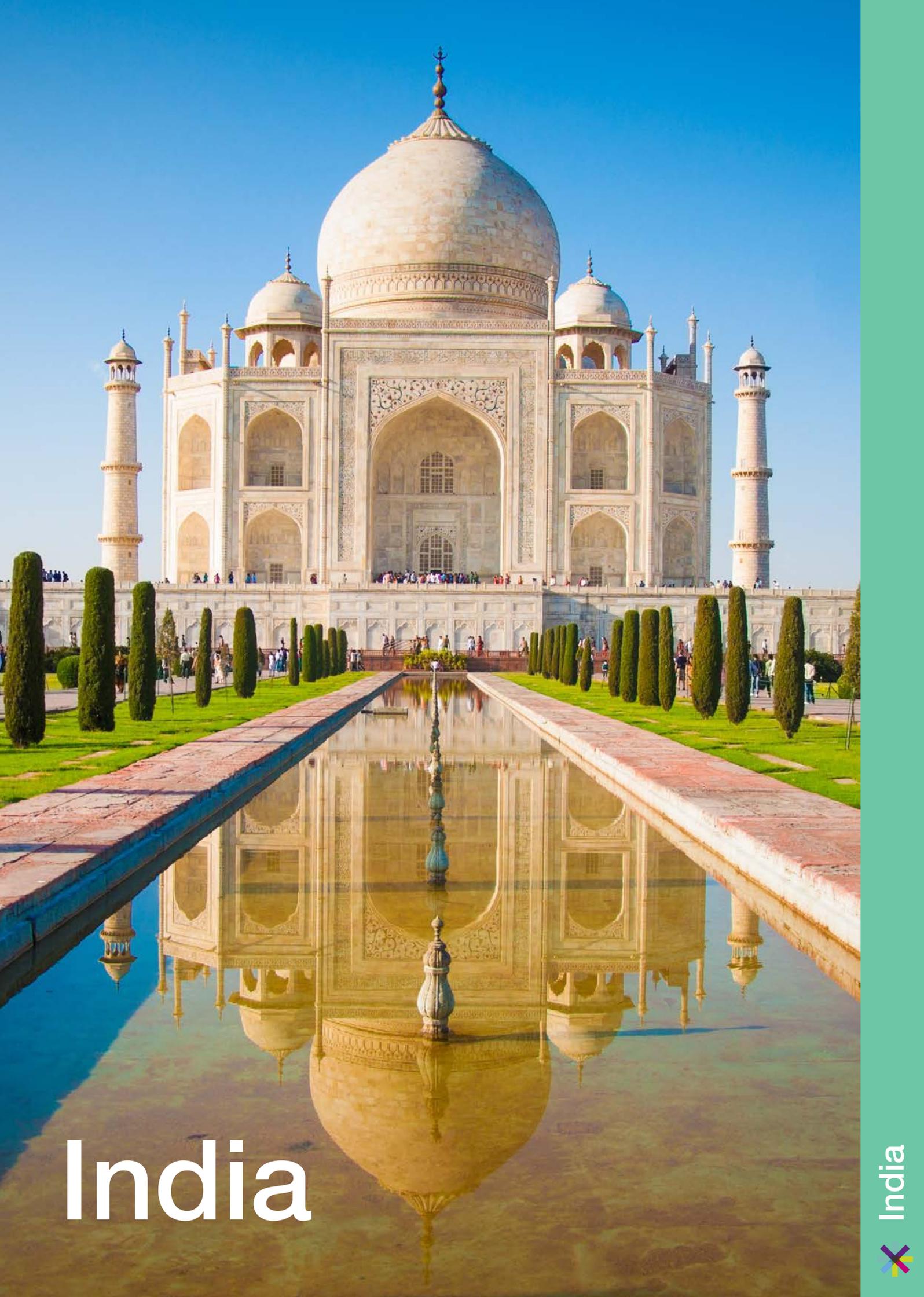


Taylor Vinters

# Asia Pacific Employment Law

Handbook 2017/18



# India



# INDIA

## SCOPE OF EMPLOYMENT REGULATION

### 1 Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

#### 1.1 Laws applicable to foreign nationals

All labour laws regulating employment relationships in India also apply to foreign nationals employed in India. These include the Employees' Provident Funds and Miscellaneous Provisions Act 1952 ("**EPF Act**"), Industrial Disputes Act 1947 ("**ID Act**"), Maternity Benefit Act 1961 ("**MBA**"), State Specific Shops and Establishments Acts etc.

Additionally, the Provident Fund (Social Security) Law has been specifically extended to foreign nationals employed by an Indian company, subject however to the provision of any social security agreement between India and the foreign national's home country.

#### 1.2 Laws applicable to nationals working abroad

Indian labour laws do not apply to Indian nationals who are employed by foreign entities abroad. However, Indian labour laws do apply to Indian nationals employed by Indian entities but sent abroad on specific arrangements.

