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EMPLOYMENT LAW OVERVIEW **INDIA** 2021-2022

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I. GENERAL OVERVIEW

1. INTRODUCTION

The Constitution of India (“Constitution”) is the cornerstone of individual rights and liberties, and provides the basic framework within which all laws in India, including laws relating to labour and employment, must operate. The Constitution guarantees certain fundamental rights to individuals such as the right to life, privacy, equality before the law and prohibition of discrimination in public education and employment on the basis of religion, sect, gender and caste. The Constitution recognises the ‘right to livelihood’ as an integral part of the fundamental right to life.

In addition to fundamental rights, the Constitution also envisages certain ‘directive principles’ which serve as a guide to the legislature towards fulfilling social and economic goals. Given India’s history, social justice has always been at the forefront of a number of Indian regulations, specifically labour and employment laws. It is important to note that several labour laws in India have been designed from a worker emancipation perspective – including those relating to factories, mines, plantations, shops and commercial establishments, as well as those relating to payment of wages, regulation of trade unions, provision of social security, industrial safety and hygiene.

However, given changing economic requirements in recent times, especially in light of the ongoing COVID-19 pandemic, the Indian Government has been increasingly conscious of the needs of businesses as well. In the last 6 months, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big-ticket reforms in the pipeline, which we hope will see the light of day in the near future.

2. KEY POINTS

- Labour and employment laws are listed under the Concurrent List in the Constitution, which means that the Union Parliament (federal legislature) and State Legislatures have co-equal powers to enact laws relating to all labour and employment matters in India. Typically, the Union Parliament enacts a Central law, while the States formulate rules thereunder. Additionally, States often enact standalone legislation as well.
- One of the central principles of Indian labour and employment law is that they distinguish between employees who are defined as ‘workmen’ and those who are in management / supervisory / administrative roles (‘non-workmen’). Most of the legislation regulates the service conditions of workmen, which are subject to far greater statutory protections. The service conditions of non-workmen are typically governed by the terms of the relevant employment contracts and the internal policies of the organisation. Determining whether a particular employee is a workman or not, has to be undertaken on a case-by-case basis.
- India does not generally recognise employment-at-will. Further, in terms of the Indian Contract Act, 1872 (“**Contract Act**”), which is the principal legislation governing contracts in India, agreements that restrain trade, business or one’s profession are void – this could have an impact on employment bonds, and on non-compete and non-solicit covenants in employment contracts.
- Trade unions are typically restricted to the more traditional forms of business, such as

the manufacturing sector; however, in recent times there has been some unionisation in the Information Technology (“IT”) sector as well. The Trade Unions Act, 1926 (“**Trade Unions Act**”) provides for registration of a trade union and the rights and liabilities of a registered trade union. It is also proposed to recognise certain trade unions both at the Central and State Government levels, which would then participate in policy-making.

- The Industrial Disputes Act, 1947 (“**ID Act**”) is the key legislation that governs industrial relations in India. The ID Act aims at securing industrial peace and harmony by providing the process for settlement of industrial disputes arising between two or more employers; between employers and workmen; and disputes among workmen.
- The Equal Remuneration Act, 1976 (“**ERA**”), mandates the payment of equal remuneration to male and female workers who undertake similar tasks. The Contract Labour (Regulation and Abolition) Act, 1970 (“**CLRA**”) is another major legislation that pertains to regulating contract labour in India.

3. LEGAL FRAMEWORK

Given that both the Union Parliament (federal legislature) and State Legislatures have co-equal powers regarding labour and employment laws, there are currently hundreds of laws relating to labour and employment in India, including around 50 statutes enacted by the Union Parliament. Most of these laws concern blue-collar employees or workmen, owing to the historical emphasis on improving working conditions for these employees. On the other hand, the legal structure relating to non-workmen (i.e., employees having managerial duties or white-collar employees) is not as comprehensive and has evolved in recent decades mainly through judicial pronouncements.

A. DIFFERENCE BETWEEN WORKMEN AND NON-WORKMEN

Section 2(s) of the ID Act defines a workman as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward. The definition however excludes the following persons: (i) those who are employed mainly in a managerial or administrative capacity; (ii) those who, being

employed in a supervisory capacity, draw a salary exceeding INR 10,000 (~USD 136) per month or (iii) those who exercise, either by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature.

That said, it is important to note that the wage ceiling of INR 10,000 (~USD 136) mentioned above is not the definitive criterion in respect of ascertaining whether or not a particular employee will be categorised as a workman. There have been multiple occasions when Indian Courts have held that whether an employee is a workman or not depends on the exact nature of the job responsibilities and duties and the context of his/her role in the organisation, rather than merely the compensation package. Determining whether a particular employee is a workman or not, has to be undertaken on a case-by-case basis. It does not depend on the level of education or the designation. Various judicial precedents have laid down that in order to determine an employee’s status as a ‘workman’, the actual, substantial and predominant work being performed by her is decisive, rather than the employee’s remuneration/designation. The other factors that are useful to determine whether an employee is a workman or a non-workman, is by taking into account whether the employee had any managerial responsibilities and whether he had authority to take any decision on behalf of the organisation.

Employees considered to be workmen under the ID Act have several additional rights – for instance, changes to their conditions of service and any termination of their employment can only be undertaken as per the specified process guaranteed under the ID Act. Further, they can approach labour commissioners and/or the industrial tribunals/labour courts in case of any unjustified termination and/or unfair labour practice, on part of the employer.

The terms of service of non-workmen (i.e., those who mainly work in a managerial or administrative capacity) are ordinarily governed by the State-specific shops and establishments legislation (“S&E Act”), the terms and conditions of their contracts of employment and the internal policies of an organisation. Persons occupying managerial and confidential positions in an organisation are exempt from the S&E Act of certain States such

as Karnataka, Andhra Pradesh, Kerala, Madhya Pradesh, Tamil Nadu and Maharashtra, among others. These employees will typically fall outside the scope of the ID Act; there are various judicial pronouncements which have held that non-workmen are not entitled to claim protection under the ID Act.

B. OTHER FACTORS

Apart from the classification of employees into workmen and non-workmen, the applicability of labour legislation also depends on the nature of activity that the employees are engaged in as well as the place of work – for instance, different laws apply depending on whether the place of work is a factory, plantation, mine, shop, or commercial establishment. Certain labour laws also take into account the number of employees engaged at a particular place of work; for instance, the scope and applicability of certain social security benefits varies, depending on the number of employees engaged in an establishment, the wages earned, and the position of the employee at the workplace.

C. OVERVIEW OF KEY LABOUR LAWS

The various labour and employment laws in India can be broadly categorised into two important themes, namely (i) employer-employee relations; and (ii) service or working conditions, such as wages, social security and working hours. Enactments such as the ID Act, the Trade Unions Act, the Industrial Employment (Standing Orders) Act, 1946 (“IESO Act”) and CLRA are focused primarily on employer employee relations, whereas enactments such as the Factories Act, 1948 (“FA Act”), the various S&E Acts, the Payment of Wages Act, 1936 (“Wages Act”), the Minimum Wages Act, 1948 (“MW Act”) and the Payment of Bonus Act, 1965 (“Bonus Act”) are focused primarily on service conditions of employees. There are both Central and State rules framed under each of the aforementioned enactments. In addition, there are enactments such as the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (“EPF Act”), the Employees State Insurance Act, 1948 (“ESI Act”) and the Payment of Gratuity Act, 1972, (“PG Act”) which provide for certain social security benefits to employees.

Industrial Disputes Act, 1947: The scope of this legislation is primarily restricted to workmen alone. However, the principles and processes laid down in this legislation have been replicated in other statutes with wider application. The ID Act inter alia covers industrial disputes, industrial action (i.e., strikes and lockouts), regulation of retrenchment, layoffs, closure, transfer of undertakings, envisages the constitution of works committees and grievance redressal committees, and also regulates changes in certain service conditions of workmen.

Shops and Commercial Establishments Act: The S&E Act is State specific – almost all States in India have enacted their own S&E Act. The S&E Act regulates service conditions of employees engaged in shops and commercial establishments, which includes most private companies and firms. It regulates hours of work, payment of wages, overtime, leave, holidays, and other conditions of service.

Employees Provident Fund and Miscellaneous Provisions Act, 1952: The EPF Act read with all rules and schemes framed thereunder is one of the major social security laws in India. Under the EPF Act, both the employer and employee, subject to certain monetary limitations and conditions, are required to contribute 12% of an employee’s ‘basic wages’ to the Employees Provident Fund / EPF. The employer’s contribution is also directed to a pension fund, from which an employee would be entitled to monthly pension upon retirement. The EPF and pension scheme has extensive rules in relation to contribution and withdrawal of funds. In light of the COVID-19 crisis, the Indian Government had temporarily reduced the above contribution rate to 10 % for the months of May, June and July 2020.

Payment of Wages Act, 1936: The Wages Act regulates the mode and method of payment of wages to certain categories of employees, namely, those to whom the payable wages do not exceed INR 24,000 (~USD 330) per month, and to those employed in factories and industrial establishments. The Wages Act provides that wages must be paid without deductions of any kind except certain authorised deductions, such as taxes on income, fines, or deductions owing to absence from duty.

Factories Act, 1948: The FA Act was enacted to regulate working conditions in factories where manufacturing operations are undertaken. It has extensive provisions with respect to the health, safety and welfare of persons who work in factories, and also regulates the working conditions of persons working in a factory.

