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REPORT  
ON  
LABOUR LAWS IN INDIA



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## CHAPTER I

### EMPLOYMENT AND LABOUR: OVERVIEW OF CURRENT INDIAN SITUATION

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#### 1. Introduction

- 1.1. The Constitution of India (“**Constitution**”) provides the jural basis for laws regulating employment and labour in India (which are collectively also referred to as ‘industrial laws’ or ‘labour laws’). The fundamental rights enshrined in the Constitution provide *inter alia* for equality before the law and for prohibition of discrimination on the basis of religion, caste, sex, etc. Similarly, the ‘Directive Principles of State Policy’ laid down in Part IV of the Constitution adjure the State to *inter alia* ensure that all citizens have an adequate means of livelihood, right to education, and just and humane conditions of work, and to further ensure participation of workers in the management of industries.
- 1.2. The Constitution hence places emphasis on the concept of social justice as one of the fundamental objects of State policy, and these protective provisions edify the spirit of Indian industrial laws.
- 1.3. Labour welfare<sup>1</sup>, ‘trade union; industrial and labour disputes’<sup>2</sup> and factories<sup>3</sup> are items found in the Concurrent List of the Constitution. This means that subject to certain conditions, both the Parliament of India as well as the individual State legislatures have the power to enact laws on these matters.

#### 2. History of Labour Law in India

- 2.1. Labour legislations enacted post independence of India have sought to tackle various problems relating to working conditions, industrial safety, hygiene and welfare, wages, trade unionism, social security, etc. Laws were also enacted to meet the special needs of specific industries and commercial establishments, such as mines, plantations, factories, shops and establishments, etc. With the declaration of a national emergency in 1975, anti-inflationary laws like Payment of Bonus (Amendment) Act, 1975, the Equal Remuneration Ordinance, 1975, etc. were enacted which led to further amelioration of workers in the country.

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<sup>1</sup> Entry 24, List III, VII Schedule, Constitution.

<sup>2</sup> Entry 22, List III, VII Schedule, Constitution.

<sup>3</sup> Entry 36, List III, VII Schedule, Constitution.



- 2.2. In the year 1991, the Indian Government adopted a policy of economic liberalisation. The resultant enhancement of competition in the fast-changing markets raised a new set of challenges since Indian labour laws (including the social security laws) were traditionally inclined to be protective of labour and not conducive to competition in the labour markets.
- 2.3. With greater mobility and flexibility in the labour markets becoming the need of the hour, employers have consistently argued in the last decade or so that the excessively pro-worker nature of Indian labour laws in the organised sector is a cause for concern.
- 2.4. This has caused the Government to consider reforms in labour laws in India. Recommendations designed to give the labour markets appropriate flexibility for it to be in a position to compete in the international markets are under consideration. It can consequently be said that the Indian job / labour market has started moving away from a 'protectionist' and closed model towards a more competitive and open model.

### **3. Structure of the Indian Labour Market**

- 3.1. The Indian labour market can be broadly divided into three categories: (i) organised sector; (ii) urban informal (i.e. unorganised) sector; and (iii) rural labour (i.e. labour engaged mostly in agriculture). Wages in the urban informal (i.e. unorganised) sector are marginally higher than those in rural areas but much lower than those in the organised sector, varying significantly across skills, occupations, experience and location. This Report on Labour Laws in India ("**Report**") examines in detail the legal regime which governs and regulates matters related to employment in the organised sector of the Indian labour market.



## CHAPTER II

### LAWS REGARDING LABOUR AND EMPLOYMENT IN INDIA

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#### 4. General

- 4.1. Since labour laws form a part of the Concurrent List of the Constitution (please see paragraph 1.3.), both the Central as well as the various State Governments have legislated very extensively on labour issues. While the Centre has enacted over 45 (forty five) labour legislations, there are also a catena of labour legislations enacted by the State Governments. In view of the sheer volume of labour laws that are in force in India, their applicability to a particular organisation is determined and affected by a variety of factors.
- 4.2. The first and foremost factor is that the Indian labour and industrial laws make a distinction between the employees who are “*workmen*” as defined under the relevant labour laws and the employees who are not workmen. Generally, employees working mainly in managerial or administrative capacity do not fall under the definition of employees who are workmen. Such employees are ordinarily governed by the terms and conditions of their contracts of employment.
- 4.3. Employees who are workmen are ordinarily afforded a greater degree of legal protection and benefits under the Indian labour and industrial laws. Under Section 2(s) of the Industrial Disputes Act, 1947 (“**ID Act**”), the definition of the term “*workman*” includes only persons (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational or clerical work, or persons who are employed to do supervisory work but are drawing wages that are not exceeding Rs. 1,600 (Rupees one thousand six hundred) per month. Persons employed mainly in managerial or administrative capacity, or persons employed in a supervisory capacity but drawing wages in excess of Rs. 1,600 (Rupees one thousand six hundred) per month, are excluded from the definition of workmen.
- 4.4. The applicability of labour legislations is also dependant upon the nature of activity that the employees are employed in. This in turn will determine whether the organisation is a “*factory*”, “*industry*”, “*shop*” or “*establishment*”. The number of employees employed in an organisation is also a relevant factor for determination of applicability of a particular labour statute. Additionally, the location of the organisation (i.e. the State in which the organisation is located) also plays a crucial role in ascertaining the compliances that an employer is required to observe, since almost all the States in India have enacted State-centric labour laws, rules and



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regulations. (The first one or two paragraphs in sections 5 to 9 under this Chapter deal with the applicability of the labour legislations being discussed therein.)

- 4.5. The labour laws in India not only deal with industrial relations (i.e. relations between the employers and employees), but also relate to payment of wages, working conditions, social security, etc. Additionally, there are several labour laws which regulate service conditions in specific industries, such as building and construction work, pharmaceuticals, dockyards, and mines. In addition, these labour laws also provide for various compliances in accordance with the procedures laid down therein. This chapter provides an insight into the laws and regulations applicable in India to labour and industrial matters.
- 4.6. In the current Indian economic environment, which is marked by globalised economy, liberalisation in trade, enhanced competition and ongoing technological advancement, rationalisation of manpower is one of the most effective keys to the efficiency of any organisation. Rationalisation of manpower does not merely mean reduction / retrenchment of employees. What it really means is reorganisation of the existing manpower such that their utilisation and output can be optimised. Hence, we have had companies approach us in the last few months for assistance not only in connection with retrenchment of employees and closure of certain offices, but also for: transfer of employees pursuant to transfer of business as a 'going concern'; offer of relocation options to employees on account of closure of a business unit or cessation of a line of business at a particular location; redefining of responsibilities pursuant to new business opportunities; identifying groups to undergo technical training to keep up with and implement new innovations; etc. While carrying out any of the aforesaid rationalisation options, it is imperative that the organisation balances commercial requirements with the legal framework.

## **5. Industrial Relations**

### **5.1. ID Act and the Rules framed thereunder**

- 5.1.1. The ID Act is the most important law that deals with the subject of industrial relations, i.e. the relations between the employer and employees. The ID Act is only applicable to workmen who are employed in any industry. It may be noted in the context of the definition of the term "workman" (as defined in paragraph 4.3. above), the Courts have interpreted "supervisory" functions to mean supervision over persons (e.g. grant of leave of absence) as opposed to supervision over things (e.g. store supervision).



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The Courts have also held that mere nomenclature (e.g. title of ‘Manager’ or ‘Supervisor’) is not sufficient to determine whether an employee is a workman under the ID Act, and what is relevant is the actual nature of work performed. If a person performs some managerial work and other clerical work, the primary or dominant functions will be the determining factor for ascertaining whether the employee is a workman or a non-workman.

5.1.2. The ID Act and the Rules framed thereunder *inter alia* regulate matters relating to retrenchment, lay-off, closure, transfer of undertakings and change in service conditions. Additionally, where the employer employs 100 (one hundred) or more workmen, prior permission of the concerned State Government is required for retrenchment, lay-off and closure.

#### *Retrenchment*

5.1.3. “*Retrenchment*” is defined to mean the termination by the employer of the services of a workman for any reason whatsoever except as a punishment by way of disciplinary action. However, retrenchment does not include:

- (i) voluntary retirement of the workman; or
- (ii) retirement on attaining superannuation, if a provision to this effect is stipulated in the contract of employment; or
- (iii) termination as a result of non-renewal of the contract of employment on its expiry or the contract being terminated pursuant to a stipulation in that behalf contained in the contract; or
- (iv) termination of the services of a workman on grounds of continued ill health.

5.1.4. The Supreme Court has interpreted the exception to “*retrenchment*” referred to in item (iii) above in a restrictive manner in the context of permanent workmen. The Supreme Court has held that the use of the words “*such contract*” means that there should be a contract of employment for a fixed term containing a stipulation that the services can be terminated prior to the expiry of the fixed term of the contract.<sup>4</sup> Where there is no fixed term, the Supreme Court has held that the benefit of exemption does not apply.

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<sup>4</sup> *S.M. Nilajkar v. Telecom, District Manager, Karnataka*, (2003) 4 SCC 27.



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- 5.1.5. Workmen cannot be retrenched except in accordance with the provisions of the ID Act. In terms of the ID Act, a workman who has been in “*continuous service*” for a period of 1 (one) year preceding the date of his retrenchment (please see paragraph 5.1.6. below), cannot be retrenched unless the following conditions are satisfied :
- (i) a minimum of 1 (one) month’s written notice must be given to the workman indicating the reasons for the retrenchment or wages for the period of the notice in lieu of such notice must be paid;
  - (ii) retrenchment compensation calculated at the rate of 15 (fifteen) days’ “*average pay*” (i.e. average of last 3 (three) months’ wages in case of monthly paid workmen) for every year of continuous service or a part thereof in excess of 6 (six) months, must be paid to the workman at the time of retrenchment (“**Retrenchment Compensation**”); and
  - (iii) notice in the prescribed Form P must be sent by registered post to the appropriate Government and other prescribed authorities in accordance with the Rules. This notice must be sent within 3 (three) days from the date on which the notice referred to in item (ii) above is given to the workman.
- 5.1.6. A workman is deemed to be in “*continuous service*” if within a period of 12 (twelve) months prior to the date of his retrenchment, he has worked for not less than 240 (two hundred forty) days. If he has worked for 6 (six) months, he will be deemed to be in “*continuous service*” if within the 6 (six) months he has worked for not less than 120 (one hundred twenty) days. For purposes of reckoning the actual number of days worked, Sundays, paid holidays / paid leave, maternity leave, etc. are to be taken into account.
- 5.1.7. The expression “*at the time of retrenchment*” as mentioned in paragraph 5.1.5. (ii) above means that the requirement to pay Retrenchment Compensation is a condition precedent to a valid order of retrenchment. In the event Retrenchment Compensation is not paid at the time of retrenchment, the retrenchment order will be invalid and inoperative in law, and subsequent payment of Retrenchment Compensation will not validate an illegal and void retrenchment.
- 5.1.8. In addition to Retrenchment Compensation, the workman is also entitled to receive all terminal benefits to which he is entitled under his contract of employment or other applicable laws, including encashment of unused leave (if any), provident fund and gratuity.





5.1.9. The ID Act also stipulates that in the event the workman to be retrenched belongs to a particular category of workmen in the concerned industrial establishment, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. This is subject to the exceptions that: (a) there is an agreement between the employer and the workman in this regard; or (b) reasons for retrenching any other workman are recorded by the employer.

*Lay-off*

5.1.10. The ID Act defines “*lay-off*” to mean the failure, refusal or inability of an employer to give employment to a workman whose name is on the muster rolls of his industrial establishment on account of:

- (i) shortage of coal, power or raw materials; or
- (ii) accumulation of stocks or breakdown of machinery; or
- (iii) natural calamity; or
- (iv) for any other connected reason.

5.1.11. An industrial establishment employing not less than 50 (fifty) workmen on an average per working day in the preceding calendar month cannot lay-off a workman who is in continuous service for a period of 1 (one) year preceding the date of his lay-off, unless the employer pays lay-off compensation for all days during which he has been laid off, calculated at the rate equal to 50% (fifty per cent) of the total of the basic wages and dearness allowance (“**Lay-Off Compensation**”). Lay-Off Compensation is not required to be paid if less than 50 (fifty) workmen have been employed on an average per working day in the preceding calendar month.

5.1.12. If a workman has been laid off for more than 45 (forty five) days during any period of 12 (twelve) months, the employer is not obliged to pay Lay-Off Compensation to such workman in respect of any period of lay-off in excess of the aforesaid period of 45 (forty five) days, provided that there is an agreement to this effect between the employer and the workman.

5.1.13. In case of a factory, mine or plantation, an employer who has laid off his workmen is required to give notice of commencement and termination of lay-off in the prescribed Forms O-1 and O-2 respectively to the concerned Regional Labour



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Commissioner (Central) and other authorities within 7 (seven) days of the said commencement or termination of the lay-off.

### *Closure*

5.1.14. Under the ID Act, the term “*closure*” has been defined to mean “*permanent closing down of a place of employment or part thereof*”. Where any “*undertaking*”<sup>5</sup> employing not less than 50 (fifty) workmen is intended to be closed down, the employer thereof must serve a notice (in Form Q) to the Central Government and other prescribed authorities by registered post at least 60 (sixty) days before the date of closure.

This requirement does not apply in cases where an employer employs less than 50 (fifty) workmen are employed, or were employed on an average per working day in the preceding 12 (twelve) months.

5.1.15. In case of closure, every workman who has been in continuous service for not less than 1 (one) year before such closure must be given 1 (one) month’s notice in writing or wages in lieu of such notice. Additionally, the workman is entitled to the same compensation as is payable in the case of retrenchment (i.e. the Retrenchment Compensation, as defined in paragraph 5.1.5.).

### *Special provisions under Chapter VB*

5.1.16. Chapter VB of the ID Act is applicable to an “*industrial establishment*”<sup>6</sup> where 100 (one hundred) or more workmen were employed on an average per working day for the preceding 12 (twelve) months. The said Chapter makes special provisions for retrenchment, lay-off and closure in cases of such industrial establishments.

