

At a glance: hiring employees in India

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Background information on applicants

Background checks

Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

In accordance with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules), employers are required to obtain consent from employees to undertake background checks if the information proposed to be confirmed includes personal information and sensitive personal data and information as described in the IT Rules. The obligations on the employers or third parties engaged by them for this purpose remain the same.

Medical examinations

Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There is no specific restriction or prohibition against employers requiring medical examinations as a condition of employment. However, such examinations should be relevant for the purpose of the services to be rendered by the applicants in question or, in other words, a direct relationship with the requirement of work. Employers can refuse to hire applicants who do not submit to an examination provided that the medical examination is necessary for the purpose of rendering services.

Drug and alcohol testing

Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific restriction against drug and alcohol testing of applicants, but generally such tests are not carried out as a prerequisite for employment in India. An employer can refuse to hire an applicant who does not submit to an examination provided the medical examination is necessary to prove the fitness of the applicant to render services. There is no restriction on having a policy prohibiting the use of any drugs and alcohol during work hours. The Shops and Establishments Act of certain states, such as Uttar Pradesh and Delhi, provide that being under the influence of alcohol while in office constitutes 'misconduct'.

Hiring of employees

Preference and discrimination

Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

An employer is not allowed to discriminate against particular people or groups of people. However, in some states the industrial policy may provide for preference to be given to natives of the relevant state.

Pursuant to the provisions of the Industrial Disputes Act 1947, preference must be given to retrenched blue-collar employees (who are citizens of India) who offer themselves for re-employment in the event that an employer proposes to employ any person subsequently.

Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

There is no specific requirement for a written employment contract; however, some employment statutes or state-specific statutes (or both) require an employment letter covering limited aspects to be issued. As a matter of best practice, written employment contracts are executed between the employer and the employee, or a detailed written appointment letter is issued to the employee, the terms of which are required to be duly accepted and acknowledged by the employee.

The employment contracts generally used in India have the following information:

- the name and address of the employer and employee;
- the title of the job or the nature of the work (or job description);
- the place of work;
- probation, if any, and its term;
- the option of the employer to transfer an employee from one office to another branch office, affiliate, etc;
- the date of commencement of employment;
- wages or salary details;
- any concessions or benefits to which an employee is entitled;
- the type of contract (permanent or fixed-term);
- the period of notice required for termination of employment;
- leave entitlement;
- conditions under which the employer can terminate the contract;
- non-compete, confidentiality and non-solicitation provisions, etc; and
- the working hours.

To what extent are fixed-term employment contracts permissible?

Fixed-term contracts are permissible in India if the requirement is only for a specific period. Fixed-term contracts are not permissible for a regular job requirement. There is no maximum period specified for fixed-term contracts under law; however, the same should be for a reasonable period.

In the case of employees in the category of workers (blue-collar), the law specifically prohibits replacement of one fixed-term employee by another fixed-term employee to avoid permanent employment.

Probationary period

What is the maximum probationary period permitted by law?

There is no maximum probationary period provided in statute. The probationary period is generally from three to six months and, in some cases, one year. The probationary period is primarily governed by the terms of employment (the appointment letter, employee handbook, standing orders, etc, as applicable) or varies from company to company or duly approved and adopted standing orders. The probation period may be extended by the employer if the employer has reasons to believe that the performance of the employee concerned may improve in future; however, the probation period should not, in any case, exceed the one year.

Classification as contractor or employee

What are the primary factors that distinguish an independent contractor from an employee?

The primary factors that may distinguish independent contractors from employees are:

- employees act under the direct supervision and control of their employers, whereas independent contractors are free from the control and supervision of employers;
- employees are subject to the terms and conditions of employment including service rules, etc, whereas independent contractors are subject to the terms of contract but not to the service rules, etc; and
- an employer–employee relationship does not exist with an independent contractor.

Is there any legislation governing temporary staffing through recruitment agencies?

The hiring of temporary staff through recruitment agencies is governed under the provisions of the Contract Labour (Regulation and Abolition) Act 1970. In accordance with the Contract Labour (Regulation and Abolition) Act 1970, temporary staff are considered as employees of the recruitment agencies. An organisation that uses the services of the temporary staff would be regarded as a principal employer under the provisions of the Act. In the event the recruitment agency fails to pay salary or applicable employee benefits to the temporary staff, the principal employer would be required to pay salary or applicable employee benefits to the temporary staff (the principal employer would have a statutory right to recover the amount from the recruitment agency).

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