



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2011/12

## EMPLOYEE SHARE PLANS

LABOUR AND EMPLOYEE BENEFITS VOL 2

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Comparative table

Analysis of critical  
legal issues



# India

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## EMPLOYEE PARTICIPATION

### 1. Is it common for employees to be offered participation in an employee share plan?

Information technology companies started the trend of offering share options to employees in India. In the last several years, the trend has extended to several other sectors including telecommunications, financial services, outsourcing, pharmaceutical and retail sectors. However, traditional sectors, such as manufacturing, are yet to see share option grants to employees.

Companies generally aim to attract and retain talented employees by offering them participation in company growth and making them stakeholders. Start-ups often find it a convenient mode of recruitment due to the unavailability of cash reserves.

### 2. Is it lawful to offer participation in an employee share plan where the shares to be acquired are shares in a foreign parent company?

The exchange control laws permit a foreign company to grant share options to directors and employees of its subsidiaries in India or of its branch office in India. The Foreign Exchange Management Act 1999 (FEMA) (along with the relevant regulations) allows an individual resident in India to:

- Acquire shares under a cashless employees' share option plan (ESOP) issued by a company outside India.
- Purchase equity share options under a foreign company's ESOP schemes, if the individual is an employee or director of:
  - an Indian office or branch of the foreign company;
  - a subsidiary in India of the foreign company; or
  - an Indian company in which the foreign company has a direct or indirect equity holding of at least 51%.

If the individual qualifies as above, Indian banks permit the individual to remit funds for the purchase of a foreign company's shares under an ESOP scheme, irrespective of whether the shares are offered directly by the issuing company or indirectly through

a trust, special purpose vehicle or step down subsidiary. However, the following conditions must be met:

- The foreign company must issue shares globally on a uniform basis.
- The Indian company must submit a report to the Reserve Bank of India (RBI) annually.

If these conditions are not met, Indian resident individuals can still purchase a foreign company's shares under the Liberalised Remittance Scheme (LRS) introduced by the RBI. Under the LRS, an individual is permitted to remit up to US\$200,000 per financial year (1 April to 31 March) (as at 1 August 2011, US\$1 was about EURO.7), provided certain conditions are met. This represents a considerable liberalisation as a decade ago a foreign company could grant options only at a reduced price or on a cashless basis.

## SHARE OPTION PLANS

### 3. What types of share option plan are operated in your jurisdiction?

The traditional ESOP continues to be predominant in India.

### 4. In relation to the share option plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular? If so, among which types of company is this plan particularly popular?

## ESOP

**Main characteristics.** ESOPs in India have broadly the same characteristics as seen globally. An option is granted subject to a vesting schedule that is typically linked to tenure and/or performance. On vesting of an option, an employee has the right to exercise the option. On payment of the exercise price, shares are issued to the employee and the employee becomes a member of the company.

If an ESOP is issued by a company whose shares are listed (or going to be listed) on a recognised share exchange in India, the company must comply with the Securities and Exchange Board of India (Employee Share Option Scheme and Employee Share Purchase Scheme) Guidelines 1999 (SEBI ESOP Guidelines). Some of the important provisions of the SEBI ESOP Guidelines are:

- ESOPs cannot be issued to promoters or members of the promoter group.
- ESOPs cannot be issued to directors if they hold more than 10% of the outstanding equity shares of the company.
- ESOPs can be issued only after making certain disclosures to employees.
- A compensation committee (consisting of a majority of independent directors) must be appointed to formulate the ESOP's terms and conditions, including:
  - the number of options to be granted per employee and in aggregate;
  - conditions under which vested options lapse (such as employment termination);
  - the exercise period and employee's right to exercise; and
  - a procedure for making fair and reasonable adjustments in the event of any corporate actions.
- The compensation committee must frame policies to prohibit insider trading and fraudulent and unfair trade practices.
- Shareholder approval is required in order to grant share options.
- A separate, further shareholder approval is required for the grant of options to either:
  - employees of a subsidiary or holding company; or
  - individual employees receiving 1% or more of the issued capital of the company in a single year.
- Restrictions on variations to ESOP terms to the detriment of the employees.
- Restrictions on the pricing of the options.
- A lock-in period of at least one year before vesting.
- Restrictions on the options' transferability.

**Types of company.** ESOPs can be issued by any company incorporated under the Companies Act 1956 of India (Companies Act) and both private and public companies issue share options to their employees. Listed companies must comply with the SEBI ESOP Guidelines while unlisted public companies must comply with the Unlisted Public Companies (Preferential Allotment) Rules 2003.

