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Legal Guides**



Practical cross-border insights into employment and labour law

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

As per the Indian Constitution, the Central as well as State Governments are empowered to enact suitable legislations to regulate and protect the interests of employees, as well to create and increase employment opportunities. Depending on the type of industry, nature of work undertaken, number of employees, location, remuneration of the employees, etc., different legislations such as the Industrial Disputes Act 1947 (**ID Act**), Factories Act 1948 (**Factories Act**), and shops and establishment acts of the relevant states (**S&E Act**) have been enacted.

With the objective to consolidate and reform labour laws and to facilitate the ease of doing business in India, the Government of India has enacted four labour codes which subsume approximately 29 labour laws. The four new labour codes are the Code on Wages 2019, the Code on Social Security 2020, the Occupational Safety, Health and Working Conditions Code 2020 and the Industrial Relations Code 2020. Whilst all the codes have been passed by both houses of Parliament and received the assent of the President, the codes are yet to be completely enforced by way of a specific notification in this regard by the Central Government. As at the time of writing this chapter, the extant labour laws referred to and explained herein shall continue to apply.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

- **Worker:** The term 'worker' is used in the context of the Factories Act to mean a person employed directly or by or through any agency in any manufacturing process or in any kind of work incidental to, or connected with the manufacturing process, or subject of the manufacturing process.
- **Workmen:** Industrial relations laws in India typically categorise employees as 'workmen' and 'non-workmen' (or 'managerial' employees). A 'workman' is a person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward. It excludes those employed in a managerial, administrative capacity or supervisory capacity drawing wages exceeding INR 10,000 from its purview.
- Special laws are also enacted for recognition and protection of certain kind of employees such as contract labour and fixed-term employees.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

In India, an employer-employee relationship can either be express or implied, written or oral. However, to avoid any dispute regarding the terms of employment, it is common practice to execute an employment contract. Only a few Indian states such as Karnataka and Delhi require an employer to issue a written employment contract to employees employed in shops and commercial establishments.

1.4 Are any terms implied into contracts of employment?

Terms and conditions of service which are regulated and mandated by statutes constitute implied terms of an employment contract. Therefore, provisions relating to payment of wages, statutory bonus, gratuity payments and mandatory social security contributions are considered to be implied terms of employment.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

S&E Acts prescribe certain employment terms and conditions such as working hours, holidays, leave entitlements, procedure for termination of employment, and so on. Further, employers shall also be required to adhere to applicable social security legislations. For instance, as per the Employees' Provident Funds and Miscellaneous Provisions Act 1952, every employer engaging 20 or more employees, shall be required to make prescribed contributions to the employees' provident fund in respect of all its employees earning less than INR 15,000 per month.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining agreements are a predominant feature of the manufacturing sector and is the product of a charter of demands and several rounds of negotiations between an employer and members of a trade union. Collective bargaining agreements can only establish better employment conditions (such as remuneration (including bonus and yearly increments), leave entitlement and so on) than those prescribed under various labour law statutes. In India, collective bargaining may take

place at company, industry, state and/or central level, depending on the number of employees forming part of the trade union and the demands of such trade unions.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions are governed by the Trade Unions Act 1926 (**TU Act**). The TU Act sets out the mechanism for registration of trade unions but does not make registration mandatory. Certain state-specific statutes such as the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act 1971 (Maharashtra TU Act) provides that a union with a membership of at least 30% of the total number of employees employed in any undertaking may apply to an industrial court for recognition. Once the trade union is recognised, refusal by an employer to bargain collectively in good faith is regarded as an unfair labour practice.

2.2 What rights do trade unions have?

The TU Act 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 carried out in furtherance of a trade disputes.

2.3 Are there any rules governing a trade union's right to take industrial action?

The ID Act prescribes the means for resolution of industrial disputes between individual workmen, trade unions and employers. It, *inter alia*, provides for non-discrimination of workmen based on their membership with trade unions and prescribes for prior notice conditions in relation to strikes that are typically organised by trade unions.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The ID Act provides for constitution of a works committee in an establishment with 100 or more workmen, in the event that the relevant government issues any specific or general directions to that effect, comprising of equal representation of workmen' and employers' representatives, to settle workmen-related disputes and any other issues related to conditions of service. The workmen representatives must be chosen in the prescribed manner and in consultation with the trade unions (*if any*).

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

A works committee does not have co-determination rights and is not intended to supplement the trade unions for the purpose

of collective bargaining. They are not authorised to consider real or substantial changes in the conditions of service. Their task is only to smooth over any friction that may arise between the workforce and management on a day-to-day basis.

2.6 How do the rights of trade unions and works councils interact?

Since workmen representatives in a works committee are chosen in consultation with the trade union, both are to work in tandem with a common objective of procuring better employment for the workmen.

