IN-DEPTH

Employment Law

INDIA

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In-Depth: Employment Law (formerly The Employment Law Review) is an insightful global survey of the employment law frameworks and related developments in key jurisdictions around the world. It analyses the most consequential current issues faced by employers, including recent case law, legislative and regulatory changes and best practices.

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India

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Summary

Introduction

Labour falls under the concurrent list of the Constitution of India, whereby both the central and state governments have power to legislate on matters relating to labour and employment.

Most of the central and state labour statutes govern the working conditions of blue-collar employees (i.e., workers), whereas the employment terms of white-collar employees (i.e., non-workers) are largely governed by private contracts.

The key sources of Indian employment laws are as follows:

1. the Constitution of India;
2. central and state statutes;
3. judicial precedents; and
4. collective or individual contracts.

Adjudication of industrial disputes in India must pass through various stages and forums. At the root level, a dispute is brought before the conciliation officer to seek resolution. If the conciliation is successful, it is recorded in a written memorandum of settlement, which is binding on the parties. Otherwise, the dispute is referred by the appropriate government body to the labour court or the industrial tribunal or the national industrial tribunal, as the case may be. An award passed by the appropriate industrial court can be challenged before the concerned high court under its writ jurisdiction. The judgment of the concerned high court may later be challenged before the Supreme Court by filing a petition for special leave.

The relevant labour statutes in India are broadly categorised into two types, namely employer–employee relationships and working conditions of employees.

Statutes such as the Industrial Disputes Act 1947 (IDA) and the Industrial Employment (Standing Orders) Act 1946 (IESOA) primarily deal with employer–employee relationships. Furthermore, enactments such as the state-specific Shops and Commercial Establishments Acts (SEAs), the Factories Act 1948 (FA) and the Payment of Wages Act 1936 focus primarily on the working conditions of employees. Statutes such as the Employees' State Insurance Act 1948, the Employees' Provident Fund and Miscellaneous Provisions Act 1952 and the Payment of Gratuity Act 1972 govern the social security benefits paid to employees.

The primary judicial bodies and government agencies responsible for enforcement of Indian employment laws are as follows:

1. labour courts, industrial tribunals and the National Tribunal are responsible for adjudicating labour disputes;
2. the Regional or Chief Labour Commissioner undertakes enforcement relating to the payment of salaries, gratuities, contract labour, employee compensation and working conditions, among other things;
3.

the Directorate of Factories enforces provisions relating to health and safety in factories;

4. the Provident Fund Commissioner is responsible for enforcement relating to the provident fund; and
5. the chairperson of the Employees' State Insurance Corporation is responsible for enforcement relating to employees' state insurance, among other things.

Year in review

The key trends in employment law in 2023 were the following.

1. The implementation of the labour codes[2] has been deferred since some state governments are yet to publish their draft rules or align them with the central rules. The government aims to implement the codes after the general elections of 2024.
2. With an aim to recognise and facilitate social security and other benefits for gig and platform workers, governments of states such as Tamil Nadu and Maharashtra have announced the framing of schemes relating to such areas as insurance, health and maternity benefits. For this purpose, the Rajasthan government has introduced the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act 2023, which proposes to set up a social security fund for gig workers.
3. The Punjab and Haryana High Court has quashed[3] the Haryana State Employment of Local Candidates Act, 2021 on the grounds of being unconstitutional and in violation of Part III of the Constitution of India. This Act provided for 75 per cent reservation of jobs in the private sector for candidates local to Haryana.
4. Several leading companies, such as Amazon, Google and Infosys, are setting the trend of 'return to office' and encouraging their employees to return to office on a regular basis. The Indian IT sector has witnessed a trend where companies are stressing the need of in-office presence to improve efficiency.
5. The Ministry of Skill Development and Entrepreneurship, Government of India, has issued[4] Guidelines for Implementation of National Apprenticeship Promotion Scheme-2 (NAPS-2) replacing the NAPS-1, which requires an establishment to pay 75 per cent of the stipend to an apprentice, after which the government will initiate the remaining payment. This is unlike NAPS-1, where an establishment had to pay the full amount of the stipend to apprentices.
6. Acknowledging the significance of the role of both mother and father for a child's welfare, protection and development, the Indian courts[5] have requested the government to make policies to recognise the right to paternity and paternal leave as a basic human right of parents.
7. The Digital Personal Data Protection Bill, 2023, after being passed by the lower house (Lok Sabha) and upper house (Rajya Sabha) of parliament, received presidential assent on 11 August 2023, to become the Digital Personal Data Protection Act, 2023 (the DPDP Act). However, the effective date for implementation of this Act is yet to be announced by the government. Furthermore, the rules under

the Act are currently at the drafting stage and are soon expected to be released for consultation.