Minimum Wages Act, 1948: The MW Act provides for the payment of minimum rates of wages to employees working in specified kinds of employment, termed 'Scheduled Employment'. Under the MW Act, the Government is required to fix industry-specific daily and monthly minimum wages, depending on the skill of the employee. Once minimum wages have been fixed, an employer is required to pay to every employee engaged in Scheduled Employment, wages at a rate that is not less than the minimum rate of wages fixed by the concerned Government for that class of employees.

Industrial Employment (Standing Orders) Act, 1946: The IESO Act is generally applicable to every industrial establishment wherein 100 or more workmen are employed, subject to any specific State rules in this regard. Certain States such as Karnataka, Maharashtra and Tamil Nadu have reduced the applicable threshold. The IESO Act requires employers in industrial establishments to formally define conditions of employment, such as classification of workmen, manner of intimating wage rates, working hours, leave periods, recruitment, shift working, attendance, procedure for availing leave, transfer of workmen, termination of workmen, and inquiries for misconduct. Such conditions are referred to as the 'Standing Orders'. The State specific rules framed under the IESO Act provide for 'Model Standing Orders', which are a set of default conditions applicable to those industrial establishments that have not framed their own Standing Orders or to those industrial establishments that are awaiting certification from the Government on their own Standing Orders. In most cases, the internal employee handbook/service regulations of the employers are generally customised and filed as the Standing Orders of that establishment. The IESO Act however provides that while the Standing Orders adopted by an employer need not necessarily be a duplication of the Model Standing Orders, they should, as far as practicable, be in conformity with the same.

Trade Unions Act: The Trade Unions Act provides for registration of a trade union and the rights and obligations of a registered trade union. The minimum number of persons required to apply for registration of a trade union is 7; however, a trade union cannot be registered unless at least 10% of the workmen or 100 workmen (whichever is lesser, and subject to a minimum of 7 workmen), employed in an establishment are its members. While employers in certain States are not legally bound to recognise trade unions or encourage collective bargaining, a registered trade union can enter into collective bargaining agreements with the employer for better wages and service conditions.

Contract Labour (Regulation and Abolition) Act, 1970: The CLRA provides for regulation of contract labour in establishments and provides for its abolition in certain circumstances. A 'workman' is deemed to be 'contract labour' if he is hired in connection with the work of an establishment, by or through a 'contractor', with or without the knowledge of the 'principal employer'. The term contractor is defined to mean a person who undertakes to produce a given result for an establishment through contract labour or who supplies contract labour for any work of the establishment. The manager or occupier of the establishment is the principal employer. Under the CLRA, every principal employer is required to make an application in the prescribed form, for the registration of the establishment with the labour authorities. Every contractor under the CLRA Act must also be licensed and should undertake work through contract labour only in accordance with such license. The contractor is required to pay wages and provide facilities for the welfare and health of the contract labour, which includes providing rest rooms, canteens, wholesome drinking water, toilets, washing facilities, and first aid facilities in every establishment. The above compliances vary depending on the number of contract labour engaged in an establishment. It is important to note that as per the CLRA, in case the contractor fails to pay wages to the contract labour, the principal employer will be responsible for the same.

4. NEW DEVELOPMENTS

A. CODIFICATION OF LABOUR LAWS

As part of a major rationalising and simplifying exercise, India has consolidated about 29 of the 44 Central laws into 4 comprehensive labour codes: Code on Wages, 2019 (“Code on Wages”); the Occupational Safety, Health and Working Condition Code, 2020 (“OSHW Code”); the Industrial Relations Code, 2020; (“IR Code”); and the Code on Social Security, 2020 (“Social Security Code”).

B. CODE ON WAGES

The Code on Wages was notified by the Ministry of Law and Justice in 2019. The Central Government has notified very few of the provision of the Code on Wages. However, it is yet to notify the other provisions of the Code on Wages. The Code on Wages subsumes and amends the following Central labour laws: the Wages Act; the MW Act; the ERA; and the Bonus Act. Further, on 7 July 2020, the Indian Ministry of Labour and Employment published the draft Code on Wages (Central) Rules, 2020 for seeking input from the stakeholders. These rules inter alia, prescribe the process and fixation method of calculating the minimum rate of wages, procedures for making payments, the process of constituting the Central Advisory Board for the purpose of fixing the floor wage, procedures for the deduction of wages and recovery, etc.

C. CODE ON SOCIAL SECURITY

The Social Security Code has been passed by both houses of the Indian parliament and received the President’s assent on 28 September 2020. However, the Social Security Code will enter into force (and likewise become enforceable) on a date yet to be notified by the Central Government. The Social Security Code will subsume the following Central labour laws: the Employees’ Compensation Act, 1923; the Employees’ State Insurance Act, 1948; the EPF Act; the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959; the Maternity Benefit Act, 1961; the PG Act; the Cine Workers Welfare Fund Act, 1981; (h) The Building and Other Construction Workers Welfare Cess Act, 1996; and the Unorganised Workers’ Social Security Act, 2008. One of the most important aspects of the Social

Security Code is that it includes within its ambit, certain non-traditional types of occupations/ workers such as gig workers, platform workers and unorganised workers, and makes provisions for providing social security benefits to them.

D. INDUSTRIAL RELATIONS CODE, 2020

The IR Code has been passed by both houses of the Indian Parliament and received the President’s assent on 28 September 2020. However, it shall come into force and become law on a date yet to be notified by the Central Government. The IR Code shall subsume the following Central labour laws: the ID Act; the IESO Act; and the Trade Unions Act. The applicability of the IR Code (and its Chapters thereof) on industrial establishments depends on various factors, such as the number of workers in an industrial establishment, as well as the nature and type of the industrial establishment.

The IR Code has introduced certain key changes to the current labour law. The IR Code has widened the scope of the term worker to include persons employed in a supervisory category, earning wages up to INR 18,000. Currently, the ID Act defines the term ‘workman’ to, inter alia, include persons in a supervisory category, earning wages up to INR 18,000. Significant changes with respect to the retrenchment process of workers have also been made. In regard to declaring a strike, the IR Code requires workers to give their employer a prior 14 days’ notice before going on strike. This requirement under the ID Act was limited to employers carrying out a public utility service. The IR Code also makes provisions for the recognition of trade unions. Further, penalties under the IR Code have increased significantly.

E. OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020

The OSHW Code aims to consolidate and amend the legislation that currently regulate occupational safety, health and working conditions of individuals employed in establishments, while providing the required flexibility for making necessary rules and regulations with respect to the subject matter thereof. The OSHW Code has been passed by both

houses of the Indian Parliament and received the President's assent on 28 September 2020. However, it shall come into force (and become enforceable) on a date yet to be notified by the Central Government.

The OSHW Code will subsume the following Central labour laws: the FA Act; the Mines Act, 1952; the Dock Workers (Safety, Health and Welfare) Act, 1986; the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; the Plantations Labour Act, 1951; the CLRA; the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; the Working Journalist (Fixation of Rates of Wages) Act, 1958; the Working Journalist and Other Newspaper Employees (Conditions of Service and Miscellaneous Provisions) Act, 1958; the Motor Transport Workers Act, 1961; the Sales Promotion Employees (Conditions of Service) Act, 1976; the Beedi and Cigar Workers (Conditions of Employment) Act, 1966; and the Cine Workers and Cinema Theatre Workers Act, 1981. The OSHW Code is applicable to all 'establishments' including: places where an industry, trade, business, manufacturing or occupation is carried out; motor transport undertakings; newspaper establishments; audio-video productions; building and construction works; and plantations, provided that there are a minimum of 10 workers employed in such places of work.

The OSHW Code is also applicable to establishments engaged in hazardous/life threatening activities, mines or ports, regardless of the number of workers engaged therein. With respect to factories, the OSHW Code applies to: i) factories wherein 20 or more workers are engaged in the manufacturing process carried out with the aid of power; ii) factories wherein 40 or more workers are engaged in the manufacturing process carried out without the aid of power.

The OSHW Code imposes certain new obligations on employers, such as the obligation to conduct free health checkups for a certain class of employees, duty to issue appointment letters to every employee, and an obligation to report certain accidents and diseases. Further, the employer shall also provide separate bathing places and locker rooms for male, female and transgender employees.

F. TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The Transgender Persons (Protection of Rights) Act, 2019 ("Transgender Act") entered into force in December 2019. The Transgender Act aims to provide for the protection of rights of transgender persons and their welfare, and for matters connected therewith. Amongst other provisions, the Transgender Act prohibits discrimination against a transgender person, including unfair treatment in relation to employment as well as discrimination in matters connected with employment (recruitment and promotion), etc. Employers are also required to designate a complaint officer, who shall be responsible for dealing with complaints with respect to violations of the Transgender Act and shall also ensure compliance with the same.

G. LABOUR LAW REFORMS IN LIGHT OF COVID-19 CRISIS

Several States, such as Andhra Pradesh, Bihar, Punjab, Rajasthan and Karnataka have issued ordinances to relax the applicability of the ID Act to certain establishments, such that provisions relating to layoffs, retrenchment, closure of certain establishments, wherein the number of workmen employed is not less than one hundred, has recently been increased to three hundred workmen. In addition to the above, some States have introduced changes in the retrenchment compensation, which was previously calculated as fifteen days' average pay for every completed year of continuous service, or any part thereof in excess of six months.

