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Individual Employee Termination (India)

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Status: **Law stated as at 01-May-2023** | Jurisdiction: **India**

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A Practice Note addressing the legal and practical issues that arise when terminating the employment of individuals in India.

This Note considers the reasons enabling lawful individual employee termination as well as what constitutes an unlawful termination. It also addresses the procedures for individual employee terminations and best practices to minimise the risk of legal challenges.

There are several important legal issues to consider when an employer or employee is seeking to terminate employment in India. These include the reason for termination, any process that must be followed, the termination payments which may be owed to the employee, and when a termination is unlawful.

This Note sets out the key details on these topics and explains which laws underpin them. It explains the concept of retrenchment and distinguishes between how the law on termination applies to workmen and non-workmen. The Note also outlines redundancy as a ground for termination and the courts' position on this, and how the law on termination applies to an employee on probation.

Relevant Laws on Termination

In India, employment can only be terminated for a reasonable cause or misconduct (see Misconduct). The concept of "at-will" employment is not recognised under Indian law.

The Industrial Disputes Act, 1947 (ID Act) and the corresponding state-specific rules provide for employment termination (retrenchment (see Retrenchment). Additionally, several state-specific labour laws (applicable to commercial establishments) also contain employment termination provisions.

The terms of employment as contained in the employer's standing orders (a set of terms and conditions of employment as envisaged under the Industrial Employment (Standing Orders) Act, 1946 (IESOA), if any), employment contract, and HR policies must also be considered. Generally, provisions in the employment contract that are more favourable to the employee will override the law.

There is no legal requirement to engage in consultation or have collective bargaining agreements with trade unions, unless the employer has recognised any trade union in the establishment (that is, it accepts a particular trade union having a representative character in its workforce).

The ID Act applies only to employees categorised as "workmen". Workmen are individuals employed to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward (section 2(s), ID Act). A workman excludes any employee primarily engaged in a managerial or administrative capacity, or in a supervisory capacity earning wages exceeding INR10,000 per month.

No distinction exists between individual terminations and collective or mass terminations under Indian labour law. In cases of reduction-in-force, there are certain specific provisions under the law with which the employer must comply (see Redundancy).

For non-workmen category employees, termination takes place as per the statutory state-specific notice requirements, the employee's contract, and the establishment's HR policies, as there is no central law which applies to termination of non-workmen.

Reasons for Termination

Indian laws permit termination of employment for misconduct (see Misconduct).

Additionally, Indian courts have generally recognised the following as reasonable causes for termination of employment:

- Non-performance.
- Redundancy.

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- Loss of confidence in the employee's ability to perform their duties and obligations.

The employer should support each of these reasons with sufficient evidence or proof on record to successfully defend a claim for wrongful termination in the Indian courts.

Courts' Power

If an employee (including non-workmen) files a claim for unlawful termination of employment and is successful, the court may direct any or all of the following:

- Reinstatement of the employee.
- Payment of back wages.
- Compensation.

Indian courts are typically pro-employee. Therefore, Indian employers should be meticulous with their documentation as evidence or proof on record relating to employment termination.

Retrenchment

Retrenchment is the termination by the employer of the service of a workman for any reason, other than as a sanction by way of disciplinary action (section 2(oo), ID Act).

Retrenchment Exclusions

Retrenchment excludes:

- Voluntary retirement of the workman.
- Retirement of the workman on reaching the age of superannuation if the employment contract between the employer and the workman concerned contains a stipulation to that effect. (The ID Act does not provide a specific age for superannuation but under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, it is 58 years old.)
- Termination of the service of the workman if their fixed-term contract (FTC) is:
  - not renewed on its expiry; or
  - terminated for any other reason stipulated in the contract.

  See also Practice Note, Fixed-Term Contracts (India).
- Termination of the service of a workman on the ground of continued ill-health.
- Termination of employment for misconduct, for which a separate process applies in line with the principles of natural justice (see Misconduct).

Conditions for Retrenchment

The conditions for retrenchment of a workman who has been in continuous service for at least one year (interpreted as 240 days of continuous service (section 25B, ID Act)) are:

- The workman has been either:
  - given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired; or
  - paid in lieu of that notice wages for the period of the notice.
- The workman has been paid, at the time of retrenchment, compensation (severance) equivalent to 15 days' average pay for every completed year of continuous service or any part of a year in excess of six months.
- Notice in the prescribed manner is served on the government in the prescribed format.

(Section 25F, ID Act.)