5.1.17. Retrenchment: In case of retrenchment in such industrial establishment, the employer is required to apply for prior permission of the appropriate State

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<sup>5</sup> While the expression “*undertaking*” has not been defined in the ID Act, the Supreme Court has held in *Management of Hindustan Steel Ltd. v. The Workmen and Ors.*, AIR 1973 SC 878, that the word “*undertaking*” has been “*used in its ordinary sense connoting thereby any work, enterprise, project or business undertaking. It is not intended to cover the entire industry or business of the employer ... Even closure or stoppage of a part of the business or activities of the employer would seem in law to be covered by this sub-section. The question has indeed to be decided on the facts of each case*”.

<sup>6</sup> Chapter VB of the ID Act defines the expression “*industrial establishment*” to mean:

- (i) “*a factory as defined in section 2(m) of the Factories Act, 1948;*
- (ii) *a mine as defined in section 2(1)(j) of the Mines Act, 1952; or*
- (iii) *a plantation as defined in section 2(f) of the Plantations Labour Act, 1951*”.



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Government in prescribed Form PA. In case permission is granted by the State Government (whether express or deemed), in addition to paying the Retrenchment Compensation, the employer must give 3 (three) months' written notice or salary in lieu thereof (instead of 1 (one) month's notice or salary in lieu thereof as indicated in paragraph 5.1.5. above). The application for permission should clearly state the reasons for the intended retrenchment and a copy of the application must be served simultaneously on the concerned workman. The concerned State Government may by order, after making appropriate enquiry and after giving a reasonable opportunity of being heard to the employer, concerned workmen and persons interested in the retrenchment, grant or refuse such permission.

If the State Government does not communicate the order within a period of 60 (sixty) days from the date on which the application was made, the permission is deemed to have been granted.

5.1.18. Lay-off: The employer in such industrial establishment is required to apply for prior permission of the appropriate State Government in prescribed Form O-3 for laying-off workmen. However, such prior permission is not required if the lay-off is due to shortage of power or natural calamity, and in the case of a mine, such lay-off is also due to fire, flood, excess of inflammable gas or explosion. The application for permission should clearly state the reasons for the intended lay-off and a copy of the application is to be served simultaneously on the concerned workmen. The concerned State Government may by order, after making appropriate enquiry and after giving a reasonable opportunity of being heard to the employer, concerned workmen and persons interested in the lay-off, grant or refuse such permission. Further, the permission is deemed to have been granted in cases where the State Government does not communicate the order within a period of 60 (sixty) days from the date on which the application was made.

Once permission has been granted (or deemed to have been granted) by the State Government, the employer is required to pay Lay-Off Compensation (as specified in paragraph 5.1.11. above) to the affected workmen.

5.1.19. Closure: For closure of such industrial establishment, the employer is required to apply in prescribed Form QA for prior permission of the appropriate State Government. The application for permission should be made at least 90 (ninety) days before the date of intended closure and should clearly state the reasons for the intended closure. A copy of the application is to be served simultaneously on the concerned workmen. The concerned State Government may by order, after making



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appropriate enquiry and after giving a reasonable opportunity of being heard to the employer, concerned workmen and persons interested in the closure, grant or refuse such permission. Further, the permission is deemed to have been granted if the State Government does not communicate the order within a period of 60 (sixty) days from the date on which the application was made.

In the event permission is granted (or deemed to have been granted) by the State Government to close down, every workman who is employed immediately before the date of application to the State Government is entitled to receive compensation calculated at the rate of 15 (fifteen) days average pay for every year of continuous service or any part thereof in excess of 6 (six) months.

*Transfer of Undertaking*

5.1.20. Under the ID Act, in case of a transfer of the ownership and management of an undertaking from an employer to a new employer, whether by agreement or operation of law, every workman who has been in continuous service for not less than 1 (one) year in an undertaking immediately before such transfer, shall be entitled to notice and compensation as if the workman had been retrenched (i.e. the Retrenchment Compensation, as defined in paragraph 5.1.15.).

5.1.21. However, a workman is not entitled to the aforesaid notice or compensation on the basis of such transfer, if the following three conditions are fulfilled:

- (i) the transfer does not interrupt the length of service of the workman;
- (ii) the terms and conditions of service applicable to the workman after the transfer are not in any way less favourable than the terms and conditions of service applicable to the workman prior to the transfer; and
- (iii) the new employer is legally bound, under the terms of transfer or otherwise, to pay to the workman, in the event of his retrenchment, retrenchment compensation on the basis that his service has been continuous and not been interrupted by such transfer.

5.1.22. In this context it is relevant to note that Courts in India have held that the term “*undertaking*” has to be understood in its ordinary meaning and sense, connoting



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thereby any work, enterprise, project or business undertaking.<sup>7</sup> The Courts have also held that in case of an undertaking that runs several industries or businesses which are distinct and separate, the aforesaid provisions may apply to “*transfer of one distinct and separate business*” of such undertaking.<sup>8</sup> However, the Courts have clarified that in such cases, the employees should have been dedicated to the distinct / separate business. To this end, the employer could maintain separate muster rolls for employees in different businesses and the organisation of employment should clearly indicate the distinctive and separate character of the different businesses. The terms and conditions of service of the employee(s) in question may also vary according to the character of business in question.

*Change in Service Conditions of Workmen*

5.1.23. Under the ID Act, an employer cannot affect any change in the conditions of service applicable to any workman and relating to wages, contributions to any provident fund, pension fund, compensatory and other allowances, hours of work and rest intervals, paid leave, change in shift working, etc. without giving notice in the prescribed Form E to the affected workmen. The notice is also required to be displayed conspicuously by the employer on a notice board at the main entrance to the establishment.

5.2. *Industrial Employment (Standing Orders) Act, 1946 (“IESO Act”) and the Rules framed thereunder*

5.2.1. The IESO Act is applicable to every industrial establishment wherein 100 (one hundred) or more workmen are employed, or were employed on any day of the preceding 12 (twelve) months. An “*industrial establishment*” is defined under the IESO Act to include *inter alia*, factories, mines, quarries and oil-fields, tramway or motor omnibus services, docks, wharves and jetties, inland steam vessels, plantations and workshops, and the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen.

5.2.2. The IESO Act requires employers in industrial establishments to formally define the conditions of employment, such as classification of workmen, manner of intimating wage rates, working hours, leave periods, recruitment, shift working, attendance and

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<sup>7</sup> *S.G. Chemicals and Dyes Trading Employees’ Union v. S. G. Chemicals and Dyes Trading Limited*, (1986) 2 SCC 126.

<sup>8</sup> *Management of R.S. Madhoram and Sons Agencies (P) Ltd. v. Its Workmen*, AIR 1964 SC 645; *Management, Mettur Beardsell Ltd. v. Workmen of Mettur Beardsell Ltd.*, AIR 2006 SC 2056.



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late coming, procedure for leave and holidays, transfer of workmen, termination of workmen, discharge, suspension or dismissal for misconduct (such conditions are referred to as the “**Standing Orders**”). The Standing Orders are applicable only to workmen.

- 5.2.3. Within 6 (six) months from the date on which the IESO Act becomes applicable to an industrial establishment, the employer is required to frame draft Standing Orders which are proposed to be adopted in the industrial establishment, and submit 5 (five) copies thereof to the concerned “*Certifying Officer*”<sup>9</sup>. The draft Standing Orders should provide for every matter set out in the Schedule to the IESO Act and any other matter that the Government may prescribe by the Rules (please also see paragraph 5.2.6. below).
- 5.2.4. Upon receipt of the draft Standing Orders, the Certifying Officer may make modifications / additions to the draft Standing Orders as may be necessary to render them certifiable under the IESO Act, after giving an opportunity of being heard to the employer, trade union (if any) and representatives of the workmen. Thereafter, the Certifying Officer is required to certify the draft Standing Orders and send copies of the certified Standing Orders authenticated in the prescribed manner within 7 (seven) days to the employer. The certified Standing Orders come into operation on the expiry of 30 (thirty) days after the date on which the said authenticated copies are sent to the employer (unless an appeal against the certified Standing Orders is preferred). The employer is required to prominently post the certified Standing Orders in English and in the language understood by the majority of workmen on special boards required to be maintained for such purpose at or near the entrance through which the majority of workmen enter the establishment.
- 5.2.5. The certified Standing Orders remain in operation and cannot be modified until the expiry of 6 (six) months from the date on which the Standing Orders or the last modification came into operation. This is, however, subject to an agreement to the contrary between the employer and the workmen, or a trade union or other representative body of workmen. After the expiry of the said period of 6 (six) months, the employer or any of the workmen, or a trade union or other representative body of workmen, may apply to the Certifying Officer for a modification to the Standing Orders.

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<sup>9</sup> The term “*Certifying Officer*” has been defined under the IESO Act to mean a Labour Commissioner or a Regional Commissioner, and includes any other officer appointed by the appropriate Government, by notification in the Official Gazette, to perform all or any of the functions of a Certifying Officer under the IESO Act.



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5.2.6. Schedules I and I-B to the Rules contain a draft or list of Model Standing Orders. The IESO Act provides that during the period from the date when the IESO Act becomes applicable to an industrial establishment to the date when duly certified Standing Orders come into operation, the Model Standing Orders prescribed under Rules shall be deemed to have been adopted in that establishment. Further, while the Standing Orders adopted by an employer need not necessarily be a duplication of the Model Standing Orders, they should, as far as it may be practicable, be in conformity with the same.

5.3. Trade Unions Act, 1926 (“TU Act”)

5.3.1. The TU Act *inter alia* provides for registration of a trade union and the rights and liabilities of a registered trade union. A “*trade union*” is defined under the TU Act to mean “*any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes federation of two or more trade unions*”.

5.3.2. A trade union may be registered under the TU Act by any 7 (seven) or more of its members (being workmen or employees). However, a trade union cannot be registered unless at least 10% (ten per cent) or 100 (one hundred) of the workmen, whichever is less (subject to a minimum of 7 (seven) workmen), engaged or employed in the establishment or industry with which it is connected, are members of such trade union as on the date of making of the registration application.

5.3.3. Additionally, the TU Act provides for certain rights and obligations of a registered trade union, which *inter alia* include the following:

- (i) A registered trade union may constitute a separate fund from which payments may be made, for the promotion of the civic and political interest of its members.
- (ii) The officers or members of a registered trade union shall not be punishable for the offence of criminal conspiracy in respect of any agreement made between the members for the purpose of furthering any such object of the trade union on which the general funds may be spent.





- (iii) No suit or other legal proceeding shall be maintainable in any civil Court against any registered trade union or its members in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the trade union is a party.

This protection is available only on the ground that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital of his labour as he wills.

- (iv) A registered trade union is not liable in any suit or other legal proceeding in any civil Court in respect of any tortuous act done in contemplation or furtherance of a trade dispute by an agent of the trade union if it is proved that such person acted without the knowledge of, or contrary to, express instructions given by the executive of the trade union. However, the trade union, its office-bearers and the members are liable for acts of violence or vandalism or any act of deliberate trespass.
- (v) Subject to any other applicable law, an agreement between the members of a registered trade union is not void or violable merely because of the fact that any of the objects of the agreement is in restraint of trade.
- (vi) The Fifth Schedule to the ID Act (dealing with Unfair Labour Practices) prevents the employers from dominating, interfering with or contributing support, financial or otherwise, to any trade union; establishing employer-sponsored trade unions; and encouraging or discouraging membership in any trade union by discriminating against any workman.
- (vii) A trade union has the right to go on strike provided the strike is legal under the provisions of the ID Act (i.e. after giving of a statutory notice).
- (viii) A workman who is a party to an industrial dispute is entitled to be represented in any proceeding under the ID Act by any member of the executive or other office-bearer of a registered trade union of which he is a member.
- (ix) Any official of a registered trade union (authorised in writing to act on behalf of the employee) may apply to the appropriate Government appointed under the MW Act, to hear and decide all claims arising out of a payment of





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less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days or of wages at the overtime rates to the employees.

- (x) A registered trade union is empowered to appear or make an application before the Commissioner appointed under the WC Act for workmen's compensation.
- (xi) While an employer is not legally bound to recognise a trade union or encourage collective bargaining, a registered trade union can enter into collective bargaining agreements with the employer for better wage and service conditions.

## **6. Service conditions**

### 6.1. Factories Act, 1948 ("**Factories Act**") and the Rules framed thereunder

6.1.1. The Factories Act has been enacted with the objective of ensuring adequate measures for the health, safety and welfare of workers and to protect workers from exploitation within the factory premises.

6.1.2. The Factories Act is applicable to all manufacturing processes and establishments falling within the meaning of "*factory*". The Factories Act defines a "*factory*" to mean any premises (including the precincts thereof), where:

- (i) 10 (ten) or more workers are working, or were working on any day of the preceding 12 (twelve) months, and in any part of which a manufacturing process is carried on with the aid of power; or
- (ii) 20 (twenty) or more workers are working, or were working on any day of the preceding 12 (twelve) months, and in any part of which a manufacturing process is carried on without the aid of power;

The Factories Act further provides that the mere fact that an electronic data processing unit or a computer unit is installed in any premises or part of it, will not make it a factory if no manufacturing process is being carried on in such premises.

6.1.3. The Factories Act defines a "*worker*" to mean a person employed, whether directly or through any agency (including a contractor) with or without the knowledge of the



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principal employer, and with or without remuneration, in any manufacturing process or in cleaning any part of the factory or in any other kind of work incidental to or connected with the manufacturing process. The expression “*manufacturing process*” is defined to mean *inter alia* any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal.

- 6.1.4. Every factory must appoint an “*occupier*”<sup>10</sup> who is responsible for various compliances under the Factories Act. In case of a company, the Factories Act provides that any one of the directors of the company shall be deemed to be the occupier. In this regard, the Supreme Court has held that in case a director is not designated as the occupier, all the directors of the company will become liable for prosecution in the event of non-compliance with the provisions of the Factories Act.<sup>11</sup>
- 6.1.5. The occupier is required to send a written notice to the Chief Inspector appointed by the State Government at least 15 (fifteen) days before he begins to occupy or use any premises as a factory. The notice should *inter alia* contain details regarding the name and address of the factory and the occupier, nature of manufacturing process to be carried on in the factory during the next 12 (twelve) months, total rated horse power installed or to be installed in the factory, name of the manager of the factory for the purposes of the Factories Act, number of workers likely to be employed in the factory. The occupier is also required to notify the Chief Inspector in writing at regular intervals, as and when a new manager is appointed.
- 6.1.6. The Factories Act enumerates the duties and responsibilities of the occupier. In brief, the occupier has the responsibility of ensuring, as far as it is reasonably practicable, the health, safety and welfare of all the workers while they are at work in the factory, subject to the minimum statutory requirements prescribed under the Factories Act.