II. HIRING PRACTICES

1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Once foreign companies set up an entity in India, they often prefer to appoint employees from their home country or headquarters for the management and control of the Indian business. This is done mainly for the convenience of co-ordination with the parent company in terms of decision-making, financial management and other business matters. This movement of employees could be undertaken by way of secondment or transfer. There are three broad considerations that must be kept in mind, in either of the approaches: (i) income tax issues; (ii) social security contributions; and (iii) visa considerations.

A. INCOME TAX ISSUES

It is imperative that any secondment/transfer of employees be structured appropriately, so as to minimise any permanent establishment risks for the foreign entity in India. Also, the tax treatment of any service fee paid/reimbursement of expenses by the Indian entity to the foreign company must be analysed well in advance given that this area has often been the subject of scrutiny by tax authorities. Further, the tax position of the individual in India must also be examined – this would depend on his/her tax residential status as specified under the Income tax Act, 1961 (“ITA”). In terms of the ITA, an individual is said to be resident in India if he/she has been physically present in India for a period of 182 days or more in the relevant financial year. However, the Finance Act of 2020 has reduced the abovementioned time period to 120 days for Indian citizens and person of Indian origin with a total income, other than income from foreign sources, of more than INR 1.5 Million (~USD 20,453)

Indian tax residents are subject to tax in India on their global income, while non-residents are subject to tax only on income that is received/deemed to

be received in India, or income accrues or arises/ deemed to accrue or arise to them in India. There are certain other tax exemptions prescribed under the relevant Double Taxation Avoidance Agreement executed between India and the concerned host country.

B. SOCIAL SECURITY CONTRIBUTIONS

It is important to note that the EPF Act also extends to a category of employees called ‘international workers’ (“IW”). An IW is defined both in an inbound (i.e. in the context of foreign employees coming to India) and outbound context (i.e. Indian employees going abroad). An IW (inbound) is a person who holds a passport other than an Indian passport and comes to work for an Indian establishment that is covered under the EPF Act. It is important to note that the EPF Act makes no distinction between a foreign worker on deputation to India and a foreign worker who is transferred to India. All IWs (inbound) are required to contribute to the EPF, unless they are ‘excluded employees’. Exclusion from EPF contributions is only granted if the IW contributes to a social security program in his/her host country which has executed a social security agreement (“SSA”) with India.

There are certain significant differences between EPF contributions in respect of IWs (inbound) and domestic employees. For instance, such IWs are required to contribute to the EPF on their ‘full salary’ and not merely ‘basic wages’. There are also differences in case of timing and manner of withdrawal of EPF contributions.

C. VISAS

Business visas to India are given strictly only for ‘business purposes’, such as sales or establishing contact on behalf of the foreign company in India. Like most other jurisdictions, business visas in India cannot be used for any direct revenue generating work or employment in India. There is a separate

employment visa category for employees coming to work at an Indian establishment, which is granted based on the sector and the term of the assignment. There are certain additional conditions prescribed in this regard, including that the foreign national must draw a salary in excess of USD 25,000 per annum. Foreign nationals, including their family members, who intend to stay in India for more than 180 days, must register with the Foreign Regional Registration Office ("FRRO") within 2 weeks of arrival in India. For the purposes of registration, the individual is required to make an application in the prescribed form and be present in person at the time of registration.

2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers may often have requirements wherein they might need to engage a sales person, representative or agent in India, even though they may not have a place of business in India. Also, the foreign employer may not intend to immediately generate any revenue in India. In such a scenario, the foreign employer need not mandatorily set up a local entity in India. There are various methods through which the foreign employer may engage/hire representatives or an agent in India depending on the exact business requirements.

A. ENGAGEMENT OF THE REPRESENTATIVE OR AGENT THROUGH A MANPOWER AGENCY

This is a model where the foreign employer enters into an arrangement/agreement with a manpower agency in India, which would provide certain services to the foreign employer through identified employees of the manpower agency. However, the manpower agency would be required to satisfy the following obligations as part of the arrangement: i) processing of salaries for the identified individuals; and ii) undertaking all legal compliances for the identified individuals on account of being their employer, including under all Indian employment laws and taxation laws.

B. ENGAGEMENT OF THE REPRESENTATIVE OR SALES PERSON AS AN INDEPENDENT CONTRACTOR

Here, the arrangement between the representative and the foreign employer will be that of a 'contract for services'. A contract for services implies an agreement wherein one party undertakes to provide services to or for another in the performance of which he is not subject to detailed direction and control, but exercises professional or technical skill and uses his own knowledge and discretion as appropriate. Such independent contractors would typically not be entitled to any social security benefits (as they will not be considered employees) and would have to pay their own taxes in India. However, it is important to note that in the event the foreign employer engages personnel in India by way of method 1 or 2, there is a risk of the foreign employer having a permanent establishment in India; accordingly, this arrangement would have to be structured appropriately and the tax implication with respect to the same will need to be identified.

3. LIMITATIONS ON BACKGROUND CHECKS

Employers are increasingly conducting background checks to guard against inaccurate resumé, overstated work experience and any employee behavioral issues. Typically, employers issue an offer letter, conduct background checks, and expressly state that the person's employment with the organisation is contingent upon his/her clearing the background checks, and vetting of educational and job qualifications. However, the permission of the concerned employee would be required to conduct a background verification. In terms of the Information Technology Act, 2000 and Information Technology (Reasonable Security practices and procedures and sensitive personal data and information) Rules, 2011 ("IT Rules"), which is the governing legislation on data protection, any company collecting, using, or disclosing any personal information of an employee/prospective employee, will require such person's consent. Further, the employer's compliance requirements under the Personal Data Protection Bill, 2019, which is likely to come into effect in 2021, will need to be examined for purposes of conducting background checks on employees.

4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Given Constitutional safeguards against discrimination on the grounds of religion, race, caste, sex, and place of birth, it is imperative that employers bear these principles in mind while conducting background verifications and job interviews. Excessively personal questions are generally not advisable. The IT Rules apply to the collection of personal information during background verifications and during the interview process as well. In terms of the IT Rules, at the time of application, the employer must inform the concerned person of: i) the fact that his/her personal information is being collected; ii) the purpose for which the information is being collected (i.e. verification of credentials); and iii) the intended recipients of the information (i.e. the employer and/or the third-party service provider who conducts background checks).

The IT Rules further state that where any Sensitive Personal Data or Information (“SPDI”) is sought to be collected (such as passwords, financial information, bank account or payment instrument details, details of health conditions, sexual orientation, medical records and history), the same can be collected only for a lawful purpose connected with a function or activity of the company, and the collection of this information must be necessary to achieve such purpose. This purpose must be notified to the prospective employee in the application/background verification form/ during an interview, and his/her consent must be obtained. It may be noted that the IT Rules permit a person to withdraw consent at any stage, in which case the company would be required to return the SPDI and not store or transfer the same any further. The IT rules prescribe certain additional safeguards for collecting, storing, processing, and transferring SPDI; for instance, the IT Rules state that any SPDI collected by a company cannot be stored/retained longer than required for the purpose of its collection, except under any applicable law.

Apart from the above, it may be noted that Indian labour and employment laws are largely silent as to the process of selection and hiring of employees in the private sector. In any case, as market practice,

most employers in India conduct at least basic (education, job history) background verification of prospective employees in accordance with the IT Rules and/or ask prospective candidates to disclose specific information as a condition precedent to the employment relationship.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

While the current labour laws in India do not strictly require that an employment contract be in writing, it is predominant market practice (with very rare exceptions) to have all terms and conditions of employment agreed and signed by both parties. A few States however, have specific legislation that necessitate a written contract in order to establish an employer-employee relationship. From the perspective of certainty and enforceability, it is strongly recommended that all employment contracts be in writing, whether as a simple appointment letter or a fully detailed contract, setting out relevant terms and conditions agreed to between the employer and employee. Employment contracts are governed by the Contract Act; accordingly, provisions stipulated therein with respect to parties being competent to contract, consideration, and validity, would be applicable to employment contracts as well.

Employment contracts in India are generally considered to be 'unlimited term' contracts, (i.e. contracts that are valid until termination or superannuation, unless specifically identified as a 'fixed term' contract). Some of the common provisions included in an employment contract are: i) location, description and title of the job; ii) date of commencement, duration (whether fixed term or unlimited term) and type (whether part-time or full-time) of the job; iii) details of any probationary period; iv) leave entitlement; v) salary details and other benefits; vi) terms governing termination of employment; vii) restrictive covenants; and viii) governing law and dispute resolution.

As discussed above, it is important to note that for 'workmen', some employment terms and certain service conditions can only be changed with 21

days' prior written notice (for certain States like West Bengal, Telangana and Andhra Pradesh, the above notice requirement is 42 days). If any workman challenges the proposed changes before the labour courts during this period, it is likely that the said change will be suspended, pending resolution of the dispute by the court.

2. FIXED-TERM /OPEN-ENDED CONTRACTS

Fixed-term employment contracts are permitted in India, as long as the employer is employing the person for a short-term requirement. The Government has recently stated that fixed-term contracts will be permitted across sectors; earlier, they were expressly permitted only in the apparel manufacturing sector. However, it is unlikely that employers will be able to convert existing permanent positions into fixed-term employment positions.

