Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering comparative analysis from top-ranked lawyers

Employment

India

Law & Practice
and
Trends & Developments

Anoop Narayanan and Priyanka Gupta
ANA Law Group

chambers.com

2020

INDIA

Law and Practice

Contributed by:
Anoop Narayanan and Priyanka Gupta
ANA Law Group see p.16

Contents

1. Introduction

1.1 Main Changes in the Past Year

Codification of Indian Labour Law

One of the most important developments in Indian labour law in 2019 has been its codification into four major pieces of labour legislation. These include:

- the Code on Wages, 2019, which replaces various wage-related laws, including those on equal remuneration, payment of bonuses and the minimum wage;
- the Occupational Safety, Health and Working Conditions Code, 2019, which merges thirteen laws regulating the health and safety conditions of workers in establishments;
- the Industrial Relations Code, 2019, replacing the Industrial Disputes Act, 1947 (ID Act), the Trade Unions Act, 1926, and the Industrial Employment (Standing Orders) Act, 1946; and
- the Code on Social Security, 2019, which shall replace nine social security-related laws in India.

Other Developments

In addition to the foregoing, several other key amendments have been notified or proposed.

India has notified the Transgender Persons (Protection of Rights) Act, 2019, which protects transgender persons against discrimination.

The government has proposed the Employees Provident Fund & Miscellaneous Provisions (Amendment) Bill, 2019 (EPF Bill, 2019), inter alia:

- granting flexibility to employees to pay varying rates of provident fund contributions;
- fixing a five-year limitation period to initiate enquiries against employers; and
- increasing the monetary penalties for non-compliance.

The monthly contribution rates for employers and employees have been reduced under the Employees' State Insurance Act, 1948 (ESI Act), thereby allowing a higher take-home amount for employees, and reduced liability for employers.

Certain state governments in India have mandated the registration of internal complaints committees formed under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This registration must be done with the office of the District Women and Child Development Officer.

1.2 COVID-19 Crisis

In the wake of the nation-wide lockdown in India, the central and the state governments have issued advisories to employers not to terminate their employees or reduce their wages during the lockdown period.

On 29 March 2020, the Ministry of Home Affairs issued an order mandating all employers to pay full wages to their workers during the lockdown period (MHA Order). The MHA Order appeared to be applicable to all categories of junior and senior employees and workmen under the ID Act.

The MHA Order's constitutional validity was challenged by various employers' groups and associations in the High Courts and also in the Supreme Court of India. However, before the Supreme Court's final order, the government had issued fresh guidelines replacing all the prior guidelines. Consequently, the employers were no longer mandated to pay full wages to or abstain from termination of employees during the lockdown period.

Several Indian states have diluted their respective state labour laws with respect to working hours under the Factories Act, 1948. These amendments are temporary in nature, and are applicable for two to three years.

The government has extended the deadlines for remitting statutory contributions and temporarily introduced certain deductions from employer contributions. It has undertaken to contribute to the employee provident fund on behalf of both employers and employees until August 2020.

Certain state governments (including Gujarat and Tripura) have increased the applicability threshold under the Contact Labour (Regulation and Abolition) Act, 1970, for a period of 1000 days.

The Ministry of Corporate Affairs has notified that ex-gratia payments made to temporary, casual or daily wage workers, above their wages and for the purpose of fighting COVID-19, will be admissible towards the company's corporate social responsibility (CSR) expenditure.

The Ministry of Labour and Employment had extended the validity of licences under the Contract Labour (Regulation and Abolition) Act, 1970 and the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, which were due for renewal during the lockdown period.

India's Supreme Court has extended all statutory limitation periods until fifteen days after the lockdown is lifted.

The government has issued guidelines and specific operating procedures for workplaces, including mandatory thermal screening, social distancing, sanitisation and the use of a contact tracing application (Aarogya Setu).

2. Terms of Employment

2.1 Status of Employee

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

For instance, the workman category (which applies to lower income groups or non-managerial employees) is governed by various statutes, such as the ID Act, the Factories Act, 1948 (Factories Act) and the Industrial Employment (Standing Orders) Act, 1946 (SO Act). 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 or administrative positions, and persons in a supervisory capacity whose wages exceed INR10,000 per month (approximately USD130).

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 covering different state professions such as the Indian civil services, the foreign services, the judiciary and subordinate category employees.

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.

Furthermore, there is a large population of workers engaged in unorganised sectors without any statutory benefits.

The category of agency or contract workers is regulated under the Contract Labour (Regulation and Abolition) Act, 1970. Normally, contract workers are not eligible for the statutory benefits payable to employees. However, in 2017 the Indian government proposed an amendment to the aforementioned legislation, suggesting a revision of the definition of "contract labour" to exclude workmen regularly employed in the establishment of the contractor. This would mean that these workers would be treated as employees of the establishment and be eligible for the statutory benefits granted to the principal employer's employees.