#### *Registration and inspection*

- 6.1.7. The Factories Act provides for registration obligations which *inter alia* require the occupier to apply for registration of the factory in the prescribed form and to obtain

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<sup>10</sup> The Factories Act defines “*occupier*” of a factory to mean any person who has the ultimate control over the affairs of the factory.

<sup>11</sup> *J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers*, (1996) 6 SCC 665.



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a factory license. The factory license is valid till the December 31<sup>st</sup> (thirty first) of the year and must be renewed thereafter.

- 6.1.8. The Factories Act also empowers the Inspector to inspect the factory, plant, machinery and records maintained by the occupier.

#### *Health*

- 6.1.9. In the interest of the health of the workers, the Factories Act mandates that all factories are to be kept clean and free from effluvia arising from any drain or other nuisance. The occupier must also provide for effective removal of dirt and refuse, disposal of wasters and effluents, cleaning of floors, painting of the factory walls, doors and windows, sufficient and suitable lighting of the workrooms, and making arrangements for wholesome drinking water, toilets, washing places and spittoons. The Factories Act further requires the occupier to provide for adequate ventilation and temperature control, prevention of inhalation and accumulation of dust and fumes, regulation of artificial humidification, and prevention of overcrowding.
- 6.1.10. The appropriate State Governments may also appoint qualified medical practitioners (“**Certifying Surgeons**”) who are required to exercise medical supervision in the event of occurrence of illness or likelihood of injury to the health of workers.

#### *Safety*

- 6.1.11. The Factories Act also specifies certain safety related obligations. These pertain to matters relating to fencing of machinery and safeguards to be observed while working on or near machinery in motion. All factories are required to provide for suitable striking gear or appliances, driving belts and other safety devices / mechanisms. The Factories Act also mandates the construction, maintenance and obstruction-free location of floors, stairs, passages, etc. for ensuring safety of the workers. Any fixed vessel, sump, tank, pit or opening in the ground or floor ought to be securely covered or fenced.
- 6.1.12. The Factories Act prohibits employment of any person to lift, carry or move heavy weights which are likely to cause injury. Factories are required to provide effective screens or goggles for protection of persons employed on, or immediately in the vicinity of, any manufacturing process which involves risk of injury to eyes by reason of exposure to particles or fragments thrown off in the course of the process or exposure to excessive light.



6.1.13. The Factories Act further requires precautions to be taken against fire, dangerous fumes and gases, use of portable electric light, explosives and inflammable gases. The Inspector is also empowered to serve an order in writing specifying the measures to be taken if it appears to him that any building or part of the building, ways, machinery or plant in the factory are in a condition that is dangerous to human life and safety or is detrimental to human health and welfare of the workers.

6.1.14. In a factory where 1000 (one thousand) or more workmen are employed or where, in the opinion of the State Government, any manufacturing process is carried on which involves any risk of bodily injury, poisoning or disease, or any other hazard to health of the persons employed in the factory, the occupier is required to employ safety officers for ensuring safe working conditions in such factory.

#### *Hazardous processes*

6.1.15. In factories involving “*hazardous processes*”<sup>12</sup>, the State Government may appoint a Site Appraisal Committee for appraisal of applications for grant of permission for the initial location or expansion of such factories. The occupiers of such factories are required to disclose all information regarding the dangers (including health hazards) to the workers, as well as the measures to overcome such hazards arising from the exposure to or handling of materials / substances in the manufacture, storage, transportation and other processes.

6.1.16. At the time of registration of a factory involved in a hazardous process the occupier is further required to lay out a detailed policy with respect to the health and safety of workers employed therein, and draw up an on-site emergency plan and detailed disaster control measures for his factory.

#### *Welfare*

6.1.17. The Factories Act specifies certain welfare related obligations which *inter alia* include provision and maintenance of adequate facilities for the use of workers in the factory which are conveniently accessible and kept clean. The factories should

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<sup>12</sup> The expression “hazardous process” has been defined under the Factories Act to mean “*any process or activity in relation to the industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, by-products, wastes or effluents thereof would:*

- (i) *cause material impairment to the health of the persons engaged or connected with it; or*
- (ii) *result in the pollution of the general environment.”*



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have provision of suitable places for keeping clothing not worn during working hours and for drying of wet clothing. Suitable arrangements should also be made for sitting for workers obliged to work in a standing position. The occupier is also required to provide first aid kits containing the prescribed contents, and such first aid kits should be readily accessible to the workers during all working hours.

6.1.18. In case of factories where more than 250 (two hundred fifty) workers are ordinarily employed, the occupiers are required to make arrangements for canteen(s) for the use of workers. In case of factories with more than 150 (one hundred fifty) workers, suitable shelters or rest rooms, lunch rooms with provision of drinking water, is also required to be made. In case of factories where 30 (thirty) or more women workers are ordinarily employed, crèches should be provided and maintained for the use of children under the age of 6 (six) years of such women. In case of every factory where more than 500 (five hundred) workers are ordinarily employed, the occupier is required to employ such number of Welfare Officers as may be prescribed by the concerned State Government.

*Working hours and leave*

6.1.19. The Factories Act mandates that the working hours for an adult worker, or an adolescent certified to work as an adult, should not exceed 48 (forty eight) hours in a week and 9 (nine) hours in a day. Every worker is allowed at least half an hour's rest interval after a maximum working of 5 (five) hours at a stretch.

6.1.20. The total hours of work (including rest hours) in a week are to be spread over not more than 10.5 (ten point five) hours in a day for adults and not more than 4.5 (four point five) hours for children. The Factories Act also regulates night shifts and overtime work (in which respect the worker shall be entitled to wages at the rate of twice his ordinary wages).

6.1.21. The workers who have worked for 240 (two hundred forty) days or more in a calendar year are entitled to annual leave with wages for a number of days calculated at the rate of 1 (one) day for every 20 (twenty) days of work performed during the previous calendar year.

6.1.22. The Factories Act requires the occupier to maintain a notice of periods of work for adults, as well as a register of adult workers showing *inter alia* the names and the nature of work of the adult workers, and the group in which they are included.



6.1.23. The Factories Act prohibits employment of children who have not completed their fourteenth year in any factory. Any child above the said age may be allowed to work in any factory only if a certificate of fitness granted with respect to him by the Certifying Surgeon, is in the custody of the manager of the factory and such child carries a token giving reference to such certificate while he is at work.

6.1.24. The Factories Act also prohibits employment of young persons on dangerous machines, unless they have been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed. The said young persons should also have received adequate training in work at the machine and be under supervision by a person who has thorough knowledge and experience of the machine.

6.2. *Local Shops and Establishments Act and the Rules framed thereunder (“S&E Act”)*

6.2.1. The S&E Act is a State legislation and varies from State to State. The S&E Act ordinarily regulates service conditions of all employees (whether workmen or not) including the hours of work, payment of wages, overtime, leave, holidays and other conditions of service. The S&E Act does not apply to workmen in a factory or to workmen in an establishment attached to a factory to whom the benefits under the Factories Act are applicable. (For such benefits, see paragraph 6.2.2. below).

6.2.2. Some of the general obligations under the S&E Act are set forth below<sup>13</sup>:

- (i) An employer is required to make an application in the prescribed form (along with the prescribed fees) for registering the establishment within 90 (ninety) days from the date on which the establishment commences its work.
- (ii) An employer intending to terminate the services of an employee who has been in continuous employment for not less than 3 (three) months, must give such employee at least 1 (one) month’s notice (or wages in lieu of such notice). This statutory notice requirement will be applicable to employees even if their contracts provide for a shorter notice period.

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<sup>13</sup> It is important to note that since S&E Acts are local legislations, there could be some variations from State to State. For sake of convenience, the references to number of days, hours etc. given in this section are based on the provisions of the Delhi Shops and Establishments Act, 1954.



The requirement to give notice (or pay wages in lieu of such notice) does not apply in cases where the termination is on account of “*misconduct established on record*”.

- (iii) No employee should be required to work for more than the prescribed number of hours (ordinarily 9 (nine) hours a day and 48 (forty eight) hours a week). In the event that an employee works beyond 9 (nine) hours a day or 48 (forty eight) hours in any week, such excess work is regarded as overtime, and wages for such work are calculated at twice the rate of the person’s normal remuneration calculated by the hour.

Notwithstanding the aforesaid, an employer cannot require an employee to work in excess of 54 (fifty four) hours a week. However, in certain States such as Delhi, all commercial establishments are exempted from the restrictions on working hours (but not from the obligation to pay overtime wages).

- (iv) An employer is required to observe close days and certain minimum holidays i.e. Independence Day (August 15), Republic Day (January 26), Mahatma Gandhi’s birthday (October 2) and other prescribed holidays (with wages) in a year. If an employee is required to work on any of these holidays he is entitled to remuneration at twice the rate of his normal wages calculated by the hour.
- (v) Employees are entitled to a total period of not less than 15 (fifteen) days as privilege leave after every 1 (one) year of continuous employment, and a total period of not less than 12 (twelve) days in every year as casual leave or sick leave with wages.

Additionally, an employee is entitled to carry forward his accrued but unavailed privilege leave such that at any one time he is not entitled to more than 45 (forty five) days’ of privilege leave. Most of the S&E Acts further provide that if an employee is discharged by the employer before he has availed of any accrued privilege leave, he is entitled to “*wages*”<sup>14</sup> for the full period of leave due to him.

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<sup>14</sup> The expression “*wages*” as used in the Delhi Shops and Establishments Act has been defined to mean “*all remuneration capable of being expressed in terms of money which would if the terms of the contract of employment express or implied were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance but does not include -*

(i) *the value of –*





- (vi) Women and young persons are not allowed to work in any establishment between 9 P.M. and 7 A.M. during the summer season and between 8 P.M. and 8 A.M. during the winter season.
- (vii) Other obligations include compliance with health, safety and other welfare measures. The employer is also required to comply with other formalities including maintenance of records, exhibiting a notice setting forth the close day, the working hours, maintenance of register of employees, and register of wages.

### 6.3. Contract Labour (Regulation and Abolition) Act, 1970 (“CL Act”)

6.3.1. The CL Act has been enacted to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances. The CL Act applies to every establishment in which 20 (twenty) or more workmen (as defined in the CL Act; please see paragraph 6.3.3 below) are employed or were employed as contract labour on any day in the preceding 12 (twelve) months and to every contractor who employs, or who employed on any day of the preceding 12 (twelve) months, 20 (twenty) or more workmen. The CL Act however does not apply to an establishment in which work only of an intermittent or casual nature is performed.<sup>15</sup>

6.3.2. The term “*establishment*” is defined to mean *inter alia* any place where an industry, trade, business, manufacture or occupation is carried on.

A workman is deemed to be a “*contract labour*” if he is hired in connection with the work of an establishment, by or through a contractor, with or without the knowledge of the principal employer.

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- (a) any house accommodation supply of light water medical attendance; or
  - (b) any other amenity or any service excluded by general or special order of the appropriate Government;
  - (ii) any contribution paid by the employer to any pension fund or provident fund or under any scheme of social insurance;
  - (iii) any travelling allowance or the value of any travelling concession;
  - (iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
  - (v) any gratuity payable on discharge.”

<sup>15</sup> Under the CL Act, work performed in an establishment is deemed not to be of an intermittent nature if it was performed for more than 120 (one hundred twenty) days in the preceding 12 (twelve) months, or if it is of a seasonal character and is performed for more than 60 (sixty) days in a year.





The term “*contractor*” includes a sub-contractor, and is defined to mean a person who undertakes to produce a given result for an establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment.

Manager or occupier of factory or head of department of Government or local authority is termed as “*principal employer*”.

- 6.3.3. The term “*workman*” is defined to mean any person employed to do any skilled, semi-skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, in or in connection with the work of an establishment, whether the terms of employment are express or implied. However, workman excludes persons employed in managerial or administrative capacity, persons employed in supervisory capacity but drawing wages in excess of Rs. 500 (Rupees five hundred) per month, and out-workers (i.e. a person to whom any articles and materials are given out by or on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of trade or business of the principal employer and the said process is to be carried out either in the home of the out-worker or in some other premises, not being premises under the control and management of the principal employer).
- 6.3.4. Under the CL Act, every principal employer of an establishment to which the CL Act applies is required to make an application in the prescribed form for the registration of the establishment to the Registering Officer within the prescribed time. Every contractor to whom the CL Act applies must also be licensed and should undertake or execute any work through contract labour only in accordance with such licence.
- 6.3.5. The principal employers (and the contractors) are required to maintain registers and records of contract labour employed, the nature of work performed by the contract labour, rates of wages paid to the contract labour, etc. in the prescribed form.
- 6.3.6. The contractor is required to provide facilities for the welfare and health of the contract labour employed by it, which *inter alia* include rest rooms, canteens, wholesome drinking water, toilets, washing facilities, and first aid facilities in every establishment to which the CL Act applies. These obligations vary depending on the number of contract labour employed in the establishment.



