# Notice of Termination (India)

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A Practice Note setting out the obligations on the employer and the employee when providing notice on termination of employment in India.

It highlights the most common issues and questions that arise regarding notice when employment terminates in India, including the mechanics of issuing notice, employment during the notice period, and notice pay.

Notice is usually required to lawfully terminate employment (for exceptions to the requirement to provide notice, see *Practice Note, Fixed-term Contracts in India*.

There are a number of important legal issues that should be understood and considered when seeking to terminate an employee's employment on notice, including how and when to serve notice.

This Note considers the requirement to give notice, the length of notice, the mechanics of serving notice, employment under notice (including garden leave), notice pay, payments in lieu of notice, and the withdrawal of notice.

This Note does not consider collective terminations of employment.

## Contractual or Statutory Notice

There is no statutory requirement to state the relevant notice periods in the employment contract. However, employers generally prefer to specify the notice period in employment contracts for both the employer as well as the employee.

Sometimes, the contractual notice period is higher than the notice period prescribed under the applicable law. In fact, it is common practice in India to do so in select industry sectors, as one month is considered insufficient by several employers, especially for senior level employees.

In the absence of a contractual provision regarding notice period in the employment agreement, the statutory minimum notice period, as per the applicable law, will apply.

### Requirements of Notice

#### Notice Requirements for Employers

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

 

The terms of employment 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, if any), employment contract and HR policies, must also be considered. Generally, if the provisions in the employment contract are more favourable to the employee, they override the law.

### Workmen

The ID Act applies only to employees categorised as "workmen" who are persons employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. Workman excludes any employee:

- Primarily engaged in a managerial or administrative capacity.
- Employed in a supervisory capacity earning wages exceeding INR10,000 per month.

(Section 2, ID Act.)

In general, employment may be terminated by the employer in India only for a reasonable cause or on grounds of the employee's misconduct. Reasons such as poor performance of an employee, loss of confidence, redundancy or position elimination, can be treated as reasonable cause for employment termination, provided they are adequately documented and supported by evidence. Provisions relating to employment termination (retrenchment) of "workman" category employees are covered under the national law, the ID Act.

Under Section 2 (oo) of the ID Act "retrenchment" is defined as the termination by the employer of the service of a workman for any reason. Retrenchment excludes termination of employment for employee misconduct, for which a separate process must be followed, in line with the principles of natural justice. Retrenchment also excludes:

- Voluntary retirement of the workman.
- Retirement of the workman on reaching the age of superannuation (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), if the contract of employment between the employer and the workman concerned contains a stipulation to that effect.
- Termination of the service of the workman if their fixed-term contract is:
    - not renewed on its expiry; or
    - is terminated for any other reason stipulated in the contract.
- Termination of the service of a workman on the ground of continued ill-health.

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

- The workman either:
    - has been given one month's notice in writing indicating the reasons for retrenchment, and the period of notice has expired; or

 

    - has been paid wages for the notice period in lieu of such notice (see *Payment in Lieu of Notice (PILON)*).

- The workman has been paid 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 is served on the Government in the prescribed manner under the state-specific ID Act rules (see *Notice to Local Authority*).

(Section 25F, ID Act.)

Specific rules apply to industrial establishments such as factories, mines, or plantations having at least 100 workmen on an average working day in the past 12 months. This limit has been increased to 300 workmen in select Indian states and the proposed new labour codes in India increase the limit to 300 workers (see Section 77 of the Industrial Relations Code, 2020). For those establishments, the following are the necessary conditions for retrenchment:

- The workman has been:
    - given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired; or
    - paid wages for the period of the notice in lieu of such notice (see *Payment in Lieu of Notice (PILON)*).
- The workman 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 prior permission of the Government before retrenching the workman.

In addition, several state-specific Shops and Establishments Acts (state-specific laws which relate to working conditions of employment and are applicable to commercial establishments) contain provisions on notice. However, some states like Maharashtra do not have such notice clauses. Typically, the notice period is one month (30 days). For example, the Delhi Shops and Establishments Act, 1954 (DSEA), provides that the employer may terminate an employee's employment who has been employed for at least three months with the employer, on giving one month's notice or pay in lieu. If the employment contract provides for a higher notice period, it must be complied with. An onerous contractual arrangement cannot override the statutory protections provided to an employee. The employer, for example, cannot provide a lesser notice period than the one month prescribed by law. In general, the employer must follow the last in first out (LIFO) rule (Section 25G, ID Act) in case of retrenchment of workers. If the employer retrenches any other workman, the reasons for doing so should be recorded in writing so that the employer has a defence in court for the reasons why they deviated from the rule. The employer can then justify choosing another workman instead of the one who should be selected based on the LIFO rule.

