GETTING THE DEAL THROUGH

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Rachel Nurse
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Editor-in-chief
Callum Campbell

Publisher
Richard Davey

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87 Lancaster Road
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India

Veena Gopalakrishnan and Vikram Shroff
Nishith Desai Associates

Statutory and regulatory framework

1 What are the main statutes and regulations relating to pensions and retirement plans?

The key statute regulating statutory pensions for employees in India is the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the EPF Act).

The EPF Act, which forms an important part of India's social security legislation, provides for the institution of a provident fund (under the Employees' Provident Funds Scheme, 1952), family pension (under the Employees' Pension Scheme, 1995 (the EP Scheme)) and deposit-linked insurance (under the Employees' Deposit-linked Insurance Scheme, 1976) for employees. The EPF Act applies to establishments employing a minimum of 20 employees.

In addition to the EPF Act, certain other enactments including the Payment of Gratuity Act, 1972 (the Gratuity Act) provide for retirement benefits.

There are also pension and retirement schemes that have been formulated for government employees, freedom fighters, victims of attack by antisocial elements, extremists, etc. The Pension Fund Regulatory and Development Authority (PFRDA) has extended the New Pension Scheme (previously available only to government employees) (NPS) to citizens of India on a voluntary basis.

The central government has established the public provident fund for the benefit of the general public to mobilise personal savings. Any member of the public (whether a salaried employee or a self-employed person) can participate in the fund by opening a provident fund account with select nationalised banks in India. A salaried employee can simultaneously become a member of employees' provident fund (whether statutory, recognised or unrecognised) and the public provident fund. Any amount subject to minimum of 500 Indian rupees and maximum of 70,000 Indian rupees per financial year) may be deposited in this account, and which amount shall not be treated as 'income' for the year for tax purposes.

2 What are the primary regulatory authorities and how do they enforce the governing laws?

The EPF Act and the schemes formulated thereunder are administered by the EPFO. The key authorities regulating the EPF Act and the schemes are:

- the Central Provident Fund Commissioner;
- Additional Provident Fund Commissioners;
- Deputy Provident Fund Commissioners;
- Regional Provident Fund Commissioners; and
- Assistant Provident Fund Commissioners.

The central government and state government appoint Controlling Authorities to administer the provisions under the Gratuity Act.

The PFRDA is the regulator for the New Pension Scheme and is responsible for appointment of various intermediaries in the system such as the central record keeping agency, pension funds, custodians, trustee bank, etc.

3 What is the framework for taxation of pensions?

The taxation of provident fund and pensions is governed by the Income Tax Act 1956 (the IT Act). The IT Act allows for tax exemptions with respect to withdrawal from provident fund and pensions if certain conditions are met.

In terms of pension payouts, the pension received by an employee under the Employees' Pension Scheme, 1995 is taxed as follows:

- in case of a government employee (ie, an employee of central government, a state government, local authority or statutory corporation), the entire amount of commuted pension is exempt from tax;
- in case of a non-government employee:
  - one-third of the commuted pension that he or she is normally entitled to receive is exempt from tax, if a gratuity is received; and
  - half of the pension that he or she is normally entitled to receive is exempt from tax, if gratuity has not been received; and
- an uncommuted pension received by government or non-government employees is chargeable for tax.

Contributions made or received under the EP Scheme are taxed as under:

- an employer's contribution to a provident fund: not treated as 'income' of the year in which contribution is made; and
- interest credited to provident fund: not treated as income of the year in which interest is credited

Lump sum payments at the time of retirement or termination of service are exempt from tax.

The accumulated balance payable to an employee participating in a recognised provident fund shall be exempt in the hands of an employee in the following situations:

- if the employee has continuous service with his or her employer for a period of five years or more. For the purpose of calculating the five-year time limit, service rendered with the previous employer will be included, if the previous employer also maintained a recognised provident fund and the provident fund balance of the employee was transferred from the previous employer to the current employer;
- if the employee has been terminated because of certain reasons that are beyond his or her control (eg, ill health of the employee, discontinuation of business of employer or the completion of the project for which the employee was employed); or

- if the employee has resigned before the completion of five years but joins another employer (who maintains a recognised provident fund and provident fund money with the current employer is transferred to the new employer).

Lump sum payments received from a non-recognised provident fund at the time of retirement or termination will be taxable as follows:
- payment received in respect of an employer's contribution and interest thereon is taxable under the head 'Salaries'; and
- payment received in respect of interest on an employee's contribution is taxable under the heading 'Income from other sources'.

Payment received in respect of an employee's contribution is not chargeable for tax.

