



EMPLOYMENT LAW OVERVIEW  
**INDIA** 2019-2020

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# I. GENERAL OVERVIEW

## 1. INTRODUCTION

The Constitution of India (the “Constitution”) is the cornerstone of individual rights and liberties, and also provides the basic framework within which all laws in India, including laws relating to labour and employment, must operate. The Constitution guarantees certain fundamental rights to individuals such as the right to life, privacy, equality before the law and prohibition of discrimination in public education and employment on the basis of religion, sect, gender and caste. The Constitution recognizes ‘right to livelihood’ as an integral part of the fundamental right to life.

In addition to fundamental rights, the Constitution also envisages certain ‘directive principles’ which serve as a guide to the legislature towards fulfilling social and economic goals. Given India’s colonial and socialist history, social justice has always been at the forefront of several Indian legislations, specifically labour and employment laws. It is important to note that several labour laws in India have been designed from a worker emancipation perspective – including those relating to factories, mines, plantations, shops, commercial establishments as well as those relating to payment of wages, regulation of trade unions, provision of social security, industrial safety and hygiene.

However, given changing economic requirements in recent times, the Indian Government has been increasingly conscious of the needs of business as well. Accordingly, it has been slowly and steadily working towards labour reform in order to improve the ease of doing business in India. There are several big-ticket reforms in the pipeline, which we hope will see the light of day in the next few years.

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## 2. KEY POINTS

- Labour and employment laws are listed under the Concurrent List in the Constitution, which means that the Union Parliament (federal legislature) and State Legislatures have co-equal powers to enact laws relating to all labour and employment matters in India. Typically, the Union Parliament enacts a Central law, while the States formulate rules thereunder. Additionally, States enact standalone legislations as well.
- One of the main principles of Indian labour and employment laws is that they distinguish between employees who are defined as ‘workmen’ and those who are in management/supervisory/administrative roles (‘non-workmen’). Most legislations regulate the service conditions of and protect the rights of only those employees who qualify as workmen under Indian laws. The service conditions of non-workmen is typically governed by the terms of the relevant employment contracts and the internal policies of the organization. Determining whether a particular employee is a workman or not, has to be undertaken on a case by case basis.
- India does not generally recognize employment-at-will. Further, in terms of the Indian Contract Act, 1872 (“Contract Act”) (which is the principal legislation governing contracts in India), agreements which restrain trade, business or profession are void – this could have an impact on employment bonds, and on non-compete and non-solicit covenants in employment contracts.
- Trade unions are typically restricted to the more traditional forms of business, such as the manufacturing sector; however, in recent times there has been some unionization in the Information Technology (“IT”) sector as well. The Trade Unions Act, 1926 (“Trade Unions Act”), provides for registration of a trade union and the

rights and liabilities of a registered trade union. It is also proposed to recognize certain trade unions both at a Central and State Government level who would then participate in policy making.

- The Industrial Disputes Act, 1947 (“ID Act”) is the key legislation that governs industrial relations in India and aims at securing industrial peace and harmony by providing the process for settlement of disputes between employers and employees.
- There is a specific legislation, the Equal Remuneration Act, 1976 (“ERA”), which mandates the payment of equal remuneration to male and female workers who undertake similar tasks. The Contract Labour (Regulation and Abolition) Act, 1970 (“CLRA”) is another major legislation that pertains to regulating contract labour.

### 3. LEGAL FRAMEWORK

Given that both the Union Parliament (federal legislature) and State Legislatures have co-equal powers regarding labour and employment laws, there are hundreds of legislations relating to labour and employment in India, including around 50 legislations enacted by the Union Parliament. Most of these legislations concern blue-collar employees or workmen, owing to the historical emphasis on improving working conditions for these employees. On the other hand, the legal structure relating to non – workmen (i.e. employees having managerial duties or white-collar employees) is not as comprehensive, and has evolved in recent decades mainly through judicial pronouncements.

#### A. DIFFERENCE BETWEEN WORKMEN AND NON-WORKMEN

Section 2(s) of the ID Act defines a workman as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The definition however excludes the following persons: (i) those who are employed mainly in a managerial or administrative capacity; (ii) those who, being employed in a supervisory capacity, draw a salary exceeding INR 10,000 (~USD 140) per month or (iii) those who exercise, either by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature.

Having said the above, it is important to note that the wage ceiling of INR 10,000 (~USD 140) mentioned above is not always the definitive criterion in respect of ascertaining whether or not a particular employee will be a workman. There have been multiple occasions when Indian courts have held that whether an employee is a workman or not depends on the exact nature of the job responsibilities and duties and the context of his/her role in the organization, rather than merely the compensation package.

Once employees are ascertained to be workmen under the ID Act, they would have several rights – for instance, certain changes to their conditions of service and any termination of employment can only be undertaken as per a specified process. Further, they can approach labour commissioners and/or the industrial tribunals in case of any unjustified termination and unfair labour practice.

The terms of service of non-workmen (i.e. those who mainly work in a managerial or administrative capacity) are ordinarily governed by the State-specific shops and establishments legislation (“S&E Act”), the terms and conditions of their contracts of employment and the internal policies of an organization. These employees will typically fall outside the scope of the ID Act - there are various judicial pronouncements which have held that non-workmen are not entitled to claim protection under the ID Act.

#### B. OTHER FACTORS

Apart from the classification of employees into workmen and non-workmen, the applicability of labour legislation also depends on the nature of activity that the employees are engaged in as well as the place of work – for instance, different laws apply depending on whether the place of work is a factory, plantation, mine, shop or commercial establishment. Certain legislations also take into account the number of employees engaged at a particular place of work – for instance, the scope and applicability of social security benefits varies, depending on the wages earned and the position of the employee at the workplace.

## C. OVERVIEW OF KEY LABOUR LAWS

The various labour and employment laws in India can be broadly categorized into two important themes, namely (i) employer-employee relations; and (ii) service or working conditions, such as wages, social security and working hours. Enactments such as the ID Act, the Trade Unions Act, the Industrial Employment (Standing Orders) Act, 1946 (the “IESO Act”) and CLRA are focused primarily on employer employee relations, whereas enactments such as the Factories Act, 1948 (the “FA Act”), the various S&E Acts, the Payment of Wages Act, 1936 (the “Wages Act”), the Minimum Wages Act, 1948 (“MW Act”) and the Payment of Bonus Act, 1965 (the “Bonus Act”) are focused primarily on service conditions of employees. There are both Central and State rules framed under each of the aforementioned enactments. In addition, there are enactments such as the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (the “EPF Act”), the Employees State Insurance Act, 1948 (the “ESI Act”) and the Payment of Gratuity Act, 1972, (the “PGA Act”) which provide for certain social security benefits to employees.

**The ID Act or the Industrial Disputes Act, 1947:** The scope of this legislation, strictly speaking, is restricted to workmen alone. However, the principles and processes laid down in this legislation have been replicated in other statutes with wider application. The IDA covers industrial disputes, industrial action (i.e. strikes and lockouts), regulation of retrenchment, layoffs, closure, transfer of undertakings, envisages the constitution of a works committees and also regulates changes in certain service conditions of workmen.

**S&E Act / Shops and Commercial Establishments Act:** The S&E Act is State specific – almost all States in India have enacted their own S&E Act. The S&E Act regulates service conditions of employees engaged in shops and commercial establishments, which includes most private companies and firms. It regulates hours of work, payment of wages, overtime, leave, holidays and other conditions of service.

**EPF Act / Employees Provident Fund and Miscellaneous Provisions Act, 1952:** The EPF Act read with all rules and schemes framed thereunder is one of the major social security legislations

in India. Under the EPF Act, both the employer and employee are required to contribute 12% of an employee’s ‘basic wages’ to the Employees Provident Fund / EPF. The employer’s contribution is also directed to a pension fund, from which an employee would be entitled to monthly pension upon retirement. The EPF and pension scheme has extensive rules in relation to contribution and withdrawal of funds.

**Wages Act / Payment of Wages Act, 1936:** The Wages Act regulates the mode and method of payment of wages to certain categories of employees, namely, those to whom the payable wages do not exceed INR 24,000 (~USD 330) per month, and to those employed in factories and industrial establishments. The Wages Act provides that wages must be paid without deductions of any kind except certain authorized deductions, such as taxes on income, fines, or deductions owing to absence from duty.

**FA Act / Factories Act, 1948:** The FA Act was enacted to regulate working conditions in factories where manufacturing operations are undertaken. It has extensive provisions in respect of health, safety and welfare of persons who work in factories.