The employer must give an opportunity to retrenched workmen who are citizens of India to offer themselves for re-employment as and when the employer proposes to employ any persons. In such a case, the retrenched workmen who offer themselves for re-employment are to be given preference over other persons (Section 25H, ID Act).

## Non-Workmen

 

For non-workmen category employees, the state-specific laws (Shops and Establishments Acts), employment contracts and company's HR policies would need to be considered for termination related provisions as there is no central law which applies to termination of non-workmen.

There are additional provisions under the ID Act in cases of closing down of an undertaking.

### Notice Requirements for Employees

The ID Act does not provide any notice period for a resigning employee. However, the Standing Orders and/or some of the state-specific Shops and Establishments Acts require employees to provide prior notice of a specific minimum period to the employer before cessation of their employment following voluntary resignation. For example, under the Punjab Shops and Commercial Establishments Act, 1958, an employee who has been in the service of the employer continuously for a period of three months, must provide 30 days' notice or pay in lieu of that notice when they resign.

A notice period longer than the statutory notice period can be agreed in the employment contract. Where the state law provides a particular notice period for the employee, it may not be necessary for an employee who is resigning to give any longer notice period that may be provided for in their contract of employment.

Generally, the notice period should be similar for both parties and if the notice period is greater than the law provides, this must be reasonable. A labour court is unlikely to accept a situation where the employer's notice period is one month, but the employee is required to serve a longer notice period. Labour courts are likely to consider the employee to be in a weaker bargaining position and would seek to protect the employee's interests. In such a case, the court may require a resigning employee to serve a similar notice period to that provided to the employer (see *Central Inland Water Transport Corporation Limited and Ors. vs. Brojo Nath Ganguly and Ors* (06.04.1986 - SC)), which discusses how an employer might have higher bargaining power, rendering the employment an unequal arrangement and violating Article 14 of the Indian Constitution).

## Notice to Local Authority

The employer must notify the labour authorities (which include conciliation officers, the chairman of the board of conciliation, labour courts/tribunals, chief or regional labour commissioners and so on) of the retrenchment of a workman who has been in continuous service for at least one year (Section 25F, ID Act). The timeline and format for such notices is prescribed under the central/state rules corresponding to the ID Act, which vary from state to state. For example, under the Industrial Disputes (Maharashtra) Rules, 1957, the authorities must be notified:

- 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 no such notice has been given but the workman is paid wages in lieu of notice.
- Either:
    - at least one month before the date of termination if such date is specified in an agreement where the retrenchment is carried out under an agreement; or
    - on the date of such agreement, where the date of termination is not so specified.

 

- However, for industrial establishments employing at least 100 employees (or 300 employees where this threshold has been increased), the state-specific rules of the ID Act require the employer to obtain the prior permission of the Government before retrenching the workman.

## Payment in Lieu of Notice (PILON)

Indian law allows for PILON to be made by the employer (see Section 25F, ID Act and notice period provisions under state-specific Shops and Establishments Acts). It is common to have employers pay in lieu of notice period in cases of dismissal for reasons of performance, downsizing and redundancy. It is not necessary to include a specific PILON clause in the employment contract, although it is good practice to do so.

There is no statutory reference on PILON to be made by an employee, except under a few state-specific Shops and Establishments Act (such as the Punjab Shops and Commercial Establishments Act, 1958, which provides that an employee who has been in the service of the employer continuously for a period of three months, is required to provide 30 days' notice or pay in lieu thereof, in case of resignation). It is also common for a PILON clause to be included in the employment contract, generally in favour of the employer.

## Amount of PILON

Employers should refer to the definition of "wages" under the applicable law to determine the amount of PILON.

The Payment of Wages Act, 1936 (POWA) defines wages as including all remuneration, whether by way of salary, allowances, or otherwise, but excludes certain components such as:

- Any bonus which does not form part of the remuneration payable under the terms of employment.
- The value of any house-accommodation, supply of light, water, medical attendance or other amenity or of any service excluded by general or special order of the State Government.
- Any contribution paid by the employer to any pension or provident fund.
- Any travelling allowance or the value of any travelling concession.
- Any special expenses paid to the employee due to the nature of their employment.
- Any gratuity payable (a payment that an employee is entitled to receive from an employer having at least ten employees, upon cessation of employment after continuous service of five years (interpreted as four years and 190 days) (see Payment of Gratuity Act, 1972)).