In the context of fixed-term employment contracts, the Indian judiciary has consistently held that successive fixed-term contracts cannot be used as a substitute for employing the person on a 'permanent' or 'unlimited term' basis and that fixed-term employment is not to be used in job roles or functions that are permanent in nature, as far as the particular employer or industry is concerned. Fixed-term employment contracts may be signed directly between the employer and employee or created through use of a contractor under the provisions of the CLRA. Expiry of a fixed term contract will typically not be considered 'retrenchment' under the provisions of the ID Act; thus, the compliances pertaining to retrenchment would not have to be undertaken in this case.

3. TRIAL / PROBATION PERIOD

Indian law permits new employees to be placed on a trial or 'probation' period. Such period is meant to provide employers the opportunity to assess the abilities and suitability of the employee to the organisation; and hence, by definition, allow the employer greater freedom to terminate employment if the employee is found unsuitable during the probation period. The IESO Act envisages a probation period of 3 (three) months – this is largely followed by companies that are not subject to the IESO as well. The general market trend in India is to have a probation period between 3 and 6 months, especially in the technology and services sectors.

During the probation period, the employer will usually have the right to terminate employment of the probationary employee without providing any notice; however, this would be subject to the stipulations of the concerned S&E legislation as well. At the end of the probation period, the employee may be 'confirmed' as a permanent employee or dismissed. Terms with respect to an employee's probation period should be adequately captured under his/her employment agreement/appointment letter.

4. NOTICE PERIOD

In terms of Indian labour legislation, 'workmen' who have undertaken at least 1 year of continuous service are entitled to a notice period of 1 month, or equivalent wages in lieu thereof. In addition, the employer would be required to pay 'retrenchment compensation' to the workman, which is calculated at the rate of 15 days' wages for every completed year of service. Further, for industries having more than 100 workmen (300 workmen in certain States), the above notice period requirement may differ and there may be certain other compliances with respect to undertaking a retrenchment exercise. However, no notice period (or payment in lieu thereof) or payment of retrenchment compensation is required in the case of workmen dismissed for misconduct, provided the employer conducts an internal inquiry prior to such dismissal.

Additionally, any notice period prescribed under the relevant S&E Acts, as well any requirements under the relevant employment contract in this regard would have to be taken into account. Given that India does not recognise the employment at-will doctrine, judicial precedents have held that termination of employment without providing any prior notice would render the contract of employment as an 'unconscionable bargain', and hence illegal.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Requirements in this regard are principally stipulated in the concerned S&E Acts, the FA Act, the IESO Act and the CLRA. The S&E Acts have stipulations relating to working hours, overtime, intervals of rest, provision of basic amenities such as drinking water, toilets, first aid facilities, etc., for employees at shops and commercial establishments. The Standing Orders formulated as per the IESO Act also have stipulations with respect to work timings, leave, overtime, holidays, for industrial establishments engaging more than 100 workmen (the threshold may be different for certain States).

The FA has extensive provisions in respect to the health, safety and welfare of workers engaged in manufacturing establishments – these compliances vary depending on the number of workmen engaged. For instance, in industrial establishments where 250 or more workmen are employed, the employer has to provide for a canteen. Suitable shelters or rest rooms, and lunchrooms with drinking water facilities are to be provided where 150 workmen are employed. Factories wherein 30 or more women workers are ordinarily employed, are to be equipped with creche facilities/nurseries for children under the age of 6 years. There are also provisions regarding toilets, washing places, temperature control mechanisms, adequate ventilation, lighting in the workrooms, painting of factory walls, doors and windows, cleaning of floors, effective removal of dirt and refuse, etc. The FA Act envisages certain precautions to be taken against explosives, inflammable gases, dangerous fumes and gases and fire.

Under the CLRA Act, the contractor is required to provide certain facilities, which include rest rooms,

child nursery facilities, canteens, wholesome drinking water, toilets, washing facilities, and first aid. It is pertinent to note that if the contractor does not provide these facilities, the onus would fall on the principal employer.

2. SALARY

Although the words ‘wages’ and ‘salary’ are commonly used interchangeably, there is a discernible difference between the two. The term ‘wages’ is used under labour/employment laws to refer to any and all remuneration and emoluments earned by an employee (excluding certain allowances and bonuses) whereas the term ‘salary’ is used under income tax law to denote the total taxable income received by an employee. It is important to note that currently, different labour laws have dissimilar definitions of wages. However, the same is likely to be remedied under the Code of Wages, which provides for a uniform definition of wages, which would then have to be closely examined.

For instance, the EPF Act refers to ‘basic wages’ which is used as the base for computing employee and employer social security contributions. Basic wages are defined as all payments which are earned by an employee in accordance with the terms of the employment contract, but does not include: i) the cash value of any food concession; ii) any dearness allowance (i.e. cash payments paid on account of a rise in the cost of living), house-rent allowance, overtime allowance, bonus, commission or any other similar allowance; and iii) any presents made by the employer.

The Wages Act on the other hand, has a much wider definition of wages; here ‘wages’ is defined as all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed, which

would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment and includes: i) any remuneration payable under any award or settlement between the parties or order of a Court; ii) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period; iii) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name); iv) any sum which by reason of termination of employment is payable under any law, contract or instrument; and v) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force.

The following are excluded: i) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court; ii) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government; iii) any contribution made by the employer to any pension or provident fund, and the interest accrued thereon; iv) any travelling allowance or the value of any travelling concession; v) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or vi) any gratuity payable.

3. MAXIMUM WORKING WEEK

This would be subject to stipulations in the State specific S&E Acts in cases of shops and commercial establishments and the FA Act for establishments in the manufacturing sector. As a general principle, employees cannot be required to work in any establishment for more than 9 hours a day or 48 hours a week, without attracting overtime payments. In order to overcome the economic crisis in times of pandemic, certain States have increased the permissible limits of working hours for employees, subject to certain conditions and restrictions.

4. OVERTIME

As described above, employees working longer than 9 hours a day or 48 hours a week are typically entitled to overtime payments. An employee working 'overtime' becomes entitled to wages at the rate of twice his/her ordinary rate of wages and could also be entitled to a compensatory time off. This would however have to be analysed further; given that there are some States which also prohibit overtime work, except in limited circumstances.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

An employer's health and safety obligations towards its employees are far more extensive in the manufacturing sector and in certain other sectors such as mines and building and construction. The various State-specific S&E Acts have special provisions with respect to ensuring safety of women who work during night shifts. Employers in such cases are required to ensure that adequate security and transport facilities are provided (at their own cost) to female employees.

As described above, the FA Act read with State specific rules thereunder has elaborate provisions regarding health and safety of workmen. These stipulations include maintaining cleanliness, disposal of wastes and effluents, provision of clean drinking water and toilets, ensuring a temperature control mechanism so as to prevent any injury to health of workmen, ensuring adequate lighting and ventilation, measures to prevent inhalation of dust and fumes, regulation of artificial humidification, measures to prevent overcrowding on factory premises, construction and proper maintenance of floors, stairs, passages and ensuring that they are obstruction free for the safety of the workers, fencing of dangerous machinery, providing suitable gear or appliances, driving belts and other safety devices. The FA Act also envisages precautions to be taken against explosives, inflammable gases, dangerous fumes, gases and fire. Non-compliance

with provisions of the FA attracts both monetary penalty and imprisonment.

In addition, the ESI Act and the Employees Compensation Act, 1923 (“ECA”) also address compensation and other benefits that the employer must provide employees in contingencies such as maternity, temporary or permanent physical disablement due to injury arising in the course of employment that results in loss of wages or earning capacity, death due to employment injury, as well as medical care to workers and their immediate dependents.

Given changing economic requirements in recent times, especially in light of the ongoing COVID-19 pandemic, the Indian Government has been increasingly conscious of the needs of businesses as well. In the last 6 months, the Indian Government has already brought in certain significant changes in labour laws with the aim of improving the ease of doing business in India. Further, there are several other big-ticket reforms in the pipeline, which we hope will see the light of day in the near future.

B. COMPLAINT PROCEDURES

In the terms of the ISEO Act, employees are required to frame grievance redressal mechanisms to address individual worker complaints. Also, under the FA where there are 20 or more workmen, a grievance committee is to be constituted in the manner prescribed. In any case as a general practice, most employers do have an internal complaint mechanism that details the processes employees must follow, in case of any workplace related issues. It is also important to note that India has a standalone legislation pertaining to sexual harassment at the workplace – the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“SHW Act”) – which prescribes a detailed complaint mechanism for instances of sexual harassment, that all Indian establishments must adhere to.

C. PROTECTION FROM RETALIATION

India does not have extensive provisions regarding protection of employee complainants / whistleblowers, that apply to establishments in the private sector. However, the SHW Act stipulates that during the pendency of any inquiry,

companies must take interim measures to protect the complainant from any retaliation at the workplace. Most employers do have stipulations in their employee handbooks / internal policies that address employee complaints and protection from any retaliation in this regard.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

In the context of private sector employment, India currently does not have a comprehensive legislation that addresses workplace discrimination, except in relation to sexual harassment and in the context of persons with disabilities and with HIV, and in the context of protection of transgender persons from discrimination under the Transgender Act.

Further, there are principles set out by the Indian judiciary that seeks to protect employees from discrimination and harassment at the workplace. It is also important to note that most new-age employers in India already cover these subjects comprehensively as part of their internal policies/employee handbook.