**MW Act / Minimum Wages Act, 1948:** The MW Act provides for the payment of minimum rates of wages to employees working in specified kinds of employment, termed ‘Scheduled Employment’. Under the MW Act, the Government is required to fix industry-specific daily and monthly minimum wages, depending on the skill of the employee. Once minimum wages have been fixed, an employer is required to pay to every employee engaged in Scheduled Employment, wages at a rate that is not less than the minimum rate of wages fixed by the concerned Government for that class of employees.

**IESO Act / Industrial Employment (Standing Orders) Act, 1946:** The IESO Act is generally applicable to every industrial establishment wherein 100 or more workmen are employed, subject to any specific State rules in this regard. The IESO Act requires employers in industrial establishments to formally define conditions of employment, such as classification of workmen, manner of intimating wage rates, working hours, leave periods, recruitment, shift working, attendance, procedure for availing leave, transfer of workmen, termination of workmen, and inquiries for misconduct. Such

conditions are referred to as the 'Standing Orders'. The State specific rules framed under the IESO Act provide for 'Model Standing Orders', which are a set of default conditions applicable to those industrial establishments that have not framed their own Standing Orders or to those industrial establishments that are awaiting certification from the Government on their own Standing Orders. In most cases, the internal employee handbook/service regulations of the employers are generally customized and filed as the Standing Orders of that establishment. The IESO Act however provides that while the Standing Orders adopted by an employer need not necessarily be a duplication of the Model Standing Orders, they should, as far as practicable, be in conformity with the same.

**Trade Unions Act:** The Trade Unions Act provides for registration of a trade union and the rights and obligations of a registered trade union. The minimum number of persons required to apply for registration of a trade union is 7; however, a trade union cannot be registered unless at least 10% of the workmen or 100 workmen (whichever is lesser, and subject to a minimum of 7 workmen), employed in an establishment are its members. While an employer is not legally bound to recognize a trade union or encourage collective bargaining, a registered trade union can enter into collective bargaining agreements with the employer for better wages and service conditions.

**CLRA/Contract Labour (Regulation and Abolition) Act, 1970:** The CLRA provides for regulation of contract labour in establishments and provides for its abolition in certain circumstances. A 'workman' is deemed to be 'contract labour' if he is hired in connection with the work of an establishment, by or through a 'contractor', with or without the knowledge of the 'principal employer'. The term contractor is defined to mean a person who undertakes to produce a given result for an establishment through contract labour or who supplies contract labour for any work of the establishment. The manager or occupier of the establishment is the principal employer. Under the CLRA, every principal employer is required to make an application in the prescribed form, for the registration of the establishment with the labour authorities. Every contractor under the CLRA Act must also be licensed and should undertake work through contract labour only in accordance with such license. The contractor is required to

pay wages and provide facilities for the welfare and health of the contract labour, which includes providing rest rooms, canteens, wholesome drinking water, toilets, washing facilities, and first aid facilities in every establishment. The above compliances vary depending on the number of contract labour engaged in an establishment. It is important to note that as per the CLRA, in case the contractor fails to pay wages to the contract labour, the principal employer will be responsible for the same.

## 4. NEW DEVELOPMENTS

The Maternity Benefit (Amendment) Act, 2017 (that amended the Maternity Benefit Act, 1961 ("MB Act")) came into force on April 1, 2017. Key changes include: (i) increased paid maternity leave from 12 weeks to 26 weeks for women employees, for the first two children; (ii) recognition of the rights of an adopting mother and of a commissioning mother (using a surrogate to bear a child) to claim paid maternity leave of 12 weeks; (iii) a 'work from home' option after the maternity leave expires; (iv) effective July 1, 2017, mandatory crèche (day care) facilities for every establishment employing 50 or more employees, and the right of mothers to visit the crèche 4 times per day. Employers are also obligated to educate employees about these benefits.

The Rights of Persons with Disabilities Act, 2016 ("RPD") was notified on April 19, 2017 and rules notified on June 15, 2017. The Act was enacted in furtherance of India's obligations under the United Nations Convention on the Rights of Persons with Disabilities. Though the RPD Act does not impose any kind of compulsory reservation of posts in the private sector for persons with disabilities, it does seek to incentivise private sector establishments to engage persons with disabilities. The Act requires private establishments to frame an 'equal opportunity policy' which would detail the facilities and amenities to be provided for persons with disabilities, so as to enable them to effectively discharge their duties. Further, the head of the establishment is required to ensure that persons with disabilities are not unduly discriminated against. The establishments are also required to conform to certain building standards, website and document related standards to ensure greater accessibility for persons with disabilities.

The Payment of Gratuity (Amendment) Act, 2018 came into force on March 29, 2018, in terms of which the duration of maternity leave has been extended from 12 weeks to 26 weeks for the purpose of calculating continuous service in the context of gratuity. The maximum limit of the gratuity benefit has also been increased from INR 1,000,000 (about \$14,000) to INR 2,000,000 (about \$28,000). Further, as per recent declarations in the Union Budget 2019, it is now proposed to increase this gratuity benefit to INR 30,00,000 (about \$42,000).

As part of a major rationalising and simplifying exercise, India has been attempting to consolidate about 44 Central laws into 4 comprehensive labour codes. Drafts of three such codes, the Code of Wages Bill, 2017 (which seeks to consolidate 4 key labour laws, namely, the MW Act, the Bonus Act, Wages Act and the ERA), the Draft Labour Code on Social Security (which seeks to consolidate major social security legislations such as the EPF Act and ESI Act) and the Code on Occupational Safety, Health and Working Conditions (which seeks to overhaul major legislations such as the FA Act and the CLRA Act) are in the public domain, with the Code of Wages Bill, 2017 being introduced in the legislature. Efforts are also being undertaken to simplify labour law compliances by the introduction of a unified portal 'Shram Suvidha Portal', and the consolidation of forms under various legislations. The Government is also undertaking efforts to increase EPF contributions by the Government, in case of certain instances such as women employees and first-time workers.

In addition, there are certain significant amendments under State legislation, including the enactment of a new S&E Act in Maharashtra, the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 as well as proposed amendments to the The Tamil Nadu Shops and Establishments Act, 1947 which would require establishments with 10 or more employees to seek registration with the labour authorities.

In another significant move, there have been major judgments relating to the right of privacy of individuals and data protection in India – it is expected that India will soon put in place a comprehensive legislation on data protection that protects the individual right to privacy.

# II. PRE-EMPLOYMENT CONSIDERATIONS

## 1. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers may often have requirements wherein they might need to engage a sales person, representative or agent in India, even though they may not have a place of business in India. Also, the foreign employer may not intend to immediately generate any revenue in India. In such a scenario, it may be noted that the foreign employer need not mandatorily set up a local entity in India. There are various methods through which the foreign employer may engage/hire representatives or an agent in India depending on the exact business requirements.

### A. ENGAGEMENT OF THE REPRESENTATIVE OR AGENT THROUGH A MANPOWER AGENCY

This is a model where the foreign employer enters into an arrangement with a manpower agency in India, which would provide certain services through identified employees. However, the manpower agency would be required to satisfy the following obligations as part of the arrangement: (i) processing of salaries for the identified individuals; (ii) undertaking all legal compliances for the identified individuals on account of being their employer, including under all Indian employment laws and taxation laws.

### B. ENGAGEMENT OF THE REPRESENTATIVE OR SALES PERSON AS AN INDEPENDENT CONTRACTOR

Here, the arrangement between the representative and the foreign employer will be that of a 'contract for services'. A contract for services implies an agreement wherein one party undertakes to provide services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion whenever appropriate. Such independent contractors would typically not be entitled to any social security benefits (as they will not be considered employees) and would have to pay their own taxes in India.

However, it is important to note that in the event the foreign employer engages personnel in India by way of method 1 or 2, there is a risk of the foreign employer having a permanent establishment in India – accordingly, this arrangement would have to be structured appropriately.

## 2. LIMITATIONS ON BACKGROUND CHECKS

Employers are increasingly conducting background checks to guard against inaccurate resumé, overstated work experience and any employee behavioral issues. Typically, employers issue an offer letter, conduct background checks and expressly state that the person's employment with the organization is contingent upon his/her clearing the background checks, and vetting of educational and job qualifications. However, the permission of the concerned employee would be required to

conduct a background verification. In terms of the Information Technology Act, 2000 and Information Technology (Reasonable Security practices and procedures and sensitive personal data and information) Rules, 2011 (“IT Rules”), which is the governing legislation on data protection in India, any company collecting, using or disclosing any personal information of an employee/prospective employee, will require such person’s consent.