Significant cases

In *Employees' Provident Fund Organisation & Another v. Sunil Kumar B and Others*,[6] the Supreme Court of India upheld the validity of the Employees' Pension (Amendment) Scheme, 2014 (the 2014 Amendment), while quashing certain provisions. The 2014 Amendment to the Employees' Pension Scheme, 1995 had, inter alia, revised the wage ceiling for contributing to the pension fund from 6,500 to 15,000 rupees, thereby permitting employees to contribute to the pension fund above such wage ceiling. In this case, it was held that, for eligible employees who had opted out of pension contributions on salaries that exceeded 15,000 rupees, another opportunity is provided to exercise the option within the prescribed time.

In *Dr Kavita Yadav v. The Secretary, Ministry of Health and Family Welfare Department and Others*,[7] the Supreme Court of India analysed whether maternity benefits would apply to a woman beyond the period of her contract or employment. The Court observed that once an employee is eligible as per Section 5(2) of the Maternity Benefits Act, 1961, she would be eligible for full maternity benefits even if those benefits would exceed the duration of her contract.

Basics of entering into an employment relationship

i Employment relationship

Some state-specific SEAs, such as those in Delhi, Karnataka and Andhra Pradesh, require an employer to issue an employment letter. Moreover, it has been held by the Indian courts under various judicial precedents that failure to issue an appointment letter would amount to an 'unfair labour practice'. Although, in most cases, written employment contracts are executed between the employer and employee, oral employment contracts are prevalent in the unorganised sector.[8]

Fixed-term employment contracts are permissible in India and are governed by the IESOA.[9] The IESOA provides that a 'fixed-term employment workman'[10] will be eligible for all statutory benefits that are available to a permanent workman proportionately, according to the period of service rendered. The IESOA restricts permanent posts in an industrial establishment from being converted into posts for fixed-term employment.

Employment contracts in India generally include the following terms:

1. names and addresses of the employer and the employee;
2. title of the job, the nature of the work or a job description;
3. place of work and options for transfers;
4. probationary period;

5. salary and other benefits;
6. notice period for dismissal;
7. leave, working hours and holidays;
8. the term and termination of the contract;
9. restrictive covenants;
10. applicability of company policies and code of conduct; and
11. the governing law, jurisdiction and dispute resolution.

To avoid any dispute or ambiguity with respect to the terms of employment, it is advisable to execute an employment contract prior to or on the date of commencement of employment.

Any changes in the employment terms of a workman are covered under the IDA, which protects the concerned workman from the employer making unilateral changes to the workman's service conditions. The IDA requires an employer to give the workman likely to be affected by any change and the appropriate government body 21 days' notice, in the prescribed manner, of the nature of the change proposed. The IDA also lists the circumstances that require a notice of change, such as wages, other allowances, hours of work, classification by grades, the introduction of new rules of discipline or alteration of existing rules except where these are provided in standing orders.

For any amendment in the employment contract of white-collar employees (i.e., non-workers), there is no requirement to provide notice. Amendments would be governed by their respective employment contracts and the general service conditions of the employer. However, to avoid any dispute at a later stage, it is advisable to inform the concerned employees before effecting an amendment and, to the extent possible, obtain written acknowledgment.

ii Probationary periods

There are no specific laws in India that deal with the terms of probation. However, the IESOA provides that a workman may be employed on probation for up to three months to fill a permanent vacancy and that the probationer is not entitled to any notice period or salary in lieu thereof during the agreed period.

Furthermore, the SEAs of various states provide that the notice period for the termination of contracts of employees who have worked for a certain period, ranging from three to six months, should be given notice of one month or salary in lieu thereof.

It is a settled law that the service of a probationer can be terminated after making an overall assessment of their performance during the probationary period and no notice is required to be given before dismissal. However, to avoid any dispute, it is advisable that the employer should observe the provisions of the SEAs regarding notice periods, if applicable, irrespective of the employee's status as a probationer.

iii Establishing a presence

A foreign company cannot hire employees unless it is constituted in the form of a company, branch office, liaison office, representative office or limited liability partnership in India. Similarly, a foreign company cannot hire employees through an agency or any third party unless it has a legal entity in India.

