



L Labour and Employee Benefits

Volume 1

THE LAW AND LEADING LAWYERS WORLDWIDE

2010/11

Cross-border
Country Q&A
PLC Which lawyer?
Lawyer profiles

India

Vikram Shroff and Harshita Srivastava
Nishith Desai Associates

www.practicallaw.com/7-503-4567

SCOPE OF LAWS

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

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

The federal government and the state governments have enacted many employment laws. These laws can be broadly categorised as laws concerning:

- Training, recruitment and conditions of employment.
- Employee compensation, social security, insurance and benefits.
- Employment disputes.
- Anti-discrimination and anti-harassment.
- Trade unions.

Whether these laws apply to an organisation and its employees depends on various factors, including the:

- Nature of the business or commercial activity.
- Office location.
- Number of the employees.
- Employee's title, role and responsibilities.
- Employee's base salary.

For example, some laws only apply to "workmen", who are specifically defined under the Industrial Dispute Act 1947 (IDA) (see *Question 17*).

Laws applicable to foreign nationals

The laws do not differentiate on the basis of an employee's citizenship. Therefore, a foreign national working in an Indian company is eligible to receive benefits and protection similar to those applicable to an Indian citizen, under the relevant laws. Indian laws will continue to apply irrespective of the choice of law in the employment contract. However, if a foreign national travels on a business assignment to India, but does not take up employment in India, the labour laws may not apply.

There is one exception. The mandatory participation of Indian nationals in the Employees Provident Fund and Miscellaneous

Provisions Act 1952 (EPFA) is subject to a ceiling on base salary (see *Question 20, Social security*). However, a foreign national must contribute irrespective of his salary, subject to the terms of any social security agreement signed between India and the foreign national's home country.

Laws applicable to nationals working abroad

An Indian citizen that is working abroad but employed by an Indian entity may not be able to claim all the benefits of the Indian labour laws. Further, the Indian exchange controls provide a ceiling for grant of stock options by an Indian company to employees working abroad. However, certain provisions of the Employee's Compensation Act 1923 (ECA), which has been extended to workmen recruited by Indian companies but are working abroad, and the EPFA, will apply to an Indian national working abroad who is employed with an Indian company, irrespective of the choice of law.

Indian labour laws do not extend to Indian citizens who are working in a foreign country and are employed by a foreign company.

EMPLOYMENT RESTRICTIONS AND INCENTIVES

2. Are there any age or nationality restrictions on managers or company directors? If so, please give details.

Age restrictions

Only persons between the age of 25 and 70 can be appointed as a public company's managing director, full-time director or manager without government approval (*Companies Act 1956 of India (CA)*).

This age restriction does not apply to private companies.

Nationality restrictions

A non-resident individual cannot be appointed as a public company's managing director, full-time director or manager (CA). A person is a resident of India if he has:

- Been staying in India for a continuous period of 12 months immediately preceding the date of his appointment as a managerial person.
- Come to stay in India either to:
 - take up employment; or
 - carry out business or a profession.



This restriction does not apply to private companies. In addition, less restrictive rules apply to public companies set up in a designated special economic zone (SEZ), under the Special Economic Zones Act 2005. Examples of leading SEZs include the SEEPZ SEZ in Mumbai, Kandla SEZ in Gujarat, MEPZ SEZ in Tamil Nadu, Falta SEZ in West Bengal and Noida SEZ in Uttar Pradesh.

3. Are any grants or incentives available for employing people? If so, please give details.

Healthy competition has developed over the past decade between various state governments to promote investment in their states. For example, some states, including Maharashtra, Karnataka, Andhra Pradesh and Tamil Nadu have introduced policies to promote their IT and IT enabled services (ITES) sectors by offering incentives. Some of these policies require the employer to employ a minimum percentage of local persons from that state to take advantage of some of the benefits.

WORK PERMITS

4. What permits do foreign nationals require to work in your country? Please explain:

- How these permits are obtained.
- How much they cost.
- How long the process takes.

Required permits

Foreign nationals require an employment visa (EV) to work in India. EVs are generally issued to highly skilled and/or qualified professionals that an Indian company appoints on a contract or employment basis. India has recently re-defined its immigration laws and clarified the nature of activities for which an EV can be issued:

- **IT and ITES sectors.** To promote these sectors in India, EVs are only granted to skilled foreign nationals who are employed at a minimum annual salary of US\$25,000 (as at 1 August 2010, US\$1 was about EURO.8).
- **Other sectors.** The number of foreign nationals that an Indian company can employ in the company or project must be:
 - no more than 1% of the total number of employees; and
 - a minimum of five and a maximum of 20.

