# Employment & labour law in India

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## Country snapshot

*Key considerations*

**Which issues would you most highlight to someone new to your country?**

The following key issues should be highlighted:

- A 30 to 90-day notice period applies in order to terminate 'workmen' (as defined in the Industrial Disputes Act, 1947) – that is, employees whose role is not primarily supervisory, administrative or managerial) for convenience, with 15 days' pay due for every year worked. In the case of manufacturing units, plantations and mines with 100 or more workmen, termination for convenience requires prior government approval; in other sectors, it requires only government notification.
- Termination for cause does not include non-performance – it includes only behaviour which qualifies as misconduct.
- The 'last in, first out' principle requires that the employer first terminate for convenience the last people to join the organisation in the same role. However, this requirement can be contracted out of. When hiring for the same role, workmen who were terminated for convenience should be given the opportunity to re-join the company.
- State laws generally provide for about 15 days of earned/regular leave a year. Employees also benefit from up to 10 days of sick leave and a possible 10 additional days of 'casual leave'. This is generally more than what most organisations would ideally like to provide.
- Most state laws provide for 'casual leave' – the employee can opt not to come to work that day without applying for leave in advance. Many organisations find this disruptive.
- Most state laws restrict women from working at night; if women are to work at night, specific approval must be obtained. This exemption is granted only to limited business sectors (eg, IT sector). Further, the employer must offer door-to-door transport and meet some security-related requirements.
- Most state laws prescribe overtime for any hours worked beyond 48 hours in a week. However, this is seldom observed.
- Indian law regulates and in some cases prohibits the use of contract workers. To engage contract workers, the contractor must hold a licence and the employer must be registered as a 'principal employer'.
- Non-compete agreements are not enforceable under Indian law, while non-solicitation clauses can be enforced only in limited ways.
- While the 'work for hire' principle applies under the Indian copyright regime, it does not apply under the Indian patent regime; employees must thus provide formal assignments.
- Indian laws require employers to maintain a plethora of registers and notices. Compliance with such requirements is difficult and full compliance is rare.

**What do you consider unique to those doing business in your country?**

Some of the points mentioned above are unique to India. In addition, while Indian employment law is mainly federal in nature, most states have a Shops and Establishments Act. These statutes are similar, but not identical. Further, some states have been permitted to make amendments to central laws, with which are thus applicable in a different manner in such states.

**Is there any general advice you would give in the employment area?**

India is heavily regulated in the employment arena. Legal assistance should be obtained with regard to employment contracts and employment terms of service. Practical advice should be sought on best practices and common practices, so that policies are HR friendly and legally compliant. Advice should also be obtained on areas where compliance is difficult, so that employers can adopt positions that balance convenience against risk.

*Emerging issues/hot topics/proposals for reform*

**Are there any noteworthy proposals for reform in your jurisdiction?**

As part of the objective to make it easier to do business in India, the government has proposed that the federal labour laws be revised and possibly amalgamated into two or three labour codes. If this is accomplished, the filing requirements will be streamlined. Amendments have also been proposed to some federal laws relating to factories and the use of apprentices. There has been no progress taking these initiatives forward and it appears unlikely that the government will do so.

Key amendments to law in recent months include a substantial change to the Maternity Benefit Act 1961 through the Maternity Benefit (Amendment) Act 2016. Key features of this amendment include:

- an increase in paid time off for eligible female employees from 12 weeks to 26 weeks in case a female employee has fewer than two children. If she has two or more children, she is entitled to 12 weeks' leave;
- the introduction of the concepts of a 'commissioning mother' and an 'adopting mother', which widens the scope of the law. Such mothers are entitled to 12 weeks' leave;
- the option to work from home once the paid maternity leave period has ended, based on an agreement with the employer; and
- requiring an establishment with 50 or more employees to set up a crèche facility.

Overall, the amendments are progressive in nature. From an employer's perspective, there will be greater financial implications due to the increased maternity leave payment and also the benefits to be paid to the new categories of eligible female employees.