However, it has been seen that prior to setting up a legal entity to do business in India, foreign companies do hire personnel through recruitment agencies in India for a short period. In this type of arrangement, all obligations in respect of the personnel are borne by the recruitment agency. This stop-gap arrangement carries with it the risk of being considered as a 'contract of service', thereby creating a relationship of master and servant and a permanent establishment (PE) of the foreign company in India.

A foreign company may engage an independent contractor without being officially registered in India. It is important to note that the contract or other arrangement between the foreign company and the independent contractor should be structured as a contract for service. This contract must clearly establish that, inter alia, the contractor is legally and economically independent, the contractor's activities are not devoted wholly or almost wholly to the foreign company and there is no supervision or control by the foreign company.

An independent contractor may create a PE of the company, under certain situations. The courts have devised primary tests and laid down several factors, namely control test, integration test, intricate factor, fixed place test, agency test, service test, among others, to determine whether personnel can be classified as independent contractors. All the relevant facts and circumstances are considered, including the terms and conditions of the agreement between the parties, when deciding the foregoing. In this regard, the double taxation avoidance agreement between India and the foreign country is also significant.

Once it is established that a foreign company has a PE in India, the profits that are attributed to its activities in India through the PE will be taxed as business income in accordance with the rules laid down in Article 7 of India's tax treaties.

Restrictive covenants

The Contract Act 1872 (CA) declares all the contracts that impose any 'restraint of trade' as void. Furthermore, India's Constitution guarantees that all citizens have a right 'to practise any profession, or to carry on any occupation, trade or business'.

It is a settled position of law that negative covenants in effect during the period of employment, when the employee is bound to serve their employer exclusively, are not to be regarded as a restraint of trade. However, there has been a recent change in industry practice concerning exclusivity provisions during the course of employment. Although most companies have taken a stern approach towards moonlighting or dual employment, some companies in the IT sector are allowing their employees to take up secondary employment during the course of their primary employment.

Post-employment conditions or restrictions are rendered void by the CA. In practice, it is common for employment contracts to have restrictive covenants, which serve as a deterrent to the employees from engaging in competing activities during and after employment.

Employers can contractually restrict their employees from misusing or disclosing their trade secrets or confidential business information and practices. These covenants survive termination of employment and are enforceable before the courts.

Wages

i Working time

The labour laws specify the maximum number of hours that a worker can be made to work. Legislation, including the FA and the SEAs, prescribes nine hours per day or 48 hours per week as the maximum number of hours that an employee can be made to work. No individual or agreement can override these statutory conditions, which are typically followed in letter and spirit.

The maximum working hour limits as provided under labour law do not differentiate between day or night work. However, the FA provides that night shifts must be on a rotational basis, and the employer is required to inform employees in advance of being required to work a night shift. Furthermore, under the FA and certain state-specific SEAs, no woman worker is supposed to work between 10pm and 5am, unless the prescribed requirements, including obtaining consent from the woman concerned, are met.

ii Overtime

Any work conducted in addition to the prescribed maximum working hours (i.e., nine hours a day or 48 hours a week) entitles employees to receive payment for overtime. Most of the state-specific SEAs and the FA provide for twice the rate of the ordinary rate of wages for the work carried out beyond the standard maximum hourly limits.

The FA and some state-specific SEAs do restrict the number of overtime hours that may be worked. For instance, the FA provides that the total number of hours of overtime must not exceed 50 in a period of three consecutive months. Similarly, the SEA of Delhi provides that an employer can only require an employee to work, with overtime, up to 54 hours a week, and a maximum of 150 hours of overtime in a year.

Foreign workers

Various labour laws (both central and state) require an employer to maintain registers and records of attendance, wages and other matters relating to its employees and to keep them at the employer's premises. However, these laws do not differentiate between employees based on their nationality. Hence, the employer is required to maintain the requisite details of foreign workers in its registers and records, as per the applicable provisions of labour laws.

Although there is no restriction on the number of foreign workers who can be brought to India to work for an Indian employer, they would require valid employment visas, which are issued to foreigners who are skilled professionals and technicians, technical experts, senior executives and the like. An employment visa will generally not be granted for jobs for

which qualified Indians are available and that are routine, ordinary, secretarial or clerical in nature.