India is yet to allow dual citizenship. However, foreign nationals who hold a person's of Indian origin (PIO) or overseas citizenship of India (OCI) card can travel to India for the purposes of employment without needing an EV.

If the EV or stay in India is for a period of over 180 days, the foreign national must register with a foreigner regional registration office (FRRO) within 14 days of arrival in India.

Obtaining permits

A foreign national can apply for an EV to his home country's Indian consulate or embassy, that is, the country where either:

- His passport has been issued.
- He has been residing for at least two years prior to the date of application.

The process for applying for an EV includes completing the visa application form and submitting certain documents, including:

- The employment offer letter.
- The appointment letter.
- A request letter from the Indian company.
- Certain declarations.

The process for applying for FRRO registration includes completing the registration form and submitting along with the passport and EV:

- Employment documentation.
- Residence details.
- A letter or undertaking from the Indian employer.

Cost

The fees for an EV application range between US\$200 to US\$800, depending on the country of application.

No fee is required for FRRO registration, except in certain border regions.

Length of process

An EV can be granted within seven to ten working days. However, in certain cases, where the matter must be referred to the Indian government's Ministry of External Affairs, the deadline may be extended to six to eight months. The deadline can be extended further for foreign nationals from certain countries where a two-step review or approval process is followed.

TERMS OF EMPLOYMENT

5. What terms govern the employment relationship? In particular:

- Is a written employment contract or statement of employment terms required?
- Are any terms implied by law into the employment contract (in addition to the terms referred to in *Question 1*)?
- Are collective agreements with trade unions or employee representatives common (generally or in specific industries)?

Written employment contract

A written employment contract is not required. However:

- Certain states such as Karnataka and Delhi require the employer to issue an appointment order in the prescribed format. The appointment order must include the:



- name and address of the establishment and the employer;
 - name of the employee and the employee's postal and permanent address;
 - employee's:
 - father's or husband's name;
 - date of birth;
 - date of entry into employment;
 - job title.
 - nature of the work entrusted to the employee;
 - serial number of the employee in the register of employment;
 - rates of the employee's wages.
- The employer must issue a written order on the employee's completion of the probationary period (*model standing orders under the central rules to the Industrial Employment (Standing Orders) Act 1946 (IESOA)*).
 - The employer must provide a letter of appointment (*Sales Promotion Employees (Conditions of Service) Act 1976 (see Question 4, Obtaining permits)*).

Employers in new sectors such as IT will usually issue detailed employment offer letters and contracts, which include detailed terms such as the term of employment, non-disclosure agreements, assignment of inventions and intellectual property, non-compete restrictions, and so on (see Questions 33 and 34). This is not common in traditional industry sectors such as manufacturing. It is generally advisable to stamp the employment agreement, under the Indian Stamp Act 1899, to make it admissible as evidence.

Implied terms

The employee may commit a tort if it does not treat its employer's trade secrets as strictly confidential, even if the employment contract does not exist or is silent concerning this issue. However, it is necessary to prove that the disclosure or misuse damages the employer.

In addition, a duty of good faith towards the employer is implied into the contract.

Collective agreements

Collective bargaining agreements are common in traditional sectors like:

- Manufacturing.
- Mining.
- Construction.

They are less common in newer and high-growth sectors such as IT/ITES, outsourcing, retail, telecommunications and financial services, which have witnessed minimal trade union activity.

MINIMUM WAGE

- 6. Is there a minimum wage? If so, please give details, in particular whether it applies to all employees, regardless of their age and experience.**

The Minimum Wages Act 1948 of India (MWA) gives the government the power to set minimum wages for the categories of employees listed in the schedule to the MWA. The government has set minimum wage rates according to the:

- Nature and location of employment.
- Type of work.
- Level of skill.
- Rate of inflation.

The specific minimum wage depends on whether the work is time work or piece work, and whether the employee is paid hourly, daily or monthly.

WORKING TIME

- 7. Are there restrictions on working hours? If so, please give details.**

The following statutes govern daily and weekly working hours:

- The Factories Act 1948 (FA) for employees working in factories.
- State-specific shops and establishment acts (SEAs) for employees working in shops or commercial establishments.

