



## JSA Newsletter Employment Law

June 2024

Transition or transfer of employees emanating from business transfer or corporate reorganisations throws open very interesting commercial, organisational and statutory considerations. The spectrum of aspects to consider for the transferor employer and transferring employees could be redundancies arising out of the arrangement, consolidation and structuring payouts and benefits, dealing with employee transition related sensitivities, and the like. Conflicting judicial precedents on the subject can further complicate negotiations and decision making processes, depending on the transaction structure.

This edition of the JSA Employment Newsletter for the months of May and June 2024 discusses key high-level employment related considerations in case of business transfers (in the private sector) in India, and also provides a brief roundup of some key regulatory developments through amendments, notifications, orders and other updates in the employment space in India. We also discuss some recent judicial precedents across several employment legislations.

### Transfer of business undertaking: key employment aspects

In the backdrop of growing business reorganisations in India, managing employee mobility and resultant costs and liabilities associated in business transfers, assumes significant importance. Strategic business decisions can be influenced by employee demands impacting their mobility and employment continuity, especially when backed by trade union involvements. Set out below are some key considerations to note in the context of transfer of business undertakings in India, with significant employee involvement.

### Laws governing rights of employees in business transfers

Employment related laws in India are governed by both Central and State laws, as part of the federal governance structure. These include laws on benefits, compensation, disputes, trade unions, work hours, social security, health and safety and cessation. Amongst other statutes, the Industrial Disputes Act, 1947 (“**ID Act**”) and the state-specific Shops and Establishments Acts (“**S&E Acts**”) are relevant in this context. Stipulations under these statutes, amongst others, in terms of employee rights, protections, terminal benefits and restrictions are critical to consider in business transfer cases.

### Employee movement in business transfers: the modes

1. **Automatic transfer:** No labour legislation in India mandates automatic transfer of employees in case of business transfers. However, some Indian courts have interpreted Section 25FF of the ID Act as enabling an automatic

transfer (that is, without prior consent) of 'workman' category employees in limited situations during transfer of an 'entire business undertaking'. This is linked to satisfaction of the following conditions:

- a) transfer is effected with continuity of service, or without service tenure interruption;
- b) transferee employer provides 'no less favourable' terms of employment to the workers; and
- c) transferee employer recognises period of employment with transferor for payment of tenure linked benefits.

Satisfaction of these conditions is only an enabling provision and not obligatory in nature. In transactions where the above conditions are satisfied, it is arguable, based on judicial precedents that 'workmen' category employees can be transferred without prior consent. However, even when all conditions of Section 25FF of the ID Act are met, the position on whether this overrides the prior consent requirement from workman category employees, has been debated by several Indian courts. These deliberations have been conflicting. Considering this, automatic transfer approach is not often the default or preferred method for employee movement, but is typically considered in cases involving trade unions.

Consent requirement triggers where (a) change in conditions of service, and (b) transfer of 'non-workman' category employees (typically those performing supervisory and managerial job functions), are envisaged. To avoid potential disputes and deficiencies linked to employee movement, organisations nevertheless tend to consider a consent-based route to transfer employees, particularly when revisions to service conditions are envisaged. In doing so, acquiring employer enjoys the flexibility to align transferring employees' service conditions to its existing practices.

2. **Separation and re-hire:** Under this approach, employees separate from the transferor employer (i.e., transferor employer initiated termination, or employee initiated voluntary resignation), and are simultaneously offered employment by the transferee employer. Employee dues are settled by the transferor employer. This approach results in a 'break in service' impacting an employee's tenure linked benefits (for example, gratuity) and hence, frowned upon by employees. However, from commercial perspective, a separation and re-hire method can in some cases, insulate the transferee employer from past liabilities (or, benefits) and hence, is generally favoured when the transferee employer is reluctant to assume legacy liabilities. Service conditions including recognising an employee's past services for limited aspects, remains subject to commercial agreement between the parties.
3. **Tripartite arrangement:** A consent based transfer involving execution of a 'tripartite transfer agreement' ("TTA") or similar agreement amongst the transferor employer, transferee employer and employee, is also another approach. This is typically considered in instances where transfer of only a vertical or unit is envisaged, as opposed to the entire business undertaking. An employee's service continuity is usually recognised and resultantly, severance obligations are unlikely to trigger on the transferor. Entitlements, benefits and obligations associated with employment tenure stands transferred to, and assumed by the transferee. Backed by the comfort that such a transfer is consent-based, parties often explore alternate structures – for instance, recognising service continuity for certain benefits, and not for all. However, to ensure a smooth transition and to incentivise employees to accept the transferee's offer, favourable terms of employment are typically offered, although not a mandate.