As per the IT Act, any gratuity received by an employee in accordance with the Gratuity Act shall be exempt from tax, up to 1 million rupees. Where gratuities were previously received under and in accordance with the Gratuity Act, and the employee has availed of a tax exemption on such previously earned gratuity, the exemption to be allowed during the year shall be reduced to the extent of the exemption already allowed, up to 1 million rupees.

Amounts earned under the public provident fund scheme and the NPS are also tax exempt to the extent certain conditions are met.

A superannuation fund of the employer approved by the commissioner of income tax is taxed as follows:
- an employer's contribution is exempt from tax. However, from the Assessment Year 2010–2011, the employer's contribution towards an approved superannuation fund is chargeable for tax in the hands of the employee for any amount exceeding 100,000 rupees per annum;
- an employee's contribution qualifies for a tax deduction of up to certain limits;
- interest on the accumulated balance is exempt from tax; and
- payment from the fund is not chargeable to tax if:
  - there is a refund of the contribution or any payment from the fund on the death of an employee (eg, payment to widow); or
  - there is a lump sum payment by way of a commutation of annuity to the employee on his or her retirement.

The IT Act also provides exemptions with respect to deposits and investments made by retired government or public sector employees.

State pension provisions

4 What is the state pension system?

As per the EPF Act, both the employer and every eligible employee are required to contribute 12 per cent of the basic wages, dearness allowance (cost of living adjustment allowance) and retaining allowance, if any, to the Employees' Provident Fund Organisation (EPFO). Employees who are Indian nationals and drawing basic wages of up to 6,500 rupees per month or employees who have an existing provident fund account based on their previous employment and desire to continue by transferring such account under the new establishment are entitled to benefits under this statute. All foreign nationals employed in India, except individuals from countries with whom India has executed a social security agreement, irrespective of the salary earned, fall within the scope of the EPF Act. The social security benefits include the provident fund (3.76 per cent), the pension fund (8.33 per cent) and deposit-linked insurance (0.5 per cent). The accumulated provident fund and pension contributions can be withdrawn only under certain circumstances. A member is entitled to a superannuation pension or early pension depending on the age of retirement and the number of years that he or she has been a member of the pension fund.

Certain large employers prefer to set up their own provident fund and pension fund trusts/plans, rather than making contributions to the government-run provident fund and pension fund set up under the EPF Act. In such a case, a trust has to be created by the employer and employees to start their own provident fund scheme and the funds need to be invested in accordance with the rules issued under the EPF Act and IT Act.

The employer is required to obtain prior approvals from:
- the EPFO, so as to be exempt from making contributions for eligible employees under the EPF Act; and
- the commissioner of income tax, so as to be eligible to receive similar tax benefits as the employees would have obtained for making contributions under the EPF Act.

If the trust is recognised by the commissioner of income tax in accordance with the rules contained under the IT Act, it is known as a recognised provident fund. If, however, a provident fund is not recognised by the commissioner of income tax, it is known as an unrecognised provident fund.

Although not mandatory under law, certain employers also provide for superannuation as a retirement benefit to employees. The employer makes an annual contribution to a group superannuation policy held by the employer with an insurance company, such as the Life Insurance Corporation of India, which has set up a Superannuation Fund. The employer pays 15 per cent of basic wages as superannuation contribution. The contribution is invested by the insurance company in various securities as per the prescribed investment pattern. Interest on contributions is credited to the member's account. Normally, the rate of interest is equivalent to the interest earned for provident fund contributions. On reaching retirement age, the member is eligible to take 25 per cent of the amount available in his or her account as a tax-free benefit. The balance is put in an annuity fund, and the insurance company will pay the member periodic annuity returns depending on the option exercised by the member. In case of employment termination, the employee has the option to transfer his or her amount to the new employer. If the new employer does not have a superannuation scheme, the employee can withdraw the amount in the account, subject to deduction of tax and approval of a tax department, or may retain the amount in the superannuation fund, until he or she reaches the superannuation age.

The Gratuity Act mandates an employer to pay a gratuity to an employee on termination of employment, in case the employee has rendered continuous service for at least five years:
- on the employee's superannuation;
- upon retirement or resignation; or
- in the event of death or serious injury due to accident or disease.

The Gratuity Act states that the completion of continuous service of five years shall not be necessary in circumstances where the cessation of employment is due to an employee's death or serious injury.

5 How is the state pension calculated and what factors may cause the pension to be enhanced or reduced?

In terms of the amount contributed under the EP Scheme, the EPFO gives an interest to the balance in the provident fund account. The government contributes 1.16 per cent of the employees' wages towards the pension fund (subject to a salary limit of 6,500 rupees per month). A member also has an option to commute one-third of the monthly pension amount, which is paid at the time of the exercising of the option for commutation.

