# International Labour and Employment Compliance Handbook

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# Labour and Employment Compliance in India

Fifth Edition

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# Legal Compliance in India

## 1. LEGAL FRAMEWORK: EMPLOYMENT LAWS

The Employment Legal Framework in India consists of the Constitution of India, Central and State statutes, judicial precedents and collective/individual contracts. The order in which the relevant sources of law take precedence in the event of a conflict is as follows:

(i) The Constitution.
(ii) Central statutes.
(iii) State statutes.
(iv) Judicial precedents.
(v) Individual agreements.
(vi) Collective agreements.

It is relevant to mention that any act or omission that is considered to be an offence or is prohibited under any laws of the land would also be deemed to be violative/prohibited/offence under the employment laws, even if not specifically covered.

Further, it is advisable to ensure that whether a specific Central or State statute, or both, are applicable, and the same are complied with. Depending on the facts of a case, Central/State-specific statues and/or compliances provided therein may be applicable to an employer and/or an employee.

*The Constitution of India* is the primary source of law in India. It sets forth the general rules for governance and coexistence. Further, it establishes the fundamental rights which are guaranteed to every citizen (and in some cases even to non-citizens) and the obligations of the State with regard to safeguarding of these rights.

Part III of the Constitution lists the fundamental rights guaranteed to a person. These include the right to freedom of speech, the right against exploitation, the right against forced labour, the right to constitutional remedies, the right to

form associations or unions and the right to practice any profession, or carry out any occupation, business or trade, etc.

With respect to fundamental rights guaranteed under the Constitution, Article 14, Article 15 and Article 21 are especially relevant in the context of employment laws.

Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 prohibits discrimination based on place of birth, race, sex, religion or caste.

Article 21 guarantees the right to life and personal liberty. Judicial pronouncements have established that this right includes the right to a clean and safe environment, suitable work conditions and privacy.

Apart from Article 21, all fundamental rights are subject to reasonable restrictions as may be imposed by the State.

Though fundamental rights are generally enforceable against the State (i.e., in matters relating to employment in the public sector), depending on facts such protection could, in adverse exceptional circumstances, also be extended to employment in the private sector, if the private employer is regarded as 'State' by way of judicial activism by Indian courts. In India, fundamental rights, which automatically apply to all individuals, may not ordinarily be enforceable against a private entity. For instance, a private company may adopt an unwritten policy wherein it does not hire a particular category of people. Hence, it would be difficult for an applicant to enforce his/her right to equality in such a situation. However, if a private employer divulges personal information of an employee without his/her consent, such employee may seek relief under the protection of Article 21 and/or other statutes such as data protection/privacy laws of India.

*Central and State statutes* – Central and State governments have the authority to enact labour laws. The primary labour statutes in India are enacted by the Central government, and the State governments have promulgated State-level amendments and rules under them. Certain labour statutes have also been enacted by the State governments. The most important labour statutes are:

The *Industrial Disputes Act, 1947* (IDA). In India, most of the legislation relating to employment matters apply to a 'workman'. A 'workman' is defined under the IDA as a person who is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, excluding a person:

(i) who is employed mainly in a managerial or administrative capacity; or
(ii) who being employed in a supervisory capacity, draws salary exceeding INR 10,000 (approx. USD 155)[1] per month or exercises functions mainly of a managerial nature.

1. USD 1 = INR 64.11 (as on date September 13, 2017).





An employee is classified as a 'workman' based on the nature of his/ her duties, and not the designation. Hence, it is important to establish a job description that clearly states the exact nature and extent of the main/ key duties and functions of an employee.

The IDA provides for investigation and settlement of industrial disputes. To facilitate this process, the IDA provides for the establishment of various authorities such as conciliation officers, boards of conciliation, courts of inquiry, labour courts, tribunals and national tribunals. It also provides for the conditions regulating strikes, lock-outs, lay-offs, closure and retrenchment.

Under the IDA, certain industrial establishments may be required to set up a grievance redressal machinery or a works committee, comprising of representatives of both the employer and the employees, with a view to promote good relations between both sides.

The ***TRADE UNIONS ACT, 1926*** (TUA) provides for the registration of trade unions and enables collective bargaining.