For industrial establishments such as factories, mines, and plantations with at least 100 workmen on an average working day in the past 12 months, the following are the conditions for retrenchment:

- The workman has been either:
  - given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired; or
  - paid in lieu of that notice wages for the period of the notice.
- The workman, at the time of retrenchment, has been paid compensation equivalent to 15 days' average pay for every completed year of continuous service or any part of a year in excess of six months.
- The employer has obtained the prior permission of the government before retrenching the workman.

(Section 25N, ID Act.)

The number of workmen required for the above conditions to apply is increased to 300 in select Indian states. The proposed new labour codes in India also increase the limit to 300 workers (section 77, Industrial Relations Code, 2020).

Notice of Retrenchment

The timeline and format for the notice of retrenchment to the government is prescribed under the central or state rules corresponding to the ID Act. For example, as per the Industrial Disputes (Maharashtra) Rules, 1957, the authorities should be notified either:

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- Not less than 21 days before the date of retrenchment, if the notice of retrenchment has been given to a workman.
- Within seven days of the date of retrenchment if the notice of retrenchment has not been given but the workman is paid wages in lieu of notice.
- Where the retrenchment is carried out under an agreement:
  - at least one month before the date of termination if that date is specified in the agreement; or
  - on the date of that agreement, where the date of termination is not so specified.

The Shops and Establishments Acts (state-specific laws applicable to commercial establishments) require an employer to provide at least one month's (30 days') prior notice or pay in lieu if employment is terminated for reasonable cause. The provisions on termination of employment under most of the state-specific Shops and Establishment Acts are applicable once the employee has completed a minimum period of employment. This is typically up to six months. Some of the Shops and Establishments Acts do not specifically apply to employees working in a managerial capacity.

See also Practice Note, Notice of Termination (India).

Redundancy

Indian courts recognise redundancy of position as a valid ground for termination of employment (see for example the Madras High Court judgment in India Type and Rubber Co v Their Workmen, AIR 1958 Mad 205). Courts have in the past upheld redundancies on account of reasons such as:

- Cessation of a particular type of business activity.
- Automation and technological advancements.
- Organisational restructuring in the case of a merger and acquisition (M&A).

As the courts in India (especially the lower courts) tend to take a conservative and pro-employee approach, it is critical that the employer demonstrates (by way of adequate documentation):

- That the role is no longer relevant and is being eliminated from the organisation due to relevant business reasons.
- How each employee was selected or shortlisted.
- Given each of the employees' experience and skill sets, that there is no possibility of re-training them or providing other opportunities with the employer or its affiliates by way of an internal transfer.

The employer should create a business case of redundancy before employment termination. While this is not legally required, it would help demonstrate the genuineness of the reasons behind the termination should the employee challenge the termination in a court of law or if they raise an allegation of victimisation. All business cases should be documented at the Indian entity level as the Indian courts are unlikely to accept some global decisions made at the parent entity level.

The business case may alternatively be supported by a resolution of the board of directors of the Indian entity. If the termination is challenged in a court of law by an employee or group of employees or trade unions, a well drafted business case would help the employer demonstrate that the redundancy was not a sham and that there were adequate business reasons warranting the elimination of those roles.

Redundancy Process for Workmen

In cases of redundancy or reduction-in-force when terminating an employee who is a workman under the ID Act, the employer should take the following steps before making a final termination decision:

- Prepare and post (in a conspicuous place on company premises) a list of all workmen who will be retrenched, set out according to seniority of their service in that category, seven days before the employees' retrenchment date.
- Follow the rule of last in, first out for selecting an employee to be terminated. The employer must justify any deviation from that rule (section 25G, ID Act). This is only applicable to workmen category employees. There is no such selection criterion mentioned under the law for non-workmen category of employees.

Neither redundancy nor reduction-in-force are legally defined. Redundancy is typically interpreted in the context of an employee's role becoming redundant owing to the employer's business-related reasons. Reduction-in-force is generally used in case of mass redundancies leading to employment downsizing.

The ID Act also requires the employer to provide an opportunity to the retrenched workmen to offer themselves for re-employment if the employer employs any persons in the future. These workmen must be given preference over others (section 25H, ID Act). This typically applies only to workmen retrenched for redundancies.

Indian labour laws do not provide for any consultation process before finalising the decision to terminate individual employment for business reasons.

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The ID Act also has additional provisions for cases of closing down an undertaking. Employers are required to provide 60 days' notice to workmen (in establishments with at least 50 workmen) before closing down an undertaking along with payment of retrenchment compensation (sections 25FFA and 25FFF). Closure of establishments such as factories, mines, and so on which employ at least 100 workmen (in some states, the threshold is 300) requires approval from the labour authorities at least 90 days before the date of closure (section 25O).

