

## HR Law Hotline

March 10, 2009

### EMPLOYMENT LAW: INCREASING LAY OFFS AUGMENT WORK AT LABOUR COURTS

Downsizing and termination of employment is inevitable, especially in the current global economy scenario. India has not escaped this stark reality. As per the survey conducted by the Labour Bureau for the period October 2008 - December 2008, the total employment in all the sectors covered by the survey, went down from 16.2 million during September 2008 to 15.7 million during December 2008, resulting in job loss of about half a million persons<sup>1</sup>. This analysis however covers only the organized sector, which is likely to be less than 10% of the total workforce of the country. Job losses in the unorganized sector are likely to be far higher. The first two months of 2009 have continued with this trend. Lay-offs and retrenchments are fertile ground for employment lawsuits and should be carefully planned and analyzed prior to implementation in order to avoid expensive and time consuming litigation.

Recent news reports suggest that India's labour courts are bustling with lawsuits as several large scale redundancies and lay-offs have been reported in the recent times. Employees are dragging their employers to court over various issues including non-payment of dues, gratuity payments, wrongful termination, etc. While India is yet to see class action suits such as those prevalent in the United States, recently, close to 70 employees have filed a case against the Indian branch of a foreign bank for non-payment of salary.

### THE LEGAL PERSPECTIVE

While Indian employment laws may not be as draconian as perceived internationally, when it comes to lay-offs and retrenchments, Indian employers have to be particularly careful. Federal and state-specific labour laws cast a whole set of obligations upon the employer. Unlike US and certain other countries, India does not follow an at-will employment system and the labour laws allow termination of employment either for cause or for misconduct.

A lay off under the Industrial Disputes Act, 1947 ("IDA") inter alia means failure, refusal or inability of employer on account of shortage of power or raw materials or accumulation of stock or break down of machinery or natural calamity, to give employment to a workman on muster roll. In such a case, the employer can either lay-off the employees by paying the prescribed compensation or offer him alternate employment, if such alternate employment does not call for any special skill or previous experience. Retrenchment means discharge of surplus labour or staff by employer for reasons other than by way of punishment.

Termination of employment as envisaged under the IDA is by way of a 'last in first out' method, in the absence of any agreement to the contrary. Accordingly, the employer is expected to terminate employment of the last person to be employed in each category. Further, the employer needs to comply with the notification and severance payment requirements as prescribed under the IDA, the state-specific shops and establishments Acts, as may be applicable, and the company's standing orders / company policies. The IDA also requires the employer to notify the labour authorities of termination of employment. For 'industrial establishments' where at least 100 workmen are employed, the procedure for lay-off and retrenchment is specifically unwieldy as it also inter alia involves a prior government approval. Invariably, such permission is discretionary and is given on the merits of each case. As per the Payment of Wages Act, 1965, the outstanding dues of the employees need to be settled before the expiry of the second working day from the day on which his employment is terminated.

Non-compliance of the labour laws may potentially expose the employer with litigation risks may include employee's reinstatement order (with continuous service and back wages) along with potential penalties and/or imprisonment of the employer.

Vyapak Desai, head of the Litigation & Dispute Resolution Practice at NDA says that "non-compliances under labour laws albeit of small magnitude may result in litigation dragged on for years which could be avoided if employer is mindful of the compliances under applicable labour laws."

An alternative approach certain employers have been considering include changing the service conditions by withdrawing/reducing certain benefits given to the employees. It is important to note that such changes also need to be in compliance with applicable labour laws.

### CONCLUSION

In view of the specific nuances under Indian labour laws relating to terminations, employers need to ensure that they comply with the applicable federal and state-specific labour laws in the event of downsizing. Employers may also consider executing separation and release agreements to potentially mitigate the risks. Certain companies also implement voluntary retirement schemes in order to incentivize the employees to resign from services.

While workforce reductions and lay-offs may be unavoidable for some employers in our current economic crisis, carefully navigating the downsizing waters continues to be critical to avoiding unnecessary and costly litigation.

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- Radhika Iyer & Vikram Shroff

1. <http://labour.nic.in/lc/42ilc.html>

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