## EMPLOYMENT STATUS

### 2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

#### 2.1 Categories of worker

Different statutes protect different categories of employees, and the applicability of the statute and the protection available is to be assessed on a case-by-case basis.

The ID Act seeks to protect 'workmen', which has been defined as persons employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. An employee employed in a managerial or administrative capacity, or in a supervisory category drawing wages exceeding INR 10,000 per month is excluded from the scope of 'workman'.

In certain states, persons holding positions of management are excluded from protections available under the state-specific legislation governing shops and commercial establishments ("**S&E Acts**"). In addition, certain labour laws classify employees as permanent workmen, probationers, temporary workmen, etc. based on the nature of their employment.

#### 2.2 Entitlement to statutory employment rights

The entitlement to statutory employment rights depends on various factors such as the category of employee, nature of work undertaken, remuneration, location of employee, and type of industry.

#### 2.3 Time periods

While the law does not specifically prescribe any maximum time periods for which each category of employee can be engaged, the employment of a probationer or a temporary employee is limited to a particular time period.

## RECRUITMENT

### 3 Does any information/paperwork need to be filed with the authorities when employing people?

#### 3.1 Filings

The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 requires an employer employing at least 25 employees to notify the local employment exchange of any employment vacancy in the organisation. An Amendment Bill to this statute proposes to extend the applicability of this statute to private establishments that employ at least 10 persons.

## PERMISSION TO WORK

### 4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

#### 4.1 Visa

##### 4.1.1 Procedure for obtaining approval. For the purpose of entering India for employment with an Indian entity, a foreign national is required to apply for an Indian employment visa to the Indian Embassy/High Commission in his country of residence, unless he has obtained an Overseas Citizen of India card. The employment visa must be issued from the foreign national's country of origin, or from the foreign national's country of domicile.

If the purpose of visit relates to business activities, such as to explore opportunities for setting up a business venture in India, attending board meetings or other general meetings for the purpose of providing business service support, the foreign national may apply for a business visa. If the foreign national intends to stay in India for more than 180 days, he/she must register with the Foreigners Regional Registration Offices or the Foreigners Registration Offices within 14 days of arrival.

The foreign national must have a valid travel document and a re-entry permit (if required under the law of the country concerned). An employment visa may be extended on a yearly basis for a maximum period of five years.

##### 4.1.2 Cost. The fee for an employment visa may vary between US\$125 and US\$1,000, depending upon the nationality of the person applying for the visa, and the duration for which the visa has been applied. The fee is subject to periodic amendments by the Government.

##### 4.1.3 Time frame. It is difficult to give a precise time frame as the process is at the discretion of the Indian Embassy/High Commission concerned.

##### 4.1.4 Sanctions. If the employment visa is not granted, the foreign national cannot travel to India for employment related activities. If the visa is granted for a particular purpose and the foreign national does not adhere to that purpose, the foreign national's visa will be cancelled and he/she will be deported. He/she may also attract sanctions of imprisonment and/or fines.

#### 4.2 Permits

Generally, except for the employment visa, no other permits are required from an immigration perspective. However, prior Government of India clearance from the Ministry of Home Affairs and the Ministry of External Affairs would be required with respect to foreign nationals of a few countries including China, Pakistan and Afghanistan.

## REGULATION OF THE EMPLOYMENT RELATIONSHIP

### 5 How is the employment relationship governed and regulated?

#### 5.1 Written employment contract

Legislation including the ID Act, Factories Act, Industrial Employment (Standing Orders) Act ("**SO Act**") and S&E Act, prescribe minimum employment terms such as working hours, wages, leave entitlement, notice and termination entitlements, health and safety standards, etc. Employers are

mandated to provide the statutorily minimum entitlements to employees.

Certain state specific S&E Acts require an employer to issue an 'appointment order' containing basic information including employer name and address, employee details, rates of wages, joining date and designation. Most employers issue appointment letters to, or execute employment agreements with, their employees, which set out the terms and conditions of employment.

It is recommended that all important terms of employment be reflected in the employment contract.

In addition, industry-specific laws also prescribe certain terms of employment. For example, industry-specific laws regulate the terms of employment for employees working in industries such as cinema, docks, building and construction, journalism, motor transport, sales promotion, and plantation. Certain special laws also apply to migrant workers.

The SO Act also prescribes Model Standing Orders containing terms and conditions of employment in the workplace.

## 5.2 **Implied terms**

Terms of employment can be implied into a contract of employment by way of custom, usage or practice. Certain courts have also acknowledged that an employee's duty of good faith towards the employer, confidentiality and non-disclosure obligations may be considered implied terms of an employment relationship.

