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ANA Law Group (Mumbai - HQ) is a full-service law firm based in Mumbai, India, with a team of experienced, talented and committed professionals with broad industry knowledge and specialisation across a wide spectrum of laws. Founded on traditional values, and coupled with prominent cross-border exposure, solution-oriented approach, and international quality services, ANA Law Group

provides significant value to the clients' business. The firm 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.

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1. Terms of Employment

1.1 Status of Employee

Indian employment laws do not distinguish between blue-collar and white-collar workers; employees are distinguished according to factors such as their designation, remuneration, place of work, nature of work, type of industry, etc.

For instance, the workman category (which is a lower income group, or non-managerial employee) is governed by different statutes, such as the Industrial Disputes Act, 1947 (the ID Act), the Factories Act, 1948 (the Factories Act), the Industrial Employment (Standing Orders) Act, 1946 (the SO Act), etc. The ID Act defines the term “workman” to include any person employed in any industry to do any manual, skilled, unskilled, technical, operational or supervisory work. The ID Act specifically excludes people in managerial positions or whose wages exceed INR10,000 (approximately USD140).

Similarly, certain Indian states exclude persons holding managerial positions from the state-specific legislation governing shops and commercial establishments.

Additionally, the SO Act classifies employees as temporary workmen, permanent workmen, probationers, substitutes, apprentices and casual workers, based on the nature of their employment.

Another distinction exists between government employees and private sector employees. The terms and conditions of government employees are contained within the Indian Constitution and the rules enacted by the federal government and state governments for different categories of services, such as Indian civil services, foreign services, judiciary, subordinate category employees, etc.

Private sector employees are governed under their employment contracts, the state-specific Shops and Establishments Acts (SE Acts), and other legislation governing private and government sector employees.

Further, there is a large population of workers engaged in the unorganised sectors without any statutory benefits. The Indian government has recently proposed a legislation to safeguard unorganised sector workers.

The engagement of agency or contract workers is regulated under the Contract Labour (Regulation and Abolition) Act, 1970. Agency workers are not treated as employees of the establishment, and are not eligible for any statutory benefits granted to the principal employer’s employees.

Indian law and the Indian courts do not distinguish between full-time and part-time workers, with the latter being en-

titled to the same benefits, subject to the provisions of the ID Act.

1.2 Contractual Relationship

Indian employment or other laws do not have any provision prescribing the term of an employment contract. Broadly, employment contracts can be for an indefinite term or a fixed term. Fixed-term contracts are commonly used for employees undertaking work of a temporary nature or project-based work; consultants and contract employees also execute fixed-term contracts with employers. Fixed-term employment was introduced in India in the apparel manufacturing sector under the SO Act. However, the government has recently extended fixed-term employments for all sectors, in order to ensure statutory benefits for fixed-term workers as well. From a practical standpoint, it is advisable to execute short-term contracts with employees to ensure flexibility in termination, and for better enforcement, specifically of restrictive covenants such as non-compete and non-solicitation. However, in many cases, including government employees, open-ended agreements are preferred to secure long-term employment and to make use of the statutory benefits available to employees based on the length of their service. In the private sector, short-term agreements present hiring challenges for employers because well-qualified employees at all levels seek job security and longer-term commitment. Accordingly, employers have to include clauses in the agreement that give them the flexibility to terminate the employment without incurring any liabilities or likelihood of potential claims by the outgoing employees.

Indian law does not mandate employer-employee contracts. However, certain state-specific SE Acts require an employer to issue an appointment letter in a prescribed form, containing basic information such as the employer’s name and address, employee details, wages and allowances, joining date, etc. Furthermore, the rules under the SO Act (to the extent applicable) require that the employer must issue a written order on the employee’s completion of the probation period.

Nevertheless, it is recommended that comprehensive employment contracts be executed in order to capture the key terms and conditions of employment, which may vary based on the nature of work and the employees’ designations. There are certain implied terms in an employment contract, such as confidentiality obligations, the protection of trade secrets, good faith, duty of care, etc.

Further, legislations including the ID Act, the Factories Act, the SO Act and the SE Acts, prescribes minimum employment terms such as work hours, wages, leave entitlement, holidays, notice and termination entitlements, health and safety standards, etc, to be clearly communicated to the workmen/employees.

A comprehensive employment contract must include all important terms, such as the job description, compensation, statutory entitlements, the term of employment, the rights and obligations of both parties, termination conditions, confidentiality and non-disclosure provisions, intellectual property and technology assignment, compliance with company policies, preferred dispute resolution mechanism, etc. For senior designations, the agreement may also include post-termination obligations, such as non-competition and non-solicitation (to the extent enforceable, or also for deterrent purposes), stock options, indemnity, garden-leave clause, etc.

In view of the proposed stringent data privacy regime in India, the employment contract may also include the employees' consent for the collection and processing of their personal data, the employees' obligation to safeguard against data breaches, and the liabilities for data breaches.

