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Global talent mobility: overcoming legal and cultural barriers in India

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'The talent you need is out there, and often it's not in your backyard. Embrace the world and bring the best into your organization.' Bill Gates

Introduction

In an era of rapid globalisation, talent mobility has emerged as a key driving factor of growth, innovation and competitive advantage for employers across the globe. As businesses increasingly expand their operations internationally, the ability to recruit and deploy talent from diverse geographies becomes a strategic imperative. Companies can acquire global talent through multiples avenues such as offering direct employment to a foreign national, the internal transfer of employees from foreign affiliates or by exploring secondment arrangements.

The primary advantage of a borderless workforce model is the ability to tap into a global pool of talent from varied backgrounds and expertise. Borderless engagement also promotes diversity within the organisation, which in turn fosters creativity and innovation within the workforce.

This evolution, however, comes with its own set of legal, regulatory and cultural challenges – particularly in a country such as India. Indian employment laws and cultural considerations are integral to the functioning of global talent mobility, and addressing these factors is critical to ensuring a smooth transition for foreign talent and fostering an inclusive and productive workforce. This article analyses the legal framework surrounding talent mobility in India, the cultural dynamics that influence workforce integration and the potential solutions to overcome these barriers.

Legal framework for talent mobility in India

As one of the largest and fastest growing economies, in the recent past, India has seen an incremental influx of foreign talent and Indian talent crossing borders to cater to the business needs of employers.

There are a few critical considerations for companies to bear in mind while treading Indian waters.

Establishing a local presence in India

In order to hire direct employees in India, it is mandatory for a foreign entity to have a local presence. The local presence could be in the form of a company, partnership firm, liaison office or a branch office. While the Indian government has simplified the process for incorporating and establishing entities, the process still requires an investment of time.

While the entity is being set up, several organisations choose to engage an Employer on Record (EOR) in India through which they engage employees. Once the entity has been set up, the employees are typically transferred to the payroll of the Indian entity. The movement of such employees should be strategically structured to mitigate possible risks under Indian employment laws. Furthermore, there should be adequate documentation and diligence completed to ensure that the new entity is not liable for any past non-compliance of the EOR.

As an alternative to engaging an EOR, some foreign entities also prefer engaging individuals as their direct consultants. This arrangement has its own risks, especially when the individuals are involved in activities that are monetised. It is also critical to ensure that payouts from the foreign entity are being made in compliance with applicable foreign exchange laws.

It is true for large parts of the world, the above options should be explored by foreign entities only for a temporary period of time as there may be certain risks and implications under Indian foreign exchange laws and taxation laws for both the foreign entity and the individual.

Compliance with immigration laws

To employ a foreign individual to work in India, they should either be an overseas citizen of India, or they should have a valid Indian work visa.

Currently, India does not have the concept of a nomad visa which would allow an individual to live and work in the country for a limited period of time. The single-window clearance system for visa applications can sometimes deter foreign talent from seeking employment in India. Additionally, there are certain reporting requirements for foreign nationals residing in India for work related purposes.

Social security contributions

Social security contributions are critical while engaging/deploying foreign nationals in India. Currently, India has entered into social security agreement with 20 different nations.^[1] Depending on the existence of a social security agreement, an employer in India must determine whether it is required to undertake social security contributions with respect to such foreign national employees.

The predominant legislation which regulates the social security contributions of foreign national employees in India is the Employees' Provident Funds and Miscellaneous Provisions Act 1952 and its corresponding rules and regulations ('EPF Law'). The EPF Law brings within its purview a category of employees called 'International Workers' (IW). Provisions under the EPF Laws with respect to IWs have been effective from late 2008.

The EPF Law recognises two categories of IWs: (1) IW inbound; and (2) IW outbound. The EPF Law^[2] defines an IW (inbound) as an employee, holding a passport other than an Indian passport, and working for an establishment in India to which the EPF Law applies. An outbound IW is an Indian employee^[3] having worked or going to work in a foreign country with which India has a social security agreement and being eligible to avail benefits under a social security programme of that country in terms of the social security agreement.

All IWs, unless they are 'excluded employees',^[4] are required to undertake social security contributions under the EPF Law in India, from the date of joining employment in an Indian establishment that is covered under the EPF Law. Unlike domestic employees, contributions would have to be undertaken on the full salary of the IWs. The contributions would have to be undertaken for IWs in India, irrespective of where the salary is paid, whether or not the same is payable in INR or foreign currency and even if the IW is on a split payroll. The rules for withdrawal are also different for domestic employees vis-à-vis IWs.

Recently, a high court in India^[5] struck down the provisions pertaining to IWs under the EPF Law on the grounds of it being unconstitutional and arbitrary and the Court held that IWs cannot be treated differently in comparison to a domestic worker in terms of the quantum of social security contributions and rules of withdrawal. This judgment, however, is currently enforceable only in the state of Karnataka.

Cultural inclusivity in the workforce

Cultural inclusivity is a crucial consideration when hiring employees in India from different countries, as it significantly influences organisational success, employee satisfaction and the overall work environment. India's own enviable diverse cultural landscape – with its various languages, religions, traditions and customs – requires organisations to adopt a highly inclusive approach to ensure that foreign employees can integrate seamlessly and contribute to the employer's objectives. The concept of cultural inclusivity goes beyond mere tolerance or acceptance of diversity; it involves actively creating an environment where employees from different cultural backgrounds feel valued, respected and empowered to contribute their unique perspectives and ideas.

When hiring foreign talent, organisations would do well to first recognise and acknowledge the cultural differences that may exist and then take proactive steps to create an inclusive atmosphere. One of the first challenges is ensuring effective communication. While English is the primary language of business communication in India, foreign national employees may still encounter certain language barriers or misunderstandings due to regional linguistic variations. To address this, companies could invest in language support programmes and promote open, transparent communication channels that encourage cross-cultural dialogue. This can help bridge communication gaps and create a sense of belonging for employees who may not be fluent in local languages or unfamiliar with the local dialects.





Similarly, for employees moving from India to a different country, efforts can always be undertaken to educate employees on the cultural nuances of the host country, such as communication styles, business etiquette and social norms.

Furthermore, employers can also consider providing flexibility for foreign employees to observe their cultural holidays and engage in practices that are important to them, while also encouraging the celebration of the host country to promote cross-cultural understanding and team bonding.

Conclusion

Global talent mobility presents both opportunities and challenges for organisations, particularly in India. While navigating the legal and cultural nuances, it is critical for businesses to foster open communication and offer cross border training to its workforce members. This will empower employers to fully utilise the potential of a borderless workforce, enabling them to tap into diverse talent pools, foster innovation through cross-cultural collaboration and drive business growth across multiple geographies and markets.

Notes

-  Government of India, Ministry of Labour and Employment, *Social Security Agreement* <https://labour.gov.in/social-security-agreement>. EPF Scheme para 83 read with paras 2(ja) and 26.
-  Though not expressly defined, an Indian employee is one who holds an *Indian passport* and is employed by an establishment subject to the EPF v.
-  Excluded employees are defined under the EPF Law as persons (i) who contribute to a social security program in their country of origin (either as citizen or a resident), with which India has entered into a Social Security Agreement (SSA), and who would qualify as a 'detached worker' as specified under such SSA; (ii) who contribute to a social security program in their country of origin (either as a citizen or a resident) with which India has a bilateral comprehensive economic agreement, and wherein there are clauses (prior to 1 October 2008), specifically exempting natural persons of either country to undertake social security contributions in the host country.
-  ^[5] *Stone Hill Education Foundation v Union of India* (WP No. 18486/2012).