### 3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Given Constitutional safeguards against discrimination on the grounds of religion, race, caste, sex and place of birth, it is imperative that employers bear these principles in mind while conducting background verifications and interviews. Excessively personal questions are generally not advisable.

As mentioned above, the IT Rules apply to the collection of personal information during background verifications and during the interview process as well. In terms of the IT Rules, at the time of application, the employer must inform the concerned person of (i) the fact that his/her personal information is being collected; (ii) the purpose for which the information is being collected (i.e. verification of credentials); and (iii) the intended recipients of the information (i.e. the employer and/or the third-party service provider who conducts background checks).

The IT Rules further state that where any Sensitive Personal Data or Information (“SPDI”) is sought to be collected (such as passwords, financial information, bank account or payment instrument details, details of health conditions, sexual orientation, medical records and history), the same can be collected only for a lawful purpose connected with a function or activity of the company, and the collection of this information must be necessary to achieve such purpose. This purpose must be notified to the prospective employee in the application/background verification form/during an interview, and his consent must be obtained. It may be noted that the IT Rules permit a person to withdraw consent at any stage, in which case the company would be required to return the SPDI and

not store or transfer the same any further. The IT rules prescribe certain additional safeguards for collecting, storing, processing and transferring SPDI - for instance, the IT Rules state that any SPDI collected by a company cannot be stored/retained longer than required for the purpose of its collection, except under any applicable law.

Apart from the above, it may be noted that Indian labour and employment laws are largely silent as to the process of selection and hiring of employees in the private sector. In any case, as market practice, most employers in India conduct at least basic (education, job history) background verification of prospective employees in accordance with the IT Rules and/or ask prospective candidates to disclose specific information as a condition precedent to the employment relationship.

# III. EMPLOYMENT CONTRACTS

## 1. MINIMUM REQUIREMENTS

While labour legislations in India do not strictly require that an employment contract be in writing, it is predominant market practice (with very rare exceptions) to have all terms and conditions of employment agreed and signed by both parties. A few states however have specific legislations that necessitate a written contract in order to establish an employer-employee relationship. From the perspective of certainty and enforceability, it is strongly recommended that all employment contracts be in writing, whether as a simple appointment letter or a fully detailed contract, setting out relevant terms and conditions agreed to between the employer and employee. Employment contracts are governed by the Contract Act – accordingly, provisions stipulated therein with respect to parties being competent to contract, consideration and validity, would be applicable to employment contracts as well. Employment contracts in India are generally considered to be ‘unlimited term’ contracts, (i.e. contracts that are valid until termination or superannuation, unless specifically identified as a ‘fixed term’ contract). Some of the common provisions included in an employment contract are: (i) location, description and title of the job; (ii) date of commencement, duration (whether fixed term or unlimited term) and type (whether part-time or full-time) of the job; (iii) details of any probationary period; (iv) leave entitlement; (v) salary details and other benefits; (vi) terms governing termination of employment; (vii) restrictive covenants; and (viii) governing law and dispute resolution.

As discussed above, it is important to note that for ‘workmen’, some employment terms can be changed only with 21 days’ prior written notice. If any workman challenges the proposed changes before labour courts during this period, it is likely that the said change will

be suspended, pending resolution of the dispute by the court.

## 2. FIXED-TERM/OPEN-ENDED CONTRACTS

Fixed-term employment contracts are permitted in India, as long as the employer is employing the person for a short-term requirement. The Government has recently stated that fixed term contracts will be permitted across sectors – earlier, they were expressly permitted only in the apparel manufacturing sector. However, it is unlikely that employers will be able to convert existing permanent positions into fixed term employment positions.

In the context of fixed term employment contracts, the Indian judiciary has consistently held that successive fixed-term contracts cannot be used as a substitute for employing the person on a ‘permanent’ or ‘unlimited term’ basis and that fixed-term employment is not to be used in job roles or functions that are permanent in nature, as far as the particular employer or industry is concerned. Fixed-term employment contracts may be signed directly between the employer and employee, or created through use of a contractor under the provisions of the CLRA. Expiry of a fixed term contract will typically not be considered ‘retrenchment’ under the provisions of the ID Act – thus, the compliances pertaining to retrenchment (as discussed under para 4 below) would not have to be undertaken in this case.

## 3. TRIAL / PROBATION PERIOD

Indian law permits new employees to be placed on a trial or ‘probation’ period. Such period is meant to provide employers the opportunity to assess the abilities and suitability of the employee to the

organisation; and hence, by definition, allow the employer greater freedom to terminate employment if the employee is found unsuitable during the probation period. The IESO Act envisages a probation period of 3 (three) months – this is largely followed by companies that are not subject to the IESO as well. The general market trend in India is to have a probation period between 3 and 6 months, especially in the technology and services sectors.

During the period of probation, the employer will have the right to terminate employment of the probationary employee without providing any notice; however, this would be subject to the stipulations of the concerned S&E legislation as well. At the end of the probation period, the employee may be 'confirmed' as a permanent employee or dismissed.

## 4. NOTICE PERIOD

In terms of Indian labour law legislation, 'workmen' who have undertaken at least 1 year of continuous service are entitled to a notice period of 1 month, or equivalent wages in lieu thereof. In addition, the employer would be required to pay 'retrenchment compensation' to the workman, which is calculated at the rate of 15 days' wages for every completed year of service. However, no notice period (or payment in lieu thereof) or payment of retrenchment compensation is required in the case of workmen dismissed for misconduct, provided the employer conducts an internal inquiry prior to such dismissal.

Additionally, any notice period prescribed under the relevant S&E Acts, as well any requirements under the relevant employment contract in this regard would have to be taken into account. Given that India does not recognize the employment at will doctrine, judicial precedents have held that termination of employment without providing any prior notice would render the contract of employment as an 'unconscionable bargain', and hence illegal.

# IV. WORKING CONDITIONS

## 1. MINIMUM WORKING CONDITIONS

Requirements in this regard are principally stipulated in the concerned S&E Acts, the FA Act, the IESO Act and the CLRA. The S&E Acts have stipulations relating to working hours, overtime, intervals of rest, provision of basic amenities such as drinking water, toilets, first aid facilities, etc., for employees at shops and commercial establishments. The Standing Orders also have stipulations with respect to work timings, leave, overtime, holidays, for industrial establishments engaging more than 100 workmen.

The FA has extensive provisions in respect of health, safety and welfare of workers engaged in manufacturing establishments – these compliances vary depending on the number of workmen engaged. For instance, in industrial establishments where 250 or more workmen are employed, the employer has to provide for a canteen. Suitable shelters or rest rooms, and lunchrooms with drinking water facilities are to be provided where 150 workmen are employed. Factories wherein 30 or more women workers are ordinarily employed, are to be equipped with creche facilities/nurseries for children under the age of 6 years. There are also provisions regarding toilets, washing places, temperature control mechanisms, adequate ventilation, lighting in the workrooms, painting of factory walls, doors and windows, cleaning of floors, effective removal of dirt and refuse, etc. The FA Act envisages certain precautions to be taken against explosives, inflammable gases, dangerous fumes and gases and fire.

Under the CLRA Act, the contractor is required to provide certain facilities, which include rest rooms, child nursery facilities, canteens, wholesome drinking water, toilets, washing facilities, and first

aid. It is pertinent to note that if the contractor does not provide these facilities, the onus would fall on the principal employer.

## 2. SALARY

Although the words ‘wages’ and ‘salary’ are commonly used interchangeably, there is a discernible difference between the two. The term ‘wages’ is used under labour/employment laws to refer to any and all remuneration and emoluments earned by an employee (excluding certain allowances and bonuses) whereas the term ‘salary’ is used under income tax law to denote the total taxable income received by an employee. It is important to note that different labour law legislations have a different definition of wages (which the Code of Wages Bill, 2017 is seeking to remedy), which would then have to be closely examined.

For instance, the EPF Act refers to ‘basic wages’ which is used as the base for computing employee and employer social security contributions. Basic wages is defined as all payments which are earned by an employee in accordance with the terms of the employment contract, but does not include: (i) the cash value of any food concession; (ii) any dearness allowance (i.e. cash payments paid on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance; and (iii) any presents made by the employer.

