



# Employment & Labour Law

# 2020

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# CONTENTS

<b>Preface</b>	Charles Wynn-Evans, <i>Dechert LLP</i>	
<b>General chapter</b>	<i>The COVID-19 Impact on Labour Issues in Japan</i> Masahiro Nakatsukasa & Yusaku Akasaki, <i>Chuo Sogo Law Office, P.C.</i>	1
<b>Country chapters</b>		
<b>Argentina</b>	Federico M. Basile, <i>Krause Abogados</i>	9
<b>Australia</b>	Joydeep Hor, <i>People + Culture Strategies</i>	18
<b>Brazil</b>	Vilma Toshie Kutomi, Cleber Venditti da Silva & José Daniel Gatti Vergna, <i>Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados</i>	28
<b>Canada</b>	Carol S. Nielsen & Cassandra Ma, <i>Filion Wakely Thorup Angeletti LLP</i>	39
<b>China</b>	Kelvin Ma & Derrick Chen, <i>PKF Legal Shanghai Demei Law Firm</i>	49
<b>Denmark</b>	Michael Møller Nielsen, Julie Flindt Rasmussen & Marta Valgreen Knudsen, <i>Lund Elmer Sandager</i>	65
<b>Egypt</b>	Dr. Eman Riad, Lina Abou El-Hassan & Heba El Abd, <i>Riad &amp; Riad</i>	76
<b>Finland</b>	Jani Syrjänen, <i>Borenius Attorneys Ltd</i>	87
<b>France</b>	Lionel Paraire & Anaëlle Donnette-Boissiere, <i>Galion Avocats</i>	93
<b>Germany</b>	Isabel Hexel, <i>Oppenhoff &amp; Partner</i>	102
<b>Hungary</b>	Dr. Ildikó Rátkai, <i>Rátkai Law Firm</i>	112
<b>India</b>	Anshul Prakash & Kruthi N. Murthy, <i>Khaitan &amp; Co</i>	121
<b>Ireland</b>	Mary Brassil & Stephen Holst, <i>McCann FitzGerald</i>	127
<b>Italy</b>	Vittorio De Luca, Roberta Padula & Claudia Cerbone, <i>De Luca &amp; Partners</i>	136
<b>Japan</b>	Masahiro Nakatsukasa & Yusaku Akasaki, <i>Chuo Sogo Law Office, P.C.</i>	144
<b>Macau</b>	Pedro Cortés & Helena Nazaré Valente, <i>Rato, Ling, Lei &amp; Cortés – Advogados</i>	153
<b>Mexico</b>	Rafael Vallejo Gil, Ana Ruiz Morales & Sarah Gibert, <i>Chevez, Ruiz, Zamarripa</i>	161
<b>Nigeria</b>	Nduka Ikeyi & Sam Orji, <i>Ikeyi Shittu &amp; Co.</i>	172
<b>Romania</b>	Andreea Suciu, Teodora Mănăilă & Gabriela Ion, <i>Suciu   The Employment Law Firm</i>	180
<b>Russia</b>	Irina Anyukhina, Olga Pimanova & Kristina Abramenko, <i>ALRUD Law Firm</i>	190
<b>Spain</b>	Enrique Ceca Gómez-Arevalillo, Sandra Muñoz Romero & Isabel Zerolo Caruana, <i>Ceca Magán Abogados</i>	197
<b>Sweden</b>	Magdalena Berg, Karolin Eklund & Christina Johansson, <i>Magnusson Advokatbyrå</i>	200
<b>Switzerland</b>	Vincent Carron & Anne Roux-Fouillet, <i>Schellenberg Wittmer Ltd.</i>	209
<b>Turkey</b>	Batuhan Şahmay & Özlem Ozdemir Yilmaz, <i>Bener Law Office</i>	218
<b>United Arab Emirates</b>		
<b>Emirates</b>	Anir Chatterji, <i>PwC Legal Middle East LLP</i>	222
<b>United Kingdom</b>	Charles Wynn-Evans & Rebecca Turner, <i>Dechert LLP</i>	231
<b>USA</b>	Ned H. Bassen & Sophie Moskop, <i>Hughes Hubbard &amp; Reed LLP</i>	241

# India

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## General labour market and litigation trends

Under the Constitution of India, labour falls within the concurrent list giving power to both the Central and the respective State Government to legislate on such items, with the residual law-making powers vesting with the Centre. This has resulted in a plethora of central and state laws related to wages, employment, industrial relations, social security, etc. being enacted to protect the interests of employees and to increase employment opportunities in a labour-abundant country such as India.