The ***INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946*** (IESOA) regulates the conditions of employment of 'workmen' as defined in the IDA in certain establishments having 100 or more workmen. In certain States, application of IESOA has also been extended to smaller establishments.[2] Further, employers in certain industries like the IT/ITES sector and operating in certain States are exempt from the scope of the IESOA. The IESOA requires the employers of establishments to which the IESOA is applicable to draft standing orders (or follow the model standing orders) and have the same certified by a certifying officer. 'Standing orders' are written documents dealing with terms and conditions of employment, and are based on the minimum standards prescribed under the Model Standing Orders prescribed by the IESOA. Since such orders are drafted by employers, the trade unions or workers are given an opportunity to provide comments on them. The Standing Orders have to be certified by the Government Certifying Officer who adjudicates upon the fairness and reasonableness of the provisions contained therein.

The ***FACTORIES ACT, 1948*** (FA) establishes working conditions of employees working in a manufacturing facility, including but not limited to, work hours, holidays, leaves, etc. It also imposes safety obligations on the employer. It is applicable to factories having ten or more workers (if working with the aid of power) and twenty or more workers (if working without the aid of power).Please note that the Factories (Amendment) Bill, 2016 was introduced in Lok Sabha on August 10, 2016 by the Ministry of Labour and Employment to amend the Factories Act. However, till date (September 15, 2017) the Bill has not been passed and hence, the proposed amendments are not effective.

2. The threshold limit for applicability of the IESOA to industrial establishments such as in Karnataka and Maharashtra is fifty workmen (and not (100)).

The ***PAYMENT OF WAGES ACT, 1936*** (PWA) provides for the payment of wages to 'employed persons' (as defined thereunder), employed in specified industries such as factories, railways, mines, etc., and it grants a speedy and effective remedy for illegal deductions and/or unjustified delay in paying wages. It only applies to employees drawing wages up to INR 24,000 (approx. USD 347.35) a month.

The ***MINIMUM WAGES ACT, 1948*** (MWA) safeguards the interests of workers, mostly in the unorganized sector. It establishes a minimum wage for certain scheduled employment. The 'unorganized sector' refers to enterprises owned by individuals or self-employed workers and engaged in the production or sale of goods or providing services, and employing less than ten persons. Further, 'unorganized sector worker' means a home-based worker, self-employed worker or a wage worker in the unorganized sector and is broader in meaning than a workman.

The ***PAYMENT OF BONUS ACT, 1965*** (PBA) provides for the payment of statutory bonus to the employees of factories, and other establishments employing twenty or more persons *in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied,* on the basis of profits or productivity of the establishment. Please note that only employees earning less than INR 21,000 (USD 328 approximately) per month are eligible for the statutory bonus as provided herein.

The ***EMPLOYEES' COMPENSATION ACT, 1923*** (ECA) provides for the payment of compensation to employees in certain specified industries, and their dependants, in case of injury and accident (including certain occupational diseases) arising out of and in the course of employment, and resulting in disability or death. The amount of compensation to be paid depends on the nature of injury, the average monthly wages and the age of an employee.

The ***EMPLOYEES' STATE INSURANCE ACT, 1948*** (ESIA) creates a social insurance scheme that provides benefits to workers in case of sickness, maternity, temporary or permanent physical disability resulting in loss of wages or earning capacity and death. Please note that only employees drawing a salary of less than INR 21,000 (USD 328) per month are eligible to avail this benefit. The ESIA is applicable to factories and notified establishments employing such number of employees and meeting such other criteria, as may be specified by the relevant government notification.

The ***MATERNITY BENEFIT ACT, 1961*** (MBA) grants maternity leave and other benefits prior to and after child birth, medical termination of pregnancy or miscarriage. It is applicable to ***INTER ALIA*** factories and/or to establishments having ten or more employees. This is a compulsory benefit for only those women employees who have been in employment for at least eighty days in the twelve months immediately preceding the date of expected delivery. The MBA will not be applicable if an employee is covered under the





ESIA. Recently, the MBA has also been extended to a woman who adopts a child below the age of 3 months and to a commissioning mother.

The ***EMPLOYEES' PROVIDENT FUND & MISCELLANEOUS PROVISIONS ACT, 1952*** (EPFA) was enacted to provide retirement and death benefits for industrial workers in establishments engaged in certain specified sectors such as those engaged in manufacturing activities, mines, etc. However, the benefit has been extended to almost all the sectors that have more than a prescribed number of workers. It provides for the establishment 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 financial protection and security to the employee (and after his death to his family members), and premature withdrawals in times of financial need. Please note that only employees drawing a salary of less than INR 15,000 (USD 233) per month are covered under the EPFA while for the others earning above this threshold, the statute is not applicable.[3]

The ***PAYMENT OF GRATUITY ACT, 1972*** (PGA) provides for the payment of a gratuity to employees who have rendered at least five continuous years of service with an employer. The gratuity is paid on termination of employment (earlier in case of death or disablement). The gratuity is payable at the rate of fifteen days' wages, based on the rate of wages last drawn by the employee, for every completed year of service or part thereof in excess of six months, subject to the ceiling of INR 1,000,000[4] (approx. USD 15,600). However, in case of death or disability, the requirement to complete five years is not applicable.

