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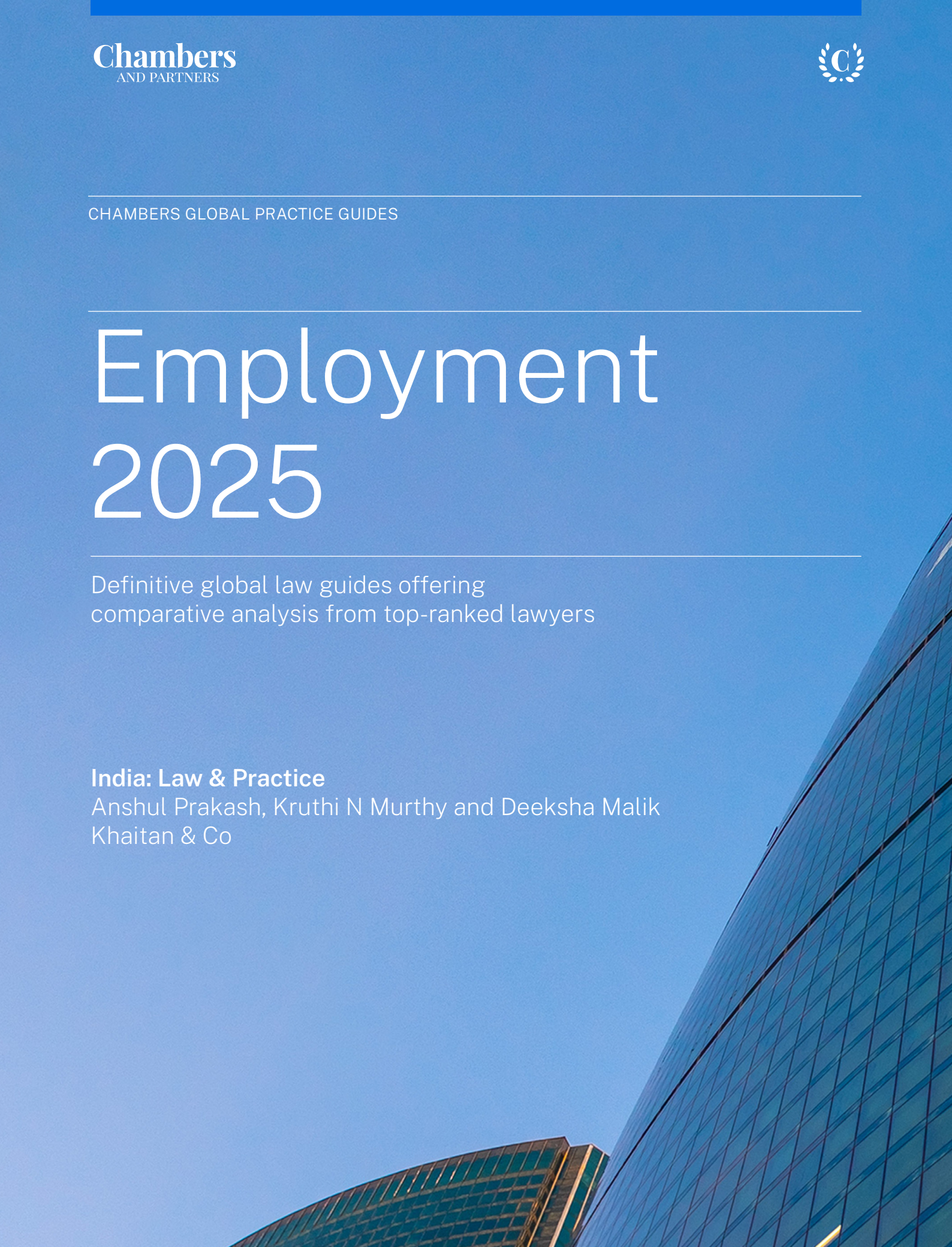
India: Law & Practice

