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India: Rights of Persons with Disabilities Act - A Well Meaning Legislation Albeit with Complex Terms, Anomalies and Aggressive Penal Provisions

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The Rights of Persons with Disabilities Act ("**the Act**") is undoubtedly a welcome and much awaited enactment. The genesis of the Act lies in the UN Convention for persons with disabilities and the Act seeks to fulfill India's obligations under this International treaty. Curiously, it has taken the Indian Parliament more than a decade to enact this legislation and the Rules thereunder ("**the Rules**") were notified only recently. However, like they say better late than never.

Highlights of the Act and Rules

- The Act replaces the erstwhile statute 'the Persons with Disabilities Act, 1995'. The previous Act covered only seven disabilities whereas the new Act widens the definition to include more than 15 disabilities including dwarfism, acid attack victims, intellectual disability and specific learning disability.
- Under the Act, persons with at least 40% of a disability are entitled to certain benefits such as reservation in employment in Government establishments- being at least 4% of the total number of vacancies in certain specified categories and 1% in certain others.

- Private establishments are exempt from the obligation of reserving jobs for persons with disabilities. However, notwithstanding the same, the Act requires a slew of obligations to be adhered to by private companies (discussed later in this exposition).
- The term 'private establishment' has been very widely defined to include a company, firm, factory, or such other establishment. Therefore, the Indian presence of any foreign company- be it a liaison office, branch, subsidiary, or joint venture would attract the provisions of the Act.
- The Rules lay down the procedure to be followed by Government and private companies alike to deal with complaints from aggrieved persons regarding discrimination on grounds of disabilities.
- Violation of any provision of the Act invites fines and penalties and in certain cases also expose directors and senior officers to liability. In contrast, corresponding statutes in other countries such as the UK Equality Act, 2010 and the statute in Japan (the Basic Law for persons with disabilities) contain no such penal provisions- the legislature in these countries have preferred to adopt a persuasive approach rather than punitive.
- The Act empowers the Executive Magistrate and the local police (within whose jurisdiction the establishment lies) to receive complaints regarding exploitation of any person with disability and to take action in respect thereof.
- The Act authorizes the Central Government to appoint a Chief Commissioner for persons with disabilities. It also empowers every State Government to appoint a State Commissioner to protect the rights of disabled persons. Such State Commissioners have the same powers as are vested in a civil court (under the Code of Civil Procedure, 1908) for the purpose of discharging their functions under the Act.
- To ensure speedy trial of offences under the Act, the State Government is required to notify for each district, a Court of Sessions to be a Special Court to try such offences. Therefore, the prosecution of an accused for offences under the Act would be triable by a Sessions Court.

Legal Obligations of Private Establishments

As mentioned above, private establishments are exempt from making job reservations for persons with disabilities. Nevertheless, every private establishment is required to observe the following statutory obligations:

1. To provide all disabled employees the right to equality and non-discrimination. The Act stipulates that no person should be discriminated on grounds of his disability unless it can be proved that the discriminating act in question is a proportionate means to a legitimate objective. The Rules make the "head" of the establishment responsible for ensuring that this provision of the Act is not misused to the detriment of disabled persons.

2. To prepare and publish an Equal Opportunity Policy ("**EOP**") for persons with disabilities. Such EOP must contain, amongst others, details regarding amenities and facilities put in place for persons with disabilities, lists of posts identified for such persons, training, promotion, allotment of accommodation and provision of assistive devices and barrier free accessibility.
3. To appoint a liaison officer to look after recruitment of persons with disabilities including the provisions and amenities for disabled employees. Such appointment is required to be notified in the EOP.
4. Maintain records relating to persons with disabilities enumerating the following:
 - i. the number of disabled persons employed and the date of commencement of their employment.
 - ii. the name, gender, and address of employees with disabilities.
 - iii. the type of disability that such employee(s) are suffering from.
 - iv. the nature of work being performed by such employees; and
 - v. the type of facilities being provided to disabled employees.
5. To produce the aforesaid records for inspection as and when called upon to do so by relevant authorities under the Act or the Rules.
6. To adhere to the standards prescribed in the Rules concerning physical environment, transport, and information & communication technology; and
7. To register a copy of the EOP with the State Commissioner or the Central Commissioner, as the case may be.