2.7 Are employees entitled to representation at board level?

There is no statutory requirement to have a representative of workmen on the board of an Indian company.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The Indian Constitution prohibits discrimination of citizens on certain grounds such as religion and sex. In furtherance of these objectives, several legislations prohibit discrimination against protected classes of persons, such as persons with disabilities, or a person who is transgender or is HIV positive, in matters of employment. Similarly, special laws have been framed to promote employment of specific classes of persons. For example, the provision of paid maternity leave and other benefits under the Maternity Benefit Act 1961 (**Maternity Benefit Act**) seek to create a conducive working environment for female employees.

3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination in relation to remuneration on the grounds of gender (whether at the time of recruitment or during employment) is prohibited under the Equal Remuneration Act 1976. Further, the Rights of Persons with Disability Act 2016 (**Disabilities Act**) prohibits discrimination on the grounds of disability and the Maternity Benefit Act prohibits discrimination on the basis of maternity status. The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act 2017 prohibits discrimination against persons with HIV and/or AIDS and also prohibits the requirement for HIV testing as a pre-requisite for obtaining employment. 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. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (**PoSH Act**) prohibits sexual harassment against women at the workplace.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

As per the PoSH Act, employers must formulate an anti-sexual harassment policy for women and widely disseminate the same at

its offices. An Internal Committee should be constituted at each office engaging 10 or more employees to redress complaints of sexual harassment by women. Further, the employer is required to organise awareness programmes for employees at regular intervals to sensitise them with the provisions of the PoSH Act.

3.4 Are there any defences to a discrimination claim?

There are no statutory defences to a discrimination claim. However, employers may defend a discrimination claim if it can be shown that the impugned discrimination is a proportionate means of achieving a legitimate aim.

3.5 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may approach the authorities appointed under the relevant anti-discrimination statutes, such as the Internal Committee under the PoSH Act, or liaison officer under the Disabilities Act. Further, employees who qualify as workmen may also approach the authorities appointed under the ID Act.

3.6 What remedies are available to employees in successful discrimination claims?

If an aggrieved employee successfully proves discrimination before the competent authority, he/she may be re-instated (if he/she was terminated or was forced to resign on the basis of such discrimination) and/or be provided with adequate compensation/damages. The anti-discrimination statutes prescribe certain additional reliefs to employees depending on the nature of discrimination (such as dismissal of person against whom a complaint of sexual harassment is filed, if the claim is proved).

3.7 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Atypical workers are also afforded the same protection by the anti-discrimination statutes, as afforded to other permanent employees. There are no additional protections prescribed for atypical workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

While there are Indian laws to protect whistle-blowers in matters pertaining to public sector establishments (including government companies and departments), no special protection is afforded to whistle-blowers in matters pertaining to the private sector.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

As per the Maternity Benefit Act, every woman who has completed 80 days 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. Commissioning mothers or adoptive mothers are also entitled to paid maternity leave. Additional paid leave is prescribed for miscarriage, medical termination of pregnancy and a tubectomy operation.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

In addition to paid maternity leave, a woman is protected from dismissal or discharge from employment on account of pregnancy or while on maternity leave. Further, the terms and conditions of her service may not be varied to her disadvantage during such period. A woman is also entitled to receive from her employer a medical bonus if no pre-natal or post-natal care is provided to the employer free of charge.

4.3 What rights does a woman have upon her return to work from maternity leave?

Upon return to work from maternity leave, a woman is entitled to additional nursing breaks during the course of her daily work to attend to the needs of her child. Further, employers with 50 or more employees are required to provide creche facilities within a reasonable distance from the establishment and allow mothers to visit the creche at least four times a day. An employer may permit a woman to work from home, if the nature of work assigned to her is such that she may work from home.

4.4 Do fathers have the right to take paternity leave?

While there is no statutory entitlement to paternity leave, an employer may at its discretion provide paternity leave to male employees.

4.5 Are there any other parental leave rights that employers have to observe?

There are no other parental leave rights that are required to be mandatorily observed by employers, besides the benefits prescribed under the Maternity Benefit Act.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Whilst not statutorily mandated, employees may be permitted flexibility in working conditions at the discretion of their employer.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

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 case of a share sale.

However, if the transaction entails an asset/business sale (including associated employees), consent of the employees must be obtained for the transfer of their employment to the buyer.

Indian labour laws do not provide for automatic transfer of employees pursuant to a business/asset sale, without obtaining consent of the employees. 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 and have rendered at least 240 days of service will be entitled to statutory notice of one month (or salary *in lieu* thereof) and retrenchment compensation (at the rate of 15 days salary for each completed year of service or part thereof in excess of six months).

