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Global Practice Guides

Employment

Law and Practice – India

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INDIA

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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INDIA LAW AND PRACTICE

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ANA Law Group has a well-established labour and employment practice and one of the specialities is the experience in handling the employment law assignments for international companies in India and the ability to walk them through the practical aspects on Indian law compliances. The Firm represents leading national and multinational companies in India. The work handled includes setting up of Indian employment infrastructure, adapting multinational corporations' international work policies for their Indian subsidiaries, drafting of Indian law compliant offer

letters and employment agreements, separation and release agreements, advice and documentation on employee non-compete and non-solicitation issues, on retrenchment, employee benefits, closures, lay-offs, employee policy manuals, employee proprietary information and inventions assignment agreements, among other things. The Firm's employment law practice stands out mainly for the ability to advise on Indian employment law issues in a fast, simple, clear and practical manner, while understanding the client's specific commercial and business concerns.

Authors



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1. Terms of Employment

1.1 Contractual relationship

It is not mandatory under Indian law to execute contracts, or to provide offer letters to candidates. However, many employers prefer to first sign offer letters to obtain a candidate's acceptance of employment and preliminary terms. An offer letter can be a basic document containing the company's offer to a candidate, a brief job description, compensation, probation, etc.

Thereafter, an employer executes exhaustive employment agreements with terms such as, name of the parties (the employer and the employee); the nature of the work and job title; work place; salary or wages; term of employment; rights of an employer and employee; obligations of an employer and employee; termination of employment; confidentiality clause; non-compete and non-solicitation clause; etc.

The employment agreement must be stamped in India prior to signing, ie, a nominal government levy will have to be paid on the agreement prior to execution.

1.2 Compensation and work hours

India's central/state governments fix and revise the minimum rate of wages from time to time for government employees under the Minimum Wages Act, 1948 (the Wages

Act). The Wages Act is not applicable to employees in the private sector.

Most private sector employment, governed under different Indian States' Shops and Establishments Acts (the Shops Acts), mandate that an employee should not be required to work for more than eight hours in any day and 48 hours in any week.

Similarly, an employee can be required to work continuously for only a maximum of five hours in a day. The rest interval prescribed is one hour for each continuous five hours of work done.

However, the Shops Acts' work hours do not apply to employees in managerial roles.

Overtime occurs when an employee works for more than eight hours in any day or 48 hours in any week. In case of additional working hours, an employee is entitled to wages at twice the ordinary rate of their normal wages.

There are no such limitations in private sector employment.

In India, there are two broad categories of private sector employees, managerial personnel and workmen. Managerial personnel are mostly governed by their respective employ-

ment contracts. The workmen category (which is a lower income group or non-managerial employee) is governed by different legislations, including the central (federal) labour law, the Industrial Disputes Act, 1947 (the ID Act).

The applicability of employee benefits depends on an establishment's total number of employees. Some key employee benefits laws include:

- India's Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (the PF Act) which prescribes a mandatory provident fund scheme. However, the PF Act will only be applicable to establishments that have a minimum of 20 employees.
- The Payment of Gratuity Act, 1972 (Gratuity Act) prescribes for payment of gratuity, upon termination of employees who had a continuous service of at least five years. The Gratuity Act applies only to establishments with ten or more employees.
- The Payment of Bonus Act, 1965 (Bonus Act) governs the payment of bonuses to employees based on profits. The Bonus Act applies to establishments which have at least 19 employees during an accounting year, and provided the employees' monthly salary does not exceed INR10,000.

1.3 Other terms of employment

Confidentiality and non-disparagement requirements are governed by agreements along with common law principles and, as such, there are no limitations.

Annual leave

Annual leave in the private sector is governed by different Shops Acts. For example, the Bombay Shops Act, 1948 prescribes that an employee who has worked for 240 days in a year is entitled to 21 days' paid leave for that year. Further, every employee who has been employed for three months in any year is entitled to a minimum of five days' leave for every 60 days worked. This leave can be accumulated for a maximum period of 42 days only.

Child care

The Child Care Leave (CCL) Rules, 2016 are only applicable to female government employees. The CCL is granted for a maximum of two years (ie 730 days) during their entire service for taking care of their minor children (ie up to 18 years of age).

