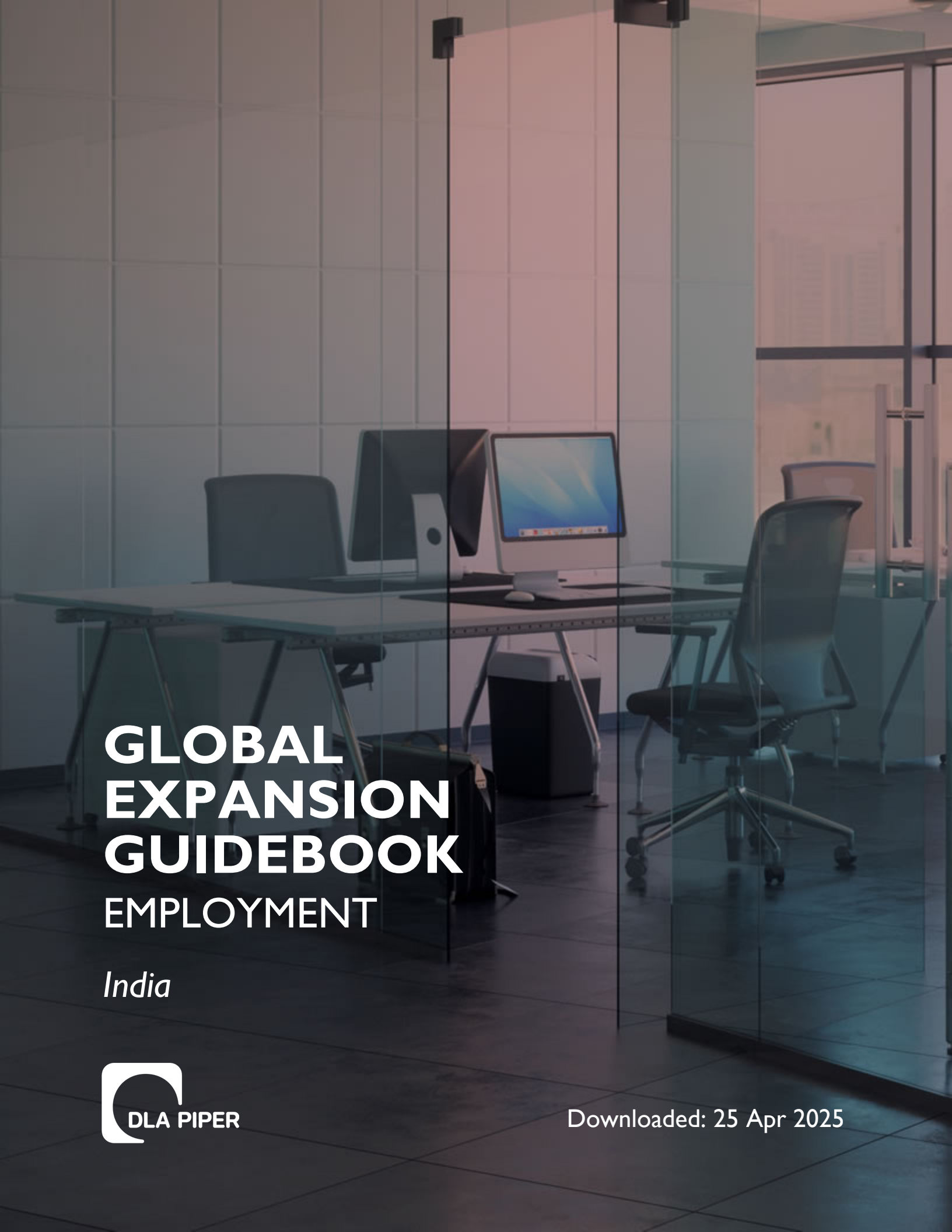

GLOBAL EXPANSION GUIDEBOOK

EMPLOYMENT

India

DLA PIPER

INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment.*

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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INDIA

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LEGAL SYSTEM, CURRENCY, LANGUAGE

India uses a common law legal system, except in the State of Goa, which has a civil code. The official currency is the Indian Rupee (INR). India is a multilinguistic country with many languages and dialects across the country. The official languages of the union government are Hindi and English. Individual states may set their own official language.

Additionally, in a major move to streamline, simplify and reform Indian employment laws, the Indian government has legislated 4 labor codes. These new codes are expected to significantly impact labor reforms, affecting more than 500 million organized and unorganized workers in India, including work structures such as "gig workers." The codes are not yet in effect, nor has the government indicated when they will be put into effect. Below is a brief overview of the codes:

1. The Code on Social Security, 2020 (SS Code) intends to consolidate, into a single code, 9 central labor statutes related to social security, which *inter alia* include the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; the Employees' State Insurance Act, 1948; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; and the Unorganized Workers' Social Security Act, 2008. It proposes to extend the social security benefits to employees and workers, in both the organized and the unorganized sectors, including "gig"
2. The Industrial Relations Code, 2020 (IR Code) intends to consolidate and amend the existing laws relating to conditions of employment in an industrial establishment and proposes to subsume, into a single code, 3 central labor statutes: the Industrial Disputes Act, 1947; the Trade Unions Act, 1926; and the Industrial Employment (Standing Orders) Act (IESO Act). A key feature of the IR Code is that it proposes to increase the threshold for applicability of the provision relating to the requirement of taking the prior permission of the appropriate government before layoff, retrenchment and closure from 100 to 300 workmen. It also seeks to provide fixed-term employees with all the benefits akin to permanent workers (including gratuity), except for notice upon conclusion of a fixed period and retrenchment compensation. The employer has been provided with the flexibility to employ workers on a fixed-term basis based on requirement and without restriction on any sector.
3. The Occupational Health, Safety and Working Conditions Code, 2020 (OSH Code) seeks to consolidate and amend the laws regulating the occupational health, safety and working conditions of the persons

employed in an establishment. It subsumes and replaces 13 central labor statutes including *inter alia* the Factories Act, 1948; the Mines Act, 1952; the Dock Workers Act, 1986; and the Contract Labour Act (Regulation and Abolition) Act, 1970.