The ***CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970*** (CLRA) - Employment of contract labour is regulated by the CLRA. CLRA requires, every covered principal employer (who employs or employed on any day of the preceding twelve months twenty[5] or more 'workmen' as defined under the CLRA) to apply for registration with the Registration Officer, and every contractor, who wishes to undertake or execute any work through contract labour, to obtain a license from the Licensing Officer.

***STATE-SPECIFIC SHOPS AND COMMERCIAL ESTABLISHMENTS ACTS*** (SEAs) – Every State in India has in place its own Shops and Commercial Establishments Act to regulate the terms of employment in shops and commercial establishments in the State. The SEA regulates ***INTER ALIA*** the terms and conditions relating to working hours, payment of wages, leave, holidays, payment for overtime work and notice for termination, etc. SEAs are

3. The Employee Provident Fund Organisation has proposed to increase the salary threshold from INR 15,000 to INR 25,000.
4. The Cabinet has passed the bill to enhance the gratuity limit from 1,000,000 to 2,000,000. However, the same is not effective as on date (September 13,2017).
5. Please note that few States such as Rajasthan and Maharashtra have increased the threshold of 20(twenty) workers to 50 (fifty) workers.

(vii) Any benefits that an employee is entitled to.
(viii) Type of contract: fixed term or indefinite term.
(ix) Period of notice required for termination of employment.
(x) Leave entitlement.
(xi) Conditions under which the employer can terminate the contract.
(xii) Non-compete, confidentiality, non-solicitation and other restrictive covenants.
(xiii) Applicability of employee handbook, service book.
(xiv) Transfer. If the parties wish to agree to negative/restrictive covenants, it is advisable to record the same in writing. However, some of the provisions such as non-compete would not be enforceable after termination of employment though they may hold some deterrent value.

Where an employee is covered by a collective agreement, the working hours, schedule and remuneration applicable to him must be determined in compliance with such collective agreement (including applicable laws).

## 2.3. Oral Contracts

So long as there is a valid offer by one party which is accepted by the other party, and such acceptance is communicated to the offering party, there exists a valid contract under the (Indian) Contract Act, 1872 (Contract Act). Employment contracts may be entered into orally, except where the written form is required by law. If there is no written contract, the party seeking to enforce an oral contact will have to prove the existence of such a contract in the event of conflict between the parties.

## 2.4. Employee Handbooks

Except in certain cases where the law requires certain aspects of employment to be notified or displayed or publicized by an employer, as covered in the IESOA, there is no legal obligation to prepare employee handbooks. However, it is a common practice to do so in most industries. Where the employers have prepared employee handbooks, they are obligated to make them available to the employees. Employees' acknowledgement to adhere to the rules contained in a handbook is usually procured in the employment contract or at the time of issue of the handbook. Companies are allowed to establish the policies and procedures they deem convenient and make any amendments, as long as they comply with the statutes, collective bargaining agreements (if any) and the employment contracts, and do not downgrade the conditions established in them.





The contents of the handbook(s) are generally divided in two parts. One part contains information on statutory benefits which employees are entitled to but which are not necessarily mentioned in the employment contract (e.g., pension plans, retirement plans, allowances and state insurance). The second part consists of any other internal benefits and by-laws which regulate employment (e.g., conduct and disciplinary rules and procedures, rules regulating promotions, safety standards and health standards). Some employee handbooks also include policies relating to employee travel, benefits, expenditures, procedure for reimbursement, etc.

## 2.5. Job Descriptions

Job descriptions are relevant in order to determine whether an employee falls under the definition of a 'workman' under the IDA or a non-workman. This description is significant as most of the labour and employment statues apply to 'workman' category of employees. Job descriptions are also necessary for defining a hierarchal structure of an establishment and to convey expectations, fix responsibilities and assess performance of an employee (though the same may not determine whether an employee will qualify as a workman or non-workman). Thus, job descriptions should be included in the employment contract/letter and must state exact duties and nature of the job (as may be revised from time to time, as per the terms of employment).

## 2.6. Offer Letters

Indian employment and labour laws do not mandatorily require an employer to issue an offer letter to a prospective employee.