A. SHW ACT

As discussed above, the SHW Act provides for a detailed complaint and inquiry mechanism in case of sexual harassment complaints at the workplace. Though it is not an anti-discrimination legislation per se, the SHW Act recognises that women may be especially vulnerable to workplace discrimination and harassment – thus, the scope of the SHW Act only extends to complaints raised by ‘aggrieved women’ that pertain to the ‘workplace’ (it is important to note that the SHW Act is not a gender-neutral legislation). That said, several companies do frame gender neutral policies on both general and sexual harassment. The SHW Act requires an employer to formulate an anti-sexual harassment policy for the effective redressal of complaints pertaining to sexual harassment.

The SHW Act defines the terms ‘sexual harassment’ broadly to include any of the following unwelcome acts or behavior: i) physical contact and advances; or ii) demand or request for sexual favors; iii) making sexually colored remarks; or iv) showing pornography; v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

In addition, the SHW Act also identifies certain circumstances which, if occurring in conjunction with sexual harassment (as defined in the SHW Act), would provide strong evidence that an offence has been committed. Such circumstances are: i) implied or explicit promise of preferential treatment in employment; or ii) implied or explicit threat of detrimental treatment in employment; iii) implied or explicit threat about present or future employment status; or iv) interference with work or creating an intimidating or offensive or hostile work environment; or v) humiliating treatment likely to affect one’s health or safety. It is important to note that the protections provided under the SHW Act extend beyond the parameters of the traditional employee-employer relationship. For example, the ‘aggrieved woman’ need not necessarily be an employee - she could be any woman who may be subject to sexual harassment at a workplace. The term ‘workplace’ is also defined broadly to include not only the usual place of employment, but any place visited during the course of employment, including any transportation provided by an employer. Further, as working from home has become the new norm amidst the COVID-19 pandemic, the ambit of the term ‘workplace’ has also been expanded.

B. OTHER LEGISLATION

Other laws address workplace discrimination issues in the private sector by prohibiting acts such as: i) refusal of / obstructing employment solely on

the grounds of a person belonging to a socially backward community; ii) deducting salary or dismissing women employees while on maternity leave; iii) payment of unequal wages to men and women employees performing similar tasks; iv) discriminating against persons with disability (as prescribed under the Rights of Persons with Disabilities Act, 2016 (“RPD”)); v) discriminating against persons with HIV, as further provided under the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention And Control) Act, 2017 (“HIV Act”); vi) discriminating against transgender persons in relation to matters associated with employment, such as recruitment, termination, promotion, etc. as prescribed under the Transgender Act. The recent trend is that most companies, irrespective of size, have far more strict internal policies with reference to the workplace discrimination issues, than what is required under various statutes.

It is also pertinent to note here that the ID Act prohibits commission of certain ‘unfair labour practices’, which include: discrimination against any workman for filing charges or testifying against an employer in any inquiry or proceeding relating to any industrial dispute or discriminating against workmen by reason of their being members of a trade union and/or showing favoritism or partiality to one set of workers regardless of merit.

There have also been attempts by the Central and State Governments to introduce ‘quotas’ / reservation of posts in the private sector, for members of particular socially backward communities. However, this has been resisted in the past, and it is unlikely that such measures will be implemented in the future due to its sensitivity and other contemporary political and sociological circumstances.

2. EXTENT OF PROTECTION

India currently does not have a single comprehensive legislation on discriminatory practices at the workplace; instead, there are various laws that prohibit certain kinds of discriminatory practices and protect the interests of vulnerable communities such as workmen, women, persons with HIV and AIDS, persons with disabilities, transgender persons and members of certain socially backward classes. For instance, with respect to women, the ERA

stipulates that male and female employees who perform similar tasks must be paid equal wages, and also mandates that employers are prohibited from discriminating against women in matters of recruitment, promotions and transfers. The Code on Wages, which has yet to come into force, also grants similar protections to employees. Further, women employed in labour intensive industries such as factories and construction sites, can work fewer hours than male employees. The MB Act also has stipulations protecting women from dismissal, while on maternity leave.

Under the RPD, the head of the establishment has the responsibility of ensuring that persons with disabilities are not discriminated against. In case any complaint is received in this regard, the head of the establishment shall either initiate action in the manner specified under the RPD / inform the concerned person as to how the ‘impugned act or omission is a proportionate means of achieving a legitimate aim’.

Under the Transgender Act, establishments are prohibited from discriminating against any transgender person with respect to matters related to the employment of such persons. The Transgender Act also requires an establishment to designate a complaint officer who would be responsible for the redressal of complaints pertaining to violations of the Act. The Transgender Act also requires an employer to provide the necessary facilities to transgender persons.

3. PROTECTIONS AGAINST HARASSMENT

A. SHW ACT PROCEDURES

Every employer is required to constitute an Internal Complaints Committee (“ICC”) that will inquire into sexual harassment complaints. The ICC shall consist of: (i) a presiding officer who will be a senior women employee; (ii) at least 2 employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge; (iii) an external member from amongst non-governmental organisations or associations committed to the cause of women or an external counsel familiar with issues relating to sexual harassment. This external counsel can either

be a social worker with at least five years' relevant experience or a person familiar with labour, service, civil or criminal law. At least half of the ICC members shall at all times be women, and the term of the ICC members shall not exceed 3 years.

The broad process followed by an ICC will be as follows: (i) Upon receipt of a complaint, if the complainant is agreeable, the ICC may attempt to settle the matter by way of conciliation. If a settlement is arrived at, the ICC need not conduct an inquiry; (ii) If the ICC conducts an inquiry, it should be conducted as per the general rules of the organisation and in accordance with principles of natural justice. A quorum of 3 ICC members is required for conducting the inquiry, which has to be completed within 90 days. In the course of conducting the inquiry, the ICC is vested with the powers of a civil court under Indian laws. Accordingly, the ICC can summon and enforce the attendance of any person and examine him/her on oath, and also require the discovery and production of documents. The parties cannot, at any stage, bring in a legal practitioner to represent them before the ICC; (iii) Upon completion of the inquiry, the ICC shall prepare a report with its recommendations, and submit the same to the employer within a period of 10 (ten) days. It is imperative that the ICC records detailed reasons for arriving at its conclusion and recommendations. The management is required to act upon the ICC recommendations within 60 days from receipt of the inquiry report.

While inquiry proceedings are ordinarily conducted face-to-face, with parties and witnesses physically appearing for the meeting, in certain circumstances, especially during the on-going pandemic, the ICC may allow the parties or witnesses to appear through video conference or by telephonic means, subject to certain conditions and considerations.

The SHW Act also prescribes other obligations of an employer, including conducting periodic training and ensuring that the workplace has adequate safety arrangements.

B. GENERAL HARASSMENT

Cases of general harassment (provided they are not criminal offences under the Indian Penal Code, 1860) are typically governed by the establishment's

internal policies, provisions of the IESO Act, and stipulations under the FA that mandate the setting up of a grievance redressal committee. Typically, the internal policies clearly stipulate the conduct that would amount to harassment, the manner of conducting an internal inquiry and nature of disciplinary action that would be undertaken, depending on the seriousness of the conduct.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

This is again governed mainly by the internal policies of an organisation – however, the SHW Act, the RPD and HIV Act have certain stipulations in this regard. In terms of the RPD, employers are required to ensure compliance with certain accessibility standards, such as: (i) standards for public buildings as specified in the 'Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons With Disabilities and Elderly Persons' as issued by the Government of India; (ii) standards for Bus Body Code for transportation system as specified in the relevant Government of India notification; (iii) website standards as specified in the guidelines for Indian Government websites, as adopted by Department of Administrative Reforms and Public Grievances, Government of India; (iv) ensuring that the documents to be placed on websites are in the Electronic Publication (ePUB) or Optical Character Reader (OCR) based pdf format.

Under the HIV Act, every establishment engaged in healthcare services and those where there is a significant risk of occupational exposure to HIV, is required to ensure a safe working environment. In terms of the SHW Act, employers have the obligation to provide a safe working environment which shall include safety from persons coming into contact at the workplace.

5. REMEDIES

Each of the statutes listed above have a different mechanism, and also penalties in case of non-compliance by employers – these penalties extend to monetary fines, imprisonment and even

cancellation of any Government registration for carrying out their business.

For instance, if an employer commits any 'unfair labour practice' as defined under the ID Act, workmen have the right to approach the concerned labour court / industrial tribunal. In terms of the SHW Act, women employees can approach the ICC / file a complaint on a portal (www.shebox.nic.in). In terms of the RPD, persons with disabilities can also approach the Central / State Commissioner for Disabilities.



VI. PAY EQUITY LAWS

1. EXTENT OF PROTECTION

In India, the Equal Remuneration Act, 1976 or the ERA mandates the payment of equal remuneration to male and female workers undertaking similar tasks or work of a similar nature. The ERA also provides for the prevention of discrimination on grounds of sex against women in matters connected with respect to employment, such as recruitment, promotion, etc. This legislation not only provides women with a right to demand equal pay, but also holds employers accountable for any violation of the ERA.

While the ERA extends protective provisions in favor of women, the Code on Wages has taken a gender-neutral approach and prohibits discrimination on the grounds of gender in matters relating to wages.