In general, there is no restriction on the length of a foreign worker's assignment. However, the presence of the worker in India is dependent on the length of the employment visa issued by the government. Depending on the nature of the project or job to be undertaken by a foreign worker in India, the employment visa may be valid for up to five years.

As per the immigration laws, the government has unrestricted powers to regulate the movement and presence of foreigners in India. An employment visa is issued from the country of origin, or from the country of domicile of the foreigner where they have resided for more than two years. However, an employment visa can be extended subsequently beyond its initial term in India, once a year, for up to 10 years.

The immigration laws prescribe that a foreign worker should receive an annual gross salary threshold of 1.625 million rupees from an Indian employer to be eligible to apply for an employment visa. However, certain categories of foreign workers are exempt from this limit, such as ethnic cooks, language teachers (other than English language teachers) and translators.

The income received by a foreign worker from an Indian employer, irrespective of the place of receipt of the money, will be considered as income earned in India and will be taxable in the hands of the foreign worker. As per Indian income tax laws, the Indian employer is obliged to pay withholding tax to the income tax authority. In addition, the employer is required to pay the requisite social security contribution (provident fund), if applicable, and any other contractual benefits, as agreed between the parties in the employment contract.

Under various laws, including the Constitution, a foreign worker is protected from inequalities and discrimination by an employer to the same extent as an Indian worker.

Global policies

Formulation of internal discipline rules is per se not a requirement under Indian labour laws. However, industrial establishments at which the IESOA is applicable are required to formulate and certify their standing orders, which would govern the terms and conditions of their workers. As per the provisions of the IESOA, it is mandatory to incorporate disciplinary rules in the standing orders. A draft of the standing orders must be filed for approval and certified by the concerned certifying officer appointed by the government. The draft standing orders are subject to the agreement of the representatives of the workers concerned or the trade union, as the case may be. A copy of the draft is therefore sent to the workers' representatives or trade union along with a notice calling for objections. On receipt of any objections, the employer and the workers are given the opportunity to be heard, after which the certifying officer will either modify or certify the draft standing orders.

Indian laws prescribe for formulating mandatory rules on certain subjects. Under the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act 2013, employers are required to formulate an anti-sexual harassment policy for their employees. The Transgender Persons (Protection of Rights) Act, 2019 and the Rights of Persons with Disabilities Act, 2016 make it mandatory for establishments to publish an equal opportunity policy to prevent discrimination against transgender persons and persons with disabilities in matters of employment. Furthermore, to safeguard the rights of persons

affected with HIV at the workplace, the Ministry of Health and Family Welfare has notified the HIV and AIDS Policy for Establishments, 2022 for all establishments[11] in light of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017. The policy aims to eliminate workplace discrimination and unfair treatment of employees affected with HIV. The Companies Act 2013 and rules made thereunder provide that certain companies[12] should establish a 'vigilance mechanism' to report genuine concerns raised by whistle-blowers.

Except for the foregoing, the framing of policies is not a mandatory requirement under Indian law.

There is no specific legal requirement to formulate the terms of employment in the local language, and notification of this to the employees is sufficient for them to apply. The terms may be handed over to the employees and an acknowledgement can be obtained from them. They may also be circulated to the employees via electronic means. Posting the terms and rules on the company's intranet and advising employees to access and read the rules regularly would be sufficient, subject to the employees being informed that the rules are available on the intranet.

Typically, disciplinary rules are provided in the employees' handbook or manual or code of conduct and are incorporated by reference in the employment contract.

Parental leave

Except for the maternity leave as prescribed under the Maternity Benefit Act 1961 (MBA), it is not mandatory for an employer in the private sector to provide either paternity or parental leave to its employees. An employer in the private sector, at its sole discretion, may formulate paternity and parental leave policies.

The MBA entitles an eligible woman to paid maternity leave of a maximum of 26 weeks, of which the woman employee can take up to eight weeks before the date of her expected delivery. Remuneration during maternity leave is paid by the respective employer and not by the government.

As per the MBA, an eligible employee is a woman who has worked with the employer for at least 80 days during the 12 months immediately preceding the date of her expected delivery.

The employee may be entitled to other benefits, such as a medical bonus, nursing breaks, working from home and a crèche facility, as per the provisions of the MBA. On 1 June 2021, the Ministry of Labour and Employment issued an advisory to encourage employers to allow nursing mothers to work from home, wherever the nature of work so permits.

