Closure in Case where chapter V-A is Applicable

Sixty days' notice to be given of intention to close down any undertaking.-

Sec 25FFA (1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to-

(a) an undertaking in which –

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months,

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Notwithstanding anything contained in sub-section (1), the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

Compensation to workmen in case of closing down of undertaking

Sec 25FFF (1) provides that Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of Section 25-F shall not exceed his average pay for three months.

Explanation.-

An undertaking which is closed down by reason merely of-

(i) financial difficulties (including financial losses); or

(ii) accumulation of undisposed of stocks; or

(iii) the expiry of the period of the lease or licence granted to it; or

(iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on,

shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this subsection. Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of Section 25-F, if-

a) the employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure;
b) the service of the workman has not been interrupted by such alternative employment; and
c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

Procedure for closing down an undertaking where Chapter V-B is applicable:

(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner: Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and

adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub- section (5) be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication: Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation

which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

Penalty for closure.- Sec 25 R

(1) states that any employer who closes down an undertaking without complying with the provisions of sub-section (1) of Section 25-O shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

(2) Any employer who contravenes an order refusing to grant permission to close down an undertaking under sub-section (2) of Section 25-O or a direction given under Section 25-P shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both, and where the contravention is a continuing one, with a further fine which may extend to two thousand rupees for every day during which the contravention continues after the conviction.

Transfer of undertakings: Compensation to workmen in case of transfer of undertakings. Sec 25 FF

Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched: Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if-

a) the service of the workman has not been interrupted by such transfer;
b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favorable to the workman than those applicable to him immediately before the transfer; and
c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

Notice of change Sec 9-A

No employer, who purposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,-

(a) without giving to the workman likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice: Provided that no notice shall be required for effecting any such change—

(a) where the change is effected in pursuance of any settlement or award; or

(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply.

Power of Government to exempt: Sec 9-B

Where the appropriate Government is of opinion that the application of the provisions of Section 9A to any class of industrial establishments or to any class of workmen employed in any industrial establishment affect the employers in relation thereto so prejudicially that such application may cause serious repercussion on the industry concerned and that public interest so requires, the appropriate Government may, by notification in the Official Gazette, direct that the provisions of the said section shall not apply, or shall apply, subject to such conditions as may be specified in the notification, to that class of industrial establishments or to that class of workmen employed in any industrial establishment.

Conditions of service, etc. to remain unchanged under certain circumstances during pendency of proceedings.- Sec 33

During the pendency of any conciliation proceedings before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,

(a) in regard to any matter connected with dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied between him and the workman

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2) no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or

(b) by discharging or punishing, whether by dismissal or otherwise such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. Explanation. For the purposes of this sub-section, a “protected workman” in relation to an establishment, means a workman, who being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of sub-section (3) shall be one per cent of the total number of workmen employed therein subject to a minimum number of five

protected workmen and a maximum number of one hundred protected workmen and for this aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, within a period of three months from the date of receipt of such application] such order in relation thereto as it deems fit:

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing extend such period by such further period as it may think fit. Provided further that, no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.

Special provision for adjudication as to whether conditions of service etc. changed during pendency of proceeding. Sec 33A

Where an employer contravenes the provisions of Section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing in the prescribed manner,-

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal, or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.

Recovery of money due from an employer: Sec 33C

(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B, the

workman himself or any other person authorised by him in writing in this behalf, or, in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue: Provided that every such application shall be made within one year from the date on which the money became due to the workman from the employer : Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months:

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case.

(4) The decision of the Labour Court shall be forwarded by it to the appropriate Government and any amount found due by the Labour Court may be recovered in the manner provided for in sub-section (1).

(5) Where workmen employed under the same employer are entitled to receive from him any money or any benefit capable of being computed in terms of money, then, subject to such rules as may be made in this behalf, a single application for the recovery of the amount due may be made on behalf of or in respect of any number of such workmen.

THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

The Industrial Employment (Standing Orders) Act, 1946 was enacted to require employers in industrial establishments to define with sufficient precision the conditions of employment under them, and to make the said conditions known to workmen employed by them. The Act not only requires the employers to lay down conditions of service but also requires that the conditions of service must be clearly laid down so that there may not be any confusion or uncertainty in the minds of the workmen, who are required to work in accordance therewith.

Application of the Act:

This Act may be called the Industrial Employment (Standing Orders) Act, 1946. It extends to the whole of India. It applies to every industrial establishment wherein one hundred or more workmen are employed, or were employed on any day of the preceding twelve months:

Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any industrial establishment employing such number of persons less than one hundred as may be specified in the notification.

Nothing in this Act shall apply to

a) any industry to which the provisions of Chapter VII of the Bombay Industrial Relations Act, 1946 (Bombay Act 11 of 1947) apply; or
b) any industrial establishment to which the provisions of the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 (Madhya Pradesh Act 26 of 1961) apply:

Provided that notwithstanding anything contained in the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 (Madhya Pradesh Act 26 of 1961), the provisions of this Act shall apply to all industrial establishments under the control of the Central Government.

Objective of the Standing Order:

There was no uniformity in the conditions of service of workers until this act was brought, which led to friction between workers and Management. An Industrial worker has the right to know the Terms & condition which he is expected to follow. The Industrial Employment (Standing Orders) Act, 1946, which, inter alia, requires

the employer to define and publish uniform conditions of employment. This is more than the HR Policy / code of conduct / handbook, of an organization. It is basically a terms on employment – Entry & Exit to the premises, Hours of work, Rates of wages, Shift schedules, Leave and Attendance, Misconduct provisions, process of termination or separation, etc.

Provisions of Standing Order regulates the conditions of employment, grievances, misconduct etc. of the workers employed in industrial undertakings. Unsolved grievances may become industrial disputes.

If the classification of employees – Temporary, Casual, Permanent, Badli, Probationary etc, can be mentioned in the draft with conditions, then it will not cause any challenges to the establishment while appointing such types of employees.

The employer of every industrial establishment is required to submit to the Certifying Officer, draft standing orders proposed by him for adoption in his industrial establishment for certification under Section 3 of the Act. The Certifying Officer is empowered to modify or add to the draft as is necessary to render the draft standing orders certifiable under the Act. It is important to note that, draft standing orders submitted to the Certifying Officer are to be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which the workmen belong

As per the provisions of the Act, the Appropriate Government is to set out model standing orders. The draft standing orders framed by an employer should as far as practicable be in conformity with model standing orders. Any industrial establishment can accept the model standing orders; the model standing orders are temporarily applicable to an industrial establishment which comes under the provisions of the Act and whose standing orders are not finally certified.

An employer who fails to submit draft standing orders or an employer who does any act in contravention of the standing orders finally certified under the provisions of the Act shall be punished with fine as specified in Section 13 of the Act.

Definition of Standing Order: Sec 2 (g)

The Industrial Employment Act, 1946 defines the meaning of 'Standing Orders' in section 2 (g). These are the rules which relate to the matters explained in the Schedule. Under this section, the employer has to make a draft of standing orders for submission to the certifying officers regarding the matters prescribed in the Schedule.

According to the Schedule annexed to the ISO, the following matters should be provided for in the standing orders of an industrial establishment:

1. Classification of workmen e.g. whether permanent, temporary, apprentices, probationers, or badlis.
2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
3. Shift working.
4. Attendance and late coming.
5. Conditions of, procedure in applying for, and the authority which may grant leave and holidays.
6. Requirement to enter premises by certain gates, and liability to search.
7. Closing and reporting of sections of the industrial establishment, temporary stoppages of work and the rights and liabilities of the employer and workmen arising there from.
8. Termination of employment, and the notice to be given by employer and workmen.
9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.
11. Any other matter which may be prescribed.