Disability leave

The Employees' State Insurance Act, 1948 prescribes that an employee in the private or public sector who sustains a disability is entitled to a minimum three days of paid leave.

Maternity leave

The Maternity Benefit Act, 1961 (Maternity Act) applies to establishments with ten or more employees.

A female employee is not entitled to maternity benefits unless she has worked in an establishment for at least 80 days in the 12 months immediately preceding the date of her expected delivery.

The Maternity Benefits (Amendment) Act, 2016 (the Maternity Act) grants maternity leave up to a maximum of 26 weeks, and prescribes a maximum of 12 weeks for women with two or more children, or who adopts a child below the age of three months.

2. Employee Representation/Unions

2.1 Representatives

An employee can bring registered representatives to meetings.

2.2 Unions

There are numerous central/state level registered trade unions across all sectors of employment in India. Most of such unions are organised under political parties.

2.3 Union elections/representation

The Trade Unions Act, 1926 (the Trade Unions Act) and the ID Act governs the formation and functions of trade unions in India. Additionally, there are also certain state-specific rules and principles for the recognition of trade unions. The Trade Unions Act, the ID Act and the state-specific regulations allow trade unions to do collective bargaining in respect of workmen's terms and conditions of employment, welfare activities, banking and medical facilities, etc.

3. Restrictive Covenants

3.1 Noncompetition clauses

The Indian Contract Act, 1872 (the Contract Act) governs restrictive covenants. Section 27 of the Contract Act holds void any agreement which restrains the exercise of a lawful profession, business or trade of any nature. However, an exception is that a party which sells its goodwill to another can agree with the buyer that it will not carry on a similar business within a specified territory, provided that such limits appear reasonable to the court.

The Contract Act's provisions are silent on the enforceability of a non-compete clause in an agreement. Therefore, the law on enforceability of non-competes in India has developed through case law jurisprudence, and also through considering the changing economic scenario and the change in bargaining positions for both employers and employees.

Therefore, although a non-compete operating beyond the term of an agreement is regarded as restraint of trade and is

unenforceable, a non-compete can be enforced under Indian law in case of the sale of goodwill of the business. 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 its successor carries on a similar business.

In a recent case, the Delhi High Court ruled that “a reading of the exception to Section 27 also demonstrates that even on a person who sells goodwill of the business only reasonable restrictions can be imposed and not complete pervasive restrictions.” (LE Passage to India Tours & Travels Pvt. Ltd v. Deepak Bhatnagar, MANU/DE/0357/2014)

Indian courts, in many cases, have favoured employers and have upheld the non-compete covenants against employees in cases involving facts and circumstances such as: the information regarding special processes and special machinery imparted to and acquired by an employee during a period of training and thereafter might be divulged; that the information and knowledge disclosed to an employee during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent company; a trade secret is some protected and confidential information which an employee has acquired in the course of his employment and which should not reach others in the interest of the employer; and an agreement to serve a person exclusively for a definite term is a lawful agreement.

Further, it is a settled legal position in India that a non-compete operating beyond the term of an agreement is regarded as a covenant in restraint of trade and therefore unenforceable.

As regards the restrictive covenants within the terms of an agreement between an employer and employee, the Indian courts have ruled in certain cases that such covenants can be enforced against employees. Please note that the courts have not expressly laid down a principle of law that any kind of negative covenant operating during the term of the agreement will always be enforceable.

3.2 Nonsolicitation of employees provisions

While there is no specific law applicable, normally, a well drafted non-solicit clause will be enforceable because an employee's obligation not to solicit other employees is not regarded as a restraint of trade. The Indian courts have considered the enforceability of non-compete clauses in many cases.

In a recent case between two companies who had entered into an agreement with a non-solicitation clause, the Delhi High Court held that notwithstanding the non-solicitation clause, the employees of both companies cannot be re-

strained from seeking employment directly with those companies as the non-solicitation clause specified that the employees can respond to general advertising of job positions in either company. The court observed that the agreement's non-solicitation clause only restricted the employers from soliciting each other's employees, but, it did not restrict the employees. The court held that in case of a restraint order against the non-solicitation breach, the employees in question would lose their jobs. Therefore, the court held that the appropriate remedy could only be damages and a restraint order against future solicitation.