Anshul Prakash, Kruthi N Murthy and Deeksha Malik
Khaitan & Co



INDIA

Law and Practice

Contributed by:
Anshul Prakash, Kruthi N Murthy and Deeksha Malik
Khaitan & Co

Contents

Khaitan & Co is one of India's oldest and most prestigious full-service law firms. Its teams comprise a powerful mix of experienced senior lawyers and dynamic rising stars in Indian law, who offer customised and pragmatic solutions that are best suited to clients' specific requirements. The firm has a strong pan-Indian and overseas presence through its offices in Delhi-NCR, Mumbai, Bengaluru, Kolkata, Chennai and Singapore, and international country-specific desks. Its employment, labour and benefits (ELB) practice has become one of the most sought-after employment practices in the country, and has advised several clients (domestic and international) from sectors such as information technology/security, mining, healthcare, construction, automobiles and management consultancy. The ELB group is known for its bespoke advice and assistance on critical issues and strategy on employee transition/workforce restructuring, employee transfers on account of business/asset transfers, trade union-related issues and more. Notable clients include Hindustan Unilever, FirstRand Bank and HDFC Limited.

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1. Employment Terms

1.1 Employee Status

There are two main kinds of classification of employees: one based on the nature of work, and another based on the duration of employment.

Classification Based on Nature of Work

Depending on the predominant nature of their responsibilities, an employee may be classified as:

- a workman, as defined in the Industrial Disputes Act 1947 (the "ID Act"); or
- a managerial employee.

To determine whether an employee is a "workman", the actual or primary work performed by the employee is examined. Some cases wherein the courts have considered the functions of an employee as being of a managerial nature are looking at the progress of work vis-à-vis quality and timeliness, ensuring compliance, manpower planning, contract management, monitoring costs, mentoring team members, and involvement in policy-making decisions regarding any aspect of the business or service, the conditions of workers/employees and other such similar powers.

The significance of this classification is that persons qualifying as "workmen" are entitled to various statutory protections/entitlements, such as severance compensation and notice (or the payment of a fixed salary in lieu thereof) in cases of termination of employment for reasons other than the employee's misconduct, and prior notice in case of any adverse change in the conditions of service.

Classification Based on Duration of Work

An employee could be either a permanent employee or a fixed-term employee, depending on the duration of work. For fixed-term employees, the duration is predetermined and limited, often tied to specific project requirements. For permanent employees, the employment relationship continues until one of the parties terminates it.

The significance of this classification is that there are certain benefits which are linked to the tenure completed by an employee in an organisation (such as gratuity, which is a statutory benefit received by an outgoing employee who has completed five years of continuous service). Accordingly, fixed-term employees may not be entitled to such benefits if the tenure of their employment is shorter (which is commonly the case). However, the stipulations set out by the central government and certain states under the Industrial Employment (Standing Orders) Act 1946 (the "IESO Act", which applies to large establishments typically engaged in manufacturing operations) allow pro-rated statutory benefits under applicable laws for fixed-term employees in the workmen category, even if they do not fulfil the minimum service period for qualifying criterion.

Other Classifications

Other than the above broad classifications, there may be other kinds of classification for very limited purposes. For instance, under the social security regime

(namely the Employees' Provident Funds and Miscellaneous Provisions Act 1952), the manner of contributions by employers and employees varies depending on whether an employee is a domestic employee (an employee working in India and holding an Indian passport) or an international worker (an expatriate employee).

1.2 Employment Contracts

In India, employment contracts can be definite (fixed-term) or indefinite (permanent), depending on the purpose/duration of the relationship envisaged by the parties. The distinction between the two kinds of employment is explained in **1.1 Employee Status**.

An employer-employee relationship can either be express or implied, written or verbal. However, to avoid any dispute regarding the terms of employment, it is a common practice to execute an employment contract. Only a few Indian states, such as Karnataka and Delhi, require a commercial establishment (a non-manufacturing establishment) to issue written appointment letters to employees, which would set out basic particulars such as wages, job designation, the nature of their duties, etc.

Certain terms that are generally incorporated in an employment contract include:

- nature of work (job description);
- place of employment;
- date of commencement of employment;
- remuneration structure;
- assignment of intellectual property by the employee to the employer;
- cessation of employment (including notice period); and
- restrictive covenants (such as non-solicitation).

However, the Indian courts have taken the view that certain terms and conditions of service which are regulated by statute will constitute implied terms of a contract of employment. Therefore, provisions relating to payment of wages, bonuses, gratuity payments and contributions towards employees' provident funds and employees' state insurance can be considered to be implied terms of a contract of employment and need not be recorded in writing. Similarly, an employee's duty to remain faithful in their duties towards the employer and to maintain the confidentiality of the employer's proprietary information is considered to be implicit in the employment contract.