2.2 Contractual Relationship

India's employment laws do not have any provisions 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. The Indian government has extended fixed-term employment to all sectors to ensure statutory benefits for fixed-term workers as well as those employed on an indefinite basis. From a practical standpoint, it is advisable to execute short-term contracts with employees to ensure flexibility in termination, and for better enforcement, particularly of restrictive covenants such as non-compete and non-solicitation clauses. However, in many cases, including that of 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 long-term commitment. Accordingly, employers have to include clauses in their employment contracts that give them the flexibility to terminate the employment without incurring any liabilities, or making potential claims by outgoing employees more likely.

Employment Contracts

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 and employee details, wages, allowances and joining date. Furthermore, the rules under the SO Act (to the extent applicable) require that the employer issues a written order on the employee's completion of the probation period.

Nevertheless, it is prudent to execute comprehensive employment contracts to capture the key terms and conditions of employment. There are certain implied terms in an employment contract, such as confidentiality obligations, the protection of trade secrets, or good faith and duty of care.

Furthermore, legislation including the ID Act, the Factories Act, the SO Act and the SE Acts, prescribe minimum employment terms such as work hours, wages, leave entitlement, holidays, notice and termination entitlements and health and safety standards. These must be clearly communicated to the workmen/employees.

A comprehensive employment contract must include all the important terms, such as the job description, rate of compensation, statutory entitlements, terms of employment, rights and obligations of both parties, termination conditions, confidentiality and non-disclosure provisions, intellectual property and technology assignment, compliance with company policies and the preferred dispute resolution mechanism. 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 and gardening leave.

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.

Formalities

As regards the formalities, 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 inadmissible as evidence in Indian courts. Furthermore, it may be 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.

2.3 Working Hours

The Factories Act, the SE Acts, the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2016 (Model Shops Act) prescribe a maximum of nine working hours per day and 48 hours a week. Furthermore, a worker shall not be made to work for more than five hours without taking a break of at least half an hour. Additionally, the Wages Code allows the government to fix working hours to constitute a normal working day inclusive of one or more specified intervals. The total spread-over period (that is the total length of time from the start of a working day to its conclusion including breaks) shall not exceed ten and a half hours under the Factories Act. However, the spread-over period is extendable up to twelve hours by a chief inspector for specific reasons under the Factories Act. The SE Acts permit a spread-over period of 11 hours per day. Furthermore, 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. The Model Shops Act does not prescribe the opening or closing hours, and the establishments can remain open throughout the week.

Gender and the Workplace

There is a restriction on women's work hours, and women are not permitted to work between 7pm and 6am. This restriction can be relaxed by a chief inspector, but no permission can be granted to work between 10pm and 5am. The Model Shops Act restricts the working hours for women in shops and establishments between 9pm and 6am. Certain state governments have granted exemptions to specific commercial establishments, such as IT companies, hotels and media companies, allowing female employees to work beyond the permissible hours at night. These exemptions are conditional and the employer must provide shelter, night crèches and protection from sexual harassment, and must follow the prescribed safety measures, such as special transport arrangements through verified drivers and cabs.

The work hours of 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 (MB Act) permits work from home or flexible work hours for eligible female employees, subject to the employer's discretion and based on the nature of the work.

Part-Time 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. Furthermore, 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.

Overtime

If workers are required to work in excess of the maximum daily and weekly working hours stipulated under various statutes, they will be entitled to receive wages for that overtime work, at twice 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 Model Shops Act, and the respective SE Acts of Maharashtra and Gujarat, have increased the permitted overtime hours significantly, to 125 hours in a quarter.

2.4 Compensation

The Ministry of Labour and Employment notified a unified and comprehensive employment law in India, the Code on Wages, 2019 (Wages Code). The Wages Code replaces the following laws:

- the Payment of Wages Act, 1936;
- the Minimum Wages Act, 1948;
- the Payment of Bonus Act, 1965; and
- the Equal Remuneration Act, 1976.

Minimum Wage

The Wages Code applies to employees in the organised and unorganised sectors. It prescribes that the central (federal) government shall fix a floor wage based on the living standards of workers and the geographical region. The state governments shall fix the minimum wage for the respective states, which must be higher than the floor wage. In cases where the existing minimum wages fixed by the central or state governments are higher than the floor wage, they cannot reduce the minimum wages.

The central/state governments must revise the minimum wage rates at least every five years.

Bonuses

The bonus payment provisions under the Wages Code apply to establishments that have 20 or more workers. Annual bonuses are payable to all employees who have put in at least thirty days work in an accounting year, and whose wages do not exceed a level notified by the central or state government. The bonus shall be at least 8.33% of the wages or INR100 (less than USD2), whichever is higher. Additionally, the employers must distribute a portion of the gross profits in proportion to the employees' annual wages, subject to a maximum bonus of 20% of their annual wages.

The Wages Code disqualifies an employee from receiving their bonus if the employee is dismissed from service for:

- fraud;
- riotous or violent behaviour during the course of their employment;
- theft or misappropriation of employer property; or
- a conviction for sexual harassment.

