Q&A: Labour & Employment Law in India

Kochhar & Co

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Legislation and agencies

Primary and secondary legislation

What are the main statutes and regulations relating to employment?

The principle sources of law and regulations relating to employment relationships in India are the Constitution, labour statutes, judicial precedence and collective and individual agreements. There are as many as 165 labour laws, including nearly 50 central (federal) laws. Most of the employment laws are applicable to employees in the category of workers (blue-collar employees).

A workman is defined under the Industrial Disputes Act 1947 as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, excluding a person:

- who is employed mainly in a managerial or administrative capacity; or
- who, being employed in a supervisory capacity, draws a salary exceeding 10,000 rupees per month or exercises functions mainly of a supervisory or managerial nature.

Apart from certain employment statutes that may be applicable to the non-workers category of employees, the employment relationship with a non-workman is governed by the employment contract (provided the terms thereof are not less favourable compared to certain applicable statutes).

The main statutes and regulations relating to employment are the:

- Industrial Disputes Act 1947;
- Factories Act 1948;
- Shops and Commercial Establishments Act as applicable in a state;
- Industrial Employment (Standing Orders) Act 1946;
- Contract Labour (Regulation & Abolition) Act 1970;
- Maternity Benefit Act 1961;
- Payment of Wages Act 1936;
- Minimum Wages Act 1948;
- Payment of Bonus Act 1965;
- Equal Remuneration Act 1976;
- Employees' Compensation Act 1923;
- Employees' State Insurance Act 1948;
- Employees' Provident Fund and Miscellaneous Provisions Act 1952;

- Payment of Gratuity Act 1972; and
- Trade Unions Act 1926.

Both central (federal) and state governments have their specific rules providing the procedure for proper enforcement of a statute. States have some statutes that deal with specific issues within the broader federal statutes umbrella.

As part of labour reform initiatives, the government has decided to amalgamate 44 central labour legislations into four codes: the Code on Wages, the Code on Industrial Relations, the Code on Social Security and the Code on Safety, Health and Working Conditions. Of the four proposed labour codes, the Code on Wages, consolidating the laws relating to wages and bonuses has been passed by both Houses of the Parliament, and it received the President's assent on 8 August 2019. The Code on Wages will come into force on the date that the central (federal) government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of the Code on Wages. Notification has not yet been issued by the central government.

Protected employee categories

Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Constitution provides equality of opportunity in matters of public employment as a fundamental right. It prohibits discrimination on the following grounds: race, gender, religion, place of birth, domicile, caste and descent.

Additionally, the Industrial Disputes Act 1947 and Industrial Establishment (Standing Orders) Act 1946 have established a list of 'unfair labour practices' and 'misconduct' for employers and employees respectively. The unfair labour practices are prohibited under the Industrial Disputes Act 1947, and some may amount to harassment in the workplace. Similarly, an employee charged with misconduct amounting to any kind of harassment will be subject to punishment.

In specific circumstances, employees in the private sector may also seek protection against such discrimination being treated as a mala fide action on the part of the employer. However, a specific statute in this respect does not exist.

As far as discrimination based on gender is concerned, the Equal Remuneration Act 1976 and the Code on Wages prohibit discrimination on the grounds of gender and against women in matters of employment (recruitment, salary, etc).

Further, the Rights of Persons with Disabilities Act 2016 prohibits employers from discriminating on the ground of disability except in cases where the act or omission is a proportionate means of achieving a legitimate aim.

Furthermore, the federal government enacted the HIV and AIDS (Prevention and Control) Act 2017 under which discrimination or unfair treatment against persons with HIV or AIDS in matters of employment is prohibited. Also, any person who is living or has lived with a person who is HIV positive is protected against discrimination.

Regarding sexual harassment, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (the Act) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules 2013 (the Rules) were notified and brought into effect from 9 December 2013. The Act lays down a comprehensive mechanism to deal with the prevention of sexual harassment in the workplace as well as provides a redressal mechanism. The Act covers all women, irrespective of their age and employment status (whether regular, temporary, ad hoc or on a daily wage basis, either directly or through an agent, including a contractor, with or without the knowledge of the principal employer and whether for remuneration or working on a voluntary basis or otherwise) and also covers domestic workers.

