



**SINGHANIA & PARTNERS** LLP  
SOLICITORS AND ADVOCATES



**LABOUR LAW  
PRIMER FOR  
MULTINATIONAL  
COMPANIES IN  
INDIA**

With increasing trade relations between India and the World, cross-border movement of employees from and out of India has increased quite considerably. In India, employees enjoy the protection of diverse laws and regulations.

The business model of the companies is increasingly service centric and it is essential for employers to have the most efficient human resource and to grant them their legal rights and entitlements. However, in a country like India, the complex legal regime usually leave the employers facing typical issues related to interpretation of the large number of labour and employment laws governing the industry. These issues prove even more challenging when one of the parties involved is a foreign national.

Hence, this primer highlights the basic requirements of labour laws both from the perspective of Indian and foreign nationals employed in India. While throwing light on the appointment/secondment of foreign nationals by Indian employers, the primer covers issues like taxation, working conditions, various social security benefits, issues related to termination of employees, importance and enforceability of non-solicitation clauses, retrenchment, various statutory registrations etc. With increasing concern for the security of female employees, employers have also been conferred with the duty to ensure protection against sexual harassment of women at the workplace.

Further, the primer also addresses the most common concern of all employers while entering into employment contracts, like the enforceability of clauses related to confidentiality, competition, poaching employees and soliciting clients. Keeping this in view, the primer would discuss the common controversies that arise from clauses in employment contracts and the caution that should be kept in mind in drafting an enforceable employment contract.

The key object is to enable the employers to familiarize themselves with the vast labour law regime of India.

## CHAPTER 1

### DEPLOYMENT OF FOREIGN EMPLOYEES

**1.1** The deputation for expatriates and foreign nationals attracts several issues under the Indian legal system. Foreign nationals are engaged in India to provide training and development to local employees, for technology transfer, compliance of joint ventures and license agreements etc.

**1.2** At the time of setting up a business in India, the foreign employer generally prefers to appoint its own employees for the management and control of the business. This is done in order to smoothen the transfer and execution of company policies to the Indian business arm. Further, it is convenient for the foreign employees working in India to co-ordinate with the parent company in terms of decision making, financial management and other business matters.

The major tax implications on a foreign and Indian national, working in India, and the liability of their employer under the Indian Income Tax Act, 1961 ('IT Act') are laid out below:

#### **1.3 Residential Status of an Expat**

An individual is taxed in India on the basis of their residential status under the IT Act. The residential status is determined on the basis of the physical presence of the individual in India during that particular financial year (1 April to 31 March).

The categorisation of the individuals on the basis of their residential status in a given financial year is done as follows:

- 1.** Resident in India –
  - Resident and ordinarily resident (ROR)
  - Resident but not ordinarily resident (RNOR)
- 2.** Non-Resident in India (NR)

Foreign nationals may be exempt from tax in India if their stay does not exceed 90 days, as prescribed in the Act, or the number of days prescribed (generally 183 days) under various double taxation avoidance agreements (DTAA) into which India has entered with other countries, subject to the satisfaction of all the other conditions.

However, in practise, an expatriate coming to India for the first time may remain RNOR for first 3 tax years. But the facts and circumstances may vary from case to case in determining the residential status.

Remuneration for services rendered by a foreign national employed by a foreign enterprise during his/her stay in India will be exempt from tax in India if:

- the total period of the stay in India does not exceed 90 days in a financial year
- the foreign enterprise is not engaged in any trade or business in India
- the remuneration is not charged to an employer subject to Indian income tax.

It may be noted that to the extent the individual qualifies for relief in terms of the 'dependent personal services' article of the applicable DTAA, there will be no tax liability. However, this exemption will not apply if the Indian entity is the individual's economic employer. In addition, any salary or local benefits received in India are also not eligible for relief.

#### **1.4 Tax liability of an Employee**

##### **1.4.1 *In respect of Indian employees-***

- Under Section 192 (1) of the IT Act, employers are required to deduct income tax on the amount payable as salary to the employees at the rate as may be applicable in the relevant financial year.
- Employers also have an option to pay tax on behalf of an employee without making any deduction from her/his income, on the income in the nature of perquisites, which are not provided for by way of monetary payment.
- Section 200(1) of the Companies Act, 1956 prohibits a company from paying remuneration free of income tax. No company shall pay to any officer or employee thereof, whether in his capacity as such or otherwise, remuneration free of any tax.
- Employers can pay tax on non-monetary perquisites provided to their employees without making any deduction from his/her salary and the tax so paid by employer on behalf of the employee on non-monetary perquisites is exempt in the hands of employee under Section 10(10CC) of the IT Act.