## Quick Q&A based on the above approaches

### 1. Timeline for effecting employee transfers.

*None, statutorily. In consent-based approaches, employment offers are rolled out sufficiently in advance, prior to the proposed transfer date. Practically, at least 2 (two) or 3 (three) weeks' notice is provided so that employees have reasonable time to consider and/or accept the offer. Where there are no changes to service conditions, this timeline can be shorter. Further, depending on the transferor's existing employee benefit structures, parties should be cognisant of timelines to factor in a revision/adaptation of similar benefits by the transferee, which may be time consuming, depending on the structure.*

## 2. **Employee liabilities passing on to the transferee.**

*In slump sale structures where the entire business undertaking transfers as a going concern, pre-transfer employee liabilities may accrue on the transferee. Social security regulations such as the Employees State Insurance Act, 1948 and the Employees Provident Fund and Miscellaneous Provisions Act, 1952 provide for joint and several liability on transferees (acquirers) in case of establishment transfers. Parties often contractually agree on the pre-transfer and post-transfer liabilities. It is common in contracts to have transferor indemnify the transferee for any claims or liability that relates to the pre-transfer period.*

*Where service continuity is recognised, transferee assumes identified liabilities associated with employment tenure, for instance in cases of gratuity (tax considerations arise in cases of transferor's funded gratuity managed by a trust), leave encashment (which is not tenure linked; and hence, contractually parties may agree on who would bear costs towards accumulated privilege leaves), retrenchment compensation (transferee assumes liability towards retrenchment compensation payment to workman category employees at the time of separation, based on total years of service), etc.*

## 3. **Role of anti-discrimination laws, if any, impacting business transfers.**

*Discrimination on grounds of gender, caste, sex, religion, disability or other protected categories should be avoided even in business transfer arrangements. Under applicable laws, women employees cannot be terminated while on maternity leave. If an impacted employee on maternity leave chooses to opt out of the transfer, unless mutually agreed between them that the employer would bear costs for the remaining maternity benefits, her employment may be terminated only at the end of her maternity leave. Employees at the receiving end of inter alia sickness benefits or disablement benefits under the Employees State Insurance Act, 1948 are protected from dismissal during the period of that benefit.*

## 4. **Other general considerations.**

*Transactions involving setting up of new establishment in India to house the transferred employees can result in the transferee being subject to local statutory permits and registration requirements under several employment regulations. Prior to deal closing, parties should be cognisant of practical timelines which may impede transaction (and consequent employee movement) progress. In some cases, establishment linked labour registrations would either need to be surrendered and re-applied, or transferred to the transferee, depending on local/state-specific requirements. The new Labour Codes amalgamating various employment laws in India are yet to come into force, however, once enforced, employment considerations may need to be reassessed in case of business transfers.*

## **Regulatory Updates**

### **Karnataka exempts IT/ITeS establishments from the Industrial Employment (Standing Orders) Act, 1946**

In a significant step towards fostering an environment of flexibility for businesses, the state government of Karnataka on June 10, 2024 has once again exempted certain categories of establishments including in the information technology ("IT") / IT-enabled services ("ITeS") sector from applicability of the Industrial Employment (Standing Orders) Act, 1946 for an additional term of 5 (five) years. This remarkable development not only empowers establishments to implement global policies but also fuels a business-friendly environment by streamlining operations in the state. By extending the exemption, the government once again paves the way for a more efficient, agile, and adaptable work environment, aligning with the evolving needs of modern businesses. However, employers will need to comply with certain pre-conditions in order to avail this exemption.

For a detailed analysis, please refer to the [JSA Prism of June 17, 2024](#).

## Unlocking operational flexibility for technology companies in Telangana: Key highlights of the latest exemption

The state government of Telangana has on June 7, 2024 renewed an exemption under the Telangana Shops and Establishments Act, 1988, for a further period of 4 (four) years, that is, up to May 29, 2028, offering greater operational flexibility to businesses, while simultaneously ensuring that employee well-being is a top priority. This move aims to foster a conducive environment for the sector to thrive by providing relaxations on inter alia working hours, overtime limits, work performed on national/festival holidays, engagement of young persons and women in night shifts and more. Further, in a nod to the digital age, employers have now been permitted to maintain statutory registers in soft copy, streamlining operations in today's fast-paced world. While providing leeway on specific operational aspects, the relaxation comes with a set of pre-defined conditions aimed at safeguarding the interests and well-being of employees. For a detailed analysis, please refer to the [JSA Prism of June 20, 2024](#).

## Employees' Provident Fund Organisation issues temporary measure to settle physical claims and benefits of beneficiaries in case of death

Ministry of Labour & Employment, Government of India *vide* circular dated May 17, 2024 allowed processing of physical claims without seeding Aadhaar as a temporary measure to confirm membership of the deceased and genuineness of claimants (*with the due approval of the OIC in an e-office file duly recording details of verification done*). The directions were issued since timely release of benefits to beneficiaries were delayed in case of death due to inaccurate/incomplete member details in Aadhaar, which could not be updated or corrected after death of the member. These directions will apply only to cases where details of members are correct in universal account number, but inaccurate or incomplete in Aadhaar database.