There are no statutorily prescribed requirements for employment contracts. However, it is advisable to stamp the contracts by paying a nominal government levy (stamp duty) under the Indian Stamp Act, 1899, as applicable to the respective state in which the contract is executed. The contract must be stamped prior to execution, or within three months of its receipt in India, if executed abroad. An unstamped contract is deemed inadmissible as evidence in Indian courts. Furthermore, it is time-consuming to stamp the agreement at the litigation stage and may delay the proceedings, which may be prejudicial to employers seeking urgent relief in cases of employee breach.

1.3 Working Hours

The Factories Act, the SE Acts and the Minimum Wages Act, 1948 (Wages Act) prescribe a maximum of nine working hours per day and 48 hours a week. Further, a worker shall not be made to work for more than five hours without taking a break of at least one hour, or half an hour for workers engaged in a manufacturing process. The total number of work hours including overtime shall not exceed 60 work hours a week. The total spread-over period shall not exceed ten and a half hours under the Factories Act, and 11 hours under the SE Acts. Further, the workers must be given at least one day off a week. The foregoing work hours, overtime and the spread-over periods may be modified by the orders of chief inspectors under the respective statutes.

There is a restriction on women's work hours, and women are not permitted to work between 7:00pm and 6:00am. This restriction can be relaxed by the Chief Inspector, but no permission can be granted to work between 10.00pm and 5.00am. Certain state governments have granted exemptions to specific commercial establishments, such as IT companies, hotels, media companies, etc, allowing female employees to work beyond the permissible hours at night. These

exemptions are conditional, and the employer must follow the prescribed safety measures, such as special transport arrangements through verified drivers and cabs, and other conditions as imposed by state-specific authorities.

The work hours of the employees working in a managerial capacity and those exempted under these statutes are governed under their respective employment contracts, and there is no cap on the maximum work hours.

Indian law does not have any provision granting flexible working hours to employees or workers. The Maternity Benefits (Amendment) Act, 2017 permits work from home or flexible work hours for eligible female employees, subject to the employer's decision and based on the nature of the work.

The ID Act does not exclude part-time workers from the definition of workmen, and the Indian courts have ruled in numerous cases that there is no distinction between full-time and part-time workers. Accordingly, part-time workers are entitled to the same terms and conditions of employment as full-time workers, on a proportionate basis and subject to the provisions of the ID Act. Further, the contractual terms for part-time workers can be the same as for full-time workers, and the same obligations can be enforced against part-time workers, including confidentiality and non-disclosure obligations.

If workers are required to work in excess of the daily and weekly working hours stipulated under various statutes, they will be entitled to receive wages for the overtime work, at twice the ordinary rate of their normal wages. The Factories Act stipulates a maximum of 50 overtime hours in a quarter, which can be extended to a maximum of 75 hours in exceptional circumstances.

The SE Acts also contain provisions relating to overtime, and permit up to 40-50 overtime hours in three months. However, the recently amended Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 has increased the permitted overtime hours significantly, to 125 hours in a quarter.

Further, the federal government has proposed the Factories (Amendment) Bill, 2016, increasing the overtime hours to 100 hours in a quarter, which can be extended to 115 hours in exceptional circumstances and to a maximum of 125 hours in cases of excessive workload. The proposed bill has been passed by the lower house of parliament, and is awaiting the consent of the upper house and the president.

1.4 Compensation

India's central/state governments fix and revise the minimum rate of wages from time to time for employees, under the Wages Act, which applies to all establishments, facto-

ries, places of business and industry types. The wage rates vary according to the state, sector, region, nature of work, worker's skills, inflation, etc. For instance, the current minimum wage applicable in the state of Maharashtra for workers employed in the construction of road ranges from USD77.7 per day, depending on whether the workers are unskilled, semi-skilled or skilled.

Indian employment law does not have any provision for the payment of a 13th month salary to employees. However, it is common in India to pay discretionary bonuses to reward and incentivise employees, primarily governed by the employment contracts. The statute that governs the payment of bonuses in India is the Payment of Bonus Act 1965 (Bonus Act), which applies to factories and all establishments with 20 or more employees during an accounting year, and to those employees whose monthly salary does not exceed INR21,000 (approximately USD300). Furthermore, the Bonus Act envisages the payment of a bonus ranging from 8.33% to 20% of the basic wage, which is INR7,000 (approximately USD100) per month, or the minimum wage notified for the employment as per the Wages Act, whichever is higher, and is linked to the employer's profitability and the allocable surplus in that year.

Many employers pay a signing bonus, a retention bonus, a performance-based bonus, etc, to incentivise employees; these are not governed under the Bonus Act.

Although there are government-prescribed compensations, minimum wages, bonuses, etc, there is no government intervention. Any non-compliance with the statutory provisions is brought before the specific redressal forums.