Many employers pay signing bonuses, retention bonuses, performance-based bonuses, etc, to incentivise employees. These are not governed under the Wages Code. Although there are government-prescribed compensations, minimum wages, bonuses, etc, there is no government intervention. However, any instance of non-compliance with the Wages Code is punishable with imprisonment for not more than three months and/or a fine of INR100,000 (approximately USD1500).

2.5 Other Terms of Employment

Vacation and vacation pay entitlement is generally covered under 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 that year.

The leave provisions under the Model Shops Act include five days of annual leave for every 60 days of work performed for workers who have been employed for at least three months in a year, one day of annual leave for every 20 days of work performed if an employee has worked for at least 240 days in the preceding year, eight days of casual leave every year to be credited on a quarterly basis, and eight festival holidays in a year. Currently, the states of Maharashtra and Gujarat have implemented these benefits.

Required Leave

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

Maternity Leave

The Maternity Benefit Act, 1961 and 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 woman 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 the medical termination of a 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 illness arising out of pregnancy, delivery or premature childbirth.

The MB Act also provides that commissioning mothers, in cases of surrogacy, 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, and single male parents who may include unmarried, widower or divorced employees. The child care leave is granted for a maximum of two years during the entire course of their government service in order to take care of their minor children (ie, children 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 suffers from a disability or illness is eligible for disability and sickness benefits, including the stipulated amount of paid sick leave. The SO Act further provides for "quarantine leave" to a workman who is prevented from attending work because of his coming into contact with a person suffering from a contagious disease, through no fault of his own. Wages for the period of quarantine leave shall be half of the regular wages payable to a workman (basic pay plus dearness allowance).

Limitations on Confidentiality
Indian law does not have any statutory limitations on confidentiality or non-disparagement requirements imposed on 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.

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 their 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. 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) and violation of a privacy policy (Section 66E).

3. Restrictive Covenants

3.1 Non-competition Clauses

The law governing contracts in India, including restrictive covenants, is the Contract Act, which holds as 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 their 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 stringent and invalidates any agreement imposing 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.

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

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

able, and those operating during the term may be enforceable in certain exceptional circumstances.

Leading Cases
In the landmark case of Krishan Murgai, the employment contract placed the employee under a post-service restraint that prevented him, for two years, from serving in any competing firm within the geographical area of his last posting. The Supreme Court of India ruled that the doctrine of restraint of trade could 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 refused to enforce the non-compete provision against the employee, inter alia, on the ground that the rights of an employee to seek 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, in the court's view, almost be a situation of "economic terrorism" or one 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.

Enforcement
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. (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.
- Partial restraint of trade, limited in time and area of operation.
- An agreement to serve a person exclusively for a definite term is a lawful agreement.

Therefore, where the employee leaves the company prior to the contract expiring, depending on the employee's designation and their exposure to the company's confidential information, the court may enforce the non-compete provision against the employee during what remains of the term of the agreement, subject to the foregoing factors.

In view of the foregoing, many employers prefer to execute fixed and short-term employment contracts with renewal clauses and retain non-compete provisions in their employment contracts for deterrent purposes.

3.2 Non-solicitation Clauses – Enforceability/ Standards
A 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 law does not prescribe any specific timeline for a non-solicitation provision to be enforced after termination of employment.

As regards 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 those customers based on that approach. (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 could not be restrained from dealing with their customers after they had 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) IIILLJ 540 Del).

Therefore, in the absence of a specific statute or settled case law, any future cases will likely be decided on the basis of the relevant facts.

4. Data Privacy Law

4.1 General Overview

Indian employment laws do not specifically cover employees' data privacy. Personal and confidential information is protected through the IT Act and the rules made thereunder. In April 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 provisions 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, health and medical conditions and records, biometrics and financial information.

Some of the key applicable provisions are laid out below.

Privacy

The Data Protection Rules requires a company that collects, receives, stores, processes or handles personal or sensitive information to provide a privacy policy on its website accessible to the data subjects. This policy should contain statements on the type of personal or sensitive data collected, the purpose of its collection, the uses to which it is put, provisions relating to disclosure of the information and the security practices and procedures adopted by the company.

Consent

The Data Protection Rules mandate companies to obtain express consent from the data subject. It is advisable for the employers to obtain all employees' consent either through their employment agreements or the company's employee policies or handbook.

Transfer of Data

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

The foregoing data transfer restrictions and requirements will be applicable to the employees' sensitive personal information when it is transferred within or outside India, such as to the employers' other businesses, or to investigating or forensic agencies for corporate fraud investigations or similar inquiry purposes.