Penal provisions under the Act

The Act stipulates a monetary fine of Rs 10,000 for the first contravention and for subsequent violations, fines of not less than Rs 50,000 but which may extend to Rs 5 lakhs. If the contravention is committed by a company, both the entity as well as the person responsible for the conduct of the business of the company would be deemed to be guilty of the offence and liable to punishment under the Act. Directors, officers, and managers of a company would also be exposed to penal provisions under the Act if it is established that the offence was committed with their consent or is otherwise attributable to their negligence.

Failure by a company to furnish information, documents, or records (as required under the provisions of the Act) has also been made an offence. The monetary fine provided for such contraventions is Rs. 25,000 in respect of each offence with an additional fine of Rs.1000 for each day of continuing failure or refusal, as the case may be.

The Act also imposes criminal liability on anyone who insults or intimidates, within public view, a disabled person with the intention of humiliating such person. This would also apply to such actions within a workplace. The punishment provided for such an offence is imprisonment for a term between 6 months to 5 years and fine. In my opinion, this provision is capable of misuse as the terms "insult" and "intimidate" are not defined and open to a very wide interpretation.

Anomalies and infirmities

Certain provisions of the Act or the Rules are inconsistent with others and also confusing. For instance, while there is no statutory obligation under the Act for private companies to hire persons with disabilities, Section 35 refers to the appropriate Government providing incentives to employers in the private sector to ensure that at least 5% of their workforce comprises of persons suffering from disabilities. Use of the term "ensure" is incongruous with the fact that it is not mandatory for private companies to hire persons with disabilities much less reserve 5% of the jobs for such purpose. Further, the confusion is compounded by the fact that no such incentives have been notified till date under the Act, the Rules or any subsequent circular published by the Central Government or the State Government.

The Rules cast the responsibility on the "head of the establishment" for ensuring that persons with disabilities are not denied their due rights and benefits. While the term "head" has not been defined under the Act, by general rules of interpretation, it would imply the managing director or the Chief Executive Officer ("**CEO**") of the company. This is akin to the definition of "occupier" under the Factories Act by virtue of which the CEO or one of the designated directors is responsible for compliance with all rules and regulations under the Factories Act. Experience has repeatedly taught us how this has proved to be highly onerous to the head or the CEO of Indian Companies who are often fastened with grave civil and criminal liabilities for violations or incidents which are not attributable to them and they have no personal control over. While legislating such enactments, Parliament should provide flexibility - at least to private companies to determine which officers should be made and held responsible for complying with statutory obligations. The head of the organization need not be placed in the firing line for breaches and contraventions he is not responsible for. Such laws are also in contradistinction to India's professional goal of 'ease of doing business in India'.

Another cause of concern for private companies are the extremely harsh and oppressive penalties stipulated in the Act. Such provisions expose directors and senior officers of private companies to legal liabilities for even innocuous and inadvertent breaches - capable of gross misuse by junior level Government officers who are authorized under the Act. The sections dealing with monetary penalties under the Act are also very widely worded and fines get triggered for the most routine and inadvertent lapses. This could make private companies vulnerable to coercion and harassment at the hands of the Government officials. Providing criminal liability and imprisonment for acts of 'insult' or intimidation is also overly harsh and severe and prone to abuse. The Act and the Rules in their present form tend to stoke resurrection of the 'Inspector Raj' and deviate from the Modi Government's philosophy of "Minimum Government and Maximum Governance". While upholding the legal rights and interests of disabled persons, the legislature could have chosen a path more persuasive rather than the punitive.

Conclusion

While private companies and establishments are exempt from the legal obligation of hiring persons with disabilities, numerous statutory duties and responsibilities are cast upon them - preparation and publication of an Equal Opportunity Policy being just one of the many. Since the spectre of fines and penalties on companies and liabilities on

directors and senior officers loom large under the Act, Indian branches and subsidiaries of foreign companies (which tend to be more vulnerable to harassment at the hands of local authorities) would be well advised to expeditiously adopt and implement all necessary steps and measures to ensure complete and meticulous compliance with the provisions of the Act and the Rules framed thereunder.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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