Definition of Employer: Sec 2(d)

"Employer" means the owner of an industrial establishment to which this Act for the time being applies, and includes-

i. in a factory, any person named under clause (f) of sub-section (1) of Section 7 of the Factories Act,1948, as manager of the factory;

ii. in any industrial establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf, or where no authority is so appointed, the head of the department;

iii. in any other industrial establishment, any person responsible to the owner for the supervision and control of the industrial establishment;

Definition of Industrial establishment: Sec 2(e)

"Industrial establishment" means

i. an industrial establishment as defined in clause (ii) of Section 2 of the Payment of Wages Act, 1936, or

ii. a factory as defined in clause (m) of Section 2 of the Factories Act, 1948, or

iii. a railway as defined in clause (4) of Section 2 of the Indian Railway Act, 1890, or

iv. the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen;

Definition of Workman: Sec 2(i)

"The expression as used in this Act is the same as is used in Section 2 (s) of the Industrial Disputes Act, and includes any person including an apprentice employed in any industry to do any skilled or unskilled, manual, supervisory, technical, operational or clerical work for hire or reward whether the terms of employment are expressed or implied and includes any person who has been dismissed, discharged or retrenched in connection with an industrial dispute or where dismissal, discharge or retrenchment has led to the dispute, but doesn't include any such person:

(i) Who is subject to the Army Act, 1950 or the Air Force Act, 1950 or the Navy Act, or

(ii) Who is employed in the Police Service or as an officer of prison or

(iii) Who is employed mainly in a managerial or administrative capacity or

(iv) Who being employed in supervisory capacity, draws wages exceeding 1100 rupees per mensem.

Certifying Officer: Sec 2 (c)

"Certifying Officer" means a Labour Commissioner or a Regional Labour Commissioner, and includes any other officer appointed by the appropriate

Government, by notification in the Official Gazette, to perform all or any of the functions of a Certifying Officer under this Act.

Procedure for certification of Draft Standing order:

Submission of draft standing orders:

Sec 3 of the states that, within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in this industrial establishment. Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where Model standing orders have been prescribed shall be, so far as is practicable, in conformity with such model. The draft standing orders submitting under this section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong. Subject to such conditions as may be prescribed, a group of employers in similar industrial establishments may submit a joint draft of standing orders under this section.

In S.K. Sheshadri v H.A.L and others, (1983) Karnataka High Court held that, as long as the Standing Orders fall within the Schedule to the Act, irrespective of the fact that they contain additional provisions which are not accounted for in the MSOs, the Standing Orders would not be deemed to be invalid or ultra vires of the Act. The MSOs only serve as a model for framing the Standing Orders.

In Hindustan Lever v Workmen, (1974) the issue relating to the 'transfer of workmen' was highlighted by concurring that, the Manager is vested with the discretion of transfer of workmen amongst different departments of the same company, so far as the terms of the contract of employment are not affected. Further, if the transfer is found to be valid, the onus of proving it to be invalid lies on the workmen in dispute.

In Management of Continental Construction Ltd. v Workmen of Continental Construction, (2003) the employer's right to terminate the service of a probationer was recognized by declaring that, if a person is an employee on probation, it is an inherent power of the employer to terminate during/ at the end of the probationary period, provided, that even while acting in accordance with the CSO, the employer's action be fair and consistent with the principles of natural justice.

Conditions for certification of standing orders:

Sec 4 provides that, Standing orders shall be certifiable under this Act if--

a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and
b) the standing orders are otherwise in conformity with the provisions of this Act ; and it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders.

Different set of Standing Orders:

Once the standing orders are certified, they constitute the conditions of the service binding upon the management and the employees serving already and in employment or who may be employed after certification." This implies that different set of standing orders cannot exist in respect of distinct sections of workmen or the employer(s), for that would frustrate the intent of the legislature by rendering the conditions of employment as indefinite & diversified, just as existed prior to the enactment of the said Act.

Certification of standing orders

The procedure for certification of Standing Order, as prescribed under Section 5 of the Act, is threefold:

1. The Certifying Officer to send a copy of the Draft Standing Order to the workmen or trade union, along with a notice calling for objections, that shall be submitted to him within 15 days of receiving such notice.
2. Upon receipt of such objections, the employer and workmen to be given an opportunity of being heard, after which the Certifying Officer shall decide and pass an order for modification of the Standing Order.
3. Finally, the Certifying Officer shall certify such Standing Order, and thereby, within seven days, send a copy of it annexed with his order for modification passed under Section 5(2).

Appeals:

Any related party aggrieved by the order of the Certifying Officer may, under sec 6, appeal to the 'appellate authority' within 30 days, provided that its decision, of confirming such Standing Order or amending it, shall be final. The appellate authority shall thereafter send copies of the Standing Order, if amended, to the related parties within seven days.

Date of operation of standing orders:

Sec 7 provides that, Standing orders shall, unless an appeal is preferred under Section 6, come into operation on the expiry of 30 days from the date on which authenticated copies thereof are sent under sub-section (3) of Section 5 or where an appeal as aforesaid is preferred, on the expiry of 7 days from the date on which copies of the order of the appellate authority are sent under sub-section (2) of Section 6.

Register of standing orders:

Sec 8 of the Act states that, a copy of all standing orders as finally certified under this Act shall be filed by the Certifying Officer in a register in the prescribed form maintained for the purpose, and the Certifying Officer shall furnish a copy there of to any person applying there for on payment of the prescribed fee.

Posting of standing orders:

Sec 9 of the Act states that, the text of the standing orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.

Modification or Alteration in 'standing orders'

Sec 10 of the Act provides that, Standing orders finally certified under this Act shall not, except on agreement between the employer and the workmen or a trade union or other representative body of the workmen be liable to modification until the

expiry of six months from the date on which the standing orders or the last modifications thereof came in to operation.

Subject to the provisions of sub-section (1), an employer or workman or a trade union or other representative body of the workmen] may apply to the Certifying Officer to have the standing orders modified, and such application shall be accompanied by five copies of the modifications proposed to be made, and where such modifications are proposed to be made by agreement between the employer and the workmen or a trade union or other representative body of the workmen, a certified copy of that agreement shall be filed along with the application. The foregoing provisions of this Act shall apply in respect of an application under sub-section (2) as they apply to the certification of the first standing orders.

In the case of The Management of M/s. Gem Properties Pvt. Ltd. High Court held that "Any Standing Orders finally certified under the Act shall not except on agreement between the employer and the workmen be liable to modification until the expiry of six months from the date on which the standing orders or last modification thereof came into operation."

The object of providing time limit was to give a fair deal. Certain decided cases reveal that an application for alteration may be accepted where there is change of circumstances or the working of the certified standing orders resulted in hardship, anomaly, inconvenience or some fact not given at the time of certification or it is felt by the applicant that the alteration will be more beneficial to the concerned parties or it is found in the interest of industry/employees. The application for alteration in standing orders must be made to the certifying officer.

In the "Industrial Employment (Standing Orders) Act, 1946," only the employer was conferred upon the right to apply for modification. But the amendment in 1956, allowed both the employee and the employer to apply for modification of the standing orders. The word 'workman' in some cases led to doubt whether a trade union can also exercise this right. Therefore, to clarify this doubt, an amendment was made in 1982 which permitted not only the employer and the employees but also the representatives of the employees or the trade unions to apply for alteration of the standing orders. In case of a 'trade union' that must be registered under the Trade

Unions Act. If a minority union applies for modification that can be objected by the majority union.

