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INTERNATIONAL

The Littler International Guide

India

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CONTRIBUTING FIRM

Nishith Desai Associates

INDIA GUIDE - CONTACT INFORMATION:

Nishith Desai Associates

Sahil Kanuga | sahil.kanuga@nishithdesai.com
Deepti Thakkar | deepti.thakkar@nishithdesai.com

93-B Mittal Court, Nariman Point, Mumbai 400021, India
+91 (22) 6669-5000 | www.nishithdesai.com

Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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ABOUT THE LITTLER INTERNATIONAL GUIDE

For more than 15 years, Littler has published the International Guide, which provides a comprehensive, comparative analysis of workplace laws and regulations for more than 45 countries and territories. Written by a combination of Littler attorneys and selected attorneys and scholars from around the globe, the compilation tracks the employment cycle in a Q&A format, with each jurisdiction providing responses to the same questions. Recently redesigned to add new questions that address relevant trends, the Guide helps multinational corporations respond to the needs of the changing global workplace. With the recent redesign, each Guide contains additional information prepared by the editors: an introduction to each section to provide readers an overview of the scope of coverage, and a Glossary of Terms at the end of the Guide.

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1. Setting Up Business & Structuring the Employment Relationship

Once a company makes a business decision to open operations in a country, from an employment law standpoint, a company must decide what corporate structure it plans to use or establish when hiring workers in the new country. This section provides information on the employment relationship and the various types of workers (*e.g.*, employees, independent contractors, temporary workers, and outsourced workers) recognized within the country. This section also details key employment considerations for: (1) hiring employees directly or through the creation of local entities; (2) hiring workers through third-party entities; (3) utilizing outsourcing services; and (4) addressing worker misclassification.

New terminology in this area, such as an "employer of record (EOR)" or "digital nomad," are included in the ***Glossary of Terms*** at the end of this Guide.

1.1 Is a business without a physical presence in the country required to create a local entity to engage local workers?

As per Indian law, all foreign companies must register locally prior to conducting business for which employees are to be hired. Specifically, all foreign employers must:

- Register to obtain approval from the Reserve Bank of India (RBI) to set up a branch, liaison, or project office.
- Once registered and the branch, liaison, or project office is set up, there are additional registrations with the corporate, labor, and tax authorities.

Alternatively, a foreign company may choose to set up a local entity in India. The question of whether a separate company should be set up and, if so, in which legal form, largely depends upon tax considerations, how the company wants to present itself on the Indian market, and what is the most practical way to ensure the company meets all employer obligations with regards to employment, social security, and tax law.

In India, the most common types of entities that may be formed by a foreign company are:

- **Liaison Office (LO):*** An LO is suitable for foreign companies that wish to set up a representative office in India to act as a facilitator between the parent/holding company and its operations/proposed markets within India. This entity must be set up in accordance with the Foreign Exchange Management Act. Foreign employers must have RBI approval prior to setting up this type of entity.
- **Branch Office (BO):*** A BO may be set up in India to undertake certain specified activities. In addition to obtaining RBI approval, this entity must be set up in accordance with the Foreign

Exchange Management Act. Foreign employers must have RBI approval prior to setting up this type of entity.

- **Project Office (PO):*** A PO may be set up in India wherein the foreign company has secured a contract from an Indian company to execute a project in India.
- **Company:** The activities of a company in India are governed by the provisions of the Companies Act, 2013 (CA 2013), and the charter documents of the company must be approved by the Registrar of Companies at the time of its incorporation. A company may be incorporated by filing necessary documents with the Registrar of Companies in the state in which the company is to be formed.
- **Limited Liability Partnership (LLP):** An LLP, which was introduced under the Limited Liability Partnership Act, 2008, is a corporate body with a distinct legal entity separate from its partners. An LLP adopts a corporate form combining the organizational flexibility of partnership with limited liability for its partners.

*An LO, BO, or PO must be established in accordance with and governed by the Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or Any Other Place of Business) Regulations, 2016 notified by the RBI under the Foreign Exchange Management Act, 1999. Such laws restrict the activities that can be undertaken by an LO, BO, or PO.

Employers risk being exposed to monetary penalties, which may extend up to 300% of the amounts involved, for failing to create an entity and register in accordance with the country's law.

1.2 Is a business permitted to engage a third-party entity to either assume the role of employer or to employ individuals locally? If so, are there restrictions on these arrangements?

In recent years, India has seen the setup of a large number of employers of record (EOR), professional employer organizations (PEO), and other staffing companies. As India is a services economy, foreign companies are increasingly relying on using Indian talent to further their business. In cases where the foreign companies do not have a local entity, EOR and PEOs increasingly are being used. This is in addition to various Indian companies in the technology and outsourcing sectors that are providing services to their foreign clients.

There are no particular legal restrictions or risks involved in engaging EOR and PEO service providers in India, although care should be taken to ensure that the EOR / PEO firm complies with all applicable laws and contractual arrangements with respect to the employees employed for the foreign company.

1.2(a) *Employer of Record*

Yes, workers may be hired through an EOR in India.

1.2(b) *Global Employment Organization*

Yes, workers may be hired through a global employment organization in India.

1.2(c) *Professional Employer Organization*

Yes, workers may be hired through a PEO in India.

1.2(d) *Temporary Work Agencies or Staffing Firms*

Yes, workers may be hired through a temporary work agency in India.

1.3 Is outsourcing allowed, and what are the legal considerations to reduce a company's exposure to liability?

India is known as the outsourcing capital of the world and outsourcing remains a priority for the government in terms of encouraging and providing incentives. Foreign companies have been heavily relying on Indian outsourcing companies (*i.e.*, service providers) to provide back-end support and solutions, with arrangements ranging from a standard outsourcing contract to a Built-Operate-Transfer contract, depending on the commercial arrangements between the parties.

One of the traditional forms of outsourcing is the supply of manpower or staffing services between two or more domestic employers/companies, an area that is regulated in India under the Contract Labor (Regulation and Abolition) Act, 1970 (CLRA). The principal employer (*i.e.*, service provider) and the contracting agency (*i.e.*, company) must obtain prior permission from the labor authorities if the total number of contract laborers (*i.e.*, workers) exceeds the prescribed thresholds. The service provider (contractor) must be licensed under the CLRA to supply contract labor. Noncompliance with the CLRA could result in monetary fines and/or imprisonment, in addition to claims from contract labor to be absorbed as permanent employees of the principal employer.

1.4 What are the major laws that govern the employment relationship?

Employment relations in India are governed by:

- **Constitutional Provisions:** The Constitution of India ("Constitution") is the supreme law of the land. Article 246 of the Constitution addresses the distribution of legislative powers between the Union legislature (Parliament) and state legislatures. As per this article, both the Parliament and state legislatures have the power to make laws with respect to the matters enumerated in List III of the Seventh Schedule (also referred to as the "Concurrent List"). Entries 22–24 and Entry 36 of the Concurrent List confer wide powers on the Parliament and the state legislatures to secure the welfare of labor, including the regulation of conditions of work, employment in industries, provident fund, employer's liability, workmen's compensation, social insurance, social security, maternity benefit, etc. The Concurrent List also deals with trade unions, industrial and labor disputes, and factories.
- **Central (Federal) Legislations:** India has over 44 central (federal) labor and employment laws. Some of the important labor and employment law legislations include:
  - **Industrial Disputes Act, 1947 (IDA):**[1] The IDA primarily provides for settlement of industrial disputes between employer-employee(s) and employee(s)-employee(s). The IDA *inter alia* contains provisions with respect to unfair labor practices, layoffs, retrenchment (termination), strikes, lockouts, and closure of an establishment. The IDA applies only to individuals categorized as "workmen" and specifically excludes persons

[1] This law is proposed to be replaced by the Industrial Relations Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

who are primarily employed in a managerial or administrative capacity or supervisors who draw a monthly salary exceeding INR 10,000.[2]

- **Factories Act, 1948 (FA):**[3] The FA covers the safety and welfare of workers employed in factories and regulates working conditions such as work hours, leaves, holidays, overtime pay, and employment of women and children. The statute is enforced by state governments.
- **Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act"):**[4] This Act provides the framework for industrial establishments. The Act also provides model standing orders for covered employers. The law mandates every covered employer of an establishment to provide clear and precise terms and conditions of service, which is to be certified by the concerned labor department and thereafter enacted.
- **Equal Remuneration Act, 1976 (ERA):**[5] The ERA provides for equal payment for men and women performing the same work and prohibits discrimination against women at the time of recruitment and during the course of employment.
- **Payment of Wages Act, 1936 (POWA):**[6] The POWA regulates the payment of wages to employees including the time and manner of payment and permissible deductions. In 2017, the salary threshold for applicability of the POWA, was increased to INR 24,000 per month.
- **Minimum Wages Act, 1948 (MWA):**[7] The MWA empowers the central and state governments to determine the minimum wages payable to employees. Minimum wages payable are determined based on the type of industry, location, and nature of work done. The state governments periodically prescribe and revise the minimum wage rates for both the organized and unorganized sectors.
- **Payment of Bonus Act, 1965 (POBA):**[8] The POBA provides for the payment of a statutory bonus to eligible employees (*i.e.*, employees drawing wages less than or equal to INR 21,000 per month) employed in covered establishments (*i.e.*, establishments employing 20 or more employees) and to be paid under certain defined circumstances.

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[2] This threshold will be revised to INR 18,000 for the Industrial Relations Code, 2020; and INR 15,000 for the purpose of Code on Wages, 2019, on notification of their respective provisions.

[3] This law is proposed to be replaced by the Occupational Safety, Health and Working Conditions Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

[4] This law is proposed to be replaced by the Industrial Relations Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

[5] This law is proposed to be replaced by the Code on Wages, 2019, which has been notified (published in the official gazette) on August 8, 2019, although its effective date is yet to be separately notified.

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- **Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPFA):**[9] The EPFA applies to establishments employing at least 20 employees. It provides for the institution of a provident fund, family pension, and deposit-linked insurance for eligible employees (*i.e.*, employees drawing wages up to INR 15,000 per month or employees who may have been making contributions during their employment with their previous employer) in covered establishments.
- **Employees' State Insurance Act, 1948 (ESIA):**[10] The ESIA provides for certain benefits to eligible employees (*i.e.*, employees drawing wages up to INR 21,000 per month) in case of sickness, maternity, and employment injury. These benefits are provided by the Employees' State Insurance Corporation constituted under the ESIA. The ESIA is applicable to establishments employing at least 10 employees.
- **Payment of Gratuity Act, 1972 (POGA):**[11] The POGA provides for the payment of gratuity to employees who have rendered continuous service of not less than five years (interpreted to mean four years and 190 days) employed in covered establishments upon cessation of employment.
- **Employees' Compensation Act, 1923 (ECA):**[12] The ECA provides for payment of compensation to employees or their family members in case of accidental death, occupational diseases, or disablement (partial or total disablement).
- **Contract Labor (Regulation and Abolition) Act, 1970 (CLRA):**[13] The CLRA regulates the employment of contract labor, the duties of the contractor and the principal employer and prohibits the use of contract labor in certain situations.
- **Child Labor and Adolescent Labor (Prohibition and Regulation) Act, 1986 (CLPRA):** The CLPRA places a complete ban on employing *children* (age 14 years or less) except in certain limited situations. It regulates the working conditions of children in such situations. The CLPRA also prohibits employment of adolescents (between 14 and 18 years of age) in hazardous occupations and processes.
- **Maternity Benefit Act, 1961 (MBA):**[14] The MBA regulates the employment of women in certain establishments for certain periods before and after childbirth and provides for maternity benefits and certain other benefits.

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[9] This law is proposed to be replaced by the Code on Social Security, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

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- **Trade Unions Act, 1926 ("TU Act"):**[15] The TU Act provides for registration of trade unions and sets the rules relating to a registered trade union, including their rights and duties.
- **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act"):** The POSH Act prescribes a mechanism for protection and prohibition of sexual harassment of women at the workplace and provides for redressal of grievances pertaining to workplace sexual harassment.
- **Rights of Persons with Disabilities Act, 2016 (RPDA):** The RPDA seeks to protect disabled persons from various forms of discrimination, introduces measures for their effective participation and inclusion in the society, and ensures equality of opportunity and adequate accessibility. While most of the obligations under the RPDA are cast upon the appropriate government and/or local authorities, certain obligations/duties are also cast upon establishments (including in the private sector).
- **Transgender Persons (Protection of Rights) Act, 2019 ("TPPR Act"):** The TPPRA provides for protection of transgender persons against any form of discrimination and ensures equality of opportunities for such persons.
- **The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Protection and Control) Act, 2017 ("HIV Act"):** The HIV Act prohibits discrimination of a person who is HIV positive or who is living or has lived with an HIV-positive person in employment of occupation and prohibits HIV testing as a prerequisite for obtaining employment.

- **Legal Codes:** Some relevant employment related legal codes are:
  - Code on Wages, 2019 ("Code on Wages") seeks to consolidate and replace four individual laws relating to wages and bonus, including the POWA, POBA, MWA, and ERA.
  - The Occupational Safety and Health Code, 2020 ("OSH Code") seeks to consolidate and replace 13 individual laws regulating the occupational safety, health and working conditions of the employees in an establishment, including the FA and CLRA.
  - The Industrial Relations Code, 2020 ("IR Code") seeks to consolidate and replace three individual laws relating to trade unions, conditions of employment in industrial establishment or undertaking, investigation and settlement of industrial disputes, namely the IDA, TU Act and Standing Orders Act.
  - The Social Security Code, 2020 ("SS Code") seeks to consolidate and replace nine individual laws relating to social security, including the EPFA, ESIA, ECA, MBA, and POGA.

1.5 What categories of workers are recognized, and what tests do courts or agencies use to evaluate these categories?

The following categories of workers are recognized in India:

[15] This law is proposed to be replaced by the Industrial Relations Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

Employee

The term *employee* differs depending upon the legislation.

For instance, the IDA defines *workman* as:

> any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward, whether the terms of employment be express or implied. However, a workman under the IDA does not include a person who is employed mainly in a managerial or administrative capacity, or a supervisor who draws a monthly salary exceeding Indian Rupees (INR) 10,000.[16]

The Shops and Establishments Acts (SEAs) of different states also define the term *employee* or *worker*. For example, the Delhi Shops and Establishment Act defines the term *employee* as follows:

> a person wholly or principally employed, whether directly or otherwise, and whether for wages (payable on permanent, periodical, contract, piecerate or commission basis) or other consideration, about the business of an establishment and includes an apprentice and any person employed in a factory but not governed by the Factories Act, 1948 (43 of 1948), and for the purpose of any matter regulated by this Act, also includes a person discharged or dismissed whose claims have not been settled in accordance with this Act"

The Code on Wages defines the term *employee* as follows:

> any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and also includes a person declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.

The Code on Wages also contains a more comprehensive definition of *worker* as follows:

> any person (except an apprentice as defined under clause (aa) of section 2 of the Apprentices Act, 1961) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes (i) working journalists as defined in clause (f) of section 2 of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; and (ii) sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976, and for the purposes of any proceeding under this Code in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched or otherwise terminated in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute; but does not include any such person (a) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or (b) who is employed in the police

[16] Industrial Disputes Act, 1947, sec. 2(s).

service or as an officer or other employee of a prison; or (c) who is employed mainly in a managerial or administrative capacity; or (d) who is employed in a supervisory capacity drawing wage of exceeding fifteen thousand rupees per month or an amount as may be notified by the Central Government from time to time.

Hence, it is necessary to ensure that the relevant definition is relied upon while interpreting the arrangement. There are also various case laws that help interpret the employment or master-servant relationship, especially where the employer is entitled to control or direct the employee's work and impose rules of conduct and standard of performance.

Independent Contractor

There is no separate definition of an independent contractor or a consultant under Indian labor laws. The relationship with an independent contractor is governed by the provisions of the Indian Contract Act, 1872 (ICA). However, there are certain judicial precedents wherein the courts have differentiated between the role of an employee and an independent contractor.

Based on case law, the most important test to determine the relationship is the extent of control and supervision exercised by one person or entity over an individual.

Temporary Workers / Badli Workman

The model standing orders with respect to industrial establishments issued under the Standing Orders Act define a *temporary worker* as a workman who has been engaged for work that is temporary in nature and likely to be finished within a limited period. The IDA defines a *badli workman* as a worker who is employed in an industrial establishment in the place of permanent employee.

1.6 What rights, protections, or entitlements are attached to each category of worker?

The status of an individual as an employee, independent contractor, or temporary worker will result in an identifiably separate set of rights for the individual. Key employment rights for each type of worker are summarized in the table below:

Rights	Employee	Independent Contractor	Temporary Worker/ Contract Worker
Discrimination Protection	Yes	No	Yes
Holiday	Yes	No	Yes
Maternity Leave and Pay, etc.	Yes	No	Yes
National Minimum Wage	Yes	No	Yes
Pensions / Retirement Benefits	Yes	No	Yes
Statutory Sick Pay	Yes	No	Yes
Unfair Dismissal	Yes	No	Yes
Whistleblowing Protection	Yes	No	Yes

1.7 What legal claims can be brought for misclassifying a worker?

Misclassification of workers may lead to potential claims against the employer:

- arising from the workers themselves (in terms of claiming permanent employment and/or employment-related benefits like social security);[17]
- arising from the labor department for nonpayment of employment-related benefits (which may lead to penalties for nonpayment) or depriving the employees of social security benefits; or
- arising from the tax department for non-withholding or under-withholding of taxes on payments to the workers.

Under the IDA, continuing to employ temporary workers for extended periods of time for purposes of depriving them of the status and privileges of permanent employees is classified as an unfair labor practice. The commission of an unfair labor practice is punishable with imprisonment for a term of up to six months and/or a fine of INR 1,000.Trade unions have, in the past, filed applications in labor courts and tribunals seeking permanency for outsourced workers, alleging that the nature of the contract is a sham and that the outsourced workers should be regularized since they are performing the same or similar work as performed by the employees of the principal employer.

In addition, misclassification could lead to tax consequences, especially in relation to the amount of withholding tax on the payments made to an independent contractor or temporary/contract worker.

Given the impending perils of employing outsourced labor, adequate measures need to be taken to: (1) ensure compliance with labor laws; and (2) mitigate any potential risks of co-employment or misclassification.

1.8 Are there emerging categories of workers based on technological innovations or economic changes?

The upcoming labor codes (yet to be made fully effective) have attempted to include definitions of certain new categories of workers and have laid down social security related provisions applicable to such workers.

The SS Code defines the following types of workers:

- *Gig worker* is "a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship."
- *Platform worker* is "a person engaged in or undertaking platform work." *Platform work* is a "work arrangement outside of a traditional employer employee relationship in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment."

The state of Rajasthan in India introduced the Rajasthan Platform-based Gig Workers (Registration and Welfare) Act 2023, which is a first-of-its-kind state law to provide social security benefits to gig and

[17] Note these are usually individual claims (not class action claims). India has not seen class action lawsuits in this area, except in case of contract labor engaged under the CLRA.

platform workers. A couple of other Indian states are in the process of introducing similar law and there are also talks of such a law at the national level.

2. Pre-Hire & Hiring

Rules and regulations governing the hiring process are as varied as they are complex. The types of information and the degree to which employers may seek information from job applicants differ significantly from country to country, and even by location within a country. Depending on the jurisdiction, whether an employer can conduct background checks (*e.g.*, request an applicant's criminal record, credit history, or educational background), conduct health screenings or perform drug and alcohol tests, may be required, lawful with restrictions, or outright illegal. Other pre-employment steps, such as whether employers must disclose pay information and/or inquire about a job applicant's pay history—also vary by country. This section focuses on issues that employers may need to consider at the pre-hire and hiring stage of the employment lifecycle.