The Wages Act on the other hand, has a much wider definition of wages – here wages is defined as all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed, which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment and

includes: (i) any remuneration payable under any award or settlement between the parties or order of a Court; (ii) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period; (iii) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name); (iv) any sum which by reason of termination of employment is payable under any law, contract or instrument; and (v) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force.

The following are excluded: (i) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court; (ii) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government; (iii) any contribution made by the employer to any pension or provident fund, and the interest accrued thereon; (iv) any travelling allowance or the value of any travelling concession; (v) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or (vi) any gratuity payable.

### 3. MAXIMUM WORKING WEEK

This would be subject to stipulations in the State specific S&E Acts in cases of shops and commercial establishments and the FA Act for establishments in the manufacturing sector. As a general principle, employees cannot be required to work in any establishment for more than 9 hours a day or 48 hours a week, without attracting overtime payments.

### 4. OVERTIME

As described above, employees working longer than 9 hours a day or 48 hours a week are typically entitled to overtime payments. An employee working 'overtime' becomes entitled to wages at the rate of twice his/her ordinary rate of wages and

could also be entitled to a compensatory time off. This would however have to be analyzed further – given that there are some States which also prohibit overtime work, except in limited circumstances.

## 5. HEALTH AND SAFETY IN THE WORKPLACE

### A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

These obligations are far more extensive in the manufacturing sector and in certain other sectors such as mines and building and construction. The various State-specific S&E Acts have special provisions with respect to ensuring safety of women who work during night shifts. Employers in such cases are required to ensure that adequate security and transport facilities are provided (at their own cost) to female employees.

As described above, the FA Act read with State specific rules thereunder has elaborate provisions regarding health and safety of workmen. These stipulations include maintaining cleanliness, disposal of wastes and effluents, provision of drinking water and toilets, ensuring a temperature control mechanism so as to prevent any injury to health of workmen, ensuring adequate lighting and ventilation, measures to prevent inhalation of dust and fumes, regulation of artificial humidification, measures to prevent overcrowding on factory premises, construction and proper maintenance of floors, stairs, passages and ensuring that they are obstruction free for the safety of the workers, fencing of dangerous machinery, providing suitable gear or appliances, driving belts and other safety devices. The FA Act also envisages precautions to be taken against explosives, inflammable gases, dangerous fumes, gases and fire. Non-compliance with provisions of the FA attracts both monetary penalty and imprisonment.

In addition, the ESI Act and the Employees Compensation Act, 1923 (the "ECA") also address compensation and other benefits that the employer must provide employees in contingencies such as maternity, temporary or permanent physical disablement due to injury arising in the course of

employment that results in loss of wages or earning capacity, death due to employment injury, as well as medical care to workers and their immediate dependents.

## B. COMPLAINT PROCEDURES

In the terms of the ISEO Act, employees are required to frame grievance redressal mechanisms to address individual worker complaints. Also, under the FA where there are 20 or more workmen, a grievance committee is to be constituted in the manner prescribed. In any case as a general practice, most employers do have an internal complaint mechanism that details processes employees must follow, in case of any workplace related issues. It is also important to note that India has a standalone legislation pertaining to sexual harassment at the workplace – the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“SHW Act”) - which prescribes a detailed complaint mechanism for instances of sexual harassment, that all Indian establishments must adhere to.

## C. PROTECTION FROM RETALIATION

India does not have extensive provisions regarding protection of employee complainants/whistleblowers, that apply to establishments in the private sector. However, the SHW Act stipulates that during the pendency of any inquiry, companies must take interim measures to protect the complainant from any retaliation at the workplace. Most employers do have stipulations in their employee handbooks / internal policies that address employee complaints and protection from any retaliation in this regard.

# V. ANTI-DISCRIMINATION LAWS

## 1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

In the context of private sector employment, India does not have a comprehensive legislation that addresses workplace discrimination, except in relation to sexual harassment and in the context of persons with disabilities and with HIV. Further, there are principles set out by the Indian judiciary that seeks to protect employees from discrimination and harassment at the workplace. It is also important to note that most new-age employers in India already cover these subjects comprehensively as part of their internal policies.

### A. BRIEF OVERVIEW OF THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013 (“SHW ACT”)

As discussed above, the SHW Act provides for a detailed complaint and inquiry mechanism in case of sexual harassment complaints at the workplace. Though it is not an anti-discrimination legislation per se, the SHW Act recognizes that women may be especially vulnerable to workplace discrimination and harassment – thus, the scope of the SHW Act only extends to complaints raised by ‘aggrieved women’ that pertain to the ‘workplace’ (it is important to note that the SHW Act is not a gender-neutral legislation). That said, several companies do frame gender neutral policies on both general and sexual harassment.

The SHW Act defines the terms ‘sexual harassment’ broadly to include any of the following unwelcome acts or behavior: (i) physical contact and advances;

or (ii) demand or request for sexual favors; (iii) making sexually colored remarks; or (iv) showing pornography (v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

In addition, the SHW Act also identifies certain circumstances which, if occurring in conjunction with sexual harassment (as defined in the SHW Act), would provide strong evidence that an offence has been committed. Such circumstances are: (i) implied or explicit promise of preferential treatment in employment; or (ii) implied or explicit threat of detrimental treatment in employment; (iii) implied or explicit threat about present or future employment status; or (iv) interference with work or creating an intimidating or offensive or hostile work environment; or (v) humiliating treatment likely to affect one’s health or safety. It is pertinent to note that the protections provided under the SHW Act extend beyond the parameters of the traditional employee-employer relationship. For example, the ‘aggrieved woman’ need not necessarily be an employee - she could be any woman who may be subject to sexual harassment at a workplace. The term ‘workplace’ is also defined broadly to include not only the usual place of employment, but any place visited during the course of employment, including any transportation provided by an employer.

### B. OTHER LEGISLATION

Other laws address workplace discrimination issues in the private sector by prohibiting acts such as: (i) refusal of / obstructing employment solely on the grounds of a person belonging to a socially backward community; (ii) deducting salary or dismissing women employees while on maternity leave; (iii) payment of unequal wages to men and women employees performing similar tasks; (iv) discriminating against persons with disability (as prescribed under the RPD); (v) discriminating

against persons with HIV, as further provided under the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention And Control) Act, 2017 (“HIV Act”). The recent trend is that most companies, irrespective of size, have far more strict internal policies with reference to the workplace discrimination issues, than what is required under various statutes.

It is also pertinent to note here that the ID Act prohibits commission of certain ‘unfair labour practices’, which include (i) discrimination against any workman for filing charges or testifying against an employer in any inquiry or proceeding relating to any industrial dispute or (ii) discriminating against workmen by reason of their being members of a trade union (iii) showing favoritism or partiality to one set of workers regardless of merit.

There have also been attempts by the Central and State Governments to introduce ‘quotas’ / reservation of posts in the private sector, for members of particular socially backward communities. However, this has been resisted in the past, and it is unlikely that such measures will be implemented in the future due to its sensitivity and other contemporary political and sociological circumstances.

## 2. EXTENT OF PROTECTION

As described above, India does not have a single comprehensive legislation on discriminatory practices at the workplace – instead, there are various legislations that prohibit certain kinds of discriminatory practices, and protect the interests of vulnerable communities such as workmen , women, persons with HIV and AIDS, persons with disabilities and members of certain socially backward classes.

For instance, with respect to women, the ERA stipulates that male and female employees who perform similar tasks must be paid equal wages, and also mandates that employers are prohibited from discriminating against women in matters of recruitment, promotions and transfers. Further, women employed in labour intensive industries such as factories and construction sites, can work lesser number of working hours than male employees. The MB Act also has stipulations protecting women from dismissal, while on maternity leave.

Under the RPD, the head of the establishment has the responsibility of ensuring that persons with disabilities are not discriminated against. In case any complaint is received in this regard, the head of the establishment shall either initiate action in the manner specified under the RPD / inform the concerned person as to how the ‘impugned act or omission is a proportionate means of achieving a legitimate aim’.

## 3. PROTECTIONS AGAINST HARASSMENT

### A. PROCESS UNDER THE SHW ACT

Every employer is required to constitute an Internal Complaints Committee (“ICC”) that will inquire into sexual harassment complaints. The ICC shall consist of: (i) a presiding officer who will be a senior women employee; (ii) at least 2 employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge; (iii) an external member from amongst non-governmental organizations or associations committed to the cause of women or an external counsel familiar with issues relating to sexual harassment. This external counsel can either be a social worker with at least five years’ relevant experience or a person familiar with labour, service, civil or criminal law. At least half of the ICC members shall at all times be women, and the term of the ICC members shall not exceed 3 years.

