The Employment Law Review

Seventh Edition

Editor
Erika C Collins

Law Business Research
THE
EMPLOYMENT
LAW REVIEW

Seventh Edition

Editor
ERIKA C COLLINS

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# CONTENTS

<table>
<thead>
<tr>
<th>Editor's Preface</th>
<th>ix</th>
<th>Erika C Collins</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 1</td>
<td>1</td>
<td>Erika C Collins and Michelle A Gyves</td>
</tr>
<tr>
<td>EMPLOYMENT ISSUES IN CROSS-BORDER M&amp;A TRANSACTIONS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 2</td>
<td>17</td>
<td>Erika C Collins and Ryan H Hutzler</td>
</tr>
<tr>
<td>GLOBAL DIVERSITY AND INTERNATIONAL EMPLOYMENT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 3</td>
<td>26</td>
<td>Erika C Collins and Ryan H Hutzler</td>
</tr>
<tr>
<td>SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 4</td>
<td>35</td>
<td>Erika C Collins</td>
</tr>
<tr>
<td>RELIGIOUS DISCRIMINATION IN INTERNATIONAL EMPLOYMENT LAW</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 5</td>
<td>51</td>
<td>Javier E Patrón and Enrique M Stile</td>
</tr>
<tr>
<td>ARGENTINA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 6</td>
<td>66</td>
<td>Chris Van Olmen</td>
</tr>
<tr>
<td>BELGIUM</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 7</td>
<td>82</td>
<td>Vilma Toshie Kutomi and Domingos Antonio Fortunato Netto</td>
</tr>
<tr>
<td>BRAZIL</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 8</td>
<td>105</td>
<td>Erin R Kuzz and Patrick M R Groom</td>
</tr>
<tr>
<td>CANADA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chapter 9</td>
<td>CHILE ................................................................. 126</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Roberto Lewin and Nicole Lüer</td>
<td></td>
</tr>
<tr>
<td>Chapter 10</td>
<td>CHINA ...................................................................... 140</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Erika C Collins and Ying Li</td>
<td></td>
</tr>
<tr>
<td>Chapter 11</td>
<td>CYPRUS .................................................................. 159</td>
<td></td>
</tr>
<tr>
<td></td>
<td>George Z Georgiou, Anna Praxitelous and Natasa Aplikiotou</td>
<td></td>
</tr>
<tr>
<td>Chapter 12</td>
<td>DENMARK .................................................................. 175</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tommy Angermair</td>
<td></td>
</tr>
<tr>
<td>Chapter 13</td>
<td>FINLAND .................................................................. 191</td>
<td></td>
</tr>
<tr>
<td></td>
<td>JP Alho and Carola Möller</td>
<td></td>
</tr>
<tr>
<td>Chapter 14</td>
<td>FRANCE .................................................................... 203</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yasmine Tarasewicz and Paul Romatet</td>
<td></td>
</tr>
<tr>
<td>Chapter 15</td>
<td>GERMANY .................................................................. 220</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Thomas Winzer</td>
<td></td>
</tr>
<tr>
<td>Chapter 16</td>
<td>GHANA .................................................................... 233</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Paa Kwesi Hagan</td>
<td></td>
</tr>
<tr>
<td>Chapter 17</td>
<td>GREECE .................................................................... 245</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Effie G Mitsopoulou and Ioanna C Kyriazi</td>
<td></td>
</tr>
<tr>
<td>Chapter 18</td>
<td>HONG KONG ................................................................ 263</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Jeremy Leifer</td>
<td></td>
</tr>
<tr>
<td>Chapter 19</td>
<td>INDIA ...................................................................... 276</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Debjani Aich</td>
<td></td>
</tr>
<tr>
<td>Chapter 20</td>
<td>INDONESIA .................................................................. 293</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Nafis Adwani and Indra Setiawan</td>
<td></td>
</tr>
<tr>
<td>Chapter 21</td>
<td>IRELAND .................................................................... 311</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Bryan Dunne and Bláthnáid Evans</td>
<td></td>
</tr>
<tr>
<td>Chapter 22</td>
<td>ISRAEL ...................................................................... 328</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Orly Gerbi, Maayan Hammer-Tzeelon, Tamar Bachar,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Nir Gal and Marian Fertleman</td>
<td></td>
</tr>
</tbody>
</table>
Chapter 23  ITALY ..................................................................................... 342
Raffaella Betti Berutto

Chapter 24  JAPAN .................................................................................... 356
Shione Kinoshita, Shiho Azuma, Yuki Minato, Hideaki Saito, Keisuke Tomida and Tomoaki Ikeda

Chapter 25  KOREA .................................................................................. 369
Kwon Hoe Kim, Don K Mun and Young Min Kim

Chapter 26  LUXEMBOURG ................................................................... 382
Guy Castegnaro and Ariane Claverie

Chapter 27  MALAYSIA ............................................................................ 408
Siva Kumar Kanagasabai and Selvamalar Alagaratnam

Chapter 28  MEXICO ............................................................................... 429
Miguel Valle, Jorge Mondragón and Rafael Vallejo

Chapter 29  NETHERLANDS .................................................................. 447
Els de Wind and Cara Pronk

Chapter 30  NEW ZEALAND .................................................................. 471
Bridget Smith and Tim Oldfield

Chapter 31  NIGERIA ............................................................................... 483
Olawale Adebambo, Folabi Kuti and Ifedayo Iroche

Chapter 32  NORWAY .............................................................................. 501
Gro Forsdal Helvik

Chapter 33  PANAMA ................................................................................ 514
Vivian Holness

Chapter 34  PHILIPPINES ........................................................................ 526
Rolando Mario G Villonco, Rafael H E Khan and Carmina Marie R Panlilio