**Popularity.** See *Question 1, Employee participation*. It is common to restrict the grant of options to senior and mid-level employees.

## Grant

### 5. In relation to the grant of share options under the plan:

- Can options be granted on a discretionary basis or must they be offered to all employees on the same terms?
- Can options be granted to non-employee directors and consultants as well as employees?
- Is there a maximum value of shares over which options can be granted, either on a per-company or per-employee basis?
- Must the options have an exercise price equivalent to market value at the date of grant?
- What are the tax and social security implications of the grant of the option?

## ESOP

**Discretionary/all-employee.** It is possible to grant options on a discretionary basis. The factors that are considered can include, among other things, an employee's:

- Tenure.
- Experience.
- Performance.
- Past contributions.

The number of options granted can be negotiated between a company and a prospective employee.

**Non-employee participation.** It is possible for a private company to grant share options to non-employees, for example, consultants, non-executive directors and promoters. However, the SEBI ESOP Guidelines prohibit a listed company from granting share options to the following:

- Persons who are not employed by the company or its subsidiaries.
- Persons who are not directors of the company or its subsidiaries.
- Promoters of the company.

**Maximum value of shares.** Share options are typically granted at an exercise price that is equal to or over the shares' face value. The SEBI ESOP Guidelines restrict the grant of options to non-employees, promoters and directors and shareholder approval may be necessary in some circumstances (see *Question 4, ESOP: Main characteristics*). If the option exercise price is to be lower than the face value of shares, government approval may be necessary.

The face value of the shares to be allotted under the ESOP by a listed company to non-resident employees cannot exceed 5% of the paid-up capital of the issuing company when an Indian company issues options or shares to employees abroad (either direct employees or employees of a joint venture or wholly-owned subsidiary) (*Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations 2000*).

**Market value.** The SEBI ESOP Guidelines allow a company to determine the exercise price, subject to the prescribed accounting policies. The compensation committee can make fair and reasonable adjustments to the exercise price in the case of corporate actions such as rights issues, bonus issues, mergers, sales of divisions and so on. Companies are also allowed to reprice unexercised options (whether or not vested) if the ESOPs are rendered unattractive due to a fall in the shares' market price.

**Tax/social security.** There is no tax levied and there are no social security obligations as a result of the grant of ESOPs.

### Vesting

#### 6. In relation to the vesting of share options:

- Can the company specify that the options are only exercisable if certain performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

### ESOP

**Exercisable only on conditions being met.** Vesting of options is typically linked to tenure but can also be linked to company or individual performance for employees at higher management levels.

**Tax/social security.** Social security contributions are not due on vesting of share options. Tax is not levied at the time of vesting, irrespective of whether the vesting is time or performance based. However, in situations where the date of exercise may coincide with the date of vesting, or if there is no exercise (for example, in the case of restricted share units) tax may be levied at the time of vesting. In this case, the employer is required to withhold the applicable taxes and deposit it with the government within the applicable time frame.

### Exercise and sale

#### 7. Do any tax or social security implications arise when the:

- Option is exercised?
- Shares acquired on exercise are sold?
- Who is obliged to account for the liability and by when?
- How (if appropriate) is the liability recovered from employees?

### ESOP

**Tax/social security on exercise.** The grant of share options to employees is regarded as an employee benefit and tax is levied at the time of exercise of the option. The difference between the fair market value of the shares at the time of exercise and the exercise price paid is subject to tax at the employee's marginal rate of tax (the maximum marginal rate of tax is 30.9%). The fair

market value is determined in accordance with prescribed rules, and every Indian or foreign company (except Indian companies whose shares are listed on a recognised stock exchange in India) offering shares to Indian residents must have a share valuation undertaken by a SEBI registered merchant banker under these rules. The employer is required to withhold the applicable tax and deposit it with the government within the applicable time frame. Social security contributions do not arise on exercise of options.

**Tax/social security on sale.** Tax is levied on sale of the shares acquired under the plan. The difference between the sale consideration and the fair market value of the shares on the date of exercise of the option is regarded as a capital gain income subject to tax at either:

- 20.6% for long-term gains (unlisted shares held for a period exceeding one year).
- 30.9% for short-term gains (unlisted shares held for a period equal to or less than one year).