##### **1.4.2 *In respect of foreign nationals-***

### 1.4.3 *Visa Requirements*

- Employment visas are issued to foreigners who are working in India, for an Indian entity. Employment visas are usually granted for one year, or the term of the contract. It can be extended in India.
- Foreign national who wants to visit India for employment in a company/firm/organization registered in India or for employment in a foreign company/firm/organization engaged for execution of some project in India, can obtain employment visa provided that they are being sponsored for an Employment Visa by their employer and they draw a salary in excess of USD 25,000 per annum. The condition of annual floor limit on income will not apply to:
  - Ethnic cooks,
  - Language teachers (other than English language teachers) / translators and
  - Staff working for the concerned Embassy/High Commission in India.
- Employment visa is also granted to foreigners coming to India as a consultant on contract for whom the Indian company pays a fixed remuneration (this may not be in the form of a monthly salary), foreign artists engaged to conduct regular performances for the duration of the employment contract given by Hotels, Clubs, other organizations, coaches of national /state level teams, or reputed sports clubs, sportsmen who are given contract for a specified period by the Indian Clubs/organizations, self-employed foreign nationals coming to India for providing engineering, medical, accounting, legal or such other highly skilled services in their capacity as independent consultants provided the provision of such services by foreign nationals is permitted under law, engineers/technicians coming to India for installation and commissioning of equipment/machines/tools in terms of the contract for supply of such equipment/machines/tools, providers of technical support/services, transfer of know-how/services for which the Indian company pays fees/royalty to the foreign company.
- Embassy/Consulate may grant employment visa, which is valid for an year irrespective of the contract. Further extension may be obtained from MHA/FRRO in the concerned state in India. The visa duration starts from the day of issuance and not from the day of entry in India. Foreign technician may get visa for period of five years or the bilateral agreement between Indian and foreign government whichever is less

with multiple entries. For highly skilled IT person visa validity is upto 3 years with multiple entries. Others can be granted visa with validity of two years with multiple entries.

- Indian Missions/ Posts may grant multiple entry project Visa to skilled or highly skilled foreign nationals coming to India for execution of projects. Project Visa will cover only professionals related to Power and Steel sector.
- Business visa is given strictly to those who make business related trips to India such as making sales or establishing contact on behalf of the company outside India.
- This is not applicable for people who are coming to India for part time or full time employment. The following activities can be carried out under a business visa: establishing an industrial/business venture or exploring possibilities to set up industrial/business venture in India, purchase/sell industrial products or commercial products or consumer durables, technical meetings/discussions, attending Board meetings or general meetings, providing business services support, recruitment of manpower, for performing duties as partners in a business and/or functioning as Directors of the company, consultations regarding exhibitions or for participation in exhibitions, trade fairs, business fairs etc., transacting business with suppliers/potential suppliers at locations in India as buyer, to evaluate or monitor quality, give specifications, place orders, negotiate further supplies etc., relating to goods or services procured from India, acting as experts/specialists on a visit of short duration in connection with an ongoing project with the objective of monitoring the progress of the work, conducting meetings with Indian customers and/or to provide technical guidance, pre-sales or post-sales activity not amounting to actual execution of any contract or project, in-house training of trainees of multinational companies/corporate houses in the regional hubs of the concerned company located in India, internship on project based work in companies/industries for students sponsored by AIESEC, conducting tours and functioning as travel agents and/or conducting business tours of foreigners or business relating to it. Duration of business visa is only of 6 months.

**1.4.4** Remuneration received by foreign expatriates working in India generally is assessable under the head “salaries” and is deemed to be earned in India. Income payable for a leave period that is preceded and succeeded by services rendered in India and that forms part of the service contract is also regarded as income earned in India. Thus, irrespective of the residence status of an expatriate employee, the salary paid for

services rendered in India is liable to tax in India. There are no special exemptions or deductions available to foreign nationals working in India.

However, a foreign national who comes to India on short-term business visits can claim an exemption under the domestic tax law or a relevant tax treaty.

