Q&A

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 an NGO and regularly employ certain project staff for specific project needs. Typically, the employment of such project staff is co-terminus with the term of the project, which is generally between 4 months to 2 years. We are in the process of revising the employment contract with such project staff. Please advice as to what are the important issues that should be included in such contract of employment.

Please note that the contract of employment with a project employee should specifically state that his employment is only for a limited duration as specified in the contract. Further, it should be provided that the employment is co-terminus with the project, and in the event the project is discontinued, for any reason whatsoever, the employment would cease with immediate effect. The contract may also include provisions and procedure relating to termination of employment by your NGO or by the employee. The contract may provide that the organisation may terminate the employment of the employee even prior to the completion of the project by giving appropriate notice or salary in lieu thereof. In addition, it may also provide that the employee shall be obliged to give prior notice of a specified duration before termination of the contract, if he/she wishes to resign. Further, the salary structure and other employee benefits available to such employees in the organisation, whether by virtue of any law or otherwise, may be specifically mentioned in the contract. It may be noted that welfare legislations, such as Employees Provident Fund and Miscellaneous Provisions Act, 1952 and Payment of Gratuity Act, 1972 may also apply to NGOs depending upon the nature of activities performed by the NGO. Generally speaking, organisations engaged in educational or scientific activities, poultry farming, hospitals or other organisations which come under the purview of 'establishments' under State Shops & Establishments Act, may be required to provide these statutory benefits to its employees. In addition to the above, you may also consider inserting suitable provisions in the contract for protecting the organisation's intellectual property and confidential information. If your organisation deals in issues, which require the organisation to maintain confidential information relating to third parties, you may consider inserting appropriate provisions in the contract for protecting the confidentiality of such privileged or personal information.

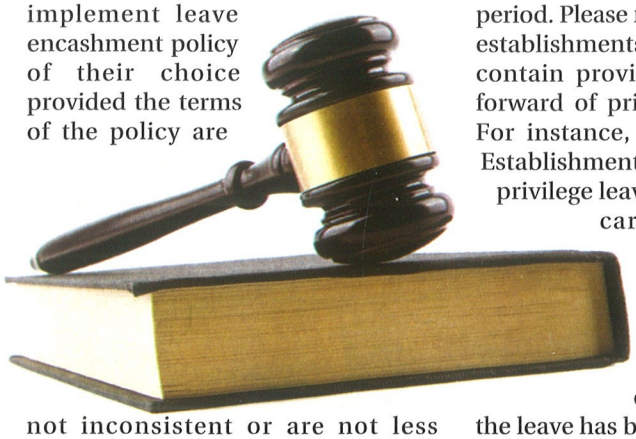
We have a factory and are currently facing certain labour disputes. We wish to know that our management is obliged under law to negotiate / discuss with an outsider in the matter of bilateral issues even when the said outsider occupies a position in the Executive body of the Trade Union.

Please note that Section 9A of the Trade Unions Act, 1926 provides that a registered Trade Union of workmen shall at all times continue to have not less than 10% or one hundred (100) of the workmen, whichever is less, subject to a minimum of seven (7), engaged or employed in an establishment or industry with which it is connected, as its members. As per Section 22 of the Trade Unions Act, in an unorganized sector not less than one-half of the total number of the office-bearers of every registered Trade Union are required to be persons actually engaged or employed in an industry with which the Trade Union is connected, and in an organized sector, not more than one-third of the total number of the office-bearers or five (5), whichever is less, are required to be persons actually engaged or employed in an industry with which the Trade Union is connected. Thus, an outsider may be a member of a trade union, and may also be appointed as an office bearer so long as the composition of the union as a whole as well as the office bearers thereof is in compliance with the aforesaid requirements. Therefore, even if the outsider in question is not employed with you, or connected to

your establishment, he can hold a position in the executive body of the Trade Union and has the right to represent a workman/workmen in matter of any negotiations between the management and workmen. Please note that Section 36 of the Industrial Disputes Act, 1947 also provides that a workman who is party to a dispute can be represented by any member of the executive or other office bearer of a registered trade union of which he is a member in any proceeding, including conciliation proceedings. Therefore, even in a proceeding under the Industrial Disputes Act, 1947, an outsider, in his capacity as office bearer of the trade union, can represent a workman against the management.

We are planning to introduce a leave encashment policy for employees. Please suggest what kind of policy we should frame? Also, please let us know if there are any legal guidelines for calculating leave encashment amount.