There are no withholding tax obligations on the company. The employee/non-employee participant must deposit the taxes by way of advance tax instalments. Social security contributions are not payable on exercise of the options.

**Accounting for tax/social security.** The company is required to withhold applicable taxes at the time of issuance of shares to the participants and deposit it with the government authorities before the seventh day of the following month.

**How liability is recovered from employee.** In the case of issuance of shares to an employee, the company can withhold taxes from the salary payable to the employee; and in the case of non-employee participants such as consultants or promoters, the participant may be required to reimburse the appropriate tax amount to the company as a condition to issuance of shares.

### SHARE ACQUISITION OR PURCHASE PLANS

#### 8. What types of share acquisition or purchase plan are operated in your jurisdiction?

The most common share acquisition plan in India is an employee share purchase plan (ESPP). Sweat equity shares are also granted, principally to founders or promoters.

#### 9. In relation to the share acquisition or purchase plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular?

### ESPP

**Main characteristics.** In an ESPP, the shares are issued upfront but are subject to certain restrictions. Listed companies must comply with the SEBI ESOP Guidelines when issuing ESPPs.

Some of the requirements are:

- ESPPs cannot be issued to promoters or members of the promoter group.
- ESPPs cannot be issued to directors if they hold more than 10% of the outstanding equity shares of the company.
- The shareholders must approve the share issue under the ESPP and certain grants of share options (see *Question 10, ESPP: Maximum value of shares*).
- A lock-in period of a minimum of one year from the date of allotment of shares.

The company has freedom to price the shares, provided it complies with the specified accounting policies.

**Types of company.** ESPPs can be issued by any company incorporated under the Companies Act.

**Popularity.** ESPPs are far less popular than ESOPs. In addition, promoters and entrepreneurs generally prefer to issue options to employees, since issue of shares upfront would make an employee a shareholder of the company on an immediate basis.

### Acquisition or purchase

#### 10. In relation to the initial acquisition or purchase of shares:

- Can entitlement to acquire shares be awarded on a discretionary basis or must it be offered to all employees on the same terms?
- Can shares be offered under the plan to non-employee directors and consultants as well as employees?
- Is there a maximum value of shares that can be awarded under the plan, either on a per-company or per-employee basis?
- Must employees pay for the shares and, if so, are there any rules governing the price?
- What are the tax/social security implications of the acquisition or purchase of shares?

#### ESPP

**Discretionary/all-employee.** ESPPs can be offered on a discretionary basis or to select employees. However, the company must include the appraisal process for determining the eligibility of employees for the ESPP in the explanatory statement to the notice issued to the shareholders (SEBI ESOP Guidelines). The shareholders can also allow offers of different numbers of shares to different categories of employee.

**Non-employee participation.** It is possible for a company to offer shares under a share purchase plan to non-employees such as consultants, non-executive directors and promoters. However, the SEBI ESOP Guidelines prohibit a listed company from granting shares under an ESPP to the following:

- Persons who are not employed by the company or its subsidiaries.
- Persons who are not directors of the company or its subsidiaries.
- Promoters of the company.

**Maximum value of shares.** There is no specified maximum value of shares. Besides restrictions on allotment of shares to non-employees, promoters and directors, the SEBI ESOP Guidelines require shareholder approval for the allotment of shares to either:

- Employees of subsidiary or holding companies.
- Employees receiving 1% or more of the issued capital of the company in a single year.

**Payment for shares and price.** Unlike sweat equity shares, employees must pay for subscribing to shares under an ESPP. There is flexibility in determining the price, although if the price is lower than the shares' face value, government permission may be necessary. Listed companies must comply with the accounting policies for pricing the shares under the SEBI ESOP Guidelines.

**Tax/social security.** Tax is levied on the difference between the fair market value of the shares and the exercise price at the time that the shares are allotted to the employee. The valuation must be done by a merchant banker for shares awarded by unlisted Indian companies and all foreign companies. The employer is responsible for withholding these taxes and depositing them with the Indian government within the applicable time frame. Social security obligations do not arise on allotment of shares under ESPP as they are not included under the definition of basic wages under the Employees' Provident Funds and Miscellaneous Provisions Act 1952 (EPF Act).

#### Sweat equity shares

**Discretionary/all-employee.** Sweat equity shares can be offered to employees or directors on a discretionary basis. A shareholder resolution must specify the class or classes of directors or employees to whom sweat equity shares are to be issued (Companies Act).