1.3 Working Hours

The working hours are primarily governed by the Factories Act 1948 (the "Factories Act") for manufacturing establishments, and by state-specific shops and establishments statutes (the "S&E Acts") for non-manufacturing commercial establishments. For some specialised sectors, working hours are governed by special statutes, such as the Mines Act 1952 for mines, and the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act 1996 for construction work.

The applicable laws provide normal working hours, which range mostly from eight to nine hours a day and are typically set at 48 hours a week. Any additional time spent by the employee towards work is subject to an overtime payment, which is twice the ordinary wages payable to the employee. Some statutes also provide weekly/quarterly limits to the number of overtime hours an employee may be required to work. Flexible working arrangements are possible, subject to adherence to the above-discussed statutory limits. It may be noted that several laws dealing with work time regulations exempt managerial employees from their purview; for such employees, the work time requirements are contractually driven.

The labour laws in India recognise both full-time and part-time employment. Part-time employees are ordinarily entitled to all benefits given to permanent employees. Having said that, there may be some restrictions on part-time employees, to which employers must be privy. For instance, the S&E Acts applicable to Maharashtra and Gujarat provide that part-time workers cannot be allowed to work more than five hours in a day.

1.4 Compensation

Minimum Wages

The minimum wage requirements are governed according to various periodic central government and state notifications under the Minimum Wages Act

1948, which determine minimum wage rates for three major categories of workers:

- unskilled;
- semi-skilled; and
- skilled.

Statutory Bonus

The Payment of Bonus Act 1965 regulates the amount of statutory bonus payable to employees (earning wages not more than INR21,000 per month) employed in certain establishments based on their profits. The law applies to every establishment employing 20 or more persons and sets out provisions relating to the payment of the minimum bonus (8.33% of the salary, capped at INR7,000 or statutory minimum wages, whichever is higher), and the maximum bonus (20% of the salary, capped at INR7,000 or statutory minimum wages, whichever is higher).

Government Intervention in Compensation

Other than the above-mentioned requirements and certain other stipulations around the time and mode of the payment of wages, as well as permissible deductions from wages, there is typically minimal intervention by the government in terms of the determination of compensation and increments. These aspects are contractually driven but may be impacted by the presence of a unionised workforce and any collective bargaining agreements entered into by them or their representatives.

1.5 Other Employment Terms

Leave and Holiday Entitlements

The working conditions of employees, including their leave entitlements, are mostly regulated according to the nature of the entity by which they are employed.

If the entity is a factory (engaged in manufacturing activity) covered under the Factories Act, employees who have worked in the factory for 240 days or more in a calendar year must be allowed, in the subsequent calendar year, privilege leave with wages at the rate of one day for every 20 days of work performed (for adults). This leave is additional to public holidays to which workers are entitled.

If the entity is a shop or a commercial establishment, the number of days of privilege leave to which employees are entitled would depend on the state-specific S&E Acts (depending on the location of the establishment). The minimum threshold usually ranges from 12 to 20 days. This leave is pro-rated for the first year of employment. In several states, employees are also entitled to casual leave (that is, leave to attend to personal needs) and sick leave.

At the time of separation, an employee is also entitled to a fixed salary for accrued but unused privilege leave, up to the maximum accrual limits set out under the Factories Act or the state-specific S&E Acts (unless the employer contractually provides more beneficial terms).

Note that there may be special laws in addition to the above that deal with leave entitlements for special kinds of workforces. For instance, the Sales Promotion Employees (Conditions of Service) Act 1976 deals with leave entitlements for employees engaged in sales activities in notified sectors, such as the pharmaceutical industry.

Maternity Benefit

As per the Maternity Benefit Act 1961 (the "MB Act"), every woman who has completed 80 days' service with the employer is entitled to paid maternity leave of 26 weeks. However, women with two or more surviving children are entitled to 12 weeks of paid maternity leave. Commissioning mothers and adoptive mothers are also entitled to paid maternity leave. Other kinds of paid leave envisaged under the law are in respect of special situations such as miscarriage, medical termination of pregnancy, tubectomy operations, etc.

Confidentiality and Non-Disparagement

There are no standard laws regarding confidentiality and non-disparagement, but it is standard practice to include these provisions in the appointment letter/employment agreement. Note that these obligations are typically continued even after the cessation of employment. The employee can be held liable under the law of contract if there is a violation of such stipulations.

