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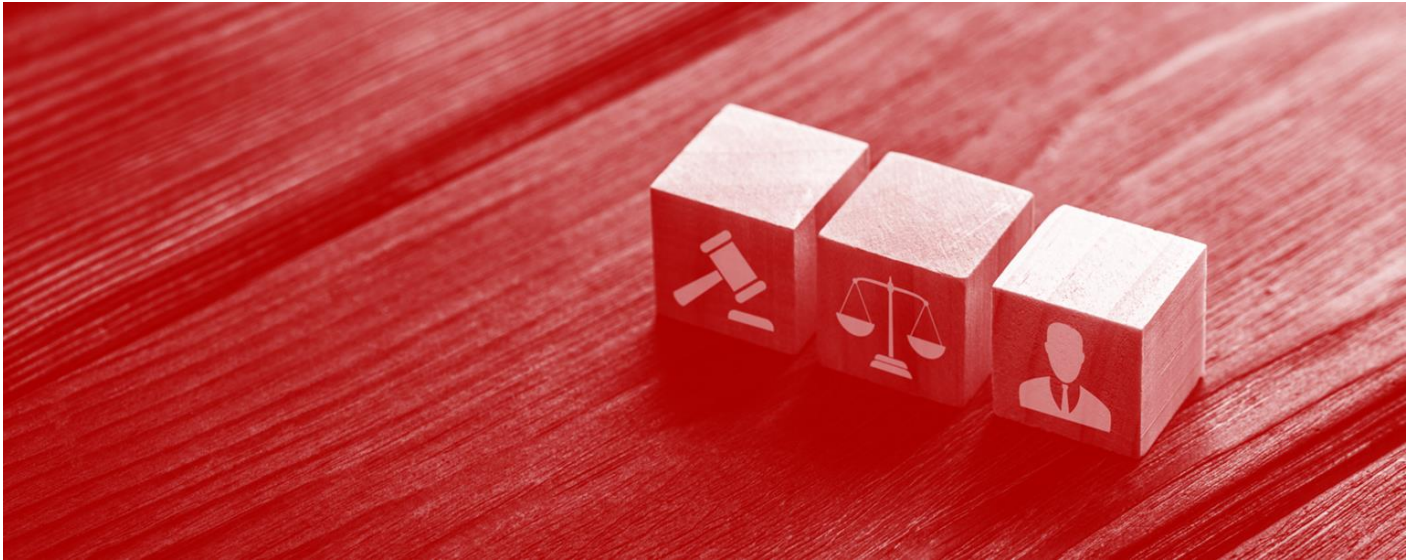


Knowledge Management

Semi-Annual Employment Law Compendium 2024

January - June 2024

Semi-Annual Employment Law Compendium 2024



This Compendium consolidates all the key regulatory developments, notifications, orders, judicial precedents and other updates in the labour and employment space in India, during the calendar period from January 2024 till June 2024. It also captures the JSA insights on:

1. Talent hiring through an 'Employer of Record' ("EOR"); and
2. Transfer of business undertaking: key employment aspects.

Regulatory Updates

Medical Termination of Pregnancy (Amendment) Rules, 2024

Under Rule 3B and in Form E of the Medical Termination of Pregnancy Rules, 2003, the word 'mental retardation' is substituted with 'women with intellectual disability'.

Employees provident fund organisation issues circular removing Aadhaar from

list of acceptable documents as a date of birth proof

Employees' Provident Fund Organisation ("EPFO") vide circular dated January 16, 2024, referring to Unique Identification Authority of India ("UIDAI") directive (circular no. 08 of 2023), notified removal of Aadhaar from the list of documents as a date of birth proof (as mentioned in Table-B of Annexure-1 of Joint Declaration – Standard Operating Procedure). The UIDAI in its directive took cognizance of the Aadhaar (Enrolment and Update) Regulations, 2016, the office memorandum dated December 20, 2018, issued by Ministry of Electronics and Information Technology and the judgement of the Hon'ble High Court of Bombay in the case of State of Maharashtra v. UIDAI and Ors¹, and concluded that Aadhaar number can be used to establish identity of an individual subject to authentication. However, cannot be used as a proof of birth. UIDAI further clarified on April 23, 2024, and stated that it is within the discretion of Aadhaar user agencies and e-KYC user agencies to determine how they utilize Aadhaar for purposes relating to establishing the date of birth. While the Aadhaar (Targeted Delivery of Financial and Other Subsidies,

¹ Criminal Writ Petition No. 3002 of 2022

Benefits and Services) Act, 2016 (“**Act**”) does not explicitly address the use of Aadhaar for verifying date of birth, the UIDAI regulations outline procedures for managing such information and individuals are required to provide supporting documents or information related to their date of birth during enrolment or update processes.

EPFO 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 officer in charge 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.

EPFO revises timeline for employers to update wage details regarding pension on higher wages

EPFO *vide* press release dated January 3, 2024, has extended the timeline for employers to update wage details regarding pensions on higher wages until May 31, 2024 (previously December 31, 2023). This extension is in response to representations made by employers and employers’ associations and takes into account the more than 3,60,000 (three lakh sixty thousand) pending applications for validation of options/joint options.

EPFO imposes restrictions on deposit and credit transactions in Paytm Payment Bank Accounts

EPFO *vide* circular dated February 8, 2024, advised all field offices to refrain from accepting claims associated with bank accounts in Paytm Payment Bank Limited

(“**PPBL**”) with effect from February 23, 2024. EPFO issued this circular in light of Reserve Bank of India’s press release dated January 31, 2024, imposing restrictive actions against operations of PPBL due to persistent non-compliances and material supervision concerns, revealed by the Comprehensive System Audit report and subsequent compliance validation report of external auditors.

ESIC rolls out circular for issuance of e-Pehchaan Card to all insured persons

In its drive to digitize internal and external processes and ensure efficiency in operations, especially services to employers and Insured Persons (“**IPs**”), the Employees’ State Insurance Corporation (“**ESI**” or “**ESIC**”) launched project ‘Panchdeep’. Subsequently, the Ministry of Labour and Employment made issuance of e-Pehchaan card to all IPs mandatory. ESIC *vide* circular dated February 5, 2024 issued directions to all regional offices/sub-regional offices to issue suitable directions to all employers under their respective jurisdictions to download and handover, to the respective employees and IPs, e-Pehchaan cards from the ESI portal, immediately after registration under the ESI scheme. Employers are also required to ensure that hard copy of e-Pehchaan card is given to all existing IPs.