**Non-employee participation.** Sweat equity shares can only be issued to employees and directors.

**Maximum value of shares.** Unlisted companies require prior government approval to issue sweat equity shares for more than either (*Unlisted Companies (Issue of Sweat Equity Shares) Rules 2003*):

- 15% of the total paid-up equity share capital in a year.
- Shares with a value totalling INR50 million or more (as at 1 August 2011, US\$1 was about INR44).

In addition, sweat equity shares form part of managerial remuneration and therefore must comply with the managerial remuneration ceilings under the Companies Act.

**Payment of shares and price.** Payment for sweat equity shares can be in the form of cash consideration or other consideration, for example, intellectual property rights, know-how or some other item of value. For listed companies, under the SEBI (Issue of Sweat Equity) Regulations 2002, the pricing of sweat equity shares cannot be less than the higher of the following:

- The average of the weekly high and low of the closing prices of the related equity shares in the six months preceding the relevant date (which is 30 days before the date of the shareholders' meeting).
- The average of the weekly high and low of the closing prices of the related equity shares during the two weeks preceding the relevant date.

If sweat equity shares are issued for non-cash consideration, the valuation of the shares must be carried out by a merchant banker.

**Tax/social security.** This is the same as for ESPPs (*see above, ESPP: Tax/social security*).

### Vesting

#### 11. In relation to the vesting of share acquisition or purchase awards:

- Can the company award the shares subject to restrictions that are only removed when performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

### ESPP

**Restrictions removed only on conditions being met.** ESPPs are typically issued based on restrictions, which are removed when performance or time-based conditions are met. In most cases, such conditions are a combination of time and performance based criteria. If the employee is unable to comply with the requirements, the shares must be repurchased or bought back. The SEBI ESOP Guidelines give a minimum lock-in period of one year on allotment of shares, although there is some flexibility in the event of merger or amalgamation.

**Tax/social security.** No tax or social security contribution is due on vesting when the restrictions attached to the shares are removed.

### Sweat equity shares

**Restrictions removed only on conditions being met.** It is not common for sweat equity shares to be issued with restrictions, except those of a general nature such as transferability and so on. However, sweat equity shares must be locked in for three years from the date of allotment (*SEBI (Issue of Sweat Equity) Regulations 2002* and the *Unlisted Companies (Issue of Sweat Equity Shares) Rules 2003*).

**Tax/social security.** This is the same as for ESPPs (*see above, ESPP: Tax/social security*).

### Sale

#### 12. What are the tax and social security implications when the shares are sold? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

### ESPP

There are no social security implications when the shares are sold. Capital gains tax is levied on the difference between the sale

consideration and the fair market value of the shares on the date of allotment of the shares. The rate of tax depends on whether the gains are long term or short term in nature and whether the shares are listed in India. The rate of tax ranges between 0% to 30.9%. The tax is payable by the employees who sell the shares and those employees must deposit the tax by way of advance tax instalments.

### Sweat equity shares

This is the same as for ESPPs (*see above, ESPP*).

## PHANTOM OR CASH-SETTLED SHARE PLANS

#### 13. What types of phantom or cash-settled share plan are operated in your jurisdiction?

Phantom or cash-settled plans are uncommon in India. Companies have resisted the grant of phantom shares, share appreciation rights and so on, and most companies prefer to use a performance-based bonus plan rather than a phantom or cash-settled plan.

#### 14. In relation to the phantom or cash-settled share plan:

- What are the plan's main characteristics?
- Which types of company can offer the plan?
- Is this type of plan popular? If so, among which types of company is this plan particularly popular?

### Phantom/cash-settled plans

**Main characteristics.** Typically, a company indexes an employee's participation in the growth of the company in relation to the increase in its share value from the date of joining of the employee until vesting, based on which certain cash rewards are made.

**Types of company.** Listed companies typically use these types of plans.

**Popularity.** These plans are not widespread in India and are most common in foreign companies extending such plans to Indian subsidiaries.

**Grant**

15. In relation to the grant of phantom or cash-settled awards:

- Can the awards be granted on a discretionary basis or must they be offered to all employees on the same terms?
- Can participation in the plan be offered to non-employee directors and consultants as well as employees?
- Is there a maximum award value that can be granted under the plan, either on a per-company or per-employee basis?
- What are the tax/social security implications when the award is made?

**Phantom/cash-settled awards**

**Discretionary/all-employee.** The awards can be made on a discretionary basis.

**Non-employee participation.** The awards can be made to non-employees such as consultants, non-executive directors and promoters.