## 5.3 **Collective agreements**

In unionised industries the terms of employment are negotiated and agreed through collective bargaining. While most labour unions are formed at company level, there are also regional and industry specific unions. It is pertinent to note that the SO Act requires the employer to consult with the employees or their representatives to finalise the terms of employment contained in the organisation's standing orders.

## 6 **What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?**

There are certain procedural requirements to be complied with when changing terms of employment.

Where an employer wishes to change the conditions of employment (for example, wages, working hours, and annual leave) of an employee who falls within the definition of "workman" under the ID Act, the employer must give either 21 or 42 days' notice of the change in the prescribed form to the affected employees. Note the length of notice depends on which jurisdiction in India the employee is located.

The employee can then either agree to the change, or object and raise an industrial dispute. Where an objection is raised, the dispute must be resolved by the relevant tribunal, and the change cannot be made until the dispute is resolved.

For employees not covered by the ID Act, the employment contract will determine whether or not the employer can make unilateral changes.

## **HOLIDAY ENTITLEMENT**

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

#### 7.1 **Minimum holiday entitlement**

Holiday entitlement is generally covered by the employment contract. However, where the employer is involved in a commercial activity, the state-specific shops and establishments statutes will apply and these determine the minimum thresholds concerning holiday entitlement. The thresholds usually range from 12 to 21 days of holiday per year. Certain state-specific shops and establishments statutes also contain provisions concerning sick leave and casual leave (which generally ranges from 12 to 24 days).

Further, the Factories Act provides that every worker is entitled to one day's paid leave for every 20 days of work.

## 7.2 **Public holidays**

These holidays differ from region to region and range from between four to 10 days' holiday each year. However, the mandatory public (national) holidays that are to be given to employees are:

- January 26 (Republic Day);
- August 15 (Independence Day); and
- October 2 (Gandhi Jayanti).

## **ILLNESS AND INJURY OF EMPLOYEES**

### **8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the Government?**

#### **8.1 Entitlement to time off**

Where the employer is involved in a commercial activity, some of the local shops and establishments statutes provide that employees are entitled to leave on account of illness or injury. Factories that employ the requisite number of workmen must also provide sick leave to their employees, in accordance with the Factories Act. These periods of sick leave are paid.

The local shops and establishments statutes apply to all categories of employees except where the Government has issued specific exemptions in relation to certain classes of employees.

#### **8.2 Entitlement to paid time off**

Where an employee is entitled to time off for illness or injury, the period of leave will be paid (see above, *Entitlement to time off*).

#### **8.3 Recovery of sick pay from the state**

The Employees' State Insurance Act 1948 ("**ESI Act**") envisages benefits to employees in case of sickness, maternity and employment injury.

Employees who are covered by the ESI Act can claim sickness or disablement benefit, which is paid by the Government. The employer cannot recover any sick pay from the Government.

Where the employee is entitled to benefits under his conditions of service that are similar to benefits under the ESI Act, the employer can discontinue or reduce those benefits under the conditions of service to a certain extent.

Further, if the employee avails himself of any sick leave from the employer under his conditions of service, the employer will be entitled to deduct from the employee's leave salary the amount of benefit he/she is entitled to under the ESI Act.

## **STATUTORY RIGHTS OF PARENTS AND CARERS**

### **9 What are the statutory rights of employees who are:**

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

## 9.1

### **Maternity rights**

The Maternity Benefit Act 1961 ("**MB Act**") envisages provision of maternity leave, maternity bonus and other benefits with respect to childbirth.

According to the recently amended MB Act ("**MB Act Amendment**"), from 1 April 2017 an eligible female employee is entitled to 26 weeks of paid maternity leave for the birth of her first two children, of which not more than eight weeks shall precede the date of her expected delivery. For every child thereafter, the female employee will be entitled to 12 weeks paid maternity leave of which not more than six weeks shall precede the date of her expected delivery.

The MB Act Amendment also:

- provides for 12 weeks of paid maternity leave to female employees adopting a child below the age of three months and for commissioning mothers;
- requires employers employing at least 50 employees to provide a crèche facility (this provision shall be effective from 1 July 2017);
- offers the possibility for mothers to work from home after availing the paid maternity leave – depending on the nature of their work; and
- requires employers to inform every female employee, in writing and electronically, about all maternity benefits available to her under the MB Act at the time of her joining the organisation.

In the event of a miscarriage or medical termination of pregnancy, a female employee is entitled to six weeks of paid leave immediately following the day of her miscarriage or termination. The MB Act also provides for paid leave if the employee undergoes a tubectomy, or in cases of any illness arising out of pregnancy, delivery, or premature childbirth.

A female employee is entitled to salary and benefits during maternity leave. She is also entitled to a medical bonus of up to INR 3,500. The employer cannot require the employee to do any work during the maternity leave.