Performance or Capability Reasons

Indian labour laws do not provide a specific list of performance or capability reasons for which an employer may terminate employment. Typically, in cases of employee non-performance, the employer should:

- Document the non-performance.
- Inform or provide regular feedback to the employee regarding the non-performance in writing.
- Provide an opportunity to the employee to improve performance.

Since termination due to poor performance is largely practice driven, employers adopt varied methods to handle the documentation. Typically, the employer should require their managers to provide performance feedback to their subordinates to ensure timely documentation of any employee non-performance.

Although not a legal requirement, employers typically implement a performance improvement process, whereby the employer documents its employees' performance following certain subjective and objective performance indicators.

A performance improvement plan may be helpful to prove the employer's efforts to provide the employee an opportunity to improve performance before the decision for termination was taken. There is no legally stipulated period for the performance improvement process, but it generally ranges from 30 to 60 days.

If the employee consistently fails to show improvement in performance, the employer may adequately document this and initiate a process of termination, if deemed necessary.

Performance issues are separate from misconduct. Employers should not confuse the two reasons for termination. The documentation for performance issues should be limited to the employee's inability to meet the desired performance standards (see the Supreme Court decision in Gupta v SNB National Centre, 2007(1) SLR45(SC)).

In India, there is no legal requirement to provide a "last chance agreement" to a non-performing employee. However, the employer should document the fact that the employee was provided an opportunity to improve their performance before it initiates the termination.

Misconduct

The IESOA typically applies to manufacturing establishments and commercial establishments in states where the Payment of Wages Act, 1936 applies under the state-specific Shops and Establishments Acts. Under the IESOA, the Model Standing Orders prescribe the following acts as misconduct:

- Fraud.
- Unauthorised absenteeism.
- Willful insubordination.
- Sexual harassment.
- Willful damage to the employer's property.
- Misappropriation.

An employer may take disciplinary action against an employee for that misconduct. A similar list is also provided under some state-specific Shops and Establishments Acts, such as Uttar Pradesh Dookan Aur Vanijya Adhishthan Adhiniyam, 1962.

The employer's policies or standing orders should set out what constitutes misconduct warranting termination of an employee through specific examples or in general terms.

Disciplinary Enquiry Process

Before the employer prescribes the applicable sanction (proportionate to the misconduct), the misconduct must first be proved through an internal disciplinary enquiry process based on the principles of natural justice.

Once the misconduct is established through a formal enquiry, an employer can terminate employment as a sanction, provided that the sanction applied is proportionate to the gravity of the misconduct (see BC Chaturvedi v Union of India, 1995 6 SCC 749).

The disciplinary enquiry process typically includes the following:

- **Charge sheet.** The employer must serve a charge sheet on an employee against whom an enquiry is initiated. The charge sheet states each of the charges against the employee and seeks their explanation for those charges. It must include adequate references to the relevant provisions in the employment contract, policies, or any applicable standing orders. While the charge sheet can be sent by registered post,

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it should be served in person where possible. An acknowledgement must be obtained on the office copy.

- **Preliminary fact-finding.** In some cases, the employer may conduct a preliminary fact-finding or investigation exercise to understand the nature of the misconduct.
- **Appointment of an enquiry officer.** An enquiry officer must be appointed to conduct the disciplinary enquiry. The enquiry officer must not be biased in any way and can be internal or external to the company.
- **Notice of enquiry.** The employee must be served with a notice of the disciplinary enquiry stating the date, time, venue, name of enquiry officer, and so on. The employer may need to issue appropriate letters to the employee if they provide an explanation for the charges or do not provide any explanation.
- **Principles of natural justice.** The enquiry must be held in accordance with the principles of natural justice, that is, the employee must be given:
  - proper notice of the enquiry;
  - a fair chance to present their case and defend themselves; and
  - an opportunity to produce any witnesses or cross-examine the witnesses produced by the employer.
- **HR policies.** The employer must comply with any specific procedure for holding a disciplinary enquiry set out in the company's policies, standing orders (if applicable), code of conduct, and so on.
- **Suspension and payment of subsistence allowance.** The employer may suspend the employee during the enquiry proceedings (although this is not warranted in all situations). Suspension is generally a security measure when the employee's continued presence in the workplace:
  - may lead to tampering with evidence;
  - may create unpredictable difficulties in conducting an impartial enquiry into the charges levelled against them;
  - could have an adverse effect on the morale of the other employees; or
  - could cause further loss to the company.

