GUIDE TO GOING GLOBAL EMPLOYMENT

Multiple countries

DLA PIPER

Downloaded: 03 Jul 2019
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INTRODUCTION


GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The Guide to Going Global series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2019 edition of our popular guide covers all of the employment and labor law basics in 60 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper’s global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that employment law is dynamic, and the legal regime in the countries surveyed could change.
AUSTRALIA

LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law jurisdiction with employment laws that operate at both the federal and state levels. Australian Dollar (AU$). English.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity can engage employees in Australia subject to business, corporate and tax considerations and proper payroll registration. Personal income tax must be paid by employees on their assessable income. However, employers are obliged to deduct tax from an employee's remuneration (called Pay as You Go or PAYG tax withholding) and also to pay 9.5% of salary (which will gradually be increased over coming years to 12%) into the employee's superannuation account (a form of pension system).

PRE-HIRE CHECKS

Required

Immigration compliance.

Permissible

Permitted with applicant’s consent and subject to relevant discrimination laws. Offers of employment may be subject to criminal record checks or medical examination (if necessary to determine fitness for a particular job).

IMMIGRATION

Foreign nationals must apply for visas to visit, live and work in Australia. Application is through the various immigration programs and visas administered by the Australian Department of Home Affairs (DHA).

The Temporary Skills Short (TSS) visa (subclass 482) may be used by businesses to address skill shortages by engaging foreign nationals to live and work in Australia for 2 years (or up to 4 years in some circumstances) where a suitably skilled Australian cannot be engaged. (The former subclass 457 Temporary Work (Skilled) Visa no
longer accepts new applications).

**HIRING OPTIONS**

**Employee**

Individuals can be recruited on either a full-time, part-time or casual basis (which means that they are employed by hour or by day) or a fixed-term contract for a limited duration.

**Independent contractor**

Independent contractors can be engaged directly by the company or via a personal services company.

**Agency worker**

Agency or temporary workers are used widely by some organizations for short periods. Agency staff are not engaged as employees of the business where they are placed on assignment.

**EMPLOYMENT CONTRACTS & POLICIES**

**Employment contracts**

A contract can be oral, but written contracts are strongly recommended and all new employees must be given a Fair Work Information Statement containing key terms as soon as possible after the commencement of employment.

**Probationary periods**

Permissible. No statutory limit, but 3-6 months is common.

**Policies**

Not mandatory, but some policies (especially regarding anti-discrimination and harassment, bullying and occupational health and safety) are strongly encouraged by laws and regulations.

**Third-party approval**

No requirement to lodge employment contract or policies with or get approval from any third party.

**LANGUAGE REQUIREMENTS**

No statutory requirements.

**MINIMUM EMPLOYMENT RIGHTS**

Employees entitled to minimum employment rights
Most employees are covered by federal minimum employment rights; a minority derive minimum rights from state jurisdictions.

**Working hours**

38 hours a week, although the employer may require an employee to work reasonable additional hours.

**Overtime**

Overtime payment (or overtime loading) may be required under an applicable award or enterprise agreement.

**Wages**

National minimum wage as of July 1, 2018 is AU$719.20 per week or AU$18.93 per hour. This is reviewed annually.

**Vacation**

4 weeks' paid annual leave during each year of service accruing progressively. In addition, an employee is entitled to be absent from work on a day that is a public holiday (8 days in total are observed nationally). Casual employees would not normally be paid for their vacation. To make up for this, they receive extra pay, called casual loading.

**Sick leave & pay**

Employees are entitled to take 10 days of paid personal/carer's leave for each year of service. An employee may take the leave if he/she is not fit for work because of personal illness or injury, or to provide support to a member of the employee's immediate family who requires care or support because of personal illness/injury or an unexpected emergency. Casual employees would not normally be paid for their sick leave. To make up for this, they receive extra pay, called casual loading.

**Maternity/parental leave & pay**

Each member of an employee couple (not necessarily employed by the same employer) is entitled to be absent from work for separate periods of up to 12 months in a single continuous period in relation to the birth or adoption of a child. As a result, the couple employees may take up to a total of 24 months' leave between them. However, if only one person is taking leave as opposed to both persons of the couple, or if one member of an employee couple wishes to take more than 12 months' leave, the employee may request a longer period from the employer. The period of extension cannot exceed 12 months less any period of parental leave taken, or intended to be taken, by the other member of an employee couple.

If both members of the couple are taking unpaid leave, the leave entitlement has to be used in 2 separate periods. However, there are the exceptions of "concurrent leave" and "keeping in touch" days, where the couple is entitled to take up to 8 weeks of unpaid parental leave at the same time.

A paid parental leave scheme exists, entitling eligible employees to 18 weeks' paid parental leave at the national minimum wage, to be paid by the government via employers.
DISCRIMINATION

The characteristics protected under equal opportunity and anti-discrimination legislation in the various states and territories of Australia, as well as in federal legislation, vary slightly from jurisdiction to jurisdiction. The protected characteristics common to all jurisdictions are: race, color, sex, sexual orientation, age, physical or mental disability, marital or relationship status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction, social origin, gender identity, intersex status or trade union membership.

BENEFITS & PENSIONS

Under the Superannuation Guarantee scheme, employers are effectively required to contribute 9.5% of employees’ quarterly "earnings base" to employee superannuation funds. There is a minimum monthly wage that should be paid before an employee is entitled to the 9.5% and a maximum contribution base. Most employers make regular contributions to the employee superannuation fund rather than making lump sum quarterly or annual contributions.

Australian law also requires that all employers maintain adequate workers’ compensation insurance for the benefit of workers injured during the course of their employment.

DATA PRIVACY

Australia has very stringent data privacy obligations. As a general rule, personally identifiable data can only be processed if it is required for the performance of the employment contract and constitutes an employee record. Certain acts and practices are exempt from the application of Australia’s data privacy laws, but there are strict criteria which must be met for an exemption to apply. Employee records are generally exempt but this exemption will not apply to documents that come into existence prior to the employment relationship (such as pre-employment/hire documentation). At the time it collects personal information, the employer is required to provide the individual with a statement setting out the company’s obligations under Australia’s data privacy laws and the individual’s rights. Further restrictions apply for sensitive personal data. Employee records (with the exception of tax file numbers) are not covered by the Australian notifiable data breach regime, which requires notification to the Office of the Australian Information Commissioner (OAIC) and to affected individuals of any data breach which could result in serious harm. However the OAIC advises that it is good practice for employers to notify employees affected by a data breach so that they may take protective action.

The monitoring of individuals and their data is covered by various surveillance legislation in each state/territory. Essentially, surveillance of employees is prohibited in sensitive areas such as washrooms and change rooms, unless the surveillance device is installed pursuant to a warrant or authorization. Surveillance is permitted in public areas if it conforms with relevant legislation. The monitoring of an employee’s use of a work computer (emails and Internet browsing) is governed by specific laws in some states.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

At common law, employees cannot be transferred from one employer to another without their consent.