2. Restrictive Covenants

2.1 Non-Competes

Validity

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 a non-compete, extending beyond the term of service is void, irrespective of the reasonability of such restriction, except in cases involving the sale of goodwill.

There is, however, case law recognising an exception to the rule covering restrictions aimed at protecting the employer's legitimate business interests, such as its business connections and trade secrets. Therefore, clauses relating to post-employment non-solicitation of employees or customers and the protection of confidentiality with respect to trade secrets are not caught by the above restrictions and have been enforced by the courts, albeit on a case-by-case basis.

Enforcement

For a breach of a restrictive covenant (being a breach of contract), the remedies discussed in the following points are available to an employer in such cases, to the extent the covenant is valid and enforceable.

Where a breach has occurred but the employer has not suffered a loss, and the contract provides a pre-estimate of the loss (in the form of liquidated damages) that might be incurred due to breach of contract, the party may claim said amount (to the extent the court determines it to be a genuine pre-estimate of the loss), irrespective of any actual loss arising on this account.

However, where the contract does not provide for such pre-estimate and the breach has occurred (as is usually the case with employment contracts), courts would typically grant an injunction restraining the former employee from continuing the breach.

Where a breach has occurred and the employer has suffered an actual loss, the employer can claim unliquidated damages for the loss caused to it which the parties knew would be caused as a result of the breach, regardless of whether or not the employer has stipulated a pre-estimate of the loss in the contract.

2.2 Non-Solicits

As mentioned in **2.1 Non-Competes**, covenants with respect to non-solicitation and non-disclosure of confidential information may be enforced post-cessation of employment on a case-by-case basis, depending on the impact of the restriction on the ability of an individual to exercise lawful pursuits.

In the case of *Desiccant Rotors International Private Limited v Bappaditya Sarkar and Another* [CS (OS) Number 337/2008], the Delhi High Court noted the following: "Clearly, in part at least, the obligation agreement sought to restrain defendant number 1 from seeking employment with an employer dealing in competitive business with the plaintiff after he had ceased to be an employee of the plaintiff, and that too for a period of two years. Such an act cannot be allowed in view of the crystal-clear law laid on this issue. However, in the impugned order dated 20 February 2008, the injunction restraining defendant number 1 is limited in scope, in the sense that it does not restrain defendant number 1 from working with defendant number 2 or any other person/company, thereby steering clear of impinging the former's freedom to choose his own workplace. The injunction only restrains defendant number 1 from approaching the plaintiff's suppliers and customers for soliciting business which is in direct competition with the business of the plaintiff. Hence, the injunction which has already been granted by order dated 20 February 2008, is made absolute."

3. Data Privacy

3.1 Data Privacy Law and Employment

At present, the limited provisions on the protection of information are set out under the Information Technology Act 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the "SPDI Rules") framed thereunder. The SPDI Rules protect individuals (whether employees or otherwise) from an entity obtaining access or using their sensitive personal data or information (SPDI). The term

"sensitive personal data or information" is defined in the SPDI Rules to mean personal information which consists of information relating to:

- passwords;
- physical, physiological and mental health conditions;
- financial information, such as bank account details;
- sexual orientation;
- medical records; and
- biometric information.

If the requested information falls within the purview of the SPDI Rules, consent from the employee would be required before the data is collected. Typically, such consent is taken at the commencement of employment itself (through a consent clause in the employment contract/company policy); even so, it is advisable for employers to procure consent at the time of the collection and/or transfer of such protected information, so that an employee has an effective opportunity to withdraw consent, which is an opportunity that must be given to the employee under the SPDI Rules.

Employers are also required to implement reasonable security practices and procedures in relation to the storage of SPDI.

It should be noted that India recently enacted the Digital Personal Data Protection Act 2023 (the "DPDP Act"). The DPDP Act received the assent of the President of India on 11 August 2023, although the provisions therein state that it would come into force on such date as the central government would notify. The DPDP Act widens the ambit of the data protection regime in India by not only covering SPDI but also including within its purview any data about an individual who is identifiable by such data. The DPDP Act provides that a person (which would include an employer) may process the personal data of a data principal (who would be an employee in the context of an employer-employee relationship) for a lawful purpose for which the data principal has given their consent, or for certain "legitimate uses" (where express consent would not be needed). The expression "legitimate uses" includes purposes associated with employment, and measures to secure the interests of the employer.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Indian labour laws do not prescribe any limitations in respect of the engagement of foreign workers by Indian establishments. However, there are certain additional compliance requirements from a social security standpoint that an employer will have to undertake, such as making employees' provident fund contributions if the foreign worker qualifies as a non-exempt "international worker" under the Employees' Provident Funds Scheme 1952.