During pregnancy, a female employee also has the right to request that she does not carry out any work which:

- Is of an arduous nature, or which involves long hours of standing;
- Is in any way likely to interfere with her pregnancy or the normal development of the foetus;
- Is likely to cause a miscarriage; or
- Would otherwise adversely affect her health.

It is unlawful to discharge or dismiss an employee on the basis that she is on maternity leave, or to issue a notice of discharge or dismissal expiring during the period of maternity leave. It is also unlawful to vary the terms of employment to her disadvantage during the period of maternity leave.

The MB Act requires an employer to provide two breaks, in addition to the regular interval for rest, for nursing the child until the child attains the age of 15 months. The Factories Act and certain state specific S&E Acts also mandate the employer to provide crèches at the workplace.

## 9.2

### **Paternity rights**

Indian employment law does not provide for paternity leave. However, some organisations will provide employees with paternity leave.

## 9.3

### **Surrogacy**

As per the MB Act Amendment, commissioning mothers are entitled to 12 weeks of paid leave from the date the child is handed over to them. Also, in a recent case involving an employee of a

Government department, the courts held that surrogate mothers (i.e. female employees who are considered the commissioning mother) are entitled to maternity leave under the MB Act.

9.4 **Adoption rights**

As per the MB Act Amendment, female employees adopting a child below the age of three months are entitled to 12 weeks of paid leave from the date the child is handed over to them.

9.5 **Parental rights**

Indian employment law does not prescribe any parental leave rights.

9.6 **Carers' rights**

Indian employment law does not prescribe any carers' rights.

**CONTINUOUS PERIODS OF EMPLOYMENT**

**10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?**

10.1 **Statutory rights created**

Eligibility for notice and severance compensation at the time of termination of employment, leave entitlement, and payment of gratuity are all dependent upon an employee remaining in continuous employment by the employer for certain specified periods of time.

Gratuity amounts are payable only if an employee has worked for an establishment for five years. According to most of the state specific S&E Acts, leave entitlement in a particular calendar year is also dependent on the employee's length of service for that year.

10.2 **Consequences of a transfer of employee**

In the case of a transfer of an undertaking, the ID Act provides that workmen are deemed to be dismissed unless the buyer fulfils certain conditions, including providing the workmen with continuity of service (see *Question 18.1, Automatic transfer of employees*).

**FIXED TERM, PART-TIME AND AGENCY WORKERS**

**11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?**

11.1 **Temporary workers**

A temporary worker is one who is engaged for a limited time period and/or for a specific purpose. The definition of "workman" under the ID Act does not exclude temporary workers and they are entitled to the same benefits as full-time permanent workers subject to the provisions of the ID Act.

11.2 **Agency workers**

The arrangements for engaging agency or contract workers are regulated by the Contract Labour (Regulation and Abolition) Act 1970. It applies to:

- Every establishment that is not seasonal in character which employs at least 20 workmen as contract labour in the preceding 12 months; and
- Every agency employing at least 20 workmen in the preceding 12 months.

Agency workers are not treated as employees of the establishment, and hence they are not eligible for any statutory benefit typically received by the principal employer's employees. They will be eligible to receive all such statutory benefits from the agency since they are direct employees of

the agency.

The courts have considered the aspect of control and supervision as the single most important factor that determines the relationship between the principal employer and agency. A misclassification risk may arise if the agency's employees work under the direct control and supervision of the principal employer. In such a case the agency's employees may claim to be employees of the principal employer and thereby claim eligibility to receive statutory benefits from the principal employer.

### 11.3 **Part-time workers**

Part-time workers are entitled to the same benefits as full-time workers subject to the provisions of the ID Act.

## **DISCRIMINATION AND HARASSMENT**

### 12 **What protection do employees have from discrimination and harassment, and on what grounds?**

The Constitution of India 1950 ("**Constitution**") guarantees equality before law and prohibits discrimination of citizens on the grounds of religion, race, caste, sex or place of birth. The Constitution also envisages equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 ("**SH Act**") prescribes a mechanism for the prevention and prohibition of workplace sexual harassment and for addressing grievances pertaining to workplace sexual harassment.

The Equal Remuneration Act 1976 ("**ER Act**") provides for the payment of equal remuneration to male and female workers for the same or similar work. The statute also prohibits discrimination against women in recruitment or in any condition of service such as promotions, training or transfer. The ID Act also categorises acts of favouritism or partiality to one set of workers, regardless of merit, as an unfair labour practice.

The MB Act restricts the employer from terminating employment during maternity leave. Certain laws also require employers in select categories to provide equal opportunities to disabled persons.

There are no standard defences to a discrimination claim. However, the defences available to an employer may include health and safety requirements and affirmative action.

Ordinarily, anti-discrimination policies are contained in the policy manual/employee handbook. Certain organisations also have ethics helplines and grievance committees to hear and resolve complaints pertaining to discrimination. Discrimination on grounds protected by law are often categorised as misconduct, punishable with disciplinary action.