2.1 Is an employer permitted to carry out background checks on an applicant or to ask an applicant about certain topics?

An employer is generally permitted to carry out background checks on applicants and inquire about various topics, but there are limitations and practical considerations. There are no specific legal provisions in India that require employers to conduct an employee background check and accordingly employee background checks are largely a matter of contract between the parties. Similarly, there are no rules or guidelines that specify the manner in which an employee background check needs to be carried out. The Reserve Bank of India (RBI)—which is the central bank of India and regulator of the financial services sector in India—has, however, issued certain notices/guidelines for banks recommending them to conduct employee background checks.

Employers should be sensitive and mindful of the data being used for background checks as well as the means of obtaining such data, as India protects the privacy of an individual from unlawful intrusion. Hence, it is advisable that the employer and the service provider who has been engaged by the employer for this purpose obtain the prior consent in writing from the prospective candidate before conducting a background check. An employee consent would help mitigate risks with respect to any claims concerning an invasion of an employee's privacy, especially in view of the data privacy provisions contained in the Information Technology Act, 2000 ("IT Act") and in case the background check involves any "sensitive personal data or information" (SPDI) of the candidate. Further, as far as possible, employers should ensure that the background check is completed before the employee is on-boarded (especially with respect to educational qualifications, past employment etc.). There are no specific restrictions in relation to carrying out background checks on existing employees especially if the check is relevant to the type of job that the individual was hired to do.

Background check practices in India vary significantly across different sectors, and even across different companies within the same sector, in the absence of any defined principles, processes, or laws. A comprehensive background check would include verification of academic records (from the concerned institutions), checks with previous employer(s), verification of address, police records, passport status, etc. The most common background checks in India are education and past employment checks. Given that India does not have a centralized database system covering all courts across the country, a comprehensive search of civil and criminal cases is likely to pose certain practical difficulties.

2.1(a) *Credit Checks*

As noted above, it is generally permissible to conduct a credit check for a job applicant, but there are certain privacy and practical limitations in doing so. Employers should be sensitive and mindful of the data obtained as well as the means of obtaining such data, as India protects the privacy of an individual from unlawful intrusion. Hence, it is advisable that the employer and the service provider who has been engaged by the employer for this purpose obtain the prior consent in writing from the prospective candidate before conducting a credit check. Prior consent is not required, but such consent can help mitigate risks with respect to any claims concerning an invasion of an applicant's privacy, especially in view of the data privacy provisions contained in the IT Act and in case the background check involves any "sensitive personal data or information" (SPDI) of the candidate.

As a practical matter, India does not have a centralized database system covering all courts across the country, so a comprehensive search of civil or criminal cases is likely to pose certain practical difficulties. This type of background check is therefore not common. That said, he Reserve Bank of India (RBI)—which is the central bank of India and regulator of the financial services sector in India—has issued certain notices/guidelines for banks recommending them to conduct employee background checks.

2.1(b) *Criminal Record Checks*

It is generally permissible to conduct a criminal record check for a job applicant, but as is the case for credit checks, there are certain privacy and practical limitations. Because India protects the privacy of an individual from unlawful intrusion, it is recommended to that the employer and the service provider who has been engaged by the employer to conduct a criminal background check obtain the prior consent in writing from the prospective candidate. Prior consent is not required, but such consent can help mitigate risks with respect to any claims concerning an invasion of an employee's privacy, especially in view of the data privacy provisions contained in the IT Act and in case the background check involves any "sensitive personal data or information" of the candidate.

As previously noted, India does not have a centralized database system covering all courts across the country, so a comprehensive search of civil and criminal cases is likely to pose certain practical difficulties. This type of background check is therefore not common.

2.1(c) *Drug and Alcohol Testing*

Indian labor laws do not contain provisions regarding drug or alcohol testing of employees. In the absence of any specific provisions restricting an employer from conducting such tests, this would be a matter of contract between the employer and the employee. The employer may choose to carry out regular drug and alcohol tests provided the employment contract and/or the company's policies so stipulate. Employers often reserve the contractual right to require employees to undergo such tests at its discretion. It could be likely that the employees may not cooperate with such tests, making it difficult for employers to conduct such tests.

2.1(d) *Educational History*

It is generally permissible for employers to verify a candidate's academic record. It is recommended, but not required, for an employer to obtain the candidate's prior written consent before conducting such checks. Educational background checks are one of the most common forms of background checks in India.

2.1(e) *Health or Medical Screening*

Employers may contractually require a candidate to undergo specific medical tests prior to hiring. For certain factory workers, fitness-for-duty exams are mandatory. Under Section 69 of the Factories Act, 1948 (FA), every *young person* (defined as a person who is either a child or an adolescent) or the young person's parent or guardian or the manager of the factory in which any young person wishes to work, has to make an application to a certifying surgeon accompanied by a document signed by the manager of the factory that such a person is fit for work in a factory. This certificate of fitness is valid for a period of 12 months and must be renewed annually. A *factory* under the FA is defined as a place where at least 10 workers are working and a manufacturing process is carried out with the aid of power (20 workers in case the manufacturing process is carried out without the aid of power).[18] The OSH Code[19] defines *factory* as any premises, including the precincts where at least 20 workers are working and a manufacturing process is carried out with the aid of power (40 workers in case the manufacturing process is carried out without the aid of power).

State-specific rules under the FA also need to be considered. For example, Rule 73-V of the Maharashtra Factories Act Rules, 1963, which is applicable to factories located in the State of Maharashtra, makes it mandatory for all workers employed in a "hazardous process" to be medically examined by a qualified medical practitioner: (1) once before employment to ascertain physical fitness of the person to do the particular job; and (2) once every six months.

Non-factory employers may as a policy require their employees to undergo certain medical tests on a periodic basis. They have the flexibility to decide the nature of medical tests that an employee may need to undergo. It may also be aligned with the requirements prescribed by the employer's group medical insurance service provider, if any.

While the importance of such tests should be communicated to the candidate/employee, it is also advisable that the terms of the offer or the company's policies, as the case may be, clearly provide for the consequences in the event that the employee fails to undertake such medical tests or if the results of the medical tests are found to be unsatisfactory and could have a negative bearing on the work to be performed by the employee.

Also note that "health conditions" and "medical records" in electronic form are protected under the data privacy laws. To that extent, collection of such information related to an employee is subject to consent of the employee. In case the employee refuses to undergo the test, the employer may not be able to compel the employee to submit to it. Additionally, the results of the medical test results should be kept confidential by the employer and should not be disclosed to a third party without the employee's consent.

2.1(f) *References from Previous Employers*

It is generally permissible for employers to obtain references from previous employers. It is recommended, but not required, for an employer to obtain the candidate's prior written consent before conducting such checks. Past employment checks are one of the most common forms of background checks in India.

[18] Factories Act, 1948 (FA), sec. 2(m).

[19] Yet to be made effective.

2.1(g) *Salary History or Prior Compensation*

There is no restriction on employers in India to collect information pertaining to an applicant's salary history or prior compensation. In fact, it is a common practice in India to collect the *wage slips* (typically for the last drawn monthly wages), which can be used as the basis from which the salary package of the new employer is negotiated with the candidate. However, the applicant may have confidentiality obligations and refuse to produce past salary slips which may contain the compensation details.

2.1(h) *Social Media or Public Web Page Searches*

Indian employers are free to search a job applicant's social media presence or conduct searches of publicly available information online. Applicant's consent is not required to search publicly available data. It is common for some employers to conduct social media check on an individual prior to hiring.

2.2 Is an employer required to hire particular groups of people in preference to others?

There are several laws that employers in India need to keep in mind when making hiring decisions:

- **The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (EECNV Act):** The EECNV Act requires the employer to notify the employment exchanges of any vacancy before filling any such vacancy in that establishment. If an employer fails to notify to the employment exchanges regarding any notifiable vacancy, the employer may be subject to monetary penalty of up to INR 1,000.
- **The Industrial Disputes Act, 1947 (IDA):** The IDA provides that an employer that has retrenched (terminated) employees (workmen) must offer to re-employ the retrenched employees, before hiring different employees. The former employees will have preference over other persons for re-employment. An employer that fails to comply with this provision of IDA may be punishable with monetary penalty of up to INR 100.

2.3 Is an employer required to provide information on pay or pay ranges when advertising a job?

No, an employer is not required to disclose the salary range or other pay information for open positions.

2.4 Are there any notices that employers must provide to employees upon hiring? If so, what are the notices?

Yes, employers are required to inform eligible employees regarding their entitlement under the Maternity Benefit Act (MBA) and Employees' Compensation Act (ECA) in written and electronic form at the time of their hiring. In Telangana and Delhi, the state shops and establishments law requires the employer to issue an appointment letter / order to the employee in a prescribed format. The appointment order requires employers to include certain details regarding the employee, the employee's salary details and, in some cases, information on the employee's increment cycle.

Such requirement is in addition to displaying on the notice board or on the website an equal opportunity policy for persons with disabilities and transgender persons, minimum wage rates, abstracts of certain labor laws or provisions of the laws, such as the Equal Remuneration Act (ERA), FA, MBA, etc.

2.5 Must an employer or a foreign national obtain any prior approval (*e.g.*, a visa, work permit, or sponsorship license) from a government authority before a foreign national can work in the jurisdiction?

Before a foreign national can work in India, the following is required:

- **Indian Employment Visa (E visa)**
  - **Approval Authority:** Indian Ministry of Home Affairs (MHA)
  - **Prior Approval Required:** Yes
  - **Processing Time:** In certain jurisdictions, depending on visa backlogs, 1-2 weeks; in others, much longer.
  - **General Cost:** INR 8,340 to 25,022.
  - **Additional Details:** Only an applicant who is a highly skilled and/or qualified professional who is being engaged or appointed by a company, organization, industry, or undertaking in India on contract or employment basis is eligible for an E visa. With limited exceptions, a foreign national must draw a salary in excess of INR 1,625,000 per annum. In case of foreign nationals coming on an E visa for a period of less than one year, the minimum salary requirement is worked out on a pro rata basis.

Generally, a foreign national who has entered India on an E visa is not allowed to change their employer during the currency of the E visa within India. That said, a foreign national who has entered India on an E visa and is working in a managerial position or senior executive position in an Indian company and/or at a skilled position (*e.g.*, a technical expert), may change their employment to another Indian company without going back to their native country, provided the change of employment is between a registered holding company, joint venture, consortium and its subsidiaries and vice versa or between subsidiaries of a registered holding company, joint venture and consortium. This is, however, subject to the approval of the MHA.

3. Employment Contracts

Employment contract requirements vary from country to country, including if they are required and whether a contract must be in writing or in a particular language. The specific provisions required to be in a contract, along with recommended provisions, vary as well. This section addresses common contract requirements employers may encounter, such as the duration of the contract, whether probationary periods are permitted, and whether employment contracts may be signed electronically. Employers may also need to note whether they have the ability to change the terms of an employment contract unilaterally or if employees are entitled to a flexible work arrangement in their country. Another area of law that differs greatly between countries is whether restrictive covenants—including noncompete, nonsolicit, and confidentiality agreements—are permissible. This section covers which restrictive covenants are permitted, if any, and the general legal framework for such agreements, as well as potential challenges to the validity of each.

The ***Glossary of Terms*** at the end of this Guide provides general definitions of the various restrictive covenants that may be permitted in some countries.

3.1 Is an employer required to provide an employee with a written employment contract or other written document? If so, what terms of employment are *required* to be included?

No, there is no particular requirement under the labor laws to have written employment contracts, except in certain cases.

Certain state-specific Shops and Establishments Acts (SEAs) (such as the Karnataka Shops and Commercial Establishments Act, 1961, Telangana Shops and Establishments Act, 1988, West Bengal Shops and Establishments Act, 1963 and the Delhi Shops and Establishments Act, 1954) require the employer to issue an appointment order/letter to its employees. The appointment order/letter must include details such as the name and address of the establishment and the employer, the name of the employee, the employee's postal and permanent address, father's/husband's name, date of birth, date of entry into employment, designation, nature of work entrusted to the employee, serial number in the register of employment, and the rates of wages payable. Further, certain model standing orders, for example the Maharashtra Industrial Employment (Standing Orders) Rules, 1959, require the employer to issue a written order upon completion of the probationary period.

Section 5 of the Sales Promotion Employees (Conditions of Service) Act, 1976, requires every employer to furnish a letter of appointment in the prescribed form to the sales promotion employee on their appointment.

The OSH Code[20] mandates that the employer issue a letter of appointment to every employee at the time of the employee's appointment. It further states that in case where an employee has not been issued such appointment letter on or before the commencement of the OSH Code, the employer should issue such letter within three months of date of commencement of the Code.

It is generally advisable that companies execute employment contracts with their employees, depending on the level of seniority and position of the employees.

3.2 What terms of employment are *recommended* to include in a written employment contract?

Although there is no prescribed format of an employment contract under Indian labor law, some of the terms that are commonly found and typically recommended to be included in such contracts are:

- the employee's duties and responsibilities;
- remuneration;
- nondisclosure of confidential information;
- assignment of intellectual property;
- restrictive covenants (such as, noncompete, nonsolicitation of the employer's employees and clients, non-disparagement, etc.);
- conflict of interest;

[20] Yet to be made effective.

- termination of employment (including as a result of misconduct); and
- return of company's property upon termination.

Some of the provisions contained in employment contracts should be drafted keeping in mind the applicable laws. For example, the termination provisions should be in compliance with the termination provisions in the applicable labor laws including the Industrial Disputes Act, 1947 (IDA) and the SEAs.

The employment contracts should be stamped as per the applicable stamp duty law on or prior to execution, in order to be admissible as evidence in a court of law.

Since there is no specific requirement to have a written employment contract (except an appointment order/letter in certain cases), there is also no requirement to provide for termination-related provisions in the employment contract. Provisions in relation to termination of employment are contained under the applicable labor laws for different categories of employees. Having said that, to the extent the employment contract has more beneficial provisions for the employee than what is provided under law, the provisions of the employment contract would be applicable.[21] Although there is no specific requirement to include termination-related provisions in the employment contract, it is better to address all the terms and conditions of employment up front including termination-related provisions (especially for employees who are in a managerial position and to whom some of the labor laws may not apply).

3.3 Are fixed-term employment contracts permissible?

Yes, fixed-term employment contracts may be permissible in India under certain circumstances.

A *fixed-term employment contract* is an employment arrangement where an employee is employed for a defined period and the employment automatically terminates when such period expires. In India, fixed-term employment contracts are only used for projects or roles that are temporary in nature, such as backfilling for an employee on maternity leave.

Typically, employment contracts are for continuous employment, until the employment is terminated in accordance with the provisions of the contract. Where employment contracts are either project-specific or for a fixed term, depending on the requirements of the assignment, there may be a need for the employer to justify to the courts the necessity of a fixed-term contract as opposed to a contract for continuous employment, especially if it is perceived that a fixed-term employment arrangement is being adopted by the employer to avoid its obligations under the termination-related provisions under the labor laws. More recently, the central government, through an amendment to the central rules to the Standing Orders Act, has expressly allowed for fixed-term employment in all establishments to which the central rules to the Standing Orders Act is applicable.[22] Similar amendments have been introduced to the state rules to the Standing Orders Act in certain Indian states such as Karnataka, Haryana, Goa, and Odisha. The Industrial Relations Code, 2020 and Code on Social Security, 2020[23] have introduced the concept and definition of fixed-term employment and make provisions for payment of all statutory benefits as applicable to a permanent worker, including gratuity on a pro-rata basis based on the tenure of fixed-term employment as per the SS Code.

[21] Industrial Disputes Act, 1947 (IDA), sec. 25J.

[22] Industrial Employment (Standing Orders) Central (Amendment) Rules, G.S.R. 235(E) Rule 2 (2018).

[23] Yet to be made effective in whole.

3.4 Are probationary periods allowed, and if so, do restrictions apply?

Yes, probationary periods are allowed and commonly used in India. However, there are no specific laws (except the Standing Orders Act discussed below) that contain provisions in relation to probationary periods, although most employers generally provide for a probationary period for junior and mid-level employees.

The model standing orders under the Standing Orders Act[24] define *probationer* as a:

> Workman who is provisionally employed to fill a permanent vacancy in a post and has not completed three months' service therein. If a permanent employee is employed as a probationer in a new post he may, at any time, during the probationary period of three months, be reverted to his old permanent post.

Additionally, for example, Section 4-A of the Maharashtra Industrial Employment (Standing Orders) Rules, 1959, provides that "every probationer who has completed the period of three months uninterrupted service in the post in which he is provisionally employed shall be made permanent in that post by the manager by an order in writing, within seven days from the date of completion of such service." The Standing Orders Act does not apply to commercial establishments in all Indian states—for instance, Karnataka,[25] Telangana, and Andhra Pradesh have exempted the IT-ITeS (Information Technology enabled Services) industries from application of Standing Orders Act. The probationary period adopted by employers in India typically varies between three and six months, based on the employer's legal ability as per local laws to terminate employment without triggering a notice requirement.

Probationary periods are typically contractually agreed and applicable irrespective of the nature of employment. Once an employee completes the probationary period, unless triggered earlier under law, employers are typically required under applicable laws to provide employees at least a month's notice or pay in lieu, prior to termination of employment. Such a requirement is provided under IDA for workmen completing at least 240 days' service and for employees covered under the state-specific shops and establishments laws (except in few states such as Maharashtra, Gujarat, Uttarakhand, Mizoram). For employees to whom shops and establishments laws and IDA are not applicable (typically employees in positions of management), the notice obligations are governed by the employment contract. For all employees, if the employment contract or employer's policies provide for more beneficial terms (such as longer notice period prior to termination of employment), such beneficial terms will prevail.

3.5 Can an employer change the terms or conditions of employment unilaterally (*i.e.*, without the employee's agreement)?

No, an employer cannot unilaterally change the protected terms or conditions of employment to the detriment of the employee. Typically, for detrimental change to the employment contract terms, the employee's consent is needed.

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[24] The model standing orders (MSOs) apply to industrial establishments under the control of the central government or a Railway Administration or in a major port, mine, or oilfield. However, the MSOs are deemed to be adopted in the establishments to which the Act is applicable until the time the standing orders are finally certified under the Industrial Employment (Standing Orders) Act, 1946.

[25] Exemption valid until May 2024.

Notice

As per the IDA, for implementing detrimental change in protected service conditions of workmen, an employer is required to provide a 21 days' prior notice to the impacted workmen in the prescribed format with a copy to the labor authorities. *Protected service conditions* include wages, compensatory and other allowances, hours of work and rest interval, paid leaves and holidays, withdrawal of customary privilege, etc.

Penalties

If an employer changes its service conditions to the detriment of employees without employee consent (where required) and/or without providing appropriate notice as prescribed, if such change is challenged as unlawful, the employer may be required to restore the status quo. The employer may also be liable for monetary penalties for not complying with its obligations under the IDA.

3.6 Is there a language requirement for written employment contracts or other employment documents?

The preferred language of employment contracts is English as English is commonly recognized and used in the Indian courts. However, where the employee is not familiar with English, a translation of the contract into a local language may be necessary or the English version may need to be explained to the employee by an interpreter, in front of a witness.

It is, however, common for certain labor courts to use local or regional language in case of notices or orders.

3.7 Can e-signatures be used to execute employment contracts or other employment documents?

Yes, e-signatures are generally permissible.

As per the Information Technology Act, 2000 ("IT Act"), an *e-signature* is defined as authentication of any electronic record by a subscriber by means of the electronic technique specified in the IT Act and includes a digital signature. The IT Act defines a *digital signature* as authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3 of the IT Act. Section 3 of the IT Act provides for authentication of electronic record by the use of asymmetric crypto system and hash function that envelop and transform the initial electronic record into another electronic record.

Prior consent is not required for an e-signature to be valid. However, at par with wet signatures, authenticity of e-signatures may be required to be proved in a court of law by way of a signature certificate.