ESIC issues revised guidelines and standard operating procedure for home delivery of drugs

ESIC *vide* circular dated January 10, 2024, revised the guidelines and Standard Operating Procedure (“**SOP**”) relating to home delivery of drugs to IPs and beneficiaries. ESIC medical colleges, on a pilot project basis, are authorised to provide the facility of home drug delivery to ESI beneficiaries. These services are limited to the districts as decided by the dean/medical superintendent of the concerned hospitals.

1. **Eligibility:** (a) all senior citizens with chronic illness entitled for treatment with ESIC, receiving consultations from the hospital and prescribed for more than 30 (thirty) days, (b) all ESIC beneficiaries, ESIC employees and their dependents, pensioners seeking consultation through e-Sanjeevani; and (c) handicapped and bed ridden patients on medication for chronic disease.

2. **Hospital's responsibility:** Hospitals are required to float a bid on the Government e-Marketplace (GeM) portal for procuring doorstep delivery services for drugs, including packaging, collection and electronic notifications to the beneficiary via SMS/WhatsApp regarding dispatch and delivery confirmation. The medical stores' in-charge are to act as nodal officer to monitor smooth functioning of the delivery process. Further, each hospital is required to adopt its own SOPs basis the process flow requirement and local needs, guidance for the vendor, pharmacist, other stake holders and grievance redressal system.
3. **Vendor's responsibility:** The vendor must ensure that the delivery of the drugs should be done through one time password based/signature of the authorized recipient. The vendor will be responsible to send a SMS/WhatsApp notification to the beneficiary intimating: (a) parcel tracking number along with the link of tracking webpage; and (b) delivery of drug packet information. Additionally, vendors are required to ensure maintenance of cold chain as and when required for certain drugs.

ESIC notifies commencement date for extension of medical benefits under the Odisha Employees' State Insurance (Medical Benefit) Rules, 1958

The Director General of ESIC *vide* notification dated March 7, 2024, designated March 1, 2024, as the commencement date for extension of medical benefits outlined in regulation 95-A of the said regulations and the Odisha Employees' State Insurance (Medical Benefit) Rules, 1958 to families of insured individuals residing in all regions of Nayagarh and Nabrangpur districts in Odisha.

Union Government issues notification mandating beneficiaries of various schemes to furnish proof of possession of aadhaar number or undergo aadhaar authentication

The Department of Empowerment of Persons with Disabilities *vide* notification dated February 29, 2024, mandated beneficiaries of various schemes offered by Government of India, to furnish proof of possession of

aadhaar number or undergo aadhaar authentication. It clarifies that the use of aadhaar as an identity document for delivery of services/benefits/subsidies simplifies the government delivery processes, brings in transparency and efficiency, and enables beneficiaries to get their entitlements directly in a convenient and seamless manner by obviating the need to produce multiple documents to prove one's identity.

Central government amends the Apprenticeship Rules, 1992



The Ministry of Skill Development and Entrepreneurship *vide* notification dated April 19, 2024, issued the Apprenticeship (Amendment) Rules, 2024 ("**Apprenticeship Amendment Rules**"), with effect from April 19, 2024, to amend certain provisions of the Apprenticeship Rules, 1992. Apprenticeship Amendment Rules provides for, inter alia, (a) minimum duration of apprenticeship to be of 3 (three) months and maximum being 2 (two) years; and (b) minimum qualification required for such apprenticeship varies across group types, but now accommodates people who have minimum qualification of passing 8th and 10th for most trade groups.

District Office, Gurugram issues Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 compliance checklist for government and non-government organizations

With the intent to promote and ensure compliance under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH Act**") by government and non-government organisations in Gurugram, the office of Additional Deputy Commissioner, Gurugram-cum-District Officer

issued a POSH Act compliance checklist on December 20, 2023 ("**POSH Checklist**") as part of the annual report submission.

The POSH Checklist provides a comprehensive list of compliances and requirements for preparing the annual report under the POSH Act including *inter alia* (a) formulation and implementation of prevention of sexual harassment policy, (b) display of notices informing employees about the organization's stance on sexual harassment and consequences of indulging in such acts, (c) awareness programs to sensitize employees and provide assistance to the harassed individual, (d) constitution and composition of Internal Committee ("**IC**"), (e) compliance with IC's recommendations in a timely manner, (f) statement under Rule 8 of Companies (Accounts) Rules, 2014 confirming compliance with the POSH Act.

Meghalaya Labour Department issues corrigendum regarding written consent from female employees willing to work from office after work hours

Department of Labour, Employment & Skill Development, Meghalaya vide corrigendum dated January 10, 2024, amended its notification dated July 19, 2023, directing all establishments registered under the Meghalaya Shops and Establishment Act, 2003 to seek written consent from female employees in case they are required to work after 7 p.m. Further, adequate safety and security arrangements of female employee should be made during working hours and employers should ensure that they reach home safely after work.

The Kannada Language Comprehensive Development (Amendment) Act, 2024

The Department of Parliamentary Affairs and Legislation Secretariat vide notification dated February 26, 2024, notified the Kannada Language Comprehensive Development (Amendment) Act, 2024 ("**KLCD Amendment Act**") which amends section 7 and section 17 of the Kannada Language Comprehensive Development Act, 2022. Section 7 is amended to include the 'Secretary, Kannada Development Authority' to be the convener of the committee. Further, section 17 of the KLCD Amendment Act mandates commercial, industrial, and

business entities, among others, functioning with approval and sanction of the government or local authorities, to ensure that their name board displays 60% in Kannada language, and that Kannada should be displayed in the upper half of the name board. Government of Karnataka, vide notification dated March 11, 2024, fixed March 12, 2024, as the effective date for the KLCD Amendment Act.