Retention of Employee Data

The Data Protection Rules provide that a corporate body must not retain sensitive personal information longer than required for the purpose for which the information was initially and 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 Personal Data Protection Bill, 2019 (PDP Bill), which is anticipated to become a law by 2021. The data collection and processing norms for employers will become stringent under the proposed regime.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

Foreign nationals working in India must obtain an appropriate employment visa depending on the duration of their stay. An employment visa may be extended on a yearly basis for a maximum period of five years. The key requirements include that the foreign national must be highly skilled or a qualified professional, or earn a minimum of USD25,000 per annum from their employer in India. If the purpose of a foreign national's visit relates to commercial activity, such as exploring business opportunities or attending board meetings or other general

meetings for the purposes 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 particular Indian state they visit.

The foreign nationals of certain countries (such as China, Pakistan and Afghanistan), who 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.

Due to the COVID-19 pandemic, the Indian government has currently prohibited international travel, and suspended all existing visas until the travel ban is lifted. However, visas belonging to the employment and project categories, as well as those of diplomats, officials, and the employees of the United Nations and other international organisations are exempted from suspension during the nationwide lockdown.

5.2 Registration Requirements

If the foreign national intends to stay in India for more than 180 days, they must register with the FRRO within 14 days of arriving, except where specifically informed that registration is not required. Foreign employees are permitted to depart India within 14 days of arrival without registering with the FRRO. Previously, they could not depart until the registration process was completed.

6. Collective Relations

6.1 Status/Role of Unions

In India, trade unions are governed under the Trade Unions Act, 1926 (TU Act) and the right to form trade unions is granted under legislation such as the ID Act, SO Act and certain state legislation, in addition to Indian courts upholding workers' rights to form trade unions. 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, inter alia:

- 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 or sickness;
- contributions to benefit workmen in general.

Traditionally, trade unions were formed in sectors such as transport, banking, manufacturing, construction and mining. However, in a recent trend in the private sector, IT employees have formed a trade union called the All India Forum for IT Employees (FITE), which has obtained registration in a few Indian states, including Maharashtra, Tamil Nadu and Karnataka. FITE represents and safeguards the rights of IT employees, including fighting illegal terminations and layoffs. This could be a turning point and more private sector employee representative bodies may emerge and pursue collective action.

The IR Code

Additionally, the proposed IR Code will replace the ID Act, the TU Act and the SO Act. The IR Code provides for registration of trade unions with at least 10% membership of workers or 100 workers, establishment of central/state trade unions, sole negotiating union and negotiation council. The Standing Committee on Labour has recently reviewed the proposed IR Code, and published a report in April 2020 raising certain issues with the IR Code, such as:

- difficulty in implementing strikes and lockouts in all establishments;
- powers of the government to defer enforcement of awards by the industrial tribunals; and
- issues related to fixed-term employment.

6.2 Employee Representative Bodies

Indian law does not grant management representation rights to employees. 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 amicable 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 rotating 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 of 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.

6.3 Collective Bargaining Agreements

Collective bargaining is regarded as an effective dispute resolution mechanism, particularly in industries where the employees are largely unionised, such as manufacturing, construction and mining. 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 memoranda 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 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 with through other means, including labour unions initiating online campaigns and resorting to social media to secure employees their statutory rights.

The IR Code proposes to prohibit and punish the commission of any unfair labour practices, including, interfering, restraining or coercing workers in their right to engage in concerted activities for collective bargaining, and refusing to bargain collectively in good faith with the trade unions/employers.

7. Termination of Employment

7.1 Grounds for Termination

The termination of employees and consequent severance payment requirements is governed in India by both central and state-specific employment legislation.

The state-specific SE Acts apply to employees working in any commercial establishments in that state. 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 to also give a reasonable cause for terminating the employment.

Indian law does not provide for "at-will" termination, other than the newly introduced Model Shops Act and the corresponding Maharashtra Shops Act and the Gujarat Shops Act, which do not include any termination provisions, thus granting flexibility to both the employers and the employees to terminate the employment.

As regards central legislation, the ID Act provides retrenchment, layoffs and business closure as grounds for 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 disciplinary action, retirement (whether voluntary or otherwise) or grounds specified in a fixed term-contract (or the non-renewal of a fixed term contract). Judicial interpretation of the term "workman" has been wide and included various professionals within its scope, including software programmers, teachers, etc.

The termination procedure differs according to the grounds of dismissal and the number of workmen in an establishment.

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

Termination on the grounds of retrenchment entails providing prior written notice to the workmen, providing compensation, giving prior intimation and obtaining prior permission from the appropriate government authority, based on the number of workmen in the establishment.

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 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 when dealing with reductions in workforce.

7.2 Notice Periods/Severance

Notice

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 that employee by providing a 14-day written notice or pay in lieu of notice.

However, the Model Shops Act and corresponding Maharashtra Shops Act and the Gujarat Shops Act have omitted the provisions relating to termination, and do not have any notice requirements for the employees as well as the employers.

The ID Act requires that 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 provide one month's notice or payment in lieu of notice. An intimation must be provided to the local labour authorities.

Where an undertaking is closed down for any reason, every workman who has been in continuous service for not less than one year in the 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, and prior permission from the local labour authorities.

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.