The maximum daily working hours are usually nine, and the weekly hours 48, although they may vary depending on the state. The relevant laws also set out:

- Opening and closing hours.
- Daily spread-over, or maximum duration, including rest hours.
- Rest intervals.
- Permitted overtime hours and rates of overtime payment.

- 8. Is there a minimum holiday entitlement? If so, please give details. How many public holidays are there in a year and are they included in the minimum holiday entitlement?**

Employees are entitled to the following:

- **Weekly holidays.** Employees are entitled to one day off every week.
- **National holidays.** The following days are regarded as national holidays:
 - Republic Day (26 January);



- Independence Day (15 August);
- Mahatma Gandhi's birthday (2 October).
- **Festival holidays.** These are either set by the relevant SEA or notified by the relevant state government, and are typically four to six days every year.
- **Leave.** The FA sets out paid leave of one day for every 20 days of work performed, while the SEAs provide 12 to 21 days of paid leave per year. Leave can be accumulated or carried forward.

To the extent that the IESOA applies, the hours of work and holidays must be set out in the certified standing orders (see *Question 5, Written employment contract*).

There are no provisions for other types of leave such as bereavement leave, family leave, military leave, jury duty leave, and unpaid leave.

ILLNESS AND INJURY PAY

9. What rights do employees have to time off in the case of illness or injury? Is that time off paid? Can an employer recover from the state sick pay granted to its employees?

The model standing orders under the IESOA and most SEAs allow employees time off for illness or injury, known as sick leave or casual leave. Sick leave usually ranges from ten to 12 days per year. Some SEAs provide greater rights of 12 days of sick leave and another 12 days of casual leave per year.

The employer cannot recover money from the government for an employee's sickness absence. However, eligible employees can claim compensation for a work-related injury from the employer under the ECA or from the Employer's State Insurance Corporation where the employer makes insurance contributions under the Employees' State Insurance Act 1948 (ESIA) (see *Question 20, Social security*).

PARENTS AND CARERS

10. What are the statutory rights of employees who are parents or carers (including those of disabled children and adult dependants)? How is employees' pay affected during periods of leave?

Maternity rights

Female employees are allowed to take 12 weeks of paid leave for pregnancy, if they have worked for at least 80 days in the 12 months preceding the date of expected delivery (*Maternity Benefits Act 1961 (MBA)*).

The employee cannot take more than six weeks of leave prior to her expected date of delivery. In addition to maternity leave, female employees are also entitled to a maternity bonus from their employer, unless that employee receives benefits under the ESIA.

Other rights

There are no provisions for paternity leave, adoption leave, parental rights or carer's rights. Certain organisations allow employees time off from work to take care of children or parents.

CONTINUOUS PERIODS OF EMPLOYMENT

11. Does a period of continuous employment create any benefits for employees? If individual employees are transferred to a new entity, are they deemed to retain their period of continuous employment?

Benefits

Certain employee rights increase with continuous service, including:

- **Severance pay.** The amount of severance pay (retrenchment compensation) payable under the IDA and certain SEAs is linked to the number of years of continuous service (see *Question 16, Severance payments*).
- **Gratuity.** An employer must pay a gratuity where employment is terminated after the employee has provided continuous service for at least five years (*Payment of Gratuity Act 1972 (POGA)*). The gratuity is paid at the rate of 15 days' pay for every completed year of service or part of year of service, subject to a limit of INR1 million (as at 1 August 2010, US\$1 was about INR46.7). It is payable on the termination of employment for:
 - superannuation (that is, when a certain agreed age is reached);
 - retirement (when employee service is terminated);
 - resignation;
 - death or disability (in that case, the five year minimum service precondition does not apply (see above)).

Transfer

In the event ownership or management of an undertaking is transferred to another undertaking, an employee who has completed at least one year's continuous service is entitled to notice and severance compensation unless certain conditions apply (see *Question 25, Automatic transfer*).

TEMPORARY AND AGENCY WORKERS

12. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

Temporary workers

Temporary workers are categorised as "workmen" and are therefore entitled to rights and benefits associated with salary or social security (for the definition of workmen, see *Question 17*). However, temporary workers may not be eligible for rights linked to continuous service (see *Question 11, Benefits*).

Agency workers

Workers appointed through a third party agency or contractor (including a staffing services company) may not be eligible for the same set of rights or benefits as permanent employees. However, they are eligible for protection under the MWA (see *Question 6*).