Finally, the MBA prohibits an employer from terminating the employment of a woman during her absence or pregnancy, or from giving notice of termination of her services during or on account of the absence.

Translation

There is no specific law that requires the translation of employment documents into the local language. However, some SEAs require an employer to exhibit notices or working

terms in the local language as understood by the workers. Furthermore, if the employment document is in an unfamiliar language or a language that the employee cannot understand, it may make the agreement invalid. To overcome this risk, it is advisable to explain the terms of the documents in a language understood by the employee and have the signed document notarised by a local notary public, whereby it is attested that the document has been read and understood by the concerned employee.

It is therefore recommended to have employment documents translated into a language understood by the employees as it reduces the risk of allegations, such as coercion, against the employer. However, the translation need not be by a certified translator or notarised.

Employee representation

The IDA mandates an industrial establishment to constitute a works committee if it employs 100 or more workers. The aim of a works committee is to promote measures to maintain industrial peace and to mediate any difference of opinion between management and workers to maintain industrial peace.

Furthermore, as per the Constitution, all citizens have the right to form associations and unions, among other organisations. The Trade Unions Act 1926 (TUA) defines a trade union as any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workers and employers, or between workers and workers, or between employers and employers. However, there is no legal obligation on employers to recognise a union or engage in collective bargaining.

The number of representatives of workers in the works committee should at least be equal to the number of management representatives. Furthermore, the TUA provides that if a trade union wishes to register itself under the TUA, it must consist of a minimum of 10 per cent of the workforce or 100 workers, whichever is the smaller, subject to a minimum of seven members.

As per the IDA, the workers' representatives must be chosen in the prescribed manner from among the workers engaged in the establishment and in consultation with their trade union, if any, registered under the TUA.

As per the provisions of the TUA, the trade union will formulate its rules regarding the manner in which the members of the executive and the other officers of the trade union will be appointed and removed. These rules must be submitted to the concerned authority at the time of registration.

The term of office of representatives on the works committee, other than a member chosen to fill a casual vacancy, shall be two years. A member chosen to fill a casual vacancy will hold office for the unexpired term of the predecessor. There is no explicit provision in the law dealing with the length of the term of representatives of a trade union.

A works committee is required to promote measures for securing and preserving amity and good relations between the employer and the workers, comment on matters of common interest or concern, and endeavour to resolve any material difference of opinion in respect of these matters. The works committee has the power to co-opt members who have special knowledge of a matter that is referred to it in a consultative capacity. The co-opted member

or members can be present at meetings only for the period during which the particular question relating to their sphere of knowledge is before the works committee.

Traditionally, the function of trade unions in India was limited largely to collective bargaining for economic considerations. However, over time, trade unions have become involved in various other matters, such as employee welfare activities, settlement of grievances and legal assistance to workers.

Employers should ensure that, where necessary, work cover or workload reductions are provided to representatives. This can include the allocation of duties to other employees, rearranging work to a different time or a reduction in workload. Employers, trade unions, works councils, union representatives and line managers should work together to ensure that provisions for time off, including for training, operate effectively and for mutual benefit. Representatives need to be able to communicate with the management, each other, their trade union, works council and employees.

As per the IDA, the representatives of a works committee should meet at least once every three months.

Data protection

i Requirements for registration

India is not a party to any convention on personal data protection, such as the EU General Data Protection Regulation or the Data Protection Directive. However, it has adopted or is a party to other international declarations and conventions that recognise the right to privacy.

On 11 August 2023, India introduced its first comprehensive data privacy law, namely the Digital Personal Data Protection Act, 2023 (the DPDP Act), to safeguard the personal data of individuals. The effective date for implementation of the DPDP Act is yet to be announced, which will be performed by way of a notification to be issued by the central government. Prior to this Act, the Information Technology Act, 2000 (the IT Act) along with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules) provided certain provisions relating to data privacy of individuals. However, the IT Act was not a specific legislation on this issue. The DPDP Act will replace Section 43A of the IT Act and the IT Rules, which has been the law on data protection until now.

There is no current requirement for a company to register itself with any data protection agency. However, the DPDP Act gives recognition to consent managers and makes it mandatory for them to register with the Data Protection Board of India (DPBI). Consent managers act as a single point of contact enabling the data principal to give, manage, review and withdraw its consent through an accessible, transparent and interoperable platform.