A member of the pension fund shall continue to be such member until:
- he or she reaches the age of 58; or
- he or she avails of the withdrawal benefit to which he or she is entitled; or
- he or she dies; or
- the pension is vested in him or her in terms of the EP Scheme.

The maximum pensionable salary is limited to 6,500 rupees per month. However if, at the option of the employer and employee, a contribution paid on salary exceeding such amount and an 8.33 per cent share of the employer is remitted into the pension fund, the pensionable salary shall be based on such higher salary.

A member is entitled to:

- a superannuation pension if he or she has eligible service of 10 years or more and retires upon reaching 58; or
- early pension, if he or she has eligible service of 10 years or more and retires or otherwise ceases employment before reaching 58.

Gratuity payable to an employee, who is eligible for the same, is calculated at the rate of 15 days' wages (based on the last drawn wages of the employee) for every completed year of service or part thereof in excess of six months, subject to a limit of 1 million rupees.

6 Is the state pension designed to provide a certain level of replacement income to workers who have worked continuously until retirement age?

Yes, the pension system has been designed to provide a certain level of income to workers after the retirement age, which is 58 under the EP Scheme. The calculation of the pension amount includes the amount of pensionable salary multiplied by the number of years of pensionable service. Further, in certain cases of minimum employment, the pensionable service standard increased by adding a weighting of two years.

7 Is the state pension system under pressure to reduce benefits or otherwise change its current structure in any way on account of current fiscal realities?

The amount of interest payable under the EP Scheme (currently 8.5 per cent per annum) is recalculated every financial year and is subject to an extensive debate internally within the EPFO and the other government departments.

Plan features and operation

8 What are the main types of private pensions and retirement plans that are provided to a broad base of employees?

Since pension and certain other retirement benefits have been provided under the social security law, private pensions and retirement benefits plans are not well developed and, accordingly, it is not very common for an employer to extend such benefits to its employees, although some large companies do provide such benefits to their employees on a contractual basis.

The two prominent types of pension plans in India are deferred annuity plans and immediate annuity plans. Most of the pension products in India are deferred pension plans. These plans have an accumulation phase where the individual first pays premiums for a specific number of years. Upon retirement, the individual receives pension income.

Immediate annuity plans require the individual to make a lump sum payment and the annuity is paid from the day such payment is made. Such plans are not very popular in India.

Unit-linked pension plans are gaining popularity in India. In such plans, the premiums paid are invested in units. After the completion of the stipulated time period of the pension plan, the annuity is paid to the policyholder either in a lump sum, annually, twice a year or monthly for their lifetime. Such plans guarantee a minimum annuity and also factor in the scope for appreciation of the capital invested by the individual.

The aforementioned are retirement plans commonly procured by individuals. Insurance providers also provide for group superannuation schemes that may be procured by employers on behalf of their employees. The premiums for such group insurance are commonly funded by the employer, at least in part.

9 What restrictions or prohibitions limit an employer's ability to exclude certain employees from participation in broad-based retirement plans?

An employer may provide non-statutory pension and retirement benefits to employees as per its discretion or as per the terms of the employment contract, and may exclude employees or classes of employees from participation in such broad-based retirement plans. At the same time, the laws in relation to anti-discrimination need to be considered in case of any differential treatment to employees.

10 Can plans require employees to work for a specified period to participate in the plan or become vested in benefits they have accrued?

Yes. Such plans are essentially contractual and are not regulated by statute. Terms to ensure loyalty of the employee, in cases where the premiums are being funded by the employer, may be incorporated. A vesting schedule, linked to the term of employment or certain performance-related parameters, can also be included.

11 What are the considerations regarding employees working permanently and temporarily overseas? Are they eligible to join or remain in a plan regulated in your jurisdiction?

Yes, it is possible for such plan to extend to employees working abroad. There are special insurance plans that cater to Indian nationals working outside India.

12 Do employer and employees share in the financing of the benefits and are the benefits funded in a trust or other secure vehicle?

The mechanism of sharing the financing varies from company to company. Some employers finance such benefits entirely while others pay a portion of the premium. It is also common to set up an employee welfare trust to provide for retirement and superannuation benefits, especially in light of the restrictions for buyback of shares. However, any such trusts set up by companies have recently been restricted to acquire shares of that company from the secondary market.

13 What rules apply to the level at which benefits are funded and what is the process for an employer to determine how much to fund a defined benefit pension plan annually?