Chapter 35  POLAND ................................................................................ 541
Roch Palubicki and Karolina Nowotna-Hartman
Chapter 36  PORTUGAL .......................................................... 556
Magda Sousa Gomes and Rita Canas da Silva

Chapter 37  PUERTO RICO .................................................. 573
Katherine González-Valentín, Maria Judith (Nani)
Marchand-Sánchez, Rafael I Rodríguez-Nevares,
Luis O Rodríguez-López and Tatiana Leal-González

Chapter 38  RUSSIA ....................................................... 589
Irina Anyukhina

Chapter 39  SAUDI ARABIA .............................................. 611
Amgad T Husein, John M B Balouziyeh and Jonathan G Burns

Chapter 40  SLOVENIA .................................................... 629
Vesna Šafar and Martin Šafar

Chapter 41  SOUTH AFRICA ............................................. 648
Stuart Harrison, Brian Patterson and Zabida Ebrahim

Chapter 42  SPAIN ......................................................... 670
Iñigo Sagardoy de Simón and Gisella Rocío Alvarado Caycho

Chapter 43  SWITZERLAND ............................................... 690
Ueli Sommer

Chapter 44  TAIWAN ........................................................ 704
Jamie Shih-Mei Lin

Chapter 45  TURKEY ........................................................ 717
Serbülent Baykan and Hazal Ceyla Özbek

Chapter 46  UKRAINE ...................................................... 732
Svitlana Kheda

Chapter 47  UNITED ARAB EMIRATES .......................... 746
Ibrahim Elsadig and Nadine Naji

Chapter 48  UNITED KINGDOM ...................................... 756
Daniel Ornstein and Peta-Anne Barrow
<table>
<thead>
<tr>
<th>Chapter 49</th>
<th>UNITED STATES ................................................................. 771</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Allan S Bloom and Carolyn M Dellatore</td>
</tr>
<tr>
<td>Chapter 50</td>
<td>ZIMBABWE ........................................................................... 785</td>
</tr>
<tr>
<td></td>
<td>Tawanda Nyamasoka</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS.................................................................. 797</td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTING LAW FIRMS’ CONTACT DETAILS.. 831</td>
</tr>
</tbody>
</table>
Every year around this time when we update and publish *The Employment Law Review*, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this seventh edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past six years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up to date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2015 in nations across the globe, and is the topic of the second general interest chapter. In 2015, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where homosexuality is a crime, and multinational companies have many challenges still with promoting their diversity programmes.
The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Because companies continue to implement ‘bring your own device’ programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. ‘Bring your own device’ issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees’ personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees’ use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our fourth and newest general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this seventh edition of The Employment Law Review includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Roberton and Sophie Arkell, for their hard work and continued support. I also wish to thank all of our contributors and my associates, Michelle Gyves and Ryan Hutzler, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2016
Chapter 19

INDIA

Debjani Aich

I INTRODUCTION

The principal sources of law and regulations relating to employment relationships in India are the Constitution of India, 1950, labour statutes, judicial precedents and collective and individual agreements. The applicability of employment law in India is based on several factors, most of which relate to the function of the employee, the activity being performed by the employer and the number of persons employed in the organisation. Briefly, India’s employment laws can be categorised as below:

a. certain laws (such as the Factories Act, 1948 (Factories Act)) apply only to a factory that is engaged in manufacturing;

b. certain laws apply to an individual who is a ‘workman’, regardless of the organisation in which they are working;

c. certain laws apply to all employees working in an establishment, without distinguishing the category of employee.

Indian employment laws are highly protective of workmen, and it can be a challenge for employers to comply with all applicable laws, some of which date back to the 1940s, albeit with more recent amendments. The labour laws require an employer to act in accordance with multiple regulatory compliances, which relate to obtaining registrations, filing periodic returns, maintenance of various registers and physical display of extracts of specific laws. These compliances may be rather tedious and problematic, as the information can be voluminous and an employer may have specific internal formats to maintain the information. In addition, statutory notices may need to be provided

1 Debjani Aich is a partner with Kochhar & Co.
by an employer to the workmen with intimation to the labour authorities, for various reasons such as change of service conditions, which would include changes to leave, remuneration, company privileges, etc.

i Legal framework

India is a federation of states. The Constitution of India demarcates the areas where central (federal) and state governments can legislate. Most employment laws are central pan-India legislations. These include laws relating to employment disputes, social welfare benefits, etc. States are generally empowered to pass amendments to these laws, with specific local applicability.

The Industrial Disputes Act, 1947 (ID Act) is the main central legislation dealing with ‘workmen’. A workman would generally be any employee, inter alia, engaged to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, but would not include an employee engaged in:

- a managerial or administrative capacity; or
- a supervisory capacity, and drawing wages more than 10,000 rupees per month.

Typically, all employees who are not in a managerial or supervisory role would be considered as workmen.

A main type of legislation that is usually enacted by a state is the Shops and Establishments Act (SEA). This law deals with issues like working hours, leave, public holidays, overtime, etc.

ii Court procedure in labour disputes

Complaints involving industrial disputes fall under the ID Act, which provides for various adjudicatory bodies – including jurisdictional conciliation officers, labour courts and industrial tribunals – to hear and resolve disputes between workmen and management. An employer and workmen may also agree to refer an industrial dispute to arbitration under the ID Act. Further, the High Courts of the states2 and the Supreme Court of India3 (India’s apex court) also have jurisdiction to hear certain labour disputes under the Constitution of India.

Under the ID Act, conciliation officers are government officials appointed to mediate and promote the settlement of industrial disputes. The government (central or state) also has the power to establish boards of conciliation for the settlement of any industrial dispute referred to it, which functions like an arbitral tribunal. Such a board would have either two or four members (nominated in equal numbers by the parties to the dispute) and would be headed by an independent chairman.