Labour Commissioner, Assam directs retrospective application of revised rate of variable dearness allowance

The Office of the Labour Commissioner, Assam vide notification dated February 8, 2024, prescribed rates at which variable dearness allowance ("**VDA**") is to be computed for certain categories of workmen, which are not covered under the Minimum Wages Act, 1948 and where workmen employed by contractors do not perform same or similar nature of work as done by workers directly employed by principal employers. Notably, the notification focuses on the following workmen categories: (a) highly skilled / account or equivalent to accountant, (b) skilled (Industrial Training Institute ("**ITI**") certificate holder or equivalent/clerk), (c) skilled (other than ITI certificate holder), (d) semi-skilled and (e) unskilled workman. The revised VDA rates are based on calculations by the Director of Economics and Statistics, Assam, which applies retrospectively from July 1, 2023, for a period of 6 (six) months, i.e. till December 31, 2023.

State government of Gujarat notifies aadhaar as a crucial identity document for multiple schemes

The Labour, Skill Development and Employment Department, State Government of Gujarat vide multiple notifications dated February 5, 2024, emphasised on utilization of aadhaar as a crucial identity document for the following schemes:

1. the mukhyamantri bhagyalaxmi bond scheme;
2. the educational assistance scheme; and
3. the special coaching class scheme.

State government of Haryana prescribes conditions for factories seeking exemption on employing women during night shift

For ensuring women's safety and security, the Governor of Haryana *vide* gazette notification dated March 14, 2024, prescribed conditions for factories seeking exemption in employing women during night shift, *i.e.* between 7 PM to 6 AM. Any such exemption sought by a factory under the Factories Act, 1948 would be valid only for 1 (one) year from the notification issuance date.

Guidelines outlined in the notification focus on preventing sexual harassment of women at workplace, particularly in factories, stressing on the importance of compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, and other relevant laws. Notably, among others, the notification emphasized on establishing internal committees, displaying policies, providing safety measures like lighting and CCTV cameras, ensuring transportation facilities, employing women security guards, and offering medical facilities during night shifts. The notification also emphasizes on compliance with labour laws, addressing grievances, conducting awareness programs, and reporting incidents to the concerned authorities.

State government of Maharashtra revises contribution rate under the Maharashtra Labour Welfare Fund Act, 1953

The state government of Maharashtra notified the Maharashtra Labour Welfare Fund (Amendment) Act, 2024 amending section 6BB of the Maharashtra Labour Welfare Fund Act, 1953. Through the amendment the state government implemented a straight jacket formula where for an employee whose name appears in the register of an establishment as on June 30 and December 31, respectively, the payment should be at the rate of INR 25 (Indian Rupees twenty-five) flat (earlier the contribution rates differed on the basis of respective wages drawn by the employees).

State government of Manipur notifies the Manipur Labour Laws (Exemption from Renewal of Registration and License by Establishment) Act, 2024

The state government of Manipur notified the Manipur Labour Laws (Exemption from Renewal of Registration and License by Establishment) Act, 2024 ("**Exemption Act**") *vide* gazette notification dated March 15, 2024. As per section 4 of the Exemption Act, employers of establishments which are enlisted in the first schedule ("**Scheduled Acts**") are not required to renew registration of their establishment as previously granted under the Scheduled Acts. This exemption is subject to a self-certification to be submitted by the establishment in the form specified in the second schedule of the Exemption Act before the month end of January every year or 30 (thirty) days of completion of relevant work, business or operation.

State government of West Bengal provides additional website for professional tax

The Directorate of Commercial Taxes, Kolkata *vide* order dated January 25, 2024 stated that in addition to the website mentioned in the West Bengal State Tax on Professions, Trades, Callings, and Employments Rules, 1979, the following website: www.wbprofessiontax.gov.in is now officially recognized as another designated website.

State government of Puducherry launches ServicePlus portal for amendment of registration certificate

The Labour Department, Government of Puducherry *vide* an office order launched an online services portal ServicePlus (*accessible at: serviceonline.gov.in*) for amendment of registration certificate under the Building and Other Construction Workers Act, 1996 ("**BOCW Act**"). Consequently, with effect from March 27, 2024, all applications with respect to amendment of registration certificate and issuance of amended registration certificate under BOCW Act will exclusively be carried out through the ServicePlus portal.

Central Government issues revised rates of variable dearness allowance for employees across sectors

The Office of Chief Labour Commissioner, Ministry of Labour and Employment *vide* order dated April 1, 2024, revised the rates of Variable Dearness Allowance (“VDA”) with effect from April 1, 2024, for employees employed in various sectors including agriculture, mining, construction and maintenance, loading and unloading, cleaning, watch and ward and other related services. This revision in VDA rates is based on the latest average consumer price index for industrial workers. Further, the notification focuses on the worker categories such as unskilled, semi-skilled/unskilled supervisory, skilled/clerical, and highly skilled.

State government of Haryana repeals Industrial Disputes (Amendment and Miscellaneous Provisions) (Haryana Amendment) Act, 1957

State government of Haryana *vide* notification dated March 26, 2024, published the Industrial Disputes (Amendment and Miscellaneous Provisions) (Haryana Amendment) Repeal Act, 2024 (“**Repeal Act**”) to repeal the Industrial Disputes (Amendment and Miscellaneous Provisions) (Haryana Amendment) Act, 1957 (“**Amendment Act**”). The notification clarifies that the Repeal Act will not affect:

1. any other enactment in which Amendment Act was applied, incorporated or referred to;
2. validity, invalidity, effect or consequences of anything done or suffered, or any obligation or liability, or any indemnity already granted under the Amendment Act;
3. any principle or rule of law, form or course of pleading, practice or procedure or existing usage, custom, office or appointment, irrespectively the same may have been in any manner affirmed or recognized or derived by, in or from Amendment Act; and
4. revive or restore any jurisdiction, office, custom, liability, right or other matter or thing not now existing or in force.

State government of Tripura removes mandatory registrations under Tripura Shops and Establishments Act, 1970

In order to promote ease of doing business in the state of Tripura, the Labour Directorate, Government of Tripura *vide* memorandum dated April 26, 2024, deleted Section 16 of Tripura Shops and Establishments Act, 1970 (“**Tripura S&E Act**”) by way of Tripura Shops and Establishment (Fifth Amendment) Act, 2021. Pursuant to the same, no shopkeeper or employer is required to obtain or maintain registration under Tripura S&E Act.

