

Doing Business in India: Navigating Employment, Data Privacy and Compliance

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Overview of Indian Employment Laws

- Employment laws include Central and State-specific laws. The Indian government has enacted 4 consolidated codes to streamline employment laws in India. Enforcement of the codes is pending.
- Number of employees: Several statutory requirements are applicable only if the employer employs more than a specified number of employees. Typically, the threshold is 10/ 20 employees.
- Location of employees: Statutory requirements vary from one State to another. States amend Central laws or enact State-specific laws to regulate aspects such as working hours, wages, leave and holidays.
- Type of work: Workmen enjoy greater statutory protection than other employees. Employees that are in a managerial, supervisory or administrative role are not considered to be workmen. Full-time employees enjoy greater statutory protection than consultants.
- Salary of employee: Several statutory benefits are only mandated if an employee earns less than a specified salary amount. For instance, statutory insurance and bonus is required to be provided to all employees earning less than INR21,000 per month.

Regulation of Employees by Employers

- Internal policies: Play a key role in regulating the working conditions. Employee handbooks include policies on prevention of sexual harassment, equal opportunity, privacy, leave, working hours and termination.
- Employment agreements: Important in case of consultants and employees that are not workmen as they enjoy fewer statutory benefits. Important clauses include:
 - Restrictive covenants: Non-compete, non-solicitation and non-disparagement obligations are generally included. Clauses on non-compete and non-solicitation of customers are typically unenforceable post-termination but are retained in agreements as deterrents.
 - Confidentiality: Trade secrets are protected by inclusion of confidentiality obligations.
 - Assignment of Intellectual Property (IP): Critical for tech and other IP-heavy businesses.
- Collective bargaining agreements: Shape employment terms in the industrial and manufacturing sectors.

Hiring Employees as a Foreign Entity

- Foreign entities require local presence to hire employees in India. Entities without local presence may engage Professional Employer Organizations (**PEOs**).
- Important to ensure that no employer-employee relationship exists between a foreign entity and PEO-engaged employees as such a relationship can lead to permanent establishment risks and breach of Indian foreign exchange laws.
- Foreign entities can mitigate risk of deemed employment by exercising minimal supervision on PEO-engaged employees. Also ensure that the PEO is responsible for payment of salaries and employee benefits to the employees while the foreign entity is only responsible for paying a service fee to the PEO.
- Important to ensure that all IP is assigned by such employees to the PEO and, in turn, assigned by the PEO to the foreign entity by specific deeds of assignment.
- Foreign entities will not be able to offer equity-linked incentives to PEO-engaged employees.

Termination of Employees

- Notice of termination:
 - At-will termination of employment is not recognized in India.
 - Mandatory notice periods are prescribed under Indian law. Termination can only be made effective if the notice period is served or if a payment is made in lieu of the notice period.
 - Immediate termination is permitted only in case of misconduct and after following due process.
- Retrenchment/ severance compensation:
 - Retrenchment compensation is mandatory in case of termination of workmen.
 - For non-workmen employees, requirement for severance compensation may be set out in the employment agreements/ internal policies.

Hypothetical

A technology company wants to let go 15 employees out of 40 in Bangalore. How do they do this and how does severance pay get calculated in Bangalore.

- Statutory Notice or Salary in Lieu: 1 month under the Industrial Disputes and Shops and Establishments Acts
- Industrial Disputes Act: Retrenchment compensation = 15 days' salary for each completed year of service
- Payment of Gratuity Act: 15 days' salary for each completed year of service
- Accumulated leave encashment: 14 days
- Documentation: Severance and Release Agreement along with a Deed of Assignment to assign IP rights
 - These documents may need some consideration
 - Stamp duty to be paid
 - ESOP vesting to be checked

Key IP Considerations

- Trademarks, copyrights, patents, designs, geographical indications, plant varieties, and layout designs are protected under Indian law.
- Trade secrets, confidential information, and industrial know-how are not protected by statute and only protected under equity and common law. Important to include robust confidentiality obligations.
- As non-compete clauses are generally not enforceable post-termination, including robust provisions on protection of disclosed IP can be an indirect means to enforcing a non-compete obligation.
- Deeds for assignment of patents must be executed in writing, registered with the Patents Registry and specify the nature of interest in the patent that is being assigned.
- Deed of assignment for copyrights must be executed in writing but need not be registered with the Copyright Board. Indian law provides for automatic revocation of copyright assignments unless the assigned right is exercised within 1 year of assignment or unless otherwise agreed under contract.