Under the Fair Work Act, there are rules which apply if there has been a "transfer of business". The transfer of
business rules apply when there is a connection between two employers (including the sale and purchase of all or part of a business, certain outsourcing and in-sourcing arrangements and where the two employers are associated entities), the new employer agrees to employ some or all employees of the old employer and there has been no significant change to the work performed by those employees. The main effect of the transfer of business rules is that a transferrable instrument (ie, a collective agreement) that covered the employee before the transfer will continue to apply after the transfer. The Fair Work Commission can make certain orders altering the effect of the transfer of business rules if it deems it appropriate.

EMPLOYEE REPRESENTATION

Under federal law, employees can choose to be represented by a union or not. As a consequence, any union validly appointed to represent an employee or employees must be recognized and dealt with according to the law. There are no employee representatives or works councils.

TERMINATION

Grounds

Termination can be brought about: by mutual agreement; upon expiry of a fixed-term contract; by the employer, with or without notice; or termination (resignation) by the employee.

Who is subject to termination laws

Employees who have completed 6 months of service with their employer (or 12 months in the case of a small business employer with fewer than 15 employees) and earn less than the high income threshold (currently AU$145,400); or who are covered by a modern award or enterprise agreement, are eligible to make a claim for unfair dismissal.

Prohibited or restricted terminations

Employers are prohibited from taking "adverse action" (including termination) against other persons because the other person has or exercises a "workplace right," or engages lawful in "industrial activity," or because of a protected attribute (such as race, sex, age or disability). Further protections include a prohibition on an employer dismissing an employee because the employee is temporarily absent from work because of illness or injury for fewer than 3 months in a 12 month period.

Third-party approval for termination/termination documents

Not applicable.

Mass layoff rules

Reporting requirements apply where a decision is made to make 15 or more employees redundant, including notifying the relevant government agency and relevant unions.

Notice
Between 1 week and 4 weeks depending on length of continuous employment (although employment contract may specify longer notice period). Where an employee is over 45 years of age and has completed at least 2 years’ continuous service, he or she will be entitled to another week’s notice.

**Statutory right to pay in lieu of notice or garden leave**

Employer can pay in lieu of notice. No right to garden leave unless specified in the contract.

**Severance**

The entitlement to severance as a result of a termination by reason of redundancy is based on a sliding scale and calculated by reference to the length of the employee’s period of continuous service on termination.

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<th>Pay</th>
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<tr>
<td>Less than 12 months of service</td>
<td>0</td>
</tr>
<tr>
<td>12 months to less than 2 years of service</td>
<td>4 weeks' pay</td>
</tr>
<tr>
<td>2 years of service to less than 3 years of service</td>
<td>6 weeks' pay</td>
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<tr>
<td>3 years of service to less than 4 years of service</td>
<td>7 weeks' pay</td>
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<tr>
<td>4 years of service to less than 5 years of service</td>
<td>8 weeks' pay</td>
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<tr>
<td>5 years of service to less than 6 years of service</td>
<td>10 weeks' pay</td>
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<tr>
<td>6 years of service to less than 7 years of service</td>
<td>11 weeks' pay</td>
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<td>7 years of service to less than 8 years of service</td>
<td>13 weeks' pay</td>
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<tr>
<td>8 years of service to less than 9 years of service</td>
<td>14 weeks' pay</td>
</tr>
<tr>
<td>9 years of service to less than 10 years of service</td>
<td>16 weeks' pay</td>
</tr>
<tr>
<td>10 years and over</td>
<td>12 weeks' pay</td>
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Note: The scale does drop from 16 weeks to 12 weeks. This is an odd historical anomaly that continues to be the case and is usually justified by the employee's entitlement to long service leave after reaching 10 years' service.

A "week's pay" is generally calculated on the basis of the employee’s base rate of pay.

Service prior to January 1, 2010 is only counted if the employee had an entitlement to redundancy pay under some other instrument prior to that date.
POST-TERMINATION RESTRAINTS

Those that protect the employer’s legitimate business interests can be enforced to the extent reasonably necessary to protect those interests in all the circumstances.

Non-competes

Typically no longer than 12 months (with some exceptions).

Customer non-solicits

Permissible.

Employee non-solicits

Permissible.

WAIVERS

Enforceable to waive contractual rights. Statutory entitlements cannot be waived or contracted out of.

REMEDIES

Discrimination

If an employee thinks they have been subject to “adverse action” (including dismissal) because of a protected attribute, they may apply for a remedy under the Fair Work Act. Remedies include compensation (there is no cap on the amount of compensation that can be awarded) and reinstatement. A civil penalty can also be ordered.

Compensatory remedies for discrimination can also be sought under Federal or State anti-discrimination legislation. Damages for economic loss and general damages (for hurt and suffering) may be ordered.

Unfair dismissal

If the Commission decides that the employee has been unfairly dismissed, it may order the reinstatement of the dismissed employee (with or without back pay) or, if that is not practicable, the payment of compensation up to a maximum of 6 months’ remuneration, or AU$72,700, whichever is less.

Failure to inform & consult

An employer who breaches any of the general protections may incur a penalty. Further, an employee, or a union acting on behalf of a member, may seek an injunction to stop the prohibited conduct or seek compensation (noting there is no cap on the amount of compensation that can be awarded).

CRIMINAL SANCTIONS

There are criminal sanctions for breach of relevant work health and safety laws. The Queensland and South
Australian labor hire licensing laws provide for terms of imprisonment in respect of some breaches.

KEY CONTACTS

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HONG KONG

LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law. The Basic Law of the Hong Kong Special Administrative Region (HKSAR) provides that courts of HKSAR may refer to the precedents of other common law jurisdictions when making decisions. Hong Kong dollar (HK$). English and Chinese.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity can engage employees in Hong Kong subject to business, corporate and tax considerations and proper payroll registration.

Payment of Hong Kong tax is the employee's responsibility. Therefore, Hong Kong employers are not required to withhold tax through the payroll system (subject to exceptional circumstance where an employer is required to withhold final payments of an employee who will leave Hong Kong for 1 month or more after termination).

PRE-HIRE CHECKS

Required

Immigration compliance.

Permissible

Any data collected as a result of pre-hire checks must be necessary and not excessive. In order to comply with the Personal Data (Privacy) Ordinance (PD(P)O), candidates are to be expressly informed of the collection, use and disclosure of any personal data in relation to them by their employer (or prospective employer). Asking a candidate to sign a Personal Information Collection Statement will assist an employer in complying with those obligations. A candidate can be asked to have a medical examination, but only after the employer has made him or her a conditional offer of employment. If criminal checks are carried out, an employer must be careful not to dismiss, exclude or display prejudice against the candidate on the basis of any spent conviction (that is, where a
person was previously convicted of an offense for which he or she was not sentenced to imprisonment of more than 3 months or a fine of more than HKD 10,000, and the person has not been convicted of any other offense for at least 3 years).