The Act mandates an employer employing 10 or more employees in a workplace to form an internal complaints committee (ICC) to look into any complaints relating to sexual harassment. An employer is required to form an ICC at every workplace location. The ICC should be a four-member committee chaired by a senior female

employee, including two employee members preferably committed to the cause of women or with experience in social work or legal knowledge and a third-party member (from an non-governmental organisation, for example).

Complaints concerning any workplace employing fewer than 10 employees, or when the complaint is against the employer, will be looked into by the local complaints committee (LCC), constituted at the district level. In the absence of an ICC, a complaint can be made to the LCC against a manager, for example. Domestic workers must approach the LCC for any complaint.

The Act and the Rules have laid down timelines for submission of a written complaint, timelines within which an ICC or LCC would have to complete the inquiry, etc. The employer is obliged to enforce the recommendations of an ICC or LCC.

If an aggrieved female employee is in agreement, then the matter may be settled through conciliation by the ICC or LCC. However, monetary benefits cannot be the basis of any conciliation.

The Act prohibits the disclosure of the identity and addresses of any aggrieved female employee, respondent or witness. In the event of a violation by any person, the employer can impose a penalty of 5,000 rupees or any penalty as prescribed in the service rules.

An employer is subject to various obligations under the Act, including bringing awareness about the Act and the Rules and introducing policies. An employer could be subject to a fine of up to 50,000 rupees if it violates its duties under the Act, and in the case of subsequent violations, the fine may be doubled, together with a penalty in the form of cancellation of its business licence, withdrawal of the registration required for carrying out business, etc.

Enforcement agencies

What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary government agencies that are responsible for enforcement of employment law statutes based on applicable statutes are the:

- Regional or Chief Labour Commissioner: enforcement relating to the payment of salary, contract labour, employee compensation, working conditions, etc;
- Director of Factories: enforcement relating to health and safety in factories;
- Provident Fund Commissioner: enforcement relating to the provident fund; and
- chair of the Employees' State Insurance Corporation: enforcement relating to employees' state insurance, etc.

Worker representation

Legal basis

Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Industrial Disputes Act 1947 mandates constitution of a works committee in industrial establishments with 100 or more workers in the event that the relevant government issues any specific or general directions to that effect.

The number of representatives of the workers in the works committee should not be less than the number of representatives of the employer. The workers' representatives must be chosen from among the workers in the establishment and in consultation with the trade union, if any, registered under the Trade Unions Act 1926.

The works committee is required to promote measures for securing and preserving amity and good relations between the employer and the workers, comment upon matters of common interest or concern and endeavour to resolve any material differences of opinion in respect of such matters.

Also, employers with 20 or more workers are required to have one or more grievances redressal committees to handle matters of individual disputes.

Powers of representatives

What are their powers?

The works committee has the power to co-opt members (ie, select employees) who have special knowledge of a matter that is referred to the works committee in a consultative capacity. The co-opted member or members can be present at meetings only for the period during which the particular question relating to their knowledge sphere is before the works committee.

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 probationary 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 probationary 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.

Temporary agency staffing

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).

Foreign workers

Visas

Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There is no numerical limitation on short-term employment visas. Depending on the qualifications of the person or the employment contracts, employment visas can last for up to five years. The visa requirements for people on employment visas in India if they are transferred to a related entity in another jurisdiction (outside India) depend on the visa regulation of the jurisdiction to which the employees are being transferred.

For foreign workers residing in India, in the case of changes in their employment, they do not need to return to their home countries to arrange for new employment visas. While residing in India, they may be subject to the fulfilment of prescribed requirements when making new applications to the government, seeking permission to change the details of their employment on their original visas.

Spouses

Are spouses of authorised workers entitled to work?

