



International Employment Lawyer

New Ways of Working

India



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LEGAL AND TAX COUNSELING WORLDWIDE

India

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Remote working

1. Has the government introduced any laws and/or issued guidelines around remote-working arrangements? If so, what categories of worker do the laws and/or guidelines apply to – do they extend to “gig” workers and other independent contractors?

The Indian government has not introduced any labour laws or guidelines around remote working.

However, India is in the process of codifying several of its national-level labour laws into four codes, and one of the labour codes in this regard is the Industrial Relations Code, 2020 (the provisions of which are yet to be made effective). The Industrial Relations Code, 2020 contains provisions relating to Standing Orders that mandate employers in certain establishments to adopt certain work rules for their employees. The draft model Standing Orders proposed by the federal government, as was published by the Ministry of Labour and Employment in December 2020^[1] (but yet to be finalised and notified) contains a reference to “work-from-home” arrangements for employers in the services sector.

Additionally, the law on maternity benefits allows a female employee (who has returned from maternity, and whose nature of work is such that it may be performed remotely) to request permission from her employer to work remotely on mutually accepted terms and conditions.

Companies that are registered with the Department of Telecommunications (as Other Service Providers), Special Economic Zones and Software Technology Parks of India, are required to comply with certain conditions for their employees to work from home.

[1]
https://labour.gov.in/sites/default/files/224080_compressed.pdf

2. Outline the key data protection risks associated with remote working in your jurisdiction.

An individual's sensitive personal data or information (SPDI), which includes information on passwords; financial information such as a bank account, credit card or debit card or other payment instrument details; physical, physiological and mental health conditions; sexual orientation; medical records and history; or biometric information or other details related to such information provided to a body corporate for the provision of services or such information received for processing under a lawful contract or otherwise and its storage are protected under Indian data privacy rules. There are certain mandatory obligations for collectors of such SPDI in electronic forms, including obtaining the consent of the data provider, formulating, publishing and complying with a privacy policy for treatment of such data and adopting certain standards of security practices. However, these obligations are not specific

to remote-working arrangements; they govern the terms of the data being collected by the employer.

With employees working remotely, employers are facing a challenge with protecting the security of client data and other confidential information, which may be duplicated or disclosed to third parties by employees working remotely on unsecured personal devices.

3. What are the limits on employer monitoring of worker activity in the context of a remote-working arrangement and what other factors should employers bear in mind when monitoring worker activity remotely?

Employers in India largely rely on their policies regarding the monitoring of worker activity, in absence of codified laws. As a result of the covid-19 pandemic and resultant lockdown, employers were not fully prepared to shift to remote working and hence faced challenges vis-à-vis ethics and the legalities of monitoring employee activity. Incidentally, there was an employee protest in one case when the employer's client required the employees providing services remotely to keep their cameras on.

While there is no legal requirement of time tracking specifically in the context of remote working in India, employers are generally required to track the working hours of employees (largely from an overtime perspective) and to comply with certain recordkeeping requirements under applicable labour laws. In this context, employers should bear in mind that their records do not falsely show an employee working beyond the stipulated daily and weekly working hours prescribed under applicable labour laws, which may trigger overtime requirements thereunder.

The law on the protection of women from sexual harassment applies to employees while they are working from home, given the expanded definition of “workplace” that includes “a dwelling place or a house”. Employers need to be careful to ensure that there is no abuse of the online means of communication, such as video calls, in the process of monitoring their employees that may lead to workplace sexual harassment-related claims.

4. Are employers required to provide work equipment (for example, computers and other digital devices) or to pay for or reimburse employees for costs associated with remote working (for example, internet and electricity costs)?

There is no legal obligation for employers to provide work equipment or reimburse the costs of remote working. However, if an employer would like an employee to work remotely, it is generally expected that the employee will be provided with the necessary tools and equipment required for remote working, including a computer and a phone, which an employee is expected to use exclusively while dealing with work-related data. There is, however, no clarity surrounding reimbursement of costs for internet or electricity, and employers adopt different arrangements, based on their remote-working policies and practices.