An employer who intends to close down an undertaking must serve notice to the appropriate government at least 60 days (if less than 100 employees) and at least 90 days (if more than 100 employees) before the date on which the intended closure will be effective, stating clearly the reasons for the intended closure of the undertaking.

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. Further, 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.

Severance

As regards severance, the Indian government has enacted the Payment of Gratuity (Amendment) Act, 2018, and has increased the gratuity limit for private sector employees to INR2 million (approximately USD26,258), which is now level with the one for government employees. Gratuity is a social security benefit provided to employees upon termination, if the employee has completed five years in the organisation.

The ID Act prescribes additional compensation to be given to workmen in cases 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 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 statutorily 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.

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.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

Indian law permits 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.

The SO Act requires the employers to conduct detailed investigation into misconduct based on the principles of natural justice. The procedure requires issuing a charge sheet, holding a domestic enquiry, reviewing the inquiry office's report, showing the cause notice to the employee and (after giving adequate opportunity to the employee to present their case) issuing the final order if the misconduct is established.

There are no statutory consequences for summary dismissal for serious cause. However, one cannot rule out the possibility of legal action in cases of summary dismissal. These kinds of disputes must be addressed on a case-by-case basis, the employers must maintain written records of their employee's performance, communications, enquiry proceedings, etc. From a practical standpoint, in many instances payment of a few months' wages, as appropriate, may be more prudent than engaging in protracted litigation with the employee, given the associated time and costs.

7.4 Termination Agreements

Indian law does not restrict employers from executing termination agreements with outgoing employees, which has become standard industry practice. The employers prefer to sign the agreement simultaneously with the severance payment.

A termination agreement normally incorporates provisions such as settlement and release of claims by the employee, the employee's acknowledgement of receipt of the final severance consideration, the employee's indemnity and representations not to defame the employer.

As regards the statutory formalities, a nominal government levy known as stamp duty must be paid on the agreement for it to be admissible as evidence in Indian courts. Furthermore, it is a good practice to execute the agreement in a notary public's presence to validate the parties' signatures.

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

7.5 Protected Employees

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

Employee representatives do not come under the protected category.

8. Employment Disputes

8.1 Wrongful Dismissal Claims

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 grounds of continued ill health. For termination on disciplinary grounds, the employer must establish that due process of inquiry and investigation was followed to establish the employees' misconduct. An employee is regarded as wrongfully dismissed if they are terminated from employment under the following circumstances:

- without being given 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 claims can be brought before the competent authority under the ID Act or the civil courts, as appropriate.

The IR Code

The proposed IR Code recognises the following actions by the employer as unfair labour practice:

- threatening to dismiss workers who join a trade union;
- discriminating against any workers by dismissing them for taking part in strikes; or
- dismissing workers:
  - (a) by way of victimisation;
  - (b) not in good faith, but in the colourable (plausible) exercise of the employer's rights;
  - (c) by falsely implicating a worker in a criminal case on false evidence or on concocted evidence;
  - (d) for patently false reasons;
  - (e) on untrue or trumped up allegations of absence without leave;
  - (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste; and
  - (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the worker, thereby leading to a disproportionate punishment.

8.2 Anti-discrimination Issues

The Constitution of India (Article 15) 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 government, state governments and local administrative authorities controlled by the government.

Further, the Wages Code 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.

Although the earlier anti-discrimination law (the Equal Remuneration Act, 1976) provided that there should not be any discrimination against women while recruiting, or in case of promotions, training or transfer, this provision has been omitted from the Wages Code.

Nevertheless, the Model Shops Act and the SE Acts of Maharashtra and Gujarat provide that women workers shall not be discriminated against in matters of recruitment, training, transfers or promotion or wages.

The burden of proof to establish discrimination in the payment of wages is on the employee. For claims of non-payment of remuneration or bonuses or lower wages, the burden of proof is on the employer that the dues have been paid to the employees.

Discrimination with regard to the payment of wages and violations of the Wage Code are punishable with a fine of up to INR100,000 (approximately USD1,300) and/or imprisonment of up to three months.

India has also notified the Transgender Persons (Protection of Rights) Act, 2019, which protects transgender persons against discrimination.

9. Dispute Resolution

9.1 Judicial Procedures

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

There are specialised employment forums constituted under the ID Act for industrial disputes, which are broadly defined under the ID Act to include disputes between employers and employers, between employers and workmen or between workmen and workmen; in connection with the employment or non-employment, 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 a nature that industrial establishments situated in more than one state are likely to be interested in, or affected by, such disputes).

Central government employees can file disputes relating to their service terms and conditions before the Central Administrative Tribunal, and state government employees can approach the State Administrative Tribunal.

As regards class actions, various Indian statutes provide for collective actions, including the ID Act, which permits class actions 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 the enforcement of fundamental rights under the Constitution, representative actions or class actions brought in the public interest through Public Interest Litigation (PIL) have gained much popularity and are widely used.