**What are the emerging trends in employment law in your jurisdiction?**

After decades of the government and courts adopting a somewhat socialist mind set, there has been a shift to a more pragmatic, business-friendly approach. The old approach, which focused on unskilled and daily wage workers, has given way to a focus on India's growing service industry. There is heightened interest in rewriting the employment laws to make them more business friendly. India's newest employment law on the prevention of sexual harassment is also leading to an increased number of sexual harassment complaints and additional processes to be followed.

Another important aspect is the move towards e-governance in the labour law sector. A new web portal launched by the government provides users with a unique labour identification number, facilitating online registration, the filing of self-certified, simplified and single online returns for specific federal laws, and a transparent labour inspection scheme on risk-based criteria. Some concessions have also been provided for start ups in terms of employment law compliances.

## The employment relationship

*Country specific laws*

**What laws and regulations govern the employment relationship?**

Some states require that the employer prepare an appointment order for new hires, although this is seldom observed. There are no direct laws dealing with probation on a general basis in India, which is, however, a common practice. The (federal) Industrial Employment (Standing Orders) Act 1946 (which is applicable to workmen), provides for a probationary period of up to three months. Certain states have built in the probation concept indirectly into their local laws, which ranges from three to six months. Ideally, a probation period should not exceed 240 days, as several statutory social welfare laws apply to employees who have worked for such period. The Industrial Disputes Act 1947 (applicable to workmen), prescribes that if certain terms of service change, notice must be given to the employee. It also prescribes requirements for termination for convenience, including notice and compensation.

**Who do these cover, including categories of worker?**

There are essentially two types of employer and two types of employee. Employers are either:

- 'establishments' – a term which encompasses all employers; or
- 'factories' – a term which typically encompasses manufacturing units.

Employees are either:

- 'employees' – a term which covers all employees in any kind of role; or
- 'workmen' (as defined in the Industrial Disputes Act, 1947) – that is, employees whose primary role is not supervisory, managerial or administrative.

In addition, certain state laws may exclude a limited percentage of senior management employees from their scope of application.

*Misclassification*

**Are there specific rules regarding employee/contractor classification?**

Indian law regulates and in some cases prohibits the use of contract workers. To engage contract workers, the contractor must hold a licence and the employer must be registered as a 'principal employer'.

*Contracts*

**Must an employment contract be in writing?**

Except in states which require an appointment order, Indian law does not explicitly require that an employment contract be in writing, although this is the typical practice followed by most employers.

**Are any terms implied into employment contracts?**

Certain legal terms are implied in the employment contract. A duty of care, a right to privacy and a duty to maintain confidentiality are implied in the employment contract.

**Are mandatory arbitration/dispute resolution agreements enforceable?**

Yes.

**How can employers make changes to existing employment agreements?**

Under Indian contract law, a contract requires the consent of both parties. Thus, the employer cannot unilaterally make changes to the employment agreement. Typically, compensation terms are set out in an annex to the agreement, which should provide that these will be subject to change from time to time. Standard terms of employment – such as working hours, vacation, benefits, security procedures and disciplinary procedures – are normally set out in the employment terms of service, rather than in the employment contract. The employment contract should state that these terms of service apply to the employee and will be subject to change from time to time.

An employer cannot change specified service conditions (eg, compensation, grade classification and customary concessions) for 'workmen' (as defined in the Industrial Disputes Act, 1947) without providing 21 days' prior statutory notice and notice to the labour authorities. This should be considered when implementing changes to an employment agreement.

*Foreign workers*

**Is a distinction drawn between local and foreign workers?**

A significant difference between local and foreign employees is evident in the law on provident funds, which is a type of pension. The threshold to qualify, the manner of deduction and the benefits are different for foreign employee, and differ further depending on whether the country of origin has a social service agreement with India. There are no other substantive distinctions between local and foreign employees.

## Recruitment

*Advertising*

**What are the requirements relating to advertising positions?**

Under the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959, if the state so requires, a private sector establishment with 25 or more employees must notify vacancies to specific employment exchanges. However, this is seldom observed.

*Background checks*

**What can employers do with regard to background checks and inquiries in relation to the following:**

**(a) Criminal records?**

While it is possible to conduct criminal background checks, this is extremely difficult in practice because criminal records are not digitised and are not consolidated nationwide. Accordingly, where a criminal background check must be carried out, this is typically done at the police station with jurisdiction over the employee's current place of residence or anywhere that he or she has lived for a reasonable period.