4. The Code on Wages, 2019 (Wage Code) consolidates 4 central labor laws relating to wage, bonus and related matters: the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign company without local registration cannot directly engage employees in India. Employers may be formed as sole proprietorship or as a partnership or an incorporated entity. Offshore entities that wish to do business in India either set up subsidiaries or joint venture companies in partnership with other local or offshore entities or, with the approval of the Reserve Bank of India, set up a liaison office, branch office or project office. In addition, proper payroll must be set up to make withholdings and deductions.

Both central and state labor laws impose various procedural requirements on employers, such as obtaining registration, maintenance of registers and records (including muster rolls for employees who present themselves for work), display of notices and filing of returns, which are to be available for inspection by inspectors or appropriate government authorities. The central government and various state governments have come up with single window registration platforms, self-certification schemes and simplified requirements for maintenance of records and registers required under various labor laws with the objective of ease of doing business in India. The government has also taken measures to implement combined registers and provide e-filing of returns to ensure compliance with certain labor legislation.

PRE-HIRE CHECKS

Required

There is no statutory requirement on an employer to carry out pre-hire background checks, except for employment in certain sectors such as mining, where medical checks are mandatory prior to employment. In the case of foreign citizens, the visa stamp or sticker in the employee's passport will include the name of the employer, and the employer will be required to provide an undertaking to the Foreigners Regional Registration Office (FRRO) on behalf of the employee to register the employee with the FRRO. Therefore, it is advisable for the employer to undertake a basic immigration check at a minimum. In addition, taking into consideration that termination of employment is not simple in India, it is common for employers to verify the professional and educational qualifications of the candidate.

Permissible

Background checks for applicants may be conducted as long as they comply with the fundamental right to privacy, which means that applicant/employee consent should be obtained. The storage, management and handling of sensitive personal data or information in the electronic form belonging to persons located in India is regulated by the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("Sensitive Information Rules") enacted under the Information Technology Act, 2000.

The Government of India recently passed the Digital Personal Data Protection Act, 2023, which seeks to be a comprehensive statute governing the protection of personal data in India and will replace the Sensitive Information Rules. However, this statute is yet to be implemented.

Establishments usually have a pre-hire background check policy in place for new hires. Background screening is generally done for education qualification verification, previous employment status, address verification, criminal background verification, reference verification and applicable database verification.

IMMIGRATION

The Government of India issues various types of visas for expatriates (ie, foreigners) visiting India. A person who is not an Indian citizen and wishes to undertake any work in India must obtain a valid visa. There are 2 key work-related visas:

- Business Visa, designated as "B" Visa
- Employment Visa, designated as "E" Visa

The duration of such visas depends on the purpose of the visit and is granted at the discretion of the government. Business visas are usually granted to foreigners coming to India, for example, on shorts visits for trainings or for business meetings. Employment visas are granted to foreigners who come to India for the purpose of employment.

If the stay in India will be for more than 180 days, the visa holder must register with the FRRO or the Foreigners Registration Offices (FRO) within 14 days of arrival.

HIRING OPTIONS

Employee

There are 2 categories of employees: workmen and non-workmen. A workman, as defined under the Industrial Disputes Act, 1947 (ID Act), is any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. Those mainly employed in a managerial or administrative capacity, or those employed in a supervisory capacity (and earning more than INR 10,000 per month) and sales employees (other than those employed in certain notified industries such as the pharmaceutical industry) are non-workmen. The IR Code has replaced references to “workman” with “worker” to make the term more gender neutral, and the definition of worker varies slightly from that of a “workman” under the ID Act and would include sales promotion employees.

Whether an employee is a workman or a non-workman is a matter of fact which can be determined on the basis of the nature of the employee's duties and the job description. If the employee is a workman, the employer must comply with certain labor and industrial laws, such as the ID Act. If the employee is a non-workman, the terms and conditions of their employment are primarily governed by their contract of employment with the employer. However, in some circumstances, employees (both workmen and non-workmen) may still be governed by the state-specific shops and establishment legislation (S&E Acts), which apply to most companies engaged in commercial activity. Employment may be indefinite, for a temporary term, full-time or part-time. The new labor codes formally recognize fixed-term employment structures and, once the codes are in effect, such employees

would be eligible to certain employment benefits that may currently not be available to them, such as gratuity payment.

Legislation has established various employment exchanges, which public establishments and certain private establishments must notify of any vacancy before a post is filled. No employer is, however, obliged to recruit any person through the exchanges. Further, under the SS Code, the coverage of the statutory employment exchanges has been broadened to include career centers, vacancies and persons seeking services of career centers and employers. The SS Code, when in force, will replace the employment exchanges (Compulsory Notification of Vacancies) Act, 1959.