Similarly, the DPDP Act also makes it mandatory for the data fiduciary to obtain the consent of the data principal before collecting personal data. In addition to obtaining the consent of the data principal, the DPDP Act puts an obligation on the data fiduciary to serve a notice

to the data principal, including personal data to be processed and the purpose, their rights under the DPDP Act and the complaint mechanism. However, there are certain 'legitimate uses' under the DPDP Act wherein no separate consent is required to be taken from the data principal, such as voluntary sharing of personal data by the data principal, providing of benefits or services by the government, employment and related purposes. The DPDP Act also casts obligations on data fiduciaries to take reasonable security safeguards to protect personal data and prevent data breaches; non-compliance of these obligations can result in a penalty of up to 2.5 billion rupees. Data fiduciaries are also required to notify data breaches to the DPBI and the affected data principal. Non-compliance of this obligation can result in a penalty of up to 2 billion rupees.

ii Cross-border data transfers

In respect of registration and consent, see Section XII(i).

Under the DPDP Act, cross-border transfers of personal data are permitted. However, the Indian government can restrict the transfer to any country or territory outside India by way of a notification. This means that the DPDP Act adopts a blacklisting approach, and personal data is freely transferable unless the transfer is to a country or territory that is blacklisted by the central government.

Furthermore, the DPDP Act explicitly states that if any Indian law (especially sectoral laws) provides for a higher degree of protection or restriction on transfer of personal data outside India, then such laws would continue to apply in addition to provisions of the DPDP Act.

Third-party transfers are permitted under the DPDP Act. However, the data fiduciary remains obligated for the compliances for the third-party under the DPDP Act. Data fiduciaries are obligated to share information about the third-party with the data principal, if they invoke their 'right to access information about personal data' under the DPDP Act.

The DPDP Act is silent in respect of joint-user agreements.

iii Sensitive data

The provisions of the DPDP Act apply to all kinds of personal data and do not provide for classification of personal data into different categories. It treats all personal data uniformly unlike the IT Rules, wherein personal data is categorised into 'personal information' and 'sensitive personal data or information' (SPDI); SPDI enjoys more protection under the IT Act and the IT Rules. Under the DPDP Act, companies are required to protect all types of personal data from a data breach and implement appropriate security measures for the same. In the absence of any distinction/classification of personal data, no enhanced protection for specific categories of personal data is provided.

iv Background checks

Indian companies generally conduct background checks on prospective employees during the recruitment process. However, the scope of background checks varies across different sectors and industries. In the absence of a specific law governing background checks of employees, guidance is taken from general laws and judicial precedents. Typically,

employers take the prior consent of employees and also reserve their right to conduct background checks in the interview documents or employment contracts.

The DPDP Act provides for certain 'legitimate uses', such as purposes of employment under which no separate consent is required from the data principal. However, there is uncertainty about whether 'purposes of employment' encompasses the data collected during recruitment and background checks when an employment offer is extended and no employer–employee relationship is established. Further clarity on the same may be expected once the rules under the DPDP Act are notified.

Credit checks would require the processing of financial information about an individual. Before the DPDP Act, as per the IT Rules, financial information was covered within the meaning of SPDI and enjoyed protection under the IT Act and the IT Rules. As the DPDP Act provides for no such distinction or classification of personal data, no enhanced protection will be provided, as discussed above.

Criminal records of individuals are primarily available from the Indian courts and the police. In the absence of comprehensive digitisation of these records, this information may not be freely available. Thus, to undertake a physical check and verification of these records, due authorisation of the concerned individual is essential. Authorisation of the individual is also required to obtain a police clearance certificate from the concerned police department.

Indian laws do not specifically provide for any areas that cannot be reviewed during a background check. However, these checks generally do not seek information about the employee's caste, religion and similar details.

v Electronic signatures

Electronic signatures are permissible in India. They were given legal recognition in 2000, after the IT Act was passed. The law permits the usage of two types of electronic signatures in India: electronic signatures and digital signatures. The IT Act provides the legal framework for electronic signatures in India and ensures that they have the same legal effect as physical signatures when performed in the manner prescribed under the IT Act.

Electronic signatures are valid and enforceable for most documents, including offer letters and employment contracts. However, there are certain exceptions, as provided under the IT Act, which states that the following documents mandatorily require a wet signature: negotiable instruments, power-of-attorney documents, trusts[13] and wills.