Government of India enhances reservation of PwD quota

Apprenticeship Training Division of Ministry of Skill Development and Entrepreneurship *vide* letter dated March 20, 2024, enhanced the reservation of PwD quota from 3% to 4% for 5 (five) categories of benchmark namely (a) locomotive disability, (b) blindness, (c) deaf, (d) autism and (e) multiple disabilities. Accordingly, the said letter provides trade eligibility list of 140 (one hundred forty) designated trades (engineering and non-engineering) under Apprenticeship Training Scheme as per Rights of Persons with Disabilities, 2016.

Union Territory of Ladakh introduces Ladakh Rights of Persons with Disabilities Rules, 2024

Administration of Union Territory of Ladakh *vide* notification dated March 28, 2024, introduced Ladakh Rights of Persons with Disabilities Rules, 2024 (“**Ladakh PwD Rules**”) to ensure rights and entitlements of Persons with Disabilities (“**PwD**”) in the Union Territory of Ladakh. Ladakh PwD Rules aim to streamline the process of applying for a certificate of disability, ensuring compliance with online application procedures specified by the Government of India. These rules provide for setting up of the Union Territory Committee for Research on Disability, as well as rules for limited guardianship for PwD. Certifying authorities are designated to issue certificates of registration to institutions as well as certificates of disability, with clear guidelines for the assessment process.

State government of Kerala notifies competent authority for requesting for “high support” for a person with disability under the Rights of Persons with Disabilities Act, 2016

In exercise of powers conferred under section 38(1) of Rights of Persons with Disabilities Act, 2016 (“**RPWD Act**”) read with rule 14A(1) of the Rights of Persons with Disabilities Rules, 2017, Government of Kerala *vide* notification dated March 11, 2024 notified the competent authority for requesting for “high support” for a person with disability under RPWD Act. Any person with benchmark disability, who considers himself to be in need of high support, or any person or organisation on his or her behalf, may apply to an authority, to be notified by the appropriate government, requesting to provide high support. The state government of Kerala notified that the ‘Joint Director, Social Justice Department’ will be the authority for receiving applications and certifying the needs of high support and its nature for the purpose of the RPWD Act.

Karnataka exempts information technology/IT-enabled services 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, once again exempted certain categories of establishments including in the information technology/ IT-enabled services 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 including the need to constitute an Internal Complaints Committee under the PoSH Act and an employee grievance redressal committee.

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

The state government of Telangana on June 7, 2024, renewed an exemption under the Telangana Shops and Establishments Act, 1988, for a period of 4 (four) years (*i.e., 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 now are 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 such as the requirement to pay overtime wages for work exceeding 48 hours a week, compensatory holiday for work performed on a national/festival holiday, transportation facility for women working during night hours etc.

Government of Puducherry revises wages of full time casual labourers in various government departments

Finance Department, Government of Puducherry *vide* order dated May 13, 2024 revised wages of persons engaged as full time casual labourers (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 7th 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.

Government of Karnataka notifies the Karnataka Compulsory Gratuity Insurance Rules, 2024 under the Payment of Gratuity Act, 1972

In exercise of powers conferred under Section 4A of the Payment of Gratuity Act, 1972 ("**Gratuity Act**"), the Government of Karnataka recently introduced the Karnataka Compulsory Gratuity Insurance Rules, 2024 ("**Gratuity Rules**") *vide* notification² dated January 10, 2024.

Applicability of Gratuity Rules

Section 4A of the Gratuity Act provides that on and with effect from the date notified by the 'appropriate Government', every employer within the ambit of such government and covered under the Gratuity Act would be required to obtain an insurance in prescribed manner, for their liability towards payment towards gratuity under the Gratuity Act. Appropriate Government also has the power to grant certain exemptions. 'Appropriate government' under the Gratuity Act means: (a) the Central Government, for *inter alia* establishments having branches in more than one state, and (b) the State Government, in other cases. For establishments within its ambit, the Central Government is yet to formulate and notify applicable rules under Section 4A of the Gratuity Act and hence, it is reasonable to infer that establishments having operations in more than one state are currently not required to obtain gratuity insurance and ensure associated compliances as mandated under the Gratuity Rules.

Compulsory insurance under Gratuity Rules

Rule 3 of the Gratuity Rules requires (a) every new employer, within 30 (thirty) days from the Gratuity Rules commencement date ("**Commencement Date**"), and (b) employers of existing establishment, within 60

(sixty) days from the Commencement Date, to obtain a valid insurance policy and seek a registration in this regard (for registration compliance, please see, Rule 5 of the Gratuity Rules). The insurance policy can be obtained from Life Insurance Corporation of India ("**LIC**") or any other approved insurance company.

Exempted establishments

Employers (a) of an establishment who have previously established an 'approved gratuity fund' ("**AGF**") and intend to continue with such arrangement, or (b) who have employed 500 (five hundred) or more persons and who now establish an AGF, are exempted from taking compulsory gratuity insurance provided that:

1. these employers submit an application in prescribed form with the prescribed authority;
2. the existing or new AGF covers entire liability of all employees of the establishment under the Gratuity Act; and
3. these employers register a gratuity trust with 5 (five) (but not equal) representatives of employers and employees with the registration authority notified under the Indian Trust Act, 1882 and ensure prescribed compliance under inter alia the Gratuity Act and the Income Tax Act, 1961.

Associated conditionalities under the Gratuity Rules would have to be complied with once the gratuity trust is set up and registered.

Developments in provident fund framework: Revised rate of damages, withdrawal benefits and pension computation

On June 14, 2024 and June 15, 2024, a series of notifications were published by the Ministry of Labour and Employment, Government of India, introducing significant amendments in the provident fund social security regime in India ("**Notifications**"). These amendments spread across the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**"), Employees' Provident Funds Scheme, 1952 ("**EPF Scheme**"), Employees' Provident Fund, Employees' Pension Scheme, 1995 ("**EPS Scheme**")

² Notification no. LD 397 LET 2023

and Employees' Deposit Linked Insurance Scheme, 1976 ("EDLI Scheme").