In accordance with the new guidelines issued by the government, spouses of authorised workers on dependent visas can convert their dependent visas into employment visas within India, subject to the following conditions:

- all the conditions laid down for the granting of an employment visa are fulfilled by applicants; and
- prior approval from the Ministry of Home Affairs is obtained.

General rules

What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The rules for employing foreign workers are as follows:

- foreign workers should be highly skilled professionals engaged on a limited-term contract or employment basis;
- foreign workers may not be granted employment visas for jobs for which qualified Indians are available;
- foreign workers may not be granted employment visas for routine, ordinary or secretarial and clerical jobs;
- foreign workers sponsored for employment visas should receive a salary in excess of US$25,000 per annum, except ethnic cooks, language teachers (other than teachers of the English language) or translators and staff working for an embassy or high commission;
- foreign workers must comply with all legal requirements, such as the payment of their tax liability, etc; and
- the Indian employer is responsible for the conduct of the foreign worker during his or her stay in India and also for the departure of the foreign national upon the expiry of the visa.

Resident labour market test

Is a labour market test required as a precursor to a short or long-term visa?

Yes. Employment visas may not be granted for routine, ordinary or secretarial or clerical jobs, or for jobs for which qualified Indians are available.

Terms of employment

Working hours

Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Normal working hours are generally restricted to nine hours per day and up to a maximum of 48 hours per week by the following, as applicable to an employer:

- the Factories Act 1948, which applies to factories; and
- the state-specific Shops and Establishment Act, which applies to establishments other than factories.

These Acts also provide for rest periods, overtime, etc; for example, in Delhi, each employee must have a rest interval of 30 minutes for every five hours of continuous work. If required to work for more than the maximum number of working hours set by the applicable statute, employees are generally paid double their normal wages.

The Factories Act 1948 and certain state-specific Shops and Establishments Acts also provide for a maximum period of working hours, including maximum overtime periods for a week, month and quarter.

There is a restriction on employers making employees work beyond the maximum working hours prescribed by law.

Overtime pay

What categories of workers are entitled to overtime pay and how is it calculated?

All employees are entitled to overtime except employees who may fall under the definition of 'employer', such as a director, occupier or manager of a factory; any other person in control of the affairs of the business that is exempt under a specific applicable law; or any other employee specifically exempted from its applicability. It is also possible that the applicable statutes may have a ceiling on the maximum percentage of employees so exempt.

Overtime wages are calculated at a rate of up to twice the normal wage depending on the location or place of work of an employee.

Can employees contractually waive the right to overtime pay?

The right to overtime is a statutory right. For any contract or agreement whereby an employee relinquishes any statutory right, including the right to receive overtime, such a waiver would be void.

Vacation and holidays

Is there any legislation establishing the right to annual vacation and holidays?

Annual vacation legislation

The Factories Act 1948 provides for annual vacation for employees working in a factory. The state-specific Shops and Establishments Act provides for annual vacation for employees in an establishment other than a factory.

Annual vacation entitlement

Subject to an employee having worked for 240 days in a calendar year, 19 days of annual vacation is permissible to employees in factories or manufacturing units. Typically, 12 to 21 days of annual vacation is permissible for employees in an establishment other than a factory.

Holiday entitlement legislation

The state-specific National and Festival Holidays Act (applicable in certain states) provides prescribed national holidays. The state-specific Shops and Establishments Act also legislates holiday entitlement.

Holiday entitlement

In addition to one day a week off, there are:

- three national holidays on 26 January, 15 August and 2 October; and
- festivals and other holidays as per the state-specific Shops and Establishments Act, which can normally be five days or more.

However, in accordance with the market practice, some employers give two days a week off and 10 to 12 holidays (including national, festival and other holidays).

Sick leave and sick pay

Is there any legislation establishing the right to sick leave or sick pay?

Legislation that deals with sick leave and sick pay includes the state-specific Shops and Establishment Act and the Employees' State Insurance Act 1948.