The principle of 'equal pay for equal work' has also been enumerated under Article 39 (d) of the Indian Constitution, which requires the State to strive for securing equal pay for equal work, for both men and women.

2. REMEDIES

Under the ERA, an employee has the right to file a complaint with the concerned labour authorities with respect to contravention of the provisions of the ERA on the part of the employer, or for claims that arise out of non-payment of wages, at equal rates, to men and women. The appropriate labour authority, after verifying the merits of the case, may initiate an inquiry into this matter and take the appropriate action (as it may deem fit).

Further, under the ERA, employers are required to maintain registers which should contain the particulars of the remuneration of its employees. The inspector appointed under the ERA has the right, at any point in time, to inspect the register if there is any suspicion of a violation of the ERA on the part of the employer, or if a complaint has

been filed by an employee, alleging violations of the provisions of the ERA.

3. ENFORCEMENT/ LITIGATION

Over the years, the principle of equal pay for equal work has evolved through judicial precedents. Indian Courts have held that discrimination based on gender only arises when men and women perform the same work or work of a similar nature. For differences in educational qualifications or for those relating to responsibility, reliability or confidentiality, the principle of equal pay for equal work would not apply.

The constitutional principle of 'equal pay for equal work' has been upheld by Indian Courts with respect to temporary employees' vis-à-vis permanent employees in the government sector, where temporary employees performing similar duties and functions as permanent employees, are entitled to draw wages at par with similarly placed permanent employees. The principle is required to be applied in all cases where the same work is being performed, irrespective of the class of employees.

VII. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

India is also in the process of framing a comprehensive legislation on data protection, which would certainly have an impact on the employer's right to monitor and review employees' electronic communications.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

In terms of the IT Rules, employers can access, review and monitor an employee's official electronic data (i.e. work-related data) subject to obtaining his/her consent, as clearly stipulated in the concerned employment contract / appointment letter and internal policy / employee's handbook. Employers would also have to formulate a privacy policy and upload the same on its website and the intranet. This privacy policy would detail all its obligations regarding collecting, storing, and processing of employees' personal information. Additional obligations are prescribed under the IT Rules in case the employer collects / has access to 'sensitive personal information' of employees such as credit card information, biometric information, passwords and medical records. Moreover, there are a couple of landmark judgments in India on the fundamental right to privacy.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

While there are no specific laws that govern employees' use of social media, any disparagement of employers and/or any divulging of confidential information would attract consequences under existing civil and criminal laws that govern defamation, breach of contract, divulging trade secrets and infringing intellectual property. Further, keeping in mind the rapidly evolving regulatory framework in relation to technology laws and data protection, employers are also defining policies that would affect their employees' participation on social media during work hours. Several companies, especially technology and outsourcing companies, have installed firewalls that prevent employees from accessing social media sites at the workplace, whereas several other companies have defined social media usage policies that educate employees on the implications of misuse of social media (especially given that employers could be held vicariously liable for any actions of employees in this regard).

In addition, employers can include strong provisions in their employment contracts / appointment letters for protection of confidential information, trade secrets, intellectual property, and other proprietary information. Indian Courts, typically, take claims of confidentiality breaches and disclosure of sensitive information very seriously; it is an established

principle under Indian jurisprudence that an employer has full and exclusive ownership of the information that the employee comes in contact with during the course of employment, including any and all information contained in the employee's official email accounts. Also, employers can, subject to obtaining employee consent, monitor employees' activities on social media during work hours for the reasons outlined above.



VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

There are various modes of termination of employment that are recognised in India, including: i) expiry of a fixed term contract / mutual separation; ii) resignation by an employee; iii) retirement or superannuation; iv) layoffs, termination due to transfer of business/closure of an undertaking/organisational restructuring; and v) termination by an employer for 'cause'. Termination for 'cause' may involve one or more of the following:

- established breach of employment contract and/or internal policies;
- employee having committed any criminal offence / authorities having initiated criminal proceedings;
- employee's inability to fulfill material obligations of his job;
- misconduct;
- inefficiency/ poor performance, after undertaking sufficient processes such as a performance improvement plan;
- loss of confidence by management; and
- abandonment of employment / continuous absenteeism.

2. COLLECTIVE DISMISSALS

'Collective dismissal' of employees is permitted under Indian labour laws, only in certain circumstances and upon satisfaction of specified conditions. In this context, the ID Act describes the following processes with respect to workmen: i) 'retrenchment', which is defined as termination of workmen's services for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action; ii) 'layoffs', which is defined as the failure, refusal or inability of an employer to employ a workman, on

account of shortage of power, raw materials, breakdown of machinery, natural calamity or any other reason beyond the employer's control. The ID Act also prescribes conditions for transfer / closure of an undertaking that would result in redundancies.

In case of retrenchment, depending on the number of workmen engaged, employers are required to either notify/seek prior approval of the concerned labour department. Also, employers are required to provide employees who have been in service for at least 1 year, a notice of 1 or 3 months (or equivalent pay) and 'retrenchment compensation' calculated at 15 days' wages for every completed year of service. It is important to note that in case of retrenchment, employers must follow the "last in, first out" principle, wherein the employment of the shortest-serving employees will be the first to be terminated, unless the employer has justifiable reasons for not doing so.

In a layoff situation, prior approval of the concerned Government may be required, and compensation would have to be paid, in the manner prescribed. Laid off workmen can also be retrenched in the manner prescribed under the IDA. Provisions with respect to layoffs under an organisation's certified Standing Orders (as may be applicable) or internal policies, will also need to be taken into consideration.

The above stipulations are all in the context of workmen – in case of managerial employees, there are no specific requirements under statute, and any dismissal would be as per the terms of their contract.

3. INDIVIDUAL DISMISSALS

As per the IDA, any dismissal of an individual workman would also be considered 'retrenchment' as described above. Accordingly, (depending on the number of workmen engaged at the establishment), the employer would have to provide prior notice

of termination of either 1 month or 3 months, or equivalent wages in lieu thereof. In addition, 'retrenchment compensation' would have to be paid, at the rate of 15 days' wages for every completed year of service.

However, in case of employees who are dismissed for misconduct (provided the employer conducts an internal inquiry prior to such dismissal) no prior notice of termination or retrenchment compensation would be required.

In the case of employees other than workmen (i.e. managerial cadre), provisions of the employment contract and the relevant S&E Acts would have to be considered. Since India does not recognise at-will employment, termination of employment without providing any prior notice at all (or equivalent pay) would typically render the contract of employment as an 'unconscionable bargain', and hence, illegal.

Several States, such as Andhra Pradesh, Bihar, Punjab, Rajasthan and Karnataka have issued ordinances to relax the applicability of the ID Act to certain establishments, such that provisions relating to layoffs, retrenchment, closure of certain establishments, wherein the number of workmen employed is not less than one hundred, has recently been increased to three hundred workmen. In addition to the above, some States have introduced changes in the retrenchment compensation, which was previously calculated as fifteen days' average pay for every completed year of continuous service, or any part thereof in excess of six months.

A. IS SEVERANCE PAY REQUIRED?

Yes, a severance payment would have to be made by the employer. However, the quantum of the amount and the processes followed would be different, depending on specific circumstances. For instance:

Voluntary resignation: If the employee voluntarily resigns, the employer must accept the same and communicate whether the employee has to serve the notice period / the notice period has been waived. In such an instance, the employer would be required to pay the following as part of severance pay:

- all accrued and unpaid wages;
- wages in lieu of accrued earned leave;

- gratuity in accordance with PG Act (i.e. 15 days wages for every completed year of service), subject to a maximum of INR 2 million (~USD 27270); and
- any other contractual dues, such as variable pay, performance bonus, etc.

Termination initiated by employer: In case of termination for misconduct (which is established as per the clear processes set out in the employee handbook, policies, and employment contract), the employer would be required to make the following payouts:

- all accrued and unpaid wages;
- wages in lieu of accrued earned leave;
- gratuity in accordance with PG Act, except where (i) any willful act, omission or negligence of the employee has caused damage to employer property; (ii) the employee has been terminated for riotous or disorderly conduct or any other act of violence; or (iii) the employee has been terminated for an offence involving moral turpitude committed in the course of employment; and
- any other contractual dues.

4. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

While a separation agreement is not mandatory under Indian laws, it is increasingly being followed by Indian companies, especially in cases of contentious separations / separation of senior executives.

B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

The key clauses in a separation agreement pertain to the employee releasing the company from all present and future liabilities with reference to the employment relationship, assignment by the employee of any and all IP created in the course of employment to the employer, the employee

agreeing to adhere to confidentiality obligations and the employee returning all company property in his/her possession or control. The reasons for separation and the terms and conditions of severance, including any separation consideration paid out and any benefits provided, should be accurately captured.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

No, there are no restrictions regarding age. However, the employee must have attained the age of majority (18 years) as required under the Contract Act.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Yes, separation agreements should be customised based on specific circumstances and should closely reflect the terms of the employment contract / employee handbook and internal policies. Such customisation may be undertaken basis the following considerations:

- Is the termination part of a workforce reduction?
- Is the termination part of a transfer of undertaking? If so, is there any change to the employment terms? Are any employee benefits being carried over?
- Is the termination part of a disciplinary proceeding?
- Is there company information or equipment that the employee needs to return?
- Are there any stock option related queries to be addressed?
- Does the employee have any specific confidentiality obligations?
- Is there a possibility of the employee disparaging the employer and its other employees?
- Should the employee be offered 'garden leave'?