**1.4.5** Where salary is payable in foreign currency, the salary income must be converted to Indian rupees. For this purpose, the rate of conversion to be applied is the telegraphic transfer-buying rate as adopted by the State Bank of India on the last day of the month immediately preceding the month in which the salary is due or paid. However, if tax is to be withheld on such an amount, the tax withheld is calculated after converting the salary payable into Indian currency at the rate applicable on the date tax was required to be withheld.

**1.4.6** The remuneration received by a foreign national is assessable under the head 'salaries' and is deemed to be earned in India if it is payable to him for services rendered in India.

- There are certain exceptions to this rule, few of them being the following:
  - i. Remuneration of an employee of a foreign enterprise is exempt from tax if his stay in India is less than 90 days in aggregate during the financial year and is not liable to be deducted from the income of the employer. This is further subject to the provisions of Double Taxation Avoidance Agreement(s) ('DTAA(s)') entered by India with various countries.
  - ii. Remuneration received by a foreign expatriate as an official of an embassy or high commission or consulate or trade representative of a foreign state is exempt on reciprocal basis.
  - iii. Remuneration under co-operative technical assistance programme or technical assistance grants agreements.
  - iv. Where the income is derived by way of royalty or fees for technical services received pursuant to an agreement.

- In addition to the above, the Central Government has entered into DTAAAs with various countries. As per Section 90(2) of the Act, in relation to an assessee to whom any DTAA applies, the provisions of the Act shall apply only to the extent they are more beneficial to the assessee. The provisions of the DTAAAs prevail over the statutory provisions.

## **1.5 Registration with FRRO**

Foreign nationals including their family members who intend to stay in India for more than 180 days have to get themselves registered with the Foreign Regional Registration Office (FRRO) within two 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. There is no registration fee charged for registration by FRRO.

## **1.6 What constitutes a Permanent Establishment?**

- As per treaty laws, India cannot tax the business income of a foreign entity, unless that entity has a Permanent Establishment ('PE') in India.
- Article 7 of the various DTAAAs stipulates that only the profits directly or indirectly attributable to the PE in India would be taxed in India. Therefore, only the PE generating income with a business connection in India will be taxable in India.
- The PE of the foreign enterprise in India may use its assets and resources to earn income both in India and outside India, but only the segment of Income that relates to the business connection in India is taxed. In the absence of business connection in India, the PE would just be a taxable entity and not a tax paying entity.
- A foreign company is generally considered to have a PE in India if the foreign company is regarded as having a fixed place in India through which the said foreign company carries on business in India.
- Under some DTAAAs, a foreign company is regarded as having a PE in India, if the company renders services (Royalties or Fees for Technical Services) to an Indian company through employees or other personnel deputed to India and such services are



rendered by its employees for more than a specified period of time. Such type of a PE is known as Service PE. Furnishing of services is the most important check for attraction of Service PE.

### **1.7 Secondment (employee loan/lease) by Parent Company to Indian subsidiary.**

- The secondment of employees though may seem to be very simple, can lead to serious tax implications both for the Indian Subsidiary Company and the Parent Overseas Company.
- The tax obligations of the seconded employee working for Indian company depend upon various factors like the residential status he acquires while working in India, place where services are being rendered, receipt of salary in India or abroad etc. However the tax obligations of the Indian and Foreign employer may not end even if seconded employee has been subject to taxes in India for salary earned as seconded employee.
- A case of secondment of employees by a foreign company may constitute a Service PE if:
  - i. The foreign company retains the direct supervision and control over the seconded employees.
  - ii. The work being performed by the employees is on behalf of the foreign company.
  - iii. The foreign company is getting any amount over and above the mere reimbursement of the salaries of the concerned employees.
- In the case of *DIT (International Taxation), Mumbai Vs. Morgan Stanley and Co. Inc.*, the Service PE was held to be in place for the foreign company due to the reason that the services were being rendered by the seconded employees on behalf of the foreign company, the foreign company being responsible for the work performed by the seconded employees and that the seconded employees continued to have a lien over their employment with the foreign company.
- The Income Tax Appellate Tribunal (ITAT) has laid down certain factors to hold that an arrangement would not constitute a Service PE on account of following reasons:

- i. The services rendered are independent of and not under the control of the foreign company.
- ii. The concerned employees are for all practical purposes, employees of the Indian company.
- iii. The foreign company is providing only the personnel and not furnishing any services through the personnel.
- iv. The reimbursement being made by the Indian company to the foreign company is only towards the actual cost of the salaries paid to the concerned employees and without any mark up.
- v. The Indian company has the right to terminate the concerned employees from the services to the Indian company.