Judicial Response Regarding Binding Nature and Effect of Standing Orders duly certified:

In the Act, no provision, regarding its binding nature and any effect on standing orders, has been made. Therefore, the decisions of the courts have been varying from time to time. Somewhere, the decisions show that the nature of the standing orders is binding on both the employer and the employee whereas in some cases, the court has decided that these are not binding. In the case of "Guest Keen Williams (Pvt.) the court held that, the standing orders when they were certified became operative and bound the employer and all the employees."

Again in Tata Chemicals,"the High Court held that: "the standing order when finally certified under the Act becomes operative and binds the employer and the workmen by virtue of the provisions of the Act and not by virtue of any contract between the employer and the workmen. The court added further: the rights and obligations created by the standing orders derive their force not form the contract between the parties but from the provisions of the Act. They are statutory rights and obligation and not contractual rights and obligations."

However, in the case of Co-operative Central Bank Ltd., the Supreme Court held that: "There is no specific provision in the Act dealing with the binding nature and effect of standing orders. In the absence of any provision, courts have held that a standing order certified under Industrial Employment (Standing Orders) Act is binding upon the employers and employees of the industry concerned. However, the decided case reveals that even though they are binding, they don't have such force of laws as to be binding on industrial tribunals adjudicating on industrial dispute."

Therefore, the binding nature of the certified standing orders has been a matter of controversy in a number of cases decided by the High Courts and the Supreme Court.

The Supreme Court made a departure to its decision given in the case of Guest Keen Williams (Pvt.) Ltd. v. P J Serling and held in the case of Salem Erode

Electricity Distribution Co.v. Their Employee Union with regard to the age of superannuation: "Once the standing orders are certified and come into operation, they become binding on the employer and all the workmen presently employed as also those employed thereafter in the establishment conducted by that employer. It cannot possibly be that such standing orders would bind only those who are employed after they come into force and not those who were employed previously but are still in employment when they come into force. It further said: if the standing orders were to bind only those who are subsequently employed, the result would be that would be different conditions of employment for different classes of workmen, one set of conditions for those who are previously employed and another for those employed subsequently, and where they are modified, even several sets of conditions of service depending upon whether a workman was employed before the standing orders are certified or after, whether he was employed before or after a modification is made to any one of them and would bind only a few who are recruited after and not the bulk of them, who though in employment, were recruited previously. Such a result could never have been intended by the legislature, for that would render the conditions of service of workmen as indefinite and diversified, as before the enactment of the Act."

The Supreme Court reiterated its aforesaid view in the case of Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union and held that: "Once the standing orders are certified, they constitute the conditions of the service binding upon the management and the employees serving already and in employment or who may be employed after certification."

Payment of subsistence allowance:

Sec 10 A (1) provides that where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance-

(a) at the rate of fifty per cent of the wages which workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary

proceedings against such workman is not directly attributable to the conduct of such workman.

If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947, within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

Notwithstanding anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State.

Certifying Officers and appellate authorities to have powers of Civil Court:

Sec 11 states that, every Certifying Officer and appellate authority shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths,, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be a Civil Court within the meaning of Sections 345 and 346 of the Code of Criminal Procedure, 1973. Clerical or arithmetical mistakes in any order passed by a Certifying officer or appellate authority, or errors arising therein from any accidental slip or omission may, at any time, be corrected by that Officer or authority or the successor in office of such officer or authority, as the case may be.

MISCONDUCT AND DOMESTIC ENQUIRY

According to the Schedule annexed to the Standing Order Act, the standing orders of an industrial establishment must provide for “Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct”.

In the matter of: Associated Cement Co. Ltd. V/s The Workmen & Anr., (1964) 3 SCR 652, it was held that:

1) Domestic enquiries need not be conducted in accordance with the technical requirements of criminal trials, but they must be fairly conducted and in holding them, considerations of fair play and natural justice must govern the conduct of the enquiry officer.

2) If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye-witness of the impugned incident.

3) Domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities.

4) If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

5) It is desirable that the conduct of domestic enquiries should be left to such officers of the employer who are not likely to import their personal knowledge into the proceedings which they are holding as enquiry officers.

6) It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him.

7) It is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross-examined even before any other evidence is led against him.

8) It is not in right spirit that a workman is called on any day without previous intimation and is put to enquiry straightaway. Such a course should ordinarily be avoided in holding domestic enquiries in industrial matters.

9) The rule that witness should not be disbelieved on the ground of an inconsistency between his statement and another document unless he

is given a chance to explain the said document, cannot be treated as a technical rule of evidence, the principle on which this rule is premised is one of natural justice.

In Tata Oil Mills Co. Ltd. V/s Its Workmen, AIR 1965 SC 155, the Supreme Court held that, findings properly recorded in domestic enquiries which are conducted fairly, cannot be re-examined by industrial adjudication unless the said findings are either perverse, mulish, or are not supported by any evidence. In Kusheshwar Dubey V/s Bharat Coking Coal Ltd & Ors, it was observed that, it is desirable that if the incident giving rise to a charge framed against a workman in a domestic enquiry is being tried in a criminal Court, the employer should stay the domestic enquiry pending the final disposal of the criminal case.

Punishments: Kinds of Punishments:

Following are the different types of punishment may be imposed in case of misconduct committed by the workman, namely

1) Dismissal
2) Discharge
3) With holding increments
4) Demotion to a lower grade
5) Suspension
6) Fine
7) Warning or censure

UNIT - IV

CONCEPT AND IMPORTANCE OF SOCIAL SECURITY

Like other socio-economic concepts, the connotation of the term "social security" varies from country to country with varying political ideologies. For example, social security in the socialist countries implies complete protection to every citizen of this country from the cradle to the grave.

In other countries which are relatively less regimented ones, social security refers to measures of protection afforded to the needy citizens by means of schemes evolved by democratic processes consistent with resources of the State.

In general sense, social security refers to protection provided by the society to its members against providential mishaps over which a person has no control. The underlying philosophy of social security is that the State shall make itself responsible for ensuring a minimum standard of material welfare to all its citizens on a basis wide enough to cover all the main contingencies of life. In other sense, social security is primarily an instrument of social and economic justice.

All the industrial countries of the world have developed measures to promote the economic security and welfare of individual and his family. These measures have come to be called as social security. Social security is dynamic concept and an indispensible chapter of a national programme to strike at the root of poverty, unemployment and diseases. Social security may provide for the welfare of persons who become incapable of working by reason of old age, sickness and invalidity and or unable to earn anything for their livelihood.

Definition of social security:

According to a definition given in the ILO publication', "Social security is the security that society furnishes through appropriate organization against certain risks to which its members are exposed. These risks are essentially contingencies of life which the individual of small means cannot effectively provide by his own ability, or foresight alone or even in private combination with his fellows".

William Beveridge has defined social security as "a means of securing an income to take the place of earnings when they are interrupted by unemployment, sickness or accident to provide for the retirement through old age, to provide against loss of support by death of another person or to meet exceptional expenditure connected with birth, death, or marriage. The purpose of social security is to provide an income up to a minimum and also medical treatment to bring the interruption of earnings to an end as soon as possible."

Social Security: characteristics of the social security program

The main characteristics of the social security program are as follows:

1. Social Security Schemes are providing social assistance and social insurance to employees who have to face challenges of life without regular earning due to some contingencies in their life.
2. These Schemes are implemented by enactments of law of the country.
3. They generally are relief providers to employees who are exposed to the risks of economic and social security. This protection is provided to them by members of the society of which he is a part.
4. These Schemes have a broad perspective. They not only provide immediate relief to the employees who have suffered on account of contingencies, but also provide psychological security to others who may face the same problems in times to come.