1.5 Other Terms of Employment

Vacation and vacation pay entitlements are generally covered under the employment contracts. The holiday/leave entitlement under Indian law includes the following:

- one day weekly paid holiday;
- four mandatory national holidays;
- four to six festival holidays, as notified by the central or state governments; and
- 12-24 days of casual/sick leave per annum, as prescribed under various statutes.

The Factories Act also provides that every worker is entitled to one day's paid leave for every 20 days of work.

Employees are eligible for annual leave with wages once they have completed one year in the organisation and served for more than 240 days in the one year.

Required Leaves

Indian law does not have a specific required leave category, and any necessity-based leave is normally part of casual leave.

Maternity Leave

The Maternity Benefit Act, 1961 and the amendment of 2017 (the MB Act) govern maternity benefits in India, and are applicable to any establishment with more than ten employees. Under the MB Act, a female employee who has worked in an establishment for at least 80 days in the 12 months preceding the date of her expected delivery is eligible for maternity benefits. The MB Act requires the employer to grant 26 weeks of paid maternity leave to the eligible female for the birth of her first two children, of which not more than eight weeks shall precede the date of her expected delivery. For every child thereafter, the female employee will be entitled to 12 weeks of paid maternity leave, of which not more than six weeks shall precede the date of her expected delivery. 12 weeks of paid leave must be granted to women who adopt a child below the age of three months.

In the event of a miscarriage or medical termination of pregnancy, a female employee is entitled to six weeks of paid leave immediately following the day of her miscarriage or termination. The MB Act also provides for paid leave if the employee undergoes a tubectomy, or in cases of any illness arising out of pregnancy, delivery or premature childbirth.

The recent amendments to the MB Act provide that commissioning mothers are also entitled to 12 weeks of paid leave from the date the child is handed over to them. Surrogate mothers are also entitled to maternity leave under the MB Act.

Indian law does not provide for paternity leave, but many Indian companies provide one to two weeks of paternity leave to their employees.

Child Care Leave

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

Disability and Illness Leave

The model standing orders under the SO Act and many SE Acts allow employees time off for illness, injury or disability, known as sick leave or casual leave. Normally, ten to 12 sick leave days are granted per year. The Employees' State Insurance Act, 1948 (ESI Act) also prescribes that an employee in the private or public sector who sustains a disability or illness is eligible for disability and sickness benefits, including the stipulated number of days of paid sick leave. The SO

Act further provides for “quarantine leave” to a workman who is prevented from attending work because he or she has come into contact with a person suffering from a contagious disease, through no fault of their own. Wages for the period of quarantine leave shall be half of the regular wages payable to a workman (basic plus dearness allowance).

Limitations on Confidentiality

Indian law does not have any statutory limitations on confidentiality or non-disparagement by an employee. However, these obligations are regarded as implied terms of employment, and the employee has a fiduciary duty not to disclose the employer’s confidential information or trade secrets and not to disparage the employer, unless the disclosure is mandatory under any law in force.

It is also relevant to understand the court’s approach in such cases. In a case involving the enforcement of a post-termination non-compete restriction, the Delhi High Court refused to enforce the non-compete provision as it was in restraint of trade. However, the court had granted an injunction restraining the employee from disclosing the employer’s confidential information and trade secrets (*Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar and Anr*, MANU/DE/1215/2009).

Further, the Bombay High Court has observed that, in the global and competitive world, various business and commercial information is required to be kept confidential in order to protect the interest of the business community at large. This casts an additional responsibility on the employees to protect the important data of the employers and their clients/customers. The court highlighted that the covenants obliging the protection of trade secrets and confidential information must be respected. Such covenants/agreements are necessary to protect the concept of confidentiality and trade secrets, and are legally accepted in India. The court ruled that the employee had breached the employment agreement, and therefore awarded damages to the employer (*Anindya Mukherjee v. Clean Coats Pvt. Ltd.*, 2011 (2) ARB LR 241 (Bom).)

In view of this, the judicial approach has been that, although the employer cannot enforce a negative covenant in restraint of trade, the employer’s interests in its confidential information or trade secrets can be secured by restraining the employee from divulging confidential information.

Employee Liability

An employee who has disclosed their employer’s confidential information in breach of the employment contract can be held liable for breach of contract under the Indian Contract Act, 1872 (Contract Act), and the employer can seek injunctive relief and damages from the offending employee.

Employers can also seek relief under the criminal legislation, and can take criminal action against the employees. Several provisions of the Indian Penal Code (IPC) and the Information Technology Act, 2000 (IT Act) govern the breach of confidentiality and disclosure provisions, and allow criminal prosecution and imprisonment or fines, or both, as appropriate. The offences under the IPC can be theft or criminal breach of trust. The relevant offences under the IT Act include hacking (Section 66), causing damage to computer systems (Section 43), tampering with computer source documents (Section 65), violation of privacy policy (Section 66E), etc.