## CHAPTER 2

### WORKING CONDITIONS

#### 2.1 Provisions for Leave

**2.1.1** The Indian Constitution law empowers both the Central and the State governments to make laws relating to the welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, maternity benefits etc. The State governments have formulated laws regulating the conditions of work for persons employed in shops, commercial establishments, establishments for public entertainment or amusement and other establishments. Therefore, in addition to the provisions under Factories Act, 1948, every State has enacted its respective Shops and Establishments Act which govern the benefits available to employees.

**2.1.2** The leave benefits while broadly similar invariably incorporates local variations depending upon the customs and commercial practices in each State.

**2.1.3** **Types of Leave:** In general practices, following types of leave are provided in an establishment governed by the Shops and Establishment Act.

**i. Weekly Holiday:** Every establishment shall remain close on atleast 1 day of every week. As per industry standards, weekly holiday is given on every Sunday.

No employee shall be required to work in any establishment for more than 9 hours in a day. However, no employee in any establishment shall be allowed to work for more than 54 hours in any week.

**ii. National/Public Holiday:** Every establishment shall remain close on 3 National Holidays (January 26, August 15 and October 2) or as may be prescribed by the respective State government. In addition to these, every employee would be entitled to 5 compulsory holidays every year which shall be exclusive of the national holiday as given above. The number of public holidays may also differ in accordance with the direction which the local authority or the respective State Government, may by publication fix for any establishment, from time to time.

**iii. Annual Leave:** The term 'Annual Leave' shall be read synonymous to Privilege/Earned Leave. This leave entitlement is to be mandatorily granted to every

employee in an establishment. Every employee, after a continuous employment of 12 months, shall be entitled to annual paid leave of 18 days for the subsequent year.

Notwithstanding the above, the number of annual leave would be different in the following states:

- Maharashtra: 21 days every year
- Rajasthan: 30 days every year
- Madhya Pradesh: 1 month every year

**iv. Sickness/Casual Leave:** Every employee shall be entitled to leave with wages of 15 days every year (may vary from state to state) on grounds of sickness, accident or any other reasonable cause. Any leave availed of by an employee in excess of the limits specified above shall be without pay.

➤ The States of Andhra Pradesh and Kerala provide for “*Special Casual Leave*” for the following purposes:

Andhra Pradesh – Every employee after completion of minimum 6 months of employment, shall be entitled for a special casual leave not exceeding 6 days available only once during his entire service, if he has undergone vasectomy or tubectomy operation.

Kerala – Every employee shall be allowed a special casual leave with wages, in case of sterilization operation, of 6 days in case of a male employee and 14 days in case of a female employee.

**v. Maternity Leave:** Female employees shall be entitled to a maternity leave of maximum 12 weeks. Provided that the period of leave before delivery should not exceed 6 weeks. In case of miscarriage or pregnancy being terminated on medical grounds, leave upto 42 days is allowed.

The Maternity Benefit Act, 1961 provides for maternity leave and other benefits before and after childbirth, medical termination of pregnancy or miscarriage. The employer is required to pay maternity benefits at the rate of the average daily wage for the period of her actual absence up to a maximum of 12 weeks.

- vi. **Carry Forward of Leave:** The unavailed number of privilege leave may be accumulated upto a period of 45 days with an exception of 56 days in West Bengal and 112 days in Tripura.
- vii. Where the employment agreement or contract of service of an establishment provides for a longer leave with wages or weekly holiday than are provided in the Act, the employee shall be entitled to only such longer period of leave or holidays, as the case may be.