IMMIGRATION

Any person who does not have the right of abode in Hong Kong and who undertakes work of any kind (whether paid or unpaid) must hold a valid employment visa (unless such person holds a valid dependent visa). Processing time is generally 6 to 8 weeks.

HIRING OPTIONS

Employee

Indefinite, fixed-term, full-time, part-time or casual.

Independent contractor

Independent contractors can be engaged directly by the company or via a personal services company.

Agency worker

Typically agreements between the agency and the end-user will stipulate that the end-user is not the employer, while the agreement between the worker and the agency will stipulate that the worker is either self-employed or an employee of the agency. The placement may be for a fixed term or open-ended. The Employment Ordinance (EO) and Employment Agency Regulations regulate employment agencies.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

A prospective employee must be provided with certain information (wages and wage period, any end-of-year payment, and length of notice) prior to commencing employment. There is no requirement to have an employment contract in writing, but it is common practice to have a written contract signed by both parties.

Probationary periods

Permissible. No statutory limit, but 3 to 6 months is common. Regardless of what the employment contract states, either party can terminate the employment contract without notice or payment in lieu during the first month of the probationary period.

Policies

No mandatory policies, although it is common for employers to implement company policies for its employees (such as an anti-discrimination policy).

Third-party approval
No requirement to lodge employment contracts or policies with or obtain approval from any third-party.

**LANGUAGE REQUIREMENTS**

No statutory requirements.

**MINIMUM EMPLOYMENT RIGHTS**

Employees entitled to minimum employment rights

The EO applies to every employee engaged under a contract of employment, to any employer of such an employee, and to any contract of employment between such parties. Employees to whom the EO applies will be entitled to basic protections including payment of wages, restrictions on wage deductions, the granting of statutory holidays (albeit not necessarily paid), and employment protection in respect of unreasonable and unlawful dismissal. Employees who are employed under a continuous contract (i.e., for 18 hours a week for 4 consecutive weeks or where the parties agree that the employee will be continuously employed, known as continuous employment) are entitled to further benefits such as rest days, paid annual leave, sickness allowance, paid statutory holidays, maternity leave, paternity leave, severance payments and long service payments.

**Working hours**

Currently no restrictions (except for young employees who are aged above 15 but under 18 and employed in an industrial undertaking), but there is a proposal in Hong Kong to introduce standard working hours and non-binding guidelines for 11 industries.

**Overtime**

No obligation to provide pay for overtime worked.

**Wages**

There is a statutory minimum wage, currently set at HK$34.50 per hour. The Hong Kong Legislative Council has approved an increase in the statutory minimum wage to HK$37.50 per hour with effect from May 1, 2019.

**Vacation**

Between 7 and 14 days depending on length of service. In addition, there are 12 statutory holidays. Banks, educational institutions, governmental departments and many private employers also elect to observe general holidays (rather than the minimum 12 statutory holidays). General holidays are declared to be every Sunday and 17 other days (which include the 12 statutory holidays).

**Sick leave & pay**

Employees in continuous employment will accrue paid sickness allowance at a rate of 2 paid sickness days for each completed month of service in the first year of employment and 4 paid sickness days for each completed month of
service thereafter, up to a maximum accrual of 120 sickness days. Sickness allowance is paid by the employer, and payment is only due for sickness days taken by an employee if the employee has taken 4 or more consecutive sickness days off. Once the employee is off for at least 4 sickness days, all of the sickness days are deemed subject to be paid the sickness allowance (including the first 3 days) up to the maximum accrual (however, this 4 consecutive days requirement does not apply to any day off taken by a female employee for her pregnancy check-ups, post-confinement medical treatment or miscarriage). The sick leave must also be supported by a valid medical certificate. Sickness allowance is paid at a daily rate equivalent to 4/5 of the daily average of the wages earned by the employee during the period of 12 months immediately before the sickness day or the first sickness day (as appropriate, or if the employee has been employed by the employer for a period shorter than 12 months immediately before the sickness day, the shorter period).

Maternity/parental leave & pay

10 weeks' maternity leave. This will be paid at 4/5 of the employee's average daily wages if the employee has been in continuous employment for no less than 40 weeks at the commencement of maternity leave. For employees without 40 weeks' continuous employment, the maternity leave is unpaid. Where an employee gives birth later than expected, the employee can also extend the period of maternity leave by the number of days between the expected date of birth and the actual date of birth. This period is unpaid. Finally, an employee can take a further period of up to 4 weeks, for illness or disability arising out of the pregnancy or childbirth. This period is unpaid and in addition to sickness allowance. Note that the Government has announced that a bill extending statutory maternity leave and maternity leave pay to 14 weeks will likely be introduced in 2019.

The EO grants 3 days' paternity leave to male employees who are employed under a continuous contract in Hong Kong in respect of the birth of each child of which he is the father. This has increased to 5 days, effective on January 18, 2019. Provided the employee has been in continuous employment for not less than 40 weeks at the commencement of the paternity leave, the paternity leave will be paid at 4/5 of the employee's average daily wages. For employees without 40 weeks' continuous employment, the paternity leave is unpaid.

DISCRIMINATION

Characteristics protected from unlawful discrimination, victimization and harassment: sex, pregnancy, marital status, family status (i.e., having responsibility for the care of an immediate family member), disability, race and union affiliation.

BENEFITS & PENSIONS

Subject to certain exemptions (for example, for people from overseas who enter Hong Kong for employment and who holds an employment visa with a validity period of less than 13 months or are covered by an overseas retirement scheme), once an employee has been employed for 60 days, the employer is required to enroll the employee into a Mandatory Provident Fund (MPF) scheme. Generally, both the employer and the employee are required to contribute a minimum of 5% of the employee's "relevant income" up to a capped maximum amount of HK$1,500 (which may be adjusted from time to time). Relevant income includes wages, salaries, leave pay, fee, commission, bonus, gratuity, housing allowance, housing benefits, any perquisite or allowance. It does not include any non-monetary benefits, severance payments or long-service payments.
DATA PRIVACY

The PD(P)O is principally concerned with 6 data protection principles (DPPs). Broadly, these require that personal data is only collected for a lawful purpose, that only personal data which is necessary and not excessive for that purpose may be collected, and that individuals are informed of certain things before data is collected or used (DPP 1); that all reasonably practicable steps need to be taken to ensure that personal data is accurate and that it should only be retained for as long as necessary to fulfill its purpose (DPP 2); that personal data must not, without the prescribed consent of the job applicant or employee, be used for a purpose other than the purpose for which it was collected (DPP 3); that all reasonably practicable steps must be taken to ensure that the personal data is secure and protected against unauthorized or accidental access, processing, erasure or other use (DPP 4); that all reasonably practicable steps must be taken to ensure that an individual can access information about the data user’s policies and practices in relation to the personal data, the kind of personal data about him or her that is being held, and the purposes for which it will be used (DPP 5); and that, with some exceptions, an individual is entitled to request access to all personal data held by a data user and to correct that data if it is inaccurate (DPP 6). There are provisions in the PD(P)O restricting the transfer of personal data outside of Hong Kong, but these are not currently in force.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

No automatic transfer of employment. This includes an associated company transfer or change of business ownership, or a merger situation where the employment entity will be changed. Therefore, the previous employer will need to terminate the employee’s employment contract and the new employer will need to offer (and the employee accept) employment. If the employee accepts employment with the new employer or unreasonably refuses employment with the new employer in circumstances where the offer of new employment is on the same terms or terms and conditions no less favorable than the terms and conditions with the previous employer, then the previous employer may be able to avoid liability for a severance payment. There is no duty to consult (either individually or collectively) with employees or employee representatives.