Employers have the discretion to implement leave encashment policy of their choice provided the terms of the policy are not inconsistent or are not less favourable than those specified under the applicable shops & establishment Act. Some employers give the employees the option to carry forward a portion of their leave entitlement for a certain period (for example, 2-3 years), and to encash the un-availed leave after the said period. Please note that the shops and establishments Acts of various States contain provisions regarding carry forward of privilege / earned leave. For instance, the Delhi Shops and Establishments Act provides that the privilege leave of employees can be carried over by the employees for a period of three years but does not contain any stipulation regarding encashment of leave, except where the leave has been sought but has not been granted or where the employment has terminated. HC



Sexual Harassment Of Women At Workplace

(Prevention, Prohibition And Redressal) Act, 2013

BY **KRISHNA VIJAY SINGH**

Sexual harassment at the workplace is a form of harassment which comprises of conduct, comments, gestures or contact of a sexual nature, whether one-time or in a continuous series of incidents which are considered as offensive, unwelcoming or embarrassing behaviour by the individual exposed to such behaviour or which might create a hostile or intimidating work environment for the person/individual exposed to such behaviour. Sexual harassment is discriminatory in nature when it amounts to placing a condition of sexual nature on employment or conditions to employment.

Sexual Harassment - Violation of Human Rights and Gender Equality

The right to equality, including gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The right to equality and the right against discrimination, are fundamental rights i.e., rights inherent to a person which the law of the land guarantees to observe and protect. India has ratified the Convention on the Elimination of all forms of Discrimination against Women ("CEDAW"), which defines sexual harassment at the workplace as a form of discrimination. By ratifying CEDAW, India has confirmed that acts of sexual harassment and sex discrimination are violations of human rights and contrary to the principles of gender justice and equality.

Sexual Harassment at the Workplace - The Law in India

The Indian judicial experience with

sexual harassment started with the case of Vishaka v State of Rajasthan ("Vishaka Case") wherein the Supreme Court of India ("Supreme Court") with regard to sexual harassment of women at the workplace, declared that each such incident results in violation of the fundamental rights of "Gender Equality" and the "Right to Life and Liberty". Sexual harassment of women in the workplace is a clear violation of their rights under Articles 14, 15 and 21 of the Indian Constitution. The Supreme Court also stated that one of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) "to practice any profession or to carry out any occupation, trade or business". Recognizing that the violation of fundamental rights of this kind is a recurring phenomenon and that the legislature had failed to provide any legal remedy for sexual harassment in the workplace, the Supreme Court decided to protect the rights of women through an effective redressal in the form of guidelines laid down to fill the legislative vacuum.

The guidelines that the Supreme Court laid down in Vishaka Case ("Vishaka Guidelines") formulated effective measures to check the evil of sexual harassment of working women at all work places. The Vishaka Guidelines make it obligatory upon employers or other responsible persons in work places and other institutions, whether in the public or private sector, to prevent or deter the commission of acts of sexual harassment against women in the workplace and further to provide for complaint mechanisms including complaint committees for the investigation and redressal for victim's complaints against sexual harassment by taking all steps necessary to do so.

The Hon'ble Supreme Court directed that the Vishaka Guidelines be "strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of working women". Based on the powers derived from Article 141 of the Constitution of India, the Supreme Court made it clear that in the absence of any suitable legislation being enacted, the directions of the Supreme Court in Vishaka case is law declared by the Supreme Court and shall be applied by all courts within the territory of India.

Beyond the Vishaka Case

With an increase in the number of women joining the workforce, both in organized and unorganized sector, ensuring an enabling working environment for women through legislation was felt imperative by the government. A Law for prevention of sexual harassment at workplaces was a long pending one and was enacted by the Parliament in 2013, and finally received the Presidential assent on April 22, 2013. The statute was enacted almost 16 years after the Supreme Court of India, in its landmark judgment in the Vishaka case laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013 ("Act") has been enacted with the objective of providing women protection against sexual harassment and for the prevention and as a measure to provide avenues for women to have their complaints resolved. The definition of Sexual harassment in the Act is in line with the Supreme Court's definition in the Vishaka Case judgment. Sexual harassment includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication):

- Physical contact or advances;
- A demand or request for sexual favours;
- Making sexually coloured remarks;
- Showing pornography; and
- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

If any act is done under any of the following circumstances that would also amount to sexual harassment:

- Implied or express promise of preferential treatment in employment;
- Implied or express threat of detrimental treatment in employment;
- Implied or express threat about her present or future employment status;
- Interference with work or creates an intimidating/offensive work environment; and
- Humiliating treatment likely to affect her health and safety. HC

[1] CEDAW at Work http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (last accessed on 07.09.2017).

[2] Vishaka and others v State of Rajasthan and others 1997 (6) Supreme Court Cases 241.