## 2.2 Working hours

- Depending on the nature of establishment or industry, the statutes provide for the maximum number of hours an individual can be required or allowed to work in a day or week.
- The Factories Act and Shops and Establishments Act provides for maximum working hours of up to nine hours a day and 48 hours a week.
- The Factories Act provides that every employee is entitled to 24 hours of continuous rest in a week (i.e., a weekly day off). If a weekly day off or compensatory day off falls after a night shift, the 24 hours from the end of the shift are given to him or her as his or her weekly day off.
- Under the said Acts, women are not allowed to work at night. In some states, however, exemptions have been provided for certain businesses such as the information technology industry. However, specific approvals may be required in such cases.
- Pursuant to the Factories Act and certain state SEAs, any work done over nine hours a day or 48 hours a week is considered 'overtime'. An employee working overtime becomes entitled to wages at the rate of twice his or her ordinary rate of wages.
- There are limits prescribed by the state-specific SEAs and the Factories Act on the amount of overtime work that can be performed by an employee. These limits vary from state to state and may be daily, monthly, quarterly or yearly.

## 2.3 Women safety.

- Certain states have laid down guidelines to ensure the safety of women employees such as they may be provided transport facility from residence to workplace. Further, all the establishments are required to incorporate anti-sexual harassment policies at the workplace in compliance with the Sexual Harassment of Women at Workplace

(Prevention, Prohibition and Redressal) Act, 2013. This section is separately dealt with in the Primer.

## **CHAPTER 3**

### **PROVISIONS AS TO WAGES**

#### **3.1 Payment of Wages Act, 1936**

The Payment of Wages Act regulates the payment of wages to workers employed in certain specified industries and provides a remedy against illegal deductions and unjustified delays in the payment of wages. It is applicable to workers employed in a factory, industrial or other establishment, whether directly or indirectly (i.e. through a subcontractor).

#### **3.2 The Minimum Wages Act, 1948**

The Minimum Wages Act safeguards the interests of workers by providing a minimum wage for certain jobs. It requires employers to pay their workers the minimum wages as fixed under Minimum Wages Act from time to time by the government.

#### **3.3 Shops and Establishments Acts**

The Shops and Establishments Act of various states contain provisions as to the wages payable to the employees and make the employer responsible for the payment of all wages to the employees. The wage period has to be fixed and cannot exceed one month. The employer is also entitled to make certain deductions from the wages on grounds of any fine imposed, deduction for absence of duty, any damage caused to the goods etc.

#### **3.4 Minimum salary requirements for foreign nationals**

As per the clarifications given by Ministry of Home Affairs for employment of foreign nationals in India, it is a prerequisite for them to have a minimum salary of USD 25000 (to protect low/less skilled Indian labour).

## CHAPTER 4

### SOCIAL SECURITY BENEFITS

#### 4.1 Employees State Insurance Policy

- The ESI Act, wherever applicable, provides for health care and cash benefit payments in the case of sickness, maternity and employment injury. It provides for need-based social insurance schemes that protect the interest of workers in contingencies such as sickness, maternity, temporary or permanent physical disablement, or death due to employment injury.
- The salary limit for eligible employees has been increased from 10,000 rupees to 15,000 rupees.

#### 4.2 Provident Fund

- The EPF Act provides for the institution of provident funds, family pension funds and deposit-linked insurance funds for the employees, which taken together provide old-age and survivorship benefits, long-term protection and security to the employee.
- The salary limit for employees covered by the EPF Act is 6,500 rupees.
- Contributions to the Fund are made by both employer and the employee and are administered by the Central Board of Trustees.
- An individual must be an employee to be a member of the Fund. Casual engagement is not ‘employment’.

#### 4.3 Provisions for International Workers

- Expatriates working in India are obligated to contribute toward the Indian provident fund systems unless they fall within the category of an “excluded employee.”
- In order to facilitate the balance of social contributions made by foreign expatriates deployed in India and by Indian nationals working in countries outside India, the Government of India has signed and is in the process of signing Social Security Agreements (SSAs) with different countries. SSAs have been signed between India and many other countries; however, only Belgium, Germany, Luxembourg, France, Denmark, Korea, Netherlands, and Switzerland had ratified the agreements.
- The Government of India has imposed a limitation on the withdrawal of provident fund balances by foreign expatriates. Under this limitation, foreign expatriates will be



able to withdraw the accumulated provident fund balance only at the age of 58 years and not at the end of their employment in India. In certain circumstances, an earlier withdrawal may be possible, such as the following:

- i. on retirement on account of permanent or total incapacity to work due to bodily or mental infirmity duly certified by a prescribed medical officer/registered practitioner;
  - ii. on suffering from tuberculosis, leprosy, or cancer, even if contracted after leaving the service on grounds of illness; or
  - iii. any of the grounds specified in the SSAs.
- Further, pursuant to the ratification of SSAs with Belgium, Germany, Luxembourg, France, Denmark, Korea, Netherlands, and Switzerland foreign expatriates from these countries are exempt from age 58 limitation.

