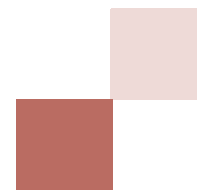


India

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GENERAL

1. What level of statutory employment protection do employees receive in your jurisdiction? Are there provisions of “mandatory law” that apply to all workers in your jurisdiction, regardless of the choice of law in the employment contract and the identity, place of incorporation or location of the employing entity?

The level of protection enjoyed by Indian employees is in many cases less than that enjoyed by EU employees, though in most cases more than that enjoyed by US employees.

Fundamental rights for equality of opportunity in matters of public employment are enshrined in the Indian Constitution (the Constitution). The Constitution directs the states to make effective provision for securing the right to work and just and humane conditions of work. Employees are largely protected by a series of labour laws; the most important ones are:

- Industrial Disputes Act 1947 (IDA).
- Payment of Bonus Act 1965.
- Payment of Gratuity Act 1972.
- Minimum Wages Act 1948.
- Employees Provident Funds and Miscellaneous Provisions Act 1952.
- Employees' State Insurance Act 1948.
- Workmen's Compensation Act 1923.
- Payment of Wages Act 1936.
- Industrial Employment (Standing Orders) Act 1946.

The Factories Act 1948 (FA) also governs employment provisions (including safety, health and welfare), but is limited to factory workers.

The applicability of protection for employees through the above legislation varies, depending on several factors including the salary level and type of work (position or designation). These laws, in general, provide protection in terms of working conditions and protect the employee in the event of dismissal or

termination by, for example, requiring the employer to:

- Give notice.
- Make payment in lieu of notice.
- Make a severance payment.
- Provide retirement benefit.
- Provide for a hearing before terminating employment for misconduct.

In addition to the above, the state-specific Shops and Establishments Acts (SEA) (which vary from state to state and are applicable to all employees), govern employment related issues such as termination, holidays, overtime and leave. However, SEAs may not be applicable where the FA applies.

Protection for employees under these laws is mandatory if the employee works in India, even if the employment contract is governed by the laws of another country. However, the employer is exempt from complying with laws providing social security benefits if the employer offers higher benefits than those provided under such laws.

EMPLOYING PEOPLE

2. Are there any age or nationality restrictions on managers or company directors?

Appointment as a managing or full-time director, or a manager of a public limited company, is prohibited if the person is not at least 25 or is over 70 (unless the appointment has been approved by the shareholders of the company). A managing director must also be resident in India (that is, he must have been staying in India for a continuous period of at least 12 months immediately preceding the date of his appointment to a managerial position, in order to take up employment in, or carry on a business or vocation, in India).

3. Are any grants or incentives available for employing people?

The Indian Government may provide tax incentives to employers to help them increase employment opportunities. A tax incentive

is offered to Indian companies engaged in manufacturing activities. These companies are given a deduction of 30% of wages paid by them to new regular workmen for three tax years, if the company employs over 100 new workmen in the preceding year.

In the last few years, some of the progressive Indian states have introduced policies to generate employment opportunities. As a result, companies are offered land and other resources, at concessionary rates, for development or building purposes as well as certain indirect tax benefits, which serve as an incentive for them to set up operations in the relevant state.

4. Do foreign nationals require work permits and, if so, how are they obtained and how long does the process take?

Foreign nationals require a work or employment visa. The Indian Consulate (located in the foreign national's country of residence) requires the necessary documentation, including confirmation of employment, before granting the necessary visa. In addition, foreign nationals who intend to stay in India for more than 180 days need to obtain a registration certificate from the relevant Foreigners Regional Registration Office (FRRO) within 14 days of arrival in India.

Applications for visas received by the Indian Embassy at the counter are processed the same day. If received by mail, processing takes about ten working days. The application form must be accompanied by:

- The applicant's passport.
- Photographs.
- Other supporting documents, such as appointment letter, contract letter, curriculum vitae and proof that the organisation is registered in India.

The fees can be paid by either:

- Money order.
- Certified cheque.
- Cashier's cheque drawn in favour of "Embassy of India" or "Consulate General of India".
- Cash, paid at the consular counter only.