2. Restrictive Covenants

2.1 Non-Competition Clauses

The Indian law governing contracts in India, including restrictive covenants, is the Contract Act, which holds void any agreement that restrains the exercise of a lawful profession, business or trade of any nature. However, as an exception, if a party sells the goodwill to another, the seller can agree with the buyer that the seller will not carry on a similar business within a specified territory. Indian law is rigid and invalidates any agreement that imposes restraint on carrying out a lawful business.

Therefore, a non-compete clause in restraint of trade is invalid and unenforceable, irrespective of any independent consideration paid to the employee.

The provisions of the Contract Act are silent on the enforceability of a non-compete clause in an agreement, other than in the case of the sale of goodwill. Therefore, the law on enforceability of non-compete covenants has developed through case law jurisprudence in India, keeping in mind the changing economic scenario and the interests of both the employers and the employees.

The courts have also differentiated between the restrictive covenants operating during the term of the agreement and after the term of the agreement.

The settled legal position in India is that non-compete covenants operating beyond the term of the agreement are regarded as restraint of trade and are unenforceable.

In the landmark case of *Krishan Murgai*, the employment contract placed the employee under a post-service restraint that prevented him from serving in any competing firm for two years within the local limits of his last posting. The Supreme Court of India had ruled that the doctrine of restraint of trade could never apply during the continuance of the contract, but a restrictive covenant extending beyond the

term of service was void (*Superintendence Co. of India Pvt. Ltd. v. Krishan Murgai*, AIR 1980 SC 1717).

In another leading case involving *Pepsi Foods*, the Delhi High Court had refused to enforce the non-compete provision against the employee, inter alia, on the grounds that the restraint order, if granted, would have the direct impact of curtailing the freedom of employees to improve their future prospects and service conditions by changing their employment; the rights of an employee to seek and search for better employment cannot be restricted by an injunction, and an injunction cannot be granted to create a situation such as “Once a Pepsi employee, always a Pepsi employee”. It would almost be a situation of ‘economic terrorism’ or a situation creating conditions of “bonded labour” (*Pepsi Foods Ltd. And Others v. Bharat Coca-Cola Holdings Pvt.* (1999) DLT 122).

Additionally, the courts have refused to enforce non-compete clauses that operate beyond the term of the agreement, stating that an employee cannot be confronted with a situation where he or she either has to work for the present employer or be forced into idleness, and that the employer cannot be allowed to perpetuate forced employment with the employer under the guise of confidentiality.

In many cases, Indian courts have favoured the employers and upheld non-compete covenants against employees in cases where the restraint imposed was reasonable.

In a leading case on the enforcement of restrictive covenants in India, the Supreme Court of India upheld the non-compete clause against the employee on the ground that the restraint operated only during the term of the agreement. The court also held that negative covenants operative during the period of the contract, when the employee is bound to serve his or her employer exclusively, are generally not regarded as restraint of trade (*Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co.*, 1967 SCR (2) 378).

Further, the Delhi High Court has observed that whether or not the contract is in restraint of trade would depend upon whether the contract was unreasonable, unfair or unconscionable. In all probability, a contract imposing a general restraint would be void. Partial restraint would prima facie be valid and, therefore, enforceable.

Additionally, the courts have enforced non-compete provisions in the following circumstances:

- to prevent the disclosure of information to rival companies where the employee had gained knowledge of special processes and equipment in the company;

- to protect trade secrets and confidential information which the employee had acquired during the course of employment;
- the partial restraint of trade, limited in both point of time and area of operation;
- an agreement to serve a person exclusively for a definite term is a lawful agreement, etc.

Therefore, where the employee leaves the company prior to the expiry of the term of the agreement, a court may enforce the non-compete provision against the employee during the remaining term of the agreement, subject to the foregoing factors.

Notwithstanding this, companies prefer to retain non-compete provisions in their employment contracts for deterrent purposes.

2.2 Non-Solicitation Clauses - Enforceability/ Standards

A well-drafted and reasoned non-solicitation covenant is enforceable under Indian law with reference to both employees and customers, because an employee’s obligation not to solicit other employees or customers of their previous employer is not regarded as a restraint of trade. The Indian courts have considered the enforceability of non-solicitation clauses in many cases, decided on a case-by-case basis. The law does not prescribe any specific timeline for a non-solicitation provision to be enforced after termination of employment. In a landmark case, two companies had entered into an agreement with a non-solicitation clause that they would not solicit the employees of the other company for a term of two years. The Delhi High Court held that, notwithstanding the non-solicitation clause, the employees of both companies cannot be restrained from seeking employment directly with those companies, and that the employees could respond to general job position advertisements in either company. The court further 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 from independently seeking jobs in the other company. The court held that the employees in question would lose their jobs if a restraint order was granted against the non-solicitation breach and therefore observed that the appropriate remedy in this case was damages and a restraint order against future solicitation (*Wipro Limited v. Beckman Coulter International*, 2006 (3) ARBLR 118 Delhi).