## **CHAPTER 5**

### **EMPLOYMENT CONTRACTS**

In anticipation of having long-term business contribution from the employees, the employers invest substantial resources in training to impart special skills, talent and knowledge. But, in general practice, after gaining the requisite skills, talent and knowledge, employees tend to shift towards more rewarding job opportunities. To restrict the employees from moving jobs, employers insert typical clauses in the employment agreement which seek to prevent the employees from leaving the job for a fixed period after the training or taking up similar employment for a fixed time period even after such employment ceases. Undoubtedly, the employer and employee have conflicting interests and both view the negative covenant in the employment agreement from their different stand points and employees usually invoke Section 27 of the Indian Contract Act.

So confronted, all employers seek to incorporate such provisions into the employment contracts which they wish to enforce at the time of termination of employment. These provisions mainly focus on protection of confidential information of the company, restrictions on direct or indirect competition, poaching employees and soliciting clients.

This chapter discusses the common controversies that arise from certain clauses in employment contracts and the caution that needs to be taken while drafting such contracts.

At the beginning of drafting any contract of service or employment, it is important to determine the status of the individual concerned. For instance, an independent contractor is not an employee in the strict sense of the term. However, Indian courts have held various independent contractors as employee depending on the terms and conditions of service.

#### **5.1 Enforceability of Employment Agreements**

As employment contracts are contracts of personal services, they are not specifically enforceable unless the suit is filed under the three circumstances which are as follows:

- i. In the first case, where relationship of master-servant is governed purely by the employment contract entered between the employer and employee, the remedy for breach of contract is to file a suit for wrongful dismissal and claim compensation. The rationale behind this remedy is that the nature of the agreement is of personal service and the parties cannot be forced to work with each other. The only sensible remedy

for a contract of such a personal nature is to claim compensation on the grounds that the employment has been wrongfully terminated or the employer may claim that the employee has not followed the terms of the contract. The relief in such cases would be monetary compensation.

- ii. In the second case, where the master-servant relationship under Industrial Law, the servant who is wrongfully dismissed may be reinstated as under a special provision under Industrial Law. This relief is a departure from the relief available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.
- iii. In the third case, where the servant is in the employment of the state or of other public or local authorities or bodies created under a statute, the remedy available to the employee in case of wrong dismissal is to declare the dismissal invalid provided he is able to prove that the dismissal is contrary to rules of natural justice or is in violation of the provisions of the statute.

## **5.2 Restraint on Trade and Employment Contracts**

- Any agreement which restricts a person from exercising a lawful profession, trade or business of any kind is void to that extent. The only exception to this rule is in relation to the sale of goodwill, where the buyer may restrict the seller from carrying on similar business within specified local limits. The law does not recognize any other valid restraint on trade, even if such a restraint is reasonable.
- The legal position in this context is very clear and is as follows:
  - i. after the expiry of the term of employment, the agreements which prevent an employee from working elsewhere would be restraint of trade, unless there is a proprietary interest of the employer involved, and
  - ii. an employee may be restricted from serving any other person or carrying on independent business during the term of employment.

## **5.3 Enforceability of Non Compete Clause**

- During the term of employment, an employer can legally restrain an employee from competing with it or taking any other employment while the employment contract is in force.
- Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade.
- The only exception to this would be if the contract and the non-compete covenant thereof is unconscionable or excessively harsh or unreasonable or one-sided.<sup>1</sup>

#### **5.4 Enforceability of Non Solicitation Clause**

- The courts have held that contracts between two employers which prohibiting the other from enticing or alluring each other's employees are enforceable as the restriction imposed is upon the respective employers and not the employees and is therefore, viewed more liberally than a restraint in an employer-employee contract.
- From an employer's perspective, it is absolutely necessary to ensure the inclusion of a non-solicitation clause in vendor/agency and similar commercial arrangements. The clause should be in effect during the term of the contract and preferably for up to one year after termination. It should be carefully worded and a special damages clause should be included.
- It is important to see that such a clause does not directly prohibit employees from taking up employment with their firm's competitor, it may act as a psychological block.