POWA applies to employees earning wages up to INR24,000 per month in industrial and other establishments (and commercial establishments to which POWA applicability has been extended through state-specific acts or separate notifications).

The ID Act is generally applicable to establishments including commercial establishments and defines "wages" as all remuneration including allowances and any commission to be paid, but excludes certain components such as bonus, pension or provident fund contributions and gratuity (Section 2 (rr), ID Act).

 

Accordingly, and depending on the state-specific law under which PILON is to be calculated, the components of base salary are applied. Any payments which are contingent on the employee remaining employed, such as contractual bonus or commission, may not be included for the purposes of calculating PILON.

The law is generally silent in respect of an employer allowing an employee to work part of the notice period and receive a PILON for the remainder. In the case of termination of employment by the employer, the employer may specify a contractual right to require an employee to work part of the notice period and receive a PILON for the remainder.

If PILON is not for the whole pay period but only for a part of the entire notice period (for example, if the pay period is one month, but a PILON is made for only two weeks), the PILON is made on a pro-rata basis, typically by calculating the per day wages of the employee.

## Timing of PILON

In the case of retrenchment of a workman by the employer under the ID Act, one of the necessary conditions is PILON, unless the workman is required to serve the notice period. Accordingly, in such a case, PILON should be paid prior to or at the time of issuing the notice of retrenchment.

For non-workmen category employees, there may be some flexibility in relation to the timing of payment of PILON, although in general, all termination payments (excluding gratuity) should be made by the end of the next working day.

PILON is a statutory payment and should be made as a lump sum (Section 25F, ID Act and notice period provisions under state-specific Shops and Establishments Acts).

It is advisable to clearly specify in the termination notice that PILON is being made and accordingly the employment is being terminated with immediate effect.

## Waiver of Right to Receive Notice

The employer must comply with the minimum requirements of the law. Accordingly, if there is a statutory requirement to provide notice to the employee, then it is not possible to contract out or waive such a right (see *Requirements of Notice*).

However, it is possible for the employer to waive the requirement for the employee to serve the notice period or the employer can agree a shorter notice period, in cases where the employee has resigned and has requested to leave earlier. In some cases, employers require the employee to pay in lieu of notice period and such a provision is included in the employment contract. However, if the employee is willing to serve the notice period after resignation, the employer is required to agree to it.

It is common to have employers pay in lieu of notice period in cases of dismissal for reasons of performance, downsizing and redundancy (see *Payment in Lieu of Notice (PILON)*).

The employer may also be able to enforce garden leave in certain cases (see *Garden Leave*).

## More Notice Given Than Required

 

If the employer or employee provides more notice than statutorily or contractually required, there is no legal requirement on the other party to accept (see *Requirements of Notice*). However, it is rare for parties to provide more notice than that which is required by law or contract at the time of employment termination.

Parties should inform each other that the notice provided is more than required by statute or contract and the period of notice should be revised accordingly. For example, if an employee resigns providing three months' notice while the contract required only two months' notice, and the employer does not require the employee to serve three months' notice, the employer should communicate this to the employee when accepting the resignation. The employee's confirmation should be obtained concerning the revised notice period if possible.

## When Notice Is Not Required

In general, the employer can only terminate employment for reasonable cause or on grounds of employee misconduct. Retrenchment is defined as the termination by the employer of the service of a workman for any reason, except, among other things, dismissal as a sanction by way of disciplinary action (ID Act) (see *Requirements of Notice*). Accordingly, in cases of termination of employment for misconduct, there is no requirement for the employer to provide a notice period, assuming this is consistent with the terms of the employment contract. The acts constituting misconduct are typically listed in the employer's Standing Orders or company policies.

## Failure to Provide Required Notice

### Employer's Notice Period

If the employer fails to provide the requisite notice to the employee (or pay in lieu of the notice period), the termination of employment can be held to be unlawful. If the contract provides for a longer notice period, non-compliance with such a requirement could be treated as unlawful termination and/or breach of contract, depending on the laws that are relied on by the employee when pursuing their claim.

The Limitation Act, 1963 provides a limitation period of three years for filing a suit from the date from when the right to sue accrues which, in this case, would be the date of termination of employment at which the required notice to the employee was not served.