These are contractual benefits provided to employees beyond and in addition to the statutory benefits they are entitled to. There are no statutes, legislation, rules or guidelines in place prescribing the mode of determining whom to fund and how much to fund. Companies usually have internal rules in place for the same.

14 What are customary levels of benefits provided to employees participating in private plans?

Commonly employers provide for group pension plans that entitle employees to receive a portion of their salary upon cessation of employment. The portion typically depends upon the number of years of continuous service rendered by the employee to the employer.

15 Are there statutory provisions for the increase of pensions in payment and the revaluation of deferred pensions?

There are no such statutory provisions.

16 What pre-retirement death benefits are customarily provided to employees' beneficiaries and are there any mandatory rules with respect to death benefits?

In addition to the statutorily available death benefits, companies also ordinarily provide for accident, health and death-related insurance for their employees. These benefits are in addition to statutory benefits such as a gratuity, which is payable in case of an employee's death.

17 When can employees retire and receive their full plan benefits? How does early retirement affect benefit calculations?

The trigger for retirement and pension plans are ordinarily contingent on the age of the employees. Commonly, the age fixed for individuals to be eligible for their retirement and annuity is 60 years.

18 Are plans permitted to allow distributions or loans of all or some of the plan benefits to members that are still employed?

Yes, it is possible for private plans to allow for distribution or loans of the plan member to employees, although care must be taken especially when there is a trust set up to administer the plan and the benefits thereunder.

19 Is the sufficiency of retirement benefits affected greatly if employees change employer while they are accruing benefits?

Retirement benefits set up by an employer generally lapse in the event of cessation of employment, since these are contractual arrangements as against a statutory requirement. Although unlikely, the terms and conditions in the plan need to be reviewed to ascertain the possibility of carrying forward the benefits.

20 In what circumstances may members transfer their benefits to another pension scheme?

Provisions with respect to transferability of benefits will ordinarily be contained in the plan documents. The same will need to be reviewed to ascertain the circumstances under which the benefits can be transferred.

21 Who is responsible for the investment of plan funds and the sufficiency of investment returns?

For private pension arrangements involving an insurance service provider, an insurance company is responsible for the investment of plan funds and the sufficiency of investment returns.

22 Can plan benefits be enhanced for certain groups of employees in connection with a voluntary or involuntary reduction in workforce programme?

Yes. These are non-statutory benefits and therefore the benefits can be enhanced for groups of employees in connection with a voluntary or involuntary reduction in the workforce programme.

23 Are non-broad based plans permitted and what types of benefits do they typically provide?

Yes, non-broad based plans are permitted although not very common in India. Such plans can be structured based on the benefits that the employer intends to provide the employees.

24 How do the legal requirements for non-broad based plans differ from the requirements that apply to broad-based plans?

There are no legal requirements that are applicable to employers.

25 How do retirement benefits provided to employees in a trade union differ from those provided to non-unionised employees?

The retirement benefits provided to unionised employees will be based on the terms that have been negotiated and bargained with the employer and as may be included in the collective bargaining agreements. The employer may also provide similar benefits to non-unionised employees at its own discretion.

26 How do the legal requirements for trade-union-sponsored arrangements differ from the requirements that apply to other broad-based arrangements?

The legal requirements for trade-union sponsored arrangements do not differ from the requirements that apply to other broad-based arrangements.

Enforcement

27 What is the process for plan regulators to examine a plan for periodic legal compliance?

Employers are not legally required to put in place private pension and retirement plans and therefore the same are purely driven by contract. That said, the government may exempt an establishment or a class of establishment from compliance with the EPF Act, the provident fund scheme, the pension scheme or the deposit-linked insurance scheme if the employees of the establishments are either members of or likely to be members of any other pension scheme, provident fund scheme or deposit-linked insurance scheme wherein the benefits are at par or more favourable than the benefits provided under the EPF Act and the schemes made thereunder. Such exempted establishments are required to submit monthly returns in the prescribed format to the EPFO.

28 What sanctions will employers face if plans are not legally compliant?

Non-compliance with the provisions of the EPF Act and the schemes made thereunder, including failure to submit any returns, submitting false returns or making false declarations is punishable with one year's imprisonment or a fine which may extend to 5,000 rupees, or both.

29 How can employers correct errors in plan documentation or administration in advance of a review by governing agencies?

The plans that are implemented so as to obtain an exemption under the EPF Act are reviewed by the EPFO prior to the grant of exemption.

30 What disclosures must be provided to the authorities in connection with plan administration?

An establishment that is exempted under the EPF Act is required to submit monthly returns to the EPFO setting out details of, inter alia, existing members, newly joined members, retiring members, wages

Update and trends

The central government has, over the past five years, been considering privatising the PFRDA and is facing opposition from employee unions.