5. What potential issues and risks arise for employers in the context of cross-border remote-working arrangements?

Some high-level considerations to be kept in mind by employers in a cross-border remote-working arrangement can be summarised as follows:

Labour law considerations

While a permanent remote-working model from India is not legally tenable for a foreign employer, it must be borne in mind that India has labour laws at national and state levels.

Accordingly, and depending on the employee's primary place of work in a remote working arrangement, the employer must consider the state labour laws and compliance.

Please also note that in cases where an employee is working remotely from India, the employee may be able to claim protection under Indian health and safety laws. We are yet to come across such cases in India involving cross-border employees.

Where an employee employed in India is moving to a foreign country to work remotely, the Indian employer will need to comply with applicable Indian labour laws concerning benefits, consultation, flexible work issues, worker health and safety obligations and taxes.

The Employees' Compensation Act, 1923, which applies to commercial establishments in some jurisdictions and certain categories of employees otherwise, and provides for compensation payable by employers to employees related to any "injury caused to an employee by accident arising out of and in the course of his employment", has extraterritorial application outside India for employees of Indian companies travelling or working overseas for their employer.

Social Security

Where an employee in India moves out of India to work remotely, subject to the terms of any social security agreement between the concerned foreign country and India, such employee may be treated as an "international worker" under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act). Similarly, where foreign nationals are employed with an Indian entity of a foreign employer, subject to any social security agreement between the concerned foreign country and India, such foreign national may be treated as an "international worker" under the EPF Act and be subject to compliance requirements thereto.

Tax considerations

The presence of an employee in India employed with a foreign entity may lead to tax or permanent establishment issues for the concerned foreign entity in India, depending upon the nature of activities carried on by such employee in India. The provisions of any double taxation avoidance agreement between India and the concerned foreign country will also need to be considered in this respect. Similarly, for employees in India moving outside India to work remotely, the employee's tax residency status will depend on the applicable tax laws in India, the concerned foreign country and other applicable considerations such as foreign exchange control regulations based on which taxes will need to be withheld or paid. Individuals may also be subject to taxation depending on their length of stay in any country.

6. Do employers have any scope to reduce the salaries and/or benefits of employees who work remotely?

An employee's salary and contractual benefits are entitlements that are contractual and employers cannot unilaterally vary such entitlements. Similarly, an employee's remuneration may

reflect the minimum rate of pay provided for in an industrial instrument such as a Modern Award and employers will not be able to reduce the remuneration or benefits without running the risk of undermining the minimum entitlements provided in the instrument.

Employers can consult with staff about a proposal to restructure their hours and pay, but generally, no such changes can be implemented without employees being given an opportunity to consider the proposed changes and agreeing to those changes.

The minimum wage order provides that an employee cannot be paid less than the national minimum wage.

The return to work and vaccinations

7. Do employers have a legal duty to provide covid-19-safe working environments? If so, what practical steps can employers take to satisfy this duty?

Employers have a duty of care to provide a safe work environment for their employees. Employers may be held liable in the event of a failure to provide safe working conditions, including those prescribed under the health and safety-related provisions of the labour laws, both in factories and commercial establishments.

Some of the practical steps that employers can take in this regard are:

- tracking government rules and guidelines recommended by industry bodies concerning prevention of covid-19 at workplaces at office reopening;
- implementing policies on prevention and management of covid-19 positive cases in the workplace following applicable government guidelines and industry practices;
- effectively and clearly communicating to employees regarding the employer's protocols around covid-19 preventive measures, testing and vaccination through the organisation of sensitisation programmes, etc.;
- re-opening offices in a phased manner, staggering shift, working or lunch hours for employees attending offices to avoid crowding at the workplace;
- regularly sanitising the workplace and disinfecting commonly used areas such as elevators, lavatories and commonly touched areas such as doorknobs and elevator buttons;
- adopting touch-free mechanisms for commonly touched areas such as handwashing facilities, sanitiser and doorknobs;
- providing handwashing and sanitizing facilities at all common places in the workplace;
- preventing crowding in elevators through encouragement to use stairs;
- allowing employees whose nature of work permits working from home to continue to do so, or work from the office on certain days of the week only;
- ensuring temperature scanning of visitors and employees visiting the workplace at entry points to rule out the entry of persons showing symptoms of covid-19;
- mandating social-distancing norms in the workplace through visual aids such as specifying safe distances on the floor, drawing circles indicating safe distance for the formation of queues in cafeterias and marking alternative seats in rows as unavailable;