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

As mentioned in question 5.1 above, upon an asset/business sale, employee rights (such as right to retrenchment compensation and gratuity basis the period of continuous service rendered) will continue to remain the same (unless commercially agreed otherwise), including any special rights accorded to them pursuant to a collective bargaining agreement.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no statutory consultation or information requirements in relation to the transfer of employees pursuant to an asset/business sale. However, as mentioned above, consent of employees must be obtained for the transfer of their services to the buyer pursuant to an asset/business sale. The duration of the consultation process with employees will be subject to the nature of the transaction and the number of employees within the scope of the transaction. While there are no statutory sanctions for failing to consult with the employees, if the employees do not consent to the transfer of employment to the buyer, then they shall continue to remain on the rolls of the seller.

5.4 Can employees be dismissed in connection with a business sale?

Employees may be dismissed by an employer in connection with a business sale, subject to fulfilment of the procedure prescribed under their respective employment contracts and the ID Act (in case the employee is a ‘workman’).

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

As mentioned in question 5.1 above, since the buyer is required to offer no less favourable terms and conditions of employment, the terms and conditions of employment may be changed so long as they are at least comparable in aggregate (specifically in terms of the existing remuneration) to the existing terms.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Except in case of termination of employment for misconduct, an employer is mandated to provide notice of termination (or salary

in lieu of notice) to the concerned employee. As per the ID Act, for termination of services of a workman who has been in continuous service for at least 240 days, an employer shall provide at least one month’s notice (or salary *in lieu* of notice) (**Notice of Retrenchment**) along with statutory severance compensation. The notice period for dismissal of non-workmen will be determined as per the terms of their employment contract. The S&E Acts also prescribe for a notice period of one month for the termination of employment by the employer.

6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

Yes, an employer may require employees to serve a period of garden leave during the notice period, in accordance with the employment contract of the employee.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

All dismissals on grounds of misconduct must be superseded by a domestic enquiry conducted in accordance with the principles of natural justice. The employee must be given a reasonable opportunity to be heard as part of the enquiry process. If the services of a workman (who has completed continuous service of at least 240 days) is terminated on grounds other than misconduct, in addition to Notice of Retrenchment, (as mentioned in question 6.1 above), the employer is also required to serve notice to the appropriate government. Further, retrenchment compensation (i.e. statutory retrenchment compensation) equal to 15 days average pay for each completed year of continuous service or any part thereof in excess of six months (**Retrenchment Compensation**) shall be payable to the workmen.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

In addition to the protection afforded by the ID Act to workmen, the Maternity Benefit Act also prohibits dismissal or discharge of women during their maternity leave.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so, how is compensation calculated?

An employer may dismiss an employee for reasons relating to the individual, such as misconduct, subject to a duly concluded disciplinary enquiry as mentioned in question 6.3 above.

An employer may also dismiss an employee for business-related reasons such as role redundancy, restructuring or closure, by following the procedure prescribed under the ID Act and/or the respective employment contract.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Please refer to the answers in questions 6.3 and 6.5 above.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee may bring forth a claim of wrongful termination if the appropriate procedure is not followed for termination of his services. The competent authorities may grant relief such as reinstatement with back wages and/or compensation.

6.8 Can employers settle claims before or after they are initiated?

Employers may settle employee claims at any time after they are initiated. For claims raised by workmen, employers may record the terms of settlement by way of a settlement agreement.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

In addition to the following procedures set out in questions 6.3 and 6.5 above, while dismissing a number of workmen, an employer shall ordinarily be required to retrench the workman who was the last person to be employed in a particular category. Further, additional requirements are prescribed in respect of factories – for instance, an employer of a factory with a workmen headcount of more than 100 is required to obtain prior permission of the appropriate government for dismissing workmen, and the workmen shall be entitled to three months' notice (or salary *in lieu* of notice) along with Retrenchment Compensation.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

If an employer does not comply with the procedure prescribed under the ID Act for employee dismissals, the concerned workmen may raise an industrial dispute with the appropriate authorities. Apart from holding such retrenchment to be illegal, the appropriate authorities may also prescribe penalties and/or imprisonment for the employer, as per the ID Act.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The Indian Contract Act 1872 stipulates that an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. A restrictive covenant, such as non-compete, extending beyond the term of service is void, irrespective of reasonability of such restriction, except in cases involving sale of goodwill. However, covenants with respect to non-solicitation or non-disclosure of confidential information, may be enforced post-termination of employment, for a reasonable period of time.

7.2 When are restrictive covenants enforceable and for what period?

Please refer to question 7.1 above.