The offer letter is not binding upon either party until it is constructed to be an employment contract under Indian laws, that is, there is a valid offer by one party and acceptance of the same by the other party. It is a common practice in India to annex the detailed employment contract or make reference to the employee handbook, if any with the offer letter, unless the offer letter has detailed terms and conditions of employment in which case upon acceptance by the employee the offer letter becomes a contract. *The offer letter would merely state the broad terms of the employment, that is, term of employment, designation and compensation, etc. The employment contract would detail all the terms and conditions of the employment such as exact nature of duties, work hours, compensation, etc. In the event of a discrepancy, the employment contract supersedes the offer letter.*

Where an employee accepts the offer letter, and the company revokes the offer before the employment contract is signed or comes into force, the

company would be obliged to pay the damages suffered by the prospective employee if he or she adopted measures in order to start working in the offered position (such as giving notice at a previous job or relocating, etc.). Therefore, it is a common practice for an employer to make the terms of the offer letter subject to certain conditions, for example, submission of original documents, background check, medical examination, etc. The liability of the employer and the amount that may be payable by him may be determined by the Courts, and not provided under any statute.

### 2.7. Checklist of Do's and Don'ts

- Execute an employment contract in writing, as it avoids potential conflicts.
- The employment contract should contain detailed terms and conditions of employment, including but not limited to, provisions regarding disciplinary action in the case of misconduct, salary, benefits, pension, retirement date or retirement benefits, etc. (unless certain aspects are covered in employees' handbook/manual and a reference of such a manual is made in the employment contract).
- Provide an employee manual containing all the terms and conditions of employment in detail, and incorporate the same by reference in the employment contract.
- The employment contract should clearly state the functions, duties and obligations of the employee.
- The employment contract should specify if it is a fixed term, for a specific purpose or an indefinite term contract.
- Requirements under the State-specific acts should be checked through lawyers to avoid any conflict.

## 3. RECRUITING, INTERVIEWING, SCREENING AND HIRING EMPLOYEES

### 3.1. Overview

Indian employment and labour laws do not provide for any rules relating to recruiting, interviewing, screening and hiring, and in fact they do not necessarily require any formal procedure regarding the same. Therefore, it would be up to an employer to devise its own policy regarding recruiting, interviewing, screening and hiring. Companies in India usually have a Human Resource/Administration department to manage the same.

However, it may be pertinent to note that an employer would be required to observe the fundamental rights envisaged in the Constitution and/or the relevant





applicable laws. For instance, an employer would be required to safe-keep the private information with respect to an applicant which may come to his/her knowledge at the time of recruitment in accordance with applicable laws such as the data protection/privacy laws of India and avoid discrimination among the applicants.

Generally, an employer (in the private sector having more than twenty-five employees) is required to notify the vacancies to the local employment exchange in the prescribed format. However, there is no mandatory requirement to appoint any person from among the applicants forwarded by employment exchange.

### 3.2. Recruiting

Apart from certain government employments, Indian employment laws do not provide any rules relating to recruitment process. The Central and the State governments have their own set of rules and regulations for their respective employees. However, the recruitment process must avoid any kind of discrimination. Employees working in the public sector are protected from discrimination on the basis of race, gender, place of birth, domicile, religion, caste, descent, etc.

Although, there is no specific law granting such a protection to employees in the private sector, the same may become applicable in certain cases based on the principle of public policy and equality.

The Equal Remuneration Act, 1976 (ERA) provides that in the recruitment process, no employer shall, discriminate based on gender, except where the employment of women in such work is prohibited or restricted under any law for the time being in force (such as in work of hazardous nature in factories or in underground mines).

### 3.3. Employment Applications

Indian labour and employment laws do not specifically provide for matters relating to employment applications. Accordingly, the employers are free to decide on the information they wish to procure from the prospective candidates. Generally, the employment applications are customized from employer to employer. Although there is no specific law prohibiting an employer from asking a prospective employee personal questions related to health, race, religion, caste, etc., it may be pertinent to note that such enquiries by an employer may be deemed as unethical, unless there exist reasonable circumstances to justify the same. For instance, where a prospective employee would be working in close contact with other employees, it could be ethical to enquire about an applicant's health in order to ensure such applicant would not pose a health

risk to the other workers. In any event, please note that an employer will be required to protect such personal information obtained from a prospective employee, from any unauthorized third-party disclosure, as per applicable data protection and privacy laws of India.