EMPLOYEE REPRESENTATION

Although Hong Kong residents have the right and freedom to form and join trade unions, the level of employee participation in trade unions is relatively low and Hong Kong enjoys a relatively harmonious climate of industrial relations. Collective bargaining agreements are uncommon.

There are no employee representatives or works councils.

TERMINATION

Grounds

Termination with notice or payment in lieu of notice is permissible.

Employees with continuous employment of 2 years or more are also protected against "unreasonable dismissal" ie, there must be a valid reason for termination and in this regard any of the following may constitute a valid reason: the conduct of the employee; the capability or qualifications of the employee for performing work of a kind which
he or she was employed to do; redundancy; illegality or some other substantial reason. Unreasonable dismissal is not a criminal offence but employees will be entitled to certain statutory remedies. Presumption of unreasonable dismissal can be rebutted by showing that there is a valid reason for termination. There is then no requirement to show that the termination was “reasonable” or “fair” in these circumstances.

Employers should also ensure they comply with the contractual terms and other implied terms relating to the reason for, and manner of, dismissal.

**Employees subject to termination laws**

Employees with continuous employment of 2 years or more are protected against unreasonable dismissal. There are prohibited or restricted terminations for all employees (see below).

**Restricted or prohibited terminations**

Female employees who are pregnant or on statutory maternity leave; any employee who is absent from work on sick leave and is in receipt of statutory sickness allowance; any employee who has suffered a work related injury entitling him or her to compensation under the Employees’ Compensation Ordinance; by reason of an employee's trade union membership and activities; by reason of an employee giving evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation; any employee who has given evidence under the Factories and Industrial Undertaking Ordinance (breach of any of the above may constitute "unlawful dismissal"); any employee who is undertaking jury service; any employee who is taking statutory vacation; and by reason of an employee’s spent conviction.

Unlawful dismissal is an offence with a fine up to HK$100,000 upon conviction.

**Third-party approval for termination/termination documents**

Not applicable for this jurisdiction.

**Mass layoff rules**

Not applicable for this jurisdiction.

**Notice**

Minimum 7 days' notice after the first month of the probationary period and during subsequent employment. If the notice is specified in the employment agreement, the notice will be the agreed period. If no notice period is specified, it is presumed to be 1 month. Notice is not required for termination for serious misconduct (ie, gross misconduct or cause) but it requires a high threshold.

**Statutory right to pay in lieu of notice or garden leave**

There is a statutory right to make a payment in lieu of notice. Right to place on garden leave depends on the terms of the contract.

**Severance**
Statutory severance payment payable to redundant employees with continuous service for 2 years or more. Calculated using a base amount per year of service or 2/3 of the employee’s last full month’s wages (being the monthly average of the wages earned by the employee during the previous 12 months (or some shorter period where the employee has been employed for less than 12 months), or 2/3 of HK$22,500, whichever is less). Total severance payment is capped at HK$390,000. Employers are entitled to offset from the liability to pay a severance payment, any gratuity or retirement scheme payment that has been made to the employee in respect of any years of service for which the severance payment is payable. For the purposes of a severance payment, there is a statutory presumption that the termination arose by reason of redundancy. This presumption can only be rebutted by an employer proving that the employment was terminated for reasons wholly unrelated to redundancy.

**POST-TERMINATION RESTRAINTS**

Those restraints that protect the employer’s legitimate business interests can be enforced if reasonable. Garden leave is common for senior employees.

**Non-competes**

Typically no longer than 3-6 months.

**Customer non-solicits**

Permissible in limited circumstances. Typically no longer than 6-12 months.

**Employee non-solicits**

Permissible in limited circumstances. Typically no longer than 6-12 months.

**WAIVERS**

Enforceable to waive contractual rights. While an employee can be asked to waive statutory rights, there is some uncertainty as to whether such a waiver would be effective to prevent an employee from subsequently bringing a claim to exercise his or her statutory rights.

**REMEDIES**

**Discrimination**

Uncapped compensation, which can include the claimant’s financial loss, injury to feelings compensation of between HK$7,800 and HK$390,000 (based on the Vento guidelines in the United Kingdom, which set out the guidelines used by tribunals to decide how much they should award for injuries to feelings) and in some instances, exemplary damages. It is likely that these amounts will be increased to reflect increases in the guidelines in the United Kingdom (to between HK$8,000 and HK$420,000) but this has yet to be decided by the courts in Hong Kong.

**Unlawful and/or unreasonable dismissal**
There is no unfair dismissal regime in Hong Kong. The EO provides a statutory right to remedies which differ depending on the circumstances in which the unlawful dismissal and/or unreasonable dismissal took place.

For unreasonable dismissal, or unreasonable and unlawful dismissal, an employee is able to claim reinstatement, reengagement or terminal payments. In particular, the Labor Tribunal may order compulsory reinstatement or reengagement of an employment (without securing consent of the employer) if the employee was unlawfully dismissed and it considers that the making of such an order is appropriate and reasonably practicable. If the employer does not reinstate or re-engage the employee as required by the order, the employer shall pay to the employee a further sum, amounting to three times the employee’s average monthly wages and subject to a ceiling of HK$72,500. The employer commits an offence if he/she willfully and without reasonable excuse fails to pay the further sum.

For unreasonable and unlawful dismissal, where no order for reinstatement or reengagement has been made, the court or Labor Tribunal may also make an award of compensation (up to HK$150,000) to the employee if the Labor Tribunal considers it just and appropriate.

Failure to inform & consult

There are no information or consultation requirements.

CRIMINAL SANCTIONS

The provisions of the EO are enforced, first by criminal law sanctions (where the usual penalty is a fine, except for payment-of-wages offenses, which can give rise to a sentence of imprisonment), and secondly, by way of civil remedies at the instance of the aggrieved employee. Further, in some instances, liability can be passed to the individual decision-maker of the employing company.