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- 6.3.7. If the contractor fails to provide any of the amenities mentioned above within the prescribed time, the same must be provided by the principal employer. The principal employer may recover the expenses incurred in providing such amenity from the contractor either by way of deduction from any amount payable to the contractor under any contract or as a debt by the contractor.
- 6.3.8. The contractor is responsible for the payment of wages to each worker employed by him as a contract labour. The CL Act makes it obligatory on the part of the principal employer to nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor. In case the contractor fails to pay the wages within the prescribed time or makes short-payment, it is the duty of the principal employer to make payment of wages in full or the unpaid balance due (as the case may be) to the contract labour. The principal employer may recover any amounts so paid from the contractor under any contract or as a debt by the contractor.
- 6.4. *Building and Other Construction Workers (Regulation of Employment and Conditions Of Service) Act, 1996 (“BCW Act”)*
- 6.4.1. The BCW Act provides for regulation of employment and conditions of service of building and other construction workers, and also sets out measures relating to their safety, health and welfare.
- 6.4.2. The BCW Act applies to every establishment which employs or employed on any day during the preceding year, 10 (ten) or more workers in any building or other construction work. The expression “*establishment*”, means *inter alia* any body corporate which employs building workers in any building or other construction work; and includes an establishment belonging to a contractor. A “*contractor*” mean a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment, and includes a sub-contractor.
- 6.4.3. A “*building worker*” has been defined to mean a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for consideration, in connection with any building or other construction work, but does not include any person who:
- (i) is employed mainly in a managerial or administrative capacity; or



- (ii) being employed in a supervisory capacity, draws wages exceeding Rs. 1,600 (Rupees one thousand six hundred) per month or exercises mainly managerial functions.

6.4.4. “*Building or other construction work*” means construction, alteration, etc. of, *inter alia*, buildings, streets, drainage, water works (including channels for distribution of water) and electric lines, but does not include any building or construction work to which the provisions of Factories Act apply.

6.4.5. An employer, in relation to an establishment, means the owner thereof, and includes the contractor in cases where the building or construction work is carried on (i) by or through a contractor, or (ii) by the employment of building workers supplied by a contractor.

6.4.6. The employer of any establishment to which the BCW Act applies is required to apply for registration within 60 (sixty) days of the date on which the BCW Act becomes applicable to the said establishment.

## 7. Payment of Wages

### 7.1. Payment of Wages Act, 1936 (“Wages Act”) and the Rules framed thereunder

7.1.1. The Wages Act regulates the mode and method of payment of “wages”<sup>16</sup> to certain employees, namely, those employees to whom the wages payable for a wage period

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<sup>16</sup> The term “wages” has been defined to mean “*all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes:*

(a) any remuneration payable under any award or settlement between the parties or order of a Court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,

but does not include-

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;



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does not exceed Rs. 6,500 (Rupees six thousand five hundred) per month, and employed in any factory, and industrial or other establishments. The Wages Act does not apply where the wages payable to an employee is Rs. 6,500 (Rupees six thousand five hundred) per month or more. The Wages Act also regulates the date of the payment of wages and specifies the deductions that may lawfully be made from the wages.

- 7.1.2. As per the Wages Act, the person responsible for payment of wages is required to fix periods in respect of which wages shall be payable (“**Wage Period**”). Such Wage Period must not exceed 1 (one) month. If the number of person employed in a factory or an industrial establishment, including daily-rated workers, is less than 1000 (one thousand), the wages must be paid before the expiry of the 7<sup>th</sup> (seventh) day after the last day of the Wage Period. In other cases, the wages have to be paid before the expiry of the 10<sup>th</sup> (tenth) day after the last day of the Wage Period.
- 7.1.3. Wages have to be paid in cash. An employer may also, with the written authorisation from his employee, pay the wages either by cheque or by crediting the wages to the bank account of the employee.
- 7.1.4. The Wages Act provides that the wages of an employee must be paid without deductions of any kind, except the deductions which are authorised by or under the Wages Act. Some of the deductions permitted under the Wages Act are set forth below:
- (i) fines;
  - (ii) deductions for absence from duty;
  - (iii) deductions in case of sit-down or stay-in strikes;

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*(2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government;*

*(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;*

*(4) any travelling allowance or the value of any travelling concession;*

*(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or*

*(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).”*



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- (iv) deductions for damage to or loss of goods entrusted to the employee for custody or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;
- (v) deductions for house accommodation, amenities and services provided / supplied by the employer;
- (vi) deductions for recovery of advances or for adjustment of overpayment of wages;
- (vii) deductions for recovery of house loans;
- (viii) deductions of income tax payable by the employee;
- (ix) deductions for subscriptions to and for payment of advances from any provident fund; and
- (x) deductions for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

7.1.5. Where the services of an employee are terminated, the wages earned by him are required to be paid before the expiry of the 2<sup>nd</sup> (second) working day from the date on which his employment is terminated.

7.1.6. Every employer to which the Wages Act applies must maintain certain registers and records in the prescribed form, containing *inter alia* the particulars of the persons employed by him, the work performed by such persons, wages paid to them, deductions made from their wages, receipts given by them and such other particulars as may be prescribed. Such registers and records should be available for inspection and be preserved for a period of 3 (three) years after the date of last entry made therein.

7.2. Minimum Wages Act, 1948 (“MW Act”) and the Rules framed thereunder

7.2.1. The MW Act provides for payment of minimum rates of wages to specified employees. The MW Act defines the term “employee” to mean *inter alia*, “any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a Scheduled Employment (as defined in paragraph 7.2.2.



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*below) in respect of which minimum rates of wages have been fixed” and also includes “an employee declared to be an employee by the appropriate Government”.*

- 7.2.2. The MW Act requires the appropriate Government (Central or State as the case may be) to fix and revise, within a specified time, minimum rates of wages payable to employees in respect of employments listed out in Part I and Part II of the Schedule to the MW Act (and as notified from time to time by the various State Governments) (“**Scheduled Employment**”). The Scheduled Employments *inter alia* include employment on the construction and maintenance of roads or in building operations, employment in an oil mill, employment in tanneries and leather manufactory, etc. It may also be noted that the list of Scheduled Employment is not exhaustive and the State Governments are empowered to add more employments to the Schedule.
- 7.2.3. If the total number of employees in any particular Scheduled Employment specified in the Schedule is less than 1000 (one thousand) in the whole of the State, it is not necessary for the appropriate State Government to fix any minimum wage for such employment. Where the Government is required to fix minimum wages for any Scheduled Employment, it may fix:
- (i) minimum time rate for time work;
  - (ii) minimum piece rate for piece work;
  - (iii) guaranteed time rate for employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis; and
  - (iv) overtime rate in respect of any overtime work performed by the employees.
- 7.2.4. Once minimum wages have been fixed, an employer is required to pay to every employee engaged in a Scheduled Employment under him, wages at a rate which is not less than the minimum rate of wages fixed by the concerned State Government for that class of employees.
- 7.2.5. Employers are required to maintain registers and records giving particulars of the employees employed by him in any Scheduled Employment, the work performed by them, the wages paid to them, the receipts given by them, etc. in such forms as may be prescribed.



## 8. Social Security

### 8.1. Employees Provident Funds and Miscellaneous Provisions Act, 1952 (“PF Act”) and the Rules framed thereunder

8.1.1. The PF Act and the Rules framed thereunder are applicable to: (1) every factory engaged in any industry specified in Schedule I to the PF Act and in which 20 (twenty) or more persons are employed; (2) to any other establishments employing 20 (twenty) or more persons as may be notified by the Central Government in this regard; and (3) establishments wherein the employer and the majority of the employees in question have agreed that the provisions of the PF Act should be made applicable to that establishment and notified by the Central Government in this regard (collectively referred to as the “**Covered Establishments**”).

8.1.2. The Central Government has framed three schemes under the PF Act, namely, the Employees’ Provident Fund Scheme, 1952 (“**PF Scheme**”), Employees’ Pension Scheme, 1995 (“**Pension Scheme**”), and Employee’s Deposit Linked Insurance Scheme, 1976 (“**EDLI Scheme**”) (collectively referred to as “**Schemes**”).

8.1.3. The Act defines the term “*employer*” to mean, in relation to a factory, the owner or occupier of the factory; and in relation to an establishment other than a factory, the person (or authority) who has the ultimate control over the affairs of the establishment.

The term “*employee*” has been defined to mean a person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages, directly or indirectly, from the employer. The term “*employee*” also includes a person employed by or through the contractor.

8.1.4. Courts in India have interpreted the employer-employee relationship to include not only a direct master-servant relationship but also a principal employer relationship. There is no one test to determine the relationship of employer-employee and the interpretation of the expression “*working for an establishment*” will be specific to the fact situation in every case.

*PF Scheme*





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- 8.1.5. All employees covered under the PF Act are entitled and required to become members of the provident fund established under the PF Scheme (“**Provident Fund**”). An employee whose monthly pay exceeds Rs. 6,500 (Rupees six thousand five hundred) from the date of joining employment is not covered by the PF Act, and hence is not required to become a member of the Provident Fund. If, however, the employee at the time of joining employment draws a monthly pay which is less than or equal to Rs. 6,500 (Rupees six thousand five hundred), the PF Act will continue to be applicable to the employee even after his monthly pay exceeds Rs. 6,500 (Rupees six thousand five hundred) but all contributions will be computed as though the monthly pay of the employee is Rs. 6,500 (Rupees six thousand five hundred).
- 8.1.6. The employer of every Covered Establishment is required to deduct from the wages of an employee an amount equal to 12% (twelve per cent) of the basic wages<sup>17</sup>, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)<sup>18</sup> (collectively, the “**Wages**”), and deposit the same in the Provident Fund as the ‘employee’s contribution’, in respect of every employee.
- 8.1.7. The employer must also make a matching contribution of 12% (twelve per cent) of the Wages payable to the concerned employee, and deposit the same in the Provident Fund as the employer’s contribution’. In addition, the employer must also pay the administrative charges (currently equal to 1.16% (one point one six per cent) of the Wages). Therefore, the aggregate cost of the employer in respect of each Covered Employee is currently 13.16% (thirteen point one six per cent) of the Wages.
- 8.1.8. The PF Scheme further stipulates that the employer will not be entitled to deduct the employer’s contribution from the Wages of the concerned employee, or otherwise be entitled to recover it from him. Additionally, the PF Act provides that the employer cannot, by reason only of his liability for the payment of any contribution

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<sup>17</sup> The expression “*basic wages*” has been defined in the PF Act to mean “*all emoluments earned by an employee while on duty, or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include:*

- (i) *the cash value of any food concession;*
- (ii) *any dearness allowance (that is to say, all cash payments by whatever name called/paid to an employee on account of a rise in the cost of living), house rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;*
- (iii) *any presents made by the employer.”*

<sup>18</sup> Thus, while dearness allowance and cash value of food concessions are excluded from the definition of “*basic wages*”, they are required to be included while computing the contribution.





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to the Provident Fund or any charges under the PF Act or the PF Scheme, reduce directly or indirectly the Wages of any employee to whom the PF Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, whether express or implied.

8.1.9. The PF Scheme specifies the circumstances in which an employee is entitled to withdraw the accumulated amounts (with interest thereon) in the Provident Fund. Such circumstances, *inter alia*, include:

- (i) upon retirement from service after attaining the age of 55 (fifty five) years;
- (ii) upon retirement from service on account of permanent and total incapacity for work due to bodily or mental infirmity;
- (iii) immediately before migration from India for permanent settlement abroad or for taking employment abroad;
- (iv) on termination of service in case of mass or individual retrenchment;
- (v) on termination of service under a voluntary scheme of retirement framed by the employer and the employees under a mutual agreement;
- (vi) under certain contingencies such as transfer to another establishment not covered under the PF Act; and
- (vii) upon cessation of employment with any Covered Establishment, provided the employee has not been employed in any Covered Establishment for a period of not less than 2 (two) months immediately preceding the date on which he makes the application for withdrawal.

#### *Pension Scheme*

8.1.10. Under the Pension Scheme, the employer is required to segregate a part of the contribution representing 8.33% (eight point three three per cent) of the employee's Wages from and out of the employer's contribution under the PF Scheme, and remit the same to the pension fund established under the Pension Scheme ("**Pension Fund**"). The contributions to the Pension Fund have to be made within 15 (fifteen) days of the close of every month by a separate bank draft or cheque in the



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prescribed manner. The Central Government is also required to contribute 1.16% (one point one six per cent) of the employees' Wages to the Pension Fund. If the Wages of an employee exceed Rs. 6,500 (Rupees six thousand five hundred) per month, the contribution by the employer and the Central Government is limited to the amount payable on a pay of Rs. 6,500 (Rupees six thousand five hundred) per month.

8.1.11. The employees are entitled to pension from the Pension Fund on retirement, superannuation, permanent disablement, etc.

#### *EDLI Scheme*

8.1.12. Under the EDLI Scheme, the employer is required to contribute every month in relation to every eligible employee: (a) 0.5% (point five per cent) of the Wages; and (b) 0.01% (point zero one per cent) of the Wages as administration charges (other than the expenses towards the cost of any benefits provided by or under the EDLI Scheme) to the fund established under the EDLI Scheme. If the Wages of an employee exceeds Rs. 6,500 (Rupees six thousand five hundred) per month, the contribution payable by the employer is limited to the amounts that would have been payable on monthly Wages of Rs. 6,500 (Rupees six thousand five hundred).

8.1.13. The EDLI fund accumulations are payable to the family of the employee, in the event of death of such employee.

#### *International Workers*

8.1.14. On October 1, 2008, the Ministry of Labour and Employment issued Notification No. G.S.R. 706(E) ("**PF Notification**"), and Notification No. G.S.R. 705(E) ("**Pension Notification**"). The PF Notification modifies existing provisions of the PF Scheme and the Pension Notification modifies the existing provisions of the Pension Scheme, to include "*International Workers*" (as defined in paragraph 8.1.15. below) as a new class of participants. As a result of these notifications, the PF Act has been made applicable to International Workers.

8.1.15. Applicability of PF Notification: By virtue of the PF notification, the PF Scheme has been amended to become applicable to all International Workers except those who are expressly defined as "*Excluded Employees*". The PF Notification defines the expression "*International Worker*" to mean:



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- (a) *“an Indian employee having worked or going to work in a foreign country with which India has entered into a social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement;*
- (b) *an employee, other than an Indian employee, holding other than an Indian passport working for an establishment in India to which the Act applies.”*

8.1.16. Though the term “*Indian employee*” has not been defined under the PF Notification, the Employees’ Provident Fund Organisation (“**EPFO**”) has clarified that “*Indian employee*” would be understood to mean an employee holding or entitled to hold an Indian passport and employed by an establishment covered under the Act.