Key amendments under the Notifications

1. **Uniform rate of damages:** Under Paragraph 32-A(1) of the EPF Scheme and relevant provisions under the EPS Scheme and the EDLI Scheme, the appropriate authority can impose damages on employers for infractions linked with delay in provident fund contributions. Damages are determined or linked to the period of default³.
2. **With effect from June 15, 2024, damages under the EPF Scheme,** EPS Scheme as well as the EDLI Scheme have now been streamlined to a uniform rate of 1% of the arrears (i.e., with respect to payment of any contribution to the fund, or in the transfer of accumulations, or in the payment of any charges payable) per month. Important to note that:
 - a) while the previous rate of damages was capped at 25% per annum for a delay of 6 (six) months and more, after the amendment, (i) damages will only be 6% for a delay of 6 (six) months, i.e. 1% per month or part thereof, and (ii) since there is no overcall cap on the rate of damages, in case of delays exceeding 25 (twenty-five) months, damages would exceed beyond the earlier 25% ceiling under the previous regime, and
 - b) interest rate for delayed contributions still remains unchanged at 12% per annum, as per Section 7Q of the EPF Act.
3. **Computation of withdrawal benefits under EPF Scheme:** Under paragraph 14 of EPF Scheme, eligible members under the scheme were provided with withdrawal benefits in cases where they have not completed eligible service tenure for receiving pension under the scheme. The formula for this determination is derived by multiplying an eligible employee's last drawn wages by the factor

indicated in Table D of the EPF Scheme (linked to the total years of service).

4. Now, under the Employees' Pension (Amendment) Scheme, 2024 ("EPS Scheme 2024"), the factors prescribed under Table D of the EPS Scheme considers "months of service" instead of "years of service", with effect from June 14, 2024. This adjustment is likely to ensure clarity and alignment of service durations, consequently facilitating smoother transitions for employees seeking lumpsum withdrawal before completion of 10 (ten) years⁴.
5. **Computation of past service pension benefits:** Under the EPS Scheme, pension determination is made as per the prescribed formula for eligible members. Table B under the EPS Scheme assumes importance, as the prescribed factors therein are essential components for determination of the pension amount. Until the Notifications, Table B under the EPS Scheme provided factors that were linked to service tenure of less than 34 (thirty-four) years.
6. However, under the EPS Scheme 2024, Table B is amended to include additional factors corresponding to service durations of up to 42 (forty-two) years, with effect from June 14, 2024. This insertion aims to provide equitable pension calculations for employees who are eligible to receive pension under the family pension scheme (i.e., with extended service histories).

The Notifications are perceived to ease employer burdens and enhance clarity in pension calculations, extended delays in provident fund contributions and related arrears could result in a higher amount of damages being levied on employers, in the absence of cap on damages. Further, views and ongoing clarifications from the regulators would be crucial in determining interpretation and effective implementation of these amendments.

³ Under Para 8A(1) of EDLI Scheme; Para 5(1) of EPS Scheme; and Para 32A(1) of EPF Scheme, damages were earlier computed as follows: (a) delay up to 2 (two) months - 5% per annum; (b) delay from 2 (two) - 4 (four) months - 10% per annum; (c) delay from 4 (four) - 6 (six) months - 15% per annum; and (d) delay exceeding 6 (six) months - 25% per annum (earlier it ranged from 5% to 25% per annum).

⁴ Table D does not specify a factor of 10 (ten) years or more, since for eligible employees completing 10 (ten) years of service, the EPF Scheme provides for superannuation pension/early pension, depending on whether the employee has completed 58 (fifty-eight) years of age at the time of exit.

Public Utility Service Notifications

Public Utility Services (First Order) 2024

The Central Government has declared the services engaged in iron ore mining to be a public utility service for a further period of 6 (six) months with effect from April 14, 2024.

Public Utility Services (Second Order) 2024 and Public Utility Services (Third Order) 2024

The Central Government has declared the services engaged in uranium industry and copper mining industry to be a public utility service for a further period of 6 (six) months with effect from May 7, 2024.

Public Utility Services (Fourth Order) 2024 and Public Utility Services (Fifth Order) 2024

The Central Government has declared the services engaged in food stuffs and lead and zinc mining industry to be a public utility service for a further period of 6 (six) months with effect from May 9, 2024.

Public Utility Services (Sixth Order) 2024

The Central Government has declared the services engaged in the processing or production or distribution of fuel gases to be a public utility service for a further period of 6 (six) months with effect from June 12, 2024.

Public Utility Services (Seventh Order) 2024 and Public Utility Services (Tenth Order) 2024

The Central Government has declared the services engaged in Industrial establishments manufacturing or producing Nuclear Fuel and components, Heavy Water and Allied Chemicals and Atomic Energy and Coal industry to be a public utility service for a further period of 6 (six) months with effect from June 28, 2024.

Public Utility Services (Eighth Order) 2024

The Central Government has declared the services engaged in banking industry to be a public utility service for a further period of 6 (six) months with effect from June 15, 2024.

Public Utility Services (Ninth Order) 2024

The Central Government has declared the services engaged in the industry of defence establishments to be a public utility service for a further period of 6 (six) months with effect from June 24, 2024.

Extension in the public utility service status of industry engaged in engaged in manufacturing of Alumina and Aluminium and Mining of Bauxite under the Industrial Disputes Act, 1947

The services engaged in the manufacturing of Alumina and Aluminium and Mining of Bauxite industry, will be a public utility service for an extended period of 6 (six) months from February 4, 2024.

Extension in the public utility service status of Iron and Steel industry under the Industrial Disputes Act, 1947

The services engaged in the Iron and Steel industry, will be a public utility service for an extended period of 6 (six) months from February 17, 2024

Extension in the public utility service status of industry engaged in manufacturing mineral oil under the Industrial Disputes Act, 1947

The services engaged in manufacture or production of mineral oil (crude oil), motor and aviation spirit, diesel oil, kerosene oil, fuel oil, diverse hydrocarbon oils and their blends including synthetic fuels, lubricating oils and the like, will be a public utility service for an extended period of 6 (six) months from February 28, 2024.