### 3.4. Pre-employment Inquiries

There is no specific law relating to mandatory pre-employment inquiries. It is a common practice for employers to conduct such inquiries in order to ascertain the suitability of a candidate for the job. It is advisable that such inquiries be conducted only with the prior written consent of the employee to avoid any allegation of breach of his/her constitutional right to privacy and/or data privacy laws, as applicable, at a later stage. For instance, information requests with respect to sexual orientation, caste, religion, financial status, etc.

### 3.5. Pre-employment Tests and Examinations

Companies are allowed to carry out all the tests and examinations needed to ascertain the suitability of a candidate for a job. The test and examinations may vary depending on the nature of job. For instance, where a candidate is being employed for a specific task involving physical strength, an employer may require candidate(s) to undergo a physical fitness or drug test.

### 3.6. Background, Reference and Credit Checks

In India there is no specific law which prohibits an employer from carrying out a background, reference or credit check. However, credit information is only available to members of CIBIL (Credit Information Bureau (India) Limited), which include only banks, financial institutions, State financial corporations, non-banking financial companies, housing finance companies and credit card companies. Hence, not every employer may have access to this information. It is, however, possible for an employer to ask a prospective employee to provide a 'Credit Score' issued by CIBIL based on credit history and credit worthiness of a person.

It is common for employers to ask prospective employees questions regarding their background, and an employer can ask a prospective employee to bring references from past employers.

Recently introduced, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information)





Rules, 2011 (IT Rules) provide for data protection/privacy law in India with regard to personal information and sensitive personal data and information.

As per the IT Rules, sensitive personal data or information of a person, amongst the following information, also consists of financial information such as bank account or credit card or debit card or other payment instrument details (which includes the credit information):

(i) password;
(ii) physical, physiological and mental health condition;
(iii) sexual orientation;
(iv) medical records and history;
(v) biometric information;
(vi) any detail relating to the above clauses as provided to the employer for providing service; and
(vii) any of the information received under above clauses by the employer for processing, stored or processed under lawful contract or otherwise.

As per the IT Rules, it is the obligation of the employer (or any entity authorized on its behalf), for the purposes of collection, receiving, processing, storing, dealing or handling any one or more of aforementioned sensitive personal information, to put in place a privacy policy. The privacy policy should cover the following aspects:

(a) details regarding the handling of or dealing with such information;
(b) details regarding the type of information collected;
(c) the purpose of collection and usage of such information;
(d) disclosure of such information (including to a third party); and
(e) reasonable security practices and procedures for the protection of information, as approved and notified by the government (including compliance by the recipient of such information).

Other obligations of the employer as per the IT Rules include the following:

(a) the employer should obtain consent in writing (through a letter, fax or e-mail) from the employee if he or she obtains information including passwords, financial information (such as bank account, credit card or debit card or other payment instrument details), physical and mental health condition, sexual orientation, medical records and history or biometric information, or any other personal information;
(b) this information is to be used by the employer only for the purposes for which it was obtained; and
(c) the employer must give the employee access to carry out any necessary correction to such information, or to withdraw the consent.

Pursuant to the said IT Rules notified, the Ministry of Communications and Information Technology issued a press notification providing a clarification

on a few grey areas and concerns of the industry with respect to the same. The said notification clarifies that the IT Rules are applicable to a body corporate or any person located within India. It further clarifies that consent can also be accorded through electronic communication, thus, even an e-acceptance of the policy of the company would also amount to consent under the IT Rules.

An employer is required to ensure compliance with respect to sensitive personal data or information of a prospective employee while doing the background check and must procure a written consent there from, in advance of a background check.

### 3.7. Interviewing

Except in certain public employments, it is not necessary for an employer to conduct an interview in every case, and there are no specific regulations on interviewing for a job position outside the domain of public administration. However, interviews are conducted as a standard practice by most of the employers but, is advisable that the questions posed at the candidates should be carefully selected to avoid any discrimination allegations. Also, care should be taken not to ask personal questions that may not be necessary for assessing the suitability for the job. *Since the law regarding privacy casts a very wide net, it is always advisable, as a matter of caution, to keep employee information private in order to avoid potential future claims. Regarding discrimination, it is not illegal for an employer to ask questions with respect to a candidate's caste, religion, etc.; however, such questions are considered to be unethical and/or unprofessional as they may not be relevant for the job. As stated earlier, the rules with respect to public job interviews would be prescribed in the government/department specific statute or rules.* The interview may be conducted in person, or by telephone or any other means as agreed between the parties.