TERMS OF EMPLOYMENT

5. What terms will govern the employment relationship? In particular:

- Is a written employment contract or statement of employment terms required?
 - Are any terms implied into the employment contract by law (in addition to mandatory terms referred to in *Question 1*)?
 - Are collective agreements with unions common (generally or in specific industries)?
-

■ **Written employment contract.** There is no mandatory requirement to have a written employment contract (although a letter giving terms of employment is required). However, it is usually advisable to have a detailed employment contract, especially for employees working in the IT or knowledge industry sector and for those likely to generate intellectual property. This type of contract can include provisions on duties and responsibilities, non-disclosure of confidential information, assignment of intellectual property, non-compete, non-solicitation and termination.

■ **Implied terms.** Implied terms include, for example, payment of salary, non-compete during the term of employment and non-disclosure of trade secrets. In addition, the provisions of the applicable labour enactments (including the IDA) are construed as implied conditions of service.

■ **Collective agreements.** Workmen/unions can be legitimately formed and may be recognised by the relevant labour commissioner. From a best practice perspective, it is always recommended that the unions are consulted on all major decisions, such as those involving employee work conditions, and that terms and conditions be negotiated collectively with the unions. The new age industries, including the information technology (IT) and IT enabled services (ITES) sectors, have not seen much union activism as yet.

6. Is there a minimum wage? If so, please give details.

Minimum wages vary depending on:

- The type of work (highly skilled, skilled, semi-skilled, unskilled, clerical and supervisory).
- Whether employees are adults, adolescents, children or apprentices.
- The location of the employer and the nature of the industry.
- The wage period (that is whether wages are paid by the hour, day, month or other longer period).

(*Minimum Wages Act 1948*.)

7. Are there restrictions on working hours? If so, please give details.

Maximum working hours are governed by the FA or the SEA unless a reduced number is agreed contractually.

Under the FA and SEA, an employee should not be required or allowed to work in a factory for more than nine hours a day and 48 hours a week. The FA and SEA specify intervals for rest and payment of wages for overtime. Most SEAs provide for overtime to be paid at twice the normal hourly wage rate. There are also additional provisions for women and young employees.

The SEA also prescribes opening and closing hours. However, some states have relaxed this requirement to promote the ITES sector (business process outsourcing and call centre operations) which need to work in different time zones, provided certain conditions regarding, for example, provision of transport and protection of female employees are complied with. There may be certain additional registration requirements that must be fulfilled to receive such benefits.

8. Is there a minimum holiday entitlement? If so, please give details (together with the number of public holidays).

Under the FA, an adult employee is entitled to paid annual leave calculated at the rate of one day for every 20 days of work performed in the previous calendar year. Since the SEA is a state-specific law, the minimum annual or privilege leave prescribed varies between states and is usually in the range of 12 to 21 days a year. Some states also provide for additional casual and sick leave. In addition, there are four national holidays that all employers must grant. There are also festival holidays that vary from state to state. If employees are required to work on holidays, the employer must comply with certain requirements, such as notification to the appropriate authority, payment of overtime and grant of a compensatory holiday.

9. Are employees entitled to management representation or to be consulted on issues that affect them? If so, please give details.

Management representation

Employees have no statutory entitlement to management representation.

Consultation

It is usually advisable to consult employees when there are proposed changes in the working environment, including policies of the organisation, especially when these policies are perceived to be unfavourable to employees. Where there is a trade union, the employer must consult the union leaders on any major decision which affects the employees. However, consultation does not necessarily mean concurrence, except where the statute specifically states that this is the case.

10. What benefits (if any) does a period of continuous employment bring for an employee in your jurisdiction? If an individual employee is transferred to a new entity, in what circumstances (if any) will the employee be deemed to retain his continuous period of employment?

Statutory protection is dependent on whether the employee has been in continuous employment. For example, the requirement that the employer gives a severance notice before termination of employment and payment of gratuity is dependent on the length of the continuous service. Certain employee contractual benefits may be provided, based on continuous employment.

Where a transfer of business takes place and employees are transferred to a transferee organisation without attracting the provisions of retrenchment, the employees are deemed to retain their continuous period of employment.

11. What statutory maternity or paternity rights do employees have?

Maternity rights

Female employees are entitled to maternity leave of 12 weeks, on completion of at least 80 days of employment. This is in addition to the other forms of leave that the employee is eligible to. An employee who takes maternity leave is entitled to return to the position in which she was employed before taking the leave or an equivalent position (if the existing position is not available). In addition to maternity leave, the Maternity Benefit Act 1961 also provides for six weeks' leave in case of miscarriage, two weeks in case of tubectomy operation and one month's leave in case of any illness arising out of pregnancy.