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INDIA

LEGAL SYSTEM, CURRENCY, LANGUAGE

India uses a common law legal system, except in the State of Goa, which has a civil code. Indian Rupee (INR). India is a multi-linguistic country with many languages and dialects across the country. The official languages of the Union Government are Hindi and English. Individual states are able to set their own official language.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign company without local registration cannot directly engage employees in India. Employers can be formed as sole proprietorship, or as a partnership or an incorporated entity. Offshore entities that wish to do business in India either set up subsidiaries or joint venture companies in partnership with other local or offshore entities; or, with the approval of the Reserve Bank of India, set up a liaison office, branch office or project office. Also, proper payroll needs to be set up to make withholdings and deductions.

Both central and state labor laws impose various procedural requirements on employers, such as obtaining registration, maintenance of registers and records (including muster rolls for employees who present themselves for work), display of notices and filing of returns which are to be available for inspection by inspectors/appropriate government authorities. For ease of doing business in India, the Government of India has permitted start-ups to submit self-certified returns and self-declaration as evidence of compliance with the provisions of the Employees State Insurance Act, 1958 (ESI Act) and Employees Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act). Certain state governments have also come up with self-certification schemes and simplified requirements for maintenance of records and registers required under various labor laws. The government has also taken measures to implement combined registers and provide e-filing of returns to ensure compliance with certain labor legislation.

PRE-HIRE CHECKS

Required

There is no statutory requirement on an employer to carry out pre-hire background checks (except for employment in certain sectors such as mining, where medical checks are mandatory prior to employment). However, the visa stamp/sticker in the employee’s passport will include the name of the employer, and the
employer will be required to provide an undertaking to the Foreigners Regional Registration Office (FRRO) on behalf of the employee to register the employee with the FRRO. Therefore, it is advisable for the employer to undertake a basic immigration check at a minimum. Also, taking into consideration that termination of employment is not simple in India, it is common for employers to verify the professional and educational qualifications of the candidate.

Permissible

Background checks for applicants can be conducted as long as they comply with the fundamental right to privacy, which means that applicant/employee consent should be obtained. Establishments usually have a pre-hire background check policy in place for new hires. Background screening is generally done for education qualification verification, previous employment status, address verification, criminal background verification, reference verification, and applicable database verification.

IMMIGRATION

The Government of India issues various types of visas for expatriates (foreigners) visiting India. A person who is not an Indian citizen who wishes to undertake any work in India must obtain a valid visa. There are 2 key work-related visas:

- Business Visa, designated as "B" Visa
- Employment Visa, designated as "E" Visa

The duration of such visas depends on the purpose of the visit and is granted at the discretion of the government. Business visas are usually granted to foreigners coming to India on short visits for trainings, business meetings, etc. Employment visas are granted to foreigners desiring to come to India for the purpose of employment.

If the stay in India will be for more than 180 days, the visa holder must register with the Foreigners Regional Registration Offices (FRRO) or the Foreigners Registration Offices (FRO) within 14 days of arrival.

HIRING OPTIONS

Employee

There are 2 categories of employees: workmen and non-workmen. A workman, as defined under the Industrial Disputes Act, 1947 (ID Act), is any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. Those mainly employed in a managerial or administrative capacity, or those employed in a supervisory capacity (and earning more than INR10,000 per month) and sales employees (other than those employed in certain notified industries such as the pharmaceutical industry) are non-workmen.

Whether an employee is a workman or a non-workman is a matter of fact which can be determined on the basis of the nature of the employee’s duties and the job description. If the employee is a workman, the employer will have to comply with certain labor and industrial laws, such as the Industrial Disputes Act, 1947. If the employee is a non-workman, the terms and conditions of his/her employment are primarily governed by his/her contract of employment with the employer. However, in some circumstances, employees (both workmen and non-workmen)
Employment Guide to Going Global

may still be governed by the state-specific shops and establishment legislation (S&E Acts), which apply to most companies engaged in commercial activity. Employment can be indefinite, for a temporary term, full-time or part-time.

Legislation has established various Employment Exchanges, which public establishments and certain private establishments must notify of any vacancy before a post is filled. No employer is, however, obliged to recruit any person through the Exchanges.

Recruitment may also be conducted through recruitment agencies, labor contractors, advertisements in newspapers and on-site recruitment at the establishment.

Independent contractor

Independent contractors can be engaged. A person is an independent contractor when a company designates the deliverables sought, and the person is free to carry out the work in the manner he/she deems fit, as long as the timelines and the quality of deliverables are met.

Establishments tend to engage independent contractors/consultants especially for activities where professional expertise is required for the business. Some employers also engage contractors to augment their workforce. However, if in reality the nature of the working relationship is one of employment, there is a risk of misclassification. If misclassified, such "contractors" will be entitled to the same employment benefits as the regular workforce.

Agency worker

The practice of employing agency workers or contract labor is prevalent to varying degrees in almost all industries and services. It is more prevalent in labor-intensive sectors such as manufacturing, mining and construction industries.

Legislation regulates the employment of labor through intermediary contractors; regulates the manner of their deployment (including obtaining requisite registration certificates and licenses); and empowers the appropriate government to abolish such arrangements in certain circumstances. The intermediary agency is liable to provide amenities and pay wages to its employees deployed at the client's (referred to as the principal employer) workplace and if it fails to do so, the principal employer is responsible, but can recover its costs from the intermediary agency.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

No requirement for a formal written contract of employment, although generally, employers enter into written employment agreements. Some state-specific S&E Acts require employers to record certain terms of employment such as wages, designation and workhours. Recent amendments to

* the Employees Compensation Act and

* the Maternity Benefit Act require employers to inform employees (in writing) of the benefits available to them thereunder.
In 2017, the government also ratified the Rights of Persons with Disabilities Act, that requires all employers to notify an equal opportunity policy which includes details of posts that persons with disabilities can apply for, amenities that are provided to disabled persons to allow them to carry out their work functions, and the manner of selection for employment for persons with disabilities.

The Industrial Employment (Standing Orders) Act applies to employees classified as "workmen" and regulates the terms of the contract to ensure uniformity and protection for that class of employee. In the event of any change in certain conditions of service of workmen (such as wages, working hours) which is prejudicial to them, the employer is required to give 21 days' notice (or more, depending on the state where the workmen are located) before implementing the change.

A collective agreement is an understanding between trade unions, who represent the interest of the workmen, and employers. Under IDA, it is unfair for a recognised trade union or the employer to refuse to bargain collectively in good faith with the other party.

Probationary periods

The duration of any trial or probationary period is determined by the contract of employment or the model standing orders. Typically, a trial or probation period will be for 3 months, but may be extended by the employer if it is not satisfied with the progress of the employee.

It is usually easier to terminate the service of a probationer as he/she does not enjoy all the statutory protection from retrenchment accorded to workmen.

Policies

Policies are optional and may be amended without employee consent, if drafted appropriately. However, for workmen employees, certain terms and conditions of service can only be modified after giving 21 days' notice. In addition to employment contracts, an employer will usually have various policies that govern its employees' various rights and obligations; for example, leave policies.