3.3 Nonsolicitation of customers provisions

As regards customers' non-solicitation clauses, in a complaint filed by American Express Bank against an employee, the Delhi High Court held that an employee cannot be restrained from dealing with its customers, after the employee has quit the bank's employment. The court observed that such a restraint order against an employee amounts to a restraint of trade on the employee. Although the bank's contract had defined “confidential information” to include customer lists, the court refused to grant a restraint order and gave a detailed explanation for the decision. There have been subsequent decisions which deviated from the above decision. Therefore, in the absence of a specific law or settled case law any future cases will likely be decided on the basis of its facts and circumstances.

4. Data Privacy Laws

4.1 General overview

In India, personal and confidential information is protected under the Information Technology Act, 2000 (the IT Act) and the IT Rules. The IT Act, inter alia, addresses the data security concerns and provides for civil and criminal liability for breach of personal data, information, computer database theft, privacy violation, etc.

The Information Technology (reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (Data Protection Rules) govern the collection and processing of personal information in India. The Data Protection Rules contain the following key provisions:

- A company that collects, receives, stores, processes or handles personal or sensitive personal information must provide a privacy policy on the company's website which should be accessible to the data providers.
- Companies must obtain express consent from the data providers regarding the purpose and use of the information. The consent can be obtained through any electronic media. Mere information to the data providers does not amount to “consent” for the purposes of the Data Protection Rules.

- A company can collect sensitive personal information only if the information is collected for a lawful purpose connected with the company's business, and collection of the information is necessary for the purpose.
- The company should ensure that the data providers are made aware of the purpose for which the information is collected, the intended recipients of the information, the agency collecting the information, the agency retaining the information, etc. Further, the data provider should be given an option not to provide the information or revise/withdraw the information.
- The company must not disclose the sensitive personal information to a third party without the data provider's consent. Further, the third party should not further disclose the information.
- The entities holding sensitive personal data should not retain the information longer than required for the purpose for which it was collected.
- The companies must have "reasonable security practices and procedures." The companies are deemed compliant if they have a documented security programme with managerial, technical, organisational and physical controls. ISO 27001 is provided as a reference standard.
- All discrepancies or grievances reported to companies must be addressed in a timely manner. Companies must appoint a grievance officer and publish his/her name and contact details on the company's website. The grievance officer must redress all the data subjects' grievances within one month of receiving notification.
- The data transfer restrictions/requirements are applicable to any personal information transferred outside India irrespective of the countries to which the data is transferred.

5. Foreign Workers

5.1 Limitations on use of foreign workers

There are no limitations on foreign nationals working within Indian companies. However, foreign nationals desiring to work in India must fulfil certain prescribed conditions to obtain an employment visa for working in India. One of the major requirements is that foreign nationals must earn a minimum of USD25,000 as salary per annum from the concerned Indian company. Further, foreign nationals must comply with the registration requirements and procedures with a concerned Foreign Regional Registration Officer (the FRRO).

5.2 Registration requirements

An international employee who visits India for long-term employment, ie more than 180 days on an employment visa, must get registered with a concerned FRRO having jurisdiction over the area where the employee plans to reside. The registration must be done within 14 days of arrival in India

by producing certain supporting documents, such as a passport, visa, photograph, residence proof, etc.

The registration procedure is normally completed in one day. However, in some cases where the FRRO requires enquiry and checks the time for completion of the registration procedure varies. The registration does not require any fees, but a delayed registration attracts a small penalty.

An employee also has an option to register beforehand by filing an online application form available at the website <http://indianvisaonline.gov.in/frro/>. The application requires information, such as personal details, nationality, contact number and address in India, etc.

6. Grounds for Termination

6.1 Is cause required

As regards cause for termination in the private sector, most of the Shops Acts stipulate that an employee with six months or more service cannot be terminated without a reasonable cause and one month's prior notice or payment in lieu thereof. The notice or payment in lieu of notice can be dispensed with for termination on the grounds of misconduct, with proof thereof based on an inquiry. Reasonable cause for termination is not defined under the Shops Acts. However, reasonable causes are generally understood to include misconduct, unauthorised and regular absenteeism, late coming, fraudulent conduct at work, etc. A dismissal on the grounds of misconduct or poor performance at work must be clearly documented and established.