**(b) Medical history?**

Employees' medical histories cannot be accessed easily, since these are not digitised and there is no repository of medical records. Employee consent is required to disclose medical records to the employer. However, some employers require employees to undergo medical checks and have the diagnostic centre send the report directly to the employer. Subject to certain specific restrictions (eg, pre-employment testing for HIV is not permitted), there is no prohibition against this practice under Indian law.

**(c) Drug screening?**

Indian law does not prohibit drug screening.

**(d) Credit checks?**

An individual is entitled to obtain information on his or her credit rating. The employer can also access this information, with the employee's permission and on providing necessary proof of identity. Access to credit rating information is more common in banks and financial institutions.

**(e) Immigration status?**

Indian law does not specifically require an employer to check the immigration status of a foreigner. Indian law does not prevent the employer from checking whether a foreign employee holds the necessary visa to work in India. If a foreign individual on an employment visa wishes to change employment to another company, he or she must leave India and apply afresh for a visa. The only exception is where the foreigner is changing jobs between a registered holding company and its subsidiaries or vice versa, or between subsidiaries of a registered holding company and the employee role is at a senior level (such as a managerial or a senior executive position) or is a skilled position (such as a technical expert). In such case the foreigner may not need to leave India, provided that they obtain prior government approval for the change in employment.

**(f) Social media?**

There is no bar against conducting background checks through social media.

**(g) Other?**

The most common background checks undertaken are of educational qualifications. The employee must consent to this and the employer (or an outsourced provider) will then write to the relevant institution requesting confirmation. The institution may charge a fee for providing this information. Most institutions have a procedure in place in this regard.

## Wages and working time

*Pay*

**Is there a national minimum wage and, if so, what is it?**

There is no national minimum wage. However, the central and state governments can issue notifications on minimum wages in specific industries. The federal government has set the recommended minimum wage to Rs176 per day and advised state governments to implement the same – state rates tend to be higher.

**Are there restrictions on working hours?**

By and large, working up to nine hours a day is permitted, with a weekly limit of 48 to 50 hours. There are laws that restrict women from working at night (between 8:00pm and 6:00am). Some states also have a maximum number of hours of overtime that can be worked.

*Hours and overtime*

**What are the requirements for meal and rest breaks?**

Most state laws provide for a break of 30 to 60 minutes after four to five hours of work. In practice, it is typical to provide a one-hour lunch break in an eight-hour day.

**How should overtime be calculated?**

Overtime is usually calculated at twice the rate of normal wages. State law defines what the term 'wages' covers; this typically includes basic wages plus normal allowances, but excludes any bonus component.

**What exemptions are there from overtime?**

There are no exemptions from paying overtime. However, the overtime provisions are seldom observed – generally, companies do not pay overtime when employees stay late to complete their work. It is recommended that employers pay overtime at least when employees are required by the nature of the assignment to work overtime – for example, call centre employees.

**Is there a minimum paid holiday entitlement?**

Yes. This varies from state to state, but is generally about 15 days. Most states prescribe up to 10 days of sick leave and some states prescribe another entitlement of up to 10 days of casual leave. In addition, most states prescribe about 10 days of public holidays; four to five of these are mandatory national and state holidays, while the remainder are chosen by the employer from a larger list provided by the state.

**What are the rules applicable to final pay and deductions from wages?**

Final pay must be made within two days of the date of termination where the employee's services are terminated by the employer. In case of the employee's resignation, the final pay-out can be made as part of the company's normal payment cycle.

Deductions are permitted from an employee's wages, but only for specified reasons (eg, on account of fines, deductions for damage to or loss of goods expressly entrusted to the employee and recovery of loans or advances). Deductions are generally permitted only up to 50% of the employee's wages.

*Record keeping*

**What payroll and payment records must be maintained?**

Under applicable state laws read with federal laws, the employer is typically required to maintain various payroll and payment records, such as a register of wages, a register of fines and a register of deductions. Payslips must also be issued to employees under federal and state law. An annual return under state law must usually be filed with the regulatory authorities which also contains payment-related declarations. Certain state laws also provide a retention period for employment records.