State-level labour courts adjudicate industrial disputes relating to matters specified in the Second Schedule of the ID Act, including the discharge or dismissal of workmen, withdrawal of any customary concession or the illegality of a strike or lockout. Industrial

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2 Each State has a High Court with superintendence over all courts and tribunals in the state.

3 The Supreme Court of India exercises original and appellate jurisdiction in relation to employment laws.
tribunals adjudicate industrial disputes relating to matters specified in the Second or Third Schedule of the ID Act. In addition, national tribunals have been set up that deal with industrial disputes that the government believes involve questions of national importance, or are of such a nature that industrial establishments situated in more than one state may be affected. In certain cases, the government (central or state) also has the power to constitute a ‘court of inquiry’ to examine any matter relevant to an industrial dispute.

Litigation in India is a long-drawn process and the duration of an industrial dispute is difficult to predict with certainty – it may range from six months to over two years.

The dispute process would vary for employees who are non-workmen. In this case, the remedy would be mainly for breach of the employment agreement, where the parties have the option to approach the jurisdictional civil court (which includes the state High Court) for relief or the appropriate authority under the applicable SEA.

II YEAR IN REVIEW

India’s current Central Government was formed in May 2014, lead by the BJP party majority. As part of its objective to make it easier to do business in India, it has proposed that the most important central labour laws be revised and possibly amalgamated into two or three labour codes. If this is implemented, substantive procedural requirements relating to compliance and filing will be streamlined.

Amendments have also been proposed to federal laws relating to factories and the use of apprentices. Drafts of the first codes merging the laws relating to industrial relations and wages have been released by the central government, though there has been reasonable pushback to the same from various quarters, including from the impacted employees. Depending on how the draft bills are implemented, it is expected that India will see major reforms to its employment laws during 2016.

As a precursor to pan-India changes, certain states in India (which have a BJP-led government) have implemented changes to their state laws. These include Rajasthan and Maharashtra, where the respective governments have amended or proposed amendments to laws relating to industrial disputes, factories and contract labour.

Another important change has been the concerted move towards e-governance in the labour law sector. A new web portal launched by the central government provides users with a unique labour identification number, facilitating online registration, the filing of self-certified and simplified online returns for specific central laws and a more transparent labour inspection scheme on risk-based criteria.

While not a law introduced in 2015, the 2013 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (POSH Act) continued to retain and gain momentum as an important piece of legislation for corporate India. The POSH Act requires every employer to have a policy against sexual harassment, and to appoint a committee to handle sexual harassment complaints. The Central Government has been very active in issuing directives to have compliances met under the POSH Act.
III SIGNIFICANT CASES

i Gayatri Balaswamy v. ISG Novasoft Technologies Ltd, High Court of Madras, September 2014 [MANU/TN/2293/2014]

This is an important case under anti-sexual harassment laws, as the quantum of compensation to the plaintiff is quite high.

The High Court of Madras directed the respondent company to pay compensation of 1.68 crores to the plaintiff, a woman, for not having constituted a complaints committee to deal with sexual harassment issues, as required under the Supreme Court of India's guidelines on the prevention of sexual harassment at the workplace (Vishaka Guidelines). The Vishaka Guidelines had the force of law from 1997 till the codified law through the POSH Act came into place as of December 2013. The High Court observed that the existence of a grievance redressal committee and an ombudsperson in the company was not a substitute for a complaints committee under the Vishaka Guidelines. This is an important case, as the quantum of compensation to the plaintiff is quite high and companies must therefore ensure that they are compliant with all requirements of the POSH Act and Vishaka Guidelines.

ii Tata Consulting Services Ltd case – revocation of termination order, High Court of Madras, January 2015

This is quite an important case, as there have been several instances, especially in the IT and Information Technology Enabled Service (ITES) sector, where the employer does not follow the ID Act process for retrenchment and instead asks the workmen to ‘resign’.

In December 2014, the respondent, Tata Consulting Services Limited (TCS), a leading IT major, had announced a large-scale reduction in force. Most of the impacted employees qualified as workmen under the ID Act. However, as per publicly available information, TCS did not follow due process required for termination of the workmen (discussed further on). One of the impacted workmen, a female employee, approached the High Court of Madras on grounds that the termination was illegal and void and seeking an injunction in relation to the same against TCS. The High Court stayed the termination through an interim injunction of four weeks. During the said period, it also came to light that the plaintiff was pregnant, though not on maternity leave. TCS, at its own volition, revoked the termination order of the plaintiff as an ‘exception’ and the case was closed and dismissed by the High Court.

Another important aspect from this case is that it demonstrates that proposed termination of a woman employee who is pregnant must be handled as an exceptional case and with sensitivity.

iii M Babu v. Management of Press Com Products, High Court of Karnataka, April 2014 [MANU/KA/1694]

This is relevant from the perspective of multiple resignations by an employee from the services of the company.

The plaintiff, who was a workman under the ID Act, contended that he had been forced into resigning from the company and that his services had been terminated.
illegally. The High Court held that such plea was not maintainable, as the plaintiff had resigned at his own volition from the company and had accepted his full and final dues from the company.

iv  Rajneesh Kumar v. State Farms Corporation of India Limited, High Court of Delhi, February 2015 [MANU/DE/0558/2015]

This is relevant from the perspective of duration and confirmation of a probation period. The petitioner’s service was terminated on the grounds that his performance was not satisfactory during the probation period.

The petitioner contended that his employment had been regarded as confirmed since he had continued working with the company beyond the maximum probation period prescribed under the company’s service rules. The High Court of Delhi held that the service rules required the probation to be completed satisfactorily, which was not the fact in the current case and the plaintiff’s case was not justifiable.

v  Indian Farmers Fertiliser Cooperative Ltd v. Presiding Officer, Labour Court — High Court of Allahabad, December 2014 [MANU/UP/2687/2014]

This is a relevant case under the Contract Labour Regulation and Abolition Act, 1970 (CLRAA) and the treatment of individuals as contract workers.