**Maximum value of awards.** There are no rules or regulations governing the maximum value of awards.

**Tax/social security.** There are no tax or social security implications at the time of granting the award.

**Vesting**

16. In relation to the vesting of phantom or cash-settled awards:

- Can the awards be made to vest only where performance or time-based vesting conditions are met?
- Are any tax/social security contributions payable when these performance or time-based vesting conditions are met? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

**Phantom/cash-settled awards**

**Award vested only on conditions being met.** Awards are typically linked to performance and/or time-based conditions.

**Tax/social security.** Tax or social security implications do not arise on vesting of the awards.

**Payment**

17. What are the tax and social security implications when the phantom or cash-settled award is paid out? Who is obliged to account for the liability and by when? How (if appropriate) is the liability recovered from employees?

**Phantom/cash-settled awards**

The employee must pay tax at the time of the cash payout, which is treated as salary income. The employer is responsible for withholding these taxes from the cash rewards being paid and depositing them with the government within the applicable time frame.

**INSTITUTIONAL, SHAREHOLDER, MARKET OR OTHER GUIDELINES**

18. Are there any institutional, shareholder, market or other guidelines that apply to any of the above plans, and which types of company are subject to them? What are their principal terms?

**Institutional investor guidelines**

Besides the general laws, the specific laws governing ESOPs, ESPPs, sweat equity shares and other similar plans are as follows:

- SEBI ESOP Guidelines (applicable to listed companies and companies that are proposing to list).
- Unlisted Public Companies (Preferential Allotment) Rules 2003 (applicable to unlisted public companies).
- SEBI (Issue of Sweat Equity) Regulations 2002 (applicable to listed companies).
- Unlisted Companies (Issue of Sweat Equity Shares) Rules 2003 (applicable to unlisted public companies).
- Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations 2000 (applicable when an Indian company issues options or shares to employees abroad).
- Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations 2004 (applicable when a foreign company issues options/shares to an Indian employee).

**Other shareholder guidelines**

See above, *Institutional investor guidelines*.

**Market rules or guidelines**

See above, *Institutional investor guidelines*.

**EMPLOYMENT LAW**

19. Is consultation or agreement with, or notification to, employee representative bodies required before an employee share plan can be launched? If so, what information must be provided and how long does the process take?

In the absence of a collective bargaining agreement giving provisions for consultation, the labour laws do not require a company to consult or notify employee representative bodies before launching an employee share plan.

20. Do participants in share plans have rights to compensation for loss of options or awards on termination of employment?

Participants have no rights to claim compensation for loss of options or awards upon termination of employment or even otherwise, including losses arising from a fall in the price of shares, unless contractually agreed. Generally, companies disclose to the participants the element of risk associated with these plans, and the possibility of loss under various circumstances, in the plan documents. The SEBI ESOP Guidelines make it mandatory for listed companies to inform the participants of the risks associated with these plans.

## EXCHANGE CONTROL

### 21. How do exchange control regulations affect employees sending money from your jurisdiction to another to purchase shares under an employee share plan? If consents or filings are needed, how much will they cost and how long will they take?

An employee can remit funds for the purchase of shares of a foreign company under an ESOP irrespective of whether the shares are offered directly by the issuing company or indirectly through a trust, special purpose vehicle or step down subsidiary, provided certain conditions are met (see Question 2).

There are no restrictions on the amount that can be remitted by the employees. Additionally, the employees are not required to seek any consent or make any filings for remitting money outside India. However, the Indian company (employer) must submit a report in the prescribed format to the RBI on an annual basis.

### 22. Do exchange control regulations permit or require employees to repatriate proceeds derived from selling shares in another jurisdiction? Are there any conditions for repatriating funds (such as monetary limits, timing, filings or consents)?

Foreign companies can repurchase shares issued to Indian residents under an ESOP if the following conditions are met (*Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations 2004*):

- The shares are issued in accordance with FEMA.
- The shares are repurchased as specified under the terms of the plan.
- An annual return is submitted to the RBI through an authorised Indian bank, giving details of the remittances and beneficiaries.

The RBI requires an Indian resident to ensure that all proceeds derived from the sale of shares in another jurisdiction are repatriated, without any offset for other liabilities outside India, not later than 90 days from the date of the sale.