However, in a significant development, the Karnataka High Court in *Stone Hill Education Foundation v Union of India & Others* [W.P. No. 18486/2012] held that the provisions of the EPF Scheme that required different treatment of Indian employees working abroad and foreign employees working in India were discriminatory and violative of Article 14 of the Constitution of India. The court struck down the differential treatment regarding social security contributions for these two classes of workers. Following this decision, the Employees' Provident Fund Organisation (EPFO) has acknowledged the ruling and is currently evaluating its next steps. These may include seeking a review or appeal before the Supreme Court of India. Until a conclusive decision is reached or further clarification is issued by the EPFO or the courts, the judgment introduces a degree of legal uncertainty regarding the continued enforceability of the existing contribution requirements for foreign nationals classified as international workers.

With respect to Overseas Citizens of India (OCI) specifically, in 2021 the Ministry of Home Affairs of the Government of India prescribed various conditions/requirements to be fulfilled by OCI cardholders before being engaged as an employee of an Indian entity. Primarily, all OCI cardholders are now permitted lifelong multiple entries to India for any purpose. However, OCI cardholders will have to seek special permission from a specified competent authority – the Foreigners Regional Registration Office (FRRO) or the relevant Indian mission – to be engaged as research scholars, in journalistic activities, or as interns or employees in foreign diplomatic missions/foreign government organisations in India (which is a special category).

For OCI cardholders who are employed by an Indian entity to render services apart from the work falling within the ambit of the special category, there is no requirement to seek prior permission from any competent authority or FRRO.

Depending on the duration of a foreign employee's stay in India and the nature of services proposed to be rendered, they will also have to comply with the applicable immigration laws for obtaining the appropriate visa (ie, a business/employment visa) to enter India.

4.2 Registration Requirements for Foreign Workers

Foreign nationals entering India on an employment visa which is valid for more than 180 days are required to register themselves with the FRRO within 14 days of their arrival in India. No such registration is required if the employment visa is valid for 180 days or less.

Furthermore, all OCI cardholders residing in India (including those rendering services apart from those in the special category) are required to notify the FRRO by email of any change in their permanent residential address or occupation (this is not a registration requirement per se).

5. New Work

5.1 Mobile Work

In 2022, the government of India amended the Special Economic Zones Rules 2006 in relation to work from home arrangements for employees working out of Special Economic Zones (SEZs). A company in an SEZ may allow certain employees to work from home or from any place outside the SEZ, and needs to notify this to the Development Commissioner through an email on or before the date on which such work from home is permitted. The unit can provide an employee working from home duty-free goods, such as a laptop, a desktop and other electronic equipment, and these goods shall be allowed to be taken outside the SEZ without the payment of duty, subject to such goods being duly accounted for in the appropriate records.

Apart from the above, Indian laws in their current form do not regulate and/or resolve issues that may arise out of employees working remotely. Most Indian labour and employment legislation is silent on the work from home/hybrid concept, and does not provide any specific guidelines that may regulate the employer-employee relationship in such scenario. Accordingly, the onus is on employers to determine and notify employees of the guidelines in relation to working remotely.

Employers continue to be liable for the health and safety of their employees when working remotely and should ensure that employees take relevant measures to ensure that their remote workplace is ergonomically sound, clean, safe and free of obstructions and hazardous materials, and does not pose a risk to their health and safety. Employers should also require their employees to comply with all building/social codes and health and safety requirements as may be applicable to employees. Employers may also be required to pay compensation to employees who are injured (which includes partial or permanent disability) or die due to accidents arising out of or in the course of their employment, whether working remotely or otherwise.

Indian data privacy laws and social security laws are central pieces of legislation and do not vary from state to state. Accordingly, there would be no change in the employers' or employees' obligations in this respect on account of working remotely.