- appointing dedicated individuals to ensure all covid-19 appropriate behaviours are observed by employees at the workplace, and to liaise with relevant health and government authorities in the event of a case of Covid-19 infection at the workplace;
- liaising with hospitals and medical centres to ensure complete vaccination of the workforce and their dependents before recalling the workforce to the office with full attendance requirements; and
- encouraging employees to self-monitor their health and report to HR or a dedicated officer whenever any employee is experiencing any Covid-19 symptoms at the workplace, to ensure prompt containment of infection.

8. Can employers require or mandate that their workers receive a covid-19 vaccination? If so, what options does an employer have in the event an employee refuses to receive a covid-19 vaccination?

Vaccination in India is voluntary. Employers cannot legally mandate employees to receive a covid-19 vaccination.

Employers may, however, refuse the entry of employees to the workplace if they are not vaccinated. However, it may not be possible to cut wages or terminate employment on the basis that an employee is not vaccinated.

Please refer to our article published in the **International Employment Lawyer** on this topic, including [recent case law in India](#). This is an evolving area and we expect more developments in due course.

9. What are the risks to an employer making entry to the workplace conditional on an individual worker having received a covid-19 vaccination?

The employer has a right to restrict the entry of any employee to its office premises if the employee is not vaccinated. In such a case, the employee may continue to work remotely.

10. Are there some workplaces or specific industries or sectors in which the government has required that employers make access to the workplace conditional on individuals having received a covid-19 vaccination?

No, not in general. However, an order has been issued directing district health authorities in Tamil Nadu (Chennai) to ensure complete vaccination of all employees and their family members in respect of all workplaces in the State[2]. The Chief Commissioner of the Bangalore municipal authority (BBMP) has issued a circular on 26 August 2021 stating that employers of commercial establishments, industries, hotels and restaurants and other offices within BBMP jurisdiction must ensure their employees are vaccinated[3] and also ensure regular testing.

However, in a recent judgment, the Meghalaya High Court stated that it is unconstitutional for government authorities to make vaccinations mandatory for individuals at the cost of their livelihood, given existing judgments by the apex court in India considering "right to livelihood" a part of "right to life" under Article 21 of the Indian Constitution. This decision was followed in a Gauhati High Court order (Aizwal Bench) and similar views were taken by the Manipur High Court and Gauhati High Court (Kohima Bench) on state directions regarding mandatory vaccination of individuals. As a result, the constitutionality of a government mandate, such as the one issued by the public health authority in Tamil Nadu and the BBMP commissioner for vaccination of individuals, is debatable.

[2] Guidelines issued by the Tamil Nadu Director of Public Health dated July 24, 2021 available [here](#)

[3]

https://drive.google.com/file/d/19_1A7CtE2Ody7Fbeih9PHpE_AHy8RE/view?usp=sharing

11. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?

An employee's medical information and history (in electronic form) is treated as SPDI under Indian privacy law, for which employers need to comply with the applicable data privacy requirements, such as procuring consent from the concerned individuals, adopting, publishing and complying with a privacy policy for collection, and processing or storage of such SPDI.

Additionally, where employers are required to disclose such data to any third parties (eg, manpower service providers may be required to disclose employee SPDI concerning covid-19 symptoms to clients to whom their employees are assigned), they should ensure that their privacy policy covers such disclosure of SPDI of employees to third parties and it receives specific consent from the concerned employees providing their SPDI to third parties. The employer in this situation should also contractually ensure that the third party receiving such SPDI complies with the applicable data privacy norms.