Third-party approval

No approvals are required for entering into contracts with employees, with the exception of the Standing Orders, which must be certified by the labor department.

LANGUAGE REQUIREMENTS

The contract must be in a language understood by both contracting parties. Contracts are generally in English, provided both parties understand it.

MINIMUM EMPLOYMENT RIGHTS

Employees entitled to minimum employment rights

Depends on the category of employee and other factors, including remuneration, location of employee and type of industry. However, pursuant to various labor statutes that govern the workforce, an employee will at a minimum
be entitled to minimum wages as framed by the relevant state government. Additionally, an employee will be entitled to a statutory bonus, provident fund contributions, insurance coverage, maternity benefits and severance dues, if he/she meets the eligibility norms as set out under these statutes.

Working hours

Working hours are governed by a variety of statutes depending on the nature of the activity undertaken by the establishment and the location of the establishment.

Working hours are governed either by the Factories Act 1948 or the relevant State specific S&E Act, depending on the nature of the activity undertaken by the establishment. For example, if the establishment is a factory, the Factories Act applies, and if the establishment is involved in a commercial activity, then the local S&E Act applicable in the region in which the establishment is located will apply. Generally, these statutes provide for working hour limits both on a daily and weekly basis. The normal daily hour limits range from between eight to nine hours, and the usual weekly limit is 48 hours. Under the Factories Act, the daily limit cannot be exceeded without the prior permission of the authorities. Under the local S&E Act, the normal working hour limits can only be exceeded up to certain prescribed limits.

Some local S&E Acts exempt certain categories of employees (such as managerial employees) or certain establishments (such as establishments involved in information technology) from all or some of the provisions of the statute.

Overtime

If employees are required to work more than the prescribed minimum working hours, they are normally required to be paid at a prescribed overtime rate. Overtime wages are generally calculated at the rate of twice the employee’s ordinary rate of pay.

Wages

India follows the standard of a "minimum wage" as opposed to living wage. State government under the Minimum Wages Act, 1948 fixes minimum wages for time work, piece work and overtime work. The minimum wage to which an employee is entitled will be dictated by a variety of factors, including:

- The nature of employment
- The industry in which the employee works
- The geographic location where the employee works

The Payment of Wages Act, 1936 provides that wages should be paid at intervals of no longer than a month. Consequently, it is the duty of every employer to ensure that wages are paid to its employees on a monthly basis, the prescribed registers are maintained and that the prescribed notices are displayed on the premises. The statute also regulates the scope and extent of deductions an employer may make from wages. This statute is currently applicable to employees whose monthly wages do not exceed INR24,000. Some local S&E Acts provide for similar restrictions in relation to permissible deductions that may be made from wages. Additionally, the Equal Remuneration Act, 1976 lays down provisions relating to equal remuneration to be payable to both men and women workers and prevention of discrimination based on gender in matters of employment.
Vacation, holidays and time off

Generally, all employees are entitled to a weekly day off.

Leave entitlement is generally covered by the employment contract. However, where the employer is involved in a commercial activity, the local S&E Acts will apply, and these determine the minimum thresholds concerning holiday entitlement. The thresholds usually range from 12 to 18 days’ holiday per year.

Further, the Factories Act, 1948 provides that every adult worker who has worked in a factory for at least 240 days in a calendar year is entitled to one day’s leave with wages for every 20 days of work.

Sick leave & pay

Sick leave varies from state to state. Certain local S&E Acts contain provisions concerning sick leave and casual leave (which generally ranges from 12 to 24 days). Also, the Standing Orders Act, if applicable, may contain sick leave provisions. Generally, an employee is entitled to the most beneficial leave entitlement provisions that are provided under the Standing Orders Act or S&E Act or the employer’s service rules.

Maternity/parental leave & pay

Indian law provides for maternity and associated leave for female employees. The law does not provide for paternity or parental leave for male employees, and such leave, if provided, would be in accordance with any contractual arrangement entered into with the employer.

Maternity leave is governed by the Maternity Benefit Act, 1961 (MBA) and Employees' State Insurance Act, 1948 (ESI Act). The ESI Act currently applies to employees whose monthly salary does not exceed INR 21,000; employees who are not covered by the ESI Act receive their maternity benefits in accordance with the MBA.

Under the MBA, women employees with less than 2 surviving children are entitled to maternity leave of 26 weeks. Women with two or more surviving children are entitled to 12 weeks of maternity leave. Further, the MBA Act provides 12 weeks leave to women employees who legally adopt a child of less than 3 months of age and to commissioning mothers, ie, employees who have children through surrogacy.

A pregnant woman suffering from an illness arising out of pregnancy, delivery, premature birth of child, miscarriage, medical termination of pregnancy or tubectomy operation is entitled to leave with payment of maternity benefit for an additional period of 1 month.

A female employee is also entitled to leave with maternity benefit for 6 weeks in the case of miscarriage or medical termination of the pregnancy, and for 2 weeks with payment of maternity leave for a tubectomy operation.

The MBA also provides for nursing breaks and a medical bonus of INR3,500 to the employee where the employer does not provide for post-natal confinement and post-natal care.

Amendments to the MBA also require employers with 50 or more employees in their establishment to provide crèche facilities for their female employees. The crèche must be within a distance prescribed by the government and female employees must be allowed 4 visits to the crèche each day (including their rest break). If the work assigned to a female employee is such that she can work from home then, after maternity leave, she and the employer may mutually agree to terms and conditions for her to work from home.
DISCRIMINATION

The right to equality is a fundamental right under the Indian Constitution and state institutions are expressly prohibited from discriminating on the basis of sex, caste, religion, race and place of birth. Although these provisions do not strictly apply to employment in the private sector, employers in the private sector are bound by the Equal Remuneration Act, 1976. This guarantees equal pay to employees performing the same work, or work of a similar nature, regardless of gender. It prohibits discrimination against women in the context of recruitment, promotion, training and transfer.

The Sexual Harassment of Women at Workplace Act, 2013 (POSH Act) also protects and provides a means of redress for women who suffer from sexual harassment at work. The POSH Act has wide application because its definition of 'workplace' covers both public and private establishments and covers regular, ad-hoc or temporary employees, either employed directly or through an agent. The POSH Act requires all offices, hospitals, institutions and other workplaces to have an internal mechanism for addressing complaints related to sexual harassment, including providing for settlement by way of conciliation. The employer has to have an internal complaints committee to look into complaints, hold an inquiry and submit a report to address any issues relating to sexual harassment. The District Officer can establish a local complaints committee for establishments that do not have internal complaints committees due to employing less than ten workers, or when the complaint is against the employer.

The employer is also prohibited from committing any unfair trade practices listed in the IDA, including discriminating against workmen.