## Government of Puducherry revises wages of Full Time Casual Labourers ("FTCL") in various government departments

Finance Department, Government of Puducherry *vide* order dated May 13, 2024 revised wages of persons engaged as FTCL (for 6 (six) categories) in various departments in the Union Territory of Puducherry effective from January 1, 2024. This was done subsequent to increase in rate of dearness allowance from 46% to 50% in respect of regular government employees, drawing pay as per 7<sup>th</sup> Central Pay Commission.

## Government of NCT of Delhi issues order regarding deposit of license fee by private placement agencies

Office of Commissioner (Labor), Government of NCT of Delhi *vide* order dated May 2, 2024 directed private placement agencies providing workers, to deposit license fee pertaining to services of grant of license amounting to INR 5,000 (Indian Rupees five thousand) under the Contract Labour (Regulation and Abolition) Rules, 1970. The service of grant of license to private placement agencies providing workers is available on e-district portal.

## Case Law Ratios

## Supreme Court rules, acceptance of resignation leads to termination of employment; communication of acceptance to the employee is irrelevant

In ***Shri Manohar Bande v. Utkranti Mandal & Ors***<sup>1</sup>, the Supreme Court held that non-communication of acceptance of resignation letter by the employer does not qualify as a ground to challenge termination of employment. Appellant, being a school teacher, tendered his resignation to the school management and consequently, the resignation was accepted. The appellant contended that his termination was invalid as acceptance of resignation was not communicated to him, and he submitted his letter seeking withdrawal of resignation before the communication of acceptance of the resignation.

Supreme Court observed that the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 does not lay down any strict guidelines about how the resignation letter should be accepted. Further, placing reliance on *North Zone Cultural centre v. Vedapathi Dinesh Kumar*<sup>2</sup>, the Supreme Court held that contention raised by the appellant about withdrawal of resignation before communication of its acceptance does not hold water.

## **Bombay High Court held that supervision of non-direct employees of an establishment qualifies as supervisory capacity**

In ***Mr. Jobi Joseph v. M/s Cadbury India Limited & Anr.***<sup>3</sup> the High Court of Judicature at Bombay held that merely because an individual supervises activities of persons who are not direct employees of an establishment does not and cannot mean that he ceases to be employed in supervisory capacity. The petitioner, a senior sales executive, contended that supervision by petitioner of employees of distributors does not mean that he was employed in supervisory capacity.

The court held that the nature of duties performed by a person would determine whether his employment is in supervisory capacity and not to determine whom he supervises, which is irrelevant. Thus, the real test for determining supervisory nature of duties is not whether persons on whom supervision is exercised are employees of establishment or not, but the nature of duties attached to the job. Further, an individual acting in the capacity of manager or supervisor may have to supervise activities of either contract workers or transporters.

## **Supreme Court: an employee cannot dictate terms of employment to the employer**

In ***M/s Bharti Airtel v. A.S. Raghavendra***<sup>4</sup>, the respondent, who was appointed as the Regional Business Head for South, filed a petition alleging he was coerced into resigning. The Labour Court, after analysing the facts, concluded that the ID Act did not apply to this case, as the respondent performed managerial roles and did not qualify as a “workman”. A division bench of the Karnataka High Court overturned this judgment, holding that the respondent’s lack of power to appoint, dismiss, or conduct disciplinary inquiries meant he fell under the definition of a “workman”. Supreme Court on April 2, 2024, upon analysing the resignation letter, held that mere mention of “not of his free will” would not mean respondent was forced to resign. Further, a person, in the employment of any company, cannot dictate terms of his employment to his employer. He has channels of venting her/his grievances but ultimately, it is the view of the competent authority within the organisation that will prevail with regard to his appraisal/rating. The Supreme Court also held that nature of respondent’s duties did not bring him within the ambit of a “workman” as defined under the ID Act. Consequently, the judgment of the Labour Court was revived and restored.

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<sup>1</sup> Civil Appeal No. 5355 of 2024.

<sup>2</sup> (2003) 5 SCC 455

<sup>3</sup> Writ Petition No. 18486 of 2012.

<sup>4</sup> Civil Appeal No. 5187 of 2023.



## Employment Practice

JSA has a team of experienced employment law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our key areas of advice include (a) advising on boardroom disputes including issues with directors, both executive and non-executive; (b) providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance; (c) providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals; (d) advising on compliance and investigations, including creating compliance programs and policy, compliance evaluation assessment, procedure development and providing support for conducting internal investigations into alleged wrongful conduct; (e) designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs; and (f) advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

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