Recruitment may also be conducted through recruitment agencies, labor contractors, advertisements in newspapers and on-site recruitment at the establishment.

State governments are also entitled to formulate rules prescribing state-specific employment conditions for employers.

Independent contractor

Independent contractors may be engaged. A person is an independent contractor when a company designates the deliverables sought, and the person is free to carry out the work in the manner they deem fit, as long as the timelines and the quality of deliverables are met.

Establishments tend to engage independent contractors or consultants especially for activities where professional expertise is required for the business. Some employers also engage contractors to augment their workforce.

However, if, in reality, the nature of the working relationship is one of employment, there is a risk of misclassification. If misclassified, such "contractors" are entitled to the same employment benefits as the regular workforce.

Although not specifically covered under statute, employment arrangements such as gig workers and platform workers have begun to be used in India. The definitions of gig workers, platform workers, etc., have been determined under the SS Code. A gig worker is defined as a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship. Furthermore, a platform worker is defined as a person engaged in or undertaking platform work. Such workers also work outside the traditional employer-employee relationship in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or provide services or any such other activities which may be notified by the Central Government, in exchange for payment. The SS Code also requires mandatory registration of gig and platform workers. However, the true impact of the labor codes will have to be reviewed once the rules under the labor codes are finalized and the SS Code brought into effect.

Agency worker

The practice of employing agency workers or contract labor is prevalent to varying degrees in almost all industries and services. It is more prevalent in labor-intensive sectors such as manufacturing, mining and construction industries.

Legislation regulates the employment of labor through intermediary contractors, regulates the manner of their deployment (including obtaining requisite registration certificates and licenses) and empowers the appropriate government to abolish such arrangements in certain circumstances. The intermediary agency is liable to provide

amenities and pay wages including payment of social security, if applicable, to its employees deployed at the client's (referred to as the principal employer) workplace and, if it fails to do so, the principal employer is responsible, but may recover its costs from the intermediary agency. The OSH Code prohibits principal employers from engaging contract labor in core activities, subject to certain circumstances. The OSH Code provides a list of non-core activities where the prohibition would not apply, such as housekeeping, security and canteen.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

Currently, there is no requirement for a formal written contract of employment, although employers generally enter into written employment agreements. Some state-specific S&E Acts require employers to record certain terms of employment such as wages, designation and work hours. The OSH Code has a statutory requirement for the employers to issue appointment letters to every employee on their appointment in the establishment, with such information and in such form as may be prescribed by the appropriate government. Recent amendments to the Employee's Compensation Act 1923 (ECA) and the Maternity Benefit Act, 1961 (MBA) require employers to inform employees (in writing) of the benefits available to them thereunder.

The Rights of Persons with Disabilities Act, 2016 (RPWD Act) requires all employers to adopt and publish an equal opportunity policy which includes details of posts that persons with disabilities may apply for, amenities that are provided to disabled persons to allow them to carry out their work functions and the manner of selection for employment for persons with disabilities.

The Transgender Persons (Protection of Rights) Rules 2020 (TPR Act) requires employers to publish an equal-opportunity policy for transgender persons which *inter alia* includes details of infrastructural facilities, measures put in for safety and security and amenities to be provided to transgender persons.

The Industrial Employment (Standing Orders) Act, 1946 (SO Act) applies to employees classified as "workmen" and regulates the terms of the contract to ensure uniformity and protection for that class of employee. In event of any change in certain conditions of service of workmen (such as wages and working hours) which is prejudicial to them, the employer is required to give 21 days' notice (or more, depending on the state where the workmen are located) before implementing the change. Under the IR Code, the threshold for the requirement to formulate standing orders by industrial establishments has been increased. The IR Code, when in force, will replace the SO Act. The Government of India is also working with industry bodies to ensure that more relevant and industry-specific standing orders are put in place.

A collective agreement is an understanding between trade unions, who represent the interest of the workmen, and employers. Under the ID Act, it is unfair for a recognized trade union or the employer to refuse to bargain collectively in good faith with the other party.

Probationary periods

The duration of any trial or probationary period is determined by the contract of employment or the model standing orders. Typically, a trial or probation period is 3 months but may be extended by the employer if they are not satisfied with the progress of the employee.

It is usually easier to terminate the service of a probationer as they do not enjoy all the statutory protection from retrenchment accorded to workmen.

Policies

Policies are optional and may be amended without employee consent, if drafted appropriately. However, for workmen employees, certain terms and conditions of service may only be modified after giving 21 days' notice. In addition to employment contracts, an employer usually has various policies that govern its employees' various rights and obligations – for example, leave policies.

Third-party approval

No approvals are required for entering into contracts with employees, with the exception of the standing orders, which must be certified by the labor department. The IR Code provides that, where an employer adopts the model standing orders prepared by the government, the same shall be deemed to be certified for the purposes of the IR Code.

Aadhaar-based registration

The Ministry of Labour and Employment has notified Section 142 of the SS Code to be effective. Under this section, any employee, unorganized worker or other person shall establish their identity or identity of their family members/dependents through the Aadhaar number for registration and avail themselves of the benefits contemplated under the SS Code. Note that other provisions of the SS Code are not yet in effect. In view of the implementation of Section 142 of the SS Code, the Employees' Provident Fund Organization has also clarified that electronic challan-cum-return will be allowed to be filed only in respect of those employee-members whose Aadhaar numbers are seeded and verified with their respective Universal Account Number.