The High Court of Allahabad held that the contract labour system is sham when wages of the purported contract worker are paid by the principal employer. In this case, the High Court held that the individual was not a contract worker but was a direct employee of the company.


This is an interesting case dealing with the requirement of an enquiry before termination due to misconduct.

The appellant was required to complete certain annual targets and conform to cost guidelines stipulated by the respondent company. In this case, it was held that termination of employment for failure to achieve targets without due enquiry was not valid.

vii  Pardeep Kumar v. Presiding Officer and another [2015 LLR 726]

This is a relevant case under the Employees Provident Fund (and Miscellaneous Provisions) Act, 1952 (EPF Act) in relation to contribution of statutory dues by a principle employer for contract workers.

It was held that once a contractor has been allotted its independent code number under the EPF Act as an employer, it acquires the status of an ‘establishment’ under the said law and becomes responsible for deposit of its employees contributions, despite the fact that such employees are engaged as contract workers by clients of the contactor. Accordingly, the principal employer (client) cannot be held liable for default in payment of statutory contributions by the contractor.
IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, if notified by the concerned state government, a private-sector employer with 25 or more employees is typically required to notify any vacancy to a local government employment exchange at least 15 days before the date on which applicants will be interviewed or tested. In practice, this is often observed in the breach and it is not common for an employer to be prosecuted for non-compliance.

There is no central statute dealing with the issue of an appointment letter or employment contract. Certain state-specific statutes may require the employer to issue an appointment order in a specified format, which would contain specifics such as the name and address of the employer, employee’s name and address, date of joining, designation, rates of wages, etc.

In practice, most companies provide an appointment letter or an employment contract indicating the date of joining, position, compensation and general terms and conditions of employment, including probation and termination. Typically, the break-up of compensation is mentioned in an annexure, which can be modified as required. The break-up of compensation would be based largely on the taxation aspects of different components of compensation.

Companies would also have an employee handbook or manual, which would contain details of company policies relating to various issues such as discipline, hours of work, leave, etc. In addition, it is quite common for companies (especially in the IT/R&D sector) to enter into confidentiality and non-disclosure agreements separately with the employees.

In case the employer wishes to change the terms of employment, one would need to check if the employee is a workman or not. For workmen, the ID Act provides for a specific process to be followed for change in specified working conditions, including wages, hours of work, etc., including provision of prior notice of 21 days. For a non-workman, it is recommended that the employer obtain the consent of the impacted employee in order to effect the change, as a unilateral change to the terms of the employment (by way of the employment contract) may be held as arbitrary and void.

ii Probationary periods

There are no direct laws dealing with probation on a general basis in India; however, this is a common practice. The (Central) Industrial Employment (Standing Orders) Act, 1946 (IESO Act) regulates working conditions for workmen and generally applies to industrial establishments employing 100 or more workmen.\(^4\) Under the IESO Act, a

\(^4\) There are state-specific modifications, such as those seen in Maharashtra and Karnataka, where the IESO Act will apply to industrial establishments with 50 or more workmen. Further, states can exempt the applicability of the IESO Act to certain sectors. Eg, in Karnataka, the IT/ITES sector is exempt from the IESO Act.
workman can be employed on a probationary basis to provisionally fill a permanent vacancy up to a maximum of three months. Any such probationer is not entitled to dismissal notice or payment in lieu during the probation.

Certain States (such as Maharashtra) have built in the concept indirectly in their local SEA, by requiring an employer to provide termination notice if the employee has worked for a specific duration (in Maharashtra, three months). No notice is required if the employee has worked less than this period.

Typically, a probation period lasts between three and six months and should ideally not exceed 240 days, as several statutory social welfare laws apply to employees who have worked for such period and a probation period exceeding this limit may be construed as a method to avoid complying with law. It is generally accepted that the services of probationary employees can be terminated at any time by either the employer or the employee as per the terms of the employment contract.

iii Establishing a presence

Actual hiring of employees would require the establishment of a legal entity to do business in India. There are various routes to set up such an entity, such as establishing a company; a branch office; a liaison/ or representative office; or a limited liability partnership.

Till such time as the legal hiring entity is not set up, if a foreign company is desirous of getting people on board, it can examine options such as entering into an independent contractor agreement with the individual or using the services of a manpower agency as a temporary measure. The use of an independent contractor, especially in relation to the duration of the contract term, would need to take into account possible adverse tax implications on the foreign company by way of having a ‘permanent establishment’ in India.

iv Contract labour

MNCs in India often do not hire direct or regular employees for ancillary services, such as security, housekeeping and catering. A company would usually hire a ‘contractor’ to provide such support services and the provision of labour by such a contractor would be regulated by the CLRAA. The CLRAA envisages registration of the ‘principal employer’ and licensing of a contractor. A ‘principal employer’ would be any person responsible for supervision and control of an establishment, namely, the company hiring the contractor. It is the responsibility of the contractor to make timely payment of salaries and other emoluments and statutory benefits to the contract labour. A key aspect of the CLRAA relates to defaults in such statutory obligations of the contractor – in such case, it is possible that the principle employer may be obligated to make good the defaults (which can include payments) to the contract labour and subsequently recover the same from the contractor.

Another factor to consider is that there should be no creation of an employer-employee relationship between the principal employer and the contract labour. The principle employer should deal only with the contractor and should have no direct supervision or control over the contract labour. A default of the latter provision may lead
to an impression that the contract labour is actually a direct hire of the principle employer and all subsequent statutory obligations (such as salary and social welfare benefits) would need to be provided by the principle employer.