Employers can settle claims before or after employees have initiated them.

In the event of a successful claim of discrimination, where employment has been terminated on that basis, the employee may be entitled to reinstatement of employment.

Violation of the ER Act, i.e. discriminating against women in connection with recruitment and employment, is punishable with a fine of up to INR 20,000 and/or imprisonment for a term which shall be not less than three months and no longer than one year.

Unfair labour practices under the ID Act are punishable with imprisonment for a term of up to six months and/or a fine of up to INR 1,000.

"Atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) do not have any additional protection against workplace discrimination.

## **TERMINATION OF EMPLOYMENT**

### **13 What rights do employees have when their employment contract is terminated?**

#### **13.1 Notice periods**

Indian employment law does not recognize "at-will" employment. Employment may be terminated only for a reasonable cause or on account of employee misconduct. In the event of termination of employment for reasons other than misconduct, employees have to be provided prior notice of termination or wages in lieu thereof. The minimum notice period is stipulated under the ID Act and applicable S&E Act and is ordinarily one month. A longer period of notice can be provided in the employment contract. The act of misconduct must be held by the employer in accordance with the principles of natural justice.

Employers can require employees to be on 'garden leave' during the term of employment. It is recommended that such a right be included in the employment contract or HR policies.

#### **13.2 Severance payments**

Payments due to an employee in the event of termination of employment include:

- **Severance:** Termination compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months. Only a "workman" who has been in continuous employment with the employer for more than one year is entitled to termination compensation.
- **Gratuity:** This is to be paid in accordance with the Payment of Gratuity Act 1972, which entitles an employee who has rendered continuous service of at least five years to gratuity upon termination of employment. Gratuity is calculated at the rate of 15 days' wages for every completed year of service or part thereof in excess of six months, subject to a limit of INR 1,000,000.
- **Accrued leave encashment:** The employee is entitled to payment of wages for accrued and untaken leave days up to the date of termination of employment.

The employer ordinarily has the option of paying wages in lieu of the termination notice.

### **14 What protection do employees have against dismissal? Are there any specific categories of protected employees?**

#### **14.1 Protection against dismissal**

An employee can bring claims of unfair dismissal or wrongful termination of employment. In certain situations, an employee can also allege unfair labour practice on the part of the employer.

The remedies for a successful claim typically include reinstatement of the employee with payment of back wages. Alternatively, the courts may award damages for illegal or wrongful termination.

#### **14.2 Protected employees**

Female employees are protected from dismissal during maternity leave. Employees receiving sickness benefit, maternity benefit or disablement benefit under the ESI Act are protected from dismissal during the period in which they are receiving that benefit.

## **REDUNDANCY/LAYOFF**

### **15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?**

#### **15.1 Definition of redundancy/layoff**

The definition of redundancy under the ID Act is quite wide and refers to the termination of workmen's services by the employer for any reason other than the following:

- Dismissal as a result of disciplinary action;
- Retirement (whether voluntary or otherwise);
- Termination on grounds specified in a fixed term-contract (or the non-renewal of a fixed term contract); and/or
- Termination on grounds of continued ill health.

The Courts have held that redundancy is a reasonable ground for termination of employment. However, employers should ensure that they have sufficient evidence supporting the fact that a role had become redundant.

## 15.2 **Procedural requirements**

The ID Act stipulates that a workman who has been in continuous service for at least one year (defined as 240 days) may be terminated only if the workman has been:

- Given at least one month's notice in writing indicating the reasons for termination and the period of notice has expired, or the workman has been paid in lieu of such notice; and
- Paid termination compensation (severance) equivalent to 15 days of average pay for every completed year of continuous service or any part thereof in excess of six months.

If the employment is in an 'industrial establishment' (defined under the ID Act to be a factory, mine or plantation employing at least 100 workmen) the employer has an obligation to provide minimum notice of three months or wages in lieu thereof.

The employer must also obtain prior Government approval to terminate employment. This requirement is irrespective of the terms of employment.

The ID Act also states the last-in-first-out process should be followed when terminating employment (where any workman belonging to a particular category of workmen in the establishment is to be terminated), except where:

- There is any agreement between the employer and the workman to the contrary; or
- There are written reasons recorded by the employer.

Further, where the employer proposes to recruit, the employer is required to provide an opportunity to the terminated workmen to offer themselves for re-employment. Such workmen are to be given preference over others.

## 15.3 **Redundancy/layoff pay**

A workman who is made redundant is entitled to compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

## 15.4 **Collective redundancies**

The statutes do not prescribe any additional obligations in the event of termination of a number of employees at the same time.

