

HR Law Hotline

June 28, 2023

DEI SERIES: PART 2: DEI OBLIGATIONS AT THE WORKPLACE

- Diversity, Equity and Inclusion (DEI) at workplace has become crucial for global employers looking to encourage healthy workplaces.
- In this hotline, we focus on Indian laws promoting DEI practices at the workplace.

“Our ability to reach unity in diversity will be the beauty and the test of our civilization.” ~ Mahatma Gandhi.

In India, the home for 1.4 billion people, diversity transcends to embrace and celebrate humanity's myriad hues through gender, caste, region, religion, ethnicity.

Articles 14, 15, 16 and 39 of the Constitution of India constitute the bedrock of diversity protection and anti-discrimination in India. Article 15 of the Constitution of India says that no one should be treated unfairly because of their religion, race, sex, caste, place of birth or any of them. It promotes equality and fairness for all. Article 16(1) mandates equality of opportunity in public employment (does not include private sector) and prevents discrimination based on religion, race, descent, place of birth, caste, sex, residence, or any combination of these reason in any public employment or office.

OVERVIEW OF ANTI-DISCRIMINATION LAWS IN INDIA

Indian laws require employers to ensure that there is no discrimination in employment against individuals with disability, transgender status or HIV status (may also extend to their family members). Additionally, employers should ensure equal pay for male and female employees for same work or work of similar nature while prohibiting discrimination against female workers in matters relating to recruitment, training, promotion, or transfer.

What constitutes ‘discrimination’ can vary based on the context. For example: In respect of persons with disability, discrimination means “any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation”. While there is no specific sanction against discrimination in employment which can impose a disproportionate burden upon employer, it may lead to reputational risk.

There are other anti-discrimination laws protecting individuals belonging to notified scheduled castes and tribes from discriminatory actions, providing criminal sanctions against persons committing such actions, besides reputational risk.

Additionally, Indian laws also prohibit termination or reduction of service benefits for female employees who are on maternity leave and certain employees who are receiving statutory benefits for illness or disability. These laws impose monetary and criminal sanctions against employers violating such restrictions.

There is also a requirement for employers to re-hire employees who need to quit service to join the territorial army. Dismissal of any such member of territorial army, unless proven otherwise, may be presumed to be with intention to avoid such an obligation.

There are also laws on protecting rights of persons with mental illness.

OTHER LAWS PROMOTING DIVERSITY AT WORKPLACE

Many global employers with local presence in India are looking to roll out DEI initiatives aligned with their global practices. Some of the Indian anti-discrimination statutes such as Rights of Persons with Disabilities Act, 2016 (“**RPD Act**”), Transgender Persons (Protection of Rights) Act, 2019 (“**TPPR Act**”) and Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (“**HIV Act**”) have been enacted in the last few years, keeping in mind the global movement towards inclusion and diversity. Besides federal rules for implementation of such laws, many Indian states are enacting their state specific rules for implementation of these laws within such states.

Laws protecting women

To address sexual harassment of women at the workplace, the Indian government had enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which completes 10 years in 2023 (“**PoSH Act**”). The PoSH Act requires all employers to adopt and widely publish a policy to prevent sexual harassment against women at their workplace and conduct regular sensitization programs for their employees and internal committee members on provisions of the law. The PoSH Act also requires employers with at least 10 employees to constitute an internal committee at their workplace to address complaints of sexual harassment,

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besides other related compliances thereto. While the PoSH Act protects only women, we have come across employers adopting gender neutral policies to address sexual and workplace harassment committed by and against individuals of all genders at the workplace.

For gender parity in wages, the Equal Remuneration Act, 1976 ("**ER Act**") requires employers to pay equal remuneration to men and women workers for same work of similar nature. Employers are prohibited from discriminating against women in the process of recruitment, promotions, training or transfer, unless prohibited by law.

The Maternity Benefit Act, 1961 ("**MB Act**") prohibits dismissal of any female employee while she is on maternity leave. MB Act was recently amended in 2017 to provide eligible employees with up to 6 months of maternity leave, and creche facilities at establishments with at least 50 employees.