3.8 Is an employee entitled to a flexible work arrangement?

Employees are not entitled to a flexible work arrangement by default, unless provided in the employment contract or employer's policies. As per the Maternity Benefit Act (MBA), where an employee's maternity leave is expired, the employee may mutually agree with the employer to work from home, should the nature of work so permit.

Entitlement to Flexible Work Arrangements[26]

Flexible work arrangements are unregulated in India. The only exception is that female employees are permitted by the MBA to request to work from home after expiry of maternity leave and such arrangement is subject to mutual agreement with the employer depending on the nature of her job.

In general, subject to the employee's work permitting such arrangement, there is no restriction on employers permitting employees to work remotely or in a hybrid manner. It is fairly common among employers in the technology and services sectors. Employers located in notified Special Economic Zones or Software Technology Parks of India are required to comply with applicable regulations in respect of allowing their employees to work from home or in a hybrid manner.

Unilateral Implementation of Flexible Work Arrangements

Employers can unilaterally implement flexible work arrangements.

Whether a New Employment Contract Is Necessary

New employment contracts are not required for implementation of flexible work arrangements. The conditions of remote work may be agreed upon in a telecommuting agreement or by way of a policy.

Considerations When Working Remotely from Another Country

It is not recommended for employers to permit employees to work remotely from outside India as it may lead to potential exposure under foreign country laws applicable in the location from where an employee is working remotely.

3.9 Are post-employment restrictive covenants enforceable? If so, under what conditions?

Post-employment noncompete covenants are generally unenforceable against employees. However, the trend of incorporating provisions to safeguard the employer's intellectual property, covenants not to compete and covenants not to solicit the employer's customers or employees has become increasingly common, predominantly with respect to mid- and senior-level employees.

The law of contracts in India is governed by the Indian Contract Act, 1872 (ICA), which is a complete code in itself. Section 27 of the ICA deals with agreements in restraint of trade and provides as follows:

> Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
>
> Exception 1: Saving of agreement not to carry on business of which goodwill is sold—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

[26] *Flexible work arrangements* encompass telework (work from home) arrangements that allow an employee to work remotely.

Thus, Section 27 of the ICA invalidates all restraints, whether general or partial, unless the restraint falls within the above exception. The exception deals only with the sale of a business along with goodwill.

Under Indian law, a service covenant extending beyond the term of service is void. The Supreme Court of India in *Superintendence Co. of India (P) Ltd. v. Sh. Krishna Murgai*[27] held that a negative covenant in a contract of employment placing a restraint on the employee that he would not serve in any other competitor's firm for two years at the place of his last posting after the employee has left the company, would be void.

However, note that in the case of *Niranjan Shankar Golikari v. Century Spinning and Mfg. Co. Ltd.*,[28] the court has held that where the contract of employment contains a negative covenant restricting the employee from taking any other employment, and the employee leaves such service, the negative covenant can be enforced to the extent that the unexpired part of the term of service would be essential for the fulfillment of the contract. In short, a post-termination restriction is void under Indian law. Courts in India have time and again reiterated that a contract containing a clause restricting an employee's right to seek employment and/or to do business in the same field beyond the term of employment is unenforceable, void and against public policy.[29] An employee cannot be confronted with a situation where the employee has to either work for the present employer or be forced to idleness.[30] Though the stance of Indian courts on the question of restraint on trade is clear, such clauses are commonly included in the terms of employment for their deterrent effect. More recently, a major tech employer in India was issued notice by labor authorities for the noncompete provision contained in its employment contracts.

The trend of incorporating restrictions on solicitation of employees, customers, or clients during or after the term of employment has become common in recent times, especially with the increasing usage of social media and professional networking sites. A nonsolicit clause is essentially a restriction on the employees from or indirectly soliciting or enticing an employee, customer, or client to terminate their contract or relationship with the company or to accept any contract or other arrangement with any other person or organization. In determining the enforceability of a nonsolicit clause, the courts have generally taken the view that such clauses will be enforceable, unless it appears on the face of it to be unconscionable, excessively harsh, or one-sided.[31]

Post-employment restrictive covenants may be included in the employment agreement or a separate agreement.

4. Working Time & Compensation

Almost every country has laws and regulations regarding work time and compensation. In addition to possible penalties for noncompliance, violations of these laws and regulation may give rise to costly and time-consuming litigation. To help avoid these consequences, it is important for employers to become familiar with the various wage and hour requirements in the countries in which they operate, particularly

[27] A.I.R. 1980 S.C. 1717.

[28] A.I.R. 1967 S.C. 1098.

[29] *See Superintendence Company of India v. Krishan Murgai*, (1981) 2 S.C.C. 246; *Percept D'Mark (India) Pvt Ltd. v. Zaheer Khan*, (2006) 4 S.C.C. 227 para 63; *Pepsi Foods Ltd v. Bharat Coca-Cola Holdings*, 1999 (50) DRJ page 688 *inter alia*.

[30] 1995 A.I.R. 2372.

[31] *Wipro Limited v. Beckman Coulter International S.A.*, 2006(3) ARBLR118 (Delhi).

since there is a wide variation among countries, and even within countries where there may be differences based on region or industry. This section addresses the laws, regulations, and issues relating to work hours and compensation, including: (1) restrictions on the number of hours an employee may work; (2) rest, meal, and other break times during the workday; (3) required minimum wage and overtime pay requirements; (4) the frequency, schedule, form, and currency in which wages must be paid; (5) mandatory or customary bonuses; (6) required payroll deductions; and (7) what laws, if any, apply to pay equity and transparency.

4.1 Is there a limit to the number of hours an employee can work daily and/or weekly? Can an employee opt out of such restrictions?

Limits to daily and weekly work hours are based on industry or regulated by state. For example, under the Factories Act, 1948, adults who work in factories may not work more than nine hours per day and 48 hours per week.

Other industry-specific labor laws, including the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1966; the Motor Transport Workers Act, 1961; The Mines Act, 1952; The Plantation Labor Act, 1951; and the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, also contain provisions regulating the working hours of employees in those specific sectors or industries.

In addition, the state-specific Shops and Establishments Acts also prescribe maximum daily and weekly work hours.

Employment contracts containing less beneficial provisions as compared to the law are not enforceable.

4.2 What general activities constitute compensable working time?

Working time typically means time during which an employee is at the disposal of the employer and it is exclusive of any interval for rest.

4.3 Are there required rest, meal, or other break periods during the workday?

Employers are required to provide employees at least 30 minutes to one hour for a rest interval (depending on the state law) after employees have completed at least 4.5 to 5 hours of continuous work.

4.4 Is there a national minimum wage?

National Minimum Wage

The Code on Wages provides for a national minimum wage, which is a floor. However, the Code on Wages is yet to be made effective.

Minimum Wage Variations Based on Region

Minimum wages vary based on region and within region depends on class of employment (*e.g.*, unskilled, skilled, highly skilled).

Minimum Wage Variations Based on Industry or Type of Worker

Minimum wages vary based on the industry in which the employee works.

4.5 If an employee works overtime, how is it compensated?

Generally, employees who work more than the number of hours specified for their industry or location must be paid overtime at double their regular rate of pay. Some industries may also have industry-specific requirements and exemptions for overtime compensation.

4.6 What elements are considered part of a salary?

The term "wages" is defined under different employment laws. For example, the POWA defines *wages* as:

> all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes—
>
> (a) any remuneration payable under any award or settlement between the parties or order of a Court;
>
> (b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;
>
> (c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);
>
> (d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;
>
> (e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,
>
> but does not include—
>
> (1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;
>
> (2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of [appropriate Government];
>
> (3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;
>
> (4) any travelling allowance or the value of any travelling concession;
>
> (5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

The labor codes once made effective, will have a uniform definition of wages across all codes.

4.7 What is the required schedule for paying wages, and in what form and currency must wages be paid?

The employer may set a daily, weekly, bi-weekly, or monthly wage period for employees, and wages must be paid according to the following schedule:

- **Employees paid on a daily basis:** must be paid at the end of their shift.
- **Employees paid on a weekly basis:** must be paid on the last working day of the week.
- **Employees paid on a two-week basis:** must be paid before the end of the second day after the end of the two-week period.
- **Employees paid on a monthly basis:** must be paid before the seventh day after the end of the month, or before the tenth day after the end of the month for establishments with over 1,000 employees.

Wages must be paid in cash, by check, direct deposit to the employee's bank account, or by wire transfer.

Wages must be paid in Indian currency.

4.8 What bonuses, if any, are mandated? What bonuses are customary?

Under the Payment of Bonus Act (POBA), applicable to all factories and other establishments having employed 20 or more persons, employers must pay a minimum annual bonus equal to 8.33% of an employee's annual wages. The maximum bonus amount employers may pay is 20% of an employee's annual wages.

Some companies also pay a discretionary bonus based on employee's performance and/or the company's profits or revenue.

4.9 What are the employer and employee payroll contributions?

Employer and employee payroll contributions include:

Type	Employer	Employee
Employee's Provident Fund (EPF) and Employee's Pension Scheme (EPS) (Compulsory for employers with more than 20 employees & a maximum monthly salary of 15,000 INR) applied on basic salary.	12%	12%
Employee's State Insurance (ESI) for employees with salaries of up to 21,000 INR per month	3.25%	.75%
Total*	**15.25%**	**12.75%**

*There may be other applicable payroll contributions.

Apart from these, based on the applicable laws in the state where the employer has its commercial establishment, employers may need to make contributions to state-level labor welfare funds.

4.10 Are there any rules related to pay equity and/or pay transparency?

4.10(a) *Pay Equity*

The Equal Remuneration Act, 1976 requires equal pay to men and women performing the same work or work of a similar nature. The Code on Wages prohibits discrimination in wages based on gender, with respect to the same work or work of a similar nature.

Some of the state rules to the Contract Labor (Regulation and Abolition) Act (CLRA) provide that a contractor's license is conditional upon the contractor providing the contract workers performing the same or similar kind of work as the principal employer's workmen, the same wage rates, holidays, hours of work, and other conditions of service.

4.10(b) *Pay Transparency*

There are no laws or regulations relating to pay transparency. There may be certain recordkeeping requirements in respect of wages paid to employees, which can be audited by labor authorities.

5. Time Off from Work

Issues associated with employee leave rights are a challenge for many employers due, in part, to the wide variety of types of leaves available to employees across the globe. Ignorance of leave laws may leave employers at risk of litigation. This section discusses the various leave rights available to employees and the corresponding employer obligations. This section also provides additional detail on leaves associated with the birth or placement of a child, such as prenatal and postnatal leave for a birth parent, related time off for a non-birth parent, and adoptive or foster parents' leave. Employers' obligations do not end once an employee returns to work after the arrival of a child. Additional laws may govern whether the employer must provide accommodations for breastfeeding, day care facilities, or flexible working arrangements for new parents.

5.1 What are the national (bank) holidays? What are the requirements if an employee works on such holidays?

Employees are typically entitled to the following national holidays each year:

Holiday	Date
Republic Day	January 26
Independence Day	August 15
Gandhi Jayanti	October 2

Additionally, there are state-specific SEAs and other state-specific national and festival holiday acts that require employers to provide a minimum number of national and festival holidays annually, such as the Karnataka Industrial Establishments (National and Festival Holidays) Act, 1963 (10 holidays a year) and

the Tamil Nadu Industrial Establishments (National and Festival Holidays) Act, 1958 (nine holidays a year). Typically, the state-specific SEAs and national and festival holiday acts allow employees to work on national and festival holidays provided they are either paid double rates of wages for the working holiday and/or a substituted holiday (compensatory time off). For example, Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 provides that where an employer requires any employee to work in the establishment on all or any of the national holidays, the employee must be paid double the amount of the daily average wages for such work and also receive leave on any other day in lieu of the compulsory holiday.

5.2 Is there a required day of rest? What are the requirements if an employee works on that day?

Employers are required to provide a rest day in certain situations.

Factories

Factory workers that are adults are entitled to rest on the first day of the week, unless the worker gets a holiday for a whole day on one of the three days immediately before or after the rest day, or the manager of the factory has complied with certain notification requirement to the labor authorities. Where a worker is deprived of any of the weekly holidays, they will be allowed, within the month in which the holidays were due to the worker or within the two months immediately following that month, compensatory holidays equal to the number of holidays such employee was deprived of. No worker in a factory can be required to work for more than 10 consecutive days without a day of holiday in between.

In some states, factories are also required to observe state specific national and festival holidays as per applicable national and festival holiday statutes, such as the Punjab Industrial Establishment (National and Festival Holidays and Casual and Sick Leave) Act, 1965.

State-specific SEAs

Every shop and commercial establishment is required to remain closed on at least one day of the week, although there are certain exceptions and relaxations. For example, the information technology and information technology-enabled services industries in certain states such as Karnataka and Telangana are permitted to remain open for 365 days a year, subject to certain restrictions. In case an employee is required to worked on a weekly holiday, the employee will need to be provided substituted holiday. In some states (such as Maharashtra and Gujarat) the employee is entitled to receive twice the ordinary rate of wages for working on a holiday.

5.3 Is an employee entitled to annual leave or vacation?

Yes, employees are entitled to paid annual leaves as follows:

Factories

For employees working in factories, the FA contains provisions with respect to annual leave with wages. Under Section 79 of the FA, every worker who has worked for a period of 240 days or more in a factory during a calendar year must be allowed, during the subsequent calendar year, paid leave for the following number of days:

- for adults, one day for every 20 days of work during the previous calendar year; and
- for children, one day for every 15 days of work during the previous calendar year.

Under the FA, an adult can carry forward up to 30 days of leave into the succeeding year, and a child can carry forward up to 40 days.

OSH Code

The OSH Code (yet to be made effective) provides that if a worker has worked for at least 180 days, the worker is entitled to one day of leave for every 20 days of work. For adolescent workers, this is increased to one day of leave for every 15 days of work.

State-specific SEAs

The state-specific SEAs also contain provisions with respect to annual paid leave, which may be between 12 and 30 days per year, depending on the state.

Indian State	Largest Commercial Cities	Annual/Privilege Leave	Carry Forward/ Accumulation (as may be specified)
Telangana	Hyderabad, Secunderabad	15 days after completion of at least 240 days of continuous service in a year	60 days of accumulation
Delhi	New Delhi	15 days after completion of every 12 months of continuous service	Accumulation of three times the period of annual / privilege leave
Gujarat	Ahmedabad	1 day of annual leave for every 20 days of work performed if an employee has worked for at least 240 days in the preceding calendar year	63 days of accumulation
Haryana	Gurgaon	1 day for every 20 days of employment	30 days of carry forward
Karnataka	Bangalore	1 day for every 20 days of work	45 days of carry forward
Kerala	Kochi	12 days after every 12 months of continuous service	24 days of accumulation
Madhya Pradesh	Bhopal, Indore	30 days' privilege leave after 12 months' continuous employment	3 months of accumulation
Maharashtra	Mumbai, Pune	1 day of annual leave for every 20 days of work performed if an employee has worked for at least 240 days in the preceding calendar year	45 days of accumulation
Rajasthan	Jaipur	1 day for every 12 days of work	30 days of carry forward
Tamil Nadu	Chennai	12 days after completion of every 12 months of continuous service	45 days of accumulation

Indian State	Largest Commercial Cities	Annual/Privilege Leave	Carry Forward/ Accumulation (as may be specified)
Uttar Pradesh	Noida	15 days leave for every 12 months of continuous employment	45 days of accumulation
West Bengal	Kolkata	14 days for every completed year of service	28 days of accumulation

Additionally, there are provisions under some of the industry-specific labor laws in relation to paid leave requirements, including the Sales Promotion Employees (Conditions of Service) Act, 1976 and Motor Transport Workers Act, 1961.

5.4 Is an employee entitled to time off if they are sick, including for medical leave?

There is no national requirement that employers provide medical leave. However, some of the state-specific SEAs or state-specific statutes on leaves (for example Punjab Industrial Establishment (National and Festival Holidays and Casual and Sick Leave) Act, 1965) regulate paid sick leaves. In some states, there is no requirement to provide sick leaves. In some states, sick leaves and casual leaves are grouped together. For example:

- Telangana Shops and Establishments Act, 1988 provides for 12 days of paid sick leave for every year and 12 days of casual leave with wages;
- Karnataka Shops and Commercial Establishments Act, 1961 provides for 12 days of leave with wages on the ground of sickness or accident or for any other reasonable cause;
- Tamil Nadu Shops and Establishments Act, 1947 provides for 12 days of casual leave and 12 days of sick leave with wages;
- West Bengal Shops and Establishments Act, 1963 provides 10 days of casual leave with wages and 14 days of sick leave with half wages; sick leave can be accumulated for up to 56 days;
- Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 provides for eight days of casual leave but does not provide for sick leaves; and
- Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 provides seven days of casual leave with wages and seven days of sick leave with wages.

Except in the state of West Bengal, unused sick leave usually expires at the end of each calendar year. Except for sick leave as provided by law (or any notified pandemic related leave, such as leave for quarantine due to COVID-19 infection, which may be notified from time to time), there are no other requirements to provide for medical leaves of absence. The employer is required to pay for the prescribed sick leave and once the employee exhausts all sick leave, the additional sick leave days may be unpaid.

5.5 Is an employee entitled to caregiver leave (*e.g.*, to care for a close relative)?

There are no requirements that an employer provide caregiver leave to employees.

5.6 Is an employee entitled to other types of leave?

Other types of leave an employee may be entitled to include:

Type of Leave	Yes	No	Details
Bereavement		X	
Court Summons		X	Note: An employee may be provided casual leave to attend court summons.
Family Events		X	
Jury Duty		X	
Menopause		X	
Menstruation		X	Note: The state government of Maharashtra has proposed an amendment to the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 providing for menstruation leaves.
Military Leave		X	
Moving Day		X	
Religious Events		X	
Union-related		X	
Voting Leave	X		• The employee receives leave on days of elections in which the employee is eligible to vote. • This leave is paid.
Other:			
Night Work	X		• In Maharashtra, a woman employee who works the night shift in a commercial establishment receives one additional day of leave for every two months. • This leave is paid.
Tubectomy	X		• The employee receives two weeks of leave immediately following a tubectomy. • This leave is paid.
Vasectomy/ Tubectomy	X		• In Telangana, an employee with at least two years of service with an employer is entitled to receive up to six days of special casual leave for a vasectomy/tubectomy. This is a one-time grant of leave. • This leave is paid.[32]

[32] Telangana Shops and Establishments Act, 1988.

5.7 Is an employee entitled to leave related to the birth of a child?

Leave is available for both birth and non-birth parents related to the birth or placement of a child.

5.7(a) *Pregnancy/Maternity/Birth*

An employee is eligible for up to 26 weeks of maternity leave under certain circumstances. The Maternity Benefit Act, 1961 (MBA) applies to every factory, mine, or plantation and to every shop or establishment with at least 10 employees, except female employees who are covered under the Employees' State Insurance Act, 1948 (ESIA) that entitles them to maternity benefits. Covered employers must inform the female employees, in writing, at the time of their initial appointment, regarding all benefits available under the MBA.

Under the MBA, a female employee who has worked for at least 80 days in the 12 months immediately before the expected date of delivery is entitled to leave of 26 weeks for her first two children. Of this, eight weeks may be taken before the expected delivery date. An eligible female employee is entitled to 12 weeks of leave for the birth of her third and subsequent children, of which six weeks may be taken before the expected delivery date.

An employee is also entitled to up to one month of additional leave in the event of an illness arising out of the pregnancy, delivery, or premature birth of a child.

The leave is paid.

Some of the state-specific SEAs also contain provisions with respect to maternity benefit (*e.g.*, Andhra Pradesh Shops and Establishments Act, 1988 (APSEA) and Punjab Shops and Commercial Establishments Act, 1958 (PSCEA)). The PSCEA provides that every woman employed in an establishment who has been continuously employed in that establishment for a period of not less than six months preceding the date of her delivery is entitled to receive a payment of a maternity benefit that will be prescribed by the government for every day during the six weeks immediately preceding and including the day of her delivery and for each day of the six weeks following her delivery. The state-specific laws mostly provide for 12 weeks of maternity leaves.