5.2 Sabbaticals

Sabbatical leave is not statutorily governed under Indian labour laws. Organisations consider and allow employees to avail themselves of sabbatical leaves at their discretion and according to mutually agreed terms and conditions. Typically, sabbatical arrangements are unpaid and would envisage the complete absence of any pecuniary relationship between the employer and the employee. Since no salary is paid to the employee during this period, no statutory social security contributions have to be made. However, employees may continue to be eligible for any other contractually agreed or policy-driven benefits like insurance coverage during the sabbatical period.

5.3 Other New Manifestations

With remote and flexible workplaces becoming the new norm, employers have adopted (and continue to

adopt) new practices to ensure the seamless flow of work. Hybrid workplaces that offer flexibility to employees to work from both the office and home have now become a standard requirement for most job seekers. To reduce real estate costs, many companies have switched to "co-working" spaces and "hot-desking" practices. Furthermore, with most companies having resumed working from the office (while retaining the hybrid model), employers have been making efforts to take care of the wellbeing of their employees, in order to help them to adjust to this shift. Factors contributing to employees' ailments have included the stress of additional commuting hours, the expensive cost of living, managing new methods of work, and physical health issues.

6. Collective Relations

6.1 Unions

In India, the Trade Unions Act 1926 provides for the registration of trade unions (which is an optional process for a trade union); such registration confers on the union certain rights and liabilities which a non-registered trade union does not have. For example, a non-managerial employee who is a party to an industrial dispute can be represented by a registered trade union. Furthermore, a registered trade union can acquire and hold movable and immovable property and can contract, sue and be sued in its name.

At the state level, however, a few states have made provisions for the recognition of a trade union; for instance, Maharashtra has enacted the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971, which sets out a procedure that may be followed by a registered trade union to obtain the status of a recognised trade union. Where a state government has not enacted legislation for the recognition of a trade union, an employer may accord its recognition to a union by way of a collective bargaining agreement.

A trade union that is both registered and recognised has the right to collective bargaining with an employer, so that if the employer refuses to negotiate with such union on the terms and conditions of employment of the workers being represented, the union can file a claim before the competent authority alleging unfair labour practices by the employer.

6.2 Employee Representative Bodies

In addition to trade unions, the ID Act provides for the constitution of a works committee in an establishment with 100 or more non-managerial employees, in the event that the relevant government issues any specific or general directions to that effect. Such works committees have an equal right of representation of non-managerial employees' representatives and employers' representatives, and the right to discuss the terms and conditions of employment of non-managerial employees in an amicable manner.

6.3 Collective Bargaining Agreements

In India, collective bargaining agreements are primarily the product of a charter of demands and several rounds of negotiations between a particular employer and its employees, who are typically members of a trade union. Collective bargaining agreements are a predominant feature of employment in the manufacturing sector, although the existence of such agreements in the services sector is not uncommon. Collective bargaining agreements can only establish better employment conditions than those prescribed under various employment and labour laws, and therefore these instruments cannot be used to opt out of statutory payments, benefits and protections. Collective bargaining agreements typically entail provisions relating to working hours, working conditions (such as health and safety), remuneration (including bonus and yearly increments), leave and holiday entitlements, etc.

For more details in relation to collective bargaining, please see **6.1 Unions**.

7. Termination

7.1 Grounds for Termination

In India, an employer may terminate the services of an employee on two main grounds, either with or without cause.

Termination Without Cause

Employment can be terminated at the employer's discretion for any reason other than proven misconduct by simply invoking the notice period provisions in the employment agreement/applicable law/policies. Such termination could be on account of:

- an employee's unsatisfactory performance;
- redundancy of the role/downsizing/closure of the establishment;
- frequent absence from work due to continued ill health, etc.

Termination without cause (or termination simpliciter) includes scenarios wherein there may be underlying reasons for the separation but the employer, as per its assessment of such reasons or cause, does not intend to or does not deem it appropriate to:

- mention or assign such reasons for the separation in the exit documentation; and/or
- deprive the employee of any contractual or statutory benefit pursuant to their exit.

The employee will be entitled to all service benefits (statutory as well as contractual) that have been earned up to the date of the cessation of employment. Non-managerial employees who have rendered at least 240 days of service will be entitled to notice of at least one month (or salary in lieu thereof) and statutory severance compensation (computed at 15 days' wages for every year of completed service or part thereof in excess of six months) ("Retrenchment Compensation"). In cases of collective redundancies involving non-managerial employees, as per the ID Act, employers will also have to comply with the "last in, first out" principle.