Paternity rights

Indian labour laws do not provide for paternity leave. However, some companies have made a provision for paternity leave in the terms of the settlements with their respective unions.

12. What statutory data protection rights do employees have?

Currently, there is no data protection law in India. Culturally, Indians have not been averse to others accessing their personal information. However, with the growth of the business process outsourcing industry, there is growing awareness in this respect, though more from a business perspective.

The government, having recognised the need, is in the process of drafting a data protection law, which would give statutory recognition to various principles of privacy. Privacy offences may also be actionable under the Indian Penal Code and can also be treated as breach of contract under civil law.

Article 21 of the Constitution of India deals with the right to life and liberty and a number of courts have interpreted this Article to include the right to privacy. However, so far, these interpreta-

tions have been with respect to government or public actions against an individual, but may be adopted with respect to private actions as well.

13. Please summarise any changes, or proposals to change, the current anti-discrimination and anti-harassment legislation in the light of the Race Discrimination Directive (2000/43/EC) and the Employment Directive (2000/78/EC) (EU countries only).

While the Race Discrimination Directive (2000/43/EC) and the Employment Directive (2000/78/EC) are not applicable to India, it should be noted that Articles 15 and 16 of the Constitution of India provide for special rights to enable persons of “backward classes” and women to obtain access to higher education or job placements. Some states also provide for affirmative action (positive discrimination). The Indian government has a reservation policy for its departments and those of public sector units. However, currently there is no law, as such, in the private sector governing reservations, and this issue is now being debated. The Supreme Court has provided guidelines to be observed by companies to ensure the prevention of sexual harassment of women.

DISMISSALS AND REDUNDANCIES

14. What statutory rights do workers have against dismissal in your jurisdiction?

Employees’ statutory rights against dismissal are based on the circumstances in which they are dismissed. In the case of retrenchment for a reasonable cause, employees are entitled to retrenchment compensation and notice (or payment in lieu of such notice). An employee dismissed for misconduct is not entitled to any benefits; however, he has an inherent right to appeal against a domestic enquiry before the Disciplinary Authority or by raising an industrial dispute. An employee who has been accused of misconduct has a right to a hearing (*Industrial Employment (Standing Orders) Act 1946*). A domestic enquiry is a departmental enquiry conducted by an officer, appointed by the management, who records the statements of the witness, on behalf of the management and the charged employee, records their cross-examination and, after evaluating the evidence recorded before him, records his findings as to whether or not the charged employee is guilty of misconduct.

15. Please give details of any rules that apply on business reorganisations and redundancies.

Provisions on redundancy and retrenchment resulting from business reorganisations are covered under the IDA. Depending on its applicability, the employer must do all of the following:

- Give notice of retrenchment (or payment in lieu of such notice).

- Pay compensation equivalent to 15 days’ pay for every completed year of continuous service (or part-year in excess of six months).
- Issue a notice in the prescribed manner to the appropriate government.

SEAs also specify the provisions for termination of service. The contractual benefits, if any, also need to be complied with.

TAXATION OF EMPLOYMENT

16. What is the basis of taxation of employment income in your jurisdiction? Please distinguish between the following situations:

- Foreign nationals working in your jurisdiction.
 - Nationals of your jurisdiction working abroad.
-

Income is taxed in India if it arises, accrues or is received in India or is deemed to arise, accrue or be received in India. Non-residents and residents are taxed at the same rates. The lowest income-band tax is 10% and the highest is 30%, plus a surcharge of 10% if the annual income is above INR850,000 (about US\$18,374).

- **Foreign nationals.** Foreign nationals are taxed in India on the income for work carried out in India, whether it is received in India or abroad. However, if such a person is present in India for less than 90 days and if his salary is paid by a foreign employer who does not have a place of business in India, then that remuneration is not subject to tax in India. If the foreign national comes from a country with which India has a tax treaty, the 90-day threshold is increased to the number of days provided in the article for dependent personal services in the relevant tax treaty.
- **Nationals working abroad.** In India, an individual’s taxability is based on the individual’s tax residency, regardless of whether the person is Indian or a foreign national. An individual is tax resident in India if:
 - he spends more than 182 days in a tax year in India; or
 - being a citizen of India, he spends more than 365 days in the immediately preceding four years in India and more than 182 days in India in the current tax year.