LANGUAGE REQUIREMENTS

The contract must be in a language understood by both contracting parties. Contracts are generally in English, provided both parties understand it.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

An employee's rights depend on the category of employee and other factors, including remuneration, location of employee and type of industry. However, pursuant to various labor statutes that govern the workforce, an employee is at a minimum entitled to minimum wages as framed by the relevant state government. Additionally, an employee is entitled to a statutory bonus, provident fund contributions, insurance coverage, maternity benefits and severance dues, if they meet the eligibility norms as set out under these statutes.

Working hours

Working hours are governed by a variety of statutes depending on the nature of the activity undertaken by the establishment and the location of the establishment.

Working hours are governed either by the Factories Act 1948 (Factories Act) or the relevant State specific S&E Act, depending on the nature of the activity undertaken by the establishment. For example, if the establishment is a factory, the Factories Act applies, and if the establishment is involved in a commercial activity, then the local S&E Act applicable in the region in which the establishment is located applies. Generally, these statutes provide for working hour limits both on a daily and weekly basis. The normal daily hour limits range from between 8 and 9 hours, and the usual weekly limit is 48 hours. Under the Factories Act, the daily limit cannot be exceeded without the prior permission of the authorities. The Factories Act will be subsumed under the OSH Code when it comes into force. Under the OSH Code, the daily working hours have been reduced from 9 hours to 8 hours per day. Under the local S&E Act, the normal working hour limits may only be exceeded up to certain prescribed limits.

Some local S&E Acts exempt certain categories of employees (such as managerial employees) or certain establishments (such as establishments involved in information technology) from all or some of the provisions of the statute.

State-specific S&E Acts generally prohibit women employees from working at night. However, certain states have permitted women employees, working in certain industries or across the board, to be employed during the night, subject to the employer adhering to certain requirements, such as ensuring safety and wellbeing of the women employees and providing them adequate facilities, including safe transportation. The OSH Code also allows women to work at night – that is, beyond 7:00pm and before 6:00am, subject to adhering to the conditions relating to safety, holidays, working hours and their consent.

Overtime

If employees are required to work more than the prescribed minimum working hours, they are normally required to be paid at a prescribed overtime rate. Overtime wages are generally calculated at the rate of twice the employee's ordinary rate of pay.

Wages

India follows the standard of a "minimum wage" as opposed to living wage. State government under the Minimum Wages Act, 1948 fixes minimum wages for time work, piece work and overtime work. The minimum wage to which an employee is entitled is dictated by a variety of factors, including:

- The nature of employment
- The industry in which the employee works and
- The geographic location where the employee works.

The Wage Code introduces a new concept of "floor wages" which is to be determined by the central government after taking into consideration the minimum living standards of a worker. Floor wages are the minimum wages below which state governments cannot fix their state-level minimum wages.

The Payment of Wages Act, 1936 (PWA) provides that wages should be paid at intervals of no longer than a month. Consequently, it is the duty of every employer to ensure that wages are paid to its employees on a monthly basis, the prescribed registers are maintained and that the prescribed notices are displayed on the premises. The statute also regulates the scope and extent of deductions an employer may make from wages. This statute is currently applicable to employees whose monthly wages do not exceed INR 24,000. However, the

Wage Code does not prescribe a threshold of wages for applicability of provisions of the PWA to the employees. The eligibility threshold prescribed under the PWA will be obsolete once the Wage Code comes into effect. Some local S&E Acts provide for similar restrictions in relation to permissible deductions that may be made from wages. Additionally, the Equal Remuneration Act, 1976 (ERA) lays down provisions relating to equal remuneration to be payable to both men and women workers and prevention of discrimination based on gender in matters of employment. The Wage Code, when in force, will replace the ERA.

Vacation, holidays and time off

Generally, all employees are entitled to a weekly day off.

Leave entitlement is generally covered by the employment contract. However, where the employer is involved in a commercial activity, the local S&E Acts will apply and determine the minimum thresholds concerning holiday entitlement. The thresholds usually range from 12 to 18 days' holiday per year.

The Factories Act provides that every adult worker who has worked in a factory for at least 240 days in a calendar year is entitled to 1 day's leave with wages for every 20 days of work. Furthermore, under the OSH Code, the number of days an adult worker is required to work in a calendar year to be eligible for annual leave with wages has been reduced from 240 days to 180 days.

Sick leave & pay

Sick leave varies from state to state. Certain local S&E Acts contain provisions concerning sick leave and casual leave, which generally range from 12 to 24 days. In addition, the SO Act, if applicable, may contain sick leave provisions. Generally, an employee is entitled to the most beneficial leave entitlement provisions that are provided under the SO Act or S&E Act or the employer's service rules.

Maternity/parental leave & pay

Indian law provides for maternity and associated leave for female employees. The law does not provide for paternity or parental leave for male employees, and such leave, if provided, would be in accordance with any contractual arrangement entered into with the employer.

Maternity leave is governed by the Maternity Benefits Act of 1961 (MB Act) and Employees' State Insurance Act, 1948 (ESI Act). The ESI Act currently applies to employees whose monthly salary does not exceed INR 21,000; employees who are not covered by the ESI Act receive their maternity benefits in accordance with the MBA.