#### **5.5 Enforceability of Confidentiality Clause**

- Unlike non-competition clauses, a confidentiality clause subsists the termination of the agreement and the employer is able to sue for recovery or damages in the event the employee joins a competitor and uses the confidential information which was available to him during the earlier employment.

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<sup>1</sup> High Court of Calcutta in *Shree Gopal Paper Mills Ltd. vs. Surendra K. Ganeshdas Malhotra*

## **CHAPTER 6**

### **SEXUAL HARASSMENT AT WORKPLACE**

- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013(‘Act’) has been published after receiving the President’s assent with the objective of providing protection against sexual harassment of women at the workplace and for the prevention and redressal of complaints of sexual harassment. The Act, however, is yet to be notified and rules are expected to be framed shortly.
- The definition of ‘sexual harassment’ includes unwelcome physical contact and advances, a demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.
- Any implied or explicit promise of preferential treatment in employment, implied or explicit threat of detrimental treatment in employment, implied or explicit threat about present or future employment status or interference with the work or creating an intimidating or offensive or hostile work environment or humiliating treatment likely to affect the employee’s health or safety in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment.
- The Act is applicable on all regular, temporary, ad hoc employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.
- workplace

#### **6.1 Duties of the Employer**

- Provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace;
- Display at any conspicuous place in the workplace, the penal consequences of sexual harassments; and the order constituting the ‘Internal Complaints Committee’ for prevention of sexual harassment at workplace;
- Organize workshops and awareness programmes at regular intervals for sensitizing the employees with the provisions of the Act and orientation programmes for the members of the Internal Complaints Committee in the manner prescribed under the Act;

- Provide necessary facilities to the Internal Complaints Committee for dealing with the complaint and conducting an inquiry;
- Assist in securing the attendance of respondent and witnesses before the Internal Complaints Committee;
- Make available such information to the Internal Complaints Committee as it may require having regard to the complaint;
- Provide assistance to the employee if he/she chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law for the time being in force;
- Cause to initiate action, under the Indian Penal Code or any other law, against the perpetrator, or if the aggrieved employee so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;
- Treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct;
- Monitor the timely submission of reports by the Internal Complaints Committee.

## **6.2 Offences and Penalty under the Act**

- The Act prescribes a penalty of up to INR 50,000 (approx. US\$1,000) for failure to constitute the Internal Complaints Committee. Repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

## **6.3 Amendments to the Indian Penal Code**

- The Indian Penal Code, 1860, by way of a recent amendment, now enlists the acts which constitute the offence of sexual harassment and further envisages penalty/punishment for such acts.<sup>2</sup> As the amendment criminalizes all acts of sexual harassment, employers are required to report all offences of sexual harassment to the appropriate authorities.

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<sup>2</sup> The Criminal Law (Amendment) Act, 2013

## CHAPTER 7

### RETRENCHMENT AND TERMINATION

#### 7.1 Employee and Workman

- Employees are categorized into following two categories as per the labour law legislations:
  - i. Employees who are ‘workman’
  - ii. Employees who are not workman
- The Industrial Disputes Act, 1947 (“IDA”) applies to employees who are workman within the definition prescribed under the Act.
- The procedure for termination of non-workman employees is covered under the relevant state Shops and Commercial Establishment Act. Certain states, however, exclude the application of Shops and Establishment Acts on managerial and supervisory level employees and in such cases, the terms and conditions in the employment contracts apply.

#### 7.2 Termination of a ‘Workman’

- In order to come under the purview of the IDA and to receive the benefits of IDA there under, the employee has to be a ‘workman’ which is defined as any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical and supervisory work for hire or reward, but does not include any such person who is employed mainly in a managerial or administrative capacity; who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees (INR 10,000) mensem or exercises, either by nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.
- For the purpose of determining the status of an employee as a ‘workman’, the terms of his contract, the nature of duties assigned to him and the work performed by him also needs to be considered.
- The conditions to be followed for retrenchment under the IDA differ on the basis of total number of employees in the Company on a given day and the tenure of employment of the workman.