A person who is not a tax resident in India, is called non-resident and is taxed in India only on his Indian sourced income. Such a non-resident may also be an Indian national, living and working abroad. If the individual is tax resident in India for two continuous years, then from the third year onwards, he would be taxed in India on his worldwide income, whether he is Indian or a foreign national. If an Indian national working abroad stays outside India for more than 182 days in that tax year, his income from such employment will not be taxable in India. If however the person stays outside India for less than 182 days to work abroad, his income from such employment is taxable in India.

17. What is the rate of tax on employment income? Are any other taxes (such as social security contributions) levied on the employment relationship?

The Indian income tax year runs from 1 April to 31 March of the following year. Tax on employment income is calculated according to the tax rates applicable to income bands, as follows:

Income	Rate of tax
Up to INR50,000 (about US\$1,080)	0%
INR50,001 (about US\$1,081) to INR60,000 (about US\$1,297)	10%
INR60,001 (about US\$1,298) to INR150,000 (about US\$3,242)	20%
INR150,001 (about US\$3,243) and above	30%

A surcharge of 10% is levied on individuals whose taxable income exceeds INR850,000 (about US\$18,374) per year.

The Finance Bill 2004 includes a proposal that salaries up to INR100,000 (about US\$2,162) should be tax free. An education cess (a special type of tax in India) at a rate of 2% on the taxes payable is also proposed. This bill was passed by parliament on 28 August 2004 and is awaiting presidential assent before it comes into effect.

There are no other taxes, such as social security contributions, levied on the employment relationship, except for provident fund and employee state insurance contributions (applicable to employees earning below a threshold limit). With a provident fund, an employee is expected to contribute a prescribed percentage of his wages to the fund and the employer also has to contribute an equivalent sum. The accumulations are invested according to the pattern of investments notified by the government and the entire sum becomes payable to the employee on his resignation, retirement, death or on termination of service. Some states also levy professional tax, which is credited against the tax liability of the employee.

LIABILITY

18. Are there any circumstances in which an employer (or a parent company) can be liable for the acts of its employees?

Employers are vicariously responsible for the acts of their employees if they are done either:

- During the course of his employment with the employer or company.
- Under the instructions of the employer.

19. Are there any circumstances in which directors or managers can be personally liable in respect of the liabilities or actions of a company?

A company must comply with certain statutory requirements (*Indian Companies Act 1956*). Failure to do so results in the officers who are in default being personally liable. An officer of the company includes managers and directors of a company. The company, being a legal entity and not a natural person, acts through its board of directors. Therefore, any act, commitment or obligation which the company is required to fulfil is deemed to be fulfilled by the directors on behalf of the company. If for any reason the director fails to comply with these obligations because of his negligence or incompetence, even though the company has the capacity to perform the relevant act or obligation, the director is personally liable for any loss or damage suffered by any third party and also by the company. In circumstances where the director has no authority to act on behalf of the company and if that director knowingly performs an act by which he creates a liability on the company, then he is personally liable for that act.

Some of the circumstances where directors are liable for the company's actions are:

- Entering into contracts on behalf of the company without the company's authority.
- Performing an act which is outside the scope of the relevant director's authority.
- Where the director acts in his own name without specifying that he is acting for or on behalf of the company.
- Where the director issues a prospectus on behalf of the company which is in contravention of the provisions of the Companies Act 1956 and contains mis-statements.
- Where the director is guilty of causing the company to commit fraud.
- Where the director allots shares in an irregular manner.

The provisions referred to above are violations of the Companies Act. Violations of other acts are governed by the provisions of those acts or by the general provisions of criminal law, which require proof beyond a reasonable doubt.

The occupier of a factory (being any one of the directors of the company) is responsible for compliance. The managers are responsible for compliance with other labour laws (*FA*).

MAJOR TRANSACTIONS

20. Is worker consultation or consent required for major transactions (acquisitions, disposals or joint ventures)? (Please distinguish if necessary between share sales and asset sales.)

Most unions enter into agreements with employers that any corporate activity which affects the rights and obligations of

workers is decided on after consultation with the relevant unions. In these circumstances, consultation and/or consent of workers as union representatives may be necessary. Consultation is more relevant for sales of assets, as they may involve closure of the old business.