V RESTRICTIVE COVENANTS

Restrictive covenants in the form of non-compete and non-solicitation clauses are normally included in an employment agreement in India. Strictly speaking, a blanket non-compete clause (restricting an employee from directly or indirectly performing services or taking up employment with any competitor of the previous employer for a specified period after the date of termination of employment with such previous employer) post termination of employment would not be enforceable under Indian laws as it would be held as a ‘restraint of trade’, but is usually included for deterrent value.

Non-solicitation agreements post termination of the employment relationship may have limited enforcement between two employers but not against the employees per se. The law on non-solicitation agreements is not very well developed. It is possible to have employees sign an employee bond – if the employee is provided with substantial training at significant cost, the employer can require him or her to remain with the organisation for a reasonable period. If the employee leaves prior to the expiry of this period, he or she may be required to repay the actual or reasonable costs incurred by the employer for such training.

VI WAGES

The Minimum Wages Act, 1948 (Minimum Wages Act), the Payment of Wages Act, 1936 (Payment of Wages Act) and the relevant SEAs generally govern the payment of wages to the employees.

The Minimum Wages Act stipulates the minimum rates of wages in certain employments. The rates of wages differ from state to state and are periodically revised.

The Payment of Wages Act regulates the payment of wages including mode, method and period for disbursement to certain classes of employed persons. The law is applicable to persons earning up to 18,000 rupees per month. This law also prescribes for situations where an employer can make deductions from an employee’s wages. Deductions usually do not exceed 50 per cent of the wages payable to the employee.

i Working hours, overtime and leave

By and large, the SEA would provide for working hours, which average around eight to nine hours per day with a prescribed rest period in between. Most state laws provide for a break of 30–60 minutes after four to five hours of work.

Any work beyond the aforesaid limits would warrant overtime payment, which is usually twice the average wages. It is relevant to note that the SEA may also provide for overtime caps, usually on a daily, weekly, monthly or annual basis.

Again, ‘wages’ are usually defined under state law, and include basic wages plus normal allowances, but exclude any bonus component. There are no exemptions
Ordinarily, companies are required to adhere to government norms on opening and closing hours and need to be closed for one day a week. As per standard business practice in India, this is usually Sunday. Exceptions have been made under the SEAs for certain sectors, such as the IT/ITES sector which needs to work on a 24 hours a day, seven days a week, 365 days a year model, for which specific permission is required from state labour authorities.

Women employees are generally not permitted to work at night (8pm to 6am), for safety reasons. Some state governments provide exceptions for sectors such as IT/ITES, for which specific approval has to be obtained from the labour authorities. Any such approval is usually subject to stringent security conditions (such as having security at the premises and in the vehicle, making sure the woman employee is not the first person picked up or the last person dropped, having a tracking device in the vehicle), which the employer is bound to follow. The general view is that if a woman employee works at night in order to finish pending work, rather than because her fixed hours demand it, this law need not be followed. However, there is serious risk if an incident takes place when the woman is going home at night.

The Factories Act is the main central law dealing with factories, distinct from ‘regular’ commercial establishments. The Factories Act provides for working hours for factory workers (a maximum of 48 hours a week or nine hours a day, or both), overtime (usually at twice the ordinary rate of wages), leave, etc. Other relevant features of the Factories Act are detailed safeguards for the health of factory workers, safety when dealing with machinery, improvement of physical conditions of the workplace and welfare amenities.

Typically, the SEA would provide for about 15–20 days of regular leave and about 10 national or public holidays. Some national holidays are compulsory, while others may be chosen out of a larger list of holidays notified by the local government. Some legislation prescribes a double wage for working on a public holiday, or payment for that day along with compensatory time off on any other day of the employee's choice; a rule that is largely observed in the breach.

ii Employee benefits

An employer may be required to provide statutory social welfare benefits to its employees according to various central legislation. The main legislation includes the EPF Act, the Employees’ State Insurance Act, 1948 (ESI Act), the Payment of Gratuity Act, 1972 (PG Act), the Payment of Bonus Act, 1965 (Bonus Act) and the Maternity Benefit Act, 1961 (MB Act).

The Minimum Wages Act provides for fixing the minimum rates of wages in certain employments. Minimum wages are declared at national, regional, sectoral and occupational or skill level. The wages are determined on a decision jointly made by the government, the employer and trade union representatives, where present.

The EPF Act applies to establishments *inter alia* employing more than 20 persons, and is compulsory for employees earning a salary up to 15,000 rupees per month. Under
the EPF Act, the employer and employee are required to make contributions to various funds (provident, pension and deposit-linked insurance) for the benefit of the employee. As a matter of practice, companies often provide this benefit to all employees regardless of their monthly compensation. If a company chooses to voluntarily follow the EPF Act, it would need to comply with all requirements thereunder, including in relation to contribution caps and filings.

Companies with foreign employees and companies sending Indian employees to work overseas would need to deal with the concept of ‘international workers’ under the EPF Act, where a higher amount of the employer’s contribution would typically need to be deposited in the provident and pension funds as compared to ‘regular’ Indian employees.

The ESI Act applies to factories, which are defined as establishments engaged in manufacture with the aid of power wherein 10 or more persons are employed. In establishments engaged in manufacture without the aid of power, 20 or more persons must be employed for the ESI Act to apply. The central government may also notify other establishments to fall under the ambit of the ESI Act. According to the labour authorities, the ESI Act is applicable to all establishments. However, there is ambiguity on this, as there do not appear to be any notifications issued on the same. The objective of the ESI Act is, *inter alia*, to provide proper medical facilities and insurance to the workman and to his or her immediate family, through a contributory fund. All employees, whether employed directly or through a contractor or part time, and who receive a salary of up to 15,000 rupees per month, are entitled to be insured under the ESI Act. The employer and the employee are required to contribute a specified percentage of the salary, which is deposited by the employer in the Employees’ State Insurance account.