Objectives of Social Security:

The objectives of social security can be sub-summed under three, categories:

1. **Compensation:** Compensation ensures security of income. It is based on this consideration that during the period of contingency of risks, the individual and his/her family should not be subjected to a double calamity, i.e., destitution and loss of health, limb, life or work.
2. **Restoration:** It connotates cure of one's sickness, reemployment so as to restore him/her to earlier condition. In a sense, it is an extension of compensation.
3. **Prevention:** These measures imply to avoid the loss of productive capacity due to sickness, unemployment or invalidity to earn income. In other words, these measures are designed with an objective to increase the material,

intellectual and moral well-being of the community by rendering available resources which are used up by avoidable disease and idleness.

Importance of Social Security

Social security is basically related to the high ideals of human dignity and social justice.

The importance of social security for the employee as well as the society is incredibly high:

a) Social Security is the main instrument of bringing about social and economic justice and equality in the society.
b) Social Security is aimed at protecting employees in the event of contingencies. This support makes the employees feel psychologically secured. This enhances their ability to work.
c) Money spent on social security is the best investment which yields good harvest. The workforce maintenance is very essential not only for the organization but also for the country at large.
d) In a welfare state, social security is an important part of public policy. In countries where social security is not given adequate consideration in public policy, the government remains unsuccessful in maintaining equality and justice.

India is a Welfare State as envisaged in her constitution. Article 41 of the Indian Constitution lays down, "The State shall within the limits of its economic capacity and development make effective provision securing the right to work, to education and to public assistance in case of unemployment, old age, sickness, and disablement and other cases of unserved wants."

Thus, social security constitutes an important step towards the goal of Welfare State, by improving living and working conditions and affording people protection against the various kinds of hazards.

Social security benefits are provided in India through legislations. Workmen's Compensation Act, 1923 enforces the employer to provide compensation to a workman for any personal injury caused by an accident, for loss of earnings etc. The Employees' State Insurance Act, 1948 enforces the employers to provide sickness benefits, maternity benefit to women employees, disablement benefit, dependent's benefit, funeral benefit and medical benefits.

The Employees Provident Fund and Miscellaneous Provisions Act, 1952 enforces the employer to provide provident fund, deposit-linked insurance etc. The Maternity Benefit Act, 1961 provides for medical benefits, maternity leave etc. The Payment of Gratuity Act, 1952 provides for the payment of gratuity at the time of retirement.

Social security legislations in India suffer from the defects like duplication. For example. Employees' State Insurance Act and Maternity Benefit Act provide for maternity benefits. In addition, different administrative authorities implement the law, resulting from overlapping. Hence, the Study Group (1957-58) appointed by the Government of India suggested an integrated social security scheme in India.

This integrated social security scheme should provide for medical care, insurance against sickness, maternity benefits unemployment insurance, employment injury, and old age pension. This scheme should be enforced by a single agency in order to avoid overlapping and duplication.

India is a welfare state and social security is an essential component of government policy.

Social security benefits in India are provided in two major way:

1. **Social Insurance:**

In this scheme, a common fund is established with periodical contributions from workers, according to their nominal paying capacity. The employers and state provide the portion of the finance. Provident fund and group insurance are example of this type.

2. **Social Assistance:**

Under this, the cost of benefits provided is financed fully by the government without any contributions from workers and employers. However, benefits are paid after judging the financial position of the beneficiary. Old age pension is an example.

Influence of I.L.O.

United Nation and ILO have made many efforts regarding social security at international level by number of Conventions and Recommendations. ILO takes part in vocational training, women workers conditions and social security for improving the working conditions of workers at international level. A number of recommendations and conventions deal with workmen's compensation, sickness insurance, invalidity, old-age, and survivor's insurance , unemployment provisions,

maternity protection and general aspects of social security.32 ILO deals with following social security areas and activities at international level:

1. **Manpower Organization and Vocational Training:**

The ILO as well as the United Nations made concerted efforts in the post second world war period in the manpower field to stimulate the most effective and productive use of human resources in the whole process of economic and social development. The ILO manpower experts have been made available to developing countries seeking help in assessing their manpower needs and in organizing vocational training programmes for meeting skill shortage.

2. **Women Workers:**

The ILO constitution specifically provides for the protection of women workers. The first Session of the International Labour Conference held in Washington in October 1919, adopted international standards protecting expectant mothers and limiting the amount of night work by women. In 1937, the Conference laid down the ILO's aims in regard to women workers, namely

a) the guarantee of all civil and political rights;
b) full opportunities to improve their education;
c) better conditions for finding employment;
d) equal pay for equal work;
e) legal protection against dangerous working conditions;
f) legal maternity protection; g. the same trade union rights as that of men.

3. **Social Security:**

The ILO has done the pioneering work in the field of social security. One of the most important instruments adopted by the ILO is the Social Security (Minimum Standards) Convention, 1952. Currently, the organization's main object is to extend social security to agriculture and plantation workers.33 ILO also established the International Social Security Association (ISSA). The ILO is the UN's agency with a mandate to improve standards , conditions and social security of workers throughout the world. The ILO's most important function is to adopt Conventions and Recommendations, which set minimum labour standards internationally. The

principles embodied in the conventions, if adopted and ratified, impose a duty to comply on the ratifying states.

International Conventions Relating to the Social Security:

The ILO Conventions have been greatly adored by the working class all over the world for their beneficial, humanitarian and missionary influence. The principal means of action in the ILO is the setting up the International Labour Standards in the form of Conventions and Recommendations. Conventions are international treaties and are instruments, which create legally binding obligations on the countries that ratify them.

ILO has number of Conventions relating to social security of workers Main Conventions are given below—

Workmen's Compensation (Accidents) Convention, 1925:

The ILO adopted Convention relating to workmen's compensation as early as 1921 followed by other conventions on the same subject in the year 1925. It provides for the payment of compensation for employment injury to all employees except those employed in agriculture, ships and fishermen. Each Member of the International Labour Organization which ratifies this Convention undertakes to ensure that workmen who suffer personal injury due to an industrial accident, or their dependants, shall be compensated on terms at least equal to those provided by this Convention.

Workmen's Compensation (occupational diseases) Convention, 1925:

The list of occupational diseases established in the international and national legal system has played important roles in both prevention and compensation for workers' diseases. Since the first establishment of the ILO list of occupational diseases in 1925, the list has played a key role in harmonizing the development of policies on occupational diseases at the international level.

Migration for Employment Convention (Revised), 1949:

This Convention was revision of the Migration for Employment Convention, 1939 and was held on June 8, 1949. Each Member of the International Labour Organization for which this Convention is in force undertakes to make available on

request to the International Labour Office and to other Members information on national policies, laws and regulations relating to emigration and immigration; information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment information concerning general agreements and special arrangements on these questions concluded by the Member. Members are required to establish, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

Equal Remuneration Convention, 1951:

This Convention was held on June 6, 1951 at Geneva and decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value. The purpose of this Convention is that the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment and rates of remuneration established without discrimination based on sex. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

The Social Security (Minimum Standards) Convention, 1952:

It covers all nine branches54 of social security and sets minimum standards for these nine branches. It is considered as a tool for the extension of social security coverage and provides ratifying countries with an incentive for doing so by offering flexibility in its application, depending on their socio-economic level. It came into force on April 27, 1955. By May 2009, 44 countries had ratified the Convention. The

Convention has been ratified by India in 1964. The 1952 ILO Convention on Social Security (Minimum Standard) has divided social security into nine components:

a) Medical care: It covers pregnancy, confinement, and its consequences and any disease which may lead to a morbid condition. The need for pre-natal and post-natal care, in addition to hospitalization, was emphasized. A morbid condition may require general practitioner care, provision of essential pharmaceuticals and hospitalization.