6.2 Layoffs

The ID Act, India's central (federal) labour legislation, applies to the closure of an industrial establishment and termination of workmen. The applicable provisions and compliance requirements for closure under the ID Act vary depending on the number of employees working in the establishment.

The closure of an industrial undertaking with at least 100 workmen must obtain government permission at least 90 days prior to the date of closure. The application for permission must specify all the reasons for the closure.

Please note that termination of employees and the severance payment requirements are governed under India's federal and state specific employment legislations.

The Shops Acts have more or less similar provisions with respect to termination. For example, in Mumbai, an employer can terminate an employee who has worked for the employer for a continuous period of at least one year by providing 30 days' prior written notice or salary in lieu of notice. In case an employee has worked for less than one year but for more

than three months, a 14 days' written notice or salary in lieu of notice is required. (Section 66 (b) of the Shops Act.)

The ID Act prescribes provisions for retrenchment of workmen. However, managerial or administrative employees or employees in a supervisory capacity with wages exceeding Rs.6500 (USD135 approximately) per month are exempted from the ID Act provisions.

The ID Act prescribes that one month's notice or payment in lieu of notice must be given to a workman, who has been in continuous service for at least one year, along with compensation which is equal to 15 days' average pay for every completed year of service, or any part thereof in excess of six months.

7. Procedures for Implementing Terminations

7.1 Internal and appeal procedures

Indian employment laws do not mandate any general internal procedure for implementing employment terminations. In case of termination for misconduct, an internal inquiry procedure must be followed. Further, an employer must adopt the principles of natural justice while conducting an internal disciplinary procedure or mechanism.

As regards appeals, the Shops Acts provides for employees to appeal before the Regional Labour Commissioner in case of termination without a reasonable cause, or for dismissal without misconduct.

The Industrial Disputes Act prescribes that industrial establishments with 20 or more workmen must have a Grievance Redressal Committee for addressing employees' grievances. Therefore, if the worker of such establishment has any grievances against termination, then the employee can approach the Grievance Redressal Committee. Subsequent redressal process is followed at the Labour Courts and other judicial forums.

8. Termination Agreements

8.1 Obtaining releases

Separate agreements are becoming common. A separation agreement normally includes provisions such as settlement and release of claims with an employee; an employee's acknowledgment of receipt of the final severance consideration; an employee indemnity; undertakings not to defame the employer, etc.

8.2 Enforceable releases

Indian law does not provide any statutory requirements on releases of claims on employment termination.

The following are limitations on the termination of employment agreements in India:

- Notice period: Under the Indian law, generally, in the private sector one month's notice must be provided before an employment termination, unless otherwise provided for under the employment contract.
- Severance payments: Termination benefits, such as leave encashment, gratuity payment, or any other such amount is payable on an employment termination.
- Natural justice principles on misconduct: An employee is entitled to the opportunity to be heard in accordance with natural justice principles, if said employee is terminated on the basis of misconduct.

9. Employment Disputes

9.1 Employment Discrimination Claims

Article 15 of the Indian Constitution of India (the Constitution), mandates that the states should not discriminate against any citizen on the grounds of sex, or other such grounds. This is a fundamental right guaranteed to Indian citizens and will normally be enforceable only against India's central (federal) government, state governments and local administrative authorities controlled by the Government of India.

The Equal Remuneration Act, 1976 (the Remuneration Act), a central (federal) legislation, mandates payment of equal remuneration to male and female employees to prevent discrimination on the grounds of sex, against women in employment. Under the Remuneration Act, the employer must pay equal remuneration to male and female employees for "same work or work of a similar nature." Additionally, there should not be any discrimination against women while recruiting employees for the same work or work of a similar nature, or in case of promotions, training or transfer.

As a measure to address the increasing instances of workplace harassment for women, India has enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the Sexual Harassment Act) on the basis of the Convention on the Elimination of all Forms of Discrimination against Women, which prescribe a safe, secure and enabling working environment in a workplace, free from all forms of sexual harassment to every woman irrespective of her age or employment status. The Sexual Harassment Act prescribes a procedure for redressal of sexual harassment complaints in the workplace. The Sexual Harassment Act requires every employer, in private

or public establishment with at least ten employees, to set up an Internal Complaints Committee (ICC) to address the issue of sexual harassment, and requires every Indian state government to appoint a district officer to receive complaints from the ICC.