Case Laws

Supreme Court clarifies 'workman' status under Industrial Disputes Act, 1947 and an employee cannot dictate terms of his employment to his employer



In *M/s Bharti Airtel Limited vs. A.S. Raghavendra*⁵, the Division Bench of the Hon'ble Supreme Court of India ("Supreme Court") holistically analysed the actual role of the respondent in the appellant's company and relied upon multiple facets such as terms of his appointment letter, nature of his supervisory duties with respect to the 4 (four) managers reporting to him, and his prior work experiences, to determine whether he qualified as a "workman" under Section 2(s) of the Industrial Disputes Act, 1947 ("ID Act"). The Supreme Court also clarified that the absence of the power to appoint, dismiss, or hold disciplinary inquiries against other employees (i.e., powers that are typically exercised by persons in managerial/supervisory roles) would not and could not be the sole determining criterion on the issue and qualify him as a "workman" under the ID Act.

Termination of woman officer solely on the ground of marriage is manifestly arbitrary

In *Union of India and Others v. Ex. Lt. Selina John*⁶ on February 14, 2024, the Supreme Court criticized the dismissal of a female nursing officer from the military nursing service ("MNS") based solely on her marriage, as a clear instance of gender bias and unfair treatment.

The petitioner, a nursing officer promoted to Lieutenant in the MNS, was discharged from her duties upon marrying an army officer. The termination, which occurred without prior notification or a chance to present a defense, cited marriage as the grounds for dismissal, citing Army Instruction No. 6 of 1977. The Supreme Court observed such regulations as unjustly targeting female nursing officers, deeming them arbitrary and in violation of fundamental rights.

Supreme Court holds denial of childcare leave to mother of disabled child is a violation of fundamental rights under the Constitution of India

In *Shalini Dharmani v. The State of Himachal Pradesh*⁷ on April 22, 2024, the division bench of the Supreme Court passed an order directing the State Himachal Pradesh to review its policies on 'Child Care Leave' for working women, with particular focus on those caring for children with special needs. The Supreme Court in its order, laid emphasis on the constitutional right of women to participate in the work force (under Articles 14, 15 and 21 read with Article 19(1)(g)) and the State's duty as a model employer that this constitutional entitlement is protected.

Supreme Court upholds regularization of contract workers based on perennial nature of work



In *Mahanadi Coalfields Ltd. v. Brajrajnagar Coal Mines Workers' Union*⁸ on March 12, 2024, the Supreme Court upheld the award passed by the

⁵ Civil Appeal No. 5187 of 2023 (Decided on April 02, 2024)

⁶ Civil Appeal No. 1990 of 2019

⁷ SLP (C) No. 16864/2021

⁸ Civil Appeal No(s). 4092-4093/2024.

Industrial Tribunal, Rourkela, Odisha (“**Industrial Tribunal**”) and held that denial of regularization of workers involved in similar nature of work is not only artificial distinction but also wholly unjustified. The appellant in this case had made 19 (nineteen) out of 32 (thirty-two) contract workers permanent on account of their work related to bunkers for operating chutes in mines, being similar to those performed by other permanent employees. However, the Supreme Court held that remaining 13 (thirteen) workers were also carrying out similar nature of tasks and thus are required to be made permanent, with back wages.

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*⁹, 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.

The 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*¹⁰, the Supreme Court held that contention raised by the appellant about withdrawal of resignation before communication of its acceptance does not hold water.

Kerala High Court: Internal Committee's failure to serve copy of complaint to the accused is violative of principles of natural justice



In the case of *Vineeth V.V. v. Kerala State Electricity Board and Ors.*¹¹ a single judge bench of the Hon'ble High Court of Kerala quashed the inquiry report prepared by the IC and held that failing to serve a copy of complaint and other relevant documents to the accused, which is mandatory under Rule 7 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, is in violation of principles of natural justice.

Balancing justice and fairness: Madras High Court's ruling on time-barred sexual harassment complaints

In the case of *R. Mohanakrishnan v Deputy Inspector General of Police*¹², a single judge bench of the Hon'ble High Court of Madras (“**Madras HC**”) made a significant ruling reinforcing that the courts should not get swayed away by discrepancies and hyper technicalities while considering cases relating to sexual harassment. Where procedural violations are pointed out, the overall fairness of the enquiry is what matters. The judgment also points out that severe cases of sexual harassment leading to significant mental

⁹ Civil Appeal No. 5355 of 2024.

¹⁰ (2003) 5 SCC 455

¹¹ WP (C) No. 9331 of 2024.

¹² 2024 SCC OnLine Mad 2123, Order dated November 11, 2024

distress and anxiety for victims can be reported and examined at any time, bypassing the 3/6 (three/six) month reporting period as set out in Section 9 of the POSH Act. It further emphasizes that in such matters, it is essential for the disciplinary authorities and courts to consider the entire issue with due sensitivity and empathy for the victims, while ensuring fair and impartial action and enquiry against the delinquent, ensuring due compliance of the principles of natural justice.

Preparation of vaccine status list by an employer w.r.t. the employees does not amount to circulating sensitive information under IT Act



In *Gopal Vittal, Bharti Airtel Ltd v. Kamatci Shankar Arumugam*¹³, the Madras HC noted an employer / organization must necessarily take into consideration welfare of majority of its employees and therefore, an individual not following the required Covid-19 norms could not be allowed access to public sphere. Therefore, termination on grounds of unauthorized absence, in light of the employee not getting vaccinated, cannot be construed as coercion or compulsion resulting in unlawful termination. Further, circulation of employee vaccination status does not amount to circulating sensitive personal data and hence is not an offence under Section 43A of the Information Technology Act, 2000, ("IT Act"). It was held that Section 43A of the IT Act is more in the nature of tort and the consequences of commission of such tort only leads to payment of damages or compensation and no punishment has been prescribed under the IT Act.