(b) Sickness benefit: It includes incapacity to work following morbid condition resulting in loss of earnings. This calls for periodical payments based on the convention specification. The worker need not be paid for the first three days of suspension of earnings and the payment of benefit may be limited to 26 weeks in a year.

(c) Unemployment benefit: It covers the loss of earning during a worker's unemployment period. When he is capable and available for work but remains unemployed because of lack of suitable employment. This benefit may be limited to 13 weeks payment in a year, excluding the first seven days of the waiting period.

(d) Old-age benefit: This benefit provides for the payment-the quantum depending upon an individual's working capacity during the period before retirement of a certain amount beyond a prescribed age and continues till death.

(e) Employment injury benefit: It covers the following contingencies resulting from accident or disease during employment:

i. Inability to work following a morbid condition, leading to suspension of earning;
ii. Total or partial loss of earning capacity which may become permanent;
iii. Death of the breadwinner in the family, as a result of which family is deprived of financial support. Medical care and periodical payment corresponding to an individual's need should be available.

(**f) Family benefit**: It means responsibility for the maintenance of children during an entire period of contingency. Periodical payment, provision of food, housing, clothing, holidays or domestic help in respect of children should be provided to a needy family.

(g) Maternity benefit: This benefit includes pregnancy, confinement and their consequences resulting in the suspension of earnings. Provision should be for medical care, including pre-natal confinement, post-natal care and hospitalization if necessary. Periodical payment limited to 12 weeks should be made during the period of suspension of earnings.

(**h) Invalidism benefit:** This benefit, in the form of periodical payments should cover the needs of workers who suffer from any, disability arising out of sickness or accident and who are unable to engage in any gainful activity. This benefit should continue till invalidism changes into old age, when old age benefits would become payable.

(i) Survivor's benefit: It means periodical payments to the family following the death of its breadwinner and should continue till the entire period of contingency. The role of the International Labour Organization in creating international standards of social insurance and in the promotion of social security has been significant. Through its Conventions and Recommendations, the ILO has exerted its influence to extend the range and classes of persons protected and the contingencies covered, and has improved the efficacy of the benefits assured.

Discrimination (Employment and Occupation) Convention, 1958:

The General Convention of ILO convened this Convention on June 4, 1958 at Geneva. The main objective of this convention is that there shall be no discrimination in the field of employment and occupation, and Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights. Each Member for which this Convention is in force shall undertake and practice the following by methods appropriate to national conditions –

a. to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;

b. to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
c. to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
d. to pursue the policy in respect of employment under the direct control of a national authority;
e. (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
f. to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

The Equality of Treatment (Social Security) Convention, 1962:

It has decided upon the adoption of certain proposals with regard to equality of treatment of nationals and non-nationals in social security. The General Conference of the International Labour Organization, having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-sixth Session on 6 June 1962, and decided upon the adoption of certain proposals with regard to equality of treatment of nationals and non-nationals in social security. By May 2009, 37 countries had ratified the Convention.

The Employment Injury Benefits Convention, 1964:

It applies to employment injury benefits to the workers. This Convention provides for payment of cash and medical benefits in cases of employment injury and at least 75% of expenses involved for all employees. The General Conference of the International Labour Organization, convened at Geneva by the Governing Body of the International Labour Office, had decided upon the adoption of certain proposals with regard to benefits in the case of industrial accidents and occupational diseases, By May 2009, 24 countries had ratified this Convention. A Member State whose economic and medical facilities are insufficiently developed may avail itself by a declaration accompanying its ratification of the temporary exceptions provided for in the Articles.

The Invalidity, Old-Age and Survivors' Benefits Convention, 1967 and the Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967

It covers old-age benefit, invalidity benefit and survivor's benefit. The coverage for payment of compensation in case of invalidity, death or old age is 50% for industrial employees, 25% for all employees including agriculture. This Convention has got parts namely; General provisions, invalidity benefit, old-age benefit, survivals benefit, standards to be complied with by periodical payments, common provisions, miscellaneous and final provisions. It has total 54 Articles. Each Member which has ratified this Convention may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more of Parts II to IV not already specified in its ratification.

Occupational Safety and Health Convention, 1981

The General Conference of the International Labour Organisation, convened this Convention at Geneva on June 3, 1981 and decided certain proposals with regard to safety and health and the working environment for the workers. This Convention applies to all branches of economic activity. It covers all branches in which workers are employed, including the public service. The term workers covers all employed persons, including public employees.

Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983:

The General Conference of the International Labour Organization, convened at Geneva by the Governing Body of the International Labour Office on June 1, 1983, and noting the existing international standards contained in the Vocational Rehabilitation (Disabled) Recommendation, 1955, and the Human Resources Development Recommendation, 1975, and since after the adoption of the Vocational Rehabilitation (Disabled) Recommendation, 1955, significant developments have occurred in the understanding of rehabilitation needs. The scope and organization of rehabilitation services, and the law and practice of many Members on the questions covered that Recommendation. The year 1981 was declared by the United Nations General Assembly, the International Year of Disabled Persons, with the theme "full

participation and equality" and that a comprehensive World Programme of Action concerning Disabled Persons is to provide effective measures at the international and national levels for the realization of the goals of "full participation" of disabled persons in social life and development. These developments made it appropriate to adopt new international standards on the subject which take account, in particular, of the need to ensure equality of opportunity and treatment to all categories of disabled persons, in both rural and urban areas, for employment and integration into the community.

The Employment Promotion and Protection against Unemployment Convention, 1988 and the Employment Promotion and Protection against Unemployment Recommendation, 1988:

It relates to unemployment benefit. It is a revision of the Unemployment Provision Convention of 1934. It provides standards in the field of employment and unemployment protection, notably for the promotion of full, productive and freely chosen employment, the principles of equality of treatment and non-discrimination, the methods of providing unemployment benefit.

Safety and Health in Mines Convention, 1995:

According to this Convention workers have a need for, and a right to, information, training and genuine consultation on and participation in the preparation and implementation of safety and health measures concerning the hazards and risks they face in the mining industry, and recognizing that it is desirable to prevent any fatalities, injuries or ill health affecting workers or members of the public, or damage to the environment arising from mining operations, and the need for co-operation between the International Labour Organization, the World Health Organization, the International Atomic Energy Agency and other relevant institutions and noting the relevant instruments, codes of practice, codes and guidelines issued by these organizations and Having decided upon the adoption of certain proposals with regard to safety and health in mines.

The Maternity Protection Convention, 2000 and the Maternity Protection Recommendation, 2000

This Convention revised a 1952 ILO Convention (C103), which in turn was a revision of the original 1919 ILO Convention (C3). The revision was aimed at gaining more ratification by easing the requirements of the 1952 convention. It covers maternity benefit to women workers. This Convention provides comprehensive protection to pregnant working women in case unemployment is due to child birth. By May 2009, 17 countries had ratified the Convention.

Safety and Health in Agriculture Convention, 2001:

The purpose of this Convention was to wider the term agriculture. According to this Convention agriculture covers agricultural and forestry activities carried out in agricultural undertakings including crop production, forestry activities, animal husbandry and insect raising, the primary processing of agricultural and animal products by or on behalf of the operator of the undertaking as well as the use and maintenance of machinery, equipment, appliances, tools, and agricultural installations, including any process, storage, operation or transportation in an agricultural undertaking, which are directly related to agricultural production. The term agriculture does not cover subsistence farming; industrial processes that use agricultural products as raw material and the related services; and the industrial exploitation of forests.