### 3.8. Hiring Procedures

In addition to the procedure followed by the employer for selecting candidate the employer must also notify the vacancies to the local employment exchange (establishments in the private sector employing more than twenty-five persons are required to notify the vacancies to the local employment exchanges).

Apart from certain laws relating to recruitments in the public sector, Indian labour and employment laws do not specifically provide for matters relating to hiring procedures. An employer is free to adopt a procedure which is best suited for him to assess an individual's suitability for the job. It is advisable that the procedure for hiring be based on objective factors in order





to avoid any claims on the grounds of discrimination. Further, care should be taken to ensure that an applicant's information that is disclosed by him/her during the interview is not made available to other applicants, agencies, etc., in order to avoid any privacy claims and/or unauthorized disclosure of such information.

### 3.9. Fines and Penalties

Apart from certain State-specific laws and requirements in the public sector, there are no other laws in India specifically relating to recruitment procedures, hence there are no prescribed fines and penalties for violation of the same.

For instance, the DSEA mandates the issuance of a letter of employment to the employees once they are recruited. In the event the employer fails to furnish such letter, he/she would be punished with fine of up to INR 250 (approx. USD 4). Further, as per judicial precedents, it has been established that in certain cases, failure to issue such a letter may amount to 'unfair labour practice' resorted to in order to deprive employees of the benefits which accrue to them.

Where the right to privacy or any other fundamental right of a person guaranteed under the Constitution is violated, such person may file an action in the High Court or the Supreme Court under limited circumstances. The Court can award compensatory damages or issue an injunction, as the relief sought may be.

Where an employer contravenes any provision of the ERA, he may be imprisoned for a period of three months up to one year and fined up to INR 20,000 (approx. USD 312).

### 3.10. Checklist of Do's and Don'ts

- It is always advisable to seek the prior written consent of the prospective employee before conducting any background, reference or credit checks.
- A 'non-disclosure and confidentiality' agreement should be executed with service providers to whom the background, reference or credit checks may be outsourced.
- An employer may transfer sensitive personal data or information for the purposes of background, reference or credit checks, however as has been mandated under the IT Rules, the services provider should ensure the same level of data protection as is required to be adhered to by the employer under law.
- The offer letter should always be made subject to completion of background, reference, credit, medical and other checks.

If the employee is suspended, pending enquiry such employee should be paid suspension allowance. As per IESOA suspension allowance shall be 50% of the salary for the first ninety days and 75% of the wage for the remaining period of suspension, if the delay in enquiry is not attributable to the conduct of the employee.

A few States (Karnataka, Tamil Nadu) have enacted a special legislation named as Payment of Subsistence Allowance, which mandates employer to pay subsistence allowance to a covered employee, during the period of suspension:

| | *Time frame* | *Tamil Nadu* | *Karnataka* |
|---|---|---|---|
| 1. | First 90 days | 50% of the wages an employee was drawing before suspension | 50% of the wages an employee was drawing before suspension |
| 2. | 90 > 180 days | 75% of the wages an employee was drawing before suspension | 75% of the wages an employee was drawing before suspension |
| 3. | 180> | Entitled to receive full wages | 90% of the wages an employee was drawing before suspension |

Any acts of sexual harassment against women at the workplace, have to be dealt with in accordance with the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) (discussed in detail in Chapter 17 below).

### 4.5. Checklist of Do's and Don'ts

- The company's policy on disciplinary measures should be clearly defined either in an employee handbook or a collective/individual agreement.
- The code of conduct and performance standards to be followed by the employees should be unambiguously communicated to the employees through an employee handbook.
- The disciplinary proceedings should be conducted only in the manner prescribed, to validate the proceedings and the order of punishment.
- The proceedings must comply with the principles of natural justice and the punishment imposed must be commensurate with the nature and seriousness of misconduct.
- All records of proceedings must be maintained in written form.
- It is advised that an objective standard for performance appraisals be established in the contract/manual to provide transparency in the system.





- The disciplinary procedure should be carried out with transparency, and evidence leading to proof of the alleged misconduct and the reasons for the punishment imposed should be recorded.

## 5. TERMINATION OF EMPLOYEES FOR PERFORMANCE OR DISCIPLINARY REASONS

### 5.1. Overview

An employer is required to follow the principles of natural justice (as discussed below) while dealing with matters related to misconduct and disciplinary action.

Even in cases of serious misconduct such as acts of violence or sexual harassment etc., which warrant summary dismissals, the employee may be dismissed immediately without any notice or payment in lieu thereof, provided that the employee has been given an opportunity to defend or explain his/her actions (during disciplinary proceeding).