¹³ Criminal Original Petition No.20928 of 2023

¹⁴ Writ Petition No. 10523 of 2023

Status alone of a person in-charge cannot qualify as 'workman'

In *Rohit Dembiwal v. Tata Consultancy Services Ltd.*¹⁴, the Hon'ble High Court of Bombay held that an IT analyst in Grade C-II, handling, *inter alia*, financial matters, reimbursement of medical and travelling expenses of team members, appraisal review and having authority to initiate disciplinary enquiry against team members does not qualify as a "workman" under the ID Act. The court re-affirmed that the dominant nature of one's duties will have to fall within one of the stipulated categories for it to be classified as a 'workman' under the ID Act.

Calculation of gratuity to employee providing continuous service for multiple entities under the same management

In *Terna Polytechnic v. Ravi Bhadrappa Randale*¹⁵, the Hon'ble High Court of Bombay held that upon establishing continuity of service of an employee under 2 (two) different entities belonging to the same management, calculation for payment of gratuity is required to be done basis the last drawn salary as on the date of cessation. Further, the court also mentioned that in such cases of continuing service for the same management, there should be no bifurcation of gratuity amount between the two entities and the same is to be paid by the last employer as on the date of cessation of employment.

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 &*

¹⁵ Writ Petition No. 11864 of 2019

Anr.¹⁶ 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.

Contract wages cannot be reduced arbitrarily

In **Darvari Singh v. State of Madhya Pradesh**¹⁷, the Hon'ble High Court of Madhya Pradesh held that those engaged by a previous contractor, upon change in employer structure, are entitled to maintain the same wages as initially agreed upon with the previous contractor, including delegation or subsequent sub-delegation to any contractor. Any reduction in wages would be deemed illegal, and the court directed to make timely payment of deducted amounts.

Disciplinary proceedings against retired employees not allowed unless empowered by statute

In **Mahendra Nath Sharma v. State of UP and Others**¹⁸ on January 9, 2024, the Hon'ble Allahabad High Court held that employers are not permitted to initiate or sustain disciplinary actions against retired employees unless explicitly sanctioned by law. The court emphasised that any disciplinary control over retired employees must stem from statutory regulations and cannot be exercised otherwise. It highlighted that disciplinary authority typically ends upon an employee's retirement, and any extension of

this authority post-retirement must be outlined in the relevant statutory provisions governing the employee's terms of service. As the petitioner's corporation's regulations lacked such provisions, the court invalidated the punitive measures and dismissed the petitioner's appeal.

Pregnant woman's right to join service upheld

In **Misha Upadhyay v. State of Uttarakhand and Others**¹⁹ on February 23, 2024, the Hon'ble Uttarakhand High Court re-affirmed that a woman cannot be refused employment solely on basis of pregnancy. This ruling came in response to a case where a 13 (thirteen)-week pregnant woman, selected as a nursing officer, was denied employment despite receiving an appointment letter, citing temporary unfit based on a medical certificate. The court criticized such denial as gender discrimination and a violation of constitutional rights. The court highlighted that a woman who joins service and later becomes pregnant is entitled to maternity leave. The court directed the authorities to permit the petitioner to join immediately, overturning the previous order that prevented her from starting her job. The said ruling sets a precedent in ensuring that pregnancy should not be a barrier to women's employment opportunities, emphasizing the importance of upholding gender equality in the workplace.

Karnataka High Court strikes down the applicability of employees' provident fund benefits to international workers



¹⁶ Writ Petition No. 18486 of 2012.

¹⁷ Writ Petition No. 11632 of 2020

¹⁸ Writ - A No. - 4338 of 2019

¹⁹ Writ Petition (S/S) No. 241 of 2024

The High Court of Karnataka in ***Stonehill Education Foundation v. The Union of India & Ors.***²⁰ struck down para 83 of the Employees Provident Fund Scheme, 1952 and para 43A of the Employees' Pension Scheme, 1995 ("Amendment(s)"), covering international workers, as wholly arbitrary and unconstitutional. The court ruled that the Amendments exceeded the scope of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and that its treatment of international workers was not in parity with that of Indian workers.

Karnataka High Court denies 'workman' status to executive secretary

In ***Smt. Bhuvaneshwari v. Management of M/S Ambuthirtha Power Pvt. Ltd.***²¹ on April 8, 2024, Hon'ble High Court of Karnataka at Bengaluru held that an 'executive secretary' handling day-to-day work of chairman and managing director including taking care of travel, renewal of passports, processing of VISA, processing of bills to accounts department does not qualify as a "workman" under the ID Act. The court clarified that the above mentioned work is discharged in a managerial capacity and clerical work, if any, is only incidental to the principal work. The court re-affirmed that the dominant nature of one's duties needs to fall within one of the stipulated categories to be classified as a 'workman' under the ID Act.

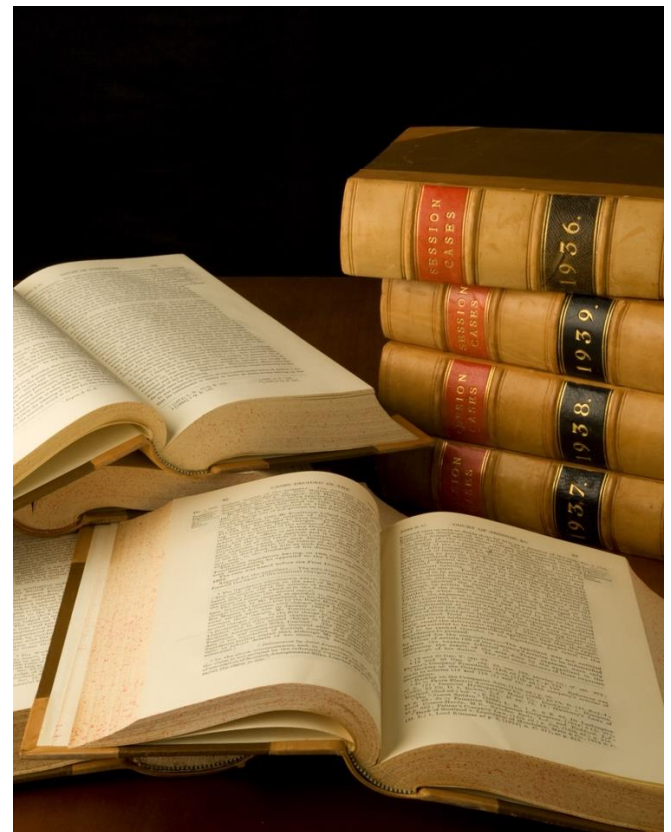
An individual workman cannot raise dispute for absorption and regularization

In ***Management of TATA Advance System Limited v. the Secretary to Department of Labour, Karnataka and Ors.***²², the Hon'ble High Court of Karnataka at Bengaluru answering a crucial question on whether an individual workman seeking absorption and regularization could raise an industrial dispute under Section 2(k) of the ID Act, placing reliance on Section 2A of the ID Act, affirmed that for a dispute to be considered an industrial dispute under the ID Act, it must be shown that it is connected with employment or non-employment of a workman, and where an individual workman can only raise a dispute for

removal, termination or dismissal, seeking absorption and regularization can only be achieved by raising a dispute in this regard through a trade union, on behalf of the workman.

