

At a glance: termination of employment in India

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Termination of employment

Grounds for termination

May an employer dismiss an employee for any reason or must there be ‘cause’? How is cause defined under the applicable statute or regulation?

The laws relating to dismissal or termination are different for employees in the worker and non-worker categories.

Employees in the worker category cannot be terminated without cause. Causes for termination include misconduct, continued ill health, non-renewal of contract, redundancy, non-performance, etc.

Non-workers can be terminated without cause (except in a few states where the reasons for termination must be provided or grounds must be disclosed) by giving requisite notice or pay in lieu thereof in accordance with the terms of the contract or the state-specific Shops and Establishments Act. However, in recent years, there have been judicial pronouncements in which the courts have held that even for terminations of non-workers, a reasonable cause must exist.

Notice

Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

It is possible to provide notice of termination or payment in lieu of the notice period.

In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

In cases of misconduct, employees can be terminated without notice or pay in lieu of notice, but an inquiry (following principles of natural justice) must be conducted before dismissing an employee in such a case.

Severance pay

Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Industrial Disputes Act 1947 and, in some states, the applicable Shops and Establishments Act, provide for severance upon termination. Employees (workers in continuous service for a period of not less than one year) are entitled to the following severance pay in the event of termination of employment:

- notice pay:
 - one month's notice or salary in lieu thereof if the employee is employed in any establishment (such as a factory) with less than 100 employees and has completed one year of continuous service. This would also apply with respect to an establishment in the service sector (with up to 100 workers); or
 - three months' notice or salary in lieu thereof if the employee is employed in a manufacturing unit (and certain other establishments) with 100 or more employees and has worked for a continuous period of one year;
- retrenchment compensation: this is only payable to employees in the worker category who have completed one year of continuous service. It is payable at the rate of 15 days' salary for every completed

year of service or any part thereof in excess of six months;

- gratuity: every employee who has completed five years of continuous service is entitled to payment of gratuity at the rate of 15 days' salary for every completed year of service. Statutorily, gratuity payments are capped at 2 million rupees;
- leave encashment: every employee should be paid for the leave that has accrued but that has not been availed of; and
- other benefits: employees are entitled to any other benefits (including any bonus that may be payable or payment for overtime work) as may be agreed upon between the parties or that are part of any agreement.

Certain state-specific compliances may also need to be adhered to.

Non-workers are entitled to a minimum of one month's notice or salary in lieu thereof as may be agreed in a contract, gratuity, leave encashment or any other benefit as agreed between the employer and the employee.

For workers or non-workers, where the terms of contract, such as minimum notice period, leave or holidays, working hours or severance compensation, are better than those required by law, those terms will prevail over statutory requirements.

Procedure

Are there any procedural requirements for dismissing an employee?

Employees in the worker category can be dismissed with cause (non-renewal of contract, non-performance, continued ill health, etc). In cases of misconduct, an inquiry must be held before dismissing the employee. Where a prima facie case exists against the employee, a charge sheet detailing the allegations against the employee, which are acts of misconduct, should be issued to him or her. The employee should be afforded reasonable time to submit a reply to the charge sheet.

If the reply is found to be unsatisfactory, the employer shall proceed with a domestic inquiry. The employer shall appoint a presenting officer (PO), who represents the case on behalf of the employer, and an inquiry officer (IO), who undertakes the disciplinary proceedings. The employee shall be informed about the appointment of the IO, and the IO shall inform the employee about the date, time and venue of the inquiry.

During the disciplinary proceedings, the IO should provide a reasonable opportunity to the PO and the employee to prove their respective positions, including the production of documents, witnesses and cross-examination of witnesses. The IO shall maintain a written record of submissions made by all persons and obtain an endorsement from those persons for those submissions. Thereafter, an inquiry report shall be prepared by the IO detailing the charges against the employee, the defence of the employee, the evidence assessed and the findings following the inquiry. Based on the findings in the inquiry report and the gravity of the offence, the employer shall decide on the disciplinary action, including dismissal, etc, that needs to be taken against the employee.

To dismiss an employee in the non-worker category:

- in cases of misconduct, an inquiry must be held before dismissing the employee (the opportunity to be heard); and
- in cases of dismissal for any other reason, the employee must be given a minimum of one month's notice or salary in lieu thereof, or as agreed in the terms of employment, and any other benefits in accordance with the terms of employment.

For both workers and non-workers, where the terms of contract, such as minimum notice period, leave and holidays, working hours or severance compensation, are better than those required by law, those terms will prevail over statutory requirements.

Where an employer employs 50 or more workers in its establishment and terminates the employment of any worker on the grounds of redundancy, the employer is required to send an intimation to the jurisdictional labour authority within three days of the issuance of the termination notice to the employee. Certain employers who

employ 100 or more workers may require prior approval from the appropriate government.

Employee protections

In what circumstances are employees protected from dismissal?

Employees in the worker category are protected from dismissal when an employee raises any industrial dispute, and the matter is pending before the competent authority for adjudication.

Further, a worker who is a member or an office bearer of any registered trade union connected with the establishment and is recognised by an employer of the establishment cannot be dismissed during the pendency of any industrial dispute in which he or she is involved without the prior written approval from the authority before which the proceedings were pending.

Generally, employees in the non-worker category do not have any statutory protection in the event of retrenchment, except for protection provided under certain state-specific legislation.

Certain statutes, such as the Maternity Benefit Act 1961, prohibit the termination of an employee's contract while on maternity leave.

Mass terminations and collective dismissals

Are there special rules for mass terminations or collective dismissals?

To dismiss workers in any establishment with fewer than 100 workers (including the service industry), the worker must be given:

- one month's advance notice or salary in lieu thereof;
- 15 days' salary for every completed year of service;
- the benefit of the last-in, first-out principle; and
- other benefits to be paid in accordance with the employment terms.

The employer must notify the labour department in the relevant area of the dismissal.

To dismiss a worker in a factory (or certain other establishments) with 100 or more workers, prior approval from the relevant labour department must be obtained by the employer, and the worker must be given:

- three months' advance notice or salary in lieu thereof;
- 15 days' salary for every completed year of service;
- the benefit of the last-in, first-out principle; and
- other benefits to be paid as per the employment terms.

In cases of mass termination of workers' employment, employers are required to follow the last-in, first-out principle and to prepare a seniority list of the employees who are being retrenched. In the event of any subsequent employee recruitment, employees (who are citizens of India) who were previously dismissed, based on the seniority list, are required to be given preference over other candidates.

There is no separate procedure for mass termination in the case of non-workers.

Certain state-specific compliances may also need to be adhered to.

Class and collective actions

Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class or collective actions are allowed to assert labour and employment claims in India. These claims (industrial disputes) must be class or collective actions espoused by a union, with the exception of claims relating to discharge, dismissal or recovery of money due.

Mandatory retirement age

Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

This is not mandatory in private employment; however, generally, employers fix a retirement age between 50 and 60 years.

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