Depending on the state, the Shops and Establishment Act may provide for sick leave ranging between seven and 14 days. Sick leave is generally paid leave in most of the states. In the case of sickness, an employee can also use any accrued casual and privilege leave.

In the case of employees covered under the Employees' State Insurance Act 1948, sickness benefits are paid by the government approximately at the rate of 60 per cent of the salary, subject to certain conditions being fulfilled.

Leave of absence

In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees can take leave of absence for sickness, accident, personal requirement, vacation or any other reasons in accordance with their eligibility or entitlement, subject to approval by their employers.

Leave may be governed by the relevant state or federal legislation that exists where an office is located. Depending on the location of an establishment, the total amount of leave could be between 27 and 44 days.

Employees are entitled to receive payment for leave subject to the availability of leave to their credit and approval of the leave by the employer.

Mandatory employee benefits

What employee benefits are prescribed by law?

Subject to the applicability of a statute to an employee or an employer, employee benefits that are prescribed by law include employee's provident fund, employee's state insurance, maternity benefit, bonus, leave (sick, casual and annual) and gratuity.

Part-time and fixed-term employees

Are there any special rules relating to part-time or fixed-term employees?

There is no specific law for part-time employees. Part-time employees generally have all the rights of regular employees, the only difference being they receive proportionate benefits.

Fixed-term contracts of employees in the worker category are recognised as an exception to the definition of retrenchment (termination in the general sense) and are, therefore, permissible under the Industrial Disputes Act 1947, subject to the condition that these contracts are not used to avoid or deny regular employment.

Public disclosures

Must employers publish information on pay or other details about employees or the general workforce?

There is both federal and state legislation that mandates an employer to publish certain information in a conspicuous place within the establishment or factory. The information that must be published by an employer is as follows:

- the categories of workers employed in the establishment or factory;
- the number of men, women, adolescents and children, if any, employed in the establishment or factory;
- the minimum rates of wages paid to each category of worker;
- the names and contact details of the members of the internal complaints committee;
- an abstract of certain legislation applicable to the establishment or factory; and
- the names and contact details of authorities having jurisdiction to implement the provisions of certain legislation applicable to the establishment or factory.

Post-employment restrictive covenants

Validity and enforceability

To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination clauses, such as non-compete clauses, are generally not valid or enforceable under Indian law. Non-solicitation in the absence of sufficient evidence may not be enforceable. However, it is common practice to include such clauses in the employment contract, especially in the case of senior employees owing to their deterrent effect.

Post-employment payments

Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Post-employment restrictive covenants are not enforceable. Upon severance of the employer–employee relations hip, employers are not required to pay anything to former employees, even if there is a clause relating to post-employment restrictions in the employment contract.

Liability for acts of employees

Extent of liability

In which circumstances may an employer be held liable for the acts or conduct of its employees?

Employers can be held vicariously responsible for the acts or omissions of their employees under the common law, if these are carried out by employees either during the course of their employment or under the instructions of employers.

Taxation of employees

Applicable taxes

What employment-related taxes are prescribed by law?

Income tax is employment-related tax. Employers are required to deduct the applicable taxes at source and deposit them with the concerned income tax department. In certain states, such as Maharashtra, employers and employees may also be required to deposit professional tax in accordance with the relevant state-specific Professions, Trades, Callings and Employment Act.

Employee-created IP

Ownership rights

Is there any legislation addressing the parties' rights with respect to employee inventions?

In the absence of any contract creating assignment or right in favour of the employer, an employee's invention is not automatically the employer's property, even if it is made:

- during the course of employment;
- with the employer's material; or
- at the expense of the employer.

Accordingly, an appropriate assignment would be required from the employee to create the interest of the employer in any invention.

Trade secrets and confidential information

Is there any legislation protecting trade secrets and other confidential business information?

Trade secrets are protected under intellectual property laws in India; however, there is no dedicated legislation in India regarding the protection of trade secrets and confidential business information. Usually, trade secrets and confidential business information continue to be enforced contractually under the Indian Contract Act 1872 (Contract Act). Through various judicial precedents, the courts in India have protected the rights arising out of trade secrets and confidential business information.

