

In review: entering the employment relationship in India

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Basics of entering into an employment relationship

i Employment relationship

Under the Employment Exchanges (Compulsory Notification of Vacancies) Act 1959, if notified by the concerned state government, a private sector employer with 25 or more employees is typically required to notify any vacancy to a local government employment exchange 15 days before the date on which applicants will be interviewed. In practice, this is often observed in the breach.

There is no central statute dealing with the issue of an appointment letter or employment contract. Certain state-specific statutes may require the employer to issue an appointment order in a specified format. In practice, most companies provide an appointment letter or an employment contract indicating the join date, position, compensation and general terms of employment. Typically, the compensation break-up is mentioned in an annexure, which can be modified as required. The compensation break-up is largely based on the taxation aspects of the different compensation components.

Companies would also have an employee handbook or manual that includes details of company policies relating to discipline, leave, and the like. In addition, it is quite common for companies (especially in the information technology, and research and development sectors) to enter into confidentiality and non-disclosure agreements separately.

If an employer wishes to amend employment terms, he or she would need to check whether the employee is a workman. For workmen, the ID Act prescribes a specific process to be followed when changing specified working conditions (e.g., wages, working hours), including giving 21 days' notice. For a non-workman, it is recommended that the employer obtain the consent of the affected employee to effect the change, as any unilateral change to the employment agreement may be held as arbitrary and void.

ii Probation

There are no direct laws in India dealing with probation in general terms; however, this is a common practice. The (federal) Industrial Employment (Standing Orders) Act 1946 (the IESO Act) regulates working conditions for workmen and generally applies to industrial establishments employing 100 or more workmen.⁶ Under the IESO Act, a workman can be employed on a probationary basis to provisionally fill a permanent vacancy for up to a maximum of three months. Any such probationer is not entitled to notice of dismissal or payment in lieu during the probation period.

Certain states (such as Maharashtra) have built the concept indirectly into the SEA, by requiring an employer to provide notice of termination if an employee has worked for a specific duration (in Maharashtra, three months). No notice is required if the employee has worked for a shorter period.

Typically, a probation period lasts between three and six months, and should ideally not exceed 240 days, as several statutory social welfare laws apply to employees who have worked for this period and a probation period exceeding this limit may be construed as a way to avoid complying with the law. It is generally accepted

that the services of probationary employees can be terminated at any time by either the employer or the employee as per the terms of the employment contract.

iii Establishing a presence

The hiring of employees requires the establishment of a legal entity to do business in India. There are various means of setting up a legal entity, such as establishing a company, a branch office, a liaison or representative office, or a limited liability partnership.

Until the legal hiring entity is set up, if a foreign company wishes to get people on board, it can examine options such as entering into an independent contractor agreement or using a manpower agency as a temporary measure. The use of an independent contractor, especially in relation to the duration of the contract term, would need to factor in possible adverse tax implications on the foreign company by way of having a permanent establishment in India.

iv Contract labour

Multinational companies in India often do not hire direct or regular employees for ancillary services, such as security, housekeeping and catering. A company would usually hire a contractor to provide these types of support services and the provision of labour by such a contractor would be regulated by the Contract Labour (Regulation and Abolition) Act 1970 (CLRAA). The CLRAA envisages registration of the principal employer and licensing of a contractor. A principal employer is any person responsible for supervision and control of an establishment, namely the company hiring the contractor. It is the responsibility of the contractor to make timely payment of salaries and other emoluments to the contract personnel. A key aspect of the CLRAA relates to defaults in the statutory obligations of the contractor – in such a case, the principle employer may need to make good the defaults (which can include payments) to the contract personnel and subsequently recover the same from the contractor. A principle employer should ensure that the contractor undertakes and is liable to comply with all statutory obligations for its personnel.

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