9.2 Contractual, Wrongful Dismissal Claims

The Shops Acts prescribes that where an employee is removed or dismissed without a given reasonable cause, or he/she has not been guilty of misconduct, such employee can appeal before the Regional Labour Commissioner having jurisdiction over the area.

9.3 Retaliation/Whistleblower Claims

Internal complaints

There are no statutory provisions in the private sector.

The Companies Act and the Companies (Meetings of Board and its Powers) Rules, 2014 (the Companies Rules) prescribes that all listed companies, companies which accept deposits from public and companies which have borrowed money from banks and financial institutions in excess of INR50 crore are required to constitute an audit committee to oversee the vigil/whistle-blower mechanism and to whom directors or employees may report their concerns or grievances. However, for other companies one of the directors appointed by the Board of Directors acts as an audit committee to oversee such a vigil mechanism. Therefore, Indian companies are now required to frame a whistle-blower policy containing the procedure of internal complaints and procedure of inquiry to be conducted by the audit committee in accordance with the Companies Act.

Complaints to authorities/regulators

The Companies Act and the Companies Rules do not provide any provisions for complaints to be made to authorities or regulators. However, the Whistleblowers Act, 2011 (the Whistleblowers Act) prescribes a procedure for filing complaints before the competent authority prescribed under the Whistleblowers Act. However, the Whistleblowers Act only applies to public servants and is not applicable to private entities.

10. Dispute Resolution

10.1 Judicial procedures

There are specialised forums at the central (federal) level and also state specific ones. The following are the employment forums under the ID Act for resolving industrial disputes in India:

- Board of Conciliation;
- Courts of Inquiry;
- Labour Courts;

- Industrial Tribunals;
- National Industrial Tribunals; and/or
- Labour Commission; etc.

The ID Act prescribes that the awards of a Labour Court, Industrial Tribunal or National Industrial Tribunal must be final and binding, and does not prescribe any provisions for appeal or revision before any higher court. However, the orders from these forums can be challenged in the High Court or the Supreme Court by way of a writ petition under Article 32 and 226 of the Indian Constitution.

Indian employment laws allow class action/collective bargaining for disputes arising between employees and employers. The collective bargaining mechanism in India involves collective agreements entered into between the employers and workmen represented by trade unions. These collective agreements are structured as memorandum of settlements which specify various clauses governing the relationship between the workmen represented by trade unions and employers. The ID Act prescribes that such settlements are binding upon the parties.

Further, there have been several landmark class action cases of employees approaching the High Courts and the Supreme Courts, on a variety of issues related to their employment.

10.2 Alternative dispute resolution

The Indian law applicable to arbitration agreements is the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

Further, the Arbitration Act prescribes that the arbitration agreements must specify the procedure of appointment of arbitrators and conduct of arbitral proceedings, etc. Foreign arbitral awards are also enforceable in India, and arbitration is an increasing choice of dispute resolution in employment contracts as well.

Mediation agreements between parties are enforceable in India. In absence of such agreements, the Code of Civil Procedure requires that the courts may first direct the parties to opt for alternative dispute resolution, such as arbitration, conciliation, mediation, etc.

10.3 Damages or other relief

If discrimination is found a worker may be awarded back wages for the period between the termination date and reinstatement in the employment.

The Indian Contract Act, 1872 (the Contract Act) also prescribes for compensatory damages for any loss or damage caused by breach of contract.

The Indian law does not generally award punitive damages.

A reasonable attorney fee can be awarded although it will not be sufficient to meet the actual expenses incurred.

The ID Act and the Shops Acts provide that employees who get terminated without reasonable cause are entitled to reinstatement damages.

10.4 Attorney's fees

A reasonable attorney fee can be awarded although it will not be sufficient to meet the actual expenses incurred.

11. Extraterritorial Application of Law

11.1 Application of domestic law outside the country

Indian employment laws do not apply to establishments outside India.

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