If the employee is terminated without being served the requisite notice period, the employee can file a complaint with the labour authorities against the employer claiming unlawful termination. The first level of dispute resolution is conciliation, but this is not mandatory (see Sections 4 to 7 and 10 of the ID Act and applicable rules). If conciliation fails for a workman, the employee may need to prove that the termination of employment by the employer failed to comply with the requirements of law or contract. In cases where the statutory requirements are not complied with, a labour court may:

- Make an order of reinstatement.
- Order payment of back-wages and continuity of service.
- Award the employee reasonable costs of litigation.

The law allows the employer to pay wages in lieu of the notice period (see *Payment in Lieu of Notice (PILON)*). There are no other legal provisions concerning payment of a sum to buy-out a notice period.

 

### Employees' Notice Period

If an employee fails to serve the required notice under law or contract, the employer has a legal claim against the employee for breach. In practice, labour courts are unlikely to award damages beyond the notice period pay, unless the employer can prove actual damages. The employer may be able to seek damages for any losses incurred by the employer, although in some state level Shops and Establishments Acts the employee's liability is limited to the amount of pro-rata salary for such period (such as the Delhi Shops and Establishments Act, which provides that if a magistrate is satisfied that an employee has been dismissed without any reasonable cause or discharged without proper notice or pay in lieu of notice, the magistrate may, for reasons to be recorded in writing, award, in addition to one month's salary, compensation to the employee).

The employee litigation process in India is fairly challenging in view of the procedural requirements and the time taken. Indian courts are not known to grant extensive damages for such matters. There is also a reputational risk involved when litigating against an employee. Accordingly, if the employee fails to serve the notice period, employers typically tend to withhold/recover the notice period pay from any full and final payments to be made to the employee at the time of cessation of employment. However, legal enforceability of such a practice is questionable since it is not an authorised deduction from wages.

Since employment contracts are of a personal nature, it is unlikely for courts to grant an injunction preventing the employee from joining another company.

Also, it is common for prospective employers to agree with the candidate to buy-out the employee's notice period with the previous employer, typically by offering an additional payment to the candidate (terming it reimbursement, notice period buy-out pay, signing bonus or joining bonus). This is particularly if the prospective employers want the candidate to join early and the previous employer allows the employee to leave early.

### Dual Employment

In India, there is no legal restriction on dual employment, although there are certain provisions restricting dual employment during the rest day (rest day means leave or holiday given to the employee. For example, under the Andhra Pradesh Shops and Establishments Act, no employee is allowed to work in any establishment, nor shall any employer knowingly permit an employee to work in any establishment on a day or part of a day on which the employee is given a holiday or is on leave).

In the case of full-time employment, the employee is generally expected not to take up work for another employer, including while they are serving their notice period for their existing employer. However, in the absence of a specific legal prohibition, it is advisable to include such a restriction in the employment contract. This helps ensure that the employee devotes the whole of their working time, energy and attention to the employer's business to the best of their skills and abilities to promote the interests and welfare of the employer.

A contractual restriction on dual employment usually applies irrespective of whether the other employer is a competitor of the existing employer, although it is common to see specific provisions on absence of conflicts and related disclosures as part of an employment contract.

## Notice During Probationary Period

There are no statutory notice periods for an employee serving their probation period. The relevant notice period provisions apply to workmen who have been in continuous employment for at least one year (ID Act) (see *Requirements of Notice*). The notice periods under several state-specific Shops and Establishments Acts begin once the employee has completed either three or six months of employment.

 

Employment contracts may contain a notice period for termination of employment during the probation period, which would be a relatively shorter period than the notice period after completion of probation.

## Service and Mechanics of Notice

### Employer Authority to Serve Notice

The termination notice should be issued by an authorised representative of the employer, which typically is HR or a general manger. Such person may be authorised by the Board of Directors in the case of a company or by the partners in the case of a partnership firm. It is recommended that the same hiring authority also issues the termination notice.

### Rules on Serving Notice and Form of Notice

It is uncommon for termination notices to be issued orally, as Section 25F of the ID Act requires notice to be issued in writing. There is no specific statutorily prescribed mode of service for a termination notice. It is common to deliver the notice:

- In person (in front of witnesses).
- By registered post (with acknowledgement due).
- By speed post.
- By electronic mail (email).
- For non-workmen, the state-specific Shops and Establishments Acts require that notice be given in writing. Employment contracts also generally state that notice must be given in writing.

If the employment contract contains a notice clause, it should be complied with. Some employers prefer to serve notice through multiple modes to retain evidence of delivery.

The notice is typically served in the same language as the employment contract, provided that the employee can read and understand that language.