Gratuity under the PG Act is a lump sum payment made to an employee on retirement, death or termination of employment due to disablement. Other than in the case of death or disablement, it is required to be paid only to employees who have completed five years of continuous service. The requirement to pay gratuity, *inter alia*, applies only to an establishment in which 10 or more persons are employed, and is applicable to all employees regardless of the amount of monthly remuneration. The amount of gratuity is determined at the rate of 15 days’ salary for every completed year of service or part thereof in excess of six months, and is based on the last drawn salary of the employee, capped at a maximum amount that is statutorily payable at 1 million rupees.

The Bonus Act applies to every establishment wherein 20 or more persons are employed on any day during an accounting year. Under the Bonus Act, an employee receiving a salary of 21,000 rupees per month or less (based on a very recent amendment) is entitled to a bonus for every accounting year if he or she has worked for at least 30 working days in that year, *inter alia*, on the basis of profits or on the basis of production or productivity. The minimum bonus required is 8.33 per cent of the salary earned by the concerned employee during an accounting year, or a sum of 100 rupees, whichever is higher. The Bonus Act also provides that the maximum bonus payable to an employee should not exceed 20 per cent of the salary earned by an employee during the relevant accounting year.

The MB Act provides for paid maternity leave and other benefits (such as a maternity bonus) in relation to childbirth, medical termination of pregnancy, miscarriage and other pregnancy-related conditions such as a tubectomy. A woman employee is
generally entitled to 12 weeks of paid maternity leave, of which at least six weeks must be post-delivery. There is a maternity bonus of 3,500 rupees if no prenatal care is provided by the employer, and the law prevents a woman employee from being terminated if she is on statutory maternity leave.

VII FOREIGN WORKERS

As mentioned above, a significant difference between Indian and foreign employees is evident under the EPF Act. The threshold to qualify, the manner of deduction and the benefits are different for a foreign employee, and differ further depending on whether the country of origin has a social service agreement with India.

There are no other substantive distinctions between local and foreign employees. Immigration issues in India are regulated broadly by federal laws, with input from the Ministry of Home Affairs and Ministry of External Affairs of the government. While the tourist visa-on-arrival provision has recently been introduced for a limited number of countries (such as Singapore, Finland, Luxembourg and New Zealand), work-related visas typically need to be applied for well in advance.

In order to stay in India and work long term with an Indian company, a foreign national requires an employment visa (E visa), unless he or she already holds a valid Overseas Citizen of India (OCI) card, which is granted to certain foreign nationals of Indian origin. Prior to January 2015, the government had promulgated a Persons of Indian Origin (PIO) card scheme, under which specified PIOs could travel to India without a visa for the duration of an issued PIO Card and avail of certain benefits akin to an Indian citizen. As of 9 January 2015, the PIO scheme has been withdrawn and all PIO cardholders are deemed to be OCIs.

To be eligible for an employment visa, a foreign worker should earn a salary of more than US$ 25,000 per year and should not be appointed to a job for which qualified Indians are available. A separate category of business visa exists that is issued only for a short-term purpose, such as a visit to India to explore possible business ventures. Foreign nationals are generally required to register with a jurisdictional Foreigners’ Registration Officer or Foreigners’ Regional Registration Officer, within 14 days of their arrival in India if they hold a visa for a period of more than 180 days.

Given the fluidity of international relationships, it is recommended that any foreigner wishing to travel to India obtain specific prior advice on the type of visa he or she needs to obtain. For example, in case of an Indian visa in the USA, if a visa applicant holds dual citizenship with the US and another country, the applicant needs to apply using their US passport, if living in the US (except for applicants who hold dual citizenship with Pakistan). Pakistani citizens who have also acquired US citizenship are required to apply for a visa only on their Pakistani passport, unless the applicant can provide a copy of his or her renunciation certificate from the Pakistani consulate. There are additional documentation requirements in the case of such a Pakistan citizen, such as sponsorship from an Indian citizen, a special visa application form, etc.

If a foreign individual on an employment visa wants to change employment to another company, he or she would need to leave India and apply for a fresh visa. The only exception is where the foreigner is changing jobs between a registered holding
company and its subsidiaries, or vice versa, or between subsidiaries of a registered holding company. In such case, the foreigner may not need to leave India, provided that he or she fulfills specific criteria, including obtaining prior government approval for the change in employment. Such a change is usually permitted only at a senior level, such as a managerial or a senior executive position or at a skilled position, such as a technical expert.

VIII GLOBAL POLICIES

The IESO Act, briefly discussed above, provides for formation of standing orders defining the working conditions for workmen in establishments to which the law applies. The orders would need to be certified by the labour authorities and made available to all workmen. Matters covered the standing orders include:

- classification of workmen (permanent, temporary, probationer, etc.);
- intimation of working hours, holidays and wages;
- shift working;
- termination of employment and related matters, including suspension or dismissal for misconduct;
- sexual harassment matters; and
- retirement.

Standing orders are required to be written in English and the language spoke by the majority of the workmen, and displayed in a specified manner by the employer to ensure maximum visibility to the workmen. It may be noted that the requirement of standing orders reduces the flexibility to choose employment terms and to amend them from time to time.

While most companies would have an employee handbook or manual dealing with issues under the IESO Act, it is advisable to check if there are any state laws that require the company to actually adopt the format of the standing orders under the IESO Act.