In recent years, several Indian states have permitted commercial establishments within their jurisdictions to engage female employees in night shifts, subject to their consent and compliance with several safety and security related conditions. Many states such as Haryana, Karnataka, Telangana, Tamil Nadu etc. have notified amendments or exemptions under such laws to permit engagement of female employees in factories and commercial establishments at night, subject to compliance with certain conditions. Employer obligations to enable such night shift work include inter alia obtaining written consent of women employees for working in night shifts, providing supporting infrastructure to women employees working from office at night such as canteens, well-lit corridors/passages, providing transportation facilities from homes of the women employees to office premises and back, ensuring presence of adequate security on office premises and to accompany women on cab rides, ensuring GPS tracking facility on transportation provided to women employees working at night etc.

The Kerala government has recently announced to grant menstrual leaves to female students at state universities. However, the Supreme Court of India has refused to comment on the same, leaving the matter for consideration of policymakers.

Laws protecting individuals belonging to LGBTQ+ groups

Besides the TPPR Act prohibiting discrimination against transgender persons in employment, the Transgender Persons (Protection of Rights) Rules, 2020 require all establishments to have an equal opportunity policy for transgender individuals. Recently, the state of Tamil Nadu has also notified state rules under TPPR Act.

Additionally, the Code on Wages, 2019 (provisions of which are yet to be made effective) provides for equal remuneration for same work for all employees irrespective of their 'gender'.

Laws protecting persons with disabilities

The RPD Act requires all establishments to have an equal opportunity policy in place which needs to be displayed on the website or in the establishment in a conspicuous place. The RPD Act also requires employers to provide reasonable accommodation to employees with disabilities unless it is an undue burden to the employer.

Laws protecting individuals belonging to protected categories

The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 ("**SCST Act**") provides for prevention of commission of offenses and atrocities against members of the Scheduled Castes and the Scheduled Tribes. The amendments and a SC decision on the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 provides that no preliminary inquiry is required for registering an FIR against an individual for atrocity against a member of scheduled caste/ scheduled tribe.

Laws protecting individuals having certain health conditions

The HIV Act prohibits discrimination against persons with HIV in employment context. The HIV Act read with its rules requires employers with at least 100 persons to comply with certain additional obligations such as regular sensitization of their employees, adopting certain policies etc. Recently, the Ministry of Health and Family Welfare has notified the model HIV policy ("**HIV Policy**") for establishments carrying out business for at least 12 months.

As per the Mental Healthcare Act, 2017, individuals with mental illness have a right to equality and non-discrimination in provision of all healthcare. The Mental Healthcare Act, 2017 also upholds rights of persons with mental illnesses to confidentiality in respect of their mental health conditions, mental healthcare, treatment and physical healthcare.

Besides, it is forbidden for employers to terminate or impose disciplinary actions on employees who are currently receiving sickness, maternity, or disablement benefits under the Employees' State Insurance Act, 1948 ("**ESI Act**"), or are absent from work due to sickness, as certified in accordance with the regulations set forth in the ESI Act.

COLLECTION OF DIVERSITY INFORMATION

While there is no legal requirement to collect self-identified racial or ethnic information from employees, employers are required to maintain census of their male and female employees in a prescribed format, which may need to be presented for inspection in case of a labour audit. Employers pro-actively collecting diversity information from employees may also find it challenging to claim ignorance if the employees later claim discrimination based on their protected characteristics.

Additionally, certain categories of electronic information such as an individual's physical, mental and physiological condition, sexual orientation, medical records and history, biometric information, etc. are considered as sensitive personal data or information (SPDI) under Indian data privacy laws, subject to applicable compliances. Diversity data in nature of SPDI will need to be collected by the employer only upon receiving employee consent and processed in compliance with the data protection rules.

LOOKING FORWARD

Progressive employers are keen on promoting diversity at their workplaces in alignment with Indian law and culture. Encouraging diversity and inclusion at the workplace may generate higher employee engagement, besides providing the employer a wider perspective.

Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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– **HR Law team**

You can direct your queries or comments to the authors.

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