As regards the non-solicitation of customers, the courts have held that merely approaching customers of a previous employer does not amount to solicitation until orders are placed by such customers based on such approach. The Madras High Court laid down the test for solicitation in a case where a vendor approached and solicited the company’s former customers for direct orders. The court observed that

it needs to be proved that the erstwhile customers were approached and only placed orders with the vendor on account of such solicitation; mere production of a quotation would not serve the purpose. The court further ruled that the company was not without any remedy and could seek damages if it could prove its case on merits (*M/s FL Smidth Pvt. Ltd. v M/s. Secan Invescast (India) Pvt. Ltd.*, (2013) 1 CTC 886).

In another case involving American Express, the Delhi High Court held that an employee cannot be restrained from dealing with its customers after said 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 (*American Express Bank Ltd. v. Ms. Priya Puri*, (2006) IILLJ 540 Del).

Therefore, in the absence of a specific law or settled case law, any future case will likely be decided on the basis of its facts and circumstances.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

Indian employment laws do not cover employees' data privacy; personal and confidential information is protected through the IT Act and the rules made therein. In Paril 2011, the federal government notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (Data Protection Rules) under the IT Act, which govern the collection and processing of personal information in India.

Although the Data Protection Rules do not contain any specific provision regarding employee data, its provision will apply if the employee data collected by the employer can be categorised as "sensitive personal data" as defined under the Data Protection Rules. Sensitive personal data includes information such as passwords, financial information, health and medical condition and records, biometrics, etc.

Some of the key applicable provisions are as follows:

Transfer of Data

The Data Protection Rules provide that an entity can transfer sensitive personal data or information to another entity or a person in India, or located in any other country, if the recipient entity ensures adherence to the same level of data protection, and only if the transfer of information is necessary to comply with a lawful contract between the transferor of information and the information provider, or is performed with the data provider's prior consent.

The foregoing data transfer restrictions/requirements will be applicable to any employee personal information trans-

ferred within or outside India, irrespective of the countries to which the data is transferred.

This is specifically relevant where the companies store their employees' HR data in their global-intra groups, or share the employees' data with the investigating or forensic agencies for corporate fraud investigations or similar inquiry purposes.

Employers can obtain their employees' consent for data disclosure or data transfer under the employment agreements executed with the employees, and also through the company's employee policy or handbook.

Retention of Employee Data

The Data Protection Rules do not specify the duration for which the data should be retained, and only provide that a body corporate must not retain the information longer than required for the purpose for which the information was lawfully collected. Therefore, employers may retain employee data without the employees' consent for a few years as deemed reasonable by the employer to deal with any potential employee claims.

Purpose

The employer should ensure that the employees are made aware of the purpose for which the information is collected, the intended recipients of the information, the agency retaining the information, etc. Furthermore, the employees should be given an option not to provide the information, or to revise/withdraw the information.

Disclosure

The employer must not disclose the employees' sensitive personal information to a third party without the employees' consent.

Security

Employers must have reasonable security practices and procedures for storing the sensitive personal information. ISO 27001 is provided as a reference standard.

The federal government has proposed an all-encompassing Data Protection Bill, 2017, which is anticipated to become a law in the next few months. The data collection and processing norms for employers will become stringent under the proposed regime.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

There are no limitations on foreign nationals working with companies in India, but they must obtain an employment visa. An employment visa may be extended on a yearly basis

for a maximum period of five years. The key requirements include that the foreign nationals must be highly skilled or a qualified professional, or earn a minimum of USD25,000 as salary per annum from the employer in India. If the foreign national's purpose of visit relates to business activities, such as to explore business opportunities or attend board meetings or other general meetings for the purpose of providing business service support, the foreign national may apply for a business visa. Foreign nationals must comply with the registration requirements and procedures of the Foreign Regional Registration Officer (FRRO) in the respective Indian state.

The foreign nationals of certain countries (such as China, Pakistan and Afghanistan) that intend to work in India or visit India for business may require prior clearance from India's Ministry of Home Affairs and the Ministry of External Affairs.

4.2 Registration Requirements

If the foreign national intends to stay in India for more than 180 days, he or she must register with the FRRO within 14 days of arriving in India.

5. Collective Relations

5.1 Status of Unions

In India, trade unions are governed under the Trade Unions Act, 1926 (TU Act). Although the TU Act provides for registration, union rights, etc, it does not actually recognise trade unions. However, there are certain state-specific laws that do recognise trade unions, such as the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and the Kerala Recognition of Trade Unions Act, 2010. The TU Act provides for optional registration of trade unions. A registered trade union is deemed to be a body corporate and has the status of a juristic entity, with the power to acquire and hold property, execute contracts, and be involved in legal proceedings in its registered name.