Depending on the responses to the above questions, corresponding provisions should be added to the separation agreement.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The remedies available for employees seeking to challenge a wrongful termination include:

- reinstatement of employment;
- back pay;
- loss of wages and earning capacity;
- all other expenses.

Workmen can approach the labour department and the industrial tribunal in this regard.

6. WHISTLEBLOWER LAWS

Currently, legislation in India concerning whistleblowers mainly pertains to listed companies and the public sector. In terms of regulations prescribed by the Securities and Exchange Board of India (SEBI), companies listed on a recognised stock exchange in India have to devise an effective whistleblowing mechanism that enables stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices. Under the (Indian) Companies Act, 2013, certain categories of companies are also required to constitute a 'vigil mechanism' for their directors and employees to report genuine concerns or grievances.

The Whistleblowers Protection Act, 2014 (which has not yet seen the light of day, with further controversial amendments being proposed) mainly governs alleged corruption and misuse of power by public servants and seeks to protect persons who expose alleged wrongdoings in government bodies, projects and offices.

It is also important to note that India has recently amended its Prevention of Corruption Act, 1988, wherein the giving of a bribe by any person (including the private sector) to a public servant for an improper performance of public duty, has now been made an offence (penalties extend to fines and imprisonment), whereas previously, only the receipt of a bribe by a public servant was covered.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

Companies in the 'knowledge industry' place high value on their intellectual and human capital. Key employees who develop the intellectual property of the company, and those who have close interactions with customers and suppliers (such as sales staff), are critical to the growth and development of the company, and on many occasions, the company may be reliant on the personal attributes and market knowledge of such employees in order to improve its market base. Therefore, companies look to protect their business interests by prescribing certain restrictions for their employees – these clauses in employment contracts which place restrictions on certain activities of employees, either during or after their employment, are ordinarily referred to as 'restrictive covenants'.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

A non-compete clause is typically a restriction placed by the employer on an employee, pursuant to which the employee cannot indulge in any activity that would be in direct competition with the business of the employer. In nearly all employment contracts, such restrictions are stipulated for as long as the employee is employed by the company; however, some employment contracts may also contain clauses which will prevent the employee from joining a competitor company, or starting a competing business for a certain period, after the employment with the company comes to an end. These clauses attain greater significance in case of promoter and/or founder's separation from the company.

B. NON-SOLICITATION OF CUSTOMERS AND SUPPLIERS

A non-solicitation clause is intended to ensure that an employee does not induce the employer company's customers, suppliers, or clients away from the company, typically after such employee leaves his/her employment.

C. NON-SOLICITATION OF EMPLOYEES

A non-solicitation clause may also prevent an ex-employee from inducing any current employees to resign from employment with the company and join the company where such ex-employee is currently employed (or any other company), at his/her direction (including any competitor of the company).

3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

As described in the earlier sections, the Constitution guarantees every Indian citizen, a fundamental right to practice a trade or profession. Further, as per the Contract Act, any contract which restrains trade, business or profession of any kind will be void. In light of this, any restrictive covenant that extends beyond the tenure of employment will not be looked upon favourably by Indian Courts (but in any case, are often incorporated into employment contracts as a deterrent measure). The courts are generally guided by the presumption that the employer is in a stronger bargaining position in comparison to the employee, and the employee has no choice but to typically accept the employer's terms.

However, there are certain principles laid down by India's judiciary that enable employers to protect their legitimate business interests:

- employers can contractually restrict their employees from misusing or disclosing the employer's trade secrets or confidential business information and practices (and the enforceability concerns with respect to restrictive covenants as outlined above, will typically not apply in these instances). Similarly, where the employee has a motive to cheat or cause irreparable harm to the employer, a restrictive covenant beyond the term of employment would be enforceable.
- non-solicitation clauses may be valid if reasonable restrictions (such as distance, time limit and location) regarding non-usage of trade secrets and goodwill are imposed on former employees, depending on their designation and access to confidential information. Courts have also held that merely approaching customers of a previous employer would not amount to 'solicitation' until orders are placed by customers based on such approach.

4. USE AND LIMITATIONS OF GARDEN LEAVE

The concept of 'garden leave' is becoming common in India. Typically, garden leave involves a situation wherein an employee gives notice or is given notice of termination, and during such notice period is directed to stay away from work and/or the office premises, whilst continuing to receive his normal remuneration. Courts have held that while it is not possible to stop an employee from leaving, he can be restricted from joining a competitor during the term of employment (i.e. during the garden leave period). However, the garden leave provision should not be unreasonable and should typically not extend to inappropriately long periods of time.

X. TRANSFER OF UNDERTAKINGS

There are specific provisions under ID Act, that protect 'workmen' in cases of transfer of business undertakings. These however do not extend to non-workmen; thus, in case of non-workmen, the terms of the employment contract and/or the internal policies of the company would have to be examined.

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In terms of Section 25FF of the ID Act, where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, every workman who has been in continuous service with that undertaking for not less than 1 year, would be entitled to one month's notice, or payment in lieu thereof, and to compensation calculated at the rate of 15 days' wages for every completed year of service.

However, Section 25 FF of the ID Act, would not apply to workmen if:

- the service of the workmen has not been interrupted by such transfer;
- the terms and conditions of service applicable to the workmen after the transfer are not in any way less 'favourable' than those applicable to them immediately before the transfer; and
- the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workmen, in the event of their retrenchment, compensation on the basis that their service has been continuous and has not been interrupted by the transfer.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The requirements mentioned above relate to the obligations of the old employer (i.e. one whose business undertaking is being transferred). However, if Section 25FF of the ID Act does not apply to the transfer of the undertaking in question (i.e. for instance, the services of the employees are not 'interrupted' on account of the transfer or alternatively, the employees resign and join the new employer), then the successor entity would have to ensure that the salary and benefits that the employees were entitled to under the old employer (such as provident fund, employee state insurance, gratuity) will continue to be paid. The EPF Act and ESI Act specifically provide for liability of the successor entity, where the predecessor has defaulted in remitting provident fund and state insurance contributions, prior to the date of the transfer of the undertaking.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The ID Act and the Trade Unions Act have provisions relating to employer and employee associations at an industrial establishment.

A. TRADE UNIONS ACT

The Trade Unions Act defines a trade union as 'any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business'. As described under Section 1 herein, at least 10% of the workmen or 100 workmen at the establishment (whichever is less, subject however to a minimum of 7) must be members of the trade union at the time of making an application for registration. The registration of a trade union under the Trade Unions Act must be distinguished from the process of 'recognition' of a trade union. Recognition is the process through which an employer agrees to negotiate with representatives of a trade union on aspects such as working conditions, wages, etc. on behalf of a particular group of workers. There are certain State level rules with respect to recognition of trade unions; however the Trade Unions Act itself does not have extensive provisions in this regard. Refusal by an employer to collectively bargain in good faith with a recognised trade union (and vice versa) qualifies as an 'unfair labour practice' as defined under the IDA, attracting consequences that include imprisonment and/or monetary penalties.

B. KEY ASSOCIATIONS UNDER THE ID ACT

In terms of the ID Act, establishments with 100 or more workmen have to constitute a 'works committee'. The works committee should promote measures for securing and preserving amity and good relations between the employer and workmen and, to this end, can comment upon matters of common interest / concern and compose any material differences of opinion that arise between employers and workmen.

Establishments with 20 or more workmen have to set up a grievance redressal committee to address individual employee grievances. However, if the establishment already has a grievance redressal mechanism in place for its workmen, it may not establish a separate grievance redressal committee.

The setting up of the works committee will not affect the right of workmen to raise industrial disputes under the ID Act. Any workman who is aggrieved by the decision of this committee can appeal to the employer, and the employer shall, within 1 month from the date of receipt of such appeal, dispose of the same and send a copy of the decision to the workman concerned.

There are other committees that have to be set up as per State rules framed under the ID Act. In Gujarat for instance, a 'joint management council' has to be formed in industrial establishments that employ 500 or more workmen.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

The Constitution of India guarantees the fundamental right of all citizens to form associations or unions, including the right to form or join trade unions. Some of the rights of registered trade unions are as follows:

- immunity is granted to office bearers and members from proceedings relating to criminal conspiracy, in instances where the trade union has been engaged in furthering its objects.
- trade unions can maintain a separate fund for political purposes from which payments may be made for the promotion of civic and political interests of its members.
- trade unions can amalgamate with other trade unions in the manner prescribed.
- agreements between members of a registered trade union shall not be void or voidable merely on account of the fact that any of its objects are in restraint of trade.
- no suit or other legal proceeding can be maintained in any civil court against any registered trade union or any office-bearer or member in respect of any act done in contemplation of a trade dispute to which a member is a party, on the ground that such act induces some other person to break a contract of employment, or that it interferes with the trade, business or employment of some other person or interferes with the right of some other person to dispose of his capital or labour as he wills it.

Trade unions have immense significance both for the wellbeing of the industrial establishment and for the society at large. Trade unions play a major role in negotiating better work conditions for employees, settlement of existing disputes and in reducing instances of industrial disputes, thereby maintaining an amicable relationship between the employer and the workforce. They can also assist in the recruitment and selection of workers and help them adjust better to the organisational structure and hierarchy.