The principal employer is required to make contributions to agency workers under the EPFA and ESIA (see *Questions 20, Social security*).

DATA PROTECTION

13. What statutory data protection rights do employees have?

India does not have a codified law on employee data protection. However, anyone who discloses information with the intent to cause, or knowledge that disclosure is likely to cause, wrongful loss or wrongful gain, may be guilty of an offence (*Information Technology Act 2000*). Information includes:

- Information stored in electronic records.
- Personal information secured in any form.

A company may be liable to pay damages if it possesses, deals or handles any “sensitive personal data or information” in a computer resource that it owns, controls or operates, and:

- Is negligent in implementing and maintaining reasonable security practices and procedures.
- As a result of this negligence causes wrongful loss or wrongful gain to any person.

The Government is yet to define “sensitive personal data or information”.

DISCRIMINATION AND HARASSMENT

14. What protection do employees have from discrimination or harassment, and on what grounds?

Discrimination

Discrimination is prohibited on the grounds of race, religion, caste, sex or place of birth (*Constitution of India (Constitution)*). However, employees in private (non-governmental) companies cannot claim protection directly under the Constitution.

Equal remuneration must be paid for the same work or work of a similar nature (*Equal Remuneration Act 1976 (ERA)*). Discrimination is prohibited against female employees in:

- Recruitment.
- Any conditions of service such as:
 - promotion;
 - training; or
 - transfer.

Harassment

India has not enacted legislation prohibiting sexual harassment in the workplace. However, the Supreme Court of India has set down guidelines to be followed in cases of sexual harassment against female employees, including that:

- Every establishment should have a policy to prevent sexual harassment.

- A complaints committee should be set up to deal with such cases.
- The committee must follow a prescribed process.
- The committee must:
 - have a majority of female members;
 - be headed by a female.

The committee may have external participants, including experts and non-governmental organisation representatives.

For any other type of harassment, the organisation can follow a grievance redressal procedure under its internal policies or standing orders.

15. Do whistleblowers have any protection? If so, please give details.

There are no specific legislative rights for whistleblowers. However, certain corporate governance rules apply to listed companies.

The listing agreement that listed companies sign with Indian stock exchanges requires that the company's audit committee review the functioning of the whistleblower mechanism that those companies must maintain as part of good corporate governance principles. In addition, it is suggested that listed companies should disclose their compliance with their whistleblower policy in their corporate governance reports.

The whistleblower mechanism must enable employees to report to the management concerns about:

- Unethical behaviour.
- Actual or suspected fraud.
- Breach of that company's code of conduct or ethics policy.

The mechanism should also provide for:

- Adequate safeguards against victimisation of employees who use the mechanism.
- Direct access to the chairman of the audit committee in certain cases.

DISMISSALS AND REDUNDANCIES

16. What rights do employees have when their employment contract is terminated? Please provide information on:

- Notice periods.
- Severance payments.
- Any procedural requirements for dismissal.

Notice periods

India does not have an at-will employment model. There are provisions to protect employees in relation to employment termination in the IDA, IOESA, and state-specific SEAs. In addition, the



employment contract may set out rights on termination. In the case of conflict, the provisions that are most favourable to the employee will prevail.

Only workmen are entitled to the notice periods under the IDA (for the definition of workmen, *see Question 17*). An employer must give one month's notice to terminate employment of eligible workmen in the case of retrenchment (*IDA*). Retrenchment means termination of a workman's employment other than for:

- Punishment inflicted under a disciplinary action.
- Voluntary retirement.
- Retirement on reaching the agreed superannuation age.
- Expiry of a fixed-term employment contract.
- Continued ill-health.

The notice must indicate the reason(s) for retrenchment.

For an industrial establishment with at least 100 workmen, the employee must both (*IDA*):

- Give three months' notice.
- Obtain prior government approval (*see below, Procedural requirements*).

An industrial establishment includes a factory, mine or plantation unit.

In all the above cases, the employer can pay salary in lieu of notice.

Notice is unnecessary for dismissal as a result of serious misconduct. The employer must prove misconduct by conducting an internal enquiry based on the principles of natural justice.

Employees that are not workmen may be able to rely on contractual notice periods or provisions set out in a state-specific SEA (*see above*).

Severance payments

Severance or retrenchment compensation is payable on retrenchment of 15 days' pay for every completed year of service or part of a year of service which is in excess of six months (*IDA*). Certain SEAs contain additional provisions concerning payment of service compensation.