IX TRANSLATION

Certain state laws require various statutory employment-related documents (such as statutory notices and registers) to be maintained or displayed in the local language, or the language understood by the majority of the workmen in the establishment. An employment agreement would not need to be framed in such a manner and is usually in English. What is important to note is that an employee is able to understand all employment-related documents.
X  EMPLOYEE REPRESENTATION

i  Works committee
Under the ID Act, if an industrial establishment employs 100 or more workmen, the government (state or central) may require the establishment to constitute a works committee with a maximum of 20 members. The works committee has a duty to promote measures for security and good relations between the employer and workmen; and towards such aim, to comment upon matters of their common interest or concern and to mediate or facilitate any material difference of opinion in respect of such matters. The committee would consist of representatives nominated by the employer and workmen representatives, both in an equal number. The ID Act provides for a specific process to be followed for election of the workmen’s representatives.

ii  Trade union
The legal right for collective bargaining exists in India through the means of a trade union. A trade union may be formed in accordance with the Trade Unions Act, 1926 for regulating relations between an employer and the employees. For the purpose of registration, any seven or more members of a trade union can subscribe their names to the charter of the trade union and apply for registration of the trade union. A trade union is entitled to enter into binding contracts and settlements with an employer. In practice, white collar employees are usually not represented by a trade union or any other collective bargaining unit. Further, trade unions are largely absent in services businesses, including in particular India’s large software, BPO and call centre industry.

In addition, certain states in India have laws dealing with trade unions, such as the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and the Kerala Recognition of Trade Unions Act, 2010.

XI  DATA PROTECTION

i  Requirements for registration
There are no requirements for an employer to register with the data protection agency or any other government body.

ii  Sensitive personal data or information
An employer has an obligation to ensure that any sensitive personal data or information (SPI) that it collects from an employee is kept secure and confidential. From an employer’s perspective, employee SPI would include personal details such as financial information (bank account or credit card details), medical records and biometric information. The employer may either contractually provide for safety norms dealing with SPI or would need to follow the extant Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 in relation to the same. Thus, companies are increasingly contracting out the safety and security measures applicable to an employee’s SPI, which is held by the company in accordance with its data protection and privacy policy.
Indian employers are beginning to introduce the ‘bring your own device’ (BYOD) concept to the workplace. BYOD programmes usually provide the employer with the right to delete all information on an employee’s personal device if there has been any security breach of company data. To ensure compliance with the Information Technology Act, 2000, the main Indian law dealing with data protection) and SPI rules, employers must ensure that express specific consent of the employee is obtained prior to participating in a BYOD programme, including the fact that the employer has the right to take over or delete any information on an employee’s personal device if it feels it is required.

iii Background checks

Background checks are a common feature that employers in India generally follow before hiring anyone, and successful completion of the same is a precondition to employment (and continuing employment) with the company. Often, employers retain the right to also conduct background checks on existing employees in case it is required for business purposes.

There is no prohibition on conducting background checks on employees, including candidates, provided their consent for the same has been obtained. This is typically through an inclusion in the pre-interview stage, or included in the final offer letter or employment agreement. Background checks could include verifications on education, criminal history, medical backgrounds, credit rating, etc. The most common background check is of academic credentials, which is typically outsourced by an employer. Most academic institutions would facilitate the process, with a possible fee requirement for the verification.

Criminal verifications are becoming somewhat common in India, though it is not an easy process as criminal records are not digitised or consolidated centrally. A criminal background check would therefore usually be carried out at the police station with jurisdiction over the employee’s current place of residence, or anywhere that he or she has lived for a reasonable period.

Individual medical histories are also not digitised, and there is no repository of medical records. Some employers require employees to undergo pre-employment medical checks, where the diagnostic centre would send the report directly to the employer. There are certain specific restrictions on the kinds of testing that an employer can ask an employee to undergo; for example, pre-employment testing for HIV is not permitted.

Under current Indian credit rating structures, an individual can obtain information on his or her credit rating. An employer can also access this information with the employee’s permission and on providing necessary proof of identity. Access to credit rating information is more common in banks and financial institutions.

XII DISCONTINUING EMPLOYMENT

The termination of employees, whether large-scale or of a single employee for convenience (and not for cause, such as termination on disciplinary grounds) would be held to be either ‘retrenchment’ or ‘termination of services’, depending on the category of the employee under applicable Indian law.
India

Retrenchment of workmen

As mentioned above, the ID Act applies to an employee who qualifies as a workman. Under the ID Act, retrenchment would mean termination of a workman *inter alia* for any reason other than as a punishment by way of disciplinary action.

In an establishment (other than a factory, mine or plantation with a minimum of 100 workmen), an employer would be required to comply with the following conditions for retrenchment of workmen who have been in continuous service for not less than one year with that employer. The employer should:

a. provide the workman with one month's written notice indicating the reasons for the retrenchment or payment in lieu thereof;

b. provide the workman with 15 days' pay for every year (or part thereof in excess of six months) of continuous service that he or she has completed in the company;

and

c. serve notice to the appropriate government.

From a practical perspective, many companies do not provide this notice (especially where only a few employees are being retrenched) because they fear that this may lead to enquiries by the labour authorities. However, not providing the notice would be a violation of law.

In case of specified establishments engaging at least 100 workmen, prior approval would need to be obtained by the employer from the appropriate government before effecting retrenchment of workmen. Also, the notice period requirement to the workmen would increase to three months in such case. The government may make an enquiry into the reason for the proposed retrenchment and give the involved parties an opportunity to be heard. Approval for the retrenchment would be given only after such hearing.

Under the ID Act, the employer would need to follow the principle of ‘last come, first go’ in case of retrenchment of workmen. An employer is statutorily required to retrench the workman last employed in the particular employment category in the establishment, unless:

a. the requirement is contacted out by both parties; or

b. the employer is able to provide valid reasons from deviating from the said requirement.

An employer should have reliable and sufficient evidence to justify the deviation from the rule, preferably in the recorded employment history of the employees, showing their inefficiency or unreliability or habitual irregularity (which may typically suffice for deviation from this principle).