Labour laws in India are constantly evolving and aim to resolve long-standing issues as well as to adapt to the needs of changing labour markets and business models. For example, where social security legislations only covered the organised sector, various schemes were floated by the appropriate governments to confer benefits to the employees in the unorganised sector as well. Similarly, the proposed Code on Social Security 2019, which was introduced in the Lok Sabha on 11 December 2019, identifies and seeks to regulate a new category of workers called ‘gig/platform workers’ (such as Uber drivers and Zomato delivery agents) who were previously not covered by any social security legislations.

The year 2019 saw significant progress of the Central Government to refine, consolidate and simplify the myriad labour law legislations in India. Such labour reforms are in line with the incumbent Central Government’s objective of improving ‘ease of doing business’ in India.

## Litigation trends

In terms of trends in industrial disputes and litigation, the number of man hours lost owing to strikes and lockouts has seen a significant decline in recent years. As per the Annual Report of the Ministry of Labour and Employment, Government of India for FY 2018–2019, the year 2019 saw a 63% (sixty-three per cent) decrease in the number of man days lost due to industrial disputes as compared to 2018. Such a drastic drop is commendable and augurs well for greater industrial productivity in the country.

The Ministry notes that the spatial/industry-wise dispersion of the number of strikes and lockouts and the workers consequently affected is not uniform, and the number of man days lost is a direct measure of the impact of industrial unrest on industrial production. Most of the industrial unrest, as indicated by strikes and lockouts, are primarily caused by issues relating to indiscipline and violence, wages and allowances and personnel matters.

## Redundancies, business transfers and reorganisations

Labour laws in India, such as the Industrial Disputes Act, 1947 (“**ID Act**”), provide protection to employees such as redundancy/retrenchment compensation in case of termination of their

employment (for any reason other than misconduct). However, such protection is available only to certain categories of employees termed as ‘workmen’. In an industrial establishment, ‘workmen’ are typically those employees who are not engaged in an administrative or a managerial capacity or, if he is employed in a supervisory capacity earning a monthly wage of less than INR 10,000. An employer is required to comply with the statutory requirements prescribed under the ID Act for retrenchment (i.e. termination of employment for any reason other than misconduct) and/or transfer of workmen pursuant to a business/asset sale.

**Redundancy:** In case of redundancies necessitating termination of services of workmen, the employer is required to comply with the notice period and compensation requirements as set out under the ID Act (i.e. statutory notice of one month (or salary *in lieu* thereof) (“**Statutory Notice**”) and retrenchment compensation at the rate of 15 days’ salary for each completed year of service (“**Retrenchment Compensation**”).

**Business transfers and reorganisations:** The ID Act does not provide for automatic transfer of employees pursuant to a business sale, without obtaining consent of the employees. If the transaction entails an asset/business sale (including associated employees), then consent of the employees must be obtained for the transfer of their employment to the buyer. Further, if the buyer does not offer: (i) continuity of service along with credit of the period of service rendered by the employee to the seller; and (ii) no less favourable terms of employment than the terms enjoyed with the seller, then all employees who qualify as ‘workmen’ under the ID Act will be entitled to Statutory Notice and Retrenchment Compensation. In a share sale scenario, the acquisition of shares by a buyer will not result in any change in employer and only the shareholding pattern of the entity will change. Therefore, there will be no employee consent requirements in the extant scenario.

### **Business protection and restrictive covenants**

Restrictive covenants are a regular feature in most employment contracts, specifically managerial employees and senior management. Commonly used restrictive covenants take the form of a non-compete agreement, non-solicitation agreement and non-disclosure/confidentiality agreements. A non-compete agreement is an agreement entered into between two parties whereby one party is prohibited from joining another competing business by virtue of being employed or associated with the other party. A non-solicitation clause in an agreement restricts an employee from soliciting the employer’s clients or customers, for his or her own benefit or for the benefit of a competitor, during or post expiry of the term of employment. A non-disclosure agreement is an agreement that restricts an employee from disclosing a trade secret or confidential information during or after cessation of employment. Such covenants are typically included in an employment contract, either as a clause in the contract or as a separate agreement.