The Maritime Labour Convention, 2006:

The Maritime Labour Convention, 2006 is an international labour Convention adopted by the International Labour Organization (ILO). It provides international standards for the world's first genuinely global industry. Widely known as the "Seafarers' Bill of Rights," was adopted by government, employer and workers representatives at a special ILO International Labour Conference in February 2006. It is a unique feature of this Convention as it aims both to achieve decent work for seafarers and to secure economic interests through fair competition for quality ship owners.

Work in Fishing Convention, 2007:

This Convention addresses such matters as minimum age for work on a fishing vessel, medical standards, work agreements, occupational safety and health, and social security.

Domestic Workers Convention, 2011:

Recognizing and considering the significant contribution of domestic workers to the global economy, which includes increasing paid job opportunities for women and men workers with family responsibilities, greater scope for caring for ageing populations, children and persons with a disability, and substantial income transfers within and between countries, and considering that domestic work continues to be undervalued and invisible is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.

EMPLOYEES COMPENSATION ACT, 1923

Every employee needs a secured job and wants to get compensation for the expenses he has incurred. This is a requirement that needs to be fulfilled by the company whether it is small scale or large scale. After all, a company's success depends on its employees. Therefore, the protection of employees' and their safety is a top priority of a company. This article is all about how much compensation is given, under what conditions, who is entitled to claim compensation and a lot more.

Characteristic features of the Act

The "Employees Compensation Act, 1923" is an Act to provide payment in the form of compensation by the employers to the employees for any injuries they have suffered during an accident. Earlier this Act was known as the Workmen Compensation Act, 1923. When the employer is not liable to pay compensation-

1. If the injury does not end in the entire or partial disablement of the employee for a period exceeding three days.

2. If the injury, not leading in death or permanent total disablement, is caused by an accident which is directly attributable to:

- The employee having at the time of the accident is under the influence of drink or drugs;
- The willful disobedience of the employee to an order if the rule is expressly given or expressly framed, for the purpose of securing the safety of employees; or
- The willful removal or disregard by the employee of any safety guard or other device which has been provided for the purpose of securing the safety of employees.

Nature of Liability

Imagine what will happen if an employee who is working putting in great benefits gets to know that he/she will not be getting any benefits. After all, people tend to do something to get something in return. When the principle of vicarious liability is applied, the employer is liable to pay compensation irrespective of his/her negligence. Employer anticipates it as damages payable to the employees but it is actually a relief for them. An Employer becomes liable when employees have sustained injuries by any accident or unavoidable situations during the course of employment. The question arises: Will an employee who is a part-time worker would still be entitled to the benefits of the Act? Yes, the employer will still get the benefits of the Act.

Who may get the compensation? To what extent the employers are liable?

To be eligible for the Employees' Compensation Act's benefits there are some requirements which need to be fulfilled:

1. You must be an employee of the Company or Organization.
2. You must have been injured at the workplace or the job was as such that you have been injured.

Doctrine of added peril

When an employee performs something which is not required in his duty, and which involves extra danger, the employer cannot be held liable to pay compensation for the injuries caused. In Devidayal Ralyaram v. Secretary of State it was ruled that

the doctrine of added peril was used as defense and the employer was not liable for the compensation.

Adjudication of Compensation

The adjudication is done by the commissioner in calculation of the amount of compensation. The quantum of compensation is calculated from the date of the accident.

Self-inflicted Injury

If a worker inflicts an injury to himself or herself it is a self-inflicted injury. The injury may be intentional or accidental but the employer is not liable for such injuries. There are some types of jobs that have a high risk for self-inflicted injuries which include-

- Law enforcement
- Medical employees
- Farmers
- Teachers
- Salespeople

Contributory negligence

Employees owe a duty to their employers to carry out their work with reasonable care so as to avoid accidents and injury. Employers are vicariously liable for the negligence of their employees but are entitled to claim a contribution or indemnity from their negligent employee in appropriate circumstances. So if there is negligence on the part of both employee and the employer then the employer will be liable to pay compensation to the extent of his own negligence, not of the employee. Hence, the compensation amount may reduce as the employer will not be liable for the negligence of the employee.

Employer's liability for Compensation Section 3:

There are certain occupations which expose employees to particular diseases that are inherent-

- Infra-red radiations;
- Skin diseases due to chemical or leather processing units;
- Hearing impairment caused by noise;

- Lung cancer caused by asbestos dust and Diseases due to effect of extreme climatic conditions.

For Example in Miners are at a risk of developing a disease called silicosis. Sometimes miners also develop lung diseases due to exposure to dust. The people who work in agricultural lands, develop diseases through spraying of pesticides. These pesticides are toxic in nature and are health hazards to many farmers.

There are thousands of workplaces where occupation itself is dangerous in nature. Provided that the employer shall not be liable:

a. if any injury does not result in the total or partial disablement of the employee for a period exceeding three days;
b. if any injury does not result in death or permanent total disablement caused by an accident which is directly attributable to-
    i. if the employee is under the influence of drink or drugs at that time,
    ii. the willful disobedience of the employee to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of employees,
    iii. the willful removal by the employee of any safety guard or other devices which he knew to have been provided for the purpose of securing the safety of employees.

Part A of Schedule III

If an employee contracts any disease that is mentioned in occupational diseases or the employee is employed for a continuous period of six months (this does not include the service period) and not less than that, the employer shall not be liable to pay the compensation as the disease will be deemed to be injury and it shall be considered as out of course of employment.

Part B of Schedule III

1. Diseases caused by phosphorus or the toxic substance present, all include exposure to risk concerned.
2. Diseases caused by mercury or toxic substances found exposure to the risk concerned.

3. Diseases caused by benzene or the toxic substances found which pose risk to the concerned.
4. Diseases caused by nitro and amino toxic substances of benzene involve risk to the concerned.

These diseases are considered occupational diseases, and they are deemed to be out of the course of employment and therefore the employer will not be liable to pay the compensation.

Part C of Schedule III

If an employee contracts a disease that is mentioned as an occupational disease which is specific to that employment, during a continuous period that is less than the period mentioned under this part of Schedule 3 is known as occupational diseases. It will be deemed that the disease has arisen out of and in the course of the employment, the contracting of such disease will be deemed to be an injury by accident within the meaning of this Section:

Pneumoconiosis is a disease caused by sclerogenic mineral dust (silicosis, anthracosilicosis, asbestosis) and silico-tuberculosis if silicosis is an essential factor in causing the resultant incapacity or death, such diseases are considered as occupational diseases.

For instance, an office of KLM Consultant was located in a new place. The new place had large areas, and a new wallpaper was also placed, the area painted, and a new carpet was also laid. Employees worked in cubicles. However, within a month of shifting, one of the employees, Rahul Sharma complained of skin allergy. At the new workplace, there were no windows in the cubicle where Rahul had shifted. A photocopy machine was near to his cubicle. Since his shifting, he started complaining of unpleasant odors, a feeling of excessive tiredness and irritation in eyes, nose, and throat. Also, some paint boxes were kept at the office which was still not removed even after his complaining. He also complained about the increasing noise and distraction there. The rashes which started a week ago with itching and redness now turned more grievous and had spread from the initial location of the hand to surfaces of the wrists. Due to his allergic condition, Rahul had to visit a doctor who advised

him to avoid going out. As Rahul had to incur expenses on visiting the doctor and medicines, he approached his employer for compensation.