8.1.17. The term “*Excluded Employee*” has been defined to mean “*an International Worker, who is contributing to a social security programme of his/her country of origin, either as a citizen or resident, with whom India has entered into a social security agreement on reciprocity basis and enjoying the status of detached worker for the period and terms, as specified in such an agreement.*”

8.1.18. It may be mentioned that as of now the only countries with which India has entered into social security agreements are Belgium, France and Germany. However, the date of entry into force of these agreements is yet to be notified. Therefore, till the ‘date of effect’ is notified, no International Worker is entitled to the status of an Excluded Employee.

8.1.19. **Provident Fund Contributions:** Pursuant to the PF Notification, every International Worker employed with a Covered Establishment, is required and entitled to become a member of the Provident Fund, unless he/she qualifies as an Excluded Employee. Therefore, employers are required to deposit Provident Fund contributions (employer’s as well as employee’s) in respect of all eligible International Workers, from the month following that when the PF Notification came into force, i.e. from November 1, 2008. The contributions are payable at the same rates as have been stipulated under the PF Scheme. Further, every Excluded Employee, who ceases to be an Excluded Employee, is also required to become a member of the Provident Fund from the beginning of the month following the month in which he loses such status.



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8.1.20. It may also be noted that the PF Notification does not specify a limit on the Wages of the International Worker in respect of which the Provident Fund contributions will be payable. However, the EPFO has clarified, in this regard, that the wage limit of Rs. 6,500 (Rupees six thousand five hundred) is not applicable to International Workers, and hence the employer is required to pay the contributions (employer's as well as employee's) on the entire Wages of the International Worker.

8.1.21. Applicability of the Pension Notification: By virtue of the Pension Notification, the Pension Scheme has become applicable to all International Workers as defined under the PF Notification and such employees are required to obtain the membership of the Pension Fund.

8.1.22. Pension Fund Contributions: The Pension Notification does not prescribe the percentage of contributions and therefore, the percentages otherwise mandated in the Pension Scheme will apply to International Workers as well.

Furthermore, the Pension Notification does not prescribe a ceiling on the International Worker's Wages up to which employer's contribution under the PF Scheme is to be diverted to the Pension Fund. In this regard, the EPFO has clarified that the ceiling of Rs. 6,500 (Rupees six thousand five hundred) prescribed under the Pension Scheme will apply to International Workers as well. Therefore, the employer is required to divert a sum equivalent to 8.33% (eight point three three per cent) of the International Worker's Wages (which are subject to a ceiling of Rs. 6,500 (Rupees six thousand five hundred)) from the employer's Provident Fund contribution to the Pension Fund.

8.1.23. Pensionable Service and Pensionable Salary: In relation to International Workers, the expression "*Pensionable Service*" has been defined to mean "*the service rendered by the member covered by an international social security agreement for which contributions have been received or are receivable, the period of service rendered and considered as eligible under such agreement.*" Therefore, the Pensionable Service of a member covered by an international social security agreement is to be determined with reference to the contributions received or receivable on his behalf in the Pension Fund, as also the period of service rendered and considered as eligible under a social security programme that may cover an International Worker.

8.1.24. As per the Pension Notification, the term "*Pensionable Salary*" for International Workers has been defined to mean the average monthly pay drawn in any manner,



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including on piece-rate basis, during the contributory period of service of the membership of the Pension Fund. It may be mentioned that the definition of pensionable service is relevant only for determining the monthly pension that will be payable to a member.

8.1.25. Withdrawal from the Pension Fund: The Pension Notification provides for withdrawal benefits available to International Workers who leave the service of the employer before being eligible for the monthly members' pension, i.e. before rendering eligible service for a minimum period of 10 (ten) years on the date of exit or on attaining the age of 58 (fifty eight) years, whichever is earlier ("**Eligible Service**").

8.1.26. If an International Worker, not being an Indian employee, hailing from a country with which India has entered into a social security agreement, has not rendered the Eligible Service, he shall be entitled to the withdrawal benefits as may be prescribed under the said agreement on reciprocal basis.

8.1.27. The withdrawal benefits available to an International Worker, who is not an Indian employee, hailing from a country with which India has not entered into a social security agreement, will be reciprocal to the withdrawal benefits available to Indian employees in that country.

8.1.28. Compliances under the Pension Notification: The Pension Notification does not prescribe any specified filing obligations for the employers in relation to the International Workers, and hence the filing obligations otherwise stipulated in the Pension Scheme will be applicable.

8.2. Employees State Insurance Act, 1948 ("**ESI Act**") and the Rules framed thereunder

8.2.1. The ESI Act *inter alia* provides for certain benefits to the employees in contingencies such as maternity, temporary or permanent physical disablement due to employment injury resulting in loss of wages or earning capacity, death due to employment injury, as well as medical care to workers and their immediate dependants (collectively the "**Benefits**").

8.2.2. An Employees' State Insurance Fund ("**Insurance Fund**") has been created under the ESI Act and the eligible employees are entitled to avail of Benefits from the accumulations in the Insurance Fund. Consequently, employers covered under the



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ESI Act are absolved of any liability under the provisions of the WC Act and the MB Act.

- 8.2.3. The ESI Act is applicable to: (a) non-seasonal factories using power and employing not less than 10 (ten) persons; and (b) factories not using power and employing not less than 20 (twenty) persons. It has also been extended to shops, hotels, restaurants, cinemas including preview theatre, road motor transport undertakings and newspaper establishments employing 20 (twenty) or more persons.
- 8.2.4. The ESI Act applies to all employees (i.e. any person employed for wages in or in connection with the work of a factory or establishment to which the ESI Act applies). The employees covered under the ESI Act include contract labourers hired through an “*immediate employer*”, i.e. a person under the supervision of the principal employer. The ESI Act, however, does not apply to employees earning Rs. 10,000 (Rupees ten thousand) per month from the date of joining the factory or establishment, as the case may be. Within 15 (fifteen) days of the ESI Act becoming applicable to a factory or establishment, the employer must apply for registration in prescribed Form 01 to the concerned Regional Office.
- 8.2.5. The employer is required to contribute an amount equal to 4.75% (four point seven five per cent) of the employee’s “*wages*”<sup>19</sup> and the employee is required to contribute 1.75% (one point seven five per cent) of the said wages to the Insurance Fund. The employer is liable to pay, in respect of each employee, the employer’s contribution as well as the employees’ contribution (as deducted from his wages), into the Insurance Fund within 21 (twenty one) days of the last day of the calendar month in which the contributions fall due.
- 8.2.6. Additionally, the employer must comply with various formalities prescribed under the ESI Act including maintenance of records, and filing of returns.

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<sup>19</sup> The term “*wages*” has been defined under the ESI Act to mean “*all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include:*

- (i) *any contribution paid by the employer to any pension fund or provident fund, or under this Act;*
- (ii) *any travelling allowance or the value of any travelling concession;*
- (iii) *any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or*
- (iv) *any gratuity payable on discharge.”*



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8.3. Workmen's Compensation Act, 1923 ("WC Act") and the Rules framed thereunder

8.3.1. The WC Act provides for payment of statutory compensation by the employer in case of personal injury or death caused to a workman by accident arising out of and in the course of employment. The WC Act applies to workmen specified in Schedule II to WC Act. These *inter alia* include persons employed as drivers, persons employed in the manufacture or handling of explosives in connection with employer's trade or business, and persons employed as watchmen in any factory or establishment.

8.3.2. However, the employer is not liable to pay compensation:

- (i) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding 3 (three) days; or
- (ii) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to drinks or drugs, wilful disobedience of a safety regulation, etc.

8.3.3. The WC act specifies the amounts to be paid as compensation in cases where:

- (i) death results from the injury;
- (ii) permanent total disablement results from the injury;
- (iii) permanent partial disablement results from the injury; and
- (iv) temporary disablement (whether total or partial) results from the injury.

8.4. Payment of Gratuity Act, 1970 ("PG Act") and the Rules framed thereunder

8.4.1. The PG Act provides for a scheme for payment of gratuity to all employees (whether workmen or not) employed in *inter alia* factories, shops or other establishments, in which 10 (ten) or more persons are employed, or were employed, on any day of the preceding 12 (twelve) months. An employee is entitled to payment of gratuity on termination of his employment, provided he has rendered continuous service for not less than 5 (five) years (except in the case of death or disability), under any of the circumstances specified below:





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- (i) superannuation; or
- (ii) retirement or resignation; or
- (iii) death or disablement due to accident or disease.

However, in case of termination of the services of an employee for any act, wilful omission or negligence causing any damage or loss to or destruction of property belonging to the employer, the gratuity shall be forfeited to the extent of the damage or loss so caused.

8.4.2. The gratuity payable to an employee is calculated as 15 (fifteen) days' wages payable multiplied by the number of years of service (with part of a year in excess of six months counted as one year). The maximum amount of gratuity payable to an employee must not exceed Rs. 3,50,000 (Rupees three lakhs fifty thousand).

8.4.3. Notwithstanding any of the foregoing, the PG Act also provides that an employee is entitled to receive better terms of gratuity under any award, agreement or contract in this regard with the employer.

8.4.4. Every employer to which the PG Act applies is also required to comply with various formalities including filing of notices.

8.5. Payment of Bonus Act, 1963 ("**Bonus Act**") and the Rules framed thereunder

8.5.1. The Bonus Act applies to every factory and other establishments employing 20 (twenty) or more persons on any day during an accounting year. It applies to all employees (whether workmen or not, except apprentices) whose salary or wage does not exceed Rs. 10,000 (Rupees ten thousand) per month.

8.5.2. Every employee is entitled to bonus, to be paid by the employer in an accounting year according to the provisions of the Bonus Act, if he has worked in the establishment for not less than 30 (thirty) working days in that year. Where the salary or wage of an employee exceeds Rs. 3,500 (Rupees three thousand five hundred) per month, the bonus payable to such employee is calculated as if his salary or wage were only Rs. 3,500 (Rupees three thousand five hundred) per month.

8.5.3. If the Bonus Act is applicable, the employer is required to pay a minimum bonus (even if he suffers losses during the accounting year) of 8.33% (eight point three





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three per cent) of the salary or wage earned by the employee during an accounting year or Rs 100 (Rupees one hundred), whichever is higher. However, no bonus is required to be paid by a new establishment in the first 5 (five) accounting years if there is no profit.

8.5.4. If in any accounting year, the allocable surplus, calculated after taking into account the amount set-on or set-off, exceeds the minimum bonus, the employer should pay bonus in proportion to the salary or wages earned by the employee during that accounting year. However, the bonus should not exceed 20% (twenty per cent) of such salary or wages of the employee.

8.5.5. The employer to which the Bonus Act applies must also comply with various formalities including maintenance of records, filing of returns.

## **9. Miscellaneous**

### **9.1. Maternity Benefit Act, 1961 (“MB Act”)**

9.1.1. The MB Act applies to factories, mines, plantations, and other shops and establishments in which 10 (ten) or more persons (whether workmen or not) are employed, or were employed, on any day of the preceding 12 (twelve) months. The MB Act mandates the payment of maternity benefit to every woman employed in an establishment, provided that she has worked for at least 80 (eighty) days in the 12 (twelve) months immediately preceding the date of her expected delivery.

9.1.2. Maternity benefit is calculated at the rate of the employee’s “*average daily wage*” for the period of her actual absence (i.e. the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day). The expression “*average daily wage*” has been defined to mean the average of the woman’s wages payable for the days on which she worked during the period of 3 (three) months preceding the date from which she absents herself on account of maternity.

9.1.3. Under the MB Act, a woman employee is entitled to maternity benefit for a maximum period of 12 (twelve) weeks, of which not more than 6 (six) weeks should precede the expected date of her delivery.



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- 9.1.4. The MB Act also provides for leave entitlements during certain circumstances / conditions arising on account of the pregnancy (such as any illness, premature birth of child, miscarriage).
- 9.1.5. In case a woman employee absents herself from work in accordance with the provisions of the MB Act, the employer is not permitted to:
- (i) discharge or dismiss her during or on account of such absence; or
  - (ii) give notice of discharge or dismissal on such a day that the notice will expire during her absence; or
  - (iii) vary any of the conditions of her service to her disadvantage.
- 9.1.6. The employer is required to maintain the prescribed records, registers and muster rolls under the MB Act.

9.2. Equal Remuneration Act, 1976

- 9.2.1. This Act provides for payment of equal remuneration to men and women workers. Pursuant to this objective, no employer is permitted to pay to any worker, employed by him, remuneration at rates less favourable than those at which remuneration is paid by him to workers of the opposite sex for performing the same work or work of a similar nature.<sup>20</sup>
- 9.2.2. Further, under this Act the employer is not permitted to discriminate against women, while making recruitment for the same work or work of similar nature.

9.3. Apprentice Act, 1961 (“Apprentice Act”) and the Rules framed thereunder

- 9.3.1. The Apprentice Act regulates and controls the training of apprentices and is applicable to certain notified industries, such as agriculture, industrial management, office management, building maintenance, and ceramic technology. Under the Apprentice Act, no person is qualified to be engaged as an apprentice to undergo

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<sup>20</sup> The expression “same work or work of a similar nature” has been defined under the Equal Remuneration Act to mean “work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those of a woman are not of practical importance in relation to the terms and conditions of employment”.



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apprenticeship training, unless he has attained 14 (fourteen) years of age and satisfies the prescribed standards of education and physical fitness.

- 9.3.2. A contract of apprenticeship is mandatory and if the apprentice is a minor, the guardian may enter into a contract of apprenticeship with the employer. The employer is required to register the contract of apprenticeship with the Apprentice Adviser appointed by the Government of India under the Apprentice Act.
- 9.3.3. The contract of apprenticeship cannot be terminated before the expiry of the period of apprenticeship training, except when the Apprenticeship Adviser terminates the contract on application of either party.
- 9.3.4. Under the Apprentice Act and the Rules framed thereunder, the employer has *inter alia* the following obligations:
- (i) to provide training to the apprentice in his trade, and ensure that a person qualified in the trade is in charge of the training the apprentice and maintain adequate qualified staff to impart practical and theoretical training to the apprentices;
  - (ii) to ensure that the prescribed stipend is paid, and prescribed work hours and norms relating to leave are followed;
  - (iii) to ensure that the norms relating to health, safety and welfare prescribed under the Factories Act are followed (wherever applicable);
  - (iv) to pay compensation as prescribed under the WC Act, for personal injuries suffered by apprentices in the course of their employment; and
  - (v) to maintain records of progress of all apprentices undergoing training and, if so required, furnish such records or information to the authorities.
- 9.3.5. The employer is also required to maintain certain records and file certain returns under the Apprentice Act and the Rules framed thereunder. These *inter alia* include Form Apprenticeship 1 (Record of training and instruction), Form Apprenticeship 2 (Quarterly Report in respect of full term apprentices) and Form Apprenticeship 3 (Quarterly Record of progress of apprentice).