The Indian Contract Act, 1872 prohibits any agreements which would be in restraint of any trade. Indian courts have therefore, consistently taken the view that post-employment non-compete clauses would be unenforceable as they would be in restraint of trade of the employee (except in cases involving sale of goodwill), while non-compete clauses operating during employment have been held to be enforceable against the employee. Non-disclosure agreements for the protection of trade secrets post-employment would form an exception to this principle and have been held to be enforceable.

Non-solicitation agreements are usually enforceable in India, during and even after expiry of the employment term, but for a reasonable period, depending on the facts and circumstances of each case. A non-solicitation agreement is likely to be enforced as long as it does not

make it too difficult for an employee to earn a living, or unfairly limit a competitor's ability to hire workers or attract customers through legitimate means. However, the onus of proof in respect of any potential breach of non-solicitation obligations is on the ex-employer.

### Discrimination protection

Several legislations have been enacted in India to prohibit discrimination against protected classes of persons.

1. The Equal Remuneration Act 1976 prohibits discrimination in relation to remuneration on the grounds of gender (whether at the time of recruitment or during employment).
2. The Rights of Persons with Disability Act 2016 prohibits discrimination on the grounds of disability status of an employee.
3. The Maternity Benefit Act 1961 ("**Maternity Benefit Act**") prohibits discrimination based on the maternity status of a female employee and provides for paid maternity leave entitlements.
4. The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome ("**Prevention and Control Act 2017**") prohibits discrimination against persons with HIV and AIDS and also prohibits the requirement for HIV testing as a pre-requisite for obtaining employment.
5. The Transgender Persons ("**Protection of Rights Act 2019**") prohibits discrimination against a transgender person resulting in an unfair treatment in employment, or a denial of, or termination from, employment.
6. The Sexual Harassment of Women at Workplace ("**Prevention, Prohibition and Redressal Act 2013**") prohibits sexual harassment of women in the workplace.

### Protection against dismissal

Indian labour legislation does not endorse a hire and fire policy. For dismissal of an employee, the provisions of the ID Act as mentioned above must be complied with. Employers need to follow certain procedures before terminating an employee's service, and in some instances, are required to pay compensation. All dismissals on grounds of misconduct must follow a proper procedure requiring a domestic enquiry. Further, the employee must be given a reasonable opportunity to be heard as part of the enquiry process. The importance of an enquiry and all aspects thereof such as the right to cross-examine have been stressed upon by courts repeatedly.

Termination of services of employees who do not qualify as a 'workman' under the ID Act will be governed by the terms of the employment agreement/appointment letter.

The decision of an employer is liable to be challenged before an Industrial Tribunal and further before the High Court and Supreme Court as well. Courts may grant relief such as reinstatement with back wages or compensation *in lieu* of reinstatement.

### Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Notice entitlements: As mentioned above, the ID Act prescribes for Statutory Notice and Retrenchment Compensation for employees who qualify as a 'workman'. Further, the state specific Shops and Establishments Acts ("**S&E Act**") also prescribe for a minimum notice period or salary *in lieu* of a notice period prior to dismissal of an employee.

Leave entitlements: The relevant S&E Acts provide for minimum leave entitlements for

employees working in shops and commercial establishments. Typically, leave is classified as earned/privileged leave, sick leave and casual leave. Upon cessation of employment, unutilised earned/privileged leave may be encashed by the employees.

Maternity and Paternity leave: As per the Maternity Benefit Act, every woman who has completed 80 days of service with the employer is entitled to paid maternity leave of 26 weeks of which not more than eight weeks shall precede the expected date of delivery. However, in case of a woman with two or more surviving children, she will be entitled to 12 weeks of paid maternity leave. Even commissioning mothers or adoptive mothers are entitled to paid maternity leave. Additional paid leaves are prescribed for miscarriage, medical termination of pregnancy and tubectomy operation. Similarly, the Employee State Insurance, 1948 Act also prescribes for employers to mandatorily obtain insurance in case of sickness, maternity and injuries suffered by employees. There is no statutory entitlement to paternity leave in India. An employer may at its discretion provide paternity leave to male employees.