The company had bought a workplace compensation insurance policy from the insurance company. The Company KLM Consultant considered it as an occupational disease and approached the employee's compensation insurance company to recover its legal liability and hence pay the compensation to Rahul.

After checking all the documents submitted by Rahul, the insurer considered it as an occupational disease and agreed to settle the claim. The insurer covered medical expenses incurred by Rahul on his treatment.

Under Section 3(3) The Central Government or the State Government gives a notification in the Official Gazette which species the diseases which will be deemed to be occupational diseases under the provisions of sub-section(2) and in the case of notification by the state government, these diseases are declared by the Act. Section 3(4) No compensation will be payable to an employee unless the disease is directly attributable to a specific injury that arises out of or in the course of employment.

Employment

Underemployment, an employee is one who works under the employer and has to work as per the terms of the company or the employer.

Personal injury

A personal injury can be compensated only in some circumstances. Injury sustained by the employee must be a physical injury. In the case of Richmond Adult Community College v McDougall (2008), M has suffered injuries mentally, psychological disorders as he was offered a job as a database assistant in a college. But when it learned about the medical history and the psychological disability M was suffering from, the college withdrew the offer. M brought a disability discrimination claim from the college. The tribunal accepted that m was suffering from mental impairment but she was not disabled within the meaning of Section 1 of the Disability Discrimination Act, 1995.

Accident

The Act provides that compensation is provided to employees and their dependants only if the injuries from the accident includes occupational diseases. The

accident must occur in the course of employment the Act also applies to railway servants and persons employed in any such capacity as specified in Schedule 2 of the Employees Compensation Act. The people employed in factories, mines, plantations, vehicles, construction works, and certain other hazardous occupations come under Schedule II.

A fatal accident is one where there is death or a high risk of loss of life of the employee. In the case of a fatal accident, the employee might die or suffer severe disablements and injuries. On the other hand, non-fatal accidents are those accidents that do not have a high probability of death. In the case of non-fatal accidents, the employee or the workman might suffer disabilities or any type of personal injury.

Both fatal and non-fatal accidents are covered by the Employees Compensation Policy, provided such accidents result in the mentioned contingencies in the act. Fatal accidents are taken as those which result in death, or permanent total disablement, permanent partial disablement or fatal injuries. If any of these contingencies occur, the employees' compensation policy would pay the claim faced by the company. In the case of non-fatal accidents though, the covered contingencies might not occur. The employee or worker might not face any type of disablement or injury from such accidents. If the employee or workman suffers from a type of disablement and the disablement does not last for more than 3 days, the claim would not be paid. As a result, in several employees' compensation policies, non-fatal accidents are usually not covered unless they cause a disablement which lasts for more than 3 days.

In Lister v Romford Ice and Cold Storage Company Limited, House of Lords upheld the decision of the Court of Appeal that an employee owed a duty in contract to his employer to take reasonable care in the use of a vehicle at work. In the event that the employer was liable to pay damages arising from the employee's negligence, the employer could bring a claim to recover that loss from his employee.

Arising out of and in the course of employment

Three factors determine whether the act is arising out of or in the course of employment:

1. When the injury occurred, the employee must have been engaged in the business of the employer. Also, he must not be doing something for his personal benefit.
2. The accident must occur where the employer was performing his duties.
3. The injuries occurred because of the risk incidental to the duties of the work or services or if the nature or condition of employment is inherent.

Notional extension of Employer's Premises

When there is a causal connection between the accident and the place where the employee is working, compensation is payable for the disability or death of the person according to the Employees Compensation Act. This is the Doctrine of Notional Extension of the workplace. The theory of this doctrine was executed in some cases:

Moondra & Co. V/s Mst. Bhawani there was a truck driver who was told by his employer to drive a petrol tanker. The driver found a leak in the tank and sought permission from the employer to look for the source of the leakage. While searching he lit a matchstick and the tank caught fire. The driver received burn injuries and died. It was held by the court that the family members of the deceased would be entitled to compensation since the accident took place at the workplace and in the course of employment.

Willful disobedience of orders or safety devices, etc.

If the employee disobeys the order expressly given or denies to obey any rules. The rules are made for the safety of the workmen but if they disobey the accident might happen. The accident can take place if the employee willfully disregards the safety guards or any other device. If the employee knew that he has been provided safety for the purpose of securing employees and still disregards it is said to be done willfully.

Compensation under Agreement

A compensation agreement ensures that an individual will get paid for the services he or she has provided to a company as an employee. A compensation agreement ensures that an individual will get paid for the services he or she provides to a company as an employee.

The question of compensation and negligence of employee

The question of compensation and negligence of employees is explained above in contributory negligence. When there is negligence on the part of the employer and employee, the employer is liable to pay compensation only to the extent of his negligence. He will not be liable to pay the full amount of compensation. So in the case of negligence of the employee, he will get only a part of compensation.

Alternative Remedy under Section 3(5)

Any right to compensation cannot be conferred by an employee in respect of injuries,if he has instituted a suit for damages in a civil court, in respect of any injury against any employer. No suit for damages shall be maintainable by an employee in any court of law.

Liability of Insurance Company

If any claim is due to the insurance company, the company cannot escape liability arising out of claim simply because notice was not issued to the company. For instance, if a notice is issued to the owner of the vehicle it is sufficient to get insurance from the company. In the case of Ram Karan v. Vijayanand the petition was filed by Ram Karan under section 482 of the code of criminal procedure because he had been illegally deprived of the benefits of the premature release. It was a violation of Articles 14, 19 and 21 of the Constitution of India. It was held that he was entitled to be released as per the rules.

Liability of Insurance Company or owner of vehicle

The question is whether the insurance coverage is available to the insured employer-owners? The owner of motor vehicles, in relation to their liabilities under the Employment Compensation Act on account of motor accident injuries caused to their employees would include additional statutory liability foisted on the insured employers under Section 40 of the Compensation Act.

Amount of compensation Section 4

1. **Where death results from the injury-**In case the employee dies, an amount equal to fifty percent of the monthly wages multiplied by a factor as per given in the Schedule 4 of the act or rupees eighty thousand is given whichever is more.
2. **Where permanent total disablement results from the injury-** In case the employee has total disablement the amount given is sixty percent or rupees ninety thousand whichever is more.
3. **Where permanent partial disablement results from injury-** In the case of permanent partial disablement, the compensation provided is equal to disability as sixty percent or rupees ninety thousand.

Compensation to be paid when due and penalty for default Section 4-A

When the employer does not accept liability for compensation to the extent claimed, he shall be bound to make a payment may be provisional and such payment shall be deposited to the employee or the commissioner. The commissioner can direct the employer to pay interest in addition to the amount at the rate of twelve percent per annum. The rate of interest can also increase which may be specified by the Central Government.

Method of calculating Wages Section 5:

The basis for the calculation of compensation is the monthly wage system. It means the amount of wages deemed to be payable for a month. A case dealing with the method of calculating wages was Zubeda Bano v. Maharashtra Road Transport Corporation, 1990. Batta does not amount to wages for computing compensation. It is

paid to workman per day to cover special expenses incurred by him due to the nature of his work.

Another case was New 'India Assurance Co. Ltd., Hyderabad v. Kotam Appa Rao, 1995, when the employer has been giving service to the employer during a continuous period of not less than twelve months preceding the accident, and when the employer is liable to pay compensation, the employee will be liable one-twelfth of the total wages. The employer is required to pay the compensation which is due for payment to employees in the last twelve months of that period.