Health & safety and wellbeing

12. What are the key health and safety considerations for employers in respect of remote workers?

India has labour laws concerning compensation payable by the employer for any personal injury caused to an employee "arising out of and in the course of" employment. While these laws have been extended in cases where an employee was travelling on official duties, we are yet to come across a specific precedent related to remote working in India. Additionally, remote working has led to the emergence of several unprecedented mental health-related issues among employees working from home, which is something employers are grappling with. Employers should also ascertain whether its insurance coverage applies to employees working remotely.

13. How has the pandemic impacted employers' obligations vis-à-vis worker health and safety beyond the physical workplace?

Since the dawn of the pandemic, with employees working remotely from different locations, employers are grappling with the applicability of health and safety-related laws such as state-specific shops and establishments acts (S&E Acts), the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA), establishment-specific legal mandates such as the requirement of creche provision under the Maternity Benefit Act, 1961, and laws related to employee compensation for injuries and the like concerning remote workers. However, there is a lack of legal precedent in India providing for clarity on the application of the age-old laws to the current remote working scenario and this area of jurisprudence is at its nascent stage.

Having said that, certain laws such as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 have a wide definition of workplace to cover an employee's dwelling place or house. In light of new remote-

working arrangements, it has become essential for employers to update their policies to address such legal considerations adequately, from an employer's duty of care perspective.

14. Do employer health and safety obligations differ between mobile workers and workers based primarily at home?

No, currently applicable Indian laws do not distinguish between home-based workers and mobile workers. There is a concept of 'out workers' under the CLRA in terms of the application of provisions thereof, which does not specifically distinguish between remote workers and home-based workers.

15. To what extent are employers responsible for the mental health and wellbeing of workers who are working remotely?

The Mental Healthcare Act, 2017 (MHA) outlines the rights of persons with mental illness, without specifying any entity against which such rights may be enforced. As a result, such rights of a person with mental illness under the MHA may extend against employers as well.

Some of the rights applicable to persons with mental illness under the MHA inter alia include the right to dignity, privacy, to be part of society, to be treated equally at a par with persons with physical illness in all provisions of healthcare besides other rights, and to be protected from emotional and sexual abuse. To that extent, employers should take into account such requirements in their policies, addressing inter alia non-discrimination of employees with mental illnesses in terms of the provision of healthcare-related benefits at par with persons with disabilities, protecting the confidentiality of any information related to an employee's mental illness, and publication of any information relating to an employee's mental illness on media with the consent of such employee.

16. Do employees have a "right to disconnect" from work (and work-related devices) while working remotely?

In 2018, a private member's bill (Right to Disconnect Bill[4]) was proposed in the Indian parliament providing for an employee's right to disconnect after working hours. However, the bill was not eventually taken up or passed by the Indian parliament, and to that extent, there is no statutory provision providing for an employee's right to disconnect in India.

The S&E Acts in some Indian states such as Karnataka (Bangalore) make it illegal for an employer to call an employee to the employer's workplace on such employee's statutory day off. While there are laws mandating payment of overtime to employees working on holidays and beyond statutorily stipulated daily and weekly working hours, there is no statutory provision for any employee right to refuse work or disconnect from work and work-related devices outside working hours, especially in a remote working scenario. However, given the rise of mental health-related issues due to the ongoing Covid-19 pandemic, the debate on the right to disconnect might just resurface in the employment scenario, with many employers devising innovative policies to ensure employees have the necessary work-life balance.

[4] <http://164.100.24.219/billstexts/lbillstexts/AsIntroduced/2317as.pdf>

Unions and/or work councils

17. To what extent have employers been able to make changes to their organisations during the pandemic, including by making redundancies and/or reducing wages and employee benefits?