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9.4. Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (“EE Act”) and the Rules framed thereunder

9.4.1. The EE Act provides for the compulsory notification of vacancies to the concerned employment exchange by the employers in every establishment in public and also such establishments in the private sector as have been notified in this regard. The employer is required to notify the vacancies at least 15 (fifteen) days before the date of interview or filling of vacancies (without interview). Notification of vacancy to the employment exchange, however, does not cast an obligation on the employer to recruit any person recommended by the employment exchange.

9.4.2. The EE Act is not applicable in relation to vacancies in any employment:

- (i) in agriculture (including horticulture) in any establishment in private sector other than employment as agricultural or farm machinery operatives;
- (ii) in domestic service;
- (iii) for which the total duration is less than 3 (three) months;
- (iv) to do unskilled office work (such as orderly or peon, dusting man and sweeper); and
- (v) connected with the staff of the Parliament.

9.4.3. Additionally, the employer is required to submit quarterly and biennial returns with the employment exchange in the prescribed forms.

## **10. Penalties under the labour laws**

10.1. Most of the Indian labour laws impose penal consequences on the employer for contravention of the provisions of such laws.

Almost all of the labour laws (whether enacted at the Central level or by a State) provide that in cases where the employer is a company, every person who, at the time of commission of the offence, was in charge of and was responsible to the company for the conduct of its business shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. However, nothing in this section shall render any such person liable to any punishment under this Act, if



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he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

It is further provided that any director, manager, secretary or other officers of the company (“**Office-Bearer**”) will be deemed to be guilty of any offence that is proved to have been committed with the consent or connivance, or is attributable to any neglect on the part of such Office-Bearer.

Consequences in such cases may range from fines for the company and its relevant Office-Bearers, to imprisonment for such Office-Bearers of the company, depending on the nature and gravity of the violations.

- 10.2. For instance, under the ID Act, in case an offence is committed by a company, every director, manager, secretary, agent or other officer or person concerned with the management of the company shall be deemed to be guilty of such offence, unless he proves that the offence was committed without his knowledge or consent.
- 10.3. Specific penal consequences have been specified in respect of breach of certain obligations under the various laws. For instance, under the ID Act, in case an employer closes down an undertaking without complying with the requirement of giving notice for closure (as provided under paragraph 5.1.19.), the employer shall be punishable with imprisonment which may extend to 6 (six) months, or with fine which may extend to Rs. 5,000 (Rupees five thousand), or with both fine and imprisonment.



## **CHAPTER III**

### **EXAMPLES AND ANALYSIS OF INDUSTRIAL AND LABOUR DISPUTES**

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#### **11. Introduction**

- 11.1. Owing to economic liberalisation in the last two decades, the regulatory authorities and the Courts are more willing to recognise the right of the employer to carry on his business in the manner he thinks fit commercially, as long as the employer complies with the minimum statutory protections available to the employees. Further, the trend of amicable settlement of disputes by employers is also being noticed in the recent years, with an increased focus on collective bargaining and participation of workers in the management. There has also been a weakening of the trade union movement with the emergence of new sectors, like information technology and biotechnology.
- 11.2. Notwithstanding the aforesaid, disputes can still arise between an employer and its employee(s) for various causes. Moreover, owing to the stringency of the statutory framework, the employer can, without so intending, be deemed to be in breach of his statutory obligations in various situations. This chapter sets out certain practical situations and examples of potential disputes or non-compliance.

#### **12. Examples**

##### *12.1. Political affiliations in trade unions*

- 12.1.1. In India, trade unions occupy a prominent position with respect to matters relating to industrial relations and labour policies. Trade unions are generally projected as being the representatives of the workers vis-à-vis the employers. Trade unions can be classified as politically affiliated trade unions and independent trade unions, and are generally aligned both industry-wise and region-wise.
- 12.1.2. In India, there are about 10 (ten) major central trade unions of workers which endorse different political ideologies. Virtually every trade union is affiliated to one of these central trade unions. Hence the issue of political affiliations of trade unions becomes important. Political parties in India too tend to patronise trade unions, especially in industrial States such as West Bengal and Maharashtra.



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- 12.1.3. Because of the political affiliations, trade unions are usually able to attract prompt attention of the concerned regulators in case of industrial disputes with the employers. There have also been some instances where the political parties have taken up the cause of the trade unions and affected workers.
- 12.1.4. Under the Indian labour laws, an employer is not obligated to recognise a trade union or to enter into collective bargaining agreements with it. However, it is not unknown for political pressure to be brought upon employers occasionally, thereby constraining them to concede to the demands raised by the workers or their trade unions. This in turn affects the ability of the employer(s) to carry on their business in the most efficient and profitable manner.
- 12.1.5. In a recent case, we were informed by the management of a leading multinational company that about 2 (two) years back, they had been besieged by a series of labour disputes and even some instances of physical violence (by the workers) at one of its manufacturing plants. The trade union with which the workmen of the company were affiliated, then approached the management and suggested that the company should take care of the operational expenses of the trade union, in consideration of which the trade union would ensure that there are no further disputes. This suggestion was tacitly supported by the local politicians as well. The management, which was completely frustrated by the mounting tension and continuous interruption of work, agreed to the aforesaid demand.

Recently, the management of the company underwent a change. The new management was not comfortable with the arrangement with the trade union, and approached us for advise on the possible consequences of, and solution to, the situation. We advised the management that under the ID Act, contribution of support (financial or otherwise) to any trade union is regarded as an unfair labour practice on the part of the employer, and hence the management should immediately discontinue the practice of contributing towards the operational expenses of the trade union. Practically however, the exercise of putting an end to the aforesaid practice involved prolonged and skilful negotiation over a considerable period of time. Stopping of the practice has also led to a resurgence of industrial disputes at the manufacturing plant. This is also being encouraged by the trade union, whose ire has been aggravated on account of the discontinued payment.

In view of the aforesaid, it is always advisable for the employers to negotiate with the trade union / workmen in keeping with the commercial expediency, but without compromising on the legal requirements. A short term benefit, while attractive, can cause greater harm in the long run.





12.2. Chapter VB of the ID Act

12.2.1. As mentioned in paragraph 5.1.16., Chapter VB of the ID Act contains special provisions to regulate retrenchment, closure and lay-off in industrial establishments where 100 (one hundred) or more workmen were employed on an average per working day on any day of the preceding 12 (twelve) months. This, amongst others, includes the requirement to obtain the prior permission of the appropriate Government by the employer. Only when such permission is granted or deemed to have been granted, can the employer in such industrial establishment proceed with the intended retrenchment, closure or lay-off.

12.2.2. By reason of Chapter VB, even if the employer is intending to retrench or lay-off a single workman, he would have to apply for and obtain the prior permission of the appropriate Government.

12.2.3. As a part of the permission process under Chapter VB, the Government may give the affected workmen and/or their representatives an opportunity to raise their concerns to the Government. This opportunity could be misused by some workmen to cause mischief for the management by raising frivolous disputes and questioning the retrenchment, closure or lay-off, as the case may be.

12.2.4. Additionally, Chapter VB gives the Government the discretion to grant or refuse to grant the permission on the basis of specified factors such as genuineness and adequacy of reasons stated by the employer, interests of the general public, etc. Though the Government is required to exercise a reasoned discretion while refusing or granting the permission, at times permission has been refused on the grounds of unemployment being generated as also in public interest.

12.2.5. In a recent case, an IT company (which satisfied the definition of an “*industrial establishment*”) was desirous of retrenching about 10 (ten) of its employees as it was overstaffed. Since it had employed 100 (one hundred) or more workmen on an average per working day during the preceding 12 (twelve) months, it was required to seek the prior permission of the concerned State Government before proceeding with the retrenchment. There was some concern regarding the fact that the State Government is empowered to exercise its discretion as to whether or not to grant the permission, after giving a fair hearing to both - the employer and the workmen. However, after making some enquiries on a “no-names” basis with the relevant Labour Officer, we recommended that the company should discuss the entire issue with the said Labour Officer and seek his inputs / guidance before proceeding to



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formally file the application. The Labour Officer gave the company officials as well as the affected workmen a fair hearing, thereby ensuring an amicable conclusion of the entire issue.

12.2.6. In view of the aforesaid, the flexibility available to the employer to run his business according to his judgment and wisdom can get restricted. Hence, from a practical perspective, it is advisable to consult the affected workmen and arrive at an amicable solution in order to minimise the possibility of a dispute being raised by the workmen at a later stage.

12.2.7. It is also important to mention here that a proposal to amend the ID Act, which will allow for more flexibility in cases of retrenchment, lay-off and closure, is currently under consideration. As per the proposed amendment, the requirement of obtaining prior permission of the concerned Government will only apply to industrial establishments where more than 1,000 (one thousand) workmen are employed.

### 12.3. Absorption of contract labour as permanent employees

12.3.1. Section 10 of the CL Act provides that the appropriate State / Central Government may prohibit employment of contract labour “*in any process, operation or other work in any establishment*”. Additionally, upon advice from the Central Advisory Board and on being satisfied that the conditions specified under Section 10(2)<sup>21</sup> of the CL Act have been fulfilled, the appropriate Government may take a decision to abolish the utilisation of contract labour *in an establishment*. Upon the notification of the aforesaid decision pursuant to Section 10(1) of the CL Act, employment of contract labour is prohibited in such establishment.

12.3.2. The historical trend of judicial reasoning with respect to this section was as follows:

An establishment, in which the employment of contract labour stood prohibited pursuant to a notification under Section 10(1) of the CL Act, was required to absorb the contract labour then employed by such establishment as its permanent

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<sup>21</sup> The conditions are as follows:-

- (a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;
- (b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;
- (c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;
- (d) whether it is sufficient to employ considerable number of whole-time workmen.



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employees, with all applicable rights / benefits, monetary or otherwise, with effect from their respective dates of joining the establishment.

12.3.3. The Supreme Court reversed this trend in India in *Steel Authority of India Ltd. vs. National Union Water Front Workers*.<sup>22</sup> The appellants in this case are a Central Government company and its branch manager (engaged in the manufacture and sale of various types of iron and steel materials in its plants located in various States of India), while the respondents are a ‘union’ representing the cause of a group of contract labourers. In this landmark case, the Supreme Court held that where employment of contract labour is prohibited in any establishment by a notification issued under Section 10(1) of the CL Act, there is no question of automatic absorption of the contract labour then employed in connection with the work of the establishment as direct / permanent employees of the establishment. The Supreme Court went on to elucidate the consequences of a notification being issued under Section 10(1) of the CL Act, some of which are set forth below:

- (i) the contract labour working in the concerned establishment at the time of issue of notification will cease to function;
- (ii) the contract of principal employer with the contractor in regard to the contract labour comes to an end;
- (iii) no contract labour can be employed by the principal employer in any process, operation or other work in the establishment to which the notification relates at any time thereafter; and
- (iv) the contract labour is not rendered unemployed as it continues in the employment of the contractor since the notification does not sever the relationship of master and servant between the contractor and the contract labour.

12.3.4. Contract labour are however still held to come within the ambit of ‘employees’ of the principal employer in situations where, on piercing the veil to discover the actual arrangement, the Court finds the contract between the contractor and the principal employer is a mere camouflage or a sham. In such circumstances, the contract labour working in the establishment of the principal employer was held to be in fact the employees of the principal employer directly. The Supreme Court in this context held as follows:

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<sup>22</sup> AIR 2001 SC 3527.



*“(5) On issuance of prohibition notification under Section 10(1) of the CL Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse / camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found not to be genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to conditions as may be specified by it for that purpose in the light of para 6 hereunder.*

*(6) If the contract is found to be genuine and prohibition notification under Section 10(1) of the CL Act in respect of the concerned establishment has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications.”*

#### 12.4. Responsibility for Provident Fund Contributions of the Principal Employer

12.4.1. The PF Act casts an obligation upon the principal employer, who directly or indirectly employs employees through a contractor, to make Provident Fund contributions in respect of such employees.

12.4.2. Since an employer could be employing contract labourers through several contractors simultaneously, it can become practically difficult for a principal employer to deduct (where applicable) and remit the employer's and the employees' contributions (please see paragraphs 8.1.6. and 8.1.7.) with respect to all such contract labourers. This problem can be further aggravated by the fact that the contract labour assigned by a contractor to perform the work of the principal employer could be changed from time to time, for instance, such contract labour



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could be rotated periodically or replaced in case the principal employer is dissatisfied with the performance of the contract labour assigned to him. Moreover, the PF Act and the Schemes framed thereunder cast an obligation upon the employer to file appropriate monthly returns in respect of employees who qualify to become members of the Provident Fund and of employees leave the service of the employer during the preceding month. In the event the employer has a large contract labour workforce, compliance with the aforesaid filing requirements can become an onerous task. Furthermore, non-compliance with the aforesaid obligations can attract penal consequences for the principal employer.

12.4.3. A solution that is emerging to this problem is that the principal employer and the contractor agree contractually that the contractor shall be responsible for making the appropriate provident fund contributions for each of the contract labourers assigned by him to the principal employer. However, a risk inherent to this arrangement is the failure on the part of the contractor to deposit the requisite contributions with the Provident Fund authorities, in breach of his aforesaid contractual obligation. In such an event, in case of scrutiny by the relevant authorities, the non-compliance with the statutory provisions would be attributed to the principal employer (and the penal consequences, if any, would be imposed upon him), irrespective of the contractual arrangement between the principal employee and the contractor. Even if the contractual arrangement provides for an indemnity, the contractor would at best be able to compensate the principal employer for any monetary costs and losses incurred by the principal employer on account of non-deposit of contributions; however, such indemnity will not afford the principal employer a protection from any criminal proceeding (and penalties) that may ensue.