Procedural requirements

An employer which is categorised as an industrial establishment where at least 100 workmen are employed must obtain the prior approval of the labour authorities before dismissing a workman (*see above, Notice periods*). Other employers must notify the labour authorities afterwards, stating the reasons for dismissal. For other employees, the procedural requirements will depend on the relevant contractual or statutory provision.

17. What protection do employees have against dismissal? Are there any specific categories of protected employees?

If the employment of a protected employee has been terminated wrongfully, that employee has the right to treat it as an industrial dispute and approach the labour authorities for relief.

Each labour law has its own definition of an employee. Only a workman can claim protection under the IDA. A workman is a person that is employed to do any manual, unskilled, skilled, technical, operational or clerical work for hire or reward. A workman does not include, among others, a person who is employed:

- Mainly in a managerial or administrative capacity.
- In a supervisory capacity and draws wages exceeding INR1,600 per month.

The definition of an employee under the state-specific SEAs is broader and covers a larger section of employees.

18. What rules apply on redundancies?

The provisions under the IDA, the relevant SEA, and the standing orders must be followed in the case of termination of employment due to redundancy. Generally, the employer must terminate employment on a last-in-first-out basis. However, this requirement can be relaxed if:

- An agreement between the employer and the employee provides otherwise.
- The employer has valid and justifiable grounds to depart from this principle.

TAXATION OF EMPLOYMENT

19. What is the basis of taxation of employment income for:

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

Foreign nationals

Taxation of employment income depends on an individual's residency status under the Income Tax Act 1961 of India (ITA). Residency status depends on the duration of an individual's stay in India, regardless of whether that individual is an Indian or foreign national. There are three categories:

- **Ordinary resident.** The individual is taxed in India on his worldwide income
- **Resident but not ordinarily resident (RNOR).** The individual is taxed in India on the income which:
 - accrues, arises, or is deemed to accrue or arise in India; or
 - is received in India.
- **Non-resident.** The individual is not taxed in India on income which:
 - does not accrue, arise, or is deemed to accrue or arise in India; or
 - is not received in India.

Therefore, taxation of a foreign national in India depends on his residency status under the ITA (*see above*). Any salary income payable in India is regarded as income earned and subject to tax in India if it is:



- For services provided in India.
- Received during a rest period or leave period which is preceded and followed by services provided in India.

Where a foreign national comes from a treaty jurisdiction (that is, a country with which India has signed a double tax avoidance agreement), the foreign national may be able to avoid double taxation on his income or claim tax credits in his home jurisdiction.

Nationals working abroad

An Indian national working abroad is not taxed on income he receives outside India if he qualifies as an RNOR or a non-resident of India (see above, *Foreign nationals*).

20. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees? If so, please give details, including the rates.

Taxation

A resident individual is taxed according to the following tax brackets for income earned in a financial year:

- Income up to INR160,000 (INR190,000 for female employees): no tax.
- Income from INR160,001 up to INR500,000: 10% tax.
- Income from INR500,001 up to INR800,000: 20% tax.
- Income above INR800,000: 30% tax.

The financial year lasts from 1 April to the following 31 March.

In addition, an individual must pay an education cess of 3% on the tax amount.

The employer must withhold tax at the time of payment of salary. The tax withheld must be deposited with the Indian tax authorities.

The ITA recognises certain tax-exempt allowances for employees, such as:

- House rent allowance.
- Leave travel allowance.
- Conveyance allowance.
- Medical reimbursement.
- Child education allowance.

Social security

The EPFA provides that the employer must contribute 12% of the base salary and dearness allowance (the amount paid to an employee on account of a rise in the cost of living) of an eligible employee to a provident fund account maintained with the Employees' Provident Fund Organisation (EPFO). An eligible employee is an employee whose salary is no more than INR6,500 per month or who continues with a provident fund membership based on his previous employment (see *Question 30*). Employees who are not eligible can make voluntary contributions.

The amount contributed is divided into three schemes:

- Employees' Provident Fund Scheme.
- Employees' Pension Scheme.
- Employees' Deposit-linked Insurance Scheme.

The employee must match the employer's contribution from his salary.

The employer must make an insurance premium contribution to the Employees' State Insurance Commission for eligible employees (*ESIA*). Employees who earn a salary of no more than INR15,000 per month are eligible for coverage, although voluntary contributions may be made for other employees. The employer must contribute 4.75% of the eligible employee's salary and the eligible employee 1.75%.