7.3 Do employees have to be provided with financial compensation in return for covenants?

There are no statutorily prescribed payments *in lieu* of restrictive covenants. However, in order to protect its business interests, employers may make payments to the employees to ensure that they adhere to such restrictive covenants. However, in the event of breach of restrictive covenants by the employees, recovery of such payments may pose a challenge.

7.4 How are restrictive covenants enforced?

For enforcement of restrictive covenants post-termination of employment, employers may approach civil courts to obtain an injunction against potential or further breach of restrictive covenants by employees (or ex-employees, as the case may be). Employers may also seek specific performance of contract and/or appropriate damages. However, the onus of proof in respect of any breach of restrictive covenants is on the employer.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

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 obtain consent of the employees for collecting, processing and storing their 'sensitive personal data or information' (which includes information such as passwords, financial information, bank account details, medical information, etc.) (**SPDI**). Employers are also required to implement reasonable security practices and procedures in relation to the storing of SPDI. Employee consent is required to be obtained prior to the transfer of employee's SPDI (within or outside India). The IT Act prescribes civil and criminal liability for disclosure of 'personal information' in breach of lawful contract or without the employee's consent.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, as per the SPDI Rules, employees have a right to obtain copies of any personal information pertaining to them held by the employer.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

There are no laws in India pertaining to the employer's right or legal requirement dealing with antecedent verification of prospective employees before engaging them. However, it is common for employers to conduct a background check on educational documents, prior experience letters, past employers and criminal records. Consent of the candidates must be obtained (typically through their application forms) for carrying out such pre-employment checks.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes, 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/or stored by the employer. In case any personal information is stored/shared via emails, telephone calls or employer provided equipment, consent of the employees must be obtained to monitor the same.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

There are no laws in India regulating the use of social media by employees. Accordingly, an employer may frame internal policies to regulate the use of social media by employees during work hours and within the workplace.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The ID Act provides for the appointment of Conciliation Officers, Board of Conciliation, Courts of Inquiry, Labour Courts, Industrial Tribunals, and National Tribunals to hear claims of workmen. Non-workmen may approach the civil court, or the appropriate authorities prescribed under the state specific S&E Acts, as applicable.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A workman can raise a dispute directly before a Conciliation Officer in case of discharge, dismissal, retrenchment or any form of termination of service. All other 'rights disputes' (as mentioned in the Second Schedule of the ID Act) and 'interest disputes' (as mentioned in the Third Schedule of the ID Act) may be raised by the trade union or management before the labour court and industrial tribunals, respectively. The ID Act also provides for conciliation of disputes and voluntary reference of disputes to arbitration (subject to consent of both, employer and workmen), prior to approaching the labour courts. Workmen do not have to pay any fees to the authorities for submission of a claim (except in case of arbitration).

9.3 How long do employment-related complaints typically take to be decided?

In the absence of a statutory timeframe within which employment related disputes must be decided, the time taken for successful resolution of complaints varies from case to case.

9.4 Is it possible to appeal against a first instance decision and if so, how long do such appeals usually take?

Yes, appeals may be filed against a first instance decision. Time taken for conclusively deciding an appeal varies from case to case.

10 Returning to the Workplace after COVID-19

10.1 Can employers require employees to be vaccinated against COVID-19 in order to access the workplace?

The Ministry of Home Affairs, Government of India, has clarified that vaccination would be voluntary for the citizens of India. However, certain state governments have issued orders requiring employers/competent authorities to ensure that employees working on the premises are fully vaccinated against COVID-19. On the basis of such orders (applicable to the respective states), orders that may be issued by other state governments in the future on similar lines, and an employer's duty of care and larger workforce safety interests, employers can educate their workforce about the advantages of COVID-19 vaccination and insist that all (present and prospective) employees be vaccinated. However, adverse action should not be taken against employees who are not vaccinated.

10.2 Can employers require employees to carry out COVID-19 testing or impose other requirements in order to access the workplace?

Yes, employers can require their employees to be tested for COVID-19 or undergo thermal screening, etc. as a condition of entering the workplace, having regard to the overall health and safety of the workforce. Most employers in India are bearing the costs of such testing requirements. However, COVID-19 test results of employees qualify as 'sensitive personal data and information' of employees, and their consent must be obtained for collecting such information and such data should be stored/processed in a secured manner in accordance with Indian data privacy laws.

10.3 Do employers need to change the terms and conditions of employment to adopt a "hybrid working" model where employees split their working time between home and the workplace?

There is no legal requirement to agree to a remote/hybrid working model through a written agreement. However, from a contractual standpoint and for completeness, most employer would record the eligibility, terms and conditions of the hybrid working model through a policy or addendum to the extant employment contracts of employees.

10.4 Do employees have a right to work from home if this is possible even once workplaces re-open?

Employees do not have a right to work from home. Any such arrangement would be subject to discussions and agreement with the employer.



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