The broad process followed by an ICC will be as follows: (i) Upon receipt of a complaint, if the complainant is agreeable, the ICC may attempt to settle the matter by way of conciliation. If a settlement is arrived at, the ICC need not conduct an inquiry; (ii) If the ICC conducts an inquiry, it should be conducted as per the general rules of the organisation and in accordance with principles of natural justice. A quorum of 3 ICC members is required for conducting the inquiry, which has to be completed within 90 days. In the course of conducting the inquiry, the ICC is vested with the powers of a civil court under Indian laws. Accordingly, the ICC can summon and enforce the attendance of any person and examine him/her on oath, and also require the discovery and production of documents. The parties cannot, at any stage, bring in a legal practitioner to represent

them before the ICC; (iii) Upon completion of the inquiry, the ICC shall prepare a report with its recommendations, and submit the same to the employer within a period of 10 (ten) days. It is imperative that the ICC records detailed reasons for arriving at its conclusion and recommendations. The management is required to act upon the ICC recommendations within 60 days from receipt of the inquiry report.

The SHW Act also prescribes other obligations of an employer, including conducting periodic training and ensuring that the workplace has adequate safety arrangements.

## B. GENERAL HARASSMENT

Cases of general harassment (provided they are not criminal offences under the Indian Penal Code, 1860) are typically governed by the establishment's internal policies, provisions of the IESO Act, and stipulations under the FA that mandate the setting up of a grievance redressal committee. Typically, the internal policies clearly stipulate the conduct that would amount to harassment, the manner of conducting an internal inquiry and nature of disciplinary action that would be undertaken, depending on the seriousness of the conduct.

## 4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

This is again governed mainly by the internal policies of an organisation – however, the SHW Act, the RPD and HIV Act have certain stipulations in this regard. In terms of the RPD, employers are required to ensure compliance with certain accessibility standards, such as: (i) standards for public buildings as specified in the 'Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons With Disabilities and Elderly Persons' as issued by the Government of India; (ii) standards for Bus Body Code for transportation system as specified in the relevant Government of India notification; (iii) website standards as specified in the guidelines for Indian Government websites, as adopted by Department of Administrative Reforms

and Public Grievances, Government of India; (iv) ensuring that the documents to be placed on websites are in the Electronic Publication (ePUB) or Optical Character Reader (OCR) based pdf format.

Under the HIV Act, every establishment engaged in the healthcare services and those where there is a significant risk of occupational exposure to HIV, is required to ensure a safe working environment. In terms of the SHW Act, employers have the obligation to provide a safe working environment which shall include safety from persons coming into contact at the workplace.

## 5. REMEDIES

Each of the statutes listed above have a different mechanism, and also penalties in case of non-compliance by employers – these penalties extend to monetary fines, imprisonment and even cancellation of any Government registration for carrying on business.

For instance, if an employer commits any 'unfair labour practice' as defined under the ID Act, workmen have the right to approach the concerned labour court / industrial tribunal. In terms of the SHW Act, women employees can approach the ICC / file a complaint on a portal ([www.shebox.nic.in](http://www.shebox.nic.in)). In terms of the RPD, persons with disabilities can also approach the Central / State Commissioner for Disabilities.

# VI. SOCIAL MEDIA AND DATA PRIVACY

## 1. RESTRICTIONS IN THE WORKPLACE

### A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

In terms of the IT Rules, employers can access, review and monitor an employee's official electronic data (i.e. work-related data) subject to obtaining his/her consent, as clearly stipulated in the concerned employment contract / appointment letter. In addition, employers would also have to formulate a privacy policy and upload the same on its website and the intranet. This privacy policy would detail all its obligations regarding collecting, storing, processing of personal information of employees. Additional obligations are prescribed under the IT Rules, in case the employer collects / has access to 'sensitive personal information' of employees such as credit card information, biometric information, passwords and medical records. Additionally, it is important to note that there has been a couple of landmark judgments in India on the fundamental right to privacy. Further, India is also in the process of framing a comprehensive legislation on data protection, which would certainly have an impact on the employer's right to monitor and review employees' electronic communications.

## 2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

While there are no specific laws that govern employees' use of social media, any disparagement of employers and/or any divulging of confidential information would attract consequences under existing civil and criminal laws that govern defamation, breach of contract, divulging trade secrets and infringing intellectual property. Further, keeping in mind the rapidly evolving regulatory framework in relation to technology laws and data protection, employers are also defining policies that would affect their employees' participation on social media during work hours. Several companies, especially technology and outsourcing companies, have installed firewalls that prevent employees from accessing social media sites at the workplace, whereas several other companies have defined social media usage policies that educate employees on the implications of misuse of social media (especially given that employers could be held vicariously liable for any actions of employees in this regard). In addition, employers can include strong provisions in their employment contracts / appointment letters for protection of confidential information, trade secrets, intellectual property and other proprietary information. Indian courts, typically, take claims of confidentiality breaches and disclosure of sensitive information very seriously – it is an established principle under Indian jurisprudence that an employer has full and exclusive ownership of the information that the employee comes in contact with during the course of employment, including any and all information contained in the employee's official email accounts. Also, employers can, subject to obtaining employee consent, monitor employees' activities on social media during work hours for the reasons outlined above.

# VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

## 1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Once foreign companies set up an entity in India, they very often prefer to appoint employees from their home country or headquarters for the management and control of the Indian business. This is done mainly for the convenience of co-ordination with the parent company in terms of decision-making, financial management and other business matters. This movement of employees could be undertaken by way of secondment or transfer. There are three broad considerations that must be kept in mind, in either of the approaches: (i) income tax issues; (ii) social security contributions; (iii) visa considerations.

## 2. INCOME TAX ISSUES

It is imperative that any secondment/transfer of employees be structured appropriately, so as to minimize any permanent establishment risks for the foreign entity in India. Also, the tax treatment of any service fee paid/reimbursement of expenses by the Indian entity to the foreign company must be analyzed well in advance, given that this area has often been the subject of scrutiny by tax authorities. Further, the tax position of the individual in India must also be examined – this would depend on his/her tax residential status, as specified under the Income tax Act, 1961 (“ITA”). In terms of the ITA, an individual is said to be resident in India if he/she has been physically present in India for a period of 182 days or more in the relevant financial year. Indian tax residents are subject to tax in India on their global income, while non-residents are subject to tax only on income that is received/deemed to be received in India, or income accrues or arises/deemed to accrue or arise to them in India. There

are certain other tax exemptions prescribed under the relevant Double Taxation Avoidance Agreement executed between India and the concerned host country.

## 3. SOCIAL SECURITY CONTRIBUTIONS

It is important to note that the EPF Act also extends to a category of employees called ‘international workers’ (“IWs”). An IW is defined both in an inbound (i.e. in the context of foreign employees coming to India) and outbound context (i.e. Indian employees going abroad). An IW (inbound) is a person who holds a passport other than an Indian passport and comes to work for an Indian establishment that is covered under the EPF Act. It is important to note that the EPF Act makes no distinction between a foreign worker on deputation to India and a foreign worker who is transferred to India. All IWs (inbound) are required to contribute to the EPF, unless they are ‘excluded employees’. Exclusion from EPF contributions is only granted if the IW contributes to a social security program in his/her host country which has executed a social security agreement (“SSA”) with India.

There are certain significant differences between EPF contributions in respect of IWs (inbound) and domestic employees. For instance, such IWs are required to contribute to the EPF on their ‘full salary’ and not merely ‘basic wages’. There are also differences in case of timing of withdrawal of EPF contributions.

## 4. VISAS

Business visas to India are given strictly only for ‘business purposes’, such as sales or establishing contact on behalf of the foreign company in India.

Like most other jurisdictions, business visas in India cannot be used for any direct revenue generating work or employment. There is a separate employment visa category for employees coming to work at an Indian establishment, which is usually granted for 1 year, or the term of the contract. There are certain additional conditions prescribed in this regard, including that the foreign national must draw a salary in excess of USD 25,000 per annum. Foreign nationals, including their family members, who intend to stay in India for more than 180 days, must generally register with the Foreign Regional Registration Office (the “FRRO”) within 2 weeks of arrival in India. For the purposes of registration, the individual is required to make an application in the prescribed form and be present in person at the time of registration.



# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. GROUNDS FOR TERMINATION

There are various modes of termination of employment that are recognized in India, including: (i) expiry of a fixed term contract / mutual separation; (ii) resignation by an employee; (iii) retirement or superannuation; (iv) layoffs, termination due to transfer of business/closure of an undertaking/ organizational restructuring; (v) termination by an employer for 'cause'. Termination for 'cause' may involve one or more of the following:

- Established breach of employment contract and/ or internal policies
- Employee having committed any criminal offence / authorities having initiated criminal proceedings
- Employee's inability to fulfill material obligations of his job
- Misconduct
- Inefficiency/ poor performance, after undertaking sufficient processes such as a performance improvement plan
- Loss of confidence by management
- Abandonment of employment / continuous absenteeism

## 2. COLLECTIVE DISMISSALS

'Collective dismissal' of employees is permitted under Indian labour laws, only in certain circumstances and upon satisfaction of specified conditions. In this context, the ID Act describes the following processes with respect to workmen: (i) 'retrenchment', which is defined as termination of workmen's services for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action; (ii) 'lay-offs', which is defined as failure, refusal or inability of an employer, on account of shortage of power, raw materials,

break-down of machinery, natural calamity or any other reason beyond the employer's control, to give employment to a workman. The ID Act also prescribes conditions for transfer / closure of an undertaking that would result in redundancies.

In case of retrenchment, depending on the number of workmen engaged, employers are required to either notify/seek prior approval of, the concerned labour department. Also, employers are required to provide employees who have been in service for at least 1 year, notice of 1 or 3 months (or equivalent pay) and also 'retrenchment compensation' calculated at 15 days wages for every completed year of service. It is important to note that in case of retrenchment, employers follow the "last in, first out" principle, wherein the shortest-serving employees will be the first to be terminated.

In a layoff situation, prior approval of the concerned Government may be required, and compensation would have to be paid, in the manner prescribed. Laid off workmen can also be retrenched in the manner prescribed under the IDA.

The above stipulations are all in the context of workmen – in case of managerial employees, there are no specific requirements under statute, and any dismissal would be as per the terms of their contract.

## 3. INDIVIDUAL DISMISSALS

As per the IDA, any dismissal of an individual workman would also be considered 'retrenchment' as described above. Accordingly, (depending on the number of workmen engaged at the establishment), the employer would have to provide prior notice of termination of either 1 month or 3 months, or equivalent wages in lieu thereof. In addition, 'retrenchment compensation' would have to

be paid, at the rate of 15 days wages for every completed year of service.

However, in case of employees who are dismissed for misconduct (provided the employer conducts an internal inquiry prior to such dismissal) no prior notice of termination or retrenchment compensation would be required.

In the case of employees other than workmen (i.e. managerial cadre), provisions of the employment contract and the relevant S&E Acts would have to be considered. Since India does not recognize at-will employment, termination of employment without providing any prior notice at all (or equivalent pay) would typically render the contract of employment as an 'unconscionable bargain', and hence, illegal.

#### A. IS SEVERANCE PAY REQUIRED?

Yes, a severance payment would have to be made by the employer. However, the quantum of the amount and the processes followed would be different, depending on specific circumstances. For instance:

**Voluntary resignation:** If the employee voluntarily resigns, the employer must accept the same and communicate whether the employee has to serve the notice period / the notice period has been waived. In such an instance, the employer would be required to pay the following as part of severance pay:

- All accrued and unpaid wages;
- Wages in lieu of accrued earned leave;
- Gratuity in accordance with PGA Act (i.e. 15 days wages for every completed year of service, subject to a maximum of INR 30,00,000 (proposed in the Union Budget 2019)); and
- Any other contractual dues, such as variable pay, performance bonus, etc.

**Termination initiated by employer:** In case of termination for misconduct (which is established as per the clear processes set out in the employee handbook, policies and employment contract), the employer would be required to make the following payouts:

- All accrued and unpaid wages;
- Wages in lieu of accrued earned leave;

- Gratuity in accordance with PGA Act, except where (i) any willful act, omission or negligence of the employee has caused damage to employer property; (ii) the employee has been terminated for riotous or disorderly conduct or any other act of violence, or (iii) the employee has been terminated for an offence involving moral turpitude committed in the course of employment;
- Any other contractual dues

## 4. SEPARATION AGREEMENTS

### A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

While a separation agreement is not mandatory under Indian laws, it is increasingly being followed by Indian companies, especially in cases of contentious separations / separation of senior executives.

### B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

The key clauses in a separation agreement pertain to the employee releasing the company from all present and future liabilities with reference to the employment relationship, assignment by the employee of any and all IP created in the course of employment to the employer, the employee agreeing to adhere to confidentiality obligations and the employee returning all company property in his/her possession or control. The reasons for separation and the terms and conditions of severance, including any separation consideration paid out and any benefits provided, should be accurately captured.

### C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

No, there are no restrictions regarding age. However, the employee must have attained majority (18 years) as required under the Contract Act.

## D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Yes. Separation agreements should be customized based on specific circumstances and should closely reflect the terms of the employment contract / employee handbook and internal policies. Such customization may be undertaken basis the following considerations:

- Is the termination part of a workforce reduction?
- Is the termination part of a transfer of undertaking? If so, is there any change to the employment terms? Are any employee benefits being carried over?
- Is the termination part of a disciplinary proceeding?
- Is there company information or equipment that the employee needs to return?
- Are there any stock option related queries to be addressed?
- Does the employee have any specific confidentiality obligations?
- Is there a possibility of the employee disparaging the employer and its other employees?
- Should the employee be offered 'garden leave'?

Depending on the responses to the above questions, corresponding provisions should be added to the separation agreement.

## 5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The remedies available for employees seeking to challenge wrongful termination include:

- Reinstatement of employment;
- Back pay;
- Loss of wages and earning capacity;
- All other expenses

As discussed above, workmen can approach the labour department and the industrial tribunal in this regard.

## 6. WHISTLEBLOWER LAWS

Currently, legislation in India concerning whistleblowers mainly pertains to listed companies and the public sector. In terms of regulations prescribed by the Securities and Exchange Board of India (SEBI), companies listed on a recognized stock exchange in India have to devise an effective whistleblowing mechanism that enables stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices in such companies. Under the (Indian) Companies Act, 2013, certain categories of companies are also required to constitute a 'vigil mechanism' for their directors and employees to report their genuine concerns or grievances.

The Whistle Blowers Protection Act, 2014 (which has not yet seen light of day, with further controversial amendments being proposed) governs mainly alleged corruption and misuse of power by public servants and seeks to protect persons who expose alleged wrongdoings in government bodies, projects and offices. It is also important to note that India has recently amended its Prevention of Corruption Act, 1988, wherein the giving of bribe by any person (including the private sector) to a public servant for improper performance of public duty or to improperly perform a public duty, has specifically been made an offence (penalties extend to fine and imprisonment). Previously, only the receipt of a bribe by a public servant was covered.

# IX. RESTRICTIVE COVENANTS

## 1. DEFINITION OF RESTRICTIVE COVENANTS

Companies in the ‘knowledge industry’ place high value on their intellectual and human capital. Key employees who develop the intellectual property of the company, and those who have close interactions with customers and suppliers (such as sales staff), are critical to the growth and development of the company, and on many occasions, the company may be reliant on the personal attributes and market knowledge of such employees in order to improve its market base. Therefore, companies look to protect their business interests by prescribing certain restrictions for their employees – these clauses in employment contracts which place restrictions on certain activities of employees, either during or after their employment, are ordinarily referred to as ‘restrictive covenants’.

## 2. TYPES OF RESTRICTIVE COVENANTS

### A. NON-COMPETE CLAUSES

A non-compete clause is typically a restriction placed by the employer on an employee, pursuant to which the employee cannot indulge in any activity that would be in competition with the business of the employer. In nearly all employment contracts, such restrictions are stipulated for as long as the employee is employed by the company; however, some employment contracts may also contain clauses which will prevent the employee from joining a competitor company, or starting a competing business for a certain period, after the employment with the company comes to an end. These clauses attain greater significance in case of promoter and/ or founder’s separation from the company.

### B. NON-SOLICITATION OF CUSTOMERS / SUPPLIERS

A non-solicitation clause is intended to ensure that an employee does not induce the employer company’s customers, suppliers or clients away from the company, typically after such employee leaves his/ her employment. Further, a non-solicitation clause may also prevent an ex-employee from inducing any current employees to resign from employment with the company and join the company where such ex-employee is currently employed / any other company at his/her direction (including any competitor of the company).