Under the MB Act, women employees with fewer than 2 surviving children are entitled to maternity leave of 26 weeks. Women with 2 or more surviving children are entitled to 12 weeks of maternity leave. Further, the MB Act provides 12 weeks leave to women employees who legally adopt a child of less than 3 months of age and to commissioning mothers (i.e., employees who have children through surrogacy).

A pregnant woman suffering from an illness arising out of pregnancy, delivery, premature birth of child, miscarriage, medical termination of pregnancy or tubectomy operation is entitled to leave with payment of maternity benefit for an additional period of 1 month.

A female employee is also entitled to leave with maternity benefit for 6 weeks in the case of miscarriage or medical termination of the pregnancy, and for 2 weeks with payment of maternity leave for a tubectomy operation.

The MBA also provides for nursing breaks and a medical bonus of INR 3,500 to the employee where the employer does not provide for post-natal confinement and post-natal care.

Amendments to the MBA require employers with 50 or more employees in their establishment to provide crèche facilities for their female employees. The crèche must be within a distance prescribed by the government, and female employees must be allowed 4 visits to the crèche each day, including their rest break. If the work assigned to a female employee is such that she can work from home then, after maternity leave, she and the employer may mutually agree to terms and conditions for her to work from home.

Other leave/time off work

Employees are entitled to leave to allow them to cast their vote during national and state elections.

DISCRIMINATION & HARASSMENT

The right to equality is a fundamental right under the Indian Constitution, and state institutions are expressly prohibited from discriminating on the basis of sex, caste, religion, race and place of birth. Various protections are applicable to individuals in the private sector, including disabled persons, female job applicants, HIV positive persons (or those who live with or have lived with a person who is HIV positive), transgender persons and workmen.

The ERA governs equal remuneration and service conditions for males and females for the same work or work of a similar nature and requires the employer to maintain certain registers with wage information.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (SH Act) protects and provides a means of redress for women who suffer from sexual harassment at work. The SH Act has wide application because its definition of 'workplace' covers both public and private establishments and regular, ad-hoc or temporary employees, either employed directly or through an agent. The SH Act requires all offices, hospitals, institutions and other workplaces to have an internal mechanism for addressing complaints related to sexual harassment, including providing for settlement by way of conciliation. The employer must have an internal complaints committee (IC) to investigate complaints, hold an inquiry and submit a report. The District Officer may establish a local complaints committee for establishments that do not have internal complaints committees due to employing less than 10 workers, or when the complaint is against the employer. Employers with 10 or more employees are also required to formulate an internal policy for the prohibition, prevention and redressal of sexual harassment in the workplace and to provide awareness and conduct training programs for IC members. The IC must submit an annual report in each calendar year to the relevant District Officer.

The employer is also prohibited from committing any unfair trade practices listed in the ID Act, including discriminating against workmen.

The RPWD Act prohibits discrimination on the basis of a person's disability, unless proportionate to achieve a legitimate aim. Under the RPWD Act, an employer must ensure that a person is not denied a promotion merely on the ground of their disability. It also requires all employers to notify and publish an equal opportunity policy with details of facilities and amenities provided to persons with disabilities to enable them to effectively discharge their duties in the establishment.

The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (HIV Act) prohibits discrimination against a person who is HIV-positive or a person who lives with or has lived with a person who is HIV-positive in matters related to employment, including denial of or termination of employment.

The TPR Act prohibits discrimination against a transgender person in employment matters, including recruitment and promotion. Further, the TPR Act requires every establishment to designate a person to be a complaint officer to handle complaints in relation to the TPR Act.

WHISTLEBLOWING

There are currently no laws that encourage or incentivize employees to raise concerns about corporate wrongdoing. However, employers may adopt policies to offer (i) protection from retaliation and victimization; and /or (ii) financial incentives to encourage employees to report misconduct.

In addition, the Companies Act, 2013 (Companies Act), the Companies (Meetings of Board and its Powers) Rules, 2014 and the Securities and Exchange Board of India's (Listing obligations and Disclosure Requirements) Regulations, 2015 (SEBI LODR) require companies to establish a mechanism for the reporting of complaints and genuine concerns raised by directors or employees of a company and to ensure adequate protection for whistleblowers. While the obligations under the SEBI LODR are applicable to publicly-listed companies, the provisions of the Companies Act are applicable to:

1. Listed companies;
2. Companies which accept deposits from the public; or
3. Companies which have borrowed money from banks and public financial institutions in excess of INR 50 crores.

Additionally, the Whistleblowers Protection Act, 2011 (WP Act) governs whistleblowing complaints relating to government companies, public servants, public authorities, public sector organizations, etc.

BENEFITS & PENSIONS

Benefits

Benefits depend on a number of factors, such as the size of the employer, the industry and the employee's length of service, including:

- Payment of Gratuity Act, 1972 provides for a lump sum amount payable on termination of employment after 5 years of service. In case of termination due to death or disablement, the employee will be entitled to the lump sum amount irrespective of length of service. The rate of gratuity payable is calculated at the rate of 15 days' wages for every completed year of service or part thereof in excess of 6 months and is currently is capped at INR 2 million. The IR Code introduces a provision for fixed-term employees to be eligible for gratuity, upon rendering service for a period of 1 year. Further, the IR Code also seeks to provide fixed-term employees with all the benefits akin to permanent workers (including gratuity), except for notice upon conclusion of a fixed period and retrenchment compensation.

