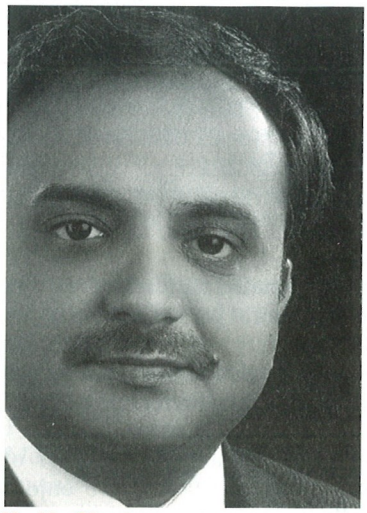
Q & A



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Krishna Vijay Singh is a senior partner at Kochhar & Co., one of the leading and largest law firms in India with offices at New Delhi, Gurgaon, Bengaluru, Chennai, Hyderabad, Mumbai, Dubai, Riyadh, Jeddah, Singapore, Tokyo and Atlanta (USA). The firm represents some of the largest multinational corporations from North America, Europe, Japan and India (many of which are Fortune 500 companies) in diverse areas of corporate and commercial laws.

We are a company in Delhi and registered under the Delhi Shops and Establishments Act. We are in the process of hiring new employees for our Company. Could you please advice, what is the minimum notice period and if we can have different notice periods for different employees of the Company?

Please note that as per Section 30(1) of the Delhi Shops and Establishment Act, 1954 ("Act") no employer can dispense with the services of an employee who has been in his employment for not less than three months without giving such person at least one month's notice in writing or wages in lieu of such notice unless the employee has been dispensed for misconduct after giving him an opportunity to explain the charge or charges against him.

Similarly, as per Section 30(2) of the Act, no employee who has put in 3 months' continuous service shall terminate his employment unless he has given to his employer a notice, of at least one month in writing.

In view of the above, you may note that there is a minimum prescribed period of one month's notice for both the employee and the employer prior to termination of employment. However, the Act does not bar the employee/ employer from agreeing upon a notice period that is longer than a month. Further, the Act does not prescribe for a compulsory consistent notice period for all employees as long as the said notice period is for the duration of one or more months.

Accordingly, you may agree upon different notice periods for different employees in the company subject to there being no employee with a notice period of less than one month. However, from the perspective of having a uniform policy, if you would like to have different notice periods, it is advisable to have a policy that prescribes difference in notice periods for employees based upon their class or seniority.

I have been employed as a worker in a factory? Last year I took more leaves than have been sanctioned to me and my employer deducted amounts equivalent to my daily wages from my salary for the additional leaves. Is such deduction legal?

The provisions related to the payment of wages of worker employed in a factory are governed by the Payment of Wages Act, 1936 ("Act"). You may note that under clause (b) of sub-section 2 of section 7 of the Act, an employer is entitled to deduct wages on account of absence from duty. The said deduction is however subject to the provisions of Section 9 of the Act. The said provision under sub-clause (2) provides as under:

"The amount of such deduction shall in no case bear to the wages payable to the

employed person in respect of the wage-period for which the deduction is made a large proportion than the period for which he was absent bears to the total period, within such wage-period, during which by the terms of his employment, he was required to work."

In other words, where the worker is absent from duty for a period of one day, the employer cannot deduct an amount that is more than the daily wage of the worker. Consequently, you may note that a deduction from salary on account of absence from duty is well within the legal right of the employer provided the deducted amount does not exceed in proportion to the period of absence in reference to the wage period.

A female employee in my company is pregnant and has applied for maternity leave. Please let me know how long does a female employee have to work in a Company to be entitled to maternity benefits and How long could be her maternity leave?

The answer to your query is in the Maternity Benefit Act, 1961 ("Act") (slightly modified by a new enactment known as Maternity Benefit Amendment Act, 2008). The said Act has wide applicability. The Act including the rules framed there under only set the bare minimum standards. As per the Act, a woman employee is entitled to maternity benefit of paid leaves up to twelve (12) weeks.

However, with increased gender sensitization and focus of employers to create a better work-life environment, certain companies permit women employees to avail maternity leave (with or without pay) up to a period of one year. Generally, in most government offices, maternity leave is six months.

Women are also provided the facility to cover expenses during the delivery in a good hospital. Health Insurance Benefits and other allowances are also provided to pregnant women by some companies. Certain companies even allow their women employees to work from home or allow them the facility of flexible working hours or day care facilities. There is no law for providing such benefits but it is the prerogative of the employer and what it chooses to provide in its employee policy.

Now, coming back to your first query, it may be noted that as per the provisions of Section 5(2) of the Act, a woman who has worked for a period of eighty (80) days or more in the twelve months immediately preceding the date of her expected delivery in an establishment of an employer is entitled to claim maternity benefits from that employer.

In respect of the second query, you may note that Section 5(3) of the Act provides that the maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery. Further, section 4(1) of the Act prohibits an employer from employing a woman in any establishment during the six weeks immediately following the day of her delivery.

Accordingly, the said female employee in your company can take paid leave for a maximum period of twelve weeks. From the aforesaid period of twelve weeks, she is entitled to choose any period subject to a maximum of six weeks as paid leaves before her due date. However, it is mandatory for your company to give her a paid leave for a period of six weeks following the actual date of her delivery.