## 3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

As described in the earlier sections, the Constitution guarantees every Indian citizen, a fundamental right to practice a trade or profession. Further, as per the Contract Act, any contract which restrains trade, business or profession of any kind will be void. In light of this, any restrictive covenant that extends beyond the tenure of employment will not be looked upon favourably by Indian courts (but are, in any case, incorporated in employment contracts as a deterrent measure). The courts are generally guided by the presumption that the employer is in a stronger bargaining position in comparison to the employee, and the employee has no choice but to typically accept the employer’s terms.

Having said the above, there are certain principles laid down by the Indian judiciary that enable employers to protect their legitimate business interests:

- Employers can contractually restrict their employees from misusing or disclosing the employer's trade secrets or confidential business information and practices (and the enforceability concerns with respect to restrictive covenants as outlined above, will typically not apply in these instances). Similarly, where the employee has a motive to cheat or cause irreparable harm to the employer, a restrictive covenant beyond the term of employment would be enforceable.
- Non-solicitation clauses may be valid if reasonable restrictions (such as distance, time limit and location) regarding non-usage of trade secrets and goodwill are imposed on former employees, depending on their designation and access to confidential information. Courts have also held that merely approaching customers of a previous employer would not amount to 'solicitation' until orders are placed by customers based on such approach.

## 4. USE AND LIMITATIONS OF GARDEN LEAVE

The concept of 'garden leave' is becoming common in India – typically 'garden leave' involves a situation wherein an employee gives notice or is given notice of termination and during such notice period, is directed to stay away from work and/or the office premises whilst continuing to receive his normal remuneration. Indian courts have held while it is not possible to stop an employee from leaving, he can be restricted from joining a competitor during the term of employment (i.e. during the 'garden leave' period as described above). The aim of garden leave is to keep the employee out of the market long enough for any confidential information that they have to go out of date, or to enable that employee's successor to establish themselves particularly with customers, so as to protect the company's goodwill. However, the garden leave provision should not be unreasonable and should typically not extend to a period after the employment comes to an end – i.e., if the effect of the 'garden leave clause' is to prohibit the employee from taking up any employment during a certain period after the cessation of the employment, then it is unlikely that such clauses will be upheld by Indian courts.

# X. TRANSFER OF UNDERTAKINGS

There are specific provisions under ID Act, that protect 'workman' in cases of transfer of business undertakings. These however do not extend to non-workmen – thus, in case of non-workmen, the terms of the employment contract and/or the internal policies of the company would have to be examined.

## 1. OVERVIEW OF APPLICABLE LAW

In terms of Section 25FF of the ID Act, where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, every workman who has been in continuous service for not less than 1 year in that undertaking would be entitled to 1 month notice or payment in lieu thereof and to compensation calculated at the rate of 15 days' wages for every completed year of service.

However, Section 25 FF of the ID Act, would not apply to workmen, if:

- The service of the workmen has not been interrupted by such transfer;
- The terms and conditions of service applicable to the workmen after the transfer are not in any way less 'favourable' than those applicable to them immediately before the transfer; and
- The new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workmen, in the event of their retrenchment, compensation on the basis that their service has been continuous and has not been interrupted by the transfer.

## 2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The requirements mentioned above relate to the obligations of the old employer (i.e. one whose business undertaking is being transferred). However, if Section 25FF of the ID Act does not apply to the transfer of the undertaking in question (i.e. for instance, the services of the employee are not 'interrupted' on account of the transfer or alternatively, employees resign and join the new employer), then the successor entity would have to ensure that the salary and benefits that the employees were entitled to under the old employer (such as provident fund, employee state insurance, gratuity) are continued to be paid. The EPF Act and ESI Act specifically provide for liability of the successor entity, where the predecessor has defaulted in remitting provident fund and state insurance contributions, prior to the date of the transfer of the undertaking.

# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The ID Act and the Trade Unions Act have provisions relating to employer and employee associations at an industrial establishment.

### A. TRADE UNIONS ACT

The Trade Unions Act defines a trade union as 'any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business'. As described under Section 1 herein, at least 10% of the workmen or 100 workmen at the establishment (whichever is lesser, subject however to a minimum of 7) must be members of the trade union at the time of making an application for registration. The registration of a trade union under the Trade Unions Act must be distinguished from the process of 'recognition' of a trade union. Recognition is the process through which an employer agrees to negotiate with representatives of a trade union on aspects such as working conditions, wages etc., on behalf of particular group of workers. There are certain State level rules with respect to recognition of trade unions, however the Trade Unions Act itself does not have extensive provisions in this regard. Refusal by an employer to collectively bargain in good faith, with a recognised trade union (and vice versa) qualifies as an 'unfair labour practice' as defined under the IDA, attracting consequences that includes imprisonment.

### B. KEY ASSOCIATIONS UNDER THE ID ACT

- In terms of the ID Act, establishments with 100 or more workmen have to constitute a 'works committee'. The works committee should promote measures for securing and preserving amity and good relations between the employer and workmen and, to this end, can comment upon matters of common interest / concern and compose any material differences of opinion that arise between employers and workmen.
- Establishments with 20 or more workmen have to set up a grievance redressal committee to address individual employee grievances. The setting up of this committee will not affect the right of workmen to raise industrial disputes under the ID Act. Any workman who is aggrieved by the decision of this committee can appeal to the employer, and the employer shall, within 1 month from the date of receipt of such appeal, dispose of the same and send a copy of the decision to the workman concerned.
- There are other committees have to be set up as per State rules framed under the ID Act. For instance, in Gujarat, a 'joint management council' has to be formed in industrial establishments that employ 500 or more workmen.

## 2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

The Constitution of India guarantees the fundamental right of all citizens to form associations or unions, including the right to form or join trade unions. Some of the rights of registered trade unions are as below:

- Immunity is granted to office bearers and members from proceedings relating to criminal conspiracy, in instances where the trade union has been engaged in furthering its objects;
- Trade unions can maintain a separate fund for political purposes from which payments may be made for the promotion of civic and political interests of its members.
- Trade unions can amalgamate with other trade unions in the manner prescribed.
- Agreements between members of a registered trade union shall not be void or voidable merely on account of the fact that any of its objects are in restraint of trade.
- No suit or other legal proceeding can be maintained in any civil court against any registered trade union or any office-bearer or member in respect of any act done in contemplation of a trade dispute to which a member is a party, on the ground that such act induces some other person to break a contract of employment, or that it interferes with the trade, business or employment of some other person or interferes with the right of some other person to dispose of his capital or labour as he wills.

Trade unions have immense significance both for the wellbeing of the industrial establishment and for the society at large as well. Trade unions play a major role in negotiating better work conditions for employees, settlement of existing disputes and in reducing instances of industrial disputes. They can also assist in the recruitment and selection of workers and help them adjust better to the organizational structure and hierarchy.

### 3. TYPES OF REPRESENTATION

#### A. NUMBER OF REPRESENTATIVES

The rules pertaining to each of the associations listed above, have detailed provisions regarding their roles and responsibilities as well as the appointment of members. For instance, in case of a works committee, the ID Act prescribes that it shall have an equal number of both employer and employee representatives and shall not exceed 20 members. Further, if the establishment has registered trade unions, then they would have to be consulted by the employer before finalizing

representatives from the workmen fraternity. A grievance redressal committee on the other hand, shall also consist of an equal number of employer and workmen representatives; however, the total number of members constituting the grievance redressal committee shall not exceed 6.

#### B. APPOINTMENT OF REPRESENTATIVES

In relation to a works committee, the employer representatives shall be nominated by the employer and shall, as far as possible, be officials who are in direct touch with the working of the establishment. Employee representatives must be chosen by way of voting in the manner prescribed. In case the establishment has registered trade unions workmen representatives on the works committee should be divided into those who are trade union members and those who are not. The works committee should have a chairman, vice chairman and two joint secretaries, who term of office shall be 2 years. The committee should meet at least once every quarter.

The chairperson of the Grievance Redressal Committee shall be selected from among the employer representatives and from the workmen representatives alternatively, on rotation basis every year. There shall, as far as practicable, be one female member on the grievance redressal committee, and depending on the total number of members on the grievance committee, the number of female members may be increased proportionately.

### 4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

Though trade unions, works committees and grievance redressal committees are all envisaged to ensure greater participation of workmen in the running of an establishment, there are subtle differences in relation to each of their terms of reference. Trade Unions are the principal collective bargaining agents and can enter into settlement agreements with employers. A works committee on the other hand, aims at pre-empting industrial disputes, smoothening working relationships

and addressing any differences by way of direct negotiations between employer and workmen representatives. A works committee functions as a recommendatory body that addresses, at the first instance, problems arising in the day to day functioning of the industrial establishment. A grievance committee looks into individual employee grievances - unlike the other two committees which are concerned with employer-employee relations as a whole.