- Health benefits: The ESI Act provides for comprehensive medical care to eligible employees and their families. It also provides for cash benefits during sickness and maternity and monthly payments in case of death or disablement. The ESI Act is intended to be subsumed under the SS Code.

- The ECA provides for the payment of compensation to an employee or their family in cases of employment-related injuries, death and temporary or permanent disability, and similar provisions have been included in the SS Code. The SS Code, when in force, will replace the ECA.

- Payment of Bonus Act, 1965 envisages payment of bonus to employees earning less than INR 21,000 per month. This statute is intended to be replaced by the Wage Code. The Wage Code provides that the wage threshold for eligibility is to be determined by the government. Such threshold is yet to be notified.

Pensions

Pensions in India may be divided into 3 categories:

- Government pensions covering government employees

- Pension schemes governed by Employees' Provident Fund and

- Miscellaneous Provisions Act, 1952 (EPF Act) Voluntary pensions

It is mandatory for every Indian employee drawing a monthly salary capped at INR 15,000 per month to be enrolled under the Employees' Provident Fund Scheme (EPFS). It is mandatory for expatriate workers to be enrolled under the EPFS, irrespective of their salary (except for expatriates contributing to a social security program of their country of origin which has a reciprocal social security agreement with India). Further, the EPF Act is intended to be subsumed under the SS Code. Under the SS Code, the central government is empowered to frame schemes for provident funds, pensions and deposit-linked insurances, and establish specific funds thereunder. In respect to the deposit-linked insurance scheme, the employer is required to pay an amount, up to a maximum of 1 percent of the wages or such other percentage of wages as may be notified by the central government. The applicability threshold under the SS Code will be as notified.

DATA PRIVACY

Employee records and employee access to data

The Information Technology Act, 2000 (IT Act) covers data protection and violation of personal privacy. This statute safeguards against certain breaches in relation to data from computer systems, prevents unauthorized use of computers and creates liability for damage suffered in the event of unauthorized access, downloading, extraction and copying of data from a computer system or network. It stipulates the penalty for breaches of confidentiality and privacy.

The storage, management and handling of sensitive personal data or information belonging to persons located in India is currently regulated by the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (Sensitive Information Rules) enacted under the IT Act and will be governed by the Digital Personal Data Protection Act, 2023, once it is implemented.

Sensitive personal data or information is defined under the Sensitive Information Rules to include passwords, financial information, physical, psychological and mental health conditions, sexual orientation, medical records and history, and biometric information.

A company receiving any of the above types of information as a result of either using the services of an individual or employing an individual must comply with the Sensitive Information Rules regarding processing and storing such information.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

Indian employment law does not provide for the automatic transfer of employees. ID Act provides that, upon transfer of the ownership or management of an undertaking, every "workman" who has been in continuous service in any industry for at least 1 year (ie, 240 days) will be deemed to have been retrenched (ie, terminated) and will be entitled to retrenchment compensation (equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of 6 months) and to receive 1 months' notice or wages in lieu thereof, unless the following applies:

- The workman consents to their employment being transferred to the transferee
- The transferee agrees to provide the employee with continuity of service on terms no less favorable than those which applied prior to the transfer

On and from the date of transfer, the transferee steps into the shoes of the transferor and becomes responsible for liabilities and obligations relating to such workmen including central and state taxes, provident fund contribution, gratuity, accident compensation and employee state insurance contribution.

With respect to liabilities prior to the date of transfer, the transferor and transferee both shall, in accordance with ESI Act and EPF Act, be jointly and severally liable to make provident fund and insurance contributions in respect of the period up to the date of the transfer, provided the liability of the transferee is restricted to an amount equivalent to the value of the assets obtained by way of the transfer.

Employees other than workmen usually resign from their service and are reappointed by the transferee unless they do not wish to transfer. In the event the transferee agrees to provide continuity of service, that continuity will then be reflected in the employment contract.

EMPLOYEE REPRESENTATION

In India, the right to form a trade union flows from the fundamental right to freedom of association in the Constitution. Unions must be composed of 7 or more people and must apply to be registered. Indian trade unions are conferred the same status as a body corporate, enjoy perpetual succession and have a common seal. They may sue and be sued in their name. Further, the provisions related to trade unions will be subsumed under the IR Code when it comes into force.

The ID Act renders both employers and trade unions liable for penal sanctions in the event they engage in unfair labor practices.

A collective agreement is an understanding between workmen represented by their trade unions and employers.

Under the ID Act, it is unfair for a recognized trade union and employer to refuse to bargain collectively in good faith with the other party.

TERMINATION

Grounds

Dismissals should be for "reasonable cause" – for example, redundancy, poor performance or continued ill health – especially in certain states, where the local S&E Act stipulates such a requirement. Otherwise, employees may be dismissed for misconduct (or "for cause"). For workmen, the ID Act defines "retrenchment" as the termination by the employer of the service of a workman for any reason whatsoever, other than as a punishment inflicted by way of disciplinary action. However, "retrenchment" does not include voluntary retirement, reaching the stipulated superannuation age, non-renewal of a contract on expiry of its term, termination arising under such fixed-term contracts or termination of service on the grounds of an employee's continued ill health. The IR Code also specifies that termination of service of a worker as a result of completion of their fixed-term employment is not considered retrenchment.