It is common to have a clear and unambiguous termination notice, confirming the following main points:

- The effective date and time of termination of employment.
- Details of payment of notice in lieu, severance, gratuity, leave encashment, and so on, as applicable.
- The continuing obligations of the employee (clauses from the employment contract may be cross-referred).
- The employee's obligation to return company property, documents, and files.

### Receipt of Notice

 

In general, there is no specific requirement for the termination notice to be acknowledged or accepted by the employee or employer ("receiving party"). However, the notice should be served in a manner so that the delivery of notice can be proved before the courts, if needed. It may be necessary for the employer to prove delivery of the notice to the employee in compliance with any employment contract provisions or otherwise.

There are no set precedents or guidance on the stage at which the termination notice will take effect. In general, depending on the mode of serving the termination notice, the employer should account for the time it takes for it to reach the recipient. In certain cases, the employment contract provides when notice will be deemed to have been received and takes effect.

## Start of Notice and the End of Employment

### Start and End of Notice

In general, the notice period starts from the date on which the notice is served on the employee and ends on completion of that period. Local state-specific Shops and Establishments Acts, however, state either 30 days or one month, and are not consistent. Accordingly, employers should be careful as to how they word their employment contract and termination notice. It is generally better to provide for a certain number of days instead of months, to avoid a situation where an employee might claim that the notice period can end only at the end of the month and not before.

The date that the notice is served is typically included when calculating the date on which the notice period ends. If, for example, the notice period is 30 days and the notice of termination is served on the 15th of the month, the notice period starts on the 15th and ends on the 14th of the next month (if it is a 30-day month). However, to avoid any uncertainty, the employer may provide one extra day of notice to complete the required notice period. If the termination notice has been issued and served correctly, the employment terminates on the date on which the notice period ends.

If part of the notice period is worked and the employee is paid in lieu for the remainder of the notice period, the employment terminates on the date on which the employment ends after the part-notice is served (see *Payment in Lieu of Notice (PILON)*).

### Notice for New Terms and Conditions

#### Workmen

An employer must serve 21 days' prior notice to the affected workmen category employees (Section 9A, ID Act) and subject to state-specific rules, to the labour authorities, if a (detrimental) change is made to select service conditions, as prescribed under law (see Schedule IV, ID Act). Additionally, a contract may be amended with the consent of both parties, unless the contract allows for a unilateral change. Imposing new terms and conditions does not constitute termination of employment under Indian law.

The law does not specify that constructive dismissal can apply in this context. There are, however, certain situations where a workman can claim unfair labour practices on the part of the employer (see Schedule V, ID Act).

#### Non-Workmen

There is no such notice requirement for non-workmen category employees. An employer may impose new terms without 21 days' notice. However, this must be subject to any employment contract terms agreed and/or signed

 

between the employee and employer for making any revisions to the contract. Under contract law, any such revisions to terms require the consent of both parties and cannot be unilateral.

## Retrospective Notice

A termination notice cannot be served retrospectively. Service of notice is a necessary condition for retrenchment of a workman (Section 25F, ID Act) (see *Requirements of Notice*).

## Notice Cannot be Served

Certain laws disallow an employer from serving a termination notice in certain circumstances, for example:

- The Maternity Benefit Act, 1961 (MBA), prohibits an employer from:
    - discharging or dismissing a female employee during or on account of her absence from work in accordance with the provisions of MBA; or
    - giving notice of discharge or dismissal on such a day that the notice will expire during the female employee's absence in accordance with the provisions of the MBA.

- The Employees' State Insurance Act, 1948 (ESIA), prohibits an employer from dismissing, discharging, reducing or otherwise punishing an employee during the period the employee is:
    - receiving sickness benefit or maternity benefit;
    - receiving disablement benefit for temporary disablement;
    - under medical treatment for sickness;
    - absent from work due to illness arising out of pregnancy or confinement rendering the employee unfit for work.

Employers should also be mindful of the anti-discrimination laws in India, especially if the employee belongs to a protected category (such as the Rights of Persons with Disabilities Act, 2016, Mental Healthcare Act, 2017 and Transgender Persons (Protection of Rights) Act, 2019 which protect certain categories of employees. Such employees may bring discrimination related claims if proper procedure has not been followed for their employment termination).