The law is not entirely clear on the electronic maintenance of registers. However, as long as the registers can be provided in the prescribed statutory format, electronic maintenance should be acceptable.

**Discrimination, harassment & family leave**

*What is the position in relation to:*

**Protected categories**

**(a) Age?**

No codified law deals directly with age as a protected category. Theoretically, under common law, it may be possible for an individual to seek protection against age discrimination. Generally speaking, where there are reasonable grounds for discrimination on the basis of age – such as the nature or location of the job – discrimination may be justified. For example, there is an age limit for recruitment in the armed forces, and the retirement age of cabin crew of India's national airlines is lower than that for employees of other central government undertakings.

**(b) Race**

The Constitution guarantees certain fundamental rights to Indian citizens, including protection against discrimination on the grounds of race. However, this protection is available only against the state and does not apply to private companies. This notwithstanding, it is uncommon for private companies to discriminate on the basis of race.

**(c) Disability?**

The Rights of Persons with Disabilities Act 2016 provides protection to persons with specified disabilities, where a private sector employer is required to have an equal opportunity policy. The law envisages some form of reservation for persons with disabilities, but it is not mandatory for private sector employers.

**(d) Gender?**

Under the Equal Remuneration Act, 1976, an employer must ensure equal treatment for women in the workplace, including parity in payment for equal work.

**(e) Sexual orientation?**

Indian employment law does address sexual orientation. Limited privacy rules include sexual orientation within the scope of sensitive personal data and information.

**(f) Religion?**

Protection against religion or caste-based discrimination is a fundamental right under the Constitution, available against the state. Although this does not apply to private companies, most do not discriminate on the basis of religion.

**(g) Medical?**

Other than the disability-related protection, there is limited protection based on medical grounds. For example, the government, through the National AIDS Control Organisation, has issued a comprehensive HIV testing policy, under which mandatory HIV testing cannot be imposed as a precondition of employment or of providing healthcare facilities during employment. Broadly speaking, an employee should not discriminate based on medical reasons where the medical/health issue is not an impediment to the job profile.

**(h) Other?**

India has laws dealing with affirmative action for certain castes and classes. These do not apply to the private sector. The government has made proposals from time to time to apply them in the private sector, but this has not been implemented.

*Family and medical leave*

**What is the position in relation to family and medical leave?**

Most states prescribe sick leave of up to 12 days. Sick leave generally cannot be carried forward to the following year. In some states, sick leave for more than a few days entitles the employer to request a doctor's certificate.

No specific legislation relates to family leave. Women are entitled to between 12 and 26 weeks of maternity leave, depending on the number of children a woman has, where the woman employee has worked for 80 days in the 12 months preceding her delivery date. Further, women are entitled to between two and six weeks of leave in specified cases, such as miscarriage, medical termination of pregnancy or tubectomy. An additional one month's leave may be available in case of any illness relating to either the delivery of a child or any of the aforementioned circumstances.

There are no provisions for paternity leave in the private sector under Indian law as yet, though a Paternity Benefits Bill 2017 has recently been drafted. Employers can voluntarily grant paternity leave if they wish.

*Harassment*

**What is the position in relation to harassment?**

India has a specific law prohibiting sexual harassment in the workplace. It provides that employers must:

- implement a policy against sexual harassment;
- make an annual filing;
- train employees regularly on such matters; and
- establish a committee to hear sexual harassment complaints. The committee must be chaired by a woman, at least half of its members must be women and must have one independent member who must have expertise in sexual harassment matters or matters relating to women.

Many acts of sexual harassment – including making sexually implicit remarks – also constitute criminal offences under the Indian Penal Code . However, the standards for conduct that amounts to a criminal offence are marginally higher.

There is no codified law on other forms of workplace harassment and employers can choose to establish their own policies in this regard.

*Whistleblowing*

**What is the position in relation to whistleblowing?**

Whistleblowers are protected within the government. Securities laws set out a voluntary whistleblower protection policy for listed companies. India's central bank, the Reserve Bank of India, requires private sector and foreign banks to implement a whistleblower policy that protects employees from retaliation.