One of the most significant rights of a trade union is to negotiate and secure terms of employment for its members through collective bargaining.

Trade unions can utilise their funds for salaries, allowances and expenses of the office-bearers, administration expenses, the prosecution or defence of any legal proceedings, the provision of educational, social or religious benefits for members, allowances for members' loss on account of death, old age, sickness, contributions to benefit workmen in general, etc.

Traditionally, trade unions were formed in sectors such as transport, banking, manufacturing, construction, mining, etc. However, in a recent trend in the private sector, IT/ITeS

employees have formed a trade union called All India Forum for IT Employees (FITE), which has obtained registrations in a few Indian states, including Maharashtra and Tamil Nadu. FITE represents and safeguards the rights of IT/ITeS employees, including regarding illegal terminations and layoffs. This can be a turning point and more private sector employee representative bodies may emerge for collective actions.

5.2 Employee Representative Bodies - Elected or Appointed

Indian law does not grant management representation rights to the employees on the company's board. Besides the trade unions, the ID Act requires that any establishment with more than 100 workmen must appoint a Works Committee consisting of an equal number of representatives of the employer and the employees. The representatives of the workmen on the Works Committee must be elected in the statutorily prescribed manner and in consultation with the relevant trade union. The primary role of a Works Committee is to secure and preserve amiable relations between the employer and the workmen, and to discuss and bring resolution to any issues of common interest or concern.

Any establishment with 20 or more workmen must appoint a Grievance Redressal Committee to resolve disputes arising out of individual grievances. The committee can have maximum of six members, with an equal number from the employer and the workmen. The committee's chairperson will be selected from the employer and the workmen on a rotation basis.

Any establishment with ten or more employees must constitute an Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, to handle instances of sexual harassment against women in the workplace. At least half the members of the ICC should be women, and the presiding officer must be a woman at a senior designation. At least two members of the ICC should be employees, and there must be one independent member from a non-government organisation or someone familiar with the issues relating to sexual harassment.

5.3 Collective Bargaining Agreements

Collective bargaining is regarded as an effective dispute resolution mechanism, specifically in industries where the employees are largely unionised, such as traditional sectors like manufacturing, construction, mining, etc. The terms and conditions of employment – including welfare activities, banking and medical facilities for the workmen – are negotiated and agreed through collective bargaining under the collective agreements. These collective agreements are also structured as memorandum of settlements, which specify various clauses governing the relationship between the workmen represented by trade unions and employers. It is

also relevant to note that the SO Act requires the employer to consult the employees or their representatives in order to finalise the terms of employment contained in the organisation's standing orders. Collective bargaining agreements do not usually exist in the private sector, and the employees' collective grievances are dealt through other means, including labour unions initiating online campaigns and resorting to social media to secure employees their statutory rights.

6. Termination of Employment

6.1 Grounds for Termination

The termination of employees and consequent severance payment requirements are governed under the Indian Central and state-specific employment legislation.

The state-specific SE Acts apply to employees working in any commercial establishments in that state. Indian law does not provide for "at will" termination. The SE Acts provide that the employer can terminate an employee by giving prior written notice to the employee. Certain SE Acts require the employer also to give a reasonable cause for terminating the employment.

As regards the central legislation, the ID Act provides retrenchment and lay off and business closure as grounds for the termination of employment. The ID Act defines the term "retrenchment" and refers to the termination of workmen's services by the employer for any reason other than as a result of disciplinary action, retirement (whether voluntary or otherwise) or grounds specified in a fixed term-contract (or the non-renewal of a fixed term contract). Considering the wide scope of the definition of workmen, the judicial interpretation has included various professionals within the definition of workman, including software programmers, teachers, etc.

Employment can be terminated with immediate effect without the notice requirement on the ground of misconduct. A dismissal on the grounds of misconduct or poor performance at work must be clearly documented and established.

Misconduct is explained under the Employee's Standing Order Act to include the following:

- wilful insubordination or disobedience;
- theft, fraud or dishonesty in connection with the employer's business or property;
- wilful damage to or loss of the employer's goods or property;
- taking or giving bribes or any illegal gratification;
- habitual absence without leave or absence without leave for more than ten days;
- habitual late attendance;
- habitual breach of any law;

- riotous or disorderly behaviour;
- habitual negligence or neglect of work; and
- striking or inciting others to strike.

The termination procedure differs according to the different grounds of dismissal and the number of workmen in an establishment. If the dismissal is on the grounds of misconduct or indiscipline, a detailed enquiry must be carried out based on principles of natural justice to prove the misconduct and issue the termination order. Termination on the ground of retrenchment entails providing prior written notice to the workmen, providing compensation, and obtaining a prior intimation/prior permission from the appropriate government authority based on the number of workmen in the establishment. For termination under the SE Acts, a prior notice must be provided to the employee along with a reasonable cause for termination.