  The employee must be paid subsistence allowance during the period of suspension in accordance with the provisions of the applicable HR policies. If no subsistence allowance is provided for in the HR policies that are in place, the employer is required to pay full salaries to a suspended employee, in the absence of any laws permitting payment of a lower subsistence allowance.
- **Ex-parte enquiry.** If the employee refuses to attend before the enquiry officer after proper notice, the enquiry officer can conduct the enquiry in the employee's absence. Before holding an ex-parte enquiry, the employer should make every possible effort to serve the notice of enquiry personally. If service of notice is impossible, it should be published on the notice board of the company, as well as in newspapers having wide local circulation. Generally, if it can be proven that the employee was deliberately and willfully refusing to accept notice and appear before the enquiry officer, the enquiry officer can proceed with the inquiry ex-parte.
- **Calling witnesses.** During the enquiry, the employee as well as the employer may present witnesses before the enquiry officer. The employee must be given an opportunity to cross-examine the employer's witnesses and vice versa.
- **Enquiry report.** The enquiry must be conducted in accordance with any timeline provided by the employer's policies or standing orders (if any). Once the enquiry is complete, the enquiry officer must prepare an enquiry report, clearly stating the conclusion of the enquiry supported by reasons based on the facts and evidence presented before the officer.

Based on the enquiry officer's report and if the misconduct is proved, the employer can take appropriate disciplinary action to sanction the employee, including termination, if deemed proportionate and appropriate.

There is no legal requirement to communicate the findings of the enquiry to the employee. Some employers, based on their policies and standing orders (if any), and exercising caution, may provide a second notice of cause to the employee, along with a communication of findings of the enquiry report, before proceeding with termination.

Resignation

The ID Act does not contain any provisions on voluntary resignation. Resignation is a purely voluntary act on the part of the employee. Indian law does not prescribe any restrictions limiting an employee's ability to resign.

The ID Act does not specify any notice period obligations for a resigning employee. However, some standing orders and state-specific Shops and Establishments Acts require employees to provide their employer prior notice of a specific minimum period before stopping work after resigning.

Generally, offer letters or employment agreements govern the notice period and other requirements relating to voluntary resignation. In most cases, there are no statutory requirements governing employee resignation.

Certain statutory payments associated with termination of employment, including severance (retrenchment

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compensation) and notice period payments, do not apply in the event of voluntary resignation.

Employers in India generally prefer to encourage or incentivise the employee to voluntarily resign rather than terminate their employment. Since unlawful termination is one of the most litigated issues under Indian labour law, termination is typically considered the last resort. Voluntary resignation largely helps to mitigate litigation risk relating to unlawful termination.

The concept of constructive dismissal has not been statutorily recognised in India.

Unlawful Terminations

An employer is not legally allowed to serve a termination notice to an employee in the following circumstances:

- When a female employee is absent from work in accordance with the provisions of the Maternity Benefit Act, 1961, to:
  - discharge or dismiss that employee on account of the absence from work; or
  - give notice of discharge or dismissal on a day so that the notice will expire during the absence.
- To dismiss, discharge, reduce, or otherwise punish an employee during the period the employee is:
  - in receipt of sickness benefit or maternity benefit;
  - in receipt of disablement benefit for temporary disablement;
  - under medical treatment for sickness; or
  - absent from work due to illness arising out of pregnancy or confinement rendering the employee unfit for work.

(Employees' State Insurance Act, 1948 (ESIA).)

Employers should also be mindful of India's anti-discrimination laws, especially if the employee belongs to a protected category. The Rights of Persons with Disabilities Act, 2016, the Transgender Persons (Protection of Rights) Act, 2019 and the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 are some statutes that provide protections against discrimination in employment to certain categories of employees. Those employees may bring discrimination-related claims if proper procedure has not been followed for their termination.

Probationary Periods

The Model Standing Orders under the IESOA define the term "probationer" as a workman who is provisionally employed to fill a permanent vacancy in a post and has not yet completed three months' service. This definition applies only to establishments to which the IESOA applies (see Misconduct). However, since no other federal law provides this definition, some guidance can be taken from this definition itself.

In practice, the probationary period adopted by employers in India varies between three to six months from the date of commencement of employment. It is customary for the employer and employee agree the probationary period based on the employee's seniority level and experience.

If an employee is within a probationary period which is less than one year, the ID Act provisions relating to retrenchment do not apply, as the workman has not completed the minimum work period threshold (which is at least one year of completed service) (see Retrenchment).

However, state-specific laws may apply. For example, the Delhi Shops and Establishments Act, 1954 (DSEA) provides that the employer may terminate an employee who has been employed for at least three months, on giving one month's notice or pay in lieu. Accordingly, if the probationary period is more than three months, the provisions under DSEA on termination are still applicable since the applicability threshold is only three months.