Discontinuing employment

i Dismissal

Dismissal under Indian laws is termination of services by way of punishment for misconduct. It implies not merely termination without notice or payment, but essentially indicates a measure of punishment. The employer is bound to give an opportunity to the employee to explain their conduct and to show cause why they should not be dismissed.

The general rule is that, in this process, there should be no violation of the principles of natural justice.

There is no requirement for a company to notify a government authority, works council or trade union of any dismissal. However, if any memorandum of settlement has been signed with a recognised trade union or works committee, then the company may need to notify the relevant body, as per the terms of the memorandum.

There is no specific provision for a procedure for dismissing an employee. However, the IESOA and some SEAs (such as those of Andhra Pradesh and Telangana) provide for a procedure for holding a domestic inquiry in respect of alleged misconduct. This procedure has further evolved by various judicial precedents and includes issuing a charge sheet, appointing an inquiry officer, holding hearings, examining and cross-examining witnesses, and evidence, among other things. The employee accused of misconduct may be suspended pending the enquiry. During this process, the principles of natural justice must be followed.

An employee who is dismissed for misconduct is typically not considered for rehiring or suitable alternative employment. Furthermore, as per some SEAs (such as Delhi and Uttar Pradesh), if an employee is dismissed as a result of established misconduct, the employer is not required to provide notice or pay in lieu thereof.

As per the provisions of the IDA, no employer is permitted, during the pendency of any proceeding in respect of an industrial dispute, to discharge or dismiss or otherwise terminate the services of a 'protected' worker without the express permission in writing of the concerned authority before which the proceeding is pending.

There is no specific requirement for severance and dismissal indemnities. However, if these indemnities are incorporated in the employment contract or policies of the company, they can be enforced at the time of dismissal.

As dismissal is a unilateral decision of dispensing with the services of an employee on account of misconduct, there is typically no scope for the parties concerned to enter into a settlement agreement to this effect.

ii Redundancies

Redundancy connotes that the business is being continued but some of the workers are discharged as surplus or for other reasons. Redundancy does not carry any stigma for the workers affected.

Lay-offs mean a temporary refusal by the employer to employ workers on account of a shortage of some resources or raw-materials, accumulation of stocks, breakdown of machinery or natural calamity, whereas redundancy is a permanent cessation of employment.

The SEAs, the IDA and the IESOA govern the procedure for redundancies, which is more commonly known as retrenchment of workers.

Redundancy in respect of non-workers is governed as per the terms of their employment contract or company policy, or as mutually agreed by the parties under the settlement agreement.

As per the IDA, industrial units employing fewer than 100 workers are required to notify the appropriate government body about the retrenchment in a prescribed manner. This notice must be sent within three days of the notice being given to the workers or payment made in lieu thereof. If the retrenchment is pursuant to an agreement, a notice must be sent out at least one month before the retrenchment date.

Industrial units employing more than the prescribed number of workers (between 100 and 300 workers) are required to make an application providing the reasons for the intended retrenchment to the appropriate government body, seeking its prior permission.

The IDA requires an employer to fulfil the following conditions, among others, prior to retrenching workers:

1. issuance of prior written notice of one or three months (depending on the number of workers to be retrenched), or pay in lieu thereof, indicating the reasons for the retrenchment;
2. payment of compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months;
3. intimation to the appropriate government body, if the number of workers employed is less than the prescribed number of workers;
4. prior permission from the appropriate government body, if the number of workers employed is less than the prescribed number of workers; and
5. application of the principle of last-in-first-out (i.e., the last worker to be employed would be the first to be retrenched).

Furthermore, employers are required to offer retrenched workers the opportunity to be re-employed. However, there is no specific requirement for suitable alternative employment to be offered.

The parties may enter into a settlement agreement. However, entering into a settlement agreement does not affect the employees' entitlement to termination benefits, including retrenchment benefits, as provided under the IDA, their employment contract or the company's policies. The settlement agreement entered into with the workers is required to be filed before the officer authorised by the appropriate government body and is binding on the parties under the provisions of the IDA.

Transfer of business

India does not have any specific legislation for the protection of employees affected by a merger, acquisition or outsourcing transaction along the lines of the Transfer of Undertakings Regulations 2006 in the United Kingdom. However, the IDA extends protection to the rights of workers in the event of the transfer of management or business of an undertaking.