Collective bargaining is the most popular mechanism adopted by employees to enforce their rights in connection with mass dismissals. Aggrieved employees can raise an industrial dispute under the ID Act or approach the appropriate forum prescribed under the state specific S&E Act. Non-compliance with the statutory requirements could result in the termination being treated as invalid and the employee being reinstated with back wages. In certain circumstances, wrongful terminations are also considered unfair labour practices under the ID Act. This is punishable by imprisonment for a term of up to six months and/or a fine of up to INR 1,000.

## **EMPLOYEE REPRESENTATION AND CONSULTATION**

**16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?**

**16.1 Management representation**

Employees are not entitled to representation at board level. The Companies Act 2013 mandates every public company having a paid up capital of INR 100,000,000 or more to appoint a managing director, who is to be a full-time workman of the company.

An industrial establishment employing 100 or more workmen is mandated to set up a "Works Committee". The Works Committee must consist of representatives of the employer and workmen engaged in the establishment. The number of representatives of workmen on the Works Committee should not be less than the number of representatives of the employer.

The representatives of the workmen on the Works Committee are to be elected in the manner prescribed under the relevant statute and in consultation with the trade union.

The main responsibility of the Works Committee is to promote measures for security and amity between the employer and workmen, to comment upon matters of common interest/concern, and to mediate any material difference of opinion in respect of such matters.

In addition, there are also certain requirements to set up a Grievance Redressal Committee and Internal Complaints Committee under the ID Act and SH Act respectively.

The ID Act has envisaged the Works Committee as an initial mediation mechanism. Unless otherwise reflected in the collective bargaining agreements, the Works Committee does not have any co-determination rights.

**16.2 Consultation**

The law does not set out any consultation requirements on a business transfer (see below, *Question 18*). That said, consultation requirements (if any) may arise due to the terms of the collective bargaining agreements.

**16.3 Major transactions**

See *Question 16.2* and *Question 18*.

**17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?**

**17.1 Remedies**

An employer only has a duty to consult if this is expressed in the employment contract or in the terms of a collective bargaining agreement. If the employer has contractually agreed to consult the employees on certain issues and if it fails to do so, the employees can refer the matter to the courts/tribunals to enforce those contractual rights.

**17.2 Employee action**

There is no statutory right for employees to be consulted on major transactions and to that extent employees may not be able to take any action under the law to prevent any transaction from going ahead.

## **CONSEQUENCES OF A BUSINESS TRANSFER**

**18 Is there any statutory protection of employees on a business transfer?**

**18.1 Automatic transfer of employees**

The ID Act provides for notice and compensation payable to employees when an undertaking is

transferred. It stipulates that where the ownership or management of an undertaking is transferred to a new employer, every workman who has been in continuous service for at least one year in that undertaking immediately before such transfer is entitled to notice and severance compensation from the previous employer, as if the employee has been terminated.

The transferor entity is exempt from providing such notice and compensation if:

- The service of the workman has not been interrupted by the transfer;
- The terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable immediately before the transfer; and
- In the event of termination of the workman, the new employer is legally liable to pay compensation as if the workman had been in service with the new employer from the time that he was in employment with the transferor.

### 18.2 **Protection against dismissal**

Employment can only be terminated for a reasonable cause or on grounds of misconduct. Elimination of a job role pursuant to a business transfer which leads to redundancy could be considered a reasonable ground for termination of employment.

### 18.3 **Harmonisation of employment terms**

In the event the transferee entity has agreed to provide the employees' service and the terms of employment are no less favourable than those with the transferor entity, benefits that are linked to the duration of employment, such as severance compensation, shall transfer to the transferee.

The law permits an employer to change the terms of employment as long as the employer notifies the impacted employees in the prescribed manner 21 days prior to implementing the change. A copy of the notification must also be submitted to the Government, including the labour department.

The terms of the collective bargaining agreement (if any) may also govern the transfer of employment and employee rights.

## **TAXATION OF EMPLOYMENT INCOME**

### 19 **What is the basis of taxation of employment income for:**

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

#### 19.1 **Foreign nationals**

Foreign nationals are subject to income tax in India on all of their income derived from a source in India or received in India during the relevant tax year (subject to any exceptions under a double taxation treaty). This includes income deemed to be received or deemed to accrue/arise in India. Generally, salary is deemed to accrue or arise in India if the services are rendered in India.

However, for an individual who is not a citizen of India, section 10(6)(vi) of the Income Tax Act 1961 provides that the remuneration received by him/her as an employee of a foreign enterprise for services rendered by him/her during his/her stay in India will be exempt from income tax, subject to the following conditions being fulfilled:

- The foreign enterprise is not engaged in any trade or business in India;
- The foreign national's stay in India does not exceed in the aggregate a period of 90 days during the relevant tax year; and

- The remuneration received by the said foreign national is not liable to be deducted from the income of the foreign enterprise chargeable to tax in India.