## **5. EMPLOYEES' REPRESENTATION IN MANAGEMENT**

The nature and extent of employees' representation eventually depends on the kind of establishment in question and the number of employees engaged at such establishment. It may be noted that the works and grievance redressal committees are only required where the requisite employee threshold is satisfied, as described above. Also, trade unionization in India is entrenched primarily in the traditional manufacturing sectors, though the IT sector has recently seen some unionization as well. In addition, certain other committees may also be required depending on the nature of the industry and any State specific requirements (some examples given below).

## **6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES**

As per the FA Act, in every factory where a hazardous process takes place or where hazardous substances are used or handled, the occupier shall set up a 'safety committee' consisting of equal number of representatives of workers and the management to promote co-operation in maintaining proper safety and health at work, and to review periodically the measures taken in that behalf. Also, in factories where there are 250 or more employees, a canteen is required to be provided by the employer which is then to be managed by a committee which would also have representatives of workmen. Safety committees are also required to be set up in mines where there are 100 or more persons employed.

# XII. EMPLOYEE BENEFITS

## 1. SOCIAL SECURITY

While India does not have a robust social security regime, there are certain key legislations that govern employee benefits in India:

### **ESI Act / Employees' State Insurance Act, 1948:**

Benefits of this Act extend to establishments where 10 or more employees are engaged (subject to any State rules), and to all employees earning less than INR 21,000 (~USD 300) per month. Employers are required to contribute an amount equivalent to 4.75% of the employees' wages monthly to an Employees' State Insurance Fund (the "Insurance Fund"), while the employee is required to contribute 1.75% of his/her wages to the Insurance Fund. The employees are then entitled to certain medical benefits (including medical care, sickness benefit, disablement benefit, etc.) from accumulations in the Insurance Fund.

### **EPF Act / Employees' Provident Fund and Miscellaneous Provisions Act, 1952:**

Benefits under this Act typically extend to establishments where there are 20 or more employees. Employees earning less than INR 15,000 per month (~ USD 211) have to compulsorily contribute to schemes under the EPF Act, whereas those earning above this limit may opt out, subject to certain conditions. Further, in cases where monthly wages exceeds INR 15,000 per month, employers and employees may either agree to (i) make contributions on the entire monthly wages in the manner prescribed or (ii) cap wages for the purposes of contribution to INR 15,000 per month.

There are three main schemes framed under the EPF Act, namely:

- The Employees' Provident Fund Scheme, 1952 (the "Provident Fund Scheme").
- The Employees' Pension Scheme, 1995 (the "Pension Scheme"); and
- The Employees' Deposit Linked Insurance Scheme, 1976 (the "Deposit Linked Insurance Scheme").

Employees are required to contribute 12% of their basic wages, dearness allowance and retaining allowance to the Provident Fund Scheme - this is undertaken by the employer (on behalf of the employee) as a monthly deduction from wages and deposited into the provident fund. An employer is then required to match this employee contribution – however, out of the 12% of the employer contribution: (i) 8.33% is directed to the pension fund set up under the Pension Scheme, (ii) 0.5% is directed to the deposit linked insurance fund set up under the Deposit Linked Insurance Scheme (iii) the remaining 3.17% is deposited into the provident fund.

### **PGA Act / Payment of Gratuity Act, 1972:**

the PGA Act contemplates payment of gratuity to all employees (whether workmen or not) engaged in establishments (including factories, shops and other commercial establishments) in which 10 or more persons are employed. An employee is entitled to gratuity if he/she has rendered continuous service for not less than 5 years (except in the case of death or disability), under any of the following circumstances, namely: Superannuation, Retirement or resignation, or Death or disablement due to accident or disease. The gratuity payable to an employee is calculated at 15 days' wages payable multiplied by the number of years of service (a part of a year in excess of 6 months counted as 1 year). A formula for computation has been prescribed in this regard.

## 2. HEALTHCARE AND INSURANCES

The main legislation applicable to the private sector, the ESI Act, contemplates medical benefits for employees in contingencies such as sickness, maternity, disablement and death due to employment injury and provides medical care to insured persons and their families. Additionally, the Employees' Compensation Act, 1923 requires employers to pay compensation (computed in the manner prescribed) in cases of death/disablement

of employees owing to injuries sustained at the workplace. There is also an ambitious universal health scheme launched by the Government (the 'Pradhan Mantri Jan Arogya Yojana') to ensure that the poor and vulnerable population is provided health cover. This scheme provides an insurance cover upto INR 5 lakh (~ USD 7000) per family, per year for secondary and tertiary hospitalization. Other than the above, most large employers in the private sector do provide medical insurance benefits to their employees and their immediate dependents, and bear the costs in this regard.

### 3. REQUIRED LEAVE

#### A. HOLIDAYS AND ANNUAL LEAVE

Provisions relating to holidays and leave are mainly prescribed in the State specific S&E Acts (for shops and commercial establishments) and under the FA Act (for factories).

- **Weekly Holiday**

The FA Act and some of the S&E Acts state that establishment shall remain closed on at least 1 day of every week (this is typically Sunday). However, the S&E Acts of certain States (for instance, Maharashtra) also contemplate that establishments may be open for all days in a year, subject to the employees being given a weekly off and certain other conditions being satisfied.

- **National and Public Holidays**

Across India, there are certain national holidays namely: (i) Republic Day (26th January); (ii) Independence Day (15th August); and (iii) birth anniversary of Mahatma Gandhi (2nd October). In addition to these, every employee would be entitled to other holidays, as may be declared by the concerned State Governments. In case an employee is required to work on any of these holidays, he/she will be entitled to twice the wages and also a compensatory off day.

- **Privileged Leave or Earned Leave**

The S&E Acts prescribe different privilege leave/earned leave requirements, and in some States employees may avail privilege leave only after being in service for a certain period (such as 3 months or 1

year). The S&E Acts also allow unutilized privilege/earned leave to be carried forward at the end of the year (subject to a limit), and also contemplate that any unutilized leave may be encashed at the time of separation from employment.

#### B. MATERNITY / PATERNITY LEAVE

There is no separate category of paternity leave recognized under Indian law, though a bill has been introduced in this regard seeking paternity leave of 15 days across all sectors. Currently however, some corporates and public sector departments do provide paternity leave to their employees, as prescribed in the concerned leave policy/rules. With respect to maternity leave, India has recently amended its MB Act (as described in the earlier sections), in terms of which women employees who have been in service for 80 days are entitled to paid maternity leave of 26 weeks. In case of a miscarriage or medical termination of pregnancy, women employees are entitled to leave with wages for a period of 6 weeks immediately following the day of the miscarriage or medical termination of pregnancy. Leave requirements are also specified for women having undergone tubectomy operations, or in case of any illness arising out of pregnancy, premature birth, delivery, miscarriage, or medical termination of pregnancy.

#### C. SICKNESS LEAVE

Typically, sick leave cannot be carried forward or encashed and is not subject to any minimum service requirements.

#### D. DISABILITY LEAVE

No specific category of disability leave is recognized in India.

#### E. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

##### A. CASUAL LEAVE

Some of the S&E Acts also recognize casual leave, which can be availed by employees in unforeseen situations, subject to the approval of an organization. This category of leave is also not typically carried forward or encashed.

## 4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Employees who fall within the purview of the EPF Act will be entitled to monthly pension, as per the rules of the Pension Scheme. Other than this, employees in the public sector will be entitled to pension as prescribed in their service rules.

## 5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

In addition to the above, various employers provide other benefits to employees (which also have certain tax benefits) such as food coupons, conveyance allowance, reimbursement of mobile phone and internet expenses. There are also specific benefit programs / labour welfare funds prescribed for certain sectors.

*Avik Biswas, Partner*  
INDUSLAW  
avik.biswas@induslaw.com  
T: +91 80 4072 6686



# INDUSLAW

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*This memorandum has been provided by:*

IndusLaw  
#101 1st Floor "Embassy Classic"  
#11 Vittal Mallya Road  
560001, Bangalore, India  
P +91 80 4072 6600  
[www.induslaw.com](http://www.induslaw.com)

### CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global  
Avenue Louise 221  
B-1050, Brussels  
Belgium  
+32 2 64 32 633  
[www.leglobal.org](http://www.leglobal.org)





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