Furthermore, the Companies Act, 2013 permits shareholders and depositors to file a petition collectively against a company, its directors, auditors or advisers if they commit any act that is prejudicial to the company's interest.

9.2 Alternative Dispute Resolution

Arbitration is an increasingly common choice of dispute resolution in employment contract disputes, and pre-dispute arbitration agreements are enforceable under Indian law.

For employees covered under the ID Act, the statute provides for voluntary referral 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 do so by a written agreement, and the presiding officer or officers of a Labour Court or Tribunal or National Tribunal will act as an arbitrator or arbitrators.

9.3 Awarding Attorney's Fees

Indian courts do not normally award punitive damages. The court may grant reasonable attorneys' fees; however, they will not be sufficient to meet the actual expenses incurred.

ANA Law Group is a full-service law firm based in Mumbai, India, with a team of committed professionals with broad industry knowledge and specialisation across a wide range of legal sectors. The firm has a well-established labour and employment practice and one of its specialities is its experience in handling employment law assignments for international companies in India and its ability to walk them through the practical aspects of Indian legal compliance. The firm represents leading national and multinational companies in India. The employment law team has expertise in providing advice to employers on routine as well as intricate legal issues. The work handled includes the setting up of Indian employment infrastructure, adapting multinational corporations' international work policies for their Indian subsidiaries, the drafting of offer letters and employment agreements compliant with Indian law, 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 assistance.

Authors

Anoop Narayanan is the founder of ANA Law Group and has been in practice for more than 26 years. He has vast advisory and transactional experience in all areas of Indian law as well as being a distinguished employment, technology and intellectual property law expert. Mr Narayanan focuses on a range of issues related to employment in information technology, manufacturing, retail, pharmaceuticals, etc. His clients include multinational corporations, law firms from around the world and Indian companies and individuals. Mr Narayanan is a member of the International Bar Association (IBA), as well as the American Bar Association (ABA), has spoken on Indian employment law issues at a number of Indian and international forums and is widely published.

Priyanka Gupta is a senior attorney at ANA Law Group and has been in practice for more than 13 years, developing a strong knowledge of the employment law area as well as her clients' legal and business concerns. She has extensive experience in handling employment law issues, including employment compliance, regulatory requirements, preparing and advising on handbooks and policies, advice on discrimination matters and employee-related data privacy and intellectual property issues. She works with both international and domestic clients, who operate in a wide range of industries, including financial services, construction, data analysis, pharmaceuticals, retail, and telecommunications and technology.

ANA Law Group

Indiabulls Finance Centre
Tower-2, 11th Floor, 1103
Elphinstone Road
Mumbai - 400 013

Tel: +91 22 6112 8484
Fax: +91 22 6112 8485
Email: mailbox@anaassociates.com
Web: www.anaassociates.com

ANA LAW GROUP
ANOOP NARAYANAN & ASSOCIATES

Trends and Developments

Contributed by:
Anoop Narayanan and Priyanka Gupta
ANA Law Group see p.20

In the past year, India has seen various legislative, administrative, and e-governance initiatives by the federal and the and state governments to generate employment and to facilitate ease of doing business.

Codification of Labour Laws
A major concern that was much-discussed in the context of the Indian employment law landscape was the volume of applicable laws and the fact that many of them were archaic and did not have much relevance to the modern world.

One of the landmark developments in Indian employment law is the codification of the labour laws. Nearly 44 archaic laws have been codified into four pieces of legislation. This will significantly reduce the employers' regulatory compliance burden.

These four pieces of legislation are:

- the Code on Wages;
- the Occupational Safety, Health and Working Conditions Code, 2019;
- the Code on Social Security, 2019; and
- the Industrial Relations Code, 2019.

The Code of Wages consolidates four important pieces of legislation (the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976). It seeks to regulate wage and bonus payments in all forms of employment. The Code has been approved by the government and is awaiting the notification of its provisions.

The Code on Occupational Safety, Health and Working Conditions seeks to regulate the health and safety conditions of workers in establishments, and consolidates 13 labour laws. The code is pending government approval.

The Industrial Relations Code consolidates and amends the laws relating to trade unions, conditions of employment in industrial establishments, and investigation and settlement of industrial disputes. The code is pending government approval.

The Code on Social Security consolidates the social security laws in India, and replaces nine social security laws, including those related to provident funds, insurance and maternity benefits. This is also pending government approval.

Although the government has taken the initiative to consolidate the labour laws, it is yet to be seen in practice whether the proposed legislations actually reform the existing matrix of the archaic labour laws or merely consolidates it.

Fixed-Term Employment
With the recent economic slowdown, employers across all sectors are moving towards fixed-term employment for their employees. This gives significant flexibility to the employers to terminate the employment. Furthermore, the fixed-term arrangement does not prejudice the employees' rights, as the terms of employment are on a par with those of permanent workers. This arrangement is significantly helping the businesses such as e-commerce to manage their human resources requirements because of the pandemic.