21. Is there any statutory protection of employees on the disposal of a business (shares or assets)? In particular:

- **Are they automatically transferred with the business?**
 - **Are they protected against dismissal (before or after the disposal)?**
 - **Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?**
-

The transfer of a business does not automatically include the transfer of the employees working in the transferred business. Employers can retain the employees or terminate their contracts on giving notice, depending on the provisions of applicable laws and their employment contract. If the terms and conditions in the transferee organisation are more favourable than those in the transferor organisation, then the protective termination provisions would not be triggered. The IDA specifies retrenchment compensation for the transfer of undertakings or the closing down of undertakings.

- **Automatic transfer.** Employees do not automatically transfer to the new employer. However, unless they are transferred to the new employer in accordance with the provisions of law, the transfer of business would attract the protective provisions of termination. Share transfer, in general, involves a change of control and, unless the new management changes terms and conditions of employment, the change in control is not regarded as transfer of business from a labour law perspective. However, in an asset sale, where the business is transferred to another entity, the provisions of termination under labour law would provide protection, although this does not provide for the automatic transfer of employees.
- **Protection against dismissal.** The protective provisions relating to dismissal are triggered whenever the employees' contracts are terminated, whether before or after disposal of the undertaking.
- **Harmonisation.** If harmonisation results in employees' terms being more favourable than before, they can be harmonised. The protective termination provisions are triggered if the terms are less favourable on harmonisation.

EMPLOYEE STOCK PLANS

22. Is it common to reward employees in your jurisdiction through employee stock plans (a stock option or other stock acquisition plan that allows employees to acquire shares or other forms of equity interest or securities)?

Deferred compensation by way of granting of stock options or stock purchase rights is becoming a trend in India. Indian public companies (listed on a stock exchange) and unlisted companies offering options to non-residents must comply with the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines 1999. Unlisted public companies must also comply with the Unlisted Companies (Preferential Allotment) Rules 2003, introduced by the Ministry of Finance and Company Affairs. To obtain the beneficial tax treatment (so that there is no tax event at the time of exercise of options), the plan or scheme should comply with the Ministry of Finance guidelines.

23. Where an employee resident in your country participates in a stock plan using the shares or other securities of a foreign parent company:

- **Is it lawful to offer participation to employees who are resident in your jurisdiction?**
 - **Is it lawful for residents to purchase and/or hold shares in the foreign parent and, if so, does it make a difference if those shares are listed on a recognised stock or investment exchange?**
 - **What (if any) regulatory consents or filings need to be completed and by when? (In particular, is a prospectus required or is an exemption available?)**
 - **Is it permissible under local exchange control regulations for employees to send money from your country to another to purchase stock under a plan? Are any consents necessary?**
 - **Broadly, how are local employees taxed on the grant and exercise of options and on the ultimate sale of stock awarded under the plan. Are there any withholding or social security implications for a local employing entity?**
-
- **Offer participation.** Foreign parent companies can offer participation to employees of its Indian subsidiary. They can also offer participation to the Indian resident employees of their branch or liaison office in India, or of a joint venture company in India in which they hold at least 51% equity.
 - **Purchase/hold shares.** Indian residents can, under the exchange control regulations, purchase and hold shares of a foreign parent company, acquired by way of a share purchase plan or under a scheme of stock option plan. It does not make any difference if the shares are listed or not.

- **Regulatory consents/filings.** Indian exchange controls have been considerably liberalised in recent years and it is common for foreign parent companies to grant stock options to Indian resident employees. There are no regulatory consents or filings required in this respect, except that any remittance of foreign exchange needs to be channelled through a bank, which is a designated “authorised dealer”. An offer of shares by a company to employees is not regarded a “public offer” and, therefore, does not require the filing of a prospectus under the current provisions of the Securities and Exchange Board of India Act and its regulations.
- **Exchange control.** Although there are no restrictions under the Indian exchange controls on employees remitting funds from India to a foreign country for purchase of shares under a stock option plan, any amount repatriated from India needs to be routed through an authorised dealer.
- **Tax.** In general, there are two taxable events in the case of stock options or purchase plans: the exercise of options and the sale of shares.

