Security Act, 2008

Sources: Existing Central Acts; Labour Codes; PRS.

Table 4: Some central Acts which are related to labour law but have not been subsumed by the Codes

Additional Central Laws	Description of the Act
Labour Laws (Simplification of Procedure for Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988	Allows establishments with up to 19 workers and up to 40 workers to submit combined annual returns and unified registers under 16 central laws (covering wages, factories and contract labour)
Apprentices Act, 1961	Provides for the regulation of training of apprentices.
Bonded Labour System (Abolition) Act, 1976	Provides for the abolition of the bonded labour system.
Child and Adolescent Labour (Prohibition and Regulation) Act 1986	Prohibits employment of children (below 14 years) in all occupations and of adolescents (14-17 years) in hazardous occupations and processes.
Public Liability Insurance Act 1991	Makes provisions for public liability insurance to provide relief to persons affected by accidents which occurred while handling any hazardous substance.
Dock Workers (Regulation of Employment) Act 1948	Makes provisions for framing a scheme for regulating the employment of dock workers. Sets up a Board to administer the scheme.
Dock Workers (Regulation of Employment) (Inapplicability to Major Ports) Act 1997	Provides for inapplicability of the Dock Workers (Regulation of Employment) Act, 1948 to dock workers of major ports in India.
Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948	Makes provisions for framing provident fund, pension, deposit linked-Insurance and bonus schemes for persons employed in coal mines.
Provident Funds Act, 1925	Deals with provident funds primarily relating to the government, local authorities, Railways and certain other institutions.
Seamen's Provident Fund Act, 1966	Makes provisions for framing a provident fund scheme for seamen.
Sexual Harassment at Workplace Act, 2013	Creates a process to redress complaints of sexual harassment at the workplace.
Boilers Act, 1923	Regulates the manufacture and use of steam boilers.

Additional Central Laws	Description of the Act
Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993	Prohibits employment of manual scavengers for certain activities. Regulates construction and maintenance of water seal latrines.
Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013	Prohibits employment of manual scavengers, manual cleaning of sewers and septic tanks without protective equipment, and construction of insanitary latrines.

Sources: Existing Central Acts; PRS.

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