## Withdrawal of Notice

A termination notice may be withdrawn unilaterally by the party that served the notice. Indian courts have generally held that an employee cannot withdraw a resignation once it has been accepted by the employer. It is advisable, however, for employers to accept the resignation once tendered by the employee, as whether the employee can withdraw their notice depends on the circumstances of each case. There is also case-law where employees have been allowed to withdraw their resignation (see *Air India Express Limited and Ors. vs. Gurdarshan Kaur Sandhu*, where the Supreme Court held that while the general rule is that an employee may withdraw their prospective resignation any time before it becomes effective, such rule is subject to two exceptions: the presence of a provision to the contrary in the contract of employment, applicable employee service rules or a legal bar on withdrawal; and arrangements already made by an employer to find a job replacement, acting on the employee's resignation).

 

There are no legal provisions on shortening or extending a notice once issued. An employer may not be able to shorten the notice period unless it pays in lieu of the remainder of the notice period, if permitted by law or contract (see *Payment in Lieu of Notice (PILON)*). Additionally, an employee may refuse to serve an extended notice period, especially if the employee has secured alternative employment.

There could also be situations where, after the employer or employee has served notice, the employee's employment is terminated by the employer with immediate effect for misconduct, provided the necessary procedure is followed. The disciplinary inquiry should be based on the principles of natural justice in establishing the act of misconduct, prior to terminating the employment. As a first step, a charge-sheet must be issued by the employer to the employee, clearly stating the charges (act of misconduct) levelled against them and requiring them to respond within a stipulated timeframe. An inquiry officer may be appointed requiring the employee to appear before them to present their case. If the employee does not appear before the inquiry officer, the officer may conduct the inquiry proceedings ex-parte and issue the report to the employer stating whether misconduct was proved. Based on the report of the inquiry officer, the employer may take necessary action (see *When Notice Is Not Required*).

## Pay During Notice

An employee is entitled to receive their regular salary and benefits during their notice period. This applies irrespective of whether the employee is required to work during their notice period or if the employee is placed on garden leave (see *Garden Leave*). However, if an employee does not work during the notice period when required to do so by their employer, the employer may choose not to pay the employee under the concept of "no work no pay". An employee may be able to get paid time off in accordance with their rights under the applicable law (leave related provisions are under state-specific Shops and Establishments Acts, for example, section 18 of the Maharashtra Shops and Establishments Act) and the employer's leave policies, and on complying with necessary procedural requirements. This would also be the case for unpaid time off, although it largely depends on the employer's approval.

## Garden Leave

The concept of garden leave is not provided for under Indian labour laws.

There is no legal requirement to have a separate written garden leave agreement in place. Generally, a garden leave clause in the employment agreement and/or in the termination agreement (if any), should suffice. If the right to place an employee on garden leave is not in any written agreement, however, it could be challenged by the employee. However, as long as the employee is receiving regular salary and benefits during the garden leave period, it should be acceptable irrespective of whether the employment contract contains a garden leave clause.

Subject to the terms of the contract, it is possible for an employer to require an employee to work part of the notice period and be placed on garden leave for the remainder. In theory, it is possible to place an employee on garden leave prior to serving the termination notice.

However, it would be unusual to do so, since the concept is linked to notice period. Based on case law (see *VFS Global Pvt Ltd vs Suprit Roy* (2008(2) BomCR446)), garden leave may be enforced only during the term of employment and not after the termination date when the employment relationship has ended.

Employers typically use garden leave to keep the exiting employee away from ongoing projects, customers or vendors, so as to reduce the risk of business disruption, especially if the employee is joining a competitor. Reduced access to the employer's confidential matters or business strategies will help reduce the possibility of theft, breach or misuse of the employer's confidential information. In some cases, the exiting employee may also influence or

 

attempt to solicit the other employees or otherwise create disruption at the workplace, and therefore placing such an employee on garden leave may be beneficial.

Also, as a matter of Indian contract law post-termination non-competition clauses are void, and hence garden leave may be the only option available to the employer during the limited term of employment for non-competition.

For an employee, a garden leave period acts as a good opportunity to use that time to apply and appear for job interviews while having the financial security of continuing to receive salary and benefits. In practice, it is relatively easier for an employee to secure an alternative employment offer whilst still in their previous employment.

There is no maximum length of garden leave prescribed by law. However, it would be unusual for an executive to be subject to an 18 months' garden leave period, for example.

The employer cannot force the employee to use their annual leave at any time including during the garden leave period. An employee's annual leave entitlement is a statutory right. It is the employee's prerogative to exercise this right at any point of time during their employment (although the employer may refuse an employee's request for annual leave for business related reasons).

Since the employer-employee relationship continues during the garden leave period, the garden leave period does not impact any of the employee's employment-related benefits. The employer must ensure that the employee gets their regular salary and benefits during their garden leave.

**END OF DOCUMENT**

 