Termination With Cause

This includes the termination of employment for breaches of the terms and conditions of employment, misconduct, etc. Termination on account of misconduct should be preceded by a domestic inquiry conducted in accordance with the principles of natural justice (ie, the employee should be given a fair opportunity to present their case and defend themselves against the charges levelled). In cases of termination on the grounds of misconduct, the employee would not be entitled to receive notice pay or any other statutory and contractual payments, except gratuity (with necessary adjustments for losses due to misconduct, if any) and leave encashment.

7.2 Notice Periods

The concept of "at will" employment (or hire and fire policy) is not recognised in India. Employers are required to comply with notice period requirements (or pay salary in lieu of notice) as per applicable laws/employment agreements and policies (whichever is higher) in case of termination of an employee's services for any reason other than proven misconduct. The ID Act and state-specific S&E Acts prescribe a minimum notice period of one month in the event of termination simpliciter. While the ID Act and most S&E Acts only apply to non-managerial employees, certain S&E Acts (such as those of Haryana and Delhi) also apply to managerial employees. Notice period requirements in respect of managerial employees will be governed by the terms of their employment agreement/employer's policy in this regard.

In case of termination simpliciter (which includes termination of employment on account of redundancy or unsatisfactory performance), non-managerial employees who have rendered at least 240 days of service will be entitled to Retrenchment Compensation. Employers are also required to notify the jurisdiction's labour commissioner regarding such termination (please note that this is not an approval requirement).

Additional Requirements for Factories, Mines and Plantations

In the termination of services of non-managerial employees (who have rendered at least 240 days of service) engaged in factories, mines or plantations employing at least 100 or 300 non-managerial employees (the threshold varies from state to state), an employer is required to:

- obtain prior permission from the appropriate government;
- give the non-managerial employees concerned three months' notice or salary in lieu thereof; and
- pay Retrenchment Compensation.

7.3 Dismissal for (Serious) Cause

There is no set list of acts of "serious/gross misconduct" or statutory guidance on what amounts to serious misconduct warranting summary dismissal. When determining an act to be misconduct or gross misconduct, factors such as whether the alleged act affects discipline in the organisation should be considered, or whether the act is backed by an improper motive and whether the act, if condoned, would send the wrong message to others.

As a general principle, termination on account of misconduct (gross misconduct or otherwise) should be preceded by a domestic inquiry conducted in accordance with the principles of natural justice. The employee should be given a fair opportunity to present their case/defend themselves against the charges levelled. To commence the domestic inquiry/proceeding, an employer is required to share a charge sheet or serve a show-cause notice to the employee concerned, so that they are aware of the charges levelled against them and can prepare to present their case. The parties should also be allowed to present their evidence/witnesses and cross-examine the witnesses presented by the other party. Following the inquiry, the findings should also be recorded and communicated to the employee.

As per judicial precedents, the requirement to conduct a disciplinary inquiry may be dispensed with in some cases, if:

- the misconduct is so apparent that a disciplinary inquiry is not required; or
- the act constituting misconduct has been unconditionally admitted by the employee.

7.4 Termination Agreements

While there is no statutory requirement for executing termination agreements/exit documentation, it is industry practice (and recommended) to record the terms of an employee's exit in an appropriate document and set out the exit payments, the release of claims provisions, post-employment obligations and restrictive covenants, etc.

There are no prescribed procedures/formalities or limitations in respect of the execution of termination documents. Depending on the nature of the exit, the documentation may vary.

In the case of resignation by an employee, a resignation acceptance letter is issued by the employer pursuant to receipt of a written resignation letter/email from the employee concerned, and it will have to be countersigned by the employee. In the case of key employees, employers may require them to execute more detailed "settlement and release agreements" that record the full and final settlement payments, as well as the related logistics and conditions.

In the case of termination of employment by the employer, the employer will issue a termination letter/notice, which is not required to be countersigned by the employee (since such termination is a unilateral act of the employer). In the case of termination simpliciter, there is no requirement to mention the circumstances of the exit in the termination notice, while in cases of termination for cause/misconduct, the termination letter will have to set out the details of the proven misconduct against the employee.

7.5 Protected Categories of Employee

Industrial relations laws in India (such as the ID Act, the IESO Act and most S&E Acts) provide protection against dismissal for the non-managerial category of employees. Protections prescribed for non-managerial employees against dismissal include prior notice requirements, payment of Retrenchment Compensation, prior approval requirements (in cases of employees engaged at factories, mines and plantations engaging more than the specified number of employees), etc.