Employees' provident fund: The Employee Provident Fund and Miscellaneous Provisions Act, 1952 (“**EPF Act**”) is also a welfare legislation, which mandates all employers and employees to contribute a particular percentage of their monthly salary (currently 12%) towards an employees' provident fund constituted by the Employees' Provident Fund Organization. While such contribution is mandatory in respect of employees earning wages less than INR 15,000 (Indian Rupees fifteen thousand), employees earning above INR 15,000 (Indian Rupees fifteen thousand) may also choose to contribute to the employees' provident fund. Such contributed amount accumulates interest and may be withdrawn by the employee upon cessation of employment, retirement, etc.

Gratuity: Gratuity is a defined end-of-service benefit plan mandated under the Payment of Gratuity Act 1972 to reward long-term service. The amount must be paid to the respective employee, upon his/her exit from employment (whether on account of resignation, retirement or otherwise) after at least five years of continuous service. Gratuity is also payable to the employee's legal heirs in the event of the employee's death or disability at any time during employment. For each year of continuous service, the employee is entitled to 15 days of last drawn basic wages.

Whistle-blower protection: The Whistle-blower Protection Act, 2014 prescribes protection of whistle-blowers in the public sector including Government companies and departments. However, whistle blowers in the private sector are not covered under any legislation yet.

### **Worker consultation, trade union and industrial action**

The ID Act and the Trade Unions Act, 1926 (“**TU Act**”) govern the major aspects of industrial relations in India. The ID Act provides for a detailed dispute resolution mechanism involving both conciliatory and adversarial forms of resolution. The TU Act legalises the formation of trade unions and provides adequate safeguards for trade unions' activities. It guarantees certain rights to trade unions which, *inter alia*, includes the right to negotiate and secure terms of employment acceptable to its members by adopting various forms of collective bargaining and the right to hold demonstrations in furtherance of its objectives. The TU Act also provides registered trade unions certain immunity from prosecution for criminal conspiracy and from any suits or legal proceedings in any civil court in respect of any act done in furtherance of a trade dispute. It is important to note that criminal charges against members of a trade union, for offences committed in course of industrial actions, do not qualify for immunity.

## Employee privacy

As per the Information Technology Act 2000 (“**IT Act**”), read along with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (“**SPDI Rules**”), an employer is mandated to implement reasonable security practices and procedures in relation to ‘sensitive personal data or information’ of its employees. Data such as medical records, passwords, etc. qualify as ‘sensitive personal data or information’. Employee consent is required to be obtained prior to the transfer of employee’s ‘sensitive personal data or information’. The IT Act prescribes civil and criminal liability for disclosure of such information in breach of lawful contract, or without the employee’s consent. Further, employers may monitor an employee’s email, telephone calls or use of its systems, so long as such monitoring is restricted to protecting the business and confidential information of the employer, and no sensitive personal data or information of an employee is being accessed and stored by the employer.

## Other recent developments in the field of employment and labour law

With a view to consolidate various labour laws in India, the Central Government has formulated the following four codes, which are yet to be implemented:

1. **Code on Wages 2019:** Seeks to replace the extant Minimum Wages Act, 1948, Payment of Wages Act, 1936, Payment of Bonus Act, 1965 and Equal Remuneration Act, 1976. This Code was passed by both houses of Parliament and also received the Presidential assent on 8 August 2019. However, the Code is yet to be enforced by way of a notification by the Central Government.
2. **Occupational Safety, Health and Working Conditions Code, 2019:** Seeks to replace 13 labour laws relating to safety, health and working conditions. These laws include: Factories Act, 1948; Mines Act, 1952; Dock Workers Act, 1986; Contract Labour Act, 1970; and Inter-State Migrant Workers Act, 1979. This Code was introduced in the Lok Sabha on 23 July 2019 and has since been referred to a standing committee for its comments.
3. **Industrial Relations Code 2019:** Seeks to replace the extant ID Act, TU Act, and Industrial Employment (Standing Orders) Act, 1946. This Code was introduced in the Lok Sabha on 28 November 2019 and has since been referred to a standing committee for its comments.
4. **Code on Social Security, 2019:** Seeks to replace nine extant labour laws on social security in India including the EPF Act, the Maternity Benefit Act and the Unorganised Workers’ Social Security Act, 2008. This Code was introduced in the Lok Sabha on 11 December 2019 and has been referred to a standing committee for its comments.

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