5.7(b) *Miscarriage/Stillbirth*

Under the MBA, a female employee is entitled to leave with wages for a period of six weeks immediately following the day of her miscarriage or medical termination of pregnancy. This leave is paid.

5.7(c) *Adoption*

A female employee is entitled to 12 weeks of leave for adopting a child, if the adopted child is less than three months old. Additionally, an employee who is a commissioning mother, meaning a biological mother who uses her egg to create an embryo implanted in another woman for surrogacy, is entitled to 12 weeks of leave from the date the child is handed over to the mother.

These leaves are paid.

5.7(d) *Paternity*

There are no requirements for paternity leave.

5.7(e) *Other Parental Leave*

There are no requirements for other parental leave related to the birth of a child.

5.8 What requirements are there for employees with infants (*e.g.*, breaks for breastfeeding, day care entitlements, part-time work)?

5.8(a) *Breastfeeding Rules*

Under the MBA, an employee is entitled to two breaks per day (in addition to their interval of rest) in order to nurse their child (see 5.8(b)). This may continue until the child is 15 months old. Employers that have at least 50 employees at their establishment are required to have a crèche facility and in turn allow the female employees up to four visits a day to the crèche.

Under the FA, state governments may make rules that require employer-provided crèche facilities to give breaks to mothers in order to feed their children at necessary intervals. See 5.8(b).

5.8(b) *Day Care Facilities*

Under the MBA, every establishment employing at least 50 employees must establish a crèche facility within the prescribed distance, either separately or along with common facilities. The states of Karnataka and Tamil Nadu have notified separate rules regulating provision of crèche facilities.

Section 48 of the FA also requires employers to provide crèches. Where 30 or more women workers are employed, the employer must provide and maintain a suitable room or rooms for the use of children under the age of six years. These rooms should provide adequate accommodation, and should be adequately lighted and ventilated, maintained in clean and sanitary condition and must be under the charge of women trained in the care of children and infants.

Section 48 of the FA provides that the state government may make rules:

- prescribing the location and the standards in respect of construction, accommodation furniture and other equipment of rooms to be provided;
- requiring the provision in factories, of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;
- requiring the provision in any factory of free milk or refreshment or both for such children; and
- requiring that facilities must be given in any factory for the mothers of such children to feed them at the necessary intervals.

Some state-specific SEAs such as the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (MSEA) also require establishments employing at least 50 workers to provide and maintain a crèche facility for the use of children of such workers. Under the MSEA, a group of establishments may jointly provide a common crèche facility with the permission of the Chief Facilitator, provided that it is within one kilometer of the establishments. Similarly, under the Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 (GSEA), an establishment employing at least 30 women workers is required to provide and maintain a suitable room or rooms as a crèche for the use of children of workers. A group of establishments may jointly provide a

common crèche facility with the permission of the Inspector, provided that the crèche facility is within one kilometer of the establishments. In Uttar Pradesh, as per the Uttar Pradesh Dookan aur Vanijya Adhisthan Adhiniyam, 1962, there is a requirement for all commercial establishments ordinarily employing at least 20 women workers to provide and maintain a crèche for use of children of such women, with employers being permitted to have a common crèche within one kilometer from the establishment. In Karnataka, as per Karnataka Shops and Commercial Establishments Act, 1961, employers engaging women employees in commercial establishments at night (8:00 P.M. to 6:00 A.M.) are required to bear the cost of crèche facilities availed by such women.

5.8(c) *Flexible Work Arrangements*

After returning from maternity leave, the MBA permits employers to allow female employees to work from home on a case-by-case basis, depending on the nature of work. The conditions governing such work from home may be mutually agreed between the employer and the employee.

5.8(d) *Other Employer Requirements*

There are no other employer requirements related to employees with infants.

6. Discrimination & Harassment

Discrimination and harassment laws are often controlled by a country's constitution, antidiscrimination statutes, and employment laws and regulations. In today's diverse workforce, employers may need to provide compliant policies to prevent discrimination and harassment based on various protected categories of employees in the workplace. Laws will differ from country to country, as some countries may offer protections for more or fewer groups. Countries that are part of the E.U. will have additional obligations due to protections by the Charter of Fundamental Rights and European Directives related to protected categories in hiring, promotions, compensation, terminations, and training or apprenticeship programs, which some European countries have incorporated into their own legislation.

The terminology in this section may vary from country to country, so for ease of reference, see the *Glossary of Terms* at the end of this Guide.

6.1 What characteristics or categories of individuals are protected under the antidiscrimination laws?

Characteristics or categories of individuals protected under the antidiscrimination laws include:

Laws Protecting Workers Against Discrimination	Categories Protected
Indian Constitution, Articles 14, 16, and 39	The Constitution prohibits discrimination by the State based on religion, race, caste, sex, descent, place of birth, or residence.
Equal Remuneration Act, 1976 (ERA)	The current law prohibits discrimination based on sex, specifically towards women.
Code on Wages[33]	Prohibits discrimination on ground of gender.

[33] The effective date is yet to be notified.

Laws Protecting Workers Against Discrimination	Categories Protected
Rights of Persons with Disabilities Act, 2016 (RPDA)	Provides protection to the individuals with a disability.
Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 ("HIV Act")	Protects persons with Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome.
HIV and AIDS Policy for Establishments	Prohibits discrimination based on perceived HIV status, which extends to a HIV positive person, an immediate family member, and progeny who reside or have resided in the same house of an HIV-infected person.
Transgender Persons (Protection of Rights) Act, 2019 ("TPPR Act")[34]	Provides for protection of transgender persons.
The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("SC/ST Act")	Prohibits certain atrocities against members of Scheduled Caste or Scheduled Tribes. Any act of atrocity against a person of Scheduled Caste or Scheduled Tribe will be punishable with imprisonment for six months to five years and a fine.
Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (MSEA) **Uttarakhand Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (USEA)** **Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 (GSEA)**	These state laws, among others, expressly prohibit discrimination against women.

6.2 What types of conduct are prohibited in relation to these protected categories?

In India, the following laws regulate conduct prohibited in relation to the above protected categories:

[34] On September 25, 2020, the Transgender Persons (Protection of Rights) Rules, 2020 under the TPPR Act, have been notified and made effective, requiring employers to put in place an equal opportunity policy for transgender persons and appoint a complaint officer to handle complaints from transgender persons.

- **Indian Constitution:** The Indian Constitution prohibits discrimination by public sector employers against any Indian citizen on grounds of religion, race, caste, sex, descent, place of birth or residence.
- **ERA and Code on Wages:** The ERA provides for the payment of equal remuneration to male and female workers performing the same work or work of a similar nature and provides for the prevention of discrimination, on the ground of sex, against women in matters of employment (including recruitment) and for matters connected therewith or incidental thereto. The ERA also provides that no employer can, while recruiting for the same work, discriminate against women except where the employment of women in such work is prohibited or restricted by or under any law.

  Consistent with the ERA, the Code on Wages also prohibits discrimination amongst employees on the ground of gender in matters relating to payment of wages by the same employer, in respect of the "same work or work of a similar nature done by any employee."

  Same work or work of a similar nature has been defined to mean work in which the skill, effort, experience and responsibility required are the same when performed under similar working conditions by employees and the difference, if any, between the skill, effort, experience and responsibility required for employees of any gender, are not of practical importance in relation to the terms and conditions of employment. The ERA will be subsumed and replaced by the proposed Code on Wages, which seeks to cover within its ambit employees of all genders.
- **RPDA:** Provides protection to individuals with disability against any form of discrimination and requires every establishment (private and public) to have an equal opportunity policy for persons with disabilities.
- **HIV Act:** Provides for prevention and control of the spread of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) and for protection of human rights of persons affected by the said virus and syndrome, including prohibiting discrimination in employment.
- **HIV and AIDS Policy for Establishments:** The HIV Act applies to all establishments with two or more persons carrying out systematic activity for at least 12 months. The policy prohibits discrimination (including in employment and occupation, and holding public and private office) based on perceived HIV status, which extends to an HIV-positive person, an immediate family member, and progeny who reside or have resided in the same house of an HIV-infected person.
- **TPPR Act:** Provides for protection of transgender persons against any form of discrimination, unfair treatment in relation to employment or occupation, denial of or termination from employment, and denial of access to multiple facilities/opportunities including opportunities to stand or hold public or private office.
- **SC/ST Act**: Prohibits atrocities against members of Scheduled Caste and Scheduled Tribes. Atrocities include obstructing such an individual from practicing any profession or employment in any job that other members of the public or any section thereof have a right to use or have access to.

State-specific Laws

Some state-specific laws (*e.g.*, Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2017 (MSEA), Uttarakhand Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2017 (USEA), and Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2019 (GSEA)) expressly prohibit discrimination against women in matters relating to recruitment, training, transfers, promotion, or wages.

Direct v. Indirect Discrimination

Indian laws do not differentiate between direct discrimination (*e.g.*, not recruiting women because of their sex) and indirect discrimination (*e.g.*, setting a criteria for employment that is not achievable by women).

Discrimination is defined specifically under each statute. For example, the RPDA defines *discrimination* in relation to disability as:

> 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.

RPDA defines reasonable accommodation as:

> necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others.

6.3 Are there any types of prohibited discriminatory conduct against other groups?

Employers should also consider the following statutory provisions (which apply to specific establishments and/or specific employees) related to prohibition of discrimination:

- **Indecent Representation of Women (Prohibition) Act, 1986:** Prohibits any advertisement/publication containing indecent representation of women.
- **Protection of Civil Rights Act, 1955:** Prescribes punishment for preaching and practice of untouchability and for discriminating against a person on the grounds of untouchability by not allowing the person to practice any profession or the carrying on any of occupation, trade or business or employment.
- **Maternity Benefit Act, 1961:** Prohibits termination of employment of a female employee during maternity leave.
- **Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989:** Provides for prevention of commission of offenses of atrocities against members of the Scheduled Castes and the Scheduled Tribes, trial of such offenses, and provision of relief and rehabilitation of the victims of the offenses.

- **Mental Healthcare Act, 2017:** Provides for promotion and fulfillment of the rights of persons with mental illness during delivery of mental healthcare and services.
- **Territorial Army Act, 1948:** Requires employers to reinstate individuals who had to quit employment with the employer to serve in the Indian Territorial Army under conditions as favorable as the conditions that applied prior to interruption in employment.
- **Diseases:** Amid infectious pandemics, such as the novel coronavirus (COVID-19), employers should consider consulting with local counsel to help ensure that all workplace policies implemented to protect workers from infection are applied uniformly to all employees and job applicants regardless of their ethnicity, race or other protected categories under the law or the employer's policies. However, to the extent an employee is unable to comply with certain requirements due to any protected characteristic such as disability or HIV status, employers may consider providing reasonable accommodation to such employees, if it is not an undue hardship for the employer.

6.4 Are there legal justifications for otherwise impermissible discrimination?

There are limited instances that allow legal justification for otherwise impermissible discrimination regarding:

- **Sex:** Under the ERA, there are no exceptions to employers with respect to complying with the provisions of the ERA, except to a limited extent where the nature of work in question is substantially different.
- **Disability:** The RPDA provides that no person with a disability will be discriminated against on the ground of disability, unless it can be shown that the impugned act or omission leading to discrimination is a proportionate means of achieving a legitimate aim, although establishments are required to ensure that this provision is not misused.[35]

6.5 Is an employer required to make adjustments for an employee based on the employee's religion?

Religious discrimination protections are only applicable to public-sector employment, therefore there are no requirements for private employers.

6.6 Is an employer required to make adjustments for an employee based on the employee's disability?

Employers are required to make adjustments for employees based on an employee's disability.

Under the Rights of Persons with Disabilities Act, employers are mandated to include within their equal opportunity policy details of the facilities/amenities that the employer will provide to disabled candidates to enable them to discharge their functions effectively. However, the law does not specifically prescribe what facilities/amenities need to be provided to each category of disabled persons. Therefore, employers will need to determine such needs on a case-by-case basis, depending on the kind/extent of disability and the nature of work to be performed by the employee. In the event that the company policies specifically prescribe any facilities/amenities that will be provided to disabled persons, such facilities must also be made available to them.

[35] Rights of Persons with Disabilities Act, 2017, sec. 3(3).

6.7 What types of harassment are prohibited under the law?

Sexual harassment against women at the workplace is prohibited by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act").

Sexual harassment is defined to include any one or more of the following unwelcome acts or behavior (whether directly or by implication): (1) physical contact and advances; (2) a demand or request for sexual favors; (3) making sexually colored remarks; (4) showing pornography; or (5) any other unwelcome physical, verbal, or nonverbal conduct of sexual nature.

The following circumstances, among others—if they occur or are present at a workplace in relation to or connected with any act or behavior of sexual harassment—may amount to sexual harassment as per the POSH Act: (1) implied or explicit promise of preferential treatment in a woman's employment; (2) implied or explicit threat of detrimental treatment in a woman's employment; (3) implied or explicit threat about a woman's present or future employment status; (4) interference with a woman's work or creating an intimidating, offensive, or hostile work environment for a woman; or (5) humiliating treatment likely to affect a woman's health or safety.

Sexual harassment is also prohibited under Indian criminal law.

6.8 What prohibitions exist regarding retaliation/reprisal?

There are no provisions in the POSH Act against retaliation or victimization, although the employer may provide such restrictions in its policies.

Companies listed on Indian stock exchanges are required to have a whistleblower policy for reporting unethical conduct, violations of an employer's code of conduct, etc. with adequate provisions to prevent retaliation against the whistleblower.

Indian laws otherwise do not contain any provisions that protect employees from retaliation for discussing their compensation. In the Indian context, employers generally include contractual restrictions that prohibit employees from discussing any remuneration-related aspects with coworkers.

6.9 Is an employer required to provide training on prevention of discrimination, harassment, or retaliation?

Yes, employers are required to provide antiharassment training, sensitizing employees regarding provisions of the POSH Act.

Antiharassment Training

The POSH Act mandates all employers to organize workshops and awareness programs for its employees at regular intervals.

- **Covered employers:** All employers are covered by the law.
- **Topics:** The trainings must be related to sexual harassment and the provisions of the POSH Act.
- **To whom:** Orientation programs, seminars, capacity-building and skill-building programs must be provided for the members of an employer's Internal Complaints Committee (IC).

Sensitization training on the POSH Act must be provided to all employees and contract workers.

- **Frequency:** Trainings must be provided to employees at regular intervals. There is no legal guidance on what an appropriate regular interval is for conducting trainings. Since the IC (constituted by an employer with at least 10 employees (inclusive of contract laborers) at their workplace under the POSH Act) is required to report the number of trainings conducted by an employer in a year in their annual report, it is common for employers to conduct POSH trainings annually. The employer is also obligated to include a declaration in the company's annual report on constitution of IC as per POSH Act.
- **Length:** Not prescribed under the POSH Act.
- **Penalties:** Any employer that contravenes provisions of the POSH Act is liable to monetary penalty of up to INR 50,000 with more severe penalties prescribed for subsequent convictions.

Other Training

Employers with at least 100 persons at their establishments are also required to organize workshops and awareness programs annually to sensitize their employees regarding provisions of the HIV Act and organize orientation programs for their Complaints Officer appointed as per HIV Act.

6.10 Are employers required to investigate allegations of discrimination, harassment, or retaliation?

Yes, employers are required to investigate all complaints related to sexual harassment.

Under the POSH Act an employer must set up an Internal Complaints Committee (IC) at each office where it has a minimum of 10 employees (inclusive of contract laborers). The IC needs to be set up by way of a written order. Certain cities / states (including Mumbai, Telangana, Noida, and Pune) have made it mandatory for the employers to either register the ICs or upload all relevant information of the ICs online.

The POSH Act mandates employers to investigate all complaints pertaining to workplace sexual harassment of women that have been escalated to the IC or to a Local Committee (as the case may be). Sexual harassment of other genders may be investigated in accordance with the employer's policies and practices.

As per the central rules to the RPDA, if head of a private establishment employing 20 or more persons receives a complaint from an aggrieved individual regarding discrimination on the ground of disability, they will need to initiate action as per the RPDA or inform the complainant how the action/omission was a proportionate means of achieving a legitimate aim.

Under the TPPR Act, all establishments are required to appoint a Complaint Officer to deal with complaints of violation of the TPPR Act.

Under the HIV Act, employers with at least 100 persons at their establishment are required to appoint a Complaints Officer to address complaints of violation of the HIV Act in the manner prescribed under rules to the HIV Act and HIV & AIDS Policy notified under the HIV Act.

6.11 May individual persons be liable for discrimination, harassment, or retaliation?

Subject to the employer's policies or code of conduct, individuals may be held liable for discrimination, harassment (including sexual harassment), or retaliation/reprisal and appropriate disciplinary action may be taken by the employer against their employees upon being found guilty in accordance with the employer's HR policies and practices. In case the individual held responsible for sexual harassment is not an employee, the employer may facilitate the complainant to file a police complaint against such individual.

7. Work Rules & Policies

An employer's obligation to create, update, and enforce workplace policies is often dictated by a country's laws. The applicability of such laws may depend on the size of the employer, the industry in which they operate, and even the region within a country where the employer is established. Even when two jurisdictions mandate similar policies in the workplace, they may diverge greatly in their notification, enforcement, and applicability requirements. This section addresses common workplace policies employers may be required to enact, including internal work rules, whistleblowing policies, health and safety policies, and general codes of conduct. Additionally, this section includes common issues related to notification, amendment, and compliance obligations.

7.1 Are there internal work rules or policies that an employer must adopt?

Yes, there is a legal requirement for certain employers to adopt and certify standing orders for their establishments as per the Standing Orders Act. The Standing Orders Act applies to "industrial establishments" with at least 100 workmen (amended to 50 workmen in some states such as Haryana and Karnataka). *Industrial establishment* includes factories under the Factories Act (FA), railways and other establishments notified by the state government as industrial establishments as per the Payment of Wages Act (POWA).

In certain states, the state government has notified commercial establishments to be industrial establishments under the POWA (*e.g.*, Haryana, Tamil Nadu). In some states, the state shops and establishments acts (SEAs) apply the POWA to all employees of commercial establishments in the state (*e.g.*, Karnataka). In such state, by virtue of coverage of the POWA to commercial establishments, the Standing Orders Act is also applicable to such commercial establishments subject to engagement of the appropriate number of workmen at the establishment. In Karnataka state, the state government has exempted Information Technology and Information Technology enabled Services establishments from application of Standing Orders until May 25, 2024 provided certain conditions have been complied with.

Establishments covered under the Standing Orders Act are required to adopt and have their standing orders certified by labor authorities as per the Standing Orders Act. The state governments have notified model standing orders for each state. The covered establishments need to ensure their standing orders are compliant with model standing orders. The certifying authority under the Standing Orders Act is also required to consult with trade union / employee representatives from the employer's establishment prior to certifying the standing orders. Any amendment to the standing orders will need to be approved as prescribed under Standing Orders. Employers are required to publish a copy of their standing orders (or model standing orders until adoption of standing orders) at their workplace on the notice board.

Noncompliance with provisions of Standing Orders Act may lead to a monetary penalty of up to INR 5,000 with additional penalties for continuing offenses.

Besides standing orders for employers covered under Standing Orders Act, all employers are also required to have the following mandatory policies:

- antisexual harassment policy under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act");
- equal opportunity policy under the Rights of Persons with Disabilities Act (RPDA) (with specific requirements for employers with at least 20 employees);
- equal opportunity policy under the Transgender Persons (Protection of Rights) Act (TPPR) rules; and
- privacy policy as per the Information Technology Act ("IT Act) and rules thereto.