An employer may for economic reasons reduce the number of its workmen, provided the process as stipulated in the ID Act is followed. The process to be followed will depend on whether the workmen to be retrenched have at least 1 year's (ie, 240 days) continuous employment and are:

- Employed in:
    - Factories/mines/plantations with less than 100 employees or
    - Other establishments
- Employed in factories, mines or plantations where the number of workmen employed in the last year is 100 or more – the ID Act has been amended in certain states to increase this threshold to 300 employees or more. The IR Code has increased this threshold to 300 employees across all states. Additionally, the IR Code also seeks to introduce a "worker re-skilling fund." The IR Code provides that an employer shall be required to contribute an amount equal to 15 days' wages or such amount as may be notified by the government for every retrenched worker. This amount will then be credited to the account of the retrenched worker in such manner as may be prescribed by the government.

For the "non-workmen" category of employees, their services may be terminated in the manner provided in their employment contracts and subject to complying with the provisions of the relevant S&E Act of the state.

Employees subject to termination laws

Where an employer plans to retrench a workman who has been in continuous service for at least 1 year (ie, 240 days) and who is employed in:

- Factories, mines or plantations with less than 100 employees or
- Other establishments, prescribed steps must be taken:

- Where the workman belongs to a particular category of workmen, in the absence of any agreement otherwise, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. If the employer retrenches any other workman, it must record the reason for doing so (Last In First Out Rule).
- The workman must be given the requisite period of notice or payment in lieu of notice.
- Retrenchment compensation must be paid to the workman.
- Notice in the prescribed manner must be served upon the appropriate government authority.

Where an employer plans to retrench a workman who has been in continuous service for at least 1 year (ie, 240 days) in factories, mines or plantations where the number of workmen employed in the last year is 100 or more (300 in some states), the following steps should be taken:

- The Last In First Out Rule must be followed before retrenching the service of a workman
- The workman must be given the requisite period of notice or payment in lieu of notice
- Prior permission of the appropriate government authority must be obtained (see below) and
- Retrenchment compensation must be paid to the workman.

For "non-workmen," the steps the employer must take will be as stated in the employment contract and the provisions of the relevant S&E Act of the state.

Restricted or prohibited terminations

The level of protection granted to workmen in relation to the termination of their employment is higher where they are employed in factories, mines or plantations where the number of workmen employed in the last year is 100 or more (300 in some states). The ID Act prohibits termination of certain categories of workmen while a dispute is pending between them and their employer except with the approval of a designated authority. Under MBA, it is unlawful for an employer to discharge or dismiss a female employee while they are on statutory maternity leave. Similar protection is provided under ESI Act to employees who earn a monthly salary not exceeding INR 21,000 and who may be in receipt of certain statutory medical benefits provided under ESI Act.

Third-party approval for termination/termination documents

Where an employer plans to retrench a workman who has been in continuous service where the number of workmen employed in the last year is 100 or more (300 or more in some states), prior permission of the appropriate government authority must be obtained by the employer. The appropriate government authority, after making inquiries with the parties and considering the genuineness and adequacy of the relevant factors, will make an order either granting or refusing to grant permission. The order of the appropriate government authority is final and binding on all parties and remains in force for 1 year.

Mass layoff rules

The retrenchment procedure described above will equally apply to mass terminations.

Notice

Notice is required to be given prior to termination. The notice period may vary from state to state, but it is normally 1 month for ordinary dismissal, unless the employment contract provides for a longer notice period.

Where:

- An employer plans to retrench a workman who is employed in factories, mines or plantations with less than 100 employees or
- At other establishments, the employee is entitled to receive 1 month's notice or payment in lieu of such notice period.

Where an employer plans to retrench a workman who is employed in factories, mines or plantations where the number of workmen employed in the last year is 100 or more (300 in some states), the employee is entitled to receive 3 months' notice or payment in lieu of such notice period. In both cases, the notice of termination must be in writing and must indicate the reason for retrenchment.

Notification and permission from the appropriate government authority must also be obtained by the employer. See above.

Statutory right to pay in lieu of notice or garden leave

Employers may make a payment in lieu of notice. The right of workmen to receive retrenchment compensation is based on their length of service as of their last working day, irrespective of whether the termination is with immediate effect or after the employee has been asked to serve the notice period.

Garden leave is possible, though there is little case law to suggest how it will be enforced by the courts. It is preferable to include a specific garden leave in the contract of employment and company policy.

Severance

In case of a termination due to redundancy, employers are required to pay retrenchment compensation. Severance or retrenchment compensation equal to 15 days' average pay for every completed year of continuous service or part thereof in excess of 6 months must be paid to a workman on termination of employment. The provisions of the IR Code, pertaining to retrenchment are aligned with the provisions under the ID Act. However, for the purposes of retrenchment compensation, the same will be calculated at the rate of 15 days' average pay or average pay of such number of days as may be notified by the appropriate government, for every completed year of continuous service or any part thereof in excess of 6 months. Additionally, as mentioned above, the IR Code also requires employer to contribute an amount equal to 15 days' wages or such amount as may be notified by the government for every retrenched worker to a "worker re-skilling fund."