There were certain central and state government restrictions on employment termination in the form of government advisories during the first and second phases of covid-19-induced lockdown in India. Orders were passed by state and central governments on mandatory payment of wages to all employees during the period of such lockdown. As a result, several employers were left with no choice but to restructure their workforces through redundancies. Owing to the same, based on certain government orders as aforesaid (the constitutional validity of which are debatable and currently sub judice), employee unions in some Indian states such as Maharashtra (Mumbai and Pune) and Karnataka (Bangalore) have been actively taking up the cause of employees who have been retrenched or whose working conditions such as wages have been adversely impacted by employers during the pandemic. However, courts have upheld the employer's rights in certain cases to deduct wages or pay reduced compensation to employees during lockdown in case of any default attributable to the employee (such as an employee's inability to attend the workplace in an operating establishment, owing to any voluntary action) or with employee consent.

18. What actions, if any, have unions or other worker associations taken to protect the entitlements and rights of remote workers?

Certain state governments, during the first and second waves of lockdown in India, issued orders mandating employers to pay full salaries or to provide holidays to employees who were unable to work owing to the closure of their workplaces. In Pune, the active trade union for employees in the information technology sector made complaints before the labour authorities based on such orders.

Labour authorities in Pune also took steps against employers through the issuance of notices and other adverse orders to block detrimental actions taken against employees such as retrenchment, reduction in wages, and change in leave policies. However, we have noticed a downward trend in such incidents during the second phase of lockdown in early 2021. During the second phase of lockdown, employers have also been more proactive in providing medical support and other assistance to employees and their families, as opposed to taking cost-optimisation-driven employee adverse actions, as was noted during the first phase of lockdown in India.

19. Are employers required to consult with, or otherwise involve, the relevant union when introducing a remote-working arrangement? If so, how much influence does the union and/or works council have to alter the working arrangement (for example, to ensure workers' health and safety is protected during any period of remote work)?

Unless there are unionised employees in the workplace or collective bargaining agreements necessitating an employer to negotiate the terms and conditions of employment to maintain industrial harmony, employers are not required to consult or otherwise involve a trade union when introducing a remote-working arrangement to their workplace. In such cases, as long

1as employee consent is procured for implementing such change in the employee's service conditions, unless there is contractual right available to the employer to automatically do so, it should be possible for the employer to implement such change. Any influence of the union in this respect will have to be assessed based on the scale of operation of the employer, nature of operation of the employer, percentage of unionised employees in the establishment etc.

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Vikram is the leader of the HR Law (employment and labour) team at the research and strategy-driven international law firm, Nishith Desai Associates which has offices in Mumbai, Silicon Valley, Bangalore, Singapore, New Delhi, Munich and New York. He has been employed with the firm for over 22 years.

He advises leading technology, media and financial services sector companies in drafting and negotiating employment contracts; non-disclosure agreements and assignment of intellectual property; competition and solicitation restrictions; structuring of expatriate and secondment arrangements; HR policies and employee handbooks; compensation structuring; employee stock option and share purchase plans; employee transfer and post-merger integration; employment termination, lay off & redundancy; employment litigation; and employment-related immigration laws.

His expertise is often sought after for urgent and sensitive HR matters. He also helps clients with employee fraud and anti-bribery policies and investigations. He regularly conducts training for employees, managers and committee members. Vikram also advises Nasscom on employment law policy matters.

Vikram has been consistently ranked as India's leading labour and employment lawyer by most of the leading international publications. Who's Who Legal has recognised Vikram as a Thought Leader for labour and employment for 2015-2020; Chambers & Partners has rated him as a Band 1 employment lawyer from 2014 to 2020. Asia Law has ranked him as the only Elite Practitioner for labour and employment in India for 2020. He has been the exclusively recommended lawyer in India by Employment Law Experts. Vikram is considered a 'Subject Matter Expert' for industrial relations by the Society for Human Resources Management India.



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Sayantani has been advising clients on matters relating to workforce management, compensation and benefits, reductions in force, disciplinary inquiries, engagement of contingent workers, employee transfers, employee issues in the context of COVID-19 etc. She has also extensively worked on matters involving HR investigations and employee litigation.