Data Privacy Regime in India

- The Information Technology Act, 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 regulate collection, storage, use, and handling of personal information (**PI**) and sensitive personal data or information (**SPDI**).
- Statutory requirements apply to entities in or outside India that process personal data either in India or use a computer, computer system, or computer network located in India.
- Statutory requirements include requirements to obtain prior consent of the data subject for use or transfer of SPDI, to publish a privacy policy, to designate a grievance officer, and to implement security practices.
- SPDI must be collected lawfully, only if necessary, and must be backed by prior consent of the provider. It must not be retained longer than necessary for its lawful purpose.
- SPDI can only be transferred or disclosed to third-parties if the third party has equivalent data protection standards and if such transfer/ disclosure has been consented to by the data subject or is necessary to perform a lawful contract between the recipient entity and the data subject.

Data Privacy Regime in India

- The Digital Personal Data Protection Act, 2023 (**DPDP Act**) was enacted in 2023 to overhaul the data privacy regime in India. However, it has yet to be enforced.
- The DPDP Act applies to the processing of digital personal data (whether collected online or offline) within the territory of India, and outside India if such processing is in connection with any activity related to the offering of goods or services to data subjects within India.
- The DPDP Act permits data processing only after obtaining the consent of the data subject, or for certain specifically identified purposes such as lawful purposes agreed under contract, performance of government functions, compliance with law and in case of medical emergencies.
- Recipients must provide for data erasure upon withdrawal of consent by provider, or when specified purpose of processing data is no longer served.
- The DPDP Act generally permits cross-border data transfers, except transfers to countries that are blacklisted by the Indian government.

Growth of AI in India

- The AI market in India is projected to reach around US\$17 billion by 2027. Presently, there are no laws or regulations in India which holistically regulate AI.
- Government advisories have attempted to regulate the space by mandating timely take-down of deepfakes by intermediaries and imposing due diligence obligations on intermediaries.
- Courts have restrained use of personality rights for commercial gain, including through use of AI and deepfakes, and held that AI-generated responses cannot be the basis of legal or factual adjudication of cases.
- Proposed Digital India Act is poised to regulate AI. The government is also working on a deep-tech policy.
- IndiaAI Mission: Indian government recently announced a budget outlay of US\$1.25 billion over the next 5 years. Objectives are to scale up AI computing infrastructure, design an AI marketplace to offer critical resources to AI innovators, establish an IndiaAI Innovation Centre, and provide funding to AI projects.

Anti-Bribery Compliance

- The Prevention of Corruption Act, 1988 (**POCA**) is the key legislation on anti-corruption in India.
- POCA penalizes bribes given to a public servant. Unlike the UK Bribery Act, 2000, POCA does not penalize bribes given to officers of private entities.
- Unlike the Foreign Corrupt Practices Act, 1977 (**FCPA**), POCA only penalizes offences committed in India. Foreign directors of Indian companies or Indian citizens residing outside India may be penalized if an offence is committed in India.
- Unlike the FCPA which only criminalizes giving a bribe, POCA criminalizes both giving and accepting a bribe, or any agreements for or any attempts thereof. It is also applicable to any middlemen who influence a public servant to take a bribe (either by a payment or otherwise).
- Commercial organizations can claim immunity from prosecution if they demonstrate they had adequate procedures in place to ensure compliance with POCA. However, the Indian government has not issued guidelines to clarify the requisite compliance measures.

General Contracting Principles

- Electronic signatures: An electronic record can be authenticated by using digital signature certificates, which are issued by certifying authorities in India. Electronic signatures other than digital signature certificates cannot be used to authenticate documents.
- Stamp duty: Stamping is a process through which the Indian government collects tax on commercial and non-commercial transactions in India. Stamp duty rates can vary from 1 State to another. Unstamped/ inadequately stamped documents are not admissible as evidence before a court/ arbitration tribunal.
- Registration: Generally, registration of documents with an authority is mandatorily required only for documents that create or extinguish rights in respect of an immovable property.
- Enforcement: Foreign arbitral awards are more easily enforceable than foreign judgments. Contracts should provide parties with the ability to seek interim relief from a competent court.

Thank You

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