Review Section 6:

1. Any half monthly payment can be reviewed by the commissioner under this act if there is an agreement between the parties or if there is an order given by the commissioner. A certificate of a qualified medical practitioner will be accompanied that there is a change in the condition of the employee subject to the rules and regulations under the Act.
2. Any half monthly payment may be reviewed, can be continued, increased, decreased or ended under the act or if the accident is found which resulted in permanent disablement. Such an employee may get less amount because he had already received by way of half monthly payments.

Communication of Payments Section 7:

Commutation of half- monthly payments- Any right to receive half- monthly payment agreement between the parties is commutation of payments. If the parties do not agree and the payment continues for not less than six months then on the application of either party, the Commissioner will redeem the payment of a lump sum amount which was agreed by the parties.

Distribution of Compensation Section 8:

Rights of heirs of dependents

1. Compensation will not be provided to the employee whose injury has resulted in death and lump sum payment will also be not provided who is

under a legal disability. The compensation may be deposited to the commissioner and a direct payment will not be allowed by the employer to the employee.

2. In the case of a deceased employee, an employer can make payment to any dependant advances. The compensation will amount to equal to three months' wages of the employee and the amount shall not exceed the compensation payable to the dependant. If the amount exceeds, it may be deducted by the commissioner from the compensation and repaid to the employer.
3. An amount not less than ten rupees which is payable may be deposited with the commissioner on behalf of that person.
4. The receipt of the commissioner will be sufficient discharge of the amount if any compensation is deposited with him.
5. When any compensation is deposited with the commissioner and he is payable to any person, he may if the person to whom the compensation is to be payable is not a woman or a person with a legal disability then he may pay the money to the person who is entitled to get the compensation.
6. When any lump sum amount is deposited with the commissioner and he is payable to a woman or a person who is legally disabled, such amount can be invested for the benefit of any other woman or a person with a disability. The commissioner may direct the amount in such cases.

Compensation not to be assigned, attached or charged Section 9:

Compensation not to be assigned, attached or charged, save as provided by this Act, no lump sum or half- monthly payment payable under this Act shall in any way be capable of being assigned or charged or be liable to attachment or pass to any person other than the workman by operation of law, nor shall any claim be set off against the same.

Notice and claims of the accident Section 10:

A claim for compensation cannot be entertained by a commissioner unless the notice of the accident is given in a certain manner.

Power to acquire statements from employers regarding fatal accidents Section 10A:

When a commissioner receives information about the death of an employee, because of an accident that is arising out of or in the course of employment, he can send a registered post or a notice to the employer of the employee, to submit a notice within thirty days of service. The statement or notice shall be in a prescribed form mentioning the circumstances under which the death took place. Also stating that whether the employer is liable or not to deposit compensation on the death of the employee.

Reports of fatal accidents and serious bodily injuries Section 10B:

A notice is required to be given to any authority when any law is in force for the time being, if any accident occurs on the premises of the employer which results in the death of employee or serious bodily injury the person on behalf of employer is required to give a notice within seven days of the death. This person shall send a report to the commissioner giving details of the death or serious bodily injury. It will be done only when it is provided by the state government that instead of sending the report to the commissioner it is sent to another authority to whom a notice can be given. “Serious bodily injury” means injury to a limb or permanent loss of sight or hearing or fracture of limbs or the insured person is absent from work for more than twenty days.

Medical Examination Section 11:

When an employee brings to the notice that he has met with an accident, before the expiry of three days he will be examined free of charge by a qualified medical practitioner. If the employee refuses to submit himself or herself for examination or in any way obstructs the same, his right to compensation shall be suspended. If the employer voluntarily leaves without having been examined in the place where he is employed, his right to compensation shall be suspended until he returns and offers himself for examination.

The incorporation of words “assessment of loss of earning capacity by the qualified medical practitioner” in Section 4(1)(c)(ii) has some purpose and it is not a case of ambiguity.

If there’s no provision that the Commissioner to see the compensation and he ignores the medical practitioner’s report, there is no question of avoiding it by Commissioner unless he desires a second report from the Medical Board; New Asian nation Assurance Co. Ltd. v. Sreedharan, 1995.

Contracting Section 12:

When a person (principal) is in the course of some business or trade, with any other person (contractor) for the execution of any work, the principal will be liable to pay the amount to the employee who has been employed in the business. The principal is liable because compensation has to be claimed from the principal and the amount of wages will be calculated by the employer.

When the principal will be liable to pay he will be indemnified by the contractor or any other person from whom the employee can claim compensation. The agreement between the principal and the contractor about the right amount and indemnity will be settled by the commissioner.

If the accident occurred at a different place that is either on the premises of the workplace or any other place, the employee will not be able to recover compensation from the employer. Other than this no other constraint is there and employees can recover compensation from the contractor instead of principal.

Remedies of employer against a stranger Section 13:

When an employee recovers compensation as he suffered any injury and creates a legal liability of some other person other than the person by whom the compensation was paid, the other person will be entitled to be indemnified by the person who is liable to pay damages.

Insolvency of employer Section 14:

1. When an employer enters into a contract with any insurer in respect of any liability to an employee, and if the employer becomes insolvent or makes a composition or scheme or arrangement with his creditors in this event the company is insolvent. The employee can recover the amount of compensation if the company is winding up and it is the case of insolvency.
2. If in any case in the case of insolvency, the contract of the employer with the insurer is void or voidable due to any reason such as non compliance on the part of the employer, if the contract is not void or voidable the insurer may be entitled to prove in the proceeding or at the time of liquidation for the amount to be paid to the employee.
3. In case the liability of the insurer to the employee is less than the liability of the employer to the employee, the employee may prove for the balance amount of the compensation in the insolvency proceedings or at the time of liquidation.
4. When the compensation is a half monthly payment, the amount due for the said purpose will be taken in a lump sum amount. The amount payable will be half monthly payment, if it be could be redeemable it will be proof.
5. The insolvency of the employer shall not be applied where a company has wound up voluntarily merely for purposes of reconstruction of the company or amalgamation with another company.

Compensation to be first charge on assets transferred by Employer Section 14-A:

When an employer transfers his assets or property before any amount is due to him in respect of any compensation, and the liability accrued is now before the date in law it is the first charge on that part of the assets or property so transferred as it consists of immovable property.

Special provisions relating to Masters and Seamen Section 15:

When the person injured in the aircraft is the master of the ship and he is the employer, but the accident happened and commenced on the ship, it is not necessary

for the seaman to give any notice of the accident for compensation for the injuries suffered.

In such cases the death of the seaman or the master, the claim for compensation may be made within one year without the notice after the news of death is received by the claimant. Also if the ship is deemed to have been lost, within eighteen months of the date on which the ship was or is deemed to have been lost.

Special provisions relating to captains and other members of the crew of aircrafts Section 15-A:

If the captain of the aircraft is serving and he is the employer but an accident occurs, any crew member or the captain it is not necessary for any crew member to give notice of the accident.

In such cases the death of the seaman or the master, the claim for compensation may be made within one year without the notice after the news of death is received by the claimant. Also if the ship is deemed to have been lost, within eighteen months of the date on which the ship was or is deemed to have been lost.

When an injured captain or any other crew member of the aircraft or the ship is discharged from any depositions or testimony of a witness is taken by a judge or magistrate the central government or any state government may enforce any proceedings on the basis that the evidence is admissible:

i. if the deposition or testimony of witness is authenticated by the signature of the Judge, Magistrate, or consular officer before it is made.
ii. if the person who is accused or he/she is the defendant is having the opportunity by himself or his agent to cross-examine the witness.
iii. if the deposition or the testimony of the witness is or was made in the course of a criminal proceeding and the proceeding was made in the presence of the person who is accused.