With respect to dismissal on the grounds of poor performance, an employer would be required to follow the procedure as prescribed in the applicable statute, that is, the IDA or the State-specific SEA (discussed in section 6 below) and/or employment contract, as may be consistent with the laws of land. Where the IDA and/or the State-specific SEA is not applicable, dismissal should be in accordance with the relevant employment contract or company policy, whichever is applicable.

In practice, a disciplinary procedure includes the following:

- The employer issues a show cause notice to the employee, giving details of the alleged misconduct, and requests a response.
- If the explanation offered is not adequate, the employer issues a charge sheet to the employee, giving details of the alleged misconduct in the show cause notice.
- An unbiased 'inquiry officer' is appointed to conduct an inquiry of the charges alleged. The inquiry officer is usually a member of the management of the employer but it is also possible to employ an outside third party.
- An inquiry report is made and submitted to the disciplinary authority, and a copy of the report is provided to the delinquent employee. A 'disciplinary authority' is usually a member of the management or human resource department of the establishment, who conducts the disciplinary proceedings, that is, he/she hears the arguments of the opposing parties, takes into account the report of the inquiry officer, etc., and gives a decision with respect to the alleged misconduct.
- An employee is afforded another opportunity to explain his/her case, and to counter the allegations.

According to the principles of natural justice, the disciplinary procedure has to include:

- the right to be heard (*audi alteram partem*);
- the right to know the charges and cross examine witnesses; and
- the right to access relevant documents, instruments, etc., to properly defend one's case.

The disciplinary authority imposes a punishment on the employee only after taking into consideration the inquiry report, representations made by the employee and any other relevant documents and circumstances.

The following conducts are typically considered 'misconduct' and trigger disciplinary proceedings:

- Indiscipline and disobedience in the employee's performance of duties.
- Verbal or physical offences against the employer or other company employees or their families.
- Breach or abuse of trust.
- Consumption of alcohol, drugs and other banned substances, smoking etc. on the company premises or company sponsored events.
- Harassment of the employer or of any persons working in the employer organization based on race or ethnicity, religious or personal convictions, disabilities, age or sexual orientation, including sexual harassment (which has to be dealt with, in accordance with the POSH Act).

The list above is indicative only and is not exhaustive.

### 5.2. Separation/Severance Pay

'Retrenchment Compensation' (discussed in section 6 below) is required to be paid (to workman) under certain circumstances prescribed in the IDA (SEAs usually do not provide for payment of any severance pay). The IDA clearly states that termination of employment (of workman), which is punishment inflicted by way of disciplinary action, would not amount to 'retrenchment', as defined therein. Hence, under Indian laws, retrenchment compensation is not payable for termination of employment on account of misconduct. However, such a term may be provided in the employment agreement or employment handbook. Having said that, any severance payments are uncommon in cases of misconduct or dismissal of employees.

Depending on the eligibility of an employee, statutory dues such as gratuity or accrued leave may need to be paid out by the employer. Such benefits may be offset by any damage or loss caused by the employee up to the limits as provided under laws (such as the PGA and the PBA) with respect to certain category of employees.





### 5.3. Fines and Penalties

The Courts may issue a writ against employers in the public sector for a dismissal based on any kind of discrimination (discussed in section 17 below).

An employee (even in private employment) can challenge an order of dismissal on grounds which include *inter alia* if the disciplinary procedure was not followed, natural justice was denied, if the alleged misconduct did not occur or if the punishment imposed was not justified.

The termination may be declared void, and the Court may order reinstatement with or without back wages, though such an order would be rarely available for the 'non-workmen' category of employees (for whom damages may be generally awarded).

### 5.4. Checklist of Do's and Don'ts

- It is advisable to provide objective standards for determining performance of an employee in the employment contract or handbook. The employee contract or handbook should clearly state the disciplinary procedure that is to be followed and the kinds of conducts which amount to 'misconduct'.
- The employee contract or handbook should state the cases in which employees would be or not be entitled to a severance pay.
- Where the delinquent employee is a senior/management level employee, and the disciplinary proceedings are conducted orally, it would be prudent to record the minutes of every meeting in writing and to obtain the signatures of both the parties on the minutes.
- The employment contract or handbook should clearly state that an employer has a right to dismiss an employee where such employee *neglects and/or fails to perform his/her assigned duties*.