Indian law does not define redundancy. However, the courts have interpreted this term in the context of an employee's role becoming redundant for reasons such as the cessation of business or the introduction of new technology. Therefore, redundancy on account of mechanisation, outsourcing, business restructuring and other business-related reasons are held to be valid grounds for termination. The ID Act does not prescribe any additional obligation or a different termination procedure for collective redundancies. However, from a practical standpoint, collective redundancies may trigger a higher risk of legal proceedings from the terminated workmen, and the courts tend to adopt a pro-employee approach in dealing with reductions in workforce.

6.2 Notice Periods/Severance

Other than termination for proven misconduct, the employer must provide prior written notice to the employee/workmen, or salary in lieu thereof. Under the SE Acts, the employer can terminate an employee who has worked for the employer for a continuous period of at least one year by providing a 30-day prior written notice or pay in lieu of notice. If an employee has been in the employer's continuous employment for less than one year but more than three months, the employer can terminate such employee by providing a 14-day written notice or pay in lieu of notice.

The ID Act requires that an employer that employs fewer than 100 workmen and wishes to retrench, or make redundant, a workman who has been in continuous service for at least one year must provide that workman with one month's notice or payment in lieu of notice.

Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in said undertaking immediately before such closure shall be entitled to the same notice and compensation as if they had been retrenched.

If there are more than 100 workmen, retrenchment will require at least three months' prior written notice or payment in lieu thereof.

Managerial and supervisory level employees exempted under the SE Acts or the ID Act can be terminated based on their contractual terms and conditions, and by giving a notice period specified under the employment contract.

The ID Act prescribes additional compensation to be given to workmen in case of retrenchment. An employer that employs fewer than 100 workmen and wishes to retrench a workman who has been in continuous service for at least one year must pay said workman compensation equal to 15 days' average pay for every completed year of service, or any part thereof in excess of six months, in addition to the statutory prescribed one month's notice or payment in lieu thereof.

There are no formal requirements for severance payments. However, from a practical standpoint, it is advisable to have the outgoing workmen execute separation and release agreements with the employer.

If an employee is retrenched, a notice of the retrenchment must also be given to the Central Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central) and the employment exchange concerned.

An employer who intends to close down an undertaking shall serve a notice to the appropriate government at least 60 days before the date on which the intended closure will be effective, stating clearly the reasons for the intended closure of the undertaking. Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall be entitled to the same notice and compensation as if they had been retrenched.

In the case of more than 100 workmen, retrenchment will require at least three months' prior written notice, or payment in lieu thereof. Further, the employer must obtain permission from the appropriate government at least 90 days prior to the date of the intended closure. If the government does not respond within 60 days, the permission will be deemed as granted and shall be valid for one year.

Under the SE Acts, the employer can terminate an employee who has worked for them for a continuous period of at least one year by providing 30 days' prior written notice or pay in lieu thereof. If an employee has been in the employer's continuous employment for less than one year but more than three months, the employer can terminate that employee by providing 14 days' written notice or pay in lieu thereof. A

notice to the labour authorities must be given intimating the termination.

In the absence of any specific agreement between the employer and the workmen, the employer must follow the "last in first out" principle at the time of the reduction in force. Furthermore, if the employer decides to make new offers, the employer is statutorily mandated to give preference and offer re-employment to the terminated workmen first. However, the courts have the discretion to permit departure from this rule, keeping in mind the employer's business interests.

Any non-compliance with the prescribed termination provisions will render the termination invalid, and the courts may direct the employers to reinstate the employees, with back wages.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Indian law permits the summary dismissal of employees for serious cause such as misconduct or indiscipline, with immediate effect without the notice requirement. A dismissal on the grounds of misconduct or poor performance at work must be clearly documented and established.

Misconduct is explained under the SO Act to include the following:

- wilful insubordination or disobedience;
- theft, fraud or dishonesty in connection with the employer's business or property;
- wilful damage to or loss of the employer's goods or property;
- taking or giving bribes, or any illegal gratification;
- habitual absence without leave or absence without leave for more than ten days;
- habitual late attendance;
- habitual breach of any law;
- riotous or disorderly behaviour;
- habitual negligence or neglect of work; and
- striking or inciting others to strike.

For termination on grounds of misconduct/indiscipline, the procedure for dismissal must be followed by the employer based on natural justice principles and after conducting a detailed investigation into misconduct. The procedure is prescribed under the SO Act and includes issuing a charge sheet, holding a domestic enquiry, reviewing the report of the inquiry office, showing the cause notice to the employee and, after giving adequate opportunity to the employee to present its case, issuing the order of punishment if the misconduct is established.