Jammu and Kashmir High Court re-affirms 'equal pay for equal work' principle

In ***Jagdish Kumar v. State (UT of J&K)***²³ on March 3, 2024, Hon'ble High Court of Jammu & Kashmir and Ladakh at Jammu re-affirmed the basic facets of 'equal pay for equal work' principle. The court, referring to the Supreme Court's judgement in ***State Bank of India & Anr. Vs M. R. Ganesh Babu & Ors.***²⁴ observed that equality is not to be based in designation or nature of work, but on several other factors like, responsibilities, reliabilities, experience, confidentially involved, functional need and requirements commensurate with the position in hierarchy and the qualification required.



²⁰ W.P. No.18486/2012

²¹ WP No. 49982/2018

²² Writ Petition 7674/2023

²³ 2024 SCC OnLine J&K 179

²⁴ 2002 (4) SCC 556

JSA Insights

Talent hiring through an EOR

The existence of a large and diverse talent pool in India with comparatively lower labour costs has led to an increasing number of foreign companies looking to invest in Indian workforce. While not uncommon, recent trends reveal an increased count in the number of foreign companies using services of an EOR to recruit talent on its behalf for support with their regular operations. In instances where foreign companies have no immediate plans of setting up operations in India, EOR based hires enable them to engage Indian talent without the need to immediately set up an Indian entity or commence active on-ground operations in India. Below, we provide an understanding of what this means, and the benefits and drawbacks of such an arrangement under the existing legal framework in India.

1. What is an EOR and how does the arrangement work?

An EOR is a service provider that assumes the legal and operational responsibilities of an employer for a (client) company's workforce, and manages compliance, payroll and administrative tasks associated with their employment, while allowing their client to focus on its operations and growth. An arrangement of this nature is generally captured through a services or similar agreement. EOR handles talent identification and management including employment compliances and payroll functions and receives 'service fees' from the client for its manpower support services. Project and work allocation is typically handled directly by the foreign company. Where setting up India operations is potentially envisaged, foreign companies may, by way of an enabling clause in their services agreement or otherwise, provide for the transition of EOR employees to their own rolls.

2. What are the benefits?

EORs allow organizations to hire talent globally by minimizing the red tape involved in incorporating subsidiaries, enabling them to onboard resources in new markets swiftly and compliantly. In essence, the client company enjoys some of the benefits of establishing an Indian entity without having to incur similar costs and compliance burdens, and in less time.

3. What are the risks and how can one mitigate them?

While using an EOR may be an effective way to start engaging talent, foreign companies should be wary of inadvertent tax and legal consequences arising out of such arrangements. It is imperative for companies opting for this arrangement to be thorough with their homework on Indian tax and employment regulatory issues, and most importantly, whether the EOR identified is compliant with applicable laws. It is critical to structure the manpower arrangement in a manner such that foreign companies are not prone to misclassification risks and claims, where EOR direct employees are construed as the engaging entity's employees. Another risk is that of disruption of business, if the EOR faces legal issues or closes down. Some of the key considerations in choosing and contractually implementing an EOR option to mitigate potential risks, are set out below.

4. Key Considerations:

- a) Foreign employer should exercise caution in engaging EOR hires particularly when it has existing employees on its rolls in India. In such cases, individuals engaged through an EOR may have claims relating to parity of pay and benefits in comparison with those employees and depending on the nature of work performed (similar, or arguably similar to those of regular employees), risk of misclassification claims cannot be ruled out.
- b) It is relevant for the foreign employer to undertake its diligence on whether the EOR is a duly registered and established legal entity, and whether it holds necessary licences to conduct its operations including provision of manpower support.
- c) Another crucial check would be to assess and confirm that the EOR is operating in compliance with extant Indian employment laws, including compliance with wages, paid holiday requirements, working hours rules and social security benefits. EORs, as primary employers, should not be in default with statutory licenses and registrations, both at an entity (operational) as well as manpower (hiring and deputing) level.

- d) Foreign employers should make appropriate determination on whether it would be necessary to have provisions like confidentiality, IP (intellectual property) rights assignment clauses and non-solicitation with the individuals engaged. Depending on the nature of work, these may or may not be necessary. However, if required, companies need to consider how these protections can be secured contractually and enforcement issues due to lack of privity of contract with the individuals engaging in a breach.
- e) Checks and balances on whether the EOR provides transparency and cooperation in HR (human resource) administration, compliances and costs, should be examined.
- f) Foreign employers should also make determination on whether their contract with the EOR should enable transitioning of (EOR) employees, to ensure continuity of business.
- g) Navigating 'Permanent Establishment' risks

Separately, foreign players should be aware and cautious of potential Permanent Establishment ("PE") risks likely to trigger in such cases, where a company's operations in a foreign country might lead to classification of having a taxable presence in India. This is relevant to note here since the EOR route is often utilised by many foreign companies as a way around the PE risk. Even while using an EOR, it is important to be watchful of certain triggers of PE classification other than the obvious one of establishment of a physical office. A few noteworthy triggers are (a) employing a local workforce which has the authority to negotiate or conclude contracts, and (b) conducting sales and significant engagement with the local market in India.

Foreign companies should carefully consider the nature of work they plan to engage an Indian workforce for and the manner of operating through an EOR to mitigate risk of such PE classification risk effectively.

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 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.

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.


























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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