7.2 Do whistleblower protections exist?

No, there are no specific whistleblowing protections for employees in India except in respect of companies whose shares are listed on Indian stock exchanges. Such listed entities need to have a whistleblower policy for reporting leakage of unpublished price sensitive information, unethical conduct, fraud, violation of code of conduct, etc. providing for adequate protection to whistleblowers against retaliation. However, the Industrial Disputes Act, 1947 (IDA) prohibits employers from discharging or retaliating against employees for filing charges or testifying against an employer in any inquiry or proceeding, which may protect certain conduct considered to be whistleblowing.

7.3 What general health and safety rules apply in the workplace?

Overview of Health & Safety Rules

Workplace health and safety are regulated through many laws in India, several of which are industry-specific.

In addition to the laws discussed in this section, public health officials have the right to issue requirements and guidelines for employers during infectious pandemics.

The FA sets standards for employees in factories. The factory inspector appointed under the FA enforces the provisions of the FA.

Employer Obligations

Under the FA, some of the safety measures that employers must ensure include (the list is nonexhaustive):

- all machinery is securely fenced by substantial safeguards;
- any examinations of machinery while in motion must be carried out by specially trained male workers wearing fitted clothing and whose names have been recorded by the employer;
- all practicable measures are taken to prevent fire, and that employees can access fire escapes and fire extinguishers;
- young persons and women are not allowed to clean, lubricate, or adjust any part of machinery while it is in motion;

- young persons are not allowed to work on any dangerous machines;
- women and young persons are not allowed to be employed near cotton openers;
- all hoists and lifts should be well-constructed and protected by a gated enclosure;
- all lifting machines, chains, ropes, and lifting tackles should be well-constructed, properly maintained, and competently examined;
- all floors, stairs, and means of access should be well-constructed and properly maintained;
- every fixed vessel, pit, sumps, and opening in floors should be securely covered or fenced; and
- no person is allowed to lift, carry, or move any load likely to cause them injury.

Additionally, the law requires that any factory engaging in hazardous processes must appoint someone experienced in handling hazardous substances to supervise these processes within the facility. *Hazardous process* means any process or activity in relation to a notified industry where, unless special care is taken, raw materials used therein or the intermediate or finished products, by-products, wastes or effluents thereof would: (1) cause material impairment to the health of the persons engaged in or connected therewith; or (2) result in the pollution of the general environment. These factories also must provide all necessary facilities for protecting workers and maintain accurate, updated health records for all workers that are exposed to any harmful substances in their work. This law defines the permissible levels of certain chemical substances allowed to be handled in a factory workplace.

As per the FA, any factory that employs 1,000 or more workers or carries out manufacturing processes that involve risk of injury must employ a requisite number of safety officers.

Employee Obligations

Under Section 111 of the FA, factory workers are prohibited from:

- willfully interfering with or misusing any appliance, convenience, or other object provided to secure worker health, safety or welfare;
- willfully and unreasonably doing anything likely to endanger themselves or other workers; and
- willfully neglecting to make use of appliances or objects provided to secure worker health and safety.

Workers who violate any of these provisions may face a three-month imprisonment and/or a fine of INR 100.

Additionally, workers must notify the occupier, agent, or person in charge of the factory if they have reasonable apprehension that the health or lives of any workers are in imminent danger.

Industry-Specific Obligations

Additional obligations on employers vary by industry, especially through state-enacted shops and establishments acts (SEAs) and state-specific rules under the FA. These include:

- **Maharashtra & MaharShops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (MSEA):** Includes the following provisions:

- requires employers with more than 100 workers to establish a Health, Safety, and Welfare Committee to identify accident-prone areas and take necessary steps to remedy these issues;
- requires every establishment to be kept clean and free of infection;
- establishments must have proper ventilation and lighting;
- no rubbish or debris is allowed to remain on premises or on their surroundings that would allow effluvia to arise within these premises;
- every employer must take all measures to protect premises and workers from danger of fire; and
- every employer must implement all safety measurements in the government's Fire and Safety Policy.

This SEA also requires employers to:

- obtain consent from female employees before having them work night shifts;
- provide proper lighting and illumination in places where women are required to move out of necessity;
- safeguard against sexual harassment in the workplace;
- employee at least three women in a night shift at any time;
- provide female employees separate, locking bathroom facilities with sanitary napkins;
- provide safe transport for female employees to and from night shifts, with all drivers and guards' details verified through the police;
- provide 12 hours between shifts for female employees who are moved from day to night shift; and
- prohibit scheduling female employees on the night shifts for 12 weeks before and after childbirth.

- **Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018:** Creates specific safety provisions and standards for textile businesses and other machinery, including:
  - cotton ginning machinery;
  - wood working tools;
  - rubber and plastic mills;
  - centrifugal machines;
  - shears slitters;
  - guillotine machines;
  - agitators and mixers;
  - leather, plastic and rubber stripper machines;
  - water sealed gas-holders;

- curing machines;
- pipelines containing inflammable materials;
- gas works; and
- fragile roofs.

- **Punjab Shops and Commercial Establishments Rules, 1958:** Requires dangerous parts of machinery to be in security-fenced establishments, that all establishments should have suitable devices to disconnect running machinery from power sources, and must provide tight-fitting clothes to employees working near moving machinery. This SEA has similar provisions regarding female employees as the MSEA.
- **Karnataka Shops and Commercial Establishments Rules, 1963:** Requires buildings of more than one story to be provided two sets of stairs, sufficiently lit, and exits to staircases must open immediately from inside. This SEA has similar provisions regarding female employees as the MSEA.
- **Andhra Pradesh Shops and Establishments Rules, 1990:** Requires dangerous parts of machinery to be in security-fenced establishments, that all establishments should have suitable devices to disconnect running machinery from power sources, and must provide tight-fitting clothes to employees working near moving machinery.
- **Tamil Nadu Shops and Establishments (Amendment) Act 2023:** Requires commercial employers to provide proper drinking water, sufficient latrine and urinals, lunchrooms and restrooms, and first-aid facilities for employees in the workplace. This SEA has similar provisions regarding female employees as the MSEA.
- **Haryana SEA:** This SEA has similar provisions regarding female employees as the MSEA.

Fatalities/Serious Occupational Injuries

In case of factories, for a fatality or injury (preventing the worker from working for at least 48 hours) at the workplace, notice has to be provided to authorities prescribed under state rules and the FA and as per the Employees' State Insurance Act (ESIA) or the Employees' Compensation Act (ECA), whichever applies to the injured/deceased employee.

There are no mandatory reporting requirements in case of commercial establishments, unless the concerned employee is covered under the ESIA or the ECA. In case of a workplace accident resulting in fatality or serious injury of an employee, notice may be provided as per the ESIA or the ECA, if either of these statutes apply to the injured / deceased employee.

A police report may also need to be filed. Employers covered under the ESIA are also required to keep an accident book at their establishment containing details of employment injuries and occupational diseases.

Penalties

Noncompliance with the FA may lead to monetary penalty of up to INR 100,000 and/or imprisonment of up to two years.

7.4 What steps are necessary to implement a global policy and/or a global code of conduct locally?

Any global policy will need to be reviewed to align with Indian laws. Once the policies are aligned, the policies may be extended to the Indian employees. It is a good practice for employers to obtain employee acknowledgment of any newly implemented policy. Such policies may be referenced in the employer's employment contract requiring employees to abide by such policies.

8. Privacy & Protection of Employee Personal Information

Protecting the rights of individuals, including employees, with respect to their personal information must be balanced against an employer's need to collect, use, store, and transfer employee data to facilitate business operations and to comply with laws around the world. In addition, unauthorized access to and improper disclosure of personal information have serious consequences to both organizations and the individuals involved. New statutes and regulations continue to emerge around the globe. And, while some countries do not have a comprehensive data protection framework specifically regulating data privacy, their federal constitution, the civil or criminal codes, and/or judicial doctrines inform the general obligations—applicable to both organizations and natural persons—with respect to the access and treatment of an individual's personal information.

This section examines the data privacy laws protecting the personal data of employees, including the employer's obligations when processing an employee's personal data, including sensitive personal data, and the employee's rights with respect to their personal data. The discussion also reviews the restrictions that may apply to an employer's transfer or export of the personal data of its employees. Finally, the applicable penalties for failure to comply with the data privacy laws are outlined, as well as an employer's obligations in the event of a data breach involving the personal information of employees. Although this comparison covers important aspects of each country's legal framework related to this topic, it is not all-inclusive and the current status should be verified by counsel as this is an area rife with frequent changes.

Refer to the ***Glossary of Terms*** at the end of this Guide for an overview of some of the terminology used in this section.

8.1 Are there any data privacy laws protecting the personal data of employees or job applicants?

Yes, there are data privacy laws that cover employees and job applicants.

The laws that protect personal data in India include:

- Information Technology Act ("IT Act");
- Reasonable Practices and Procedures and Sensitive Personal Data or Information Rules, 2011 ("Data Protection Rules") issued as per Section 43A of the IT Act; and
- Digital Personal Data Protection Act, 2023 (DPDPA), assent granted on August 11, 2023, not yet in force.

8.2 What are an employer's obligations when processing (*i.e.*, collecting, storing, using, handling, etc.) personal data of employees or job applicants?

The IT Act, as amended, along with the Data Protection Rules issued as per Section 43A of the IT Act, contain provisions protecting sensitive personal data or information (SPDI) (see discussion in **8.3**). These provisions are not, however, applicable to data that does not fall within the definition of SPDI.

Once in force, the DPDPA permits employers to process an individual's personal data "for the purposes of employment or those related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee." The term "for the purposes of employment" is not defined but is likely to be construed broadly to include data of employees and job applicants. To that extent, employers may have more flexibility in processing employee personal data once the DPDPA is made effective.

8.2(a) *Lawful Basis for Processing*

The current law does not regulate processing of data that does not qualify as SPDI.

Once in force, the DPDPA recognizes processing of employee personal data in digital form for employment related purposes and those related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee" as "legitimate use." For such processing, the consent and notice provisions of the DPDPA are not applicable.

8.2(b) *Notice of Processing*

The current law does not require a notice of processing for data that does not qualify as SPDI.

Once in force, the DPDPA will not require the data controller to provide notice to employees if the data is processed for employment-related purposes and purposes related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee.

8.2(c) *Security, Accuracy, and Retention of Personal Data*

- **Security:** As per Data Protection Rules, body corporates are required to have a documented information security policy and the same must be disclosed in the privacy policy.

  The law does not prescribe any specific standard. However, IS/ISO/IEC 27001 on "Information Technology - Security Techniques - Information Security Management System - Requirements" is recognized as one example of reasonable security practices.

  There is a similar obligation upon Data Fiduciaries[36] under the DPDPA. A Data Fiduciary is obligated to protect personal data in its possession or under its control, including in respect of any processing undertaken by it, by taking reasonable security safeguards to prevent personal data breach.

[36] As per the DPDPA, *Data Fiduciary* means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.

- **Accuracy:** As per the Data Protection Rules, an employer collecting SPDI must permit the employees, as and when requested by them, to review the information they had provided and ensure that any SPDI found to be inaccurate or deficient should be corrected or amended as feasible. However, the employer is not responsible for ensuring accuracy.

  As per the DPDPA, where personal data processed by a Data Fiduciary is likely to be (1) used to make a decision that affects the employee; or (2) disclosed to another Data Fiduciary, the Data Fiduciary processing such personal data must ensure its completeness, accuracy, and consistency.

- **Retention:** As per the Data Protection Rules, employers holding SPDI must not retain that information for longer than is required for the purposes for which the information may lawfully be used or is otherwise required under any other law for the time being in force.

  There is no specific clause under the DPDPA regarding retention of employee data. However, it is recommended that personal data of employees should be erased as soon as it is reasonable to assume that the personal data is no longer required for "the purposes of employment" or such purposes "related to safeguarding the employer from loss or liability such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee" unless retention is required for any other law.

8.3 Are there any special requirements related to sensitive personal data of employees or job applicants?

The Data Protection Rules define *sensitive personal data or information* (SPDI) as such personal information that consists of information relating to: (1) password; (2) financial information such as bank account or credit card or debit card or other payment instrument details; (3) physical, physiological, and mental health condition; (4) sexual orientation; (5) medical records and history; (6) biometric information; (7) any detail relating to the above clauses as provided to the body corporate for providing service; and (8) any of the information received under the above clauses by the body corporate for processing, as well as any information stored or processed under a lawful contract or otherwise.

Employers should keep in mind that *inter alia* a person's physical, physiological, and mental health data and medical records and history (in electronic form) are categorized as SPDI and protected under the IT Act and Data Protection Rules. Unlawful infringement of these laws—such as obtaining health data without consent, unlawfully disclosing it to third parties, or failure to maintain reasonable security practices and procedures—may lead to liability to pay compensation, imposition of monetary fines and/or imprisonment. Accordingly, employers implementing policies or practices to collect employees' health data or medical records electronically (*e.g.*, screening for temperature and symptoms of an infectious disease) should consider working with local counsel to help ensure such policies and practices comply with local law.

The IT Act along with the Data Protection Rules apply to data or information "in a computer resource," and not to information in the physical domain. But note that other provisions of the IT Act do not appear to be restricted to information stored in electronic records but seem to extend to personal information secured in any form, for example Section 72A.

The IT Act requires a corporate body to implement and maintain "reasonable security practices and procedures." The Data Protection Rules (Rule 8) define *reasonable security practices and procedures* as follows:

> A body corporate or a person on its behalf shall be considered to have complied with reasonable security practices and procedures, if they have implemented such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security programme and information security policies.

The Data Protection Rules also enumerate the compliance requirements in relation to collection, access, transfer, disclosure, and usage of SPDI by a corporate body within or outside India. Currently, If the employer is collecting and/or processing SPDI of the employees via a computer resource, the employer would have to comply with the Data Protection Rules with respect to collection, processing, and transfer, which include, *inter alia*:

- The employer would need to obtain prior written consent (including via electronic means) of the employee for the collection of such SPDI. Such consent should state the purpose of collection.
- The employee should be given information about the intended recipients of the SPDI, and the identity of any agent involved in the collection and whether any transfer of the SPDI is to take place.
- The employer would need to have a privacy policy in place in accordance with the parameters provided in the Data Protection Rules, and such privacy policy should also be published on its website.
- The employee should have the right to review the information provided and correct any deficiencies.
- The employer is also required to provide an option to withdraw the consent provided earlier.

Transfer of SPDI in an electronic form or medium (computer resource) by the collector of the SPDI is allowed within or outside India: (1) for the performance of a lawful contract; or (2) where prior consent of the data provider has been taken. Further, the transferee needs to adhere to at least the same levels of data protection as set out in the Data Protection Rules.

There is no specific requirements under the DPDPA regarding sensitive data.

8.4 What rights do employees and job applicants have with respect to their personal data?

The current law does not provide specific rights to an individual with respect to personal data that does not fall within the definition of SPDI.

Once in force, under the DPDPA, employees will have:

- **Right to Nominate Another to Exercise Their Rights:** The right to nominate any other individual, who, in the event of death or incapacity of the employee, can exercise their rights in accordance with the DPDPA.
- **Right to Redress Grievances:** the right to have readily available means of grievance redressal provided by the employer in respect of any act or omission of the employer regarding the performance of its obligations in relation to the personal data or the exercise of their rights under the DPDPA.

8.5 Is an employer permitted to transfer the personal data of its employees or job applicants?

8.5(a) *Transfers Within the Jurisdiction*

Transfers within India are freely permitted, to the extent the transferee provides the same level of data protection as the data controller compliant with the Data Protection Rules.

There are no restrictions under Indian law for the transfer of data (in a purely physical domain) to third parties within the country, nor are there restrictions on the transfer of data that does not fall within the definition of SPDI.

Once in force, under the DPDPA, transfers within India will be permitted so long as such transfers are for the purposes of employment or such purposes related to safeguarding the employer from loss or liability such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee.

8.5(b) *Transfers Outside the Jurisdiction*

Transfers of regular personal data outside of India are freely permitted to the extent the transferee provides the same level of data protection as the data controller compliant with the Data Protection Rules.

There are no restrictions under Indian law for the export of data (in a purely physical domain) to related companies in the United States, nor are there restrictions on the export of data that does not fall within the definition of SPDI.

Under the DPDPA, transfers outside India are permitted so long as such transfers are for the purposes of employment or such purposes related to safeguarding the employer from loss or liability such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee. Under the DPDPA, the Central Government may restrict the transfer of personal data by a Data Fiduciary[37] for processing to such country or territory outside India. The list of such countries has currently not been notified.

[37] As per the DPDPA, Section 2(i), *Data Fiduciary* means any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data.

8.5(c) *What are the penalties for failure to comply with the data privacy laws?*

There is no specific enforcement authority under the IT Act. Certain adjudicatory authorities appointed by state/federal government are empowered to adjudicate on matters related to the IT Act. For example, Section 43A of the IT Act states that when a corporate body is negligent in implementing and maintaining reasonable security practices and procedures in relation to any SPDI that it possesses, and such negligence causes wrongful loss or wrongful gain to any person, the entity is liable to pay damages by way of compensation to the affected person. Currently, there is no maximum limit in relation to the amount of compensation required to be paid, and the amount is subject to the discretion of the relevant authority or court.

In addition to the above, Section 72A of the IT Act states that when the offense of unauthorized disclosure of personal information occurs with the intent to cause, or knowledge that such disclosure is likely to cause, wrongful loss or wrongful gain, then the offender may be punished with imprisonment up to three years and/or with a fine up to INR 500,000.

Once in force, the Data Protection Board will enforce the provisions of the DPDPA. The DPDPA authorizes the Data Protection Board to impose monetary penalties for certain violations of the DPDPA. For example, breach of any provision of the DPDPA or rules thereunder may be punishable with a monetary penalty of up to INR 500 million.

8.6 In the event of a data breach involving personal information of an employee, what are the employer's obligations?

All individuals, organizations and corporate entities are mandatorily required to report certain identified cybersecurity incidents to the Indian Computer Emergency Response Team ("CERT-In") in accordance with the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 and directions issued by CERT-In on April 28, 2022 ("Directions"). Any incident as stated in Annexure A to the Directions and meeting the following criteria should be reported within six hours of the relevant entity having noticed or having been brought to notice such incident:

- cyber incidents and cybersecurity incidents of severe nature (such as denial of service, distributed denial of service, intrusion, spread of computer contaminant including Ransomware) on any part of the public information infrastructure including backbone network infrastructure;
- data breaches or data leaks;
- large-scale or most frequent incidents such as intrusion into computer resource, websites, etc.; or
- cyber incidents impacting safety of human beings.

All other cybersecurity incidents must be reported within a reasonable time. As per the DPDPA, the Data Fiduciary must give the Data Protection Board formed under the DPDPA and each affected employee, intimation of any personal data breach[38] in such form and manner as will be prescribed under the DPDPA.

[38] *Personal data breach* means any unauthorized processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction, or loss of access to personal data, that compromises the confidentiality, integrity, or availability of personal data.

9. Workers' Representation, Unions & Works Councils

While most industrialized and developing nations recognize individuals' right of association as a fundamental right, each country's labor and employment laws create a unique legal framework that governs employees' right to organize and be represented collectively. Union membership across the globe varies based on whether workers in a given country must organize at the individual employer level or whether a country's labor laws invite unions to negotiate collective bargaining agreements for entire sectors or classes of workers. Equally impactful, the role of works councils in a particular country may also determine the collective consultation rights provided to workers. To assist multinational employers in understanding the individual laws governing their relationship with worker representative bodies, this section helps inform when an employer is required to recognize and work with unions or works councils and what rights and obligations that recognition entails. This section also provides information on the extent to which strikes, lockouts, picketing, and secondary actions are recognized, or possibly restricted, if a labor dispute arises.

The ***Glossary of Terms*** at the end of this Guide provides an overview of some of the terminology in this section.

9.1 Do workers have a fundamental right of association and representation regarding their working conditions?

Yes, India recognizes the right of a worker to join a union. Specifically, the right to form associations or unions (so long as the association is for a lawful purpose) is a fundamental right under Article 19(1)(c) of the Constitution. This right can be exercised at an individual's discretion.

