

EMPLOYMENT CONTRACTS IN INDIA

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The relationship between an employer and employee can either be express or implied. While in India, employers generally issue offer letters to employees prior to signing a formal employment contract, the practice of executing employment contracts is widely followed by almost all establishments. Also, in some states, the State-specific Shops and Establishments Acts (**S&E Acts**) require the employer to issue a written appointment letter to the employees. A well-structured employment contract can be a crucial document to govern the terms, conditions and relationship between the employer and employee. Apart from limited implied terms, the rights and obligations of an employer can be enforced only if they are stipulated in the employment contract, applicable statute or the employer's internal policies that have been adequately communicated to the employee.

This primer provides an overview of key features of Indian employment contracts.

EMPLOYMENT CONTRACTS

Private employers in India typically use the following types of employment contracts:

- an open-ended contract, where the contract continues until the employer or the employee ends it; or
- a fixed-term contract, which comes to an end after a specified duration. Such contracts are mostly executed where the intent is to recruit the individual for a specific tenure or when the employment is for a specific task or project of a known duration.

Regardless of whether the employee has been engaged on a fixed term contract or an open-ended contract, common principles of contract law such as offer, acceptance, certainty (as any uncertainty or ambiguity risks could render a contract void), consideration and competence of the parties should be complied with, when drafting an employment contract. Also, the entitlement to various employee benefits remains the same under both types of contracts and the contract of employment must adhere to the requirements of various labour statutes, such as the S&E Acts, the Industrial Disputes Act, 1947 (**ID Act**) and the Industrial Employment (Standing Orders) Act, 1946 (**SO Act**), which specify minimum conditions of employment.

Where feasible, the benefit in having a fixed term contract is that once the tenure of the fixed term contract is over, no additional process needs to be followed for terminating the contract. In India, most disputes raised by employees relate to termination of employment. In the case of an open-ended employment contract, the employer would have to provide severance pay and comply with other applicable



statutory requirements (such as provisions regarding retrenchment) at the time of the termination. These requirements would not apply where the contract comes to an end due to the expiry of its tenure. However, care must be taken before entering into fixed-term contracts for permanent or perpetual roles.

It is generally advisable to make employment contracts comprehensive and detailed to address key aspects of employment and to ensure compliance with applicable statutes or internal policies of an employer. Some clauses that are routinely incorporated into an employment contract are: (a) job title and scope of work; (b) probation period and period of service; (c) place of employment and provisions on transfer; (d) salary/wages, bonus and incentives; (e) retirement benefits, health and welfare benefits (if any); (f) hours of work, rest, holidays and leaves; (g) confidentiality and non-compete provisions; (h) intellectual property and data protection; (i) employee surveillance; (j) procedures for resolution of grievances; (k) suspension of the employee pending any disciplinary action; (l) notice, termination, resignation or retirement provisions; and (m) governing law and jurisdiction (including an arbitration clause, which may be used for non-workmen category employees). However, since amendments to a bilateral contract will also require the consent of the employee, employers should examine if certain terms and conditions that are more susceptible to changes/revisions periodically, should be covered in separate policy documents instead of the employment contract.

EMPLOYING FOREIGN NATIONALS

With increasing foreign investments into India, it is commonplace to engage foreign employees into various roles by MNCs and Indian companies. Foreign employees can be employed in India, either under a direct employment agreement with the Indian entity or through a secondment arrangement. In case of secondment of employees, the foreign entity, the Indian entity and the employee would normally execute a secondment agreement which would govern the terms of the secondment. In most cases, a local employment contract between the employee and the entity in the host country is also executed to ensure compliance with immigration laws and mitigate tax risks.

While the plethora of labour legislations at the Central and State level in India usually leave employers with complex interpretational issues, these issues prove even more challenging when one of the parties involved is a foreign national. However, apart from employment law concerns, the major issues to be assessed in relation to foreign employee secondment arrangements are compliance with immigration and tax laws. The deputation of foreign nationals raises several issues such as visa requirements, registration with Foreign Regional Registration Office, tax implications etc. under the Indian legal system.

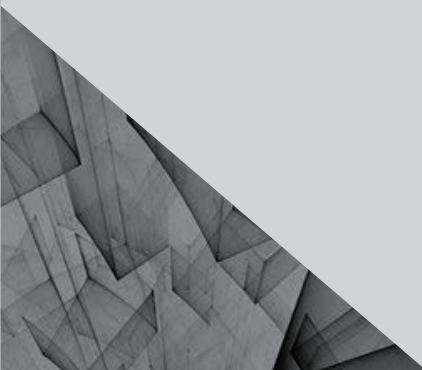


TERMINATION OF EMPLOYMENT

Termination of employment is mainly governed by the provisions of the ID Act, the SO Act and the S&E Acts. These legislations stipulate the minimum period of notice required to be provided to an employee prior to termination, the procedure for termination, severance payment etc. and apply to the extent an employment contract contains provisions that are comparatively less beneficial to the employee.

It is therefore critical to determine if an employee is covered by any applicable labour statute before planning a termination. For instance, even if a workman's contract of employment stipulates that his/her employment can be terminated with 15 days' notice or payment in lieu thereof, such a termination can be struck down as illegal since the ID Act stipulates a minimum notice period of 30 days or payment in lieu thereof.