## Privacy in the workplace

*Privacy and monitoring*

**What are employees' rights with regard to privacy and monitoring?**

Accessing a computer system without the permission of the network owner or administrator is illegal. In the employment scenario, the employer is the owner of the network. The position is less clear with regard to bring your own device initiatives. It is recommended that employers obtain employee consent before monitoring electronic conduct. Indian law does not otherwise protect employees' rights to privacy with regard to electronic usage.

**To what extent can employers regulate off-duty conduct?**

By and large, the law does not address employers' right to regulate off-duty conduct. Employers typically insist in employment contracts/terms of service that employees cannot work elsewhere and the courts have upheld such provisions. Some employment contracts provide that bringing the employer into disrepute constitutes grounds for disciplinary action. Policies on the use of devices provided by the employer will also apply to use of those devices outside the workplace.

**Are there rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?**

Accessing a computer, computer system or computer network without the permission of the owner or person in charge of the same is illegal. Accessing a computer provided by the employer while it is being used on the employer's network should be acceptable. The law is unclear with regard to accessing password protected social media accounts. It is likely that this would be considered illegal.

There is no prohibition on monitoring employees' social media accounts without logging into those accounts, although employers should beware of certain overbroad provisions on cyberstalking.

## Trade secrets and restrictive covenants

*Intellectual Property*

**Who owns IP rights created by employees during the course of their employment?**

In the case of copyright, the IP rights are owned by the employer. In the case of patents, they are owned by the inventor (employee).

*Restrictive covenants*

**What types of restrictive covenants are recognised and enforceable?**

Non-compete agreements post termination of employment are not enforceable against employees. Non-solicitation agreements post termination of employment have limited enforcement between two organisations, but not against employees. However, the law on non-solicitation agreements is not well developed. It is possible to have employees sign an employee bond – if the employee is provided with substantial training at significant cost, the employer can require him or her to remain with the organisation for a reasonable period. If the employee leaves prior to the expiry of this period, he or she will be required to repay the actual or reasonable costs incurred by the employer for such training.

*Non-compete*

**Are there any special rules on non-competes for particular classes of employee?**

Under Indian law, a non-compete agreement post termination of employment is not enforceable against an employee. This applies to all classes of employee without exception.

## Discipline and grievance procedures

*Procedures*

**Are there specific laws on the procedures employers must follow with regard to discipline and grievance procedures?**

An employer must follow the principles of natural justice when conducting a disciplinary or grievance procedure. Certain federal laws relate to the handling of disciplinary and grievance procedures, such as the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947. In all cases the employee must be provided with the opportunity to be heard and the process should be reasonable and fair. If an establishment has 20 or more 'workmen' (as defined in the Industrial Disputes Act, 1947) under the act, it must establish a grievance redressal committee or a similar mechanism to handle employee grievances.

## Industrial relations

*Unions and layoffs*

**Is your country (or a particular area) known to be heavily unionised?**

No, although certain areas are more unionised than others – for instance, there is more union activity in the manufacturing sector. Union activity in the services sector is negligible, though recent years have seen some movement towards unionisation in the IT sector.

**What are the rules on trade union recognition?**

Indian federal law does not require an employer to recognise a trade union, although there are provisions on the registration of trade unions. Under the Trade Unions Act, 1926, seven or more members of a trade union can apply for registration, provided that at least 10% or 100 employees in the establishment, whichever is less, are members of the trade union. The law also provides for specific criteria to be followed by a trade union. While registration of a trade union is not mandatory, a registered trade union is regarded as a legal entity.

Once a trade union has been registered, it is up to the employer to recognise the trade union. Some states – such as Maharashtra, Kerala and West Bengal – have local laws on the recognition of trade unions. Broadly, most industrial establishments adhere to a voluntary code of discipline which includes criteria for the recognition of trade unions. The code, which was issued at an Indian Labour Conference meeting in 1957, provides for certain criteria to be followed by a trade union in order to be recognised by the employer, such as:

- having at least one year's standing;
- having at least 15% of the membership of the establishment to claim recognition; and
- having 25% of the work force to claim recognition on an industrial basis.