In addition, the Trade Unions Act, 1926 ("TU Act"), which regulates the functioning of registered trade unions, requires that employers allow employees to form a trade union if they so desire.

In particular, workers participate in unions in the traditional sectors, such as manufacturing, mining, and construction.

9.2 What are the types of worker representative bodies recognized in the jurisdiction?

India recognizes trade unions. Certain employers may also be required to create a works committee. Trade unions desiring to obtain registration can register themselves as per the TU Act. Indian law does not distinguish between trade unions and labor unions.

The types of worker representative bodies recognized in India include:

- **Trade Unions:** *Trade unions* are defined under Section 2(h) of the TU Act as "any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions."
- **Negotiating Union:** The Industrial Relations Code ("IR Code"), which is yet to be made effective, introduces this concept and defines *negotiating union* as the registered trade union that has been recognized as the union having the statutory right of negotiating with the employer of the industrial establishment on prescribed matters.

- **Works Committee:** The role of a works committee is to promote measures for securing and preserving amity and good relations between the employer and workmen and to review matters of their common interest or concern and endeavor to resolve any material difference of opinion in respect of such matters.
- **Negotiating Council:** The IR Code (which is yet to be made effective) introduces this concept. The employer may constitute a negotiating council consisting of the representatives of the registered trade unions for participating in negotiations on certain prescribed matters. A negotiating union will be constituted where the employer's establishment has workers belonging to more than one trade union but no such trade union has participation of more than 51% of the workers on the employer's muster roll. A negotiating council must consist of representatives from multiple concurrently operating trade unions, empowered to negotiate with the employer.

9.3 When is an employer required to recognize a worker representative body?

Under extant laws, the employer is not required to recognize a trade union. The employer may be required to constitute a works council in case it employs at least 100 workmen at its establishment and it has been mandated by the state government.

Under the IR Code (once its provisions become effective) employers will be required to recognize a negotiating union or a negotiating council. If an employer has only members of one trade union at its workplace, the employer will be required to recognize such trade union as the registered union subject to meeting conditions prescribed under state rules to the IR Code. If an employer's workplace has workers[39] who are members of more than one trade union, then the trade union to which more than 51% of workers subscribe will be the negotiating union. If no such union exists, the employer will need to constitute a negotiating council.

[39] As per IR Code, *worker* means:

> any person (except an apprentice as defined under clause (aa) of section 2 of the Apprentices Act, 1961) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes working journalists as defined in clause (f) of section 2 of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 and sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976, and for the purposes of any proceeding under this Code in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched or otherwise terminated in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person— (i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who is employed in a supervisory capacity drawing wages exceeding eighteen thousand rupees per month or an amount as may be notified by the Central Government from time to time: Provided that for the purposes of Chapter III, "worker"— (a) means all persons employed in trade or industry; and (b) includes the worker as defined in clause (m) of section 2 of the Unorganised Workers' Social Security Act, 2008.

9.3(a) *Recognition of a Union*

Under the TU Act, any seven or more members of a trade union may obtain registration and form a registered trade union as prescribed under the Act. The TU Act provides for legal recognition to trade unions and a registered trade union becomes a legal person, distinct from its members.

There is no requirement under the TU Act for mandatory representation of any particular class of workers. A trade union may consist of temporary or permanent workmen. Moreover, a trade union may consist of all or select classes of workers and it is not necessary that separate unions be formed for separate categories of workers.

Certain Indian states have enacted state-specific legislations providing for various compliance steps to be undertaken by the trade unions and the process for applying for recognition of a trade union. Examples include the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labor Practices Act, 1971 (for Maharashtra) and the Kerala Recognition of Trade Unions Act, 2010 (for Kerala). The Industrial Relations Code, 2020 (which has not yet become effective) introduces the concept of recognition of a negotiating trade union or a negotiating counsel in a national labor law statute, although similar provisions were included in the statutes for Maharashtra and Kerala. The IR Code also introduces certain minimum thresholds that trade unions will need to meet to get registered. For example, under the IR Code, no trade union of workers will be registered unless at least 10% of the workers or 100 workers employed in the industrial establishment or connected industry are members of the trade union on the date of registration.

9.3(b) *Recognition of a Works Committee*

Under the Industrial Disputes Act, 1947 (IDA), industrial establishments employing at least 100 workmen on any day in the preceding 12 months may be required by the government (by general or special order) to constitute a Works Committee consisting of representatives of the employer and workmen engaged in the establishment.

9.4 Do workers acquire special rights, protections, or obligations by being a member of a worker representative body?

Yes. The IDA stipulates certain unfair labor practices prohibited by the employer that create certain protections for employees. These include threatening workmen with discharge or dismissal for joining a trade union or encouraging or discouraging membership of any trade union by discriminating against a workman. Certain executives or office bearers of a registered trade union (l% of total number of workmen) may acquire the status of protected workmen subject to applicable compliances, which protects them against certain detrimental employer actions (such as dismissal) during pendency of an industrial disputes.

An employee is also subject to obligations by joining a trade union – namely, employees pay a membership fee that is set by the trade union rules/charter documents.

9.5 Is the employer required to bargain with, consult, and/or inform the worker representative body? If so, under what circumstances?

There is no mandatory bargaining requirement under extant laws. If employers have a collective bargaining agreement in place, changes to the same may be subject to consent of the trade union / employees. The IDA sets forth certain unfair labor practices that address bargaining or consultation. Specifically, an employer cannot refuse to bargain collectively in good faith with a recognized trade union.

Further, an employer cannot grant wage increases to workmen at crucial periods during union organizing to undermine the efforts of the trade union.

There are some bargaining requirements under the IR Code (yet to be made effective). As per the IR Code, if an industrial establishment has a registered trade union, the employers must recognize it as the negotiating union for the workers, subject to certain conditions as may be prescribed by the government.

Employers may be required to negotiate all matters relating to the workforce with the negotiating trade union or the negotiating council.

9.6 What are the primary mechanisms of action (*e.g.*, strikes, picketing, etc.) workers may use to advocate for their collective rights or working conditions?

The IDA contains provisions on strikes and lockouts. Picketing and secondary actions are not otherwise regulated although not legally prohibited when done outside the working hours and the employer's establishment.

All employees have the right to collective bargaining. A strike must be in compliance with the provisions of the IDA. A *strike* is defined by Section 2(q) of the IDA as "cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment." Workmen conducting strikes may not be entitled to protections under the IDA when the strike is not justified or is illegal.[40]

Procedures, Restrictions & Timing

Strikes and lockouts can be used under various circumstances, such as, if the terms of the employment contract have been breached or if there has been a change in service conditions. All strikes should be legal and justified, that is, they should conform to the requirements provided herein under the IDA. If the strike does not conform to these requirements, it will be considered as an illegal strike and the employer may take disciplinary action against the striking employees.

There is a general prohibition on the employees to go on a strike and on the employer to declare a lockout during:

1. the pendency of proceedings before a Labor Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings;
2. the pendency of conciliation proceedings, before a Board and seven days after the conclusion of such proceedings;
3. the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings; or
4. any period in which a settlement or award is in operation in respect of any of the matters covered by the settlement or award.

Additionally, Section 25 of the IDA also prohibits persons from knowingly spending or applying money in direct furtherance or support of any illegal strike or lockout.

[40] *Syndicate Bank v. K Umesh Nayak*, 1995 AIR 319.

Specific to lockouts, the IDA includes a provision that threatening a lock-down or closure in response to a trade union being established constitutes an unfair labor practice.

Compensation & Replacement Workers

Striking employees are entitled to wages during the period of strike if the strike is legal (as per the IDA and other applicable laws) and justified (not perverse).[41] Recruiting replacement workmen during a legal and justified strike is considered an unfair labor practice under the IDA.

9.7 Does the law prohibit or otherwise limit workers' right to strike in specific industries, job positions, or circumstances?

The IDA imposes restrictions on strikes and lockouts in a "public utility service," including the requirement to provide a notice of six weeks. The government has notified various essential services as public utility services, such as services in hospitals and dispensaries.

10. Individual Dismissals & Collective Redundancies

An employer's decision to end the employment relationship with an employee may arise from a variety of reasons stemming primarily from the employee's conduct or actions (*e.g.*, poor performance) or due to economic or other business reasons (*e.g.*, business cessation, layoffs, reorganization of internal departments or introduction of technology so that an employee's tasks are to be phased out and no longer required). The term *redundancy* in this section refers to a dismissal for a reason not related to the employee's performance but for economic, technical, or structural reasons.

The laws surrounding terminations vary greatly from country to country. In some countries, the legal framework is relatively simple, requiring no different treatment based on the reasons behind the employer's decision to terminate or the number of employees involved (*e.g.*, *small-scale redundancy*[42] compared to a *collective redundancy*[43]). Other countries prohibit employers from taking any unilateral action and, instead, require the employer to engage in a process of consultation and negotiation with the works council or worker representative bodies prior to any collective redundancy taking effect. The sanctions for noncompliance can be significant—including compensation, court injunction, and criminal penalties. Terminating employees is an area particularly fraught with legal risk, so it is recommended that employers always seek advice from legal counsel.

10.1 On what grounds can an employer dismiss an employee?

10.1(a) *Permitted Grounds*

Indian labor law does not recognize "at-will" employment. Termination of an employee's employment may only be for: (1) reasonable cause; or (2) on account of misconduct.

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[41] *Syndicate Bank*, 1995 AIR 319.

[42] A *small-scale redundancy* is a dismissal of one or more employee(s) for Redundancy that will generally *not* trigger enhanced consultation with worker representative bodies (such as unions, works councils, etc.) and other notification obligations (equivalent to WARN in the United States or collective redundancies across Europe).

[43] A *collective redundancy* includes plant closures or business cessation that may be subject to additional notification or consultation obligations equivalent to the WARN Act (in the United States) and collective redundancies (across Europe). Synonyms include mass layoff, large-scale reduction-in-force, or collective dismissal.

Reasonable cause may include *retrenchment*, which the Industrial Disputes Act, 1947 (IDA) defines as the termination by the employer of the service of a workman for any reason whatsoever other than as a result of "a punishment inflicted by way of disciplinary action." (See **10.1(a)(iv)**.)

Employee rights pertaining to termination of employment are contained under the IDA, state-specific shops and establishments acts (SEAs), standing orders, and the employment contract.

10.1(a)(i) *Misconduct*

As noted above, termination of an employee's employment can be on account of misconduct. The Model Standing Orders (MSOs) provide a list of acts and commissions on the part of an employee that may amount to *misconduct*, which also includes the following:

- absence from service without notice in writing or without sufficient reasons;
- theft, fraud or dishonesty in connection with the employer's business or property;
- taking or giving bribes or any illegal gratification; or
- habitual negligence or neglect of work.

10.1(a)(ii) *Capabilities and Performance*

Termination of a workman for continued ill health is not protected under the IDA. Accordingly, conditions for retrenchment of a workman (unilateral termination of employment by employer) are not triggered in such cases.

Employees may also be terminated for poor performance. Prior to terminating employment for poor performance (and to be in compliance with applicable laws), the employer must adequately document the employee's performance issues, to be able to demonstrate that: the employee was provided real-time and consistent feedback on poor performance; the employee was provided an opportunity to improve performance; the employee failed to improve performance despite such opportunity; and the employee was informed regarding failure to perform at the employer's desired level and to improve performance.

10.1(a)(iii) *Economic and Structural Reasons (e.g., Redundancy)*

Redundancy is not defined under Indian laws. However, in the past, courts have considered restructuring of an employer's organization as a reasonable cause for termination of employment. In case an employer terminates employment for redundancy, the employer should be wary of backfilling such position immediately. There are requirements under the IDA for employers to provide notice and preference to retrenched workmen while hiring for future vacancies.

10.1(a)(iv) *Other Reasons*

As noted above, employers can "retrench" workmen provided it is based on reasonable cause. *Retrenchment* is the termination by the employer of the service of a workman for any reason other than as a result of "a punishment inflicted by way of disciplinary action," but excludes: (1) voluntary retirement of the workman; (2) retirement of the workman on reaching the age of superannuation (as per the terms of contract); (3) termination as a result of nonrenewal of the contract; or (4) termination on the grounds of continued ill-health.

Courts have also upheld an employer's ability to terminate employees in positions of responsibility for loss of confidence in limited cases involving fraud, theft, misappropriation, etc.

10.1(b) *Prohibited Grounds*

Indian labor law does not recognize an "at-will" employment relationship. Dismissal of an employee's employment may be for a reasonable cause or on account of misconduct, as discussed in **10.1(a)**. The following reasons are *not* considered reasonable cause for termination:

- voluntary retirement of the workman;
- retirement of the workman on reaching the age of superannuation (as per the terms of contract);
- termination as a result of nonrenewal of the contract; and
- termination on the grounds of continued ill-health.

Employers are prohibited from terminating employment of employees who are on maternity leave and employees who are in receipt of sickness or disability benefit under the Employees' State Insurance Act, 1948 (ESIA).

Further, under Section 33 of the IDA, before taking any action against a protected workman (see discussion in **9.4**), an employer is required to obtain permission from the appropriate government authority during the pendency of any proceeding in respect of an industrial dispute. Specifically, permission is required before: (1) altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or (2) discharging or punishing whether by dismissal or otherwise, of a "protected" workman. Approval of the appropriate authority is also required in a case of dismissal of an employee for any misconduct not connected with the dispute, from an establishment whose management and employees have a dispute pending before the said authority.

10.2 Does the employer have to inform the employee of the grounds for dismissal?

In India, an employer is required to inform the employee of the grounds for dismissal.

10.3 What process must an employer follow when dismissing an individual employee?

In case of termination of employment for reasons other than misconduct, employees have to be provided prior notice of termination or wages in lieu thereof. The minimum notice period is stipulated under the IDA and applicable SEAs is ordinarily one month. A longer period of notice may be prescribed under the employment contract, in which case, such provision will prevail (given that it is more beneficial to the employee). In the termination notice issued to workmen, employers are required to provide the reason for termination of employment.

Prior to termination of employment for misconduct, the employer must prove the alleged misconduct in a disciplinary enquiry process following principles of natural justice.

10.3(a) *Termination Based on Employee Misconduct*

In case of dismissal as a result of misconduct on the part of an employee, a notice period or pay in lieu of notice is not necessary. However, in certain state SEAs (shops and establishments acts) such as in Telangana, there is a lack of clarity on whether notice is required in case of termination of employment

for misconduct. However, it is important that the necessary disciplinary procedure be followed (*e.g.*, the employer is required to conduct a domestic (internal) inquiry based on the principles of natural justice).

The definition of retrenchment under Section 2(oo) of the IDA does not include termination as a result of "a punishment inflicted by way of disciplinary action." Accordingly, termination as a result of misconduct will need to be as per the state-specific SEAs and the Model Standing Orders (MSO) as applicable.

In December 2020, the Ministry of Labor and Employment released draft Model Standing Orders for manufacturing and service sector establishments, which are yet to be finalized and notified. These have been issued under the powers conferred to the central government by the provisions of Industrial Relations Code ("IR Code").[44] The draft Model Standing Orders have introduced some new provisions, including those relating to work from home and flexibility in shift working. As per the IR Code, the provisions of Chapter IV relating to standing orders apply to every industrial establishment employing at least 300 workers on any day in the preceding 12 months.

10.3(b) *Termination Based on Capabilities and Performance*

In order to terminate employment for an employee's continued ill-health, the employer is not required to follow the process provided under the IDA as discussed in **10.3(d)**. Accordingly, employee may be terminated by employer in accordance with applicable state level laws, contractual provisions, employer's policies and standing orders, as applicable.

For terminating employment of a workman for performance-related reasons, the employer is required to follow process as discussed in **10.3(d)**. The employer needs to adequately document the employee's poor performance prior to termination.

10.3(c) *Small-Scale Redundancy*

See discussion in **10.3(d)**.

10.3(d) *Other Reasons*

The following describes the standard process for retrenchment/termination in India. In order to retrench workmen who have completed continuous service of at least one year (defined to mean 240 days), the employer is required to:

- give one month's notice or pay in lieu thereof, indicating the reasons for retrenchment;
- pay retrenchment compensation (severance) equivalent to 15 days' average pay for every completed year of service or any part thereof in excess of six months; and
- give a notice to the labor authorities in the prescribed format. In the case of a business closing down, the employer is required to give 60 days' notice (90 days in certain cases, along with a requirement of prior permission) to the labor authorities.

The provisions for retrenchment are different for workers employed in a factory covered by the Factories Act (FA), a mine or a plantation, employing at least 100 workmen (increased to 300 in some states) on an average working day for the preceding 12 months. As per Section 25N of the IDA, the employer must fulfill the following conditions:

[44] Section 29 of the IR Code. The IR Code is yet to be made effective.

- give the workman three months' notice in writing (or pay in lieu of notice) indicating the reasons for retrenchment;
- obtain prior permission from the appropriate government authority before terminating the workman; and
- where the permission has been granted, provide every workman, at the time of retrenchment, compensation equal to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

In the absence of any agreement to the contrary, the IDA ordinarily requires the employer to retrench the workman who was the last person to be employed in that category, unless specific reasons exist for selection of a different workman for retrenchment. Such reasons must be recorded by the employer.

In addition to the termination provisions in the IDA and model standing orders (MSOs),[45] if applicable, the employment termination provisions under the state-specific SEAs also need to be complied with for employees working in shops and commercial establishments.

10.4 For collective redundancies, are there additional or different rules?

No, there are no additional rules for collective redundancies other than Section 25N of the IDA (see **10.3(d)**).

Closure of an Undertaking

There are specific provisions with respect to closure of an undertaking under the IDA. *Closure* is defined as "the permanent closing down of a place of employment or part thereof." When an employer intends to close down an undertaking, at least 60 days before the intended closure, a notice in the prescribed manner has to be given to the appropriate government clearly stating the reasons for the intended closure of the undertaking. However, this requirement of notice does not apply to an undertaking that is set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project or to an undertaking that:

- currently employs less than 50 workmen; or
- has employed less than 50 workmen on an average per working day in the preceding 12 months.

On the closure of an undertaking, the employer has to pay compensation to the workmen, which may be payable to them upon retrenchment.

In case of industrial establishments employing more than 100 workmen on an average per working day for the preceding 12 months, an approval for such closure is required from the appropriate government, the application for which has to be made at least 90 days before the date of the intended closure.

Employees Protected from Collective Dismissals

Employees who have entered into employment contracts containing more favorable provisions may be protected from collective dismissals, since the termination of employment would be primarily governed

[45] While the MSOs apply to *industrial establishments (*which are defined to mean factories, plantations, mines, oilfields, etc.), the applicability of MSOs has also been extended to commercial establishments in some Indian states like Haryana (Gurgaon).

by the provisions of their respective employment contracts. Employers are also not permitted to dismiss female employees who are on maternity leave or insured persons as per Employees' State Insurance Act, 1948 who are in receipt of sickness benefit, maternity benefit, disablement benefit, or is under medical treatment for sickness or is absent from work as a result of illness arising out of pregnancy or confinement, as per provisions of Employees' State Insurance Act, 1948.

Additionally, as per the IDA, during the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labor Court or Tribunal or National Tribunal in respect of an industrial dispute, an employer cannot for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

Further, in case of any misconduct not connected with the dispute, the employer may discharge or punish, whether by dismissal or otherwise, a workman provided he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

Additionally, during the pendency of any such proceeding in respect of an industrial dispute, an employer cannot take any action against a protected workman concerned in such dispute by discharging or punishing, whether by dismissal or otherwise without the express permission in writing of the authority before which the proceeding is pending. A *protected workman* in this context means a workman who, being a member of the executive or other office-bearer of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

Section 33 of the IDA also provides that in every establishment, the number of workmen to be recognized as protected workmen should be 1% of the total number of workmen employed subject to a minimum number of five protected workmen and a maximum number of 100 protected workmen. The appropriate government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

10.4(a) *Triggering Event*

See discussion in **10.3(d)**.