- For termination for any reason whatsoever, unless on grounds of misconduct, of every ‘workman’ who has been in continuous employment of the Company for 1 year or more, the employer has to comply with the following requirements:
  - i. The employer must give one month’s notice to the workman indicating the reasons for termination, or payment in lieu of wages for the period of notice.
  - ii. The employer is required to give to retrenchment compensation to the workman. Such compensation is to be calculated at the rate of 15 days’ average pay for every completed year of continuous service or part thereof in excess of six months.
  - iii. A notice of such retrenchment shall also be given to the Central Government in the prescribed form, within three days of the date on which notice is served to the workman or date on which he is paid wages in lieu of such notice.

### **7.3 Benefits on Termination**

**7.3.1. Provident Fund:** The employer is not required to make any additional payment to the employee at the time of termination. However, the employee has an option to either withdraw the Provident Fund or transfer his Provident Fund account with the new employer.

**7.3.2. Payment of Gratuity:** Gratuity is payable to all employees (who have completed five years of service) in the event of their superannuation, retirement, resignation, death, discharge on the ground of total disablement due to an accident or a disease and termination other than dismissal on account of misconduct.

If the last drawn monthly salary of the employee is taken as ‘x’, then the amount of gratuity payable to him shall be calculated as follows:

$$\text{Payment of Gratuity} = [(x/26)*15]*(\text{number of years of service})$$

**7.3.3. Leave Encashment:** The Shops and Establishments Acts of mostly all states provide that if an employee is discharged by his employer before he has been allowed the leave, or if, having applied for and having been refused the leave, he quits his employment before he has been allowed the leave, the employer shall pay him full wages for the period of leave due to him.

**7.3.4.** Over and above the statutory payments, the employee is also entitled to the severance benefits as may be available to him under the company policy (if any).



## CHAPTER 8

### **REGISTRATIONS REQUIRED UNDER VARIOUS LABOUR LEGISLATIONS**

#### **8.1 Shops and Establishments Act**

- A state-specific legislation to regulate the terms of service and other conditions of work.
- Contains provisions for regulating the working hours, payment of wages, leave holidays in shops, commercial establishments, residential hotels, restaurants, theatres and other places of public amusement or entertainment.
- Every establishment covered by the statute is required to register itself with the Inspector of the respective Shops and Establishments Authority within 30 days from the date of commencing its work.

#### **8.2 Provident Fund**

- The Employees Provident Funds and Miscellaneous Provisions Act, 1952 (PF Act) applies to all factories or establishments employing twenty (20) or more persons.
- Compulsory registration after the number of employees reaches the prescribed limit.
- Voluntary coverage where the number of employees is less than 20.
- Employer is required to contribute a certain percentage of the salary, dearness allowance and retaining allowance of the employee, into the PF account.
- Employer's responsibility to deduct employee's contribution and deposit it the PF account along with his own contribution. Failure to collect the employee's contribution would make the employer responsible.
- The employees drawing wages up to INR 6,500 (INR Six thousand five hundred) per month are statutorily entitled to the provident fund benefit under the PF Act.

#### **8.3 Employee State Insurance**

- The Employee State Insurance Act, 1948 (ESI Act) applies to all factories and establishments employing twenty (20) or more persons.
- Every factory or establishment to which this ESI Act applies shall be registered with the Regional Office within 15 days of the Act becoming so applicable.

#### **8.4 Factories Act, 1948**

- The Act is applicable where 10 or more persons are employed at a place in which a manufacturing process is carried on with the aid of power, or a place where 20 or more persons are employed at a place in which manufacturing process is carried on without the aid of power.
- Registration is required to be done as per the rules laid by the respective State governments in this regard.

## **8.5 Professional Tax**

- Professional Tax is levied by various States in India on the income earned by way of profession, trade, calling or employment.
- In case of salaried and wage earners, the liability to deduct Professional Tax is on the Employer and deposit the same with the respective State government.
- Every person liable to pay Professional Tax under the respective State legislation shall apply for Registration Certificate to the respective State's tax department in the manner prescribed.
- In case of more than one place of work, registration has to be done separately with the respective jurisdictional authority.
- The Indian states which have enacted provisions for Professional Tax are Karnataka, West Bengal, Andhra Pradesh, Maharashtra, Tamil Nadu, Gujarat, Assam, Chattisgarh, Kerala, Meghalaya, Orissa, Tripura and Madhya Pradesh.