12.4.4. As a further safeguard, the contract between the principal employer and the contractor should contain a provision to the effect that the contractor shall produce the '*challans*' (i.e. documentary evidence of the deposit of the requisite contributions, duly endorsed / stamped by the Provident Fund authorities) before the principal employer on a monthly basis.

12.4.5. We were recently approached by a company, against which an enquiry had been initiated by the office of the Regional Provident Fund Commissioner ("RPFC") regarding certain violations noticed during an inspection. During the enquiry, the Provident Fund officials also raised the issue of the contract workers that the company had been engaging from time to time. Though the company itself had not been depositing Provident Fund contributions with respect to the aforesaid contract workers, it was able to produce *challans* evidencing the deposit of the necessary Provident Fund contributions (i.e. the employer's and the employees' shares) by the



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contractors. The RPFC's office dropped the issue upon the production of the *challans*. Hence, in this particular case the production of *challans* acted as a mitigating factor in favour of principal employer. However, since there is no statutory provision to this effect, it is important to remember that each RPFC may not take the same view.

## 12.5. Service bonds

12.5.1. It is not unknown for an employer to require an employee to execute a service bond in favour of the employer, guaranteeing that the employee will continue in the services of the employer for the term of the contract for service, failing which he shall be liable to compensate the employer up to the amount specified in the agreement. Such bonds are more common in cases where the employer sponsors (or at least subsidises) the cost of sending the employee on an educational or a training programme.

12.5.2. The validity of such service bonds has been disputed by the employees. However, Courts in India have upheld the validity of service bonds in cases where the employer has incurred a monetary expenditure on any specialised training with a view to enhance the skills of the employee. Two cases in this context are discussed below.

12.5.3. In one such case,<sup>23</sup> a suit was filed by the employer, Fertiliser and Chemical Travancore Ltd, for recovery of damages on the basis of a bond executed by some selected trainees to the effect that the trainees shall work for the employer for a minimum period of 5 (five) years after the completion of the training programme. In case of a breach of this condition by any of the trainees, Rs.10,000 (Rupees ten thousand) was to be paid as reasonable compensation for the damages likely to be incurred by the employer. The Kerala High Court held that a trainee who accepts the selection and joins training after entering into bond, binds himself to undergo the training and then accept regular appointment, if offered, for a minimum period of 5 (five) years, failing which he is liable to pay damages. The Court held that the training process involves time, energy and expenses for the employer. The employer will definitely incur a loss if any trainee breaches the conditions of the bond, since the employer is deprived of the expected service of a competent person, for which fresh selection and training may become necessary.

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<sup>23</sup> *Fertiliser and Chemical Travancore Ltd. v. Ajay Kumar and others*, 1990 LLR 711 (Kerala High Court).





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12.5.4. In *Toshniwal Brothers (P) Ltd. v. E. Eswarprasad and others*,<sup>24</sup> the appellant (Toshniwal Brothers (P) Ltd.) filed a suit for recovery of the amount spent and expenses incurred on the training of the defendant, upon his failing to serve the appellant as agreed for a minimum period of 3 (three) years. The Madras High Court held that “*legal injury could be safely presumed to have resulted in a case where the employer or the management concerned was shown to have either incurred any expenditure or involved itself into financial commitments to either give any special training either within the country or abroad, or in having conferred any special benefit or favour to the detriment*” of the employer in favour of the employee.

12.5.5. The Court further held that it would be sufficient to prove that an employee has been the beneficiary of any special favour or concession or training, at the cost and expense wholly or in part of the employer, and there has been a breach of the undertaking by the beneficiary of the same.

#### 12.6. Sexual harassment at the workplace

12.6.1. Traditionally, in India, sexual harassment was always prevalent at the workplace, but was not perceived as a problem since women were reluctant to complain about any instance of sexual harassment, fearing social stigma on account of the publicity that any such complaint would attract. However, in recent years, increase in the number of working women coupled with their economic independence and greater awareness of their rights, has brought the issue of sexual harassment into the open.

12.6.2. Sexual harassment is a criminal offence under the Indian Penal Code, 1860, and is punishable with a maximum imprisonment of 1 (one) year or fine or both. However, there is no statute in force in India which specifically deals with the issue of sexual harassment at the workplace. Therefore, the Courts in India while dealing with such cases of sexual harassment, have stepped in to fill the gap in legislation.

12.6.3. The Supreme Court of India in a landmark judgment, namely, *Vishaka v. State of Rajasthan*,<sup>25</sup> (the “**Vishaka Judgment**”), has laid down certain guidelines and norms which are required to be observed at all workplaces to help prevent sexual harassment of women at the workplace as well as punishment in case of any such occurrence. The Supreme Court had declared that pending enactment of suitable legislation, the directions in the Vishaka Judgment would be binding and enforceable in law.

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<sup>24</sup> 1997 LLR 500 (Madras High Court).

<sup>25</sup> AIR 1997 SC 3011.





12.6.4. Pursuant to the Vishaka Judgment, the Model Standing Orders framed under the IESO Act (please see paragraph 5.2.), have been amended to include ‘Sexual Harassment’ as an act of misconduct. However, since the Standing Orders are applicable only to workmen, and are only required to be adopted by “industrial establishments” employing more than 100 (one hundred) workmen, the Vishaka Judgment continues to be applicable to all workplaces, irrespective of the number of employees as well as the nature of the employer’s establishment.

12.6.5. The Vishaka Judgment defines sexual harassment to include:

*“... such unwelcome sexually determined behaviour (whether directly or by implication) as:*

- a) physical contact and advances;*
- b) a demand or request for sexual favours;*
- c) sexually coloured remarks;*
- d) showing pornography;*
- e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”*

12.6.6. The Vishaka Judgment lays down duties of the employer to prevent commission of acts of sexual harassment and provides the procedure for resolution / settlement / prosecution in case of occurrence of such acts. The employers are required to establish an appropriate, time-bound complaint mechanism in their respective organisations to redress any complaint made by a victim. Such mechanism should provide, where necessary, for a Complaints Committee, a special counsellor and other support services, including maintenance of confidentiality.

12.6.7. The Supreme Court has periodically examined the implementation of the Vishaka Judgment. For instance, in the case of *Medha Kotwal Lele & others vs. Union of India & others*,<sup>26</sup> the Supreme Court emphasised the need for implementation of its guidelines laid down in the Vishaka Judgment and issued a series of directions to the Central and the State Governments for proper and systematic implementation of the same.

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<sup>26</sup> Writ Petition (CRL.) No. 173-177 of 1999.



## CHAPTER IV

### CATEGORIES OF EMPLOYEES: IMPLICATIONS UNDER INDIAN LABOUR LAWS

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#### 13. Different types of employees

- 13.1. The workforce of any employer / entity in India (whether a company or a liaison office or a branch office; please see Chapter VII) would normally comprise predominantly of directly hired employees (whether workmen or not), who may be hired permanently or for a fixed term or on a temporary basis.
- 13.2. In addition, the employer could also be required to engage consultants as well as contract labour through a service provider / contractor (e.g. for provisions of house keeping services, gardening services) pursuant to an agreement in this regard.

#### 14. Applicability of laws

- 14.1. While hiring (or terminating the services of) directly hired employees, whether hired on a permanent or a fixed term basis or for a temporary period, all of the laws discussed in Chapter II, could potentially be applicable. In order to ascertain the applicability of each of the laws, the following factors *inter alia* need to be taken into consideration:
- (i) whether or not the employee in question is a workman;
  - (ii) the total number of employees in the establishment or office or factory;
  - (iii) the nature of business in which the employer is engaged, and the nature of work being performed by the employee in the course of his employment;
  - (iv) the monthly salary / wages of the employee; and
  - (v) the State in which the office / establishment / factory is located.

Each of the factors mentioned above has been discussed in Chapter II.

- 14.2. Consultants, such as auditors, etc., would normally be engaged on a principal-to-principal basis. Hence, no employment law would as such be applicable to the consultants so engaged, and the relationship between the consultant and the entity



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engaging him would be regulated by the contract for services. A sample of such agreement and the salient features / provisions of such agreement have been discussed in Chapter V.

- 14.3. Contract labour for procurement of certain services (such as housekeeping, gardening, security) would normally be hired by an entity / employer through a service provider / contractor, pursuant to an agreement on a principal-to-principal basis. As the principal employer, the person procuring the services has the ultimate responsibility of ensuring the provision of the applicable statutory benefits to the contract labour. For illustrations of the obligations of the principal employer vis-à-vis contract labour, please see paragraphs 6.3. and 12.4.
- 14.4. The sample agreement annexed to this Report (as **Annexure III**) can also be utilised for entering into a contract with a service provider / contractor, subject to the variations discussed in paragraph 19.



## CHAPTER V

### SAMPLE AGREEMENTS: EXPLANATION AND ANALYSIS

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#### 15. Introduction

15.1. An employer would be required to enter into appropriate types of agreements in order to hire / engage the workforce discussed in Chapter IV. Therefore, in this Chapter we are dealing with the types of agreements which would ordinarily be required for the aforesaid purpose. For ease of discussion, samples of some draft agreements<sup>27</sup> have been attached as Annexures at the end of this Report. These include:

- (i) standard employment agreement for hiring direct employees (attached as **Annexure I**);
- (ii) the variations required in an employment agreement with a managing director, as opposed to an agreement with any other employee (attached as **Annexure II**);
- (iii) standard consultancy agreement (attached as **Annexure III**), and
- (iv) the variations required in a standard consultancy agreement in order to contract with a service provider have been highlighted in **Annexure III** itself in the form of footnotes.

15.2. The issues to be considered in relation to the salient clauses of the aforesaid agreements are provided in a tabular format in the below-set paragraphs. Clauses of each of the aforesaid draft agreements which involve specific statutory issues or which need to be seen in a definite legal context have been cross-referenced and explained in the below-set tables for each agreement. The portions placed within square brackets in the agreements imply that such clauses (or portions thereof) are essentially commercial in nature, and hence would be determined in accordance with appropriate and applicable policy of the employer.

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<sup>27</sup> The sample agreements annexed to this report are merely by way of illustration, and appropriate legal advice should be obtained at the time of execution any such agreement to ensure that they address all the commercial concerns of, and negotiations between, the parties.



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15.3. In this context, it is important to mention that employers should also consider having an ‘Employee Handbook’ or an ‘Employment Policy’. Such a Handbook / Policy should lay down the rules and regulations which are expected to govern the employees’ conduct, deals with issues like:

- (i) overtime policy;
- (ii) leave entitlement and leave encashment for different grades of employees;
- (iii) procedures for termination of service;
- (iv) a brief description of matters that would be regarded as misconduct and the disciplinary procedures that would ensue in such case;
- (v) entitlement of different grades of employees in case of travel, boarding and lodging; and
- (vi) special benefits available to different grades of employees.

15.4. If an employer has such a Handbook / Policy, the employment agreement can have a clause to the effect that the terms and conditions of service set forth in Handbook / Policy (which can be attached as an annexure to the employment agreement) would be applicable to the employee. This would enable the employer to execute shorter employment agreements since only some special employee-specific clauses would then be required to be incorporated into the individual employment agreements. This would also enable maintenance of greater uniformity and clarity across all employment agreements entered into by an employer with its employees.

## **16. Standard Employment Agreement**

16.1. A draft of standard employment agreement which may be used by an employer to hire any employee (irrespective of their level) is attached as **Annexure I** to this Report. The employment of an employee is regulated by the terms and conditions contained in the said draft.

16.2. The issues required to be considered in relation to the said draft (in the manner explained in paragraph 15.2. above), are discussed in the table below:



S. No.	Clause No.	Explanation
1.	2	Appointment for a fixed term is usually advisable in case of workmen category of employees (as defined in paragraph 4.3.) for the reasons specified in paragraph 5.1.4.
2.	3.4	<p>Section 27 of the Indian Contract Act, 1872 (“<b>Contract Act</b>”) provides that every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void. Hence, the legal position regarding non-compete clause contained in the draft agreement may be analysed with reference to the two situations set out below:</p> <p>(i) <b><i>During the course of employment</i></b></p> <p>A negative covenant to the effect that during the term / currency of the contract, the employee will not engage himself in any trade or business or will not take up employment under any other employer (whether or not the functions he performs in such subsequent employment are similar to the functions performed under his prior employment) do not amount to a restraint of trade under Section 27 of the Contract Act.</p> <p>The employer can thus enter into agreements with its employees which restrict the employees from engaging in any professional activity outside his employment.</p> <p>(ii) <b><i>Post employment</i></b></p> <p>Restrictive covenants that prohibit employees from engaging in any competitive business post employment are not valid and enforceable, and are hit by Section 27 of the Contract Act.</p> <p>However, some employers, while being fully aware that post-termination non-compete clauses are non-enforceable under Indian law, still prefer to include such a restrictive</p>



		provision with a view to exert a psychological pressure on the employee.
3.	3.6	<p>Hours of work are determined in accordance with the local S&amp;E Act of the relevant State<sup>28</sup> (or the Factories Act, where applicable). In this context please see item (iii) of paragraph 6.2.2.</p> <p>There are also certain restrictions on the employment of young persons and women during certain hours. In this context please see item (vi) of paragraph 6.2.2.</p>
4.	3.7 and 4	These clauses enable an employer to transfer / relocate an employee between its various business divisions, and to transfer such employee to any place it deems fit (including transfers outside the country).
5.	5.2	In certain types of employment, the minimum wages are fixed statutorily (please see paragraph 7.2.). Certain benefits payable to an employee are also regulated statutorily, and have been discussed in detail under paragraph 8.
6.	7	The local S&E Act of every State statutorily provides for certain periods of privilege leave (i.e. paid leave or earned leave), sickness leave and casual leave. For the legal entitlements of an employee in connection with the same, please see item (v) of paragraph 6.2.2.
7.	8.1	In addition to the statutory sick leave entitlement as set out in Clause 8.1, it is not unknown for employers to provide additional 'Sickness and Incapacity' benefit (of about 30-60 days) to employees of senior levels. However, this is not a statutory requirement, and can be deleted if not in keeping with the employer's practices. In this regard, please also see Clause 13.5.

<sup>28</sup> Wherever the statutory issues explained in the table pertain to the S&E Act (which is a local legislation, and hence varies slightly from State to State), for the sake of convenience, the references to number of days, hours etc. given in this table are based on the provisions of the Delhi Shops and Establishments Act, 1954.