There are no statutory consequences of summary dismissal for serious cause. However, one cannot rule out the pos-

sibility of legal action in case of summary dismissals. These kinds of disputes must be addressed on a case-by-case basis and, in many instances, payment of a few months' wages, as appropriate, may be a better solution than engaging in protracted litigation with the employee, with the associated time and costs.

6.4 Termination Agreements

Indian law does not restrict employers from executing termination agreements with outgoing employees, which has become a standard industry practice. The employers prefer to sign the agreement at the same time as the payment of the severance consideration.

A termination agreement normally incorporates provisions such as settlement and release of claims by the employee, acknowledgement of the employee that he or she received the final severance consideration, employee's indemnity, representations not to defame the employer, etc, which are favourable to the employer.

There are no statutory requirements or restrictions for termination agreements. Reasonable releases, non-disclosure and non-disparagement provisions may be enforceable against the employees.

6.5 Protected Employees

Female employees are protected from dismissal during maternity leave, and employees receiving sickness benefit, maternity benefit or disablement benefit under the ESI Act are protected from dismissal during the period in which they are receiving the benefit.

Employee representatives do not come under the protected category.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

An employee who has been in continuous service for more than a year cannot be terminated from employment at will, unless they are dismissed by way of disciplinary action, for non-renewal of contract, or on the ground of continued ill health. For termination on disciplinary grounds, the employer must establish that due process of inquiry and investigation was followed in order to establish the employees' misconduct. Therefore, an employee is regarded as having been wrongfully dismissed if he or she is terminated from employment under the following circumstances:

- without giving a reasonable cause as stipulated under certain SE Acts;
- without the prior statutory prescribed notice;
- based on discrimination;

- for misconduct that the employer failed to establish; or
- without complying with the termination provisions under the employment contract.

Wrongful dismissal can be challenged as an unfair labour practice, and the claims can be brought before the competent authority under the ID Act or the civil courts, as appropriate.

7.2 Anti-Discrimination Issues

Article 15 of the Constitution of India (Constitution) prohibits discrimination against any citizen on the grounds of religion, race, caste, sex, place of birth 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. The central Equal Remuneration Act, 1976 (Remuneration Act) mandates the payment of equal remuneration to male and female employees for the "same work or work of a similar nature", in order to prevent discrimination on the grounds of sex against women in employment. Additionally, there should not be any discrimination against women while recruiting employees for the same work or work of a similar nature, or in the case of promotions, training or transfer.

The burden of proof to establish the discrimination is on the complainant.

An employee who has faced termination based on discrimination may be entitled to reinstatement of employment with back wages; the courts also have the discretion to grant damages to the aggrieved employee. Further, violation of the Remuneration Act (ie, discriminating against women in connection with recruitment and employment) is punishable with a fine of up to INR20,000 (approximately USD300) and/or imprisonment of up to one year. Unfair labour practices under the ID Act are punishable with imprisonment of up to six months and/or a fine.

8. Dispute Resolution

8.1 Judicial Procedures

There are specialised employment forums constituted under the ID Act to address industrial disputes, which are broadly defined under the ID Act to include disputes between employers and employees or between employers and workmen, or between workmen and workmen, in connection with the employment or non-employment or the terms of employment or conditions of labour. These forums are as follows:

- the Works Committee;
- Conciliation Officers (for mediating and promoting the settlement of industrial disputes);
- the Board of Conciliation;

- Courts of Inquiry (to inquire into any matter appearing to be connected with or relevant to an industrial dispute);
- Labour Courts (for adjudicating industrial disputes); and
- Tribunals and National Tribunals (to adjudicate issues of national importance or of such nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such disputes).

Non-industrial disputes or those relating to private sectors or employment contracts are brought before the civil courts of competent jurisdiction.

Various Indian statutes provide for collective actions, including the ID Act, which permits class action in the form of collective bargaining. However, class action claims in courts are infrequent and it is not a popular civil remedy in India.

In writ jurisdiction to the Supreme Court or the High Courts for enforcement of fundamental rights under Constitution, representative actions or class actions brought in public interest through Public Interest Litigation (PIL) have gained much popularity and are widely used.

Furthermore, the Indian government recently introduced the concept of “class action suits” under Section 245 of the Companies Act, 2013, which permits the shareholders and depositors to file a petition collectively against the company, its directors, auditors or advisers if they commit any act that is prejudicial to the company’s interest.

8.2 Alternative Dispute Resolution

Arbitration is an increasing choice of dispute resolution in employment contracts. The ID Act provides for voluntary reference of disputes to arbitration. Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, by a written agreement, refer the dispute to arbitration, and the presiding officer of a Labour Court or Tribunal or National Tribunal will act as an arbitrator or arbitrators.

Pre-dispute arbitration agreements are enforceable under Indian law.

8.3 Awarding Attorney’s Fees

Indian courts do not normally award punitive damages. Reasonable attorney fees can be awarded, although they will not be sufficient to meet the actual expenses incurred.

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