The RPWD Act prohibits discrimination on the basis of a persons disability, unless proportionate to achieve a legitimate aim. Under the RPWD Act, an employer must ensure that a person is not denied a promotion merely on the ground of his/her disability. It also requires all employers to notify and publish an equal opportunity policy with details of facilities and amenities provided to persons with disabilities to enable them to effectively discharge their duties in the establishment. For establishments with 20 or more employees:

- the policy must contain a list of positions suitable for persons with disabilities; the manner of selection of persons with disabilities, post-recruitment and pre-promotion training, preference in transfer and posting, special leave, preference in allotment of residential accommodation, if any, and other facilities; details of the provisions for assistive devices, barrier-free accessibility and other provisions; and details of the liaison officer

- a liaison officer must be appointed to look after the recruitment of persons with disabilities and the provision of facilities and amenities

The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (HIV Act), in effect since September 10, 2018, prohibits discrimination against a person who is HIV positive or a person who lives with or has lived with a person who is HIV positive in matters related to employment, including denial of or termination of employment.

BENEFITS & PENSIONS

Benefits
Benefits depend on a number of factors, such as the size of the employer, the industry and the employee’s length of service, including:

- Payment of Gratuity Act, 1972 provides for a lump sum amount payable on termination of employment after 5 years of service. In case of termination due to death or disablement, the employee will be entitled to the lump sum amount irrespective of length of service. The rate of gratuity payable is calculated at the rate of 15 days’ wages for every completed year of service or part thereof in excess of 6 months and is currently capped at INR 2 million.

- Health benefits: The ESI Act provides for comprehensive medical care to eligible employees and their families. It also provides for cash benefits during sickness and maternity and monthly payments in case of death or disablement.

- Employees Compensation Act, 1923 provides for the payment of compensation to an employee or his family in cases of employment-related injuries, death, and temporary or permanent disability.

- Payment of Bonus Act, 1965 envisages payment of bonus to employees earning less than INR 21,000 per month.

**Pensions**

Pension/s in India can be divided into three categories:

- Government pensions covering government employees

- Pension schemes governed by Employees’ Provident Fund and Miscellaneous Provisions Act, 1952 (EPF Act)

- Voluntary pensions

It is mandatory for every Indian employee drawing a monthly salary capped at INR 15,000 per month to be enrolled under the Employees’ Provident Fund Scheme (EPFS). It is mandatory for expatriate workers to be enrolled under the EPFS, irrespective of their salary.

**DATA PRIVACY**

Employee records and employee access to data

The Information Technology Act, 2000 covers data protection and violation of personal privacy. This statute safeguards against certain breaches in relation to data from computer systems, prevents unauthorised use of computers and creates liability for damage suffered in the event of unauthorized access, downloading, extraction and copying of data from a computer system/network. It stipulates the penalty for breaches of confidentiality and privacy.

The storage, management and handling of sensitive personal data or information belonging to persons located in India is regulated by the Sensitive Information Rules enacted under the Information Technology Act, 2000.
Sensitive personal data or information is defined under the Sensitive Information Rules to include passwords, financial information, physical, psychological and mental health conditions, sexual orientation, medical records and history, biometric information.

Any body corporate receiving any of the above types of information as a result of either using the services of an individual or employing an individual must comply with the Sensitive Information Rules regarding processing and storing that information.

**RULES IN TRANSACTIONS/BUSINESS TRANSFERS**

Indian employment law does not provide for the automatic transfer of employees. IDA provides that upon transfer of the ownership or management of an undertaking, every "workman" who has been in continuous service in any industry for at least 1 year (i.e., 240 days) will be deemed to have been retrenched (i.e., terminated) and will be entitled to retrenchment compensation (equivalent to 15 days’ average pay for every completed year of continuous service or any part thereof in excess of 6 months) and to receive 1 month’s notice or wages in lieu thereof, unless the following applies:

- The employee consents to their employment being transferred to the transferee
- The transferee agrees to provide the employee with continuity of service on terms no less favorable than those which applied prior to the transfer

On and from the date of transfer, the transferee steps into the shoes of the transferor and becomes responsible for liabilities and obligations relating to such workmen including central and state taxes, provident fund contribution, gratuity, accident compensation, employee state insurance contribution.

With respect to liabilities prior to the date of transfer, the transferor and transferee both shall, in accordance with ESI Act and EPF Act, be jointly and severally liable to make provident fund and insurance contributions in respect of the period up to the date of the transfer, provided the liability of the transferee is restricted to an amount equivalent to the value of the assets obtained by way of the transfer.

With respect to employees other than workmen, they will usually resign from their service and will be reappointed by the transferee unless they do not wish to transfer. In the event the transferee agrees to provide continuity of service, that continuity will then be reflected in the employment contract.

**EMPLOYEE REPRESENTATION**

In India, the right to form a trade union flows from the fundamental right to freedom of association in the Constitution. Seven or more persons may form a union and apply to have the union registered. Indian trade unions are conferred the same status as a body corporate, enjoy perpetual succession and have a common seal; they may sue and be sued in their name.

IDA renders both employers and trade unions liable for penal sanctions in the event they engage in unfair labor practices.

A collective agreement is an understanding between workmen represented by their trade unions and employers.
Under the IDA, it is unfair for a recognized trade union and employer to refuse to bargain collectively in good faith with the other party.

**TERMINATION**

**Grounds**

Dismissals should be for "reasonable cause" – eg, redundancy, poor performance, continued ill health, etc. – especially in certain states, where the local S&E Act stipulates such a requirement. Otherwise, employees may be dismissed for misconduct (or "for cause"). For workmen, the IDA defines "retrenchment" as the termination by the employer of the service of a workman for any reason whatsoever, other than as a punishment inflicted by way of disciplinary action. However, "retrenchment" does not include voluntary retirement, reaching the stipulated superannuation age, non-renewal of a contract on expiry of its term, termination arising under such fixed-term contracts, or termination of service on the grounds of an employee’s continued ill health.

An employer may for economic reasons reduce the number of its workmen, provided the process as stipulated in the IDA is followed. The process to be followed will depend on whether the workmen to be retrenched have at least 1 year’s (ie, 240 days) continuous employment and are:

- Employed in:
  - Factories/mines/plantations with less than 100 employees
  - Other establishments
  - Employed in factories/mines/plantations where the number of workmen employed in the last year is 100 or more (please note that IDA has been amended in certain states to increase this threshold to 300 employees or more)

For the "non-workmen“ category of employees, their services may be terminated in the manner provided in their employment contracts and subject to complying with the provisions of the relevant S&E Act of the state.