8.	9	<p>Since it is usually preferred by the employer that the distribution of bonus (as well as its amount) should be at the sole discretion of the employer (subject to the statutory norms in this regard as set out in paragraph 8.5.), this clause contains appropriate language to that effect.</p> <p>In view of the aforesaid, any language which could be interpreted to mean that the distribution of bonus is a binding obligation on the part of the employer or that the payment of any minimum amount is guaranteed, should be strictly avoided.</p>
9.	10	<p>This clause enables the employer to take benefit of, and establish ownership over, any intellectual property that may be discovered / created by the employee during his term of employment. It imposes an obligation upon the employee to execute all required documents and undertake all required actions to transfer ownership of such intellectual property to the employer.</p>
10.	11	<p>A restrictive covenant for the protection of confidential information of the employer would be valid and enforceable both during the course of employment and post employment. But the onus of proof to prove any breach of the confidentiality obligation (and thereby to enforce restraint) would be upon the employer, who would be required to prove definitely that the employee has acquired substantial knowledge of some Confidential Information, and is intending to use or disclose the same.</p>
11.	13	<p>Termination of employees of different categories is regulated by the ID Act and the local S&amp;E Acts. These have been discussed in detail in paragraphs 5.1.3. to 5.1.9 and item (ii) of paragraph 6.2.2.</p> <p>It is recommended that an employer dismissing / terminating the services of an employee should procure the execution of a 'receipt, release and waiver', acknowledging</p>



		receipt of the full and final termination payment(s) due to him and releasing the employer and its affiliates from any claims that he may have in connection with his employment, termination and matters incidental and related thereto. This would be of assistance to the employer in defending any claim that the employee may raise in the future against the employer or any of its affiliates.
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## 17. Employment Agreement with a Managing Director

17.1. An employment agreement for hiring a Managing Director is largely similar to agreements entered into with other managerial employees (as discussed in paragraph 14 above). The main difference in the agreement with a Managing Director would pertain to the nature and scope of his ‘Duties and Powers’. Certain other differences could also arise in the event that the Managing Director has been inducted as a director on the Board of the company.

For the sake of convenience, only those clauses that could change in a Managing Director’s employment Agreement have been set out in **Annexure II**.

17.2. It is also possible that the Managing Director will be paid benefits and provided amenities which are more favourable than those extended to other managerial employees. However, these are commercial, case-specific issues, and hence we are not dealing with them in this Report.

## 18. Standard Consultancy Agreement

18.1. A draft of an agreement that may be used to engage consultants, whether they are auditors, business consultants, etc. or to engage other service providers / contractors for provision of certain services (such as housekeeping, cleaning) by deploying an adequate number of contract labour, is attached to this Report and marked as **Annexure III**. The attached draft is generic in nature, and will be required to be amended / adapted in consonance with the nature of consultancy or other services sought to be procured by the employer pursuant to such agreement. For instance, in the event that an entity is engaging an advertising / promotion / marketing consultant, and such consultant is permitted to use the employer’s trademarks in the course of performing its contractual obligations under the agreement, the agreement must strictly delineate the parameters within which the consultant can use such



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trademarks and contain an obligation to return all trademark related material to the employer whenever requested, and in any event upon the expiry or termination of the agreement.

18.2. In addition, if the consultant is a company, then certain appropriate representations and warranties should also be obtained from such company. These include representations and warranties to the effect that:

- (i) the company is duly organised and validly existing under the laws of the country of its incorporation;
- (ii) the execution and delivery of this Agreement has been properly authorised;
- (iii) the company has full corporate power to execute, deliver and perform its obligations under this Agreement;
- (iv) this agreement constitutes a legal, valid and binding obligation enforceable in accordance with its terms;
- (v) this agreement does not conflict with or result in the breach of, or default under, any provision of its constitution documents or any term of any contractual arrangement to which the company is a party or under any provision of any laws to which it is subject;
- (vi) to the company's knowledge there are no actions, claims, proceedings or investigations pending or threatened against it and/or by it which may have a material effect on the subject matter of this agreement; and
- (vii) the company has (and shall maintain as valid and up-to-date) all licences, authorisations, consents, approvals and permits required under applicable laws in order to perform its obligations under this agreement, and shall otherwise comply with all laws applicable to the performance of those obligations.

18.3. The issues required to be considered in relation to the draft attached as **Annexure III** (in the manner explained paragraph 15.2. above), are discussed in the table below:



<b>S. No.</b>	<b>Clause No.</b>	<b>Explanation</b>
1.	2.2	Depending upon whether the services of the consultant are being engaged on an exclusive or on a non-exclusive basis, which will really be a business call, appropriate protective covenants are required to be incorporated in the agreement.
2	4.1	The consultant should be required to raise its invoice(s) as per a format mutually agreed between the client and the consultant (provision has been made in the draft agreement for incorporation of the format as Schedule III thereto), wherein a brief description of the services rendered and all related details (such as volume, standard) should be provided by the consultant. This will enable the client to assess the invoice(s) in the light of the services that are being charged therein.
3.	4.2	It would be advisable to attach a Schedule setting out the standards of accommodation, travel, etc. that the consultant may avail of.
4.	4.3	The agreement should clearly specify which party shall be responsible to bear the service tax on the services rendered by the consultant, if applicable.
5.	5	For the confidentiality obligations of the consultant, please see the comments at S. No. 10 in the explanation table for the draft of the standard employment agreement (as set out in paragraph 16.2.).
6.	9	For non-compete obligations of the consultant, please see the comment at S. No. 2 in the explanation table for the draft of the standard employment agreement (as set out in paragraph 16.2.).

## **19. Standard Service Provider Agreement**



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- 19.1. An agreement with a service provider would be quite similar to an agreement for engaging a consultant (as discussed under paragraph 18 above). The main difference in the agreement with a service provider would pertain to the nature and scope of ‘Services’ required to be rendered by the service provider, and the manner in which they are rendered (for example, by way of deployment of contract labour on the premises of the principal employer, or by way of offsite performance of services).

The variations required in a standard consultancy agreement in order to contract with a service provider have been highlighted in **Annexure III** itself in the form of footnotes.

- 19.2. It is also possible that a few other commercial, case-specific changes will be required to be made. However, since these would be negotiated between the parties at the time of execution of the agreement, it is not possible to address such issues at this stage.



## **CHAPTER VI**

### **HIRING A NEW EMPLOYEE: POINTS TO BE CONSIDERED**

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#### **20. Issues to be considered while hiring a new employee:**

- 20.1. The employer must exercise due care at the time of recruitment of new employees. Before proceeding with recruitment, the employer must assess the man-power requirement in the organisation. The employer must also broadly identify the nature of duties and functions that are to be performed by the potential employees.
- 20.2. The level / type of professional qualifications, skills and experience that would be commensurate with the nature of business activities undertaken by the organisation as well as the role intended to be assigned to the potential employee must also be considered.
- 20.3. After assessing the requirements of the organisation, the employer may advertise the vacancies / posts which need to be filled up. The advertisement could be published in widely circulated newspapers, business or trade magazines, internet portals, etc. It is also a known practice for employers to engage human resource consultants for the purposes of recruiting employees. In case experience is not a criterion, employers can also recruit fresh graduates from colleges (in such cases, potential employers should approach the concerned academic institution well before the end of the academic year, and enrol to participate in campus recruitments). In India, word of mouth publicity also works.
- 20.4. The advertisement should contain a brief description of the employer, details regarding the vacancy and job specifications, required qualifications and experience / skills / knowledge, an indication as to remuneration and location, etc. The employer should ensure that the advertisement clearly sets out the necessary details to attract the right candidates.

#### **21. Interview:**

- 21.1. The recruitment process should be clearly explained to the potential employees. Upon receiving applications (whether in response to direct advertisement or through human resource consultants), the employer may conduct tests and/or preliminary interviews for the purpose of short-listing candidates for the final interview.



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- 21.2. After the short-listing process, relevant individuals from the employer's organisation can conduct interviews of the shortlisted candidates. The interviewers should not only ask pertinent questions to assess the knowledge and skill levels of the candidate and their suitability for the job requirements, but should also provide the candidate sufficient information about the organisation, its culture, its expectations, etc. Even in cases where a candidate has been finalised, if considered necessary, an extra round or two of meetings should be held till both, the employer and the potential employee, are satisfied that they match each other's requirements and expectations.
- 21.3. While conducting an interview, the employer should avoid asking questions that may be indicative of discrimination on the grounds of sex, caste, creed or religion. However, there is no restriction on questioning the interviewee about his knowledge, skills, experience and ability to handle the job.

## **22. Offer of employment:**

- 22.1. If the employer is desirous of employing a particular candidate on the basis of his application and job interview, an appropriately drafted offer of employment may be issued to the prospective employee. The offer of employment should be drafted in such a manner that any and all conditions precedent to being offered permanent employment with the employer are clearly stated therein. These conditions precedent may include background checks, medical examination, acceptance of terms of employment, etc. Further, in case of background checks, it is prudent for the employer to obtain the prior consent of the candidate so as to minimise the chances of the candidate raising a dispute as to breach of privacy.
- 22.2. The terms and conditions of employment must be separately and clearly stated in the offer of employment. The offer of employment should be subject to the acceptance by the candidate.

## **23. Contract of employment:**

- 23.1. The final step would be the contract of employment<sup>29</sup>. Though oral contracts are also permissible under Indian law, the normal, popular and recommended practice is to enter into written contracts stating clearly the terms and conditions of

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<sup>29</sup> However, it is quite common for the final contract as well as the offer of employment to be consolidated into one document.





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employment. Once the contract of employment is signed and accepted by both the employer and the employee, the parties are bound by the terms of the contract.

- 23.2. Since the contract of employment governs the rights and obligations of the employer and the employee, drafting of the contract of employment with due diligence assumes great significance.



## CHAPTER VII

### CATEGORIES OF ORGANISATIONS: IMPLICATIONS OF LABOUR LAWS

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#### 24. General

A foreign company proposing to undertake business operations in India may either incorporate a company under the Companies Act, 1956, or set up a branch office or a liaison office.

#### 25. Company

- 25.1. A foreign company may either incorporate a wholly owned subsidiary or a joint venture in India. With respect to employment and labour laws, the obligations and compliances applicable to such a company would depend on the nature of activity undertaken by the company, the number of employees, and the State in which the company has been incorporated and/or has offices / establishments / factories.
- 25.2. The factory of a company engaged in manufacturing activities, for instance, would be required to comply with the provisions of the Factories Act (as explained in paragraph 6.1.) while its corporate office would be required to comply with the local S&E Act (as explained in paragraph 6.2.).
- 25.3. In case of a company engaged in trading activities, or a company providing services, the labour law compliances would depend on the nature of activity performed by the company. For example, if such company falls under the definition of a commercial establishment, it will have to comply with the requirements under the local S&E Acts.
- 25.4. Irrespective of the nature of the activity performed by the company, it would be required to comply with a whole host of beneficial legislations provided it satisfies the applicable criteria in terms of number of employees, etc. Some such legislations are:<sup>30</sup>
- (i) ID Act
  - (ii) Wages Act;

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<sup>30</sup> For the applicability criteria of these legislations, please see Chapter II.



- (iii) PF Act;
- (iv) PG Act; and
- (v) MB Act.

## **26. Liaison office / Branch office**

- 26.1. Setting up of a branch office or a liaison office is regulated by the Foreign Exchange Management (Establishment in India of Branch Office or Other Place of Business) Regulations, 2000 (“**Regulations**”) issued under the Foreign Exchange Management Act, 1999. A branch office or a liaison office can undertake only those activities as are permitted under the Regulations.
- 26.2. The role of a liaison office is restricted to collecting information about possible market opportunities and providing information about the company and its products to prospective Indian customers. A liaison office is permitted to undertake only the following activities:
- (i) representing the parent / group companies in India;
  - (ii) promoting export and import from and to India;
  - (iii) promoting technical / financial collaboration; and
  - (iv) acting as a channel for communication.
- 26.3. Foreign companies which are engaged in manufacturing and trading activities abroad are allowed to set up branch offices in India. A branch office can be set up only for the following purposes:
- (i) export / import of goods;
  - (ii) rendering professional or consultancy services;
  - (iii) carrying out research work, in which the parent company is engaged;



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- (iv) promoting technical or financial collaboration between Indian companies and the parent or overseas group company;
- (v) representing the parent company in India and acting as buying / selling agent in India;
- (vi) rendering services in information technology and development of software in India;
- (vii) rendering technical support to the products supplied by parent / group companies; and
- (viii) foreign airline / shipping company.

26.4. With respect to labour legislations applicable to liaison offices and branch offices, it is pertinent to note that these are offices (or establishments as defined under certain legislations, such as the PF Act). Hence, the applicability of labour laws to such offices will not be exempted or varied merely because of the fact that these are offices of a foreign company. Therefore, depending on the number of employees employed by these offices as well as the States in which these offices are situated, several labour legislations will be applicable to them. These legislations include the local S&E Act as well as the legislations mentioned in paragraph 25.4. above.<sup>31</sup>

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<sup>31</sup> For the applicability criteria of these legislations, please see Chapter II.



## **CHAPTER VIII**

### **CONCLUSION**

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This Report deals with the salient features and trends of employment prevailing in India, and the major issues to be considered by an employer in India, depending on the nature, size and location of the business as well as the nature of the employees' duties and responsibilities.

Special attention should be given to these matters as they could result in liabilities not only for the employer but also, in cases where the employer is a company, for officers / directors of the company (as mentioned in paragraph 10).

*The contents of this Report are based upon our interpretation of the present provisions of the relevant labour statutes and may need review upon any future change in law, issue of any clarification, notification, or any decision of judicial / quasi-judicial authorities. The implications in this Report are purely a matter of interpretation and are not binding on any regulatory authorities.*

*We have no responsibility to update this Report for events or circumstances occurring after the date of this Report, unless specifically requested.*

*While this Report sets out the broad legal regime regulating employment, it is recommended that any party relying on it should also obtain independent legal advice in order to determine / address any specific issues / obligations that may be applicable to it against the background of the individual facts and circumstances.*