10.4(b) *Employer Obligations*

See discussion in **10.3(d)**. There are no additional employer obligations.

10.4(c) *Timing*

The timeline for retrenchment of employees depends on the size of the organization. In case of an industrial establishment[46] in which not less than 100 workmen (increased to 300 in some states) were employed for the preceding 12 months, the retrenchment procedure may take a minimum of three months as the notice required to be given to the employees under law for termination of their employment is three months.

[46] *Industrial establishment* means: a factory under the Factories Act, 1948; a mine under the Mines Act, 1952; or a plantation under the Plantations Labor Act, 1951.

In other establishments, the retrenchment procedure could take place in one to two days, depending on the process followed by the employer.

The duration of such a process may also increase in case: (1) there are trade unions involved; and (2) there are any negotiations between the employer and the trade unions. Further, from a timing perspective, many employers also consider undertaking such retrenchments in phases rather than doing it all at once.

10.5 What general costs will an employer pay for dismissing an employee?

10.5(a) *Statutory Termination Pay*

Severance is to be paid when employment of a workman is terminated by the employer due to retrenchment, closure of the establishment, or due to any reason other than misconduct. Severance under the IDA is calculated at the rate of 15 days' "wages" for every completed year of continuous service or any part thereof in excess of six months.

Wages under the IDA is defined to mean all remuneration capable of being expressed in terms of money, that would, if the terms of employment (expressed or implied) were fulfilled, be payable to a workman in respect of their employment or of work done in such employment.

Wages include:

- such allowances (including dearness allowance[47]) as the workman is, for the time being, entitled to;
- the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;
- any travelling concession; and
- any commission payable on the promotion of sales or business or both;

but does not include—

- any bonus;
- any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force; and
- any gratuity payable on the termination of his service.

Therefore, the termination pay will be equivalent to the wages that should be paid under the IDA. In addition to severance under the IDA, there may be other payments required under applicable labor laws and contractual arrangements and the state-specific SEAs.

In addition to severance, employees are also entitled to receive gratuity as per Payment of Gratuity Act, 1972 (POGA) in the event they have completed continuous service of at least five years (interpreted as four years and 240 days) with the employer. Employees are also entitled to payment for accrued but

[47] The *dearness allowance* is a cost-of-living adjustment paid by employers to employees, which is designed to address the impact of inflation.

unused leave days. Employees covered under the Payment of Bonus Act, 1965 are also entitled to get arrears of statutory bonus as may be applicable.

Additionally, in the states of Andhra Pradesh and Telangana, the Andhra Pradesh Shops and Establishments Act (APSEA) and Telangana Shops and Establishments Act (TSEA) contain a specific provision regarding payment of service compensation whereby all employees who have been in continuous employment for at least one year with the establishment are also entitled to receive service compensation amounting to 15 days' average wages for each year of continuous employment. Such provisions over and above liability of an employer to pay gratuity have been held to be unconstitutional by the Supreme Court of India.[48]

10.5(b) *Notice Pay*

For the statutory minimum notice period and pay, see discussion in **10.3**. The employer can provide pay in lieu of the notice period.

10.5(c) *Other Required Pay or Benefits*

The employer is required to pay employees in lieu of leave encashment as per applicable state SEA. The employer is also required to pay arrears of accrued but unpaid wages to terminated employees. Typically, under the POWA, wages need to be paid within the second working day from date of termination. The employer is also required to pay gratuity to those employees who have completed continuous service of five years (conservatively interpreted as four years and 190 days). Gratuity must be paid within 30 days from the end of employment. Employers are required to pay arrears of statutory bonus to eligible employees.

10.6 What penalties apply for an employer's alleged noncompliance in dismissal situations?

10.6(a) *Individual Dismissals*

Where an employee has been wrongfully dismissed, the employee can approach the appropriate authorities to refer the matter to the Labor Court or the Tribunal depending on the jurisdiction. There is no limitation period prescribed under law for making claims against the employer under the IDA. However, under the Limitation Act, 1963, claims relating to contracts, which include individual disputes such as termination of service, must be made within three years.

Depending on the facts of each case, generally, on wrongful dismissal, an employee may be entitled to:

- damages for loss of earnings and other benefits that the employee would have been entitled to in the course of employment;
- reinstatement of service; and
- interest on the payable wages in the event the employee is not paid due salary.

The court may also instruct the employer to pay the attorneys' fees incurred by the employee. However, this may be awarded on a case-by-case basis. In 2021, the Supreme Court of India adjudicated upon an issue of whether the termination of an employee was justified under law and opined that violation of

[48] *Grand Kakatiya Sheraton Hotel & T.E. & W.Un v. Srinivasa Resorts Limited & ors.*, [2009] IN SC 436.

Section 25F of the IDA will not automatically entail reinstatement with back wages,[49] although the court may grant a suitable compensation as an appropriate remedy.[50]

10.6(b) *Redundancy and Collective Redundancies*

See discussion in 10.6(a).

10.7 What obligations apply when an employee resigns?

Where an employee resigns, the retrenchment-related provisions under the IDA and the notice requirement under state SEAs are not triggered. Accordingly, the employer can comply with the employment contract and its policies/standing orders to determine the employee's notice period and employer's ability to provide the employee an early release. In case of resignation, retrenchment compensation is not payable and leave encashment obligations may be limited. All other payments such as gratuity, arrears of contractual payments, arrears of statutory bonus, etc. will apply.

10.8 It is a common practice among Indian employers to provide a resigning employee with a relieving letter. Is an employee's release of claims in a separation agreement enforceable?

An employee's release of claims in a separation agreement may not be enforceable, to the extent it releases the employer from statutory obligations.

Although there is no specific restriction under Indian labor law for obtaining a release of claims from a former employee, in India, the concept of an employee release is not very common and is yet to be tested in the courts of law. While a release may help with contractual claims, it is unlikely to release the employer from any statutory claims in view of the fact that a right under law cannot be contractually waived. Also, certain labor laws prohibit the employer from contracting out from the obligations imposed by those laws.

Formal separation agreements are not very common, although there is a prevalence of voluntary retirement schemes (VRS) wherein the employer provides incentives to the employees to resign from service. The payment in a VRS usually exceeds the amount that the employer would have to pay under applicable labor laws as a result of termination of the employee's employment. At times, the employer also assists the retrenched employees to find alternate employment opportunities.

11. Employment & Corporate Transactions

Corporate transactions can have legal and practical implications for employees. The structure of a corporate transaction (whether a share sale, indirect share sale, or business sale) will determine the nature and extent of the buyer's and seller's obligations to employees, employee representative bodies (*e.g.*, unions, works councils, social economic committees, etc.), and governmental authorities, as well as the timing of such obligations.

In a share sale or indirect share sale, the identity of the employer does not change. The buyer becomes the new owner of the employer entity and the employment relationship between the employer and its employees continues as it was before the sale.

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[49] *Madhya Bharat Gramin Bank v. Panchamlal Yadav* [2021] SCC Online 759.

[50] *Ranbir Singh v. Executive Engineer PWD* [2021] SCC Online 670.

In contrast, what happens to the employer's employees in the event of a business sale varies across jurisdictions. In some jurisdictions, employees are protected by laws providing for their automatic transfer from the seller to the buyer with the sale of the business (*i.e.*, the buyer becomes the new employer automatically). In other jurisdictions, there is no such statutory automatic transfer mechanism to protect employees and the employees' employment would need to be terminated with the seller, and new employment entered into with the buyer. Jurisdictions may or may not have other protections pertaining to the transfer of employees from seller to buyer. For example, buyers may be required to offer employment on the same terms and conditions, employee consent may be required, or certain payments relating to the termination of employment by the seller may need to be made.

This section covers the different types of corporate transactions and compares the legal obligations of the seller and buyer in each circumstance. Because of the many potential employment-related complexities involved with a business sale, those transactions are treated in greater depth below than share sales.

Finally, this section assumes that the relevant entities are private companies. Where the transaction involves a company that is listed on a stock exchange, additional rules may apply that are outside the scope of this Guide.

To the extent the reader may be unfamiliar with some of the terms used in this section, see the ***Glossary of Terms*** at the end of this Guide.

11.1 Are there legal obligations to inform, consult, and/or reach agreement with employees, worker representative bodies, or any government agency in certain corporate transactions?

11.1(a) *Share Sale*

No, there are no such obligations in a share sale.

When a business sells its stocks (shares), Indian corporate and labor/employment laws do not require the seller to provide pre-deal-closing notification to, or consult with, its employees, employee representatives, or government labor agencies. The lack of such requirements is due to the understanding that with a share sale, only the shareholding of the entity changes, and the employees remain employed by the same entity.

Nor does Indian law impose pre-deal-closing notice or consultation requirements upon the buyer with respect to its existing workforce, employee representatives, or government labor agencies, although it may be good practice to let the buyer's existing employees know about the proposed transaction and its anticipated outcomes.

It is uncommon to involve or consult worker representatives during a share sale unless obviously their interests are being jeopardized or that it could potentially lead to strikes or unrest.

11.1(b) *Indirect Share Sale*

No, there are no such obligations in an indirect share sale.

In the case of an indirect share sale, the seller is not required to provide pre-deal-closing notification to, or to consult with, the seller's employees, employee representatives, or government labor agencies.

Again, with an indirect share sale, only the shareholding of the entity changes, and the employees remain employed by the same entity.

Nor is the buyer required to notify or consult with its existing workforce, employee representatives, or government labor agencies prior to an indirect share sale, although it may be good practice to let the buyer's existing employees know about the proposed transaction and its anticipated outcomes.

It is uncommon to involve or consult worker representatives during an indirect share sale unless obviously their interests are being jeopardized or that it could potentially lead to strikes or unrest.

11.1(c) *Business Sale*

No, there are no such obligations in a business sale.

In case of a business sale, the seller is not required under corporate or labor/employment law to provide pre-deal-closing notification to, or consult with, employees, employee representatives, or government labor agencies. Nor is the asset buyer required to notify or consult with its existing workforce, employee representatives, or government labor agencies prior to the sale, although it may be good practice to let the buyer's existing employees know about the proposed transaction and its anticipated outcomes.

It is uncommon to involve or consult worker representatives during a business sale unless obviously their interests are being jeopardized or that it could potentially lead to strikes or unrest.

11.2 What are important legal considerations within the context of a business sale?

11.2(a) *Process for Employee Transfers*

In case of a business sale involving the transfer of ownership or management of an undertaking, typically the seller's employees are transferred to the buyer under the provisions of the Industrial Disputes Act, 1947 (IDA).

Per Section 25FF of the IDA, if the ownership or management of an undertaking is transferred to a new employer, whether by agreement or by operation of law, every workman who has been in continuous service (as defined under the IDA) for at least one year in that undertaking immediately before such transfer, is entitled to notice and compensation from the old employer as if they have been retrenched (terminated), as follows:

- one month's notice in writing indicating the reasons for retrenchment, or payment of wages in lieu of such period of notice; and
- payment of compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

However, Section 25FF of the IDA provides that the seller (previous employer) is exempt from providing such notice and compensation if the following three conditions are met:

- the workman's service has not been interrupted by the transfer;
- the terms and conditions of service applicable to the workman after such transfer are not in any way less favorable to the workman than those applicable immediately before the transfer; and

- in case of retrenchment of the workman, the new employer is legally liable to pay compensation on the basis that the workman has been in continuous service with the new employer from the time that they were in original employment with the old employer, and their service has not been interrupted by the transfer.

See **2.1** for definition of "workman" under the IDA.

11.2(b) *Employee Consent or Objection*

There is no specific requirement under Section 25FF of the IDA to obtain employee consent for their transfer. However, it is generally a recommended practice to obtain their consent especially to better manage their expectations and avoid any litigation in the future.

If employees are to be transferred in cases where there is no transfer of ownership or management of an undertaking (and hence Section 25FF does not get triggered), it may be necessary to obtain employee consent for their transfer.

In the case of *JV Sudhakar v. Govt of Andhra Pradesh*,[51] the Andhra Pradesh High Court – following the Supreme Court decision in Management, *Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*,[52] – held that Section 25FF does not envisage consent of the workmen as a pre-requisite for the transfer of an undertaking. However, in the case of *IPCL Employees' Association v. Indian Petrochemical Corp. Ltd.*,[53] the Gujarat High Court held that the express or implied consent of the workman is necessary to bring into existence the relationship of employer and employee between the transferee and the workman, even in a business transfer envisaged under Section 25FF. Further, the Supreme Court in *Sunil Kr Ghosh v. K Ram Chandran*[54] held: "It is settled law that without consent, workmen cannot be forced to work under different management and in that event, those workmen are entitled to retirement/retrenchment compensation in terms of the Act."

If a trade union exists, it is generally recommended that the transferor employer negotiate all the matters relating to the workers with the trade union leaders, unless already covered in the collective bargaining agreement. Thus, in case of a transfer or sale of a business, the seller and buyer are recommended to ensure that they reach an agreement with the trade unions (if any) with respect to any deviation in employee benefits.

In certain situations, it is also common to structure employee transfers in a way where the employees voluntarily resign from the seller and accept new employment with the buyer, in which case the buyer has flexibility to deviate from the transfer-related conditions prescribed under Section 25FF.

11.2(c) *Successor Liability*

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPFA) is India's prominent social security law. Upon transfer of employment resulting from the transfer of an undertaking, Section 17A of the EPFA provides for transfer of the employees' provident fund accounts from the seller to the buyer.

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[51] (2011) I LLJ 540AP.

[52] AIR 2006 SC 2056.

[53] (2008) 3 GLR 1856.

[54] (2012) I LLJ 625 SC.

Section 17B of the EPFA provides that in the event an employer transfers the establishment, the employer and the person to whom the establishment is transferred are jointly and severally liable to pay the contribution and other sums due from the employer under any provisions of the EPFA for the period up to the date of transfer. However, Section 17B further provides that the liability of the transferee is limited to the value of the assets obtained by it upon such transfer.

Similarly, with respect to the Employees' State Insurance Act, 1948 (ESIA), another prominent social security law, Section 93-A deals with the consequences of a transfer of an establishment in whole or in part by sale, gift, lease, license, or in any other manner. In such cases, the employer and the person to whom the establishment is transferred are jointly and severally liable to pay any amount due in respect of any contribution or other amounts payable under the ESIA for the period up to the date of transfer. Section 93-A further provides that the liability of the transferee is limited to the value of the assets obtained by it upon such transfer.

In addition, upon employee transfer following the conditions prescribed under Section 25FF of the IDA, the successor of the business would inherit, and accordingly need to provide, the benefits that are linked to continuity of service (such as leave accrual, gratuity, and severance).

11.2(d) *Continuation of Benefits and Service*

The conditions of transfer under Section 25FF of the IDA include that the workman's service is not interrupted by the transfer and further that the terms and conditions of service applicable to the workman after the transfer are not in any way less favorable to the workman than those applicable immediately before the transfer. Hence, in general, the incoming employer may not be able to change the employment terms or the employment contract to the employees' detriment while ensuring that the conditions of transfer are being complied with.

As a result of recognition of service, if the new employer decides to retrench (terminate) the employee, the new employer must compensate the employee as if they have been in continuous/uninterrupted service with the new employer from the time that they were originally employed by the old employer. Similarly, if the new employer does not provide terms and conditions of employment equally favorable to those applicable under the seller immediately prior to transfer, then the seller must provide notice and retrenchment compensation to the workmen.

11.2(e) *Selective Offers of Employment*

In case of a business sale, it is possible for the buyer to limit the new employment offer to select employees of the seller, in which case the rest of the employees continue to remain employed with the seller and the seller may need to terminate employment as per applicable laws and contractual arrangements.

11.2(f) *Additional Rights of Employees*

In addition to Section 25FF under the IDA, discussed in **11.2(a)** and **11.2(b)**, establishments must also ensure compliance with the other provisions of the IDA, including conditions precedent to the retrenchment of workmen, the procedure for closing down an undertaking, the penalty for layoff, the right of compensation for laid off workmen, etc., as may be applicable. A Division Bench of the Kerala High Court[55] has held that if the termination of a workman by the transferor on the eve of transfer is *mala fide*

[55] *Thomas Paul v. Industrial Tribunal, Kozhikode*, (1978) Lab. I.C. 207 (Ker).

or an act of victimization, the termination will be illegal and inoperative. The provisions of this section will apply only to a case of *bona fide* and genuine transfer and not to fictitious or benami[56] transfer.[57]

11.2(g) *Union Recognition and Collective Bargaining*

In case of a business sale, depending on the mode of sale, the terms of the transfer documents and any collective bargaining agreements, it would need to be determined whether the buyer will need to continue to recognize the union and any collective bargaining agreements. Usually, in a unionized environment, the union will ensure that they continue to be recognized and that the buyer will comply with the terms of the collective bargaining agreement.

11.3 Are there additional important legal considerations within the context of a share sale or indirect share sale?

Unlike a business sale, there is generally no flexibility for the buyer of the business when it comes to a share sale as all the employee liabilities associated with the business / entity are inherited by the buyer.

11.4 Are there any legal restrictions that prevent or restrict the use of secondment or transitional services arrangements?

It is fairly common to use secondment or transitional service arrangements. One unique consideration is the applicability of the Contract Labor (Regulation and Abolition) Act, 1970 (CLRA) to such arrangements and related registrations / compliance, especially where the employees of the vendor or staffing service providers are working from the customer's office.

11.5 Are there any other issues that may give rise to a material liability, a material legal risk, or a material delay because of the transaction?

From a corporate law perspective, a merger of two companies is a fairly time consuming process as it may require court approval. Hence, it would lead to delays in closing of the transaction.

12. Employment Disputes & Legal Landscape

Disputes may arise throughout any stage of the employment relationship. If and when the relationship goes awry, employers can more wisely address the situation if they are familiar with the many governmental bodies and public entities enforcing the laws and understand the dispute resolution processes that come into play. These vary not only by country, but often by regions and jurisdictions within each country as well. This section provides an overview of the entities and mechanisms available to enforce the laws governing the employment relationship and sets forth guidelines on the types of claims employers may face. This section also discusses options for addressing and/or resolving employment disputes and concludes with a summary of areas of greatest risk for foreign employers, offering possible suggestions on how to minimize such risks.

[56] *Benami* is used to refer to a transaction where there is a genuine transfer of title, but the transferee is merely an ostensible owner for a third party whose name does not appear on the record.

[57] *Gurmail Singh v. State of Punjab*, (1991) II L.L.J. 76(89).

12.1 What government bodies enforce the major laws that govern the employment relationship?

As mentioned previously, India has a large number of labor and employment laws, both at the federal and state levels. Under several of the labor laws, there are authorities formed or referenced in order to enforce the law. Hence, depending on the law involved, the relevant authorities would be the appropriate forum for any dispute.