As per the provisions of the IDA, whether a transfer of business or management of an undertaking is by way of agreement or by operation of law, workers who have been in continuous service for more than one year are entitled to receive notice and compensation

from their old employer, in the same way as retrenched workers. However, this compliance would not be applicable if all the following conditions are met:

1. the service of the worker has not been interrupted by the transfer;
2. terms and conditions of service applicable to the worker after the transfer are not in any way less favourable than those applicable to the worker immediately before the transfer; and
3. the new employer would be liable to pay retrenchment compensation to the transferred worker on the basis that service has been continuous and has not been interrupted because of the transfer.

On the basis of various judicial precedents, the old employer needs to obtain the consent of the worker prior to a transfer to the new employer. If a worker does not consent to being transferred, they are entitled to compensation, which is to be determined as if the worker had been retrenched.

Outlook and conclusions

With the rapid growth of gig and platform-based workforce, the Indian government is working towards ensuring social security for these workers. During the G20 Labour and Employment Ministers Meeting 2023, the Indian government also focused on the topic of adequate and sustainable social protection and decent work for gig and platform workers. Furthermore, various organisations have formulated policies to ensure that all gig workers on their platforms are provided wages on par with applicable minimum wage standard.

Use of artificial intelligence (AI) is revolutionising various sectors in India such as healthcare, agriculture, education and e-commerce. It is expected to impact the employment sector in both a positive and negative manner, resulting in job displacement on the one hand, and creation of new job opportunities on the other. As India currently does not have any codified laws or statutory rules on AI, there is a need to develop a framework to regulate AI.

The DPDP Act introduces a new phase of technology law in India. It represents a major step in safeguarding personal data, bolstering the digital security posture of the country, and addressing longstanding data privacy issues. Various principles of data protection are encapsulated in the DPDP Act, such as data minimisation, purpose and storage limitation, and accountability, the impact of which will be far-reaching, affecting individuals, businesses and the overall economy. We will have to wait to see the effect of the DPDP Act on businesses, as the implementation date of the Act and the draft of the rules made thereunder are yet to be announced by the Indian government.

Endnotes

1 Rahul Chadha is the managing partner, Savita Sarna is a partner, Manila Sarkaria is a principal associate and Natasha Sahni is a senior associate at Chadha & Co. ^ Back to section

2 The Code on Wages 2019, the Code on Social Security 2020, the Industrial Relations Code 2020 and the Occupational Safety, Health and Working Condition Code 2020. Back to section

3 On 17 November 2023. Back to section

4 See the notification dated 25 August 2023. Back to section

5 Refer to the judgment by the High Court of Judicature at Madras in the matter of*B Saravanan v. Deputy Inspector General of Police*, W.P.(MD). No.19561 of 2023. Back to section

6 Civil Appeal Number. 8143-8144 of 2022. Back to section

7 Civil Appeal Number 5010 of 2023. Back to section

8 'Consisting of all unincorporated private enterprises owned by individuals or households engaged in the sale or production of goods and services operated on a proprietary or partnership basis and with fewer than 10 workers.' 'Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector', Academic Foundation (1 January 2008), p. 1774. Back to section

9 The Industrial Employment (Standing Orders) Act 1946 (IESOA) is generally applicable to certain specified industrial establishments with 100 or more workers. However, certain states have extended the provisions of the IESOA to smaller establishments as if they were industrial establishments. Back to section

10 The Industrial Disputes Act 1947 defines a 'workman' as any person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The term workman is interchangeably used with the term 'worker' under certain Indian statutes, such as the Factories Act 1948. Thus, the terms 'worker' and 'workman' have the same meaning and can be used interchangeably. Furthermore, 'employees' acting in a managerial, administrative or supervisory capacity are not considered as workers. However, the term 'employee', as defined under various statutes, is wide enough to include both workmen and non-workmen in its ambit. Back to section

11 Section 3 of the HIV and AIDS Policy for Establishments, 2022 defines an establishment as 'a body corporate or co-operative society or any organisation or institution or two or more persons jointly carrying out a systematic activity for a period of twelve months or more at one or more places for consideration or otherwise, for the production, supply or distribution of goods or services'. Back to section

12 The Securities Exchange Board of India requires every listed company to formulate a whistle-blower policy to enable employees to report genuine concerns. However, there is no specific law on whistle-blowing applicable to private employers in India. Back to section

13 Section 3 of the Indian Trusts Act, 1882 defines a trust as an 'obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner'. ^ Back to section

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