LIABILITY

21. Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
- A parent company can be liable for the acts of a subsidiary company's employees?

Employer liability

An employer can be held vicariously liable in tort for the negligent acts or omissions of its employees that are committed in the ordinary course of employment (that is, authorised by the employer).

An employer is not excluded from liability for a personal injury caused to an employee as the result of the negligence of another employee on the basis that they are both employees of the same employer (*Employers' Liability Act 1938*).

Parent company liability

A parent company cannot be held directly liable for the acts of a subsidiary company's employees. The corporate veil can only be lifted in the case of a sham contract (for example, where an employment contract is not a genuine employment relationship).

22. What are an employer's obligations regarding the health and safety of its employees?

Detailed provisions concerning employees' health and safety and the standards that an employer must comply with are provided under the following laws:

- **The FA.** This covers a number of issues relating to health and safety, including:
 - cleanliness;
 - ventilation;
 - disposal of wastes and effluents;
 - dust and fumes;
 - overcrowding;
 - lighting;



- drinking water;
- latrines and urinals;
- spittoons.
- **Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996.** This covers rules relating to:
 - the handling and use of explosives;
 - the erection, installation and maintenance of construction equipment;
 - precautions to be taken in case of inhalation of dust;
 - transport; and
 - medical facilities.
- **SEAs.** These cover issues relating to:
 - cleanliness;
 - ventilation;
 - lighting;
 - precautions against fire; and
 - the provision of first-aid boxes.
- **Other laws.** Specific laws may apply depending on the industry (for example, laws relating to mines, plantations, dock workers, child labour, and so on).

Certain factories where at least 1,000 workers are employed are required to employ safety officers. Factories involving hazardous processes must appoint competent, qualified and experienced persons to handle and supervise hazardous substances.

REPRESENTATION AND CONSULTATION

23. 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)?

Management representation

Employees are not entitled to management representation.

Consultation

An employer does not need to consult employees concerning issues that affect them, in the absence of a trade union and a collective bargaining agreement that contains this requirement.

However, the employer must (*IDA*):

- Appoint a works committee consisting of representatives of the employer and workmen.
- Notify workmen of any proposed change to service conditions, including any change to:
 - wages (including the period and mode of payment);
 - provident fund or pension contributions (*see Question 26*);
 - allowances;

- hours of work or rest intervals;
- changes to shift working;
- worker classification;
- withdrawal of concessions or privileges;
- introduction or changes to disciplinary rules;
- change to a plant or process that may lead to retrenchment (*see Question 16*);
- change in the number of persons employed in an occupation, process, department or shift.

Where there is a trade union, it is advisable for the employer to consult on certain issues to reduce the risk of litigation.

Major transactions

The employer does not need to consult employees about major transactions (*see above, Consultation*).

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

Remedies

There are no consultation duties (*see Question 23*).

Employee action

Employees can approach labour courts if they believe a particular change that is being introduced might affect their employment or be detrimental to their service conditions. However, if the employer complies with the relevant laws, it may be difficult to prevent the employer from introducing the change.

TRANSACTIONS

25. Is there any statutory protection of employees on a business transfer? In particular:

- Are they automatically transferred with the business?
- Are they protected against dismissal (before or after the disposal)?
- Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?

Automatic transfer

Employees can be automatically transferred as a result of a transfer of business, if certain conditions are met (*see below*). The transfer of the ownership or management of an undertaking is treated as employment termination for an eligible workman under the *IDA*. In that case, the workman is entitled to one month's notice and severance pay (*see Question 16*).

However, if all of the following conditions are met, the transfer of business is not treated as a termination of employment and the employee is automatically transferred:

- The service remains uninterrupted.



- The new employment terms and conditions are not less favourable.
- The previous employment term is recognised for the purposes of calculating severance pay on termination of employment.

Protection against dismissal

Workmen under the IDA are eligible to receive notice and severance compensation in the event of a business transfer, except in cases of automatic transfer and if certain conditions are met (see above, *Automatic transfer*).

Harmonisation

Harmonisation of employment terms is possible. However, care should be taken that the harmonised terms are not less favourable to the transferred employees when compared to their previous employment terms (see above, *Automatic transfer*). If the harmonised terms are less favourable, the transfer is not considered valid and the workmen are eligible to receive notice and severance compensation (see above, *Automatic transfer*).