In addition, the employer must pay certain termination benefits to employees who are dismissed, including leave encashment, gratuity payment (for employees, whether workmen or not, with 5 years or more of continuous service), payment in lieu of notice (if no notice is given), statutory bonus payment and any other amounts due under the employment contract. Employees who are being terminated on account of misconduct are not entitled to notice pay or retrenchment compensation.

POST-TERMINATION RESTRAINTS

Non-competes

The Indian Contract Act 1872 provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind is void. Therefore, non-competition clauses which operate during the course of employment are generally not regarded as restraint of trade. However, post-termination non-competition clauses are void and unenforceable.

Customer non-solicits

Possibly enforceable. With post-termination non-dealing/non-solicit provisions, it may be argued that a restriction on activities with customers is a restraint of trade, if by complying the former employee is prejudicially affected from carrying out any trade. Whether such a clause is enforceable or not is, therefore, dependent on the facts of the case.

Non-solicitation provisions, even if they are upheld, generally only entitle the employer to damages, and it is highly uncommon for an Indian Court to grant an injunction preventing the customer from taking their business elsewhere. At best, a claim for damages may succeed against the employee for breach of their contractual agreement if the employer may show that the enforcement of the provision is essential to protect its confidential information and that the provision does not prejudice the former employee's ability to carry on a business or trade and therefore is not in restraint of trade.

Employee non-solicits

Where it is suspected that a non-dealing/non-solicitation covenant has been breached, a claim for damages may be made against the employee for breach of their contractual agreement if the employer can show that the enforcement of the provision would not prejudice the employee's ability to carry on their business/trade. However, even if a non-solicitation provision is upheld, this will generally only entitle the employer to damages. It is unlikely that an Indian Court would grant an injunction preventing other employees from leaving and joining a rival firm.

WAIVERS

The doctrine of waiver is recognized in Indian contract law. A waiver must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Though any waiver against statutory entitlements given by an employee is unlikely to be enforceable, a generic waiver of contractual rights may be enforced.

REMEDIES

Discrimination

Complaints against unfair labor practices under the ID Act on grounds of discrimination may be filed by a workman or a trade union before the labor courts. Damages for wrongful dismissal will be assessed in accordance with what the employee would have received if the contract had been properly terminated on its terms.

Complaints of sexual harassment under the POSH Act may be filed by the victim with the internal complaints committee (if against another employee) or the local complaints committee (if against the employer). The victim of sexual harassment may directly file a complaint with the police station having jurisdiction or under the Indian Penal Code, 1860 before the criminal courts.

Complaints for discrimination on the basis of a person's disability must be raised with the head of the establishment who should take immediate action in accordance with the provisions of the RPWD Act. The RPWD Act provides for a complaint to be raised with the Chief Commissioner or State Commissioner for Persons with Disabilities.

Complaints of discrimination on the basis of gender of a transgender person may be made to the complaint officer who will enquire into the same within the timelines prescribed under the TPR Act and Rules.

Potential sanctions for discrimination and harassment include fines, imprisonment (in limited circumstances), damages, injunctive relief to prevent future discriminatory acts, and cancellation of business licenses. Sanctions depend on which legislation applies. In addition, courts do not tend to follow a set pattern of sanctions and could grant damages as well as pass injunctive orders preventing discriminatory acts being committed in the future.

In addition, individual employees who unlawfully discriminate against or are guilty of sexual harassment of another may be personally liable for their discriminatory actions. They may be subject to an internal inquiry and disciplinary action by the employer and/or be named as a party in employment litigation and be liable for any compensation/punitive damages/imprisonment awarded against the employee by the labor courts, civil courts or criminal courts.

Unfair dismissal

Complaints of unfair dismissal are filed before the labor courts or tribunals. The courts may grant an employee reinstatement with full back wages with continuity in service, reinstatement without back wages, only back wages without reinstatement or only monetary compensation and consequential benefits.

Failure to inform & consult

The ID Act stipulates that an employer who proposes to effect any change in its conditions of service including wages, compensatory and other allowances, hours of work, or any rationalization, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen may not effect such a change without giving those workmen likely to be affected 21 days' notice. In some states, the period of notice required is longer and no notice is required where the change is effected in pursuance of a settlement or award. Notice of change is required only where the change in the terms of service is to the detriment of the workman. Any failure on the part of the employer to adhere to this notice process will render any such change void.

As stated above, recent amendments to the MBA and ECA require employers to inform their employees of the benefits available to them thereunder in writing at the time of their appointment. Further, the POSH Act requires that employers provide/organize training, workshops and awareness programs for their employees to make them aware of the provisions of the POSH Act. Employers are also required under the RPWD Act to notify an equal

opportunity policy with the contents (as mentioned above). Additionally, under the TPR Act and related rules, employers are required to publish an equal opportunity policy and display such policy on the company website and in absence of a website, at conspicuous places in the premises.

CRIMINAL SANCTIONS

Sanctions for violating labor statutes include both imprisonment and fine. The extent of such penal provisions will depend on the statute and the nature of the breach.

The Wage Code, SS Code and OSH Code also provides for a single authority to carry out inspections of the compliance status of establishments under these codes and advise employers and employees on better compliance. Further, the inspector/ facilitator is required to give an opportunity to the employer to comply with the provisions of the said code within a stipulated timeline before initiation of certain prosecution proceedings. Additionally, the labor codes allow for the compounding of offenses, at any time before or after initiation of the prosecution.

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