The MB Act also prohibits the dismissal or discharge of women (engaged in managerial or non-managerial roles) during their pregnancy or while on maternity leave.

8. Disputes

8.1 Wrongful Dismissal

Employees may initiate wrongful dismissal claims on various grounds, including shortfall/denial of exit payments and failure to follow the due procedure for

termination – ie, failure to comply with a notice period in case of termination simpliciter, failure to conclude a disciplinary inquiry in cases of termination on account of misconduct, failure to comply with the "last in, first out" principle in cases of collective redundancy involving non-managerial employees, etc.

Only non-managerial employees may approach the labour courts/industrial tribunals constituted under the ID Act with a claim of wrongful dismissal. Managerial/supervisory employees would be precluded from approaching the labour commissioner, labour court, industrial tribunal, High Court or Supreme Court for any relief, and may only approach the competent civil courts or the appropriate authorities prescribed under the S&E Acts (if applicable).

In the case of a successful claim of wrongful dismissal in respect of non-managerial employees, the competent authorities may award relief of reinstatement of services (with or without back wages) and/or damages. However, in respect of managerial employees, depending on the facts and circumstances of the case, the civil courts may only award compensation/damages by way of relief; managerial employees are not entitled to any relief that is akin to the reinstatement of services.

8.2 Anti-Discrimination

Employees may raise claims/disputes in cases of contravention/non-compliance with any of the following anti-discrimination legislation in India:

- the Equal Remuneration Act 1976, which prohibits discrimination in relation to remuneration on the grounds of gender (whether at the time of recruitment or during employment);
- the Rights of Persons with Disabilities Act 2016, which prohibits discrimination on the grounds of the disability status of an employee;
- the MB Act, which prohibits discrimination based on the pregnancy/maternity status of a woman and provides for paid maternity leave entitlements;
- the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act 2017, which prohibits discrimination against persons with HIV and AIDS, and also prohibits the requirement for HIV testing for obtaining employment;
- the Transgender Persons (Protection of Rights) Act 2019, which prohibits discrimination against a transgender person resulting in unfair treatment in employment, or a denial of, or termination from, employment; and
- the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, which prohibits the sexual harassment of women in the workplace.

The relief granted to the aggrieved employee can be in the form of an injunction, punishment of the offender, a penalty, compensation, reinstatement of services or another form of relief, and is subject to the provisions of the applicable law, the nature of discrimination, the impact/consequences of such discrimination, etc.

8.3 Digitalisation

There have not been any regulations regarding virtual hearings as far as employment disputes are concerned. In most labour courts/industrial tribunals, hearings continue to be conducted in person, although a few judicial forums have allowed online filings, depending on the jurisdiction.

9. Dispute Resolution

9.1 Litigation

The ID Act provides for the appointment of conciliation officers, boards of conciliation, labour courts and industrial tribunals to hear the claims of non-managerial employees. A non-managerial employee 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 courts or industrial tribunals, respectively.

Managerial employees may approach the civil court or the appropriate authorities prescribed under the S&E Acts (if applicable).

The common law principles of class action suits or representative litigation are found in the ID Act, which permits and facilitates collective bargaining by employees/workers (whether through a trade/labour union or otherwise).

9.2 Alternative Dispute Resolution

Disputes between employers and employees may be subject to arbitration. In fact, the ID Act provides that the employer and non-managerial employees may agree to refer industrial disputes to arbitration (as per the procedure prescribed under the ID Act) before approaching the labour courts.

The parties may agree to refer disputes arising between employers and managerial employees to arbitration in accordance with the Arbitration and Conciliation Act 1996, provided that the agreement containing the arbitration clause is adequately stamped. However, subjecting employee disputes to arbitration proceedings in India is uncommon given the personal nature of the contract as opposed to commercial agreements, and as the costs involved in arbitration proceedings mostly tend to exceed the litigation costs in employee disputes in India. Accordingly, arbitration clauses are typically not included in employment agreements in the ordinary course and are largely restricted to key executive and founders agreements.

9.3 Costs

While the relevant judicial authority may, at its discretion and depending upon the facts and circumstances of the case, award attorneys' fees to the prevailing employee, there is no statutory entitlement/right in this regard.

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