Data protection

Rules and obligations

Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules) provide for privacy law in India with regard to personal information and sensitive personal data and information.

All employers (or any entity authorised on their behalf), for the purposes of collecting, receiving, processing, storing, dealing or handling personal data and sensitive personal information, are required to put in place a privacy policy including the following aspects:

- details regarding the handling or dealing of the information;
- details regarding the type of information collected;

- the purpose of collection and usage of the information;
- disclosure of the information (including to a third party); and
- reasonable security practices and procedures for the protection of information, as approved and notified by the government.

Other obligations include the following:

- employers should obtain consent in writing (through a letter, fax or email) from employees if they obtain information, including passwords, financial information (such as bank account, credit card or debit card or other payment instrument details), physical and mental health condition, sexual orientation, medical records and history or biometric information, or any other personal information;
- the information must be used by employers only for the purposes for which it was obtained; and
- employers must give employees access to carry out any necessary corrections to the information or allow them to withdraw consent.

Business transfers

Employee protections

Is there any legislation to protect employees in the event of a business transfer?

Employees in worker category are protected in the event of a business transfer.

In the event of termination or retrenchment, employees (employed in continuous service (as defined in the Industrial Disputes Act 1947) for not less than one year) are entitled to the following benefits:

- one month's notice or salary in lieu thereof; and
- retrenchment compensation at the rate of 15 days' salary for every completed year of service or part thereof in excess of six months.

In the event that the new employer proposes to employ such employees, subject to following requirements, the above benefits are not payable to workers if:

- the service of the employees is uninterrupted;
- the terms and conditions with the new employer are no less favourable than those applicable to the employees immediately before the transfer; and
- in cases of retrenchment, the new employer pays compensation on the basis that an employee's services have been continuous and uninterrupted.

Employees in the non-worker category do not have any such statutory protection, and generally the terms of contract would prevail.

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

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.

Dispute resolution

Arbitration

May the parties agree to private arbitration of employment disputes?

Employees in the non-worker category may agree to private arbitration.

Employees in the worker category and the employer may both agree to voluntarily refer the dispute to arbitration, any time before the dispute has been referred to a Labour Court or Industrial Tribunal, by a written agreement and in accordance with the provisions of the Industrial Disputes Act 1947.

Employee waiver of rights

May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can agree to waive statutory claims, but the law provides the right to demand statutory dues, even if waived. However, no such right prevails in case of contractual dues.

Limitation period

What are the limitation periods for bringing employment claims?

In the case of claims by employees in the worker category relating to wrongful dismissal, discharge or termination, the limitation prescribed is three years.

In the case of any other industrial disputes by employees, no limitation period is prescribed. However, the same is required to be raised within a reasonable period.

In the case of employee compensation, claims must be raised within two years of the occurrence of the accident. However, in some cases courts have allowed or waived limitation.

In the case of any claims by employees in the category of non-workers, the limitation period is three years.

Update and trends

Key developments of the past year

Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

With a view to harmonise and consolidate the various legislations pertaining to wages, the government introduced the Code on Wages Act, 2019 in the Lower House of the Parliament on 23 July 2019, which received Presidential assent on 8 August 2019 after it was passed in both Houses of the Parliament. The Code on Wages has unified and subsumed four different acts, namely the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Payment of Bonus Act 1965 and the Equal Remuneration Act 1976. However, the Code on Wages has not yet been brought into effect as it has not been notified by the appropriate government.

Recently, the National Company Law Tribunal's New Delhi bench has ruled that the dues of the workers and employees towards the provident fund, pension fund and gratuity fund are considered as ‘assets of workers or employees’ lying with the corporate debtor. These dues are therefore to be paid to the workers and employees on priority, without reference to or waiting for distribution of liquidation assets in accordance with the waterfall mechanism stipulated by the Insolvency & Bankruptcy Code, 2016.

Kochhar & Co - Rohit Kochhar