**Employees subject to termination laws**

Where an employer plans to retrench a workman who has been in continuous service for at least 1 year (ie, 240 days) and who is employed in:

- Factories/mines/plantations with less than 100 employees
- Other establishments, prescribed steps must be taken:
  - Where the workman belongs to a particular category of workmen, in the absence of any agreement otherwise, the employer shall ordinarily retrench the workman who was the last person to be employed in that category. If the employer retrenches any other workman it must record the reason for doing so ("Last In First Out Rule")
  - The workman must be given the requisite period of notice or payment in lieu of notice
Retrenchment compensation must be paid to the workman

Notice in the prescribed manner must be served upon the appropriate government authority

Where an employer plans to retrench a workman who has been in continuous service for at least 1 year (i.e., 240 days) in factories/mines/plantations where the number of workmen employed in the last year is 100 or more (300 in some states), the following steps should be taken:

○ The Last In First Out Rule has to be followed before retrenching the service of a workman

○ The workman must be given the requisite period of notice or payment in lieu of notice

○ Prior permission of the appropriate government authority must be obtained (see below)

○ Retrenchment compensation must be paid to the workman

For "non-workmen", the steps which the employer must take will be as stated in the employment contract and the provisions of the relevant S&E Act of the state.

Restricted or prohibited terminations

The level of protection granted to workmen in relation to the termination of their employment is higher where they are employed in factories/mines/plantations where the number of workmen employed in the last year is 100 or more (300 in some states). The IDA prohibits termination of certain categories of workmen while a dispute is pending between them and their employer except with the approval of a designated authority. Under MBA it is unlawful for an employer to discharge or dismiss a female employee whilst they are on statutory maternity leave. Similar protection is provided under ESI Act to employees who earn a monthly salary not exceeding INR 21,000 and who may be in receipt of certain statutory medical benefits provided under ESI Act.

Third-party approval for termination/termination documents

Where an employer plans to retrench a workman who has been in continuous service where the number of workmen employed in the last year is 100 or more (300 or more in some states), prior permission of the appropriate government authority must be obtained by the employer. The appropriate government authority, after making inquiries with the parties and considering the genuineness and adequacy of the relevant factors, will make an order either granting or refusing to grant permission. The order of the appropriate government authority is final and binding on all parties and remains in force for one year.

Mass layoff rules

The retrenchment procedure described above will equally apply to mass terminations.

Notice

Notice is required to be given prior to termination. The notice period may vary from state to state, but it is normally 1 month for ordinary dismissal, unless the employment contract provides for a longer notice period.

Where:
• An employer plans to retrench a workman who is employed in factories/mines/plantations with less than 100 employees

• Other establishments, the employee is entitled to receive one month’s notice or payment in lieu of such notice period

Where an employer plans to retrench a workman who is employed in factories/mines/plantations where the number of workmen employed in the last year is 100 or more (300 in some states), the employee is entitled to receive 3 months’ notice or payment in lieu of such notice period. In both cases, the notice of termination must be in writing and must indicate the reason for retrenchment.

Statutory right to pay in lieu of notice or garden leave

Employers may make a payment in lieu of notice. The right of workmen to receive retrenchment compensation is based on their length of service as of their last working day (irrespective of whether the termination is with immediate effect or after the employee has been asked to serve the notice period).

Garden leave is possible, though there is little case law to suggest how it will be enforced by the courts. It is preferable to include a specific garden leave in the contract of employment and company policy.

Severance

In case of a termination due to redundancy, employers are required to pay retrenchment compensation. Severance or retrenchment compensation equal to 15 days' average pay for every completed year of continuous service or part thereof in excess of six months must be paid to a workman on termination of employment.

In addition, the employer must pay certain termination benefits to employees who are dismissed, including: leave encashment; gratuity payment (for employees, whether workmen or not, with 5 years or more of seniority); payment in lieu of notice (if no notice is given); statutory bonus payment and any other amounts due under the employment contract. Employees who are being terminated on account of misconduct will not be entitled to notice pay or retrenchment compensation.

POST-TERMINATION RESTRAINTS

Non-competes

The Indian Contract Act 1872 provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is void. Therefore, non-competition clauses which operate during the course of employment are generally not regarded as restraint of trade. However, post-termination non-competition clauses are void and unenforceable.

Customer non-solicits

Possibly enforceable. With post-termination non-dealing/non-solicit provisions, it can be argued that a restriction on activities with customers is a restraint of trade, if by complying the former employee is prejudicially affected from carrying out any trade. Whether such a clause is enforceable or not is, therefore, dependent on the facts of the case. Non-solicitation provisions, even if they are upheld, generally only entitle the employer to damages, and it is highly
uncommon for an Indian Court to grant an injunction preventing the customer from taking his/her business elsewhere. At best, a claim for damages may succeed against the employee for breach of their contractual agreement if the employer can show that the enforcement of the provision is essential to protect its confidential information as well as that the provision does not prejudice the former employee's ability to carry on a business/trade and therefore is not in restraint of trade.

**Employee non-solicits**

Non-solicitation provisions in relation to other employees can be enforced against a former employee but the courts will not generally grant injunctive relief restraining the employees who are being solicited from leaving the company.

**WAIVERS**

The doctrine of waiver is recognized in Indian contract law. A waiver must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Though any waiver against statutory entitlements given by an employee is unlikely to be enforceable, a generic waiver of contractual rights may be enforced.

**REMEDIES**

**Discrimination**

Complaints against unfair labor practices under IDA on grounds of discrimination may be filed by a workman or a trade union before the labor courts. Damages for wrongful dismissal will be assessed in accordance with what the employee would have received if the contract had been properly terminated on its terms.

Complaints of sexual harassment under the POSH Act may be filed by the victim with the internal complaints committee (if against another employee) or the local complaints committee (if against the employer). The victim of sexual harassment may directly file a complaint with the police station having jurisdiction, or under the Indian Penal Code before the criminal courts.

Complaints for discrimination on the basis of a person's disability must be raised with the head of the establishment who should take immediate action in accordance with the provisions of the RPWD Act. The RPWD Act provides for a complaint to be raised with the Chief Commissioner or State Commissioner for Persons with Disabilities.

**Unfair dismissal**

Complaints of unfair dismissal are filed before the labor courts/tribunals. The courts can grant an employee reinstatement with full back wages with continuity in service, or reinstatement without back wages, or only back wages without reinstatement, or only monetary compensation and consequential benefits.

**Failure to inform & consult**

The IDA stipulates that an employer who proposes to effect any change in its conditions of service including wages, compensatory and other allowances, hours of work, or any rationalization, standardization or improvement
of plant or technique which is likely to lead to retrenchment of workmen; may not effect such a change without giving those workmen likely to be affected 21 days' notice. In some states, the period of notice required is longer and no notice is required where the change is effected in pursuance of a settlement or award. Notice of change is required only where the change in the terms of service is to the detriment of the workman. Any failure on the part of the employer to adhere to this notice process will render any such change void.

As stated above, recent amendments to the MBA and ECA require employers to inform their employees of the benefits available to them thereunder in writing at the time of their appointment. Further, the POSH Act requires that employers provide/organize training, workshops and awareness programs for their employees to make them aware of the provisions of the POSH Act. Employers are also required under the RPWD Act to notify an equal opportunity policy with the contents (as mentioned above).

**CRIMINAL SANCTIONS**

Sanctions for violating labor statutes include both imprisonment and fine. The extent of such penal provisions will depend on the statute and the nature of the breach.

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