PENSIONS

26. Do employers and/or employees make pension contributions to the state in your jurisdiction? If so, please give details of:

- The contributions payable.
- The tax treatment of those contributions.
- The monthly amount of the state pension.

Contributions

The federal government manages social security in India. The employer must contribute 12% of base salary and dearness allowance for each eligible employee to a provident fund account (this contribution must be matched by the employee) (*EPFA*) (see *Question 20, Social security*). 8.33% of the contributions are paid towards the Employees' Pension Scheme (EPS). Contributions towards the pension fund constituted under the EPS provides for a number of different pension benefits, including:

- Superannuation pension.
- Retirement pension.
- Permanent total disablement pension.
- Widow or widower's pension.
- Children pension (a monthly pension amount for a maximum of two surviving children of the deceased).
- Orphan pension (this is payable in certain cases when the widow pension is not payable).

Tax

An employer's contribution to a provident fund is not subject to tax. Provided certain conditions are met, there is no tax payable:

- On the interest earned on the balance amount in the provident fund account.

- At the time of withdrawal from the provident fund account in compliance with the EPFA's provisions.

The employee contribution can be taxed unless the employee is able to claim certain deductions.

Monthly amount

The monthly amount of the pension depends on the level of contributions made and the individual circumstances.

27. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do such schemes provide pensions the value of which:

- Can usually be determined at the start of the arrangement (for example, the value is linked to the employee's salary)?
- Cannot usually be determined at the start of the arrangement (for example, the value is dependent on employer and employee contributions and investment return on those contributions)?

Supplementary pension schemes are neither mandatory nor common in India. However, certain companies provide superannuation schemes which grant benefits similar to pension schemes and offer certain tax benefits.

Individuals can obtain insurance policies for pensions from private insurance companies.

28. Is there a regulatory body that oversees the operation of supplementary pension schemes? If so, please briefly summarise the regulatory framework.

The Pension Fund Regulatory and Development Authority (PFRDA) is the regulatory body that oversees the operation of pension schemes in India. The PFRDA promotes income security for the elderly and protects the interests of the subscribers to a pension fund.

In the absence of any regulations issued by the PFRDA for managing supplementary pension schemes, the trustees of the pension trust or fund can manage investments based on the provisions of the indenture of trust.

The recently introduced National Pension Scheme (NPS) seeks to promote a contribution-based pension system in the country. While it is mandatory for government employees to contribute to the NPS, private sector employees are yet to actively participate.

29. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)? If so, please give details.

Tax reliefs have not been provided for contributions to supplementary pension schemes by the employees. An employer may however be eligible for certain tax benefits for contributions to superannuation schemes, provided certain conditions are met.



30. Is there any legal protection of employees' pension rights on a business transfer? In particular:

- Do supplementary pension rights qualify as acquired rights that transfer automatically under national legislation?
 - If not, is there any other protection for pension rights on transfer?
-

Rights do not transfer automatically and depend on multiple factors. The situation concerning rights under EPFA depends on whether or not the employee had rights under EPFA in the original and/or new company. If the employee had rights under EPFA in the old company, and not the new (for example, he now earns more than the ceiling salary (see *Question 20, Social security*)), he can transfer those rights to the new establishment if the rules of the provident fund permit this. If he has rights in the new company but did not have rights in the old whether or not he has any credit to transfer depends on whether he made any voluntary contributions (see *Question 20, Social security*).

The situation concerning supplementary pension rights depends on the terms of the relevant policy. Whether or not the employee transfers automatically depends on whether the employment terms and conditions are less favourable (see *Question 25, Automatic transfer*).

31. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
 - Employees of a foreign subsidiary company?
-

Employees working abroad

Employees of an Indian parent company, who are working abroad, may in certain cases be able to participate in a pension scheme established by the parent company in India.

Employees of a foreign subsidiary company

Employees of a foreign subsidiary company cannot participate in a pension scheme established by a parent company in India, unless the scheme is a private pension scheme which provides otherwise.

BONUSES

32. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded? If so, please give details.

It is very common to reward employees in India through contractual or discretionary bonuses. In several cases, a Diwali festival bonus is paid to employees. Where the Payment of Bonus Act 1965 (POBA) applies, it is mandatory to pay an annual bonus to eligible employees. POBA applies to establishments that employ a minimum of 20 employees. However, only those employees

who receive a monthly salary of up to INR10,000 are eligible to receive a statutory bonus. The bonus amount, which is linked to the profitability and the allocable surplus in an accounting year, is a minimum of 8.33% and maximum of 20% of the employee's salary.