**What are the rules on collective bargaining?**

Under Indian law, a refusal to bargain collectively in good faith with a recognised trade union is an unfair labour practice by the employer.

**Termination**

*Notice*

**Are employers required to give notice of termination?**

In the case of 'workmen' (as defined in the Industrial Disputes Act, 1947), employers must give 30 days' notice for termination for convenience or make a payment in lieu of the notice period. In the case of other employees, most states also provide for 30 days' notice for termination for convenience, with a similar provision for payment in lieu of notice.

*Redundancies*

**What are the rules that govern redundancy procedures?**

For a 'workman' (as defined in the Industrial Disputes Act, 1947) who has completed one year of continuous service, the employer must provide 30 days' notice or payment in lieu, together with the reasons for termination and severance compensation of 15 days for every year worked or a part thereof in excess of six months. Notice must also be given to the government.

In the case of a manufacturing unit, plantation or mine with 100 or more workmen, prior government approval of the termination is required. Further, in such cases the workmen must be given three months' notice or payment in lieu, together with the reasons for termination and severance compensation of 15 days for every year worked or a part thereof in excess of six months.

For other employees, most states also require 30 days' notice or make a payment in lieu of the notice period. A gratuity is payable for each employee who has completed five years of continuous service, at the rate of 15 days for every year worked or a part thereof in excess of six months. Statutory gratuity is usually always payable, unless:

- the employment has been terminated *inter alia* for an act or negligence that has caused loss, damage or destruction to the employer's property; or
- where the employment has been terminated for riotous or violent conduct of the employee or any act involving moral turpitude in the course of employment.

In any of the foregoing cases, gratuity may be forfeited either partially or completely, depending on the incident.

Under the 'last in, first out' principle, which applies to workmen, the employer must first terminate the last workmen to join the organisation in the same role. This rule can be contracted out of. The employer is also required to offer re-employment first to the retrenched worker who is an Indian citizen.

**Are there particular rules for collective redundancies/mass layoffs?**

No specific rules on collective redundancies/mass layoffs exist.

*Protections*

**What protections do employees have on dismissal?**

An employee who is dismissed, whether for cause or convenience, has the right to appeal the dismissal on statutory or contractual grounds before the appropriate authorities – typically, the jurisdictional labour authorities. The grounds for challenging the dismissal include the following:

- the employer has not provided a reason for the termination;
- the dismissal is unfair; or
- misconduct has not been established.

The redressal process usually involves approaching the appropriate labour authorities seeking conciliation as a first step, followed by adjudication if the labour authorities agree that this is required.

**Courts/tribunals**

*Jurisdiction and procedure*

**Which tribunals or courts have jurisdiction to hear complaints?**

Complaints involving industrial disputes fall under the Industrial Disputes Act 1947, which provides for various adjudicatory bodies – including jurisdictional conciliation officers, labour courts and industrial tribunals – to hear and resolve disputes between 'workmen' (as defined in the Industrial Disputes Act, 1947) and management.

**What is the procedure and typical timescale?**

A worker can raise a dispute directly before a conciliation officer in case of dismissal, retrenchment (termination for convenience) or any form of termination of service. If conciliation fails, a report is sent to the appropriate state government through the Ministry of Labour. After considering this report, the Ministry will either refer the dispute for adjudication or refuse to do so.

In all other cases – whether rights disputes (eg, withdrawal of a customary concession or privilege or the illegality of a strike or lock-out) or interest disputes (eg, issues relating to wages, compensation and other allowances or leave) – the dispute must be raised by a trade union or by duly-authorised representatives or by the management where the dispute relates to an act committed by a 'workman' (as defined in the Industrial Disputes Act, 1947) against the employer.

After the matter has been referred to the labour court, the adjudication process begins. At the end of the proceedings, an award is issued by the presiding officer of the court. The Ministry of Labour will publish the award in the Official Gazette within 30 days of receipt of the award. The award becomes enforceable 30 days after publication in the Official Gazette.

The duration of cases is difficult to predict with certainty; they can range from six months to over two years, as litigation in India is quite protracted.

*Appeals*

**What is the route for appeals?**

Appeals against labour court or industrial tribunal decisions are brought before the respective state High Court and then before the Supreme Court of India.

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