If the employee wishes to resign during the probationary period, they must comply with:

- The notice period obligations under any applicable state-specific Shops and Establishments Acts.
- Any employment terms and conditions in the employment agreement between the parties.

Certain state-specific rules of central laws may also be applicable at the end of the probationary period. For example, in Maharashtra, the employer must issue an order in writing to make a probationer permanent in the post in which they are provisionally employed after the probationer has successfully completed three months' uninterrupted service in that post, within seven days from the date of completion of that service (Section 4-A, Maharashtra Industrial Employment (Standing Orders) Rules, 1959). If the probationer's services are unsatisfactory, the manager may terminate their services after their probationary period.

Termination Payments

The following statutory payments need to be considered in relation to termination:

- Accrued and unpaid wages up to the termination date.
- Payment in lieu of the notice period (minimum of one month as per the applicable laws. If the employment contract provides for a higher notice period, that

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higher notice must be provided). See also Practice Note, Notice of Termination (India).

- Severance (retrenchment compensation) calculated at the rate of 15 days' pay for every completed year of service or any part of a year in excess of six months. This only applies to workmen category of employees who have completed at least one year (interpreted as 240 days) of employment. Severance payment calculations are based on the definition of wages under the ID Act, which refers to gross wages.
- Gratuity in accordance with the Payment of Gratuity Act, 1972 (POGA). This is payable only to employees (by an employer of at least ten employees) who have completed at least five years (interpreted as four years and 190 days) of continuous service with the employer. Gratuity must be paid at the rate of 15 days' wages based on the rate of wages last drawn by the employee for every completed year of continuous service or part of a year in excess of six months (Section 4, POGA). The definition of wages under POGA is interpreted to mean basic wages. Gratuity is capped at INR2 million (POGA).
- Wages in lieu of accrued and unavailed (privilege or annual) leave up to a state-specific prescribed limit. The term "privilege leave" is interchangeably used with annual leave. It typically refers to leave which the employee is statutorily entitled to receive as a matter of right under the law.
- Arrears of statutory bonus, where applicable.

Any other accrued contractual dues such as bonuses, Employee Stock Option Plans (ESOP), and so on owed to the employee must be paid at the time of termination.

An employer cannot avoid compliance with the requirement to have a reasonable cause or permissible grounds for termination by offering severance, indemnification, or a similar payment.

If an employer terminates an employee and is unable to prove reasonable cause for termination before the courts in an unlawful termination claim, the court may order remedies (which may include compensation and reinstatement, for example).

If the employee resigns (rather than employer-led termination), there is no legal requirement to pay severance (retrenchment compensation), or any notice period payments mentioned above. However, all other payments listed above must be made.

Timelines

If the employment of any person is terminated by or on behalf of the employer, the wages they earned should be paid before the expiry of the second working day from the day of termination (Section 5(2), Payment of Wages Act, 1936). Payment of retrenchment compensation and notice pay should be before or on the date of retrenchment.

Date of Termination

The law does not specifically prescribe any guidance regarding the date of termination. Generally, the notice of termination cites the last day of employment, which is considered the effective date of termination, and when the rights and obligations of the employer and employee end. However, there are certain termination-related payments that must be made before the termination (see Timelines).

Termination and Other Related Agreements

There is no statutory requirement to execute a termination agreement in the case of employer-initiated termination.

Indian labour laws do not contain any specific provisions relating to mutual termination or mutual separation from employment. Generally, separation and release agreements are signed in the case of voluntary resignation or mutual separation (see Practice Note, Separation Agreements (Employment): India: Overview). In practice, and to ensure amicable separation, employers prefer to enter into mutual separation agreements with employees rather than initiate termination. However, these agreements largely remain untested by Indian courts.

A separation agreement contains clauses reminding the employee of their post-termination obligations, including confidentiality, IP, and non-solicit and non-compete restrictions. Post-termination non-compete clauses are not enforceable in India but post-termination non-solicit clauses may be enforceable if they are reasonable. Non-compete and non-solicit clauses within the term of employment are enforceable.

Typically, a separation agreement also evidences the payment of contractual ex-gratia payments to the employee, which also acts as consideration for signing the agreement. To be admissible as evidence in courts, it is advisable to have the agreement stamped as per applicable stamp duty law on or before the date of execution (see the Indian Stamp Act, 1899 and state-specific laws on stamp duty, which are applicable based on the state where the contract is to be executed, for example, the Maharashtra Stamp Act).

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