12.2 What are the primary mechanisms to resolve employment disputes?

The Industrial Disputes Act, 1947 (IDA) has been enacted for the purposes of investigation and settlement of industrial disputes. An *industrial dispute* has been defined to mean "any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labor, of any person." The authorities for resolving industrial disputes as provided under the IDA are as follows:

- **Grievance Redressal Committee (GRC):** The IDA mandates the formation of a GRC for the resolution of disputes arising out of individual grievances. Each industrial establishment employing at least 20 workmen is required to institute one or more GRCs. Setting up a GRC does not affect the right of any workman to raise an industrial dispute under the IDA. Any workman aggrieved by the decision of the GRC may file an appeal with the employer. The employer must hear and decide on the appeal within one month from the date of receipt of the appeal and send a copy of the decision to the workman concerned.
- **Works Committee (WC):** In every industrial establishment in which at least 100 workmen are employed or have been employed on any day in the preceding 12 months, the "appropriate government"[58] may require the employer to create a WC consisting of representatives of employers and workmen engaged in the establishment. The duty of the WC is to promote measures for securing and preserving amity and good relations between the employer and workmen, to comment upon matters of their common interest or concern and to endeavor to resolve any material difference of opinion in respect of such matters.
- **Conciliation Officers:** The appropriate government may appoint such number of persons as it thinks fit to be conciliation officers, charged with the duty of mediating in, and promoting the settlement of, industrial disputes. A conciliation officer may be appointed for a specified area, or for specified industries in a specified area, or for one or more specified industries, and either permanently or for a limited period. A conciliation officer who is not able to arrive at a fair and amicable settlement acceptable to both parties will send the report to the appropriate government. The government may then refer the industrial dispute to the Board of Conciliation, Labor Court, or Industrial Tribunal.
- **Board of Conciliation:** The appropriate government may, as occasion arises, create a Board of Conciliation for promoting the settlement of an industrial dispute. The Board of Conciliation will consist of a chairman and two to five other members. The chairman will be an

[58] As defined under Section 2(a) of the IDA, "appropriate government" in relation to any industrial disputes concerning any industry carried on by or under the authority of the Central Government, means the central government; and in relation to any other industrial dispute, means the State Government.

independent person and the other members must be persons appointed in equal numbers to represent the parties to the dispute.

- **Courts of Inquiry:** The appropriate government may create a Court of Inquiry for inquiring into any matter appearing to be connected with, or relevant to, an industrial dispute. The Court of Inquiry may consist of one independent person or of such number of independent persons as the appropriate government may think fit, and where a Court of Inquiry consists of two or more members, one of them must be appointed as the chairman.
- **Labor Courts:** The appropriate government may create one or more Labor Courts for the adjudication of industrial disputes and for performing such other functions as may be assigned to them. The Labor Court consists of one person who is the "Presiding Officer" and who is to be appointed by the appropriate government. The Labor Court has the power to interpret standing orders and to decide whether there has been a violation of standing orders; to decide whether a discharge or dismissal of a workman was legal; to withdraw any customary concession or privilege; and to adjudicate the legality of a strike or lock-out and other matters that are not under the Industrial Tribunal.
- **Tribunals:** The appropriate government may, by notification in the *Official Gazette*,[59] create one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter. The Industrial Tribunal consists of one person who is appointed by the appropriate government. Additionally, the appropriate government may also appoint two persons as assessors to advise the Industrial Tribunal in the proceedings before it. The Industrial Tribunal has authority to decide matters involving wages, including period and mode of payment, compensatory and other allowances, hours of work and rest intervals, leave with wages and holidays, bonus, profit sharing, provident fund and gratuity, shift working changes, rules of discipline, retrenchment of workmen, as well as other matters. Special tribunals have been created for dealing with specific matters. For example, provident fund cases under the EPFA are dealt with by a Provident Fund Appellate Tribunal established under the provisions of the EPFA (and The Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997).
- **National Tribunals:** The central government may create one or more National Tribunals for the adjudication of industrial disputes that, in the opinion of the central government, involve questions of national importance or are of such a nature that industrial establishments situated in more than one state are likely to be interested in, or affected by, such disputes. The National Tribunal consists of one person who is to be appointed by the central government.
- **Arbitration:** In addition to the above, as per the IDA,[60] the employer and the workmen have the option to refer a dispute to arbitration by way of a written agreement before such dispute is referred to any of the above-mentioned authorities.

12.3 May an employer compel employees to arbitrate employment disputes?

The IDA allows the employer and the employee to opt for arbitration instead of approaching the labor authorities. Section 10-A of the IDA states that where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the

[59] Section 3(39) of the General Clauses Act, 1897 defines "Official Gazette" or "Gazette" as the Gazette of India or the Official Gazette of a State.

[60] IDA, sec. 10-A.

dispute has been referred to the Labor Court, Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference will be to such person or persons as an arbitrator or arbitrators as may be specified in the arbitration agreement. A copy of the arbitration agreement has to be forwarded to the appropriate government and the conciliation officer and the appropriate government must, within one month from the date of the receipt of such copy, publish the same in the Official Gazette.

Considering the foregoing provisions, it should be possible for the employer to compel the employees to arbitrate claims of wrongful dismissal provided the parties have an arbitration agreement in place. It may not be possible to compel employees to refer the dispute to arbitration in the absence of any such agreement allowing for arbitration. In the Indian context, given the protection provided to employees under labor laws, and since labor courts and tribunals are set up under such laws, employees often prefer to make their complaints to the labor courts rather than referring the matter to arbitration.

12.4 Can an employee bring claims on behalf of other workers (*i.e.*, class or collective action)?

Order 1 Rule 8 of the Civil Procedure Code provides that where there are numerous persons having the same interest in a particular suit, then one party can represent such other people in a common cause of action. Therefore, where the claim relates to a number of workmen, and there is a common cause of action, any one worker can file a suit on their own behalf and the other workers. The Payment of Wages Act, 1936 (POWA) similarly allows for a single application with respect to claims from an unpaid group. There is also a similar provision under the Industrial Disputes Act, 1947 (IDA) for workmen entitled to receive any money or benefit capable of being computed in terms of money, enabling filing of a single application for recovery of such amounts, on behalf of or in respect of any number of such workmen. Additionally, as per the Trade Unions Act, 1926 (TU Act), trade unions can prosecute any rights of the trade union and the rights arising out of the relations of any member with their employer or with a person whom the member employs.

12.5 What are the most important characteristics of the legal culture relating to employment?

India is a sovereign, secular, and democratic republic with a parliamentary system of government. The diversity in India is evident from its geographical area and varieties of culture, language, and ethnicity. Agriculture, manufacturing, construction, and mining traditionally formed a major source of employment in India, although the services sector has made rapid strides over the last two decades. The British rule for over 100 years has had an enormous impact on the employment culture in India. The establishment of industries in the cities resulted in creation of more jobs and has also resulted in the migration of a large number of people from the rural areas to the urban and semi-urban areas.

The population of the country, being the second largest in the world, makes India one of the largest providers of the global workforce. However, a large section of the Indian workforce belongs to the unorganized sector. Communism and the Marxist philosophy have greatly influenced the people in India. It is because of this influence, coupled with the large population of employees in the unorganized sector, that the labor laws in India and the court rulings have generally favored employees, who are perceived to be disadvantaged on account of having lesser bargaining power than employers. In many cases, Indian labor laws have not been amended to reflect the growth in the industrial and services sectors and employment generated by these sectors. For example, the objective of the Contract Labor (Regulation and Abolition) Act, 1970 (CLRA) is to prevent exploitation of workmen having lesser bargaining power and to ensure that they do not suffer on account of less favorable working conditions. While such a law is

primarily essential in sectors such as security services, housekeeping and janitorial services, watch and ward services, landscaping, gardening etc., the definition of "workman" under the CLRA seems to bring within its purview, persons who have been engaged as, *inter alia*, software engineers, research engineers, testing and quality engineers, project engineers, etc. Applying the statute to the IT industry, which primarily renders specialized services at customer premises, is quite absurd and was not perceived at the time of framing the statute.

12.6 What are the five most common mistakes foreign employers make and what can be done to help avoid them?

Some of the most common mistakes foreign employers can make include:

1. **Terminating employment at-will:** Indian labor laws do not permit an at-will employment relationship. Employers can terminate employment only for reasonable cause or for misconduct. Further, due process needs to be followed based on the principles of natural justice in order to prove the act of misconduct prior to terminating employment. Foreign employers often overlook this basic requirement and ignore the employment termination provisions of law. This may lead to a potential litigation risk, and in a worst-case scenario, courts could order reinstatement with back wages by treating the termination as illegal or unlawful.
2. **Directly employing local workers in India**: Foreign employers at times directly employ employees in India. The Indian exchange control regulations require a foreign employer to obtain prior government permission to conduct business activities in India and thereby employ individuals. Violation of the exchange control regulations may lead to monetary penalties levied by the Reserve Bank of India (RBI) on the foreign company, as well as the employee, in India.
3. **Creating permanent establishment exposure in India:** Foreign employers conducting business activities directly through employees in India could also end up creating a tax and permanent establishment exposure in India. Such risks could also arise by way of secondment arrangements. The activities carried on by the employees, the period of stay of the employees in India, as well as other factors, are relevant in determining whether there is permanent establishment exposure. Such exposure could lead to the foreign company being taxed in India on income generated through the activities of such employees in India. To mitigate potential risks, the employees in India should not be given any authority to negotiate or enter into contracts on behalf of the foreign company in India. The nature of activities to be conducted in India should also be considered in light of the provisions of a double taxation avoidance agreement between India and the country in which the foreign company is situated. Foreign employees employed in India are also required to contribute to social security in India, subject to the provisions of any social security agreement or totalization agreement between India and the foreigner's home country.
4. **Use of temporary workers (through staffing services agencies) without government permission:** Globally, it is common for employers to employ temporary staff in the organization. Temporary staffing is a recent human resource trend in India. Many foreign employers, especially those in the services sector, are now hiring temporary employees (temps) from employee leasing firms. It is important to note that such recruitment strategy may trigger the provisions of the CLRA, which was primarily enacted to regulate the employment of contract labor. The employer (also known as the "principal employer" as per

the CLRA) is required to obtain government permission prior to engaging contract labor. The labor authorities, prior to granting such registration, inter alia, ascertain whether contract labor may be utilized for the activities as indicated by the principal employer, in the application form. The contract labor is to be used only for activities that do not form part of the core function of an organization. If the registration is not granted, the principal employer may not use contract labor for the specified activities.

There have been cases where the courts have deemed contract laborers who were engaged in prohibited activities to be regular employees of the principal employer. There may also be potential demands from the union representatives that contract laborers be absorbed by the principal employer as regular full-time employees. Further, under the CLRA, in the event the contractor fails to comply with some of the employment-related obligations, the principal employer is responsible for the same.

5. **Extending global employee handbook to employees in India without legal review**: In the desire to create universally-applicable employment policies, foreign employers often disregard local law requirements and extend the employee policies and code of conduct as may be used in the foreign country to the employees in India. Unfortunately, it could lead to the following implications: (1) a potential violation of the local labor laws resulting in penalties; (2) employees receiving lesser benefits than those stipulated under Indian law, thereby increasing the risk of potential litigation; and (3) giving more benefits than may be required under local labor law, which may have financial implications for the foreign employer.

There has also been considerable activity in recent years in respect of issues relating to dual moonlighting/ dual employment, remote working (from different Indian states) and return to office, performance management, recruitment frauds, etc. Also, employers will need to take up considerable efforts in revising their employment contract, HR policies and processes, compliances, etc. once the new labor codes are made effective.

To help avoid these mistakes, employer should seek proper legal advice from local counsel familiar with applicable laws.

GLOSSARY OF TERMS[61]

1 – Setting Up Business & Structuring the Employment Relationship

- ***Digital Nomad:*** Foreign employees who relocate to another country but maintain their employment relationship with their original employer in their home country.
- ***Employer of Record (EOR):*** An EOR takes on the legal responsibility for employees and assumes the role and duties of "employer" for its client company. This allows the client company the opportunity to expand into a new country without creating its own separate, local entity. Although similar to a PEO, the EOR generally offers a smaller range of services than a PEO.
- ***Gig Workers:*** Workers performing paid work, on demand, outside of a traditional full-time employment relationship with one employer. This includes app-based ride-hail and food-delivery work.
- ***Global Employment Organization (GEO):*** Similar to both an EOR and PEO, a GEO can act as the employer of record for a client company that expands globally as well as take on the administrative HR functions similar to a PEO. A GEO has local entities through which it will hire workers to carry out business operations and offers a range of HR services.
- ***Outsourcing:*** The transfer of a part of a company's tasks to third parties that were previously carried out by the company's own employees. When discussing outsourcing, "company" refers to the company that is hiring a third-party service provider to provide workers to perform a company task. "Service provider" refers to the third-party service provider / intermediary company that provides workers to a company to perform tasks under the outsourcing agreement. The workers remain employees of the service provider.
- ***Platform Workers:*** A category of gig workers whose work is based on software apps and digital platforms.
- ***Professional Employer Organizations (PEO):*** A PEO will hire employees in a foreign market for a client company such that the company does not need to set up its own local entity. Among other HR services, PEOs may assist with recruitment, onboarding, and payroll.
- ***Temporary Work Agencies (TWA) or Staffing Firms:*** TWAs or staffing firms are entities that employ a worker and then place that individual in one or more "user companies": the individual's employment contract is with the TWA and not the user company.
- ***Worker Misclassification:*** Refers to when employers treat certain employees/workers as independent contractors or self-employed.

3 – Employment Contracts

- ***Flexible Work Arrangements:*** This term encompasses telework (work from home) arrangements that allow an employee to work remotely.
- ***Intellectual Property Protection***: An agreement stating that employer owns the rights to intellectual property developed during employment relationship.

[61] This Glossary was created by the editors of *The Littler International Guide*. Specific jurisdictions may have more nuanced definitions of the terms.

- ***Noncompete:*** A provision that purports to prevent an employee from working for a competitor after employment with a current employer.
- ***Nondisclosure Agreement:*** An agreement that restricts the employee from using or disclosing the employer's confidential information.
- ***Nonpoach:*** A provision that purports to prevent an employee from enticing away a colleague but does not prevent the employee from working for a competitor.
- ***Nonsolicit:*** A provision that purports to prevent an employee from enticing away a client but does not prevent the employee from working for a competitor.

6 – Discrimination & Harassment

- ***Adjustments Based on Disability:*** Refers to any modification or accommodation to a job duty, work environment, or a hiring practice to provide an employee who has a disability equal opportunity to get a job and to successfully perform job duties. Examples of disability adjustments may include, but are not limited to, facility enhancements (accessible restrooms, ramps, etc.), modified work schedules, equipment modification, etc.
- ***Adjustments Based on Religion:*** This phrase refers to any adjustment or accommodation to the work environment that allows an employee to practice their religion. Adjustments may include, but are not limited to, flexible scheduling, exceptions to an employer's dress or grooming code, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.
- ***Direct Discrimination:*** This refers to discrimination of an individual or a group who are being treated less favorably due to one or more protected categories. In some countries, this may be referred to as a direct distinction.
- ***Indirect Discrimination:*** This is the general idea that an employment practice, policy, or procedure that applies to all employees on its face has a detrimental effect on an individual or group in a protected category. In the United States, for example, this is referred to as disparate treatment.
- ***Harassment:*** Harassment is generally understood to include unwelcome conduct, such as creating a hostile or offensive environment, based on a protected category.
- ***Moral Harassment:*** Such harassment is unwelcome conduct that is humiliating in nature that takes place in the workplace. Moral harassment may include actions that intend to embarrass or intimidate an individual in the workplace. In some countries, such as New Zealand, this is better known as workplace bullying.
- ***Protected Category:*** This refers to a group of people who have legal protection from being discriminated against due to a certain trait. Common traits include race, sex, national origin, religion, and age. Other jurisdictions may refer to this concept as a protected group, protected ground, protected characteristic, or protected class.
- ***Retaliation/Reprisal:*** Retaliation, also known as reprisal, is when an employer takes an adverse action against an employee for engaging in a legally protected activity, such as filing a complaint against the employer for unlawful discrimination. An adverse action may include, but is not limited to, termination, reassignment of a job position, or workplace discipline. In Hong Kong, for example, this is generally referred to as victimization.

- ***Sexual Harassment:*** This form of harassment is based on the protected category of "sex," and may include unwelcome behavior such as physical or verbal advancements of a sexual nature. In Denmark, this is commonly known as transgressive behavior.

8 – Privacy & Protection of Employee Personal Information

- ***Data Controller***: The natural or legal person, organization, or any other entity that alone or jointly with others determines the purposes and means of the processing of personal data. May be referred to as "personal information handler" or "personal information controller" in some jurisdictions.
- ***Data Dissociation***: A method of pseudonymization that processes the collected information or data separately from the identifiable specific person. Typically used for research data.
- ***Data Processor***: A natural or legal person (other than an employee of the Data Controller), organization, or other entity that processes personal data on behalf of the Data Controller. An entity can be both a controller and a processor at the same time, depending on the function the entity is performing. May be referred to as "personal information processor" in some jurisdictions.
- ***Data Processing***: Any operation or set of operations that is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure, or destruction. May be referred to as "personal information handling" in some jurisdictions.
- ***Data Subject***: An identified or identifiable natural person. May be referred to as "principal," "data owner," "registered individual," or "holder" in some jurisdictions.
- ***Personal Data***: Any information relating to an identified or identifiable natural person. Identification may be direct or indirect by means of other information. May also be termed "personal information" in some jurisdictions.
- ***Sensitive Personal Data***: Data that is more significantly related to the perception of a reasonable expectation of privacy, such as medical or financial information. Note that data may be considered more or less sensitive depending on context or jurisdiction. May also be referred to as "special categories of personal data" or "sensitive information" in some jurisdictions.

9 – Workers' Representation, Unions & Works Councils

- ***Labor Unions:*** Voluntary associations that represent workers in various industries and negotiate with employers to secure better wages, benefits, or working conditions for their members.
- ***Lockouts:*** Temporary suspension of work or closure of the workplace, usually to pressure employees to modify their bargaining demands.
- ***Picketing:*** Placing individuals outside a workplace to publicly protest the employer; most often takes place during strikes.
- ***Secondary Action:*** An effort to disrupt the business of a second employer to place pressure on the original employer involved in a labor dispute.

- ***Strikes:*** The cessation of work or other concerted activity on the part of employees, usually to pressure an employer to meet their bargaining demands.
- ***Trade Unions:*** Typically organized for a specific trade or occupation, so may have a narrower focus and scope of representation. A subset or synonym of trade unions may also be called industrial unions (representing particular workers in an industry) or sectoral unions (representing workers in a particular sector).
- ***Works Councils:*** Committees that include employees of a particular employer that discuss wages and working conditions for that employer.

10 – Individual Dismissals and Collective Redundancies

- ***Redundancy:*** Refers to a dismissal for a reason not relating to the employee's performance but for economic (business cessation, lay-offs), technical, or structural reasons. The precise definitions and terminology may vary across jurisdictions.
- ***Small-Scale Redundancy:*** A dismissal of one or more employee(s) for Redundancy that will generally not trigger enhanced consultation with worker representative bodies (such as unions, works councils, etc.) and other notification obligations (equivalent to WARN in the United States or collective redundancies across Europe).
- ***Collective Redundancy:*** Collective dismissals by reason of Redundancy, including plant closures or business cessation that may be subject to additional notification or consultation obligations equivalent to WARN (in the United States) and collective redundancies (across Europe). Synonyms include mass layoff, large-scale reduction-in-force, or collective dismissal.

11 – Employment & Corporate Transactions

- ***Business Sale:*** The buyer acquires a bundle of assets and rights comprising the target business of the employer; this may also be referred to as an "asset sale."
- ***Closing:*** when the transaction is legally completed (*i.e.*, the shares or assets have transferred to the buyer and all conditions precedent are completed).
- ***Indirect Share Sale:*** When the parent company of the employing entity is sold; may also be referred to as a "change of control."
- ***Share Sale:*** The buyer acquires all of the shares in the employing entity.
- ***Signing:*** When a binding legal agreement to the transfer is entered into where the closing will take place in the future subject to certain conditions.

About The Littler International Guide

For more than 15 years, Littler has published the International Guide, which provides a comprehensive, comparative analysis of workplace laws and regulations for the countries and territories listed below. For more information, contact innovation@littler.com.

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 Mexico	 Netherlands	 New Zealand	 Nicaragua	 Nigeria
 Norway	 Panama	 Peru	 Philippines	 Poland
 Portugal	 Puerto Rico	 Romania	 Singapore	 South Africa
South Korea	Spain	Sweden	Switzerland	United Arab Emirates
United Kingdom	United States	Venezuela		