Some companies in new sectors also provide for sign-on bonuses, profits sales linked bonuses, performance milestone bonuses, retention bonuses, loyalty bonuses, and so on, to recruit and retain talent.

IP

33. If employees create IP rights in the course of their employment, do the employees or the employer own the rights?

Generally, employees own IP rights that they have created. However, unless there is an agreement to the contrary, an employer will be the first owner of a copyright over a work made in the course of employment under a contract of service or apprenticeship (*Copyright Act 1957*).

Where an employee creates an invention, he must specifically assign that invention to the employer for the employer to be able to apply for a patent for that invention. This is because the only persons that can apply for a patent are the (*Patents Act 1970*):

- Person claiming to be the true and first inventor of the invention.
- Assignee of the person claiming to be the true and first inventor of the right to make that application.
- Legal representative of any deceased person who immediately before death was entitled to make that application.

RESTRAINT OF TRADE

34. 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 pay its former employees remuneration while they are subject to post-employment restrictive covenants?

It is possible to restrict a full-time employee's activities during the employment term.

However, an employer cannot prevent an ex-employee from competing after the termination of employment. A post-termination non-compete provision is not enforceable in India as it is considered to be a restraint of trade. In addition, "garden leave" clauses may not be enforceable after termination of employment.

PROPOSALS FOR REFORM

35. Are there any proposals to reform employment law or pensions law in your jurisdiction?

There are the following proposals for reform:



- A law prohibiting sexual harassment is expected shortly as the Protection of Women against Sexual Harassment at the Workplace Bill 2007 has been introduced and is being considered by the Parliament (see *Question 14, Harassment*).
- The various laws on compensation, including the MWA, Payment of Wages Act 1965, POBA, and POGA are planned to be consolidated into a single law concerning payment of wages, minimum wages, bonuses and gratuities (see *Questions 6 and 32*).
- The government has proposed to increase the salary limit for a supervisor under the definition of workman from the current limit of INR1,600 per month, in view of the increasing salary levels in the country and the recent increases to salary limit and coverage under the POBA, POGA and ESIA (see *Question 17*).
- The monthly salary threshold under the EPFA is proposed to be increased to INR15,000 to increase its coverage (see *Question 20, Social security*).
- It is proposed to strengthen the Child Labour (Prohibition and Regulation) Act 1986, by:
 - setting up special courts to try child labour cases;
 - including education of child labour by the employer;
 - including an offence of trafficking of children for labour;
 - increasing penalties and providing power to the government for search and seizure.
- There are recent suggestions to amend the Apprentices Act 1961 by:
 - doubling the payment rates under the apprenticeship training scheme, with the government bearing half the cost;
 - requiring companies to employ at least 50% of the apprentices.

CONTRIBUTOR DETAILS



VIKRAM SHROFF

Nishith Desai Associates

T +91 22 6669 5000

F +91 22 6669 5001

E vikram@nishithdesai.com

W www.nishithdesai.com



HARSHITA SRIVASTAVA

Nishith Desai Associates

T +91 22 6669 5000

F +91 22 6669 5001

E harshita@nishithdesai.com

W www.nishithdesai.com

Qualified. Bar Council of Maharashtra and Goa, 2002

Areas of practice. Labour and employment laws; employment agreement/documentation; employee benefits; employee stock option plans; compensation structuring; employment immigration; employment termination and severance; employment litigation.

Recent transactions

- Represented GoAhead Software, Inc. in its acquisition of Avantellis from Emerson Network Power, which has operations in the US and in India.
- Advised MoSys Inc. in its acquisition of the assets of Prism Circuits, Inc. and its Indian subsidiary, Prism Circuits India.
- Advised Mars, Inc. on its acquisition of the information technology division of Wm. Wrigley Jr. Company.

Qualified. Bar Council of Maharashtra and Goa, 2009

Areas of practice. Labour and employment laws; employment documentation; labour law compliances.

Recent transactions

- Represented GoAhead Software, Inc. in its acquisition of Avantellis from Emerson Network Power, which has operations in the US and in India.
- Advised MoSys Inc. in its acquisition of the assets of Prism Circuits, Inc. and its Indian subsidiary, Prism Circuits India.
- Advised Mars, Inc. on its acquisition of the information technology division of Wm. Wrigley Jr. Company.