An employer is not required to provide any alternative employment to retrenched workmen. However, a retrenched workman has a right to priority in case of any re-hiring, where an employer is required to first offer employment to those workmen who were retrenched by it and are citizens of India.

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5 ‘Continuous service’ generally means the working in an establishment for 240 days in the immediately preceding 12-month period.
Notification of employee representatives is not required in case of retrenchment under the ID Act unless there are recognised employee representatives or a trade union and the agreement with such body or union requires notification, especially in case of large-scale retrenchments. From a practical perspective, an employer would hold a meeting with the impacted employees or workmen and explain the termination requirement to them and thereafter commence with the formal process of the retrenchment.

It is important to note that, notwithstanding the provisions of the ID Act in relation to retrenchment, if a workman’s employment agreement has better termination provisions (such as a longer notice period or severance pay), the employer would be bound by the same.

ii Termination of non-workmen

The SEA may specify a notice period to be provided to all employees, including non-workmen. For example, under the Karnataka SEA, an employer is required to provide at least one month’s notice in writing or wages in lieu thereof for any employee who has been in continuous employment for not less than six months. Further, the terms of the employment contract would need to be examined for termination of non-workmen and related severance conditions.

In practice, an employer may ask for the resignation of the employee rather than terminate him or her. Most employees are willing to resign as it is a face-saving method for them to leave the company. If this method is resorted to, this should not be a reason to deny the employee any due compensation under the law or contract.

iii Termination for misconduct

The above rules may not apply to termination of an employee due to misconduct. For example, certain state SEAs (including the Karnataka SEA) mention that the notice period requirement need not be followed if the employee is being terminated for misconduct. Termination due to misconduct would occur in the event of a breach of the rules of the employer or some objectionable conduct. An employer can provide detailed rules in the employee manual or appointment letter of what an employee can and cannot do in the workplace. This will ensure that there is no doubt as to whether certain conduct amounts to misconduct or not.

If the termination of an employee (in particular, a workman) is by way of disciplinary action, the employer would need to follow the principles of natural justice and the guidelines evolved from various court decisions, including inter alia proving the misconduct of the employee. Additionally, if there were any standing orders or service rules applicable to such termination, the same would need to be followed. There is no prescribed notice period in such a termination but the employer would need to follow a formal disciplinary process. Broadly speaking, in order to prevent the possibility of an employee challenging the termination before a court of law on the grounds of mala fide intentions, victimisation, etc., it is recommended that an employer follow the procedure described below. They should:

a issue a charge sheet or a show-cause notice on the employee;
b hold a domestic inquiry (a single individual may be appointed as an inquiry officer to conduct the internal domestic inquiry). The person conducting the inquiry and taking the decision should not be directly involved in the conduct in question, and should preferably not be the immediate superior of the employee;
c peruse the report of the inquiry officer; and
d issue an order of dismissal.

An order of dismissal may be challenged in a labour court, and if it is found to be flawed
the court has the power to order reinstatement with continuity of service, back wages,
and consequential benefits.

iv Termination under employment contract
An employment contract would normally mention a notice period or payment in lieu
thereof for termination of an employee other than for misconduct. In the case of senior
management this is likely to be three months, and in the case of other employees this
would be one month. In practice, at the time of termination the employer would check
whether the compensation payable under law is more than that prescribed under the
contract. If so, the employer would pay the employee the compensation prescribed by
law.

XIII TRANSFER OF BUSINESS

Under the ID Act, where the ownership or management of an undertaking is transferred,
whether by agreement or by law, from the employer to a new employer, the new employer
is required to ensure that:
a the service of the workmen is not interrupted by such transfer (i.e., continuity of
service must be maintained, which is relevant for the provision of certain statutory
welfare benefits);
b the terms and conditions of service applicable to the workman after the transfer
cannot be less favourable than those applicable to him or her immediately before
the transfer; and
c under the transfer terms or otherwise, in the event of future retrenchment, the
new employer is legally liable to pay to the workman compensation on the basis
that his or her service has been continuous and not interrupted by the transfer.

If the new employer does not comply with the above conditions, the workmen who have
been in continuous service of one year immediately before the transfer are entitled to
notice and compensation as if they were being retrenched.

While not specifically provided under the ID Act, case law provides that transfer of
workmen is not automatic and the employer should obtain the consent of the workmen.
A letter will be provided by the transferor company, indicating to the employees that
they will be transferred and a new offer letter will be provided by the new employer.

If a workman refuses to be transferred, then the current employer has the option
to terminate him or her by way of retrenchment.

XIV OUTLOOK

With the focus of the current government on major employment legislation reforms, it
will be important to see how the changes play out over the next few years.
Appendix 1

ABOUT THE AUTHORS

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Debjani Aich is a partner in the Bangalore office of the firm. She is one of the main lawyers responsible for the firm’s employment law practice, and she represents some of the world’s largest information technology companies in relation to their India operations. Debjani’s other practice areas include contracts; telecom; defence and government procurement; and competition and antitrust law. She also advises nuclear suppliers on liability issues under Indian law.

Debjani’s employment law practice includes representing and advising global MNCs in relation to their workforce related operations in India, both from a federal and state-level employment and labour law perspective. She is actively involved in employment-related documentation (including employment contracts, NDAs, secondment contracts and employment and HR policies), compensation structuring, compliance issues/audits, employee transfer and integration issues, immigration matters and employment-related negotiations. She has considerable experience in handling employee terminations, including large-scale reductions in force, and also serves as the external counsel and observer in termination discussions. Debjani also represents clients before the labour authorities on employment litigation matters.

Debjani regularly conducts workplace training on employment laws, including in relation to anti-sexual harassment laws and discrimination, at a senior management and general employee level. She is a frequent speaker on employment and human rights issues at international and national conferences and events.1
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