Further, an employer-employee relationship can be terminated at the instance of the employer or the employee (through resignation), by mutual consent, employee's retirement/superannuation and on the expiry of a fixed-term contract. Courts in India have broadly categorised termination of employment at the instance of the employer into the following two categories: (a) termination simpliciter; and (b) stigmatic termination.



a. Termination simpliciter

Termination simpliciter refers to termination with the statutorily required minimum notice period or payment in lieu thereof for causes other than misconduct - the underlying principle being that the termination is not being imposed as a punishment on the employee. This concept comes under the bracket of the term '*retrenchment*' under the ID Act, which has been defined to mean termination for any reason except:

- As punishment inflicted by way of disciplinary action;
- Retirement/superannuation;
- Termination for continued ill-health; or
- Expiry and non-renewal of the term of an employment contract.

Reasons for retrenchment could range from redundancy to non-performance or loss of confidence in the employee for various reasons.

The corresponding provisions for retrenchment under most of the S&E Acts mandate that any person who has been in the service of the employer for a specified duration must be given prior notice of termination (usually 30 days) or payment in lieu thereof, except in cases where the employee has committed misconduct. Most S&E Acts expressly require an employer to provide a '*reasonable cause*' for the termination and this concept of '*reasonableness*' has also found backing in Indian judicial precedents. Therefore, a termination without any reason or for reasons that are wholly vague or arbitrary, even though the employee has been given adequate notice or payment in lieu thereof, is liable to be challenged before a court and may even be struck down in certain circumstances.



b. Stigmatic termination

This refers to termination on grounds of misconduct. The governing provisions with respect to dismissal for misconduct under the ID Act and S&E Acts are similar. An employer may dismiss an employee for misconduct without providing any notice or payment in lieu thereof, provided the employee has been given a fair hearing to respond to the charges levelled against him in accordance with the principles of natural justice.

Indian courts have established that habitual and unauthorized absence from work, wilful insubordination, theft, fraud, dishonesty, wilful damage or loss of employer's property, bribery, engaging in strikes unlawfully, being inebriated at work, harassing customers etc. amount to misconduct. Since the punishment is required to be proportionate to the offence, the law requires the employer to consider the gravity of the offence and the past record of the employee prior to dismissing the employee.

Also, termination of employment in certain circumstances is not considered valid such as termination in violation of fair labour practices as set out in the ID Act, dismissal on the account of trade union activity or membership, dismissal by way of victimisation, dismissal not in good faith, dismissal by falsely implicating a worker in a criminal case, dismissal without due regard to natural justice etc.

NON-COMPETE, NON-SOLICITATION RESTRICTIONS AND CONFIDENTIALITY UNDERTAKINGS

Most employment contracts have non-compete and non-solicit clauses and confidentiality provisions. While non-compete provisions that extend beyond the term of employment are invalid under Indian law, there is no restriction on the extension of non-solicit and confidentiality provisions even after termination of an employment contract.

a. Non-compete

Under the provisions of the Indian Contract Act, 1872 (**Contract Act**), which is the principal law governing contracts in India, a contract in '*restraint of trade*' is void. The only exception to this is where goodwill of a business is sold.

As a general principle, non-compete restrictions imposed on an employee during the subsistence of an employment relationship are enforceable in India. The Supreme Court of India has ruled that negative covenants which operate during the period of employment, when an employee is bound to serve his employer exclusively, are not regarded as a restraint of trade.

However, courts in India have consistently held that non-compete clauses that operate post-termination of an employment contract are a '*restraint of trade*' as they have the potential to deprive an individual of his or her fundamental right to earn a livelihood and are consequently void under the Contract Act. In fact, the law does not even permit '*reasonable*' post-termination restrictions that an employer may impose solely for protecting business interests.

b. Non-Solicitation

Non-solicitation clauses are meant to put a restriction on the employee of a company, to prevent him from soliciting other employees or customers of the company, during and post-termination of employment. Companies assert that such restrictions are necessary to protect their proprietary rights and confidential information.

Like non-compete restrictions, non-solicit covenants have also been the subject of judicial analysis in India. Typically, courts have held that while restrictive covenants for non-solicitation are enforceable during the term of employment in India, such obligations post-termination may be enforced in limited circumstances, based upon the facts and circumstances of each case.

c. Confidentiality

In the absence of specific data protection legislation in India, the terms and conditions in a contract relating to data protection and confidentiality are governed primarily by the provisions of Contract Act.

A breach of the confidentiality clauses in an employment contract entitles an employer to terminate the services of the employee. There are several provisions of the Indian Penal Code, 1860 and Information Technology Act, 2000 which are also attracted in case of breach of confidentiality and disclosure provisions, which allow criminal prosecution and imprisonment, or fine, or both.

Indian courts also recognise that confidentiality obligations can subsist beyond the duration of employment and can restrain an ex-employee from using confidential information relating to his/her previous employer, even if they do not restrain the individual from joining a competitor. In addition to seeking an injunction to restrain an employee from using confidential information post termination or claiming damages for breach, an employer could also take criminal action against an employee.



An employment contract is a binary agreement between an employer and an employee governing their rights, duties and responsibilities. One of the main advantages of executing an employment agreement is that it allows detailed terms of employment to be specified to ensure compliance with laws and best industry practices. It fosters a structured employer-employee relationship and sets the expectations of the job.

That said, it is also important to remember that due to the unequal bargaining power between organisations and most employees in their rank and file, terms that are too aggressive or one-sided run the risk of being struck down by courts. For that reason, along with the fact that employment in India is heavily regulated, it is imperative to thoroughly vet the terms of an employment contract before signing it and seek practical guidance, if in doubt.

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