## 6. LAY-OFFS, REDUCTIONS IN WORKFORCE, AND/OR REDUNDANCIES AS A RESULT OF JOB ELIMINATIONS OR OTHER RESTRUCTURING

### 6.1. Overview

Depending upon the nature of the establishment, the termination of employment of a person in a factory, a 'shop', 'establishment' or 'commercial establishment', as the case may be, would be subject to IDA and/or a relevant SEA. In case of an employee being a 'workman' under the IDA (irrespective of whether he is employed in a factory or an establishment), termination of his employment

or retrenchment will have to be in accordance with the IDA (i.e., he will be entitled to *inter alia* retrenchment compensation (severance pay), calculated in accordance with the IDA).

If the terms of employment or employee handbook provide for more beneficial notice provisions, severance pay, and other payouts at the time of termination of employment the latter would supersede the statutory provisions. However, senior/manager/supervisory level employees are usually not covered by SEA and/or IDA except for minimum requirement of duration of notice under the SEA in certain States, etc. In such cases, termination is required to be executed in accordance with the employment contract or as may be provided in the employee handbook, if any.

Indian employment laws applicable to establishments which qualify as 'industry' as defined in the IDA or otherwise, broadly cover termination of employment of workman on the following grounds:

(i) Dismissal due to cessation of business or part of business undertaking.
(ii) Resignation as per the terms of the contract.
(iii) Dismissal for misconduct.
(iv) Discharge which covers retirement, dismissal for ill health and expiry of contract.
(v) Retrenchment (termination) by the employer of employment of a workman for any reason other than those mentioned above.

The IDA provides for the compensation and other conditions that are to be complied with where an employer wishes to lay-off, retrench on account of closure of undertaking or otherwise retrench his/her employees excepting the exclusions provided therein. It is mandatory for an employer to comply with the requisites of the IDA and/or SEA with regard to lay-offs, redundancies and closure of undertaking, as applicable (as discussed in section 6.2 below).

Under the IDA, termination of services of a workman by an employer is referred to as 'retrenchment'. All kinds of termination of service are retrenchment except where termination is:

(i) by way of punishment inflicted pursuant to disciplinary action;
(ii) voluntary retirement of a workman, or retirement of a workman upon reaching the age of superannuation;
(iii) a result of the non-renewal of the contract of employment or under a stipulation thereof; or
(iv) on the ground of continued ill health.

The SEAs may require certain conditions to be followed in case of termination, such as in the case of DSEA, which is applicable to shops and establishments in Delhi, an employer is required to serve a notice of at least one month stating reasons for termination or pay wages in lieu thereof to the concerned





employee, if such an employee has been in continuous service for three months or more.

In all cases, if the employment contract provides for better terms and conditions relating to retrenchment, including payment of compensation and/or notice of dismissal, etc., the same would prevail over statutory obligations.

## 6.2. Reductions in Workforce/Layoffs/Job Eliminations

The employment laws in India do not make any distinction between collective and individual terminations of service.

Where a reduction in workforce or lay-off is contemplated in an establishment which qualifies as an 'industry or industrial undertaking' as defined in the IDA, the provisions of the IDA would be applicable in addition to any other Central/State statutes which may be applicable to a particular industry/employer or employee having worked for a certain period of time.

*Retrenchment* – The IDA, sets out detailed procedural requirements for retrenchment of workman who has rendered at least one year of continuous service. Generally speaking, the procedure includes:

(i) Giving notice of one month or three months, as applicable (as per the IDA), or wages in lieu thereof, and retrenchment compensation equivalent to fifteen days average pay for every completed year of continuous service to concerned workmen.
(ii) Service of a written notice of the termination on the relevant governmental authority, giving reasons for the proposed retrenchment or seek prior authorization from the relevant governmental authority before effecting retrenchment (applicable only to certain 'industrial establishments' as specified under the IDA, as the case may be).

Also, an employer is required to follow the *last come first go* rule (also known as the '*last in first out*' rule) in a category, unless there are valid reasons for not complying with the rule, such as inefficiency, unreliability and habitual irregularity of the employee. The employer also has to make an '*offer of re-employment*' to retrenched workers who are citizens of India, where the employer proposes to employ persons after retrenchment in place of terminated employees.

In case of retrenchment in an undertaking which qualifies as a 'factory' as defined under the FA, or a 'plantation' as defined under the Plantations Labour Act, 1951 or 'mine' as defined under the Mines Act, 1952 and if such undertaking meets the threshold criteria of employing the specified number of workmen, the employer is required to apply for prior permission of the appropriate government in prescribed form. In case such permission is