Where a foreign national comes to India and is present in India for a period of 182 days or more during the relevant tax year, he/she will be considered resident in India. However, for the initial few years (two or three years, depending on his/her date of arrival and the number of days stay in India), he/she will be considered as not ordinarily resident for tax purposes and the following income will be subject to tax in India:

- Income received, or deemed to be received, in India;
- Income accrued or arising, or deemed to accrue or arise, in India; and/or
- Income accrued or arising outside of India in relation to a business controlled, or a profession set up, in India.

Thereafter, once the foreign national becomes "ordinarily resident" in India, his/her global income is taxable in India.

## **20 Nationals working abroad**

As a general principle, the global income of an individual who is "ordinarily resident" in India (see above, *Foreign nationals*) is chargeable to tax in India, including all income which accrues or arises outside India during the relevant tax year.

However, if this person's stay in India is for less than 182 days in aggregate during the relevant tax year, such person would be considered a non-resident in India for that year. In this case, the person would be liable for tax in India only for income derived from a source in India or received in India during the relevant tax year, including income deemed to be received or deemed to accrue or arise in India (subject to any exceptions under an applicable double taxation treaty).

## **21 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?**

### **21.1 Rate of taxation on employment income**

The following rates of income tax apply to individuals as of 1 April 2016 (different tax rates are levied on income received by persons aged above 60 years and 80 years):

- Income of INR 250,000 or less: nil.
- Income above INR 250,000 but not more than INR 500,000: 10% on the amount exceeding INR 250,000.
- Income above INR 500,000 but not more than INR 1 million: INR 25,000 plus 20% on the amount exceeding INR 500,000.
- Income above INR 1 million but not more than INR 10 million: INR 125,000 plus 30% on the amount exceeding INR 1 million.
- Where the income exceeds INR 10 million: INR 125,000 plus 30% on the amount exceeding INR 1 million (as increased by a surcharge at the rate of 10% of the amount of income-tax so computed).

In addition to the above, an education tax at a rate of 3% is also payable.

### **21.2 Social security contributions**

The EPF Act applies to specified factories and establishments employing 20 or more employees. The EPF Act provides for the following three schemes:

- Provident Fund Scheme ("PF Scheme");

- Pension Scheme; and
- Employee Deposit Linked Insurance Scheme (“**EDLI Scheme**”).

The PF Scheme is applicable to all employees earning a salary of not more than INR 15,000 per month, unless:

- They have been members of the fund during their previous employment;
- The employer and concerned employee voluntarily seek coverage; and
- The employee is an "international worker" (that is, a foreign national working in India), where the EPF Act is applicable regardless of the salary threshold.

See also *Question 24*.

The statutory rate of contribution under the PF Scheme is 12% of the statutory defined wages, which is paid by both the employer and employee (that is, the total payable is 24%). The employer must pay both contributions (i.e. its own contribution and its employee's contribution), but can recover the employees' contribution by deducting the amount from the employees' salary. A portion of the employer's contribution (equating to 8.33%, which is capped at wages of INR 15,000 per month) is diverted from the PF Scheme into the Pension Scheme (unless the employee is an international worker, in which case the INR 15,000 cap does not apply).

Under the EDLI Scheme, the employer must contribute 0.5% of basic wages. The wages on which this amount is calculated is capped at INR 15,000 per month for all employees. See also *Question 24*.

The ESI Act is applicable to establishments employing 20 or more employees (though in some states this threshold is reduced to 10 employees). Under the ESI Act (which applies to employees whose salary does not exceed INR 21,000 per month), both the employee and the employer must make contributions to the Employees' State Insurance Corporation at the rate of 1.75% and 4.75% respectively. The employer must pay both contributions (i.e. its own contribution and its employee's contribution), but can recover the employees' contributions by deducting the amount from the employees' salary.

## **BONUSES**

### **22 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?**

Yes, it is fairly common in India to reward and incentivize employees through payment of contractual or discretionary bonuses. There are no restrictions or guidelines under Indian law pertaining to the payment of contractual or discretionary bonuses to employees.

The Payment of Bonus Act 1965 ("**POBA**") provides for payment of a compulsory statutory bonus to persons (earning a salary of up to INR 21,000 per month) employed in certain establishments under defined circumstances. The POBA envisages that the payment of a statutory bonus may be in the range of 8.33% to 20% of the salary payable to the employee. The wage ceiling for computing statutory bonus is INR 7,000 per month or the minimum wage notified for the employment as per the Minimum Wages Act 1948, whichever is higher.

## **RESTRAINT OF TRADE**

### **23 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?**

#### **23.1 Restriction of activities**

During the term of employment, an employer can restrict the employee from working for a third party, including its competitors.

### Post-employment restrictive covenants

The freedom to exercise any trade, business or profession has been assured as a fundamental right to all Indian citizens by the Constitution. The Indian Contract Act 1872 stipulates that an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. A restrictive covenant which restricts competition and extends beyond the term of service is void and unenforceable, irrespective of the reasonability of the restriction. One exception relates to cases involving a sale of goodwill.