3. TYPES OF REPRESENTATION

A. NUMBER OF REPRESENTATIVES

The rules pertaining to each of the associations listed above, have detailed provisions regarding their roles and responsibilities as well as the appointment of members. For instance, in case of a works committee, the ID Act prescribes that it shall have an equal number of both employer and employee representatives and shall not exceed 20 members. Further, if the establishment has registered trade unions, then they would have to be consulted by the employer before finalising representatives from the workmen fraternity. A grievance redressal committee on the other hand, shall also consist of an equal number of employer and workmen representatives; however, the total number of members constituting the grievance redressal committee shall not exceed 6.

B. APPOINTMENT OF REPRESENTATIVES

In relation to a works committee, the employer representatives shall be nominated by the employer and shall, as far as possible, be officials who are in direct touch with the working of the establishment. Employee representatives must be chosen by way of voting in the manner prescribed. In case the establishment has registered trade unions workmen representatives on the works committee should be divided into those who are trade union members and those who are not. The works committee should have a chairman, vice chairman and two joint secretaries, who term of office shall be 2 years. The works committee should meet at least once every quarter.

The chairperson of the Grievance Redressal Committee shall be selected from among the employer representatives and from the workmen representatives alternatively, on rotation basis every year. There shall, as far as practicable, be one female member on the grievance redressal committee, and depending on the total number of members on the grievance committee, the number of female members may be increased proportionately.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

Though trade unions, works committees and grievance redressal committees are all envisaged to ensure greater participation of workmen in the running of an establishment, there are subtle differences in relation to each of their terms of reference. Trade Unions are the principal collective bargaining agents and can enter into settlement agreements with employers. A works committee on the other hand, aims at pre-empting industrial disputes, smoothening working relationships and addressing any differences by way of direct negotiations between employer and workmen representatives. A works committee functions as a recommendatory body that addresses, at the first instance, problems arising in the day to day functioning of the industrial establishment. A grievance committee looks into individual employee grievances - unlike the other two committees which are concerned with employer-employee relations as a whole.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

The nature and extent of employees' representation eventually depends on the kind of establishment in question and the number of employees engaged at such establishment. It may be noted that the works and grievance redressal committees are only required where the requisite employee threshold is satisfied, as described above. Also, trade unionisation in India is entrenched primarily in the traditional manufacturing sectors, though the IT sector has recently seen some unionisation as well. In addition, certain other committees may also be required depending on the nature of the industry and any State specific requirements.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

As per the FA Act, in every factory where a hazardous process takes place or where hazardous substances are used or handled, the occupier shall set up a 'safety committee' consisting of an equal number of representatives of workers and the management to promote co-operation in maintaining proper safety and health at work, and to periodically review the specific measures taken in this regard. Also, in factories where there are 250 or more employees, a canteen is required to be provided by the employer, which is then to be managed by a committee that would also have representatives of workmen. Furthermore, safety committees are required to be set up in mines where there are 100 or more persons employed.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

The key legislation governing employees' benefits in India include:

A. EMPLOYEES' STATE INSURANCE ACT, 1948

Benefits of this ESI Act extend to establishments where 10 or more employees are engaged (subject to any State rules), and to all employees earning less than INR 21,000 (~USD 286) per month. Employers are required to contribute an amount equivalent to 4.75% of the employees' wages monthly to an Employees' State Insurance Fund ("Insurance Fund"), while the employee is required to contribute 1.75% of his/her wages to the Insurance Fund. The employees are then entitled to certain medical benefits (including medical care, sickness benefit, disablement benefit, etc.) from accumulations in the Insurance Fund.

B. EMPLOYEES' PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952

Benefits under this Act typically extend to establishments where there are 20 or more employees. Employees earning less than INR 15,000 per month (~USD 204) have to compulsorily contribute to schemes under the EPF Act, whereas those earning above this limit may opt out, subject to certain conditions. Further, in cases where monthly wages exceeds INR 15,000 per month, employers and employees may either agree to i) make contributions on the entire monthly wages in the manner prescribed or ii) cap wages for the purposes of contribution to INR 15,000 per month. There are three main schemes framed under the EPF Act, namely:

- Employees' Provident Fund Scheme, 1952 ("Provident Fund Scheme").
- Employees' Pension Scheme, 1995 ("Pension Scheme"); and
- Employees' Deposit Linked Insurance Scheme, 1976 ("Deposit Linked Insurance Scheme").

Employees are required to contribute 12% of their basic wages, dearness allowance and retaining allowance to the Provident Fund Scheme - this is undertaken by the employer (on behalf of the employee) as a monthly deduction from wages and deposited into the provident fund. An employer is then required to match this employee contribution – however, out of the 12% of the employer's contribution: 8.33% is directed to the pension fund set up under the Pension Scheme; 0.5% is directed to the deposit linked insurance fund set up under the Deposit Linked Insurance Scheme; and the remaining 3.17% is deposited into the provident fund.

In light of the COVID-19 crisis, the Government of India temporarily reduced the above rate of contribution from 12% to 10% for the months of May, June and July 2020 (for both employer and employees), to decrease the financial liability of the employer and also to increase the take home salary of the employees.

C. PAYMENT OF GRATUITY ACT, 1972

The PG Act contemplates payment of gratuity to all employees (whether workmen or not) engaged in establishments (including factories, shops and other commercial establishments) in which 10 or more persons are employed. An employee is entitled to gratuity if he/she has rendered continuous service for not less than 5 years (except in the case of death or disability) under any of the following circumstances, namely: superannuation, retirement or resignation, or death or disablement due to accident or disease. The gratuity payable to an employee is calculated at 15 days' wages payable

multiplied by the number of years of service (a part of a year in excess of 6 months counted as 1 year). A formula for computation has been prescribed in this regard.

2. HEALTHCARE AND INSURANCES

The main legislation applicable to the private sector, the ESI Act, contemplates medical benefits for employees in contingencies such as sickness, maternity, disablement, and death due to employment injury and provides medical care to insured persons and their families. Additionally, the ECA requires employers to pay compensation (computed in the manner prescribed) in cases of death/disablement of employees owing to injuries sustained at the workplace.

The Government also launched an ambitious universal health scheme (the 'Pradhan Mantri Jan Arogya Yojana') to ensure that the poor and vulnerable populations are provided health insurance coverage up to INR 5 lakh (~ USD 6818) per family, per year, for secondary and tertiary hospitalisation. In addition to the above, most large employers in the private sector provide medical insurance benefits to their employees and their immediate dependents, and bear the costs in this regard.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Provisions relating to holidays and leave are mainly prescribed in the State specific S&E Acts (for shops and commercial establishments) and under the FA Act (for factories).

The FA Act and some of the S&E Acts state that establishments shall remain closed on at least 1 day of every week (this is typically Sunday). However, the S&E Acts of certain States (e.g., Maharashtra, Karnataka and Tamil Nadu) contemplate that some establishments may remain open on all days of the week, subject to them allowing every worker a weekly holiday of at least 24 consecutive hours (and other conditions being satisfied).

Across India, there are certain national holidays namely: Republic Day (26th January); Independence Day (15th August); and the birth anniversary of Mahatma Gandhi (2nd October). In addition to these, every employee would be entitled to other holidays, as may be declared by the concerned State Governments. In case an employee is required to work on any of these holidays, he/she will be entitled to twice the wages and also a compensatory off day.

The S&E Acts prescribe different privilege leave/earned leave requirements, and in some States, employees may avail privilege leave only after being in service for a certain period (such as 3 months or 1 year). The S&E Acts also allow unutilised privilege/earned leave to be carried forward at the end of the year (subject to a limit), and also contemplate that any unutilised leave may be encashed at the time of separation from employment.

B. MATERNITY AND PATERNITY LEAVE

With respect to maternity leave, female employees who have been in service for 80 days are entitled to paid maternity leave of 26 weeks. In case of a miscarriage or medical termination of pregnancy, female employees are entitled to leave with wages for a period of 6 weeks, immediately following the day of the miscarriage or medical termination of pregnancy. Leave requirements are also specified for women having undergone tubectomy operations, or in case of any illness arising out of pregnancy, premature birth, delivery, miscarriage or medical termination of pregnancy.

There is no separate category of paternity leave recognised under Indian law, though a bill has been introduced in this regard seeking paternity leave of 15 days across all sectors. Currently however, some corporate and public sector departments provide paternity leave to their employees, as prescribed in the concerned leave policy/rules.

C. SICKNESS AND DISABILITY LEAVE

Typically, sick leave cannot be carried forward or encashed and is not subject to any minimum service requirements. However, in certain States like Gujarat, Andhra Pradesh and Telangana employees could be eligible to encash their sick leave at the

time of their discharge from employment. No specific category of disability leave is recognised in India.

D. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Some of the S&E Acts also recognise casual leave, which can be availed by employees in unforeseen situations, subject to the approval of an organisation. This category of leave is also not typically carried forward or encashed.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Employees who fall within the purview of the EPF Act will be entitled to a monthly pension, as per the rules of the Pension Scheme. Other than that, employees in the public sector will be entitled to such pension(s) as prescribed in their service rules.

5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

In addition to the above, various employers provide other benefits to employees (which also have certain tax benefits) such as food coupons, a conveyance allowance and reimbursement of mobile phone and Internet expenses. There are also specific benefit programs and labour welfare funds prescribed for certain sectors.

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