This may, in practice, aid the creation of more employment because employers can recruit human resources as needed. Otherwise, the concern was that employees recruited on a short-term basis would claim permanent status and that employers would avoid such hiring.

Furthermore, for fixed-term employment contracts, the government has agreed to reduce the eligibility criteria for employees to get gratuity payments from five years to one year.

Equal Opportunity for Transgender Persons
The Indian government has enacted the Transgender Persons (Protection of Rights) Act, 2019, which prohibits any kind of discrimination against a transgender person, including unfair treatment in the workplace, and in relation to recruitment and promotion. The law mandates employers to designate a person to handle complaints in relation to discrimination against transgender persons.

Permission to Engage Women Employees at Night in Factories
India's Factories Act, 1948 prohibits women employees from working at night. Only women in the Information Technology and Information Technology Enabled Services (IT/ITES) sectors have been allowed to work at night shift after obtaining specific permission from the local labour authorities and subject to the employers complying with the prescribed safety measures.

However, the government of Indian State of Karnataka has allowed women employees in factories to work during night

hours. This is only if the women employees desire to work during the night, subject to the employer complying with the specified health, safety and security conditions. The conditions imposed by the government on the employers appear to be onerous. For instance:

- providing transportation accompanied with a female security guard and cameras;
- at least ten women workers must be engaged in a batch and the total number of women workers shall not be less than two thirds of the total strength; and
- a fortnightly report to the Inspector of Factories with details of all the employees on the night shift.

Therefore, although this is a progressive step and may be adopted in other Indian states, the foregoing cumbersome compliance requirements may ultimately deter employers from engaging women employees to work during the night shift.

Amendments in the State-Specific Labour Laws

The state-specific Shops and Establishments Acts govern the terms and conditions of employment for the employees. In the past year, there have been some significant and progressive changes in the Shops Acts aimed at providing more flexibility to both the employer and the employees. For instance, the states of Karnataka, Kerala, Madhya Pradesh, Andhra Pradesh and Telangana have exempted establishments from renewing their registration under the relevant Shops Act. Some of the states have permitted all shops and establishments to remain open for 24 hours on all days of the year, subject to certain compliances. The state of Telangana has exempted the IT/ITES companies from several provisions of the Shops Act, such as the work hours, and opening and closing time requirements.

COVID-19

Indian businesses have been no exception to the pandemic-induced economic crisis. As well as discussion of frustration of contracts, force majeure and data privacy issues, one of the key legal subjects concerning many international and Indian companies has been reduction of workforce and/or the variation of terms of employment in India. In addition, it appears that the several months of lockdown and working from home may have demonstrated (contrary to the pre-lockdown understanding) that a large team of employees is not necessary for all assignments, thereby giving rise to a new understanding of productivity. Considering that experts and forecasts anticipate greater adversity and economic turmoil in the coming days, it will be vital to ensure efficiency in the workforce and to reduce manpower-related expenses where possible.

Termination freeze

As soon as the Indian government locked down the country due to COVID-19, the federal and the state governments issued advisories for the employers across all sectors not to terminate the employees or deduct their wages.

However, the employer fraternity in India faced a conundrum when India's Ministry of Home Affairs issued an order, on March 29th (MHA Order), protecting all categories of employees (workers as well as senior level employees) from termination and reduction in wages during the lockdown period. At a time when businesses were struggling with uncertainty and business continuity, this order compounded employers' challenges. The government had invoked its absolute powers under the Disaster Management Act, 2005, contravention of which triggered penal penalties for the employers.

Notwithstanding this, there were media reports that many employers could not pay their employees full salaries or retain all of them, and some of these employers faced, or were under the threat of, legal actions initiated by the labour authorities/employee associations upon the employees' complaints.

The MHA Order's constitutional validity was challenged by various employers' groups and associations in the High Courts and also in the Supreme Court of India. However, before the Supreme Court's orders, the government issued new guidelines superseding all prior lockdown guidelines, including the MHA Order.

Nevertheless, the government's order did prevent many employers from terminating their employees or reducing their wages during the initial lockdown period.

The government also took various measures to support employers, including extending the deadlines for payments of social security contributions, renewal of licences, filing of tax returns, schemes to support small and medium size enterprises, etc. Additionally, the government took it upon itself to pay employees' and employers' provident fund contributions for three months.

Moreover, in an attempt to reduce employers' liability and facilitate business activities, some of the state governments in India have suspended the applicability of certain labour laws, for a specific period of time. For instance, many state governments increased the daily work hours for employees, primarily in the manufacturing sector, in addition to other relaxations. As some of these relaxations were oppressive for the employees (resulting in unemployment and health hazards due to longer work hours), several public interest litigations were filed against this suspension of labour laws.

Despite the aforesaid, no material financial support is provided by the Indian government for the employer fraternity in India.