The Payment of Gratuity (Amendment) Bill, 2012 was introduced in the Upper House of the Indian parliament in November last year with a view to enhance the benefits available to employees under the Gratuity Act. The proposed amendment envisages increasing the entitlement from 15 days' wages to 30 days' wages for every completed year of service or part thereof in excess of six months.

contributed, details of the trust operating the private fund, details of investment of the accumulated money, etc.

31 What disclosures must be provided to plan participants?

There are no mandatory disclosures prescribed under law. The private plan documents may prescribe the same.

32 What means are available to plan participants to enforce their rights under pension and retirement plans?

Ordinarily, private plans set out the mechanism for withdrawal of benefits. However, the withdrawal provisions for a recognised provident fund set up by the employer need to comply with provisions contained under the EPF Act and the schemes or rules thereunder, and cannot be more favourable than the provisions for withdrawal under the EPF Act.

Plan changes and termination

33 What restrictions and requirements exist with respect to an employer's changing the terms of a plan?

With respect to private pension plans, the plan documents set out the requirements and restrictions on the employer's ability to change the terms of the plan. In case of a recognised provident fund, the changes need to be in compliance with the EPF Act.

34 What restrictions and requirements exist with respect to an employer terminating a plan?

The plan documents will set out the provisions on the ability of the employer to terminate the plan.

35 What protections are in place for plan benefits in the event of employer insolvency?

The plan documents will contain such protections. The protections will depend on the nature of the retirement benefit. To the extent the plan benefits are transferred to a trust set up by the employer, the assets of the trust may be protected in the event of employer insolvency.

36 How are retirement benefits affected if the employer is acquired?

The plan documents will set out the implications of an acquisition or change in control.

37 Upon plan termination, how can any surplus amounts be utilised?

Depending on the nature of the plan, the surplus amounts can be used by the employer or the trustee (as the case may be) for employee welfare and benefit.

Fiduciary responsibilities

38 Which persons and entities are 'fiduciaries'?

The directors of the company and the managers and officers in charge are typically considered to be in a fiduciary capacity. If the plan is being implemented through a trust, the trustee occupies a fiduciary position.

39 What duties apply to fiduciaries?

A fiduciary is expected and required to act bona fide and in the best interest of the beneficiaries, which in case of a private pension plan would be the employees. A fiduciary should protect the interests of the beneficiaries. A fiduciary is also required to acquire and maintain sufficient knowledge and understanding of the business to enable it to discharge its duties. In case a fiduciary delegates its duties to subordinates, it is its duty to supervise the subordinates. A fiduciary must take care of assets and properties in the same fashion as a trustee of a trust would take care of the assets in his possession for the benefit of the beneficiaries. Finally, a fiduciary must use reasonable care and skill.

A fiduciary must not place itself in a position of conflict of personal interest.

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LEGAL AND TAX COUNSELING WORLDWIDE
MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI

Veena Gopalakrishnan veena.gopalakrishnan@nishithdesai.com
Vikram Shroff vikram.shroff@nishithdesai.com

26, Maker Maxity
3rd North Avenue, Bandra-Kurla Complex
Bandra (E), Mumbai 400051
India

Tel: +91 22 6159 5000
Fax: +91 22 6159 5001
www.nishithdesai.com

40 What are the consequences of fiduciaries' failing to discharge their duties?

A fiduciary may be held personally liable for a breach of a fiduciary duty towards the beneficiaries. Depending on the nature of the breach, a fiduciary may also be held liable for a breach of contract or a breach under the law of torts. However, in determining the extent of the fiduciary's liability it is necessary to examine carefully the role he or she played in regard to the alleged tortious acts.

In certain cases, a fiduciary may be held liable to compensate the beneficiaries for loss suffered due to transactions entered into beyond the powers of the fiduciary and in particular to restore the value of assets that have been disposed of in connection with the ultra vires transaction.

Legal developments and trends

41 Have there been legal challenges when certain types of plans are converted to different types of plan?

The regime for private pension plans in India is still at an evolving stage and accordingly we are yet to face any such legal challenges with respect to conversion of plans.

42 Have there been legal challenges to other aspects of plan design and administration?

No. There have been no significant legal challenges with respect to plan design and administration.

43 How will funding shortfalls, changing worker demographics and future legislation likely affect private pensions in the future?

Considering that private pension plans are still being evolved in India, there may not be sufficient clarity on how funding shortfalls, changing worker demographics and future legislation may affect private pensions in the future.

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