The courts have held that restrictive covenants with respect to non-solicitation after employment, or cases of unauthorised disclosure of confidential information, may be enforced.

The law does not prescribe any specific timeline for restrictive covenants to be enforced after termination of employment.

There is no statutory requirement to provide financial compensation in return for restrictive covenants. Restrictive covenants are ordinarily included in the employment contract.

Employers can enforce certain restrictive covenants by seeking injunctions or damages in a court of law.

## PROPOSALS FOR REFORM

### 24 Are there any proposals to reform employment law in your jurisdiction?

Certain important proposed regulatory changes are:

- Consolidation of important labour laws: The Ministry of Labour and Employment in India, in an effort to consolidate the laws pertaining to industrial relations, wages and benefits, has proposed two Bills:
  - The Labour Code on Industrial Relations Bill 2015; and
  - The Labour Code on Wages Bill 2015.

Some of the changes proposed under the Labour Code on Industrial Relations Bill 2015 are:

- Exempting employers employing up to 50 workmen from notice and severance compensation requirements under the applicable law;
- Increase in the amount of severance compensation payable on termination of employment; and
- Increase in the headcount threshold relating to triggering the requirement of obtaining governmental permission for termination of employment or closure of an establishment.

Some changes proposed under the Labour Code on Wages Bill 2015 are:

- A uniform, comprehensive definition of 'wages' in relation to calculating compensation and benefits;
  - Replacing the existing (labour) 'inspector' with a 'facilitator' who will monitor compliance with the law, as well as provide guidance on effective ways of complying with the law; and
  - Inclusion of transgender persons within the provisions relating to prohibition of discrimination in payment of wages on the grounds of sex.
- Small Factories (Regulation of Employment and Conditions of Services) Bill 2014: The Bill seeks to regulate small factories (factories employing up to 40 workers) but at the same time facilitate them to carry out business. The proposal is to cut down on cumbersome procedures by providing:

- Online registration of units;
- E-filing of compliance returns by employers through a single unified form; and
- Making certain laws inapplicable to small factories.
- Amendments to the EPF Act: Certain proposed key amendments to the EPF Act include:
  - Reducing the employee threshold for applicability of the EPF Act from 20 to 10;
  - The wage ceiling for mandatory contributions to the employees' provident fund organization is proposed to be increased to INR 25,000 per month from the existing INR 15,000 per month.
  - Revising the definition of 'wages';
  - Allowing small establishments deploying up to 40 workers to contribute between 9% to 12% of wages (instead of the mandatory 12%); and
  - Providing an option to the employees to choose between EPF Scheme and the New Pension Scheme.
- Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill 2016: The Union Cabinet has approved the Bill which will apply to establishments employing 10 or more workers (except manufacturing units). The following are a few key proposals under the Bill:
  - Allowing establishments to remain open 365 days a year;
  - Permitting women to work during night shifts if the employer provides shelter, ladies toilets, adequate protection of their dignity, and transportation, etc.;
  - Exempting highly skilled workers (for example, workers employed in IT, Biotechnology and R&D division) from the limit of 125 over-time hours in a quarter;
  - Preventing discrimination against women in the matter of recruitment, training, transfer or promotions; and
  - Online registration through a simplified procedure.

The Bill will be sent to the respective state Governments to enable them to modify their state-specific S&E Acts. Until such time the respective states modify their local law or otherwise adopt the Bill, the provisions of the Bill will not have any effect.

- Amendment to the Payment of Gratuity Act, 1972 ("**POGA**"): The gratuity limit is expected to be raised to INR 20,00,000. Currently, as per the POGA, an employer can limit the gratuity payable to the employee to INR 10,00,000.
- Rights of Persons with Disabilities Act, 2016 ("**Disabilities Act**"): The Central Government has enacted the Disabilities Act which imposes obligations on the government to take steps towards ensuring equality of opportunity for persons with disabilities and preventing discrimination on the basis of disabilities. The Disabilities Act is not yet in force and will come into effect on the date notified by the Central Government. The Disabilities Act imposes the following obligations in relation to private employers:
  - a. Every establishment must prepare an equal opportunity policy, detailing measures proposed to be taken by it for skill development and employment of persons with disabilities;
  - b. A copy of the establishment's equal opportunity policy must be registered with the authority appointed under the Disabilities Act; and

- c. Every establishment must maintain records of persons with disabilities in relation to their matters of employment, facilities provided and other necessary information as prescribed.

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*Parts of this overview were originally prepared by Nishith Desai Associates for the International Comparative Legal Guide to Employment & Labour Law 2015 published by the Global Legal Group. Vikram Shroff and Ajay Singh Solanki of Nishith Desai Associates have updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.*

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