Working from home

Although working from home or telecommuting had gained popularity in some organisations in the past few years, it has now become the new normal. In fact, employers are forming working from home contracts to capture the terms of employment in this new arrangement and to minimise their liability. Some of the legal issues arising out of working from home arrangements include interpretation of what amounts to the "course of employment" for the purposes of various statutes. Whether inappropriate sexual conduct on a telephone or video call can trigger the provisions under the anti-sexual harassment laws, whether any injury caused to the employee while working from home will be deemed as an accident in the course of employment and therefore subject to compensation, etc.

Furthermore, can the employee rightfully work from home or can he or she be required to attend the office physically? What are the conditions under which the employee can be allowed to work from home? Can the employee claim overtime while working from home, and, if so, how would the employer assess the employees' work hours? Do employees working from home receive the same benefits as those working out of office? The employer and the employee will have to ensure a clear bifurcation of the work created by the employee while working from home to determine the ownership and the proprietary rights involved in the work product. The employer will have to deploy more robust data protection tools and infrastructure to address any data leakage/theft. In view of the foregoing, employers will have to ensure specific HR policies and clear contacts to capture all potential legal issues in the working from home scenario.

Job loss

Although many industries and organisations are working efficiently in the remote working mode, there have been certain industries, such as hospitality and travel and tourism, which have been heavily impacted by the pandemic situation. These industries have witnessed significant job losses as a natural consequence of the situation.

However, there has also been discussion of many businesses taking advantage of the pandemic situation, selectively terminating their employees or closing down establishments, which may not have been easy in the normal circumstances. Furthermore, there are instances of employers refusing to pay any compensation to employees since the lockdown, thereby creating a major distress situation. In the absence of any alternative support mechanisms, the large number of people who have been subjected to job loss or have been unpaid for several months will require sustainable and immediate rehabilitation measures.

Return to work

As the lockdown in India has been partly lifted and as employees are returning to work, employers are adopting measures for their employees' safety in the workplace, specifically measure against the spread of COVID-19. Additionally, India's Ministry of Home Affairs has issued guidelines and operating procedures for employers to comply with when offices reopen. These include the mandatory installation of a contact tracing mobile application by all employees, staggered work hours, mandatory thermal screening, frequent sanitisation and social distancing in work areas.

The key current responsibility for employers is to be more sensitive and careful of their employees' health and safety. Employers must ensure that employees disclose their exposure to the virus, stay away from the workplace as much as possible, and avoid putting other employees at risk. Furthermore, the employer must comply with all data privacy requirements and ensure that employees do not disclose other employees' medical history or health-related personal data.

The return to work arrangements have triggered a lot of legal concerns and corresponding documentation to address the pandemic-related risks, employee health as well as employee privacy.

Employers will have to revisit their employment contracts and HR policies to provide more flexibility, for both the employer and the employees.

Additionally, there have been discussions around compensation structure, which may have to be reassessed to include more relevant allowances, such as for health and hygiene. Similarly, provision of secure and private travel arrangements for employees residing in different parts of a city to the workplace and back is another concern that many employers are grappling with.

ANA Law Group is a full-service law firm based in Mumbai, India, with a team of committed professionals with broad industry knowledge and specialisation across a wide range of legal sectors. The firm has a well-established labour and employment practice and one of its specialities is its experience in handling employment law assignments for international companies in India and its ability to walk them through the practical aspects of Indian legal compliance. The firm represents leading national and multinational companies in India. The employment law team has expertise in providing advice to employers on routine as well as intricate legal issues. The work handled includes the setting up of Indian employment infrastructure, adapting multinational corporations' international work policies for their Indian subsidiaries, the drafting of offer letters and employment agreements compliant with Indian law, 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 assistance.

Authors

Anoop Narayanan is the founder of ANA Law Group and has been in practice for more than 26 years. He has vast advisory and transactional experience in all areas of Indian law as well as being a distinguished employment, technology and intellectual property law expert. Mr Narayanan focuses on a range of issues related to employment in information technology, manufacturing, retail, pharmaceuticals, etc. His clients include multinational corporations, law firms from around the world and Indian companies and individuals. Mr Narayanan is a member of the International Bar Association (IBA), as well as the American Bar Association (ABA), has spoken on Indian employment law issues at a number of Indian and international forums and is widely published.

Priyanka Gupta is a senior attorney at ANA Law Group and has been in practice for more than 13 years, developing a strong knowledge of the employment law area as well as her clients' legal and business concerns. She has extensive experience in handling employment law issues, including employment compliance, regulatory requirements, preparing and advising on handbooks and policies, advice on discrimination matters and employee-related data privacy and intellectual property issues. She works with both international and domestic clients, who operate in a wide range of industries, including financial services, construction, data analysis, pharmaceuticals, retail, and telecommunications and technology.

ANA Law Group

Indiabulls Finance Centre
Tower-2, 11th Floor, 1103
Elphinstone Road
Mumbai - 400 013

Tel: +91 22 6112 8484
Fax: +91 22 6112 8485
Email: mailbox@anaassociates.com
Web: www.anaassociates.com

ANA LAW GROUP
ANOOP NARAYANAN & ASSOCIATES