In addition to the above, in the unfortunate event of miscarriage or tubectomy operation, your said female employee would be entitled to paid leaves for a period of six weeks or two weeks respectively immediately following the day of her miscarriage/tubectomy operation. Likewise, in the event of illness arising out of pregnancy, delivery, premature birth of child or miscarriage, she would be entitled in addition to the period of absence allowed to her above with wages at the rate of maternity benefit for a maximum period of one month. HC

FORM IV (See Rule 8)

Statement about ownership and other particulars about newspaper entitled Human Capital of India as required to be published in the first issue every year after last day of February.

1. Place of publication	:	New Delhi
2. Periodicity of publication	:	Monthly
3. Printer's name	:	Punita Malhotra
Whether citizen of India	:	Yes
Address	:	F-316, G.F, Lado Sarai, Old M.B. Road New Delhi-110030
4. Publisher's name	:	Punita Malhotra
Whether citizen of India	:	Yes
Address	:	F-316, G.F, Lado Sarai, Old M.B. Road New Delhi-110030
5. Editor's name	:	Punita Malhotra
Whether citizen of India	:	Yes
Address	:	F-316, G.F, Lado Sarai, Old M.B. Road New Delhi-110030
6. Name and addresses of individuals who own the newspaper and partners or shareholders holding more than one percent of the total paid-up capital (as on 28.02.2014)	:	Punita Malhotra F-316, G.F, Lado Sarai, Old M.B. Road New Delhi-110030

I, Punita Malhotra, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Punita Malhotra
Signature of publisher

The Battle of the Doctrines

A well known provision, viz, Section 3(1) of the Employee's Compensation Act, 1923 ("Act") entitles an employee covered by the Act to compensation from his employer on account of a personal injury caused arising out of and in the course of the employment. As a rule, the employment does not commence until the employee has reached the place of employment and concludes upon the departure of the employee from the place of employment, the journey to and from the place of employment being excluded.

However, the same is subject to the doctrine of notional extension. The said theory stretches the phrase 'course of employment' to include areas that an employee passes or re-passes in going to and in leaving the actual place of employment. As per the doctrine, reasonable extension could be provided in both time and place and an employee may be regarded as in the course of his employment even though he had not reached or had left his employer's premises.

The theory of Notional Extension was first taken up by the Supreme Court in the case of Saurashtra Salt Manufacturing Co. v. Bai Valu Raja; A.I.R. (1958) S.C. 881. Although, in the said case, the Hon'ble Court denied compensation to the deceased from the employer, it observed in paragraph 7 of the judgment:

"The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension."

The principles of the said doctrine also find a mention under the provisions of Section 51E of the Employees' State Insurance Act, 1948. The said provision provides:

"An accident occurring to an employee while commuting from his residence to the place of employment for duty or from the place of employment to his residence after performing duty, shall be deemed to have arisen out of and in the course of employment if nexus between the circumstances, time and place in which the accident occurred and the employment is established."

The said doctrine of notionale extension is subject to another doctrine, namely, the 'doctrine of added peril' which disentitles an injured employee from compensation on the ground that he had taken a greater risk than he had been required by his employer to assume, resulting in the accident and consequent injury or death. This doctrine contemplates that if an employee while doing his employers work undertakes to do something which he is not ordinarily called upon to do and which involves extra danger he cannot hold his employer liable for the risk arising therefrom. For instance, if an employer requires every employee to put on a safety harness while climbing, and an employee, in disregard of such a provision, climbs without a safety harness and is injured, the doctrine of added peril may disentitle him from compensation for the injured caused during the course of his employment. The Supreme Court in the case of Mackinnon Mackenzie and Co. (P) Ltd. v. Ibrahim Mahmmed Issak held in paragraph 5 as under:

"If the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."

The two doctrines, thus attempt to achieve contradictory objectives. The doctrine of notional extension is favorable to an employee and attempts to stretch the provisions of Section 3 (1) of the Act to include time and place beyond the traditional definition of employment. The doctrine of added peril, on the other hand, is favorable to the employers as it seeks to exclude an injury that may have occurred due to the additional risk taken by the employer than normally required or assumed.

Overlap of the two doctrines and the final outcome could be derived from one of the earliest English cases to use the said doctrines, i.e. Lancashire and Yorkshire Rail Co. v. Highley (1917) AC 352. In the said case, the accidental injury to a workman during his commute, though considered within the course of employment was rejected on the ground of added peril as he was taking a short-cut between tracks on railway line.

While there can be no strait-jacket rules for the application of the doctrine of notional extension or the doctrine of added peril, a review of the facts and circumstances of each case in light of the principles enshrined under both doctrines aids in better assessment of the liability of employer against any personal injury or death that may have been caused to an employee. However, in order to ease the application of the above doctrines vis-à-vis the law of the land, the Hon'ble Supreme Court in the case of Malikarjuna G. Hiremath v. The Branch Manager, Oriental Insurance Co. Ltd. and Anr AIR2009SC2019, has reduced it all to three principles to attract the provisions of section 3(1) of the Act. The said principles are:

- there must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.
- the onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.
- If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the facts of each case. HC