On exercise of options, employees are subject to tax in India on the “perquisite” value, being the difference between the exercise price and the market value of the shares. In this case, the company granting the options is required to withhold tax on this perquisite value.

On sale of shares, the difference between the sale price and the market value at the time of exercise (if this difference results in gains) is taxed as capital gains. If the shares are held for more than 12 months, the gain is taxed as long-term capital gains at a rate of 20% (plus the applicable surcharge and education tax). If the shares are held for 12 months or less, then the sale would be taxed as short-term capital gains at the rate applicable to normal income (the highest rate for individuals is 30%, plus surcharge and education cess).

If the stock option plan under which the employees receive options is a qualifying plan (a plan in compliance with the Ministry of Finance guidelines and filed with the Chief Commissioner of Income Tax under whose jurisdiction the Indian company is assessed), then the exercise of stock options will not trigger a taxable event. On sale of shares, the employees are taxed on the capital gains (the difference between the sale price and the exercise price). All such gains would be either short or long-term capital gains depending on the period for which the shares are held before the disposition. Even when the options trigger perquisite value tax at exercise, there are no social security implications.

PENSIONS

- 24. Is it common (or compulsory) for employees to participate in private pension schemes established by their employing company? Are any tax reliefs available on contributions to such schemes (by the employing company and employees)?**

Companies may consider setting up private trusts and registering them with the concerned authorities to obtain tax deduction for contributions made to them. Employees' contributions to pension funds are also tax deductible for the employee. However, when the employee receives the redemption amount from the fund, it attracts income tax.

- 25. Can employees who are working abroad and employees of a subsidiary company in a different country participate in a pension scheme established by a parent company in your country? Are the same tax reliefs referred to in Question 24 still available in these circumstances?**

Employees who are employed by an Indian company but are seconded abroad, are entitled to participation in the provident fund, as may be applicable to them. However, if such employees' remuneration is not paid by a company that is taxed in India and if the remuneration is not subject to tax in India, then the company making the pension fund contribution for such employees cannot use the tax-deductible expense for the contribution.

BONUSES

- 26. Is it common to reward employees in your jurisdiction through contractual or discretionary bonuses? Are employers subject to specific guidelines or standards of reasonableness when exercising bonuses?**

The Payment of Bonus Act, which applies to all factories and establishments employing 20 or more employees, makes it mandatory to give a bonus, applied only to employees whose salaries are no more than INR3,500 (about US\$76) per month. However, even if it is not mandatory, in general, from a human resources perspective, companies pay performance or festival bonuses. These optional bonus payments are at the discretion of the employer. In practice, employers contractually agree to pay bonuses as a percentage of the employees' salary.

INTELLECTUAL PROPERTY

- 27. If an employee creates intellectual property rights in the course of his employment, who owns the rights?**

An employer is the owner of all copyrights, unless there is a contractual term to the contrary (*section 17, Indian Copyright Act 1957*). For other forms of intellectual property rights, especially patents, it is advisable that they are assigned to the company

through the employment contract or a separate intellectual property or inventions' assignment agreement.

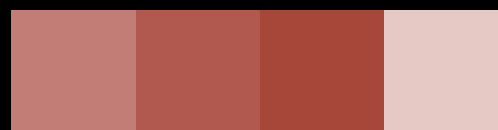
PROPOSALS FOR REFORM

28. Briefly summarise any proposals for reform.

Proposed major amendments to labour laws:

- IDA: not to apply to "supervisors". The IDA does not apply to employees performing predominantly supervisory duties. However, the National Labour Commission has recommended that all categories of employees with wages above INR10,000 (about US\$217) per month should be excluded from the IDA
- Payment of Bonus Act: the limit of INR3,500 (about US\$76) is proposed to be raised to INR10,000 (about US\$217).
- Currently, closure of business and retrenchment of employees in industries which fall within the definition of "factory" and employing more than 100 workmen require onerous government approvals, making it difficult to exit. Many states are proposing to reduce the impact of these rigorous provisions to attract the setting up of industries in a bid to increase employment opportunities in their states. However, these reforms will take time due to political sensitivity. The National Labour Commission has recommended that industries must be permitted to "down-size" or "right-size" by providing for enhanced compensation rather than seeking government permission or approval.
- In a bid to provide employment opportunities to economically deprived people, some states are in the process of bringing about legislation to require affirmative action by employers in the private sector.

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