## INTERNATIONALLY MOBILE EMPLOYEES

### 23. What is the tax position when:

- An employee who is resident in your jurisdiction at the time of grant of a share option or award leaves your jurisdiction before any taxable event (such as the amendment, vesting, exercise or release of the option or award or the grant of a replacement) affecting the option or award takes place?
- An employee is sent to your jurisdiction holding share options or awards granted to him before he is resident in your jurisdiction and a taxable event occurs after he arrives in your jurisdiction?

#### Resident employee

An employee resident in India is taxed on their worldwide income. Therefore, the employee must pay tax at the time of exercise of the share option on the difference between the fair market value

on the date of exercise and the exercise price. The employer must withhold the applicable taxes and deposit them with the government within the applicable time frame. A merchant banker in India must issue a valuation report if the shares are unlisted in India or are of a foreign company.

Upon sale of the shares issued upon exercise, a resident employee must pay capital gains tax in India if the shares are in an Indian company. Where the shares issued are in a company other than an Indian company, tax will be levied in accordance with the domestic laws and applicable tax treaties.

#### Non-resident employee

A non-resident employee is taxed in India only to the extent that salary income is earned in India and the benefit relating to a period of employment in India during the vesting period is taxed in India. The benefit arising at the time of exercise of the option (the difference between the fair market value of the shares and the exercise price) is pro-rated over the vesting period depending on the number of days spent in India during this period.

Upon sale of the shares issued upon exercise, a non-resident employee must pay capital gains tax in India if the shares are in an Indian company.

Indian law on the taxation of employee share options in the case of internationally mobile employees has received relatively little jurisprudence at this time, which can result in uncertainty in some circumstances.

## PROSPECTUS REQUIREMENTS

### 24. For the offer of and participation in an employee share plan:

- What are the prospectus requirements?
- Are there any exemptions from prospectus requirements?
- If so, what are the conditions for the exemption(s) to apply?
- Are any prospectus/securities laws consents or filings required?

**Prospectus needed for employee share plan offer.** There are no prospectus requirements for an Indian company granting options to its employees or employees of its subsidiary or holding companies. While there is no explicit exemption for foreign companies, it is unlikely that prospectus requirements would be triggered as the grants would be made to a close group of persons, such as employees.

**Exemption(s) for employee share plan offers.** There are no prospectus requirements for employee share plan offers.

**Conditions for exemptions.** There are no conditions for exemptions for employee share plan offers.

**Consents or filings.** In addition to making disclosures in the directors' report for the purposes of receiving shareholder approval (by special resolution in a general meeting), listed companies must make extensive disclosures to their shareholders in relation to ESOPs or ESPPs. Details of the disclosure requirements are given in the SEBI ESOP Guidelines.

Listed companies must also obtain an in-principle prior approval from the concerned share exchanges to list the shares on exercise and must notify the share exchanges when the options are exercised and shares issued. The formats for the approval and notification are given in the SEBI ESOP Guidelines. The listing of the shares must also comply with the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.

## OTHER REGULATORY CONSENTS OR FILINGS

### 25. Are there any other regulatory consents and filing requirements and/or other administrative obligations for an offer of and participation in an employee share plan?

Companies are required to seek shareholders' and board approval prior to instituting the employee shares plans. Listed companies are required to make filings as discussed in *Question 24, Prospectus requirements*.

Except as set out in *Questions 24 and 25*, there are no other regulatory consents, filing requirements or other administrative obligations for offer of, or participation in, an employee share plan. However, upon exercise, the employer is required to withhold taxes and deposit the same with the government within a week from the end of the month in which the deduction is made.

## FORMALITIES

### 26. What are the applicable legal formalities?

**Translation requirements.** There is no requirement to translate the plan documents in to local languages. Customarily, plans are issued in English which is primarily used by businesses in India.

**E-mail or online agreements.** There are no rules prohibiting employees from entering into binding agreements electronically. However, typically, companies provide physical copies of the plans and related agreements to employees for execution.

**Witnesses/notarisation requirements.** There are no requirements for witnessing, notarisation or registration of agreements.

**Employee consent.** There is no legal requirement to obtain the employee's consent to administer their options or awards, although it is generally advisable to indicate the withholding

tax requirements in the plan. Certain companies also obtain the employee's acceptance in this regard. Employee consent is required prior to the company sharing an employee's details with an overseas company. Additionally, the Indian company should have a "Privacy Policy" in place in accordance with the Reasonable security practices and procedures and sensitive personal data or information Rules 2011.

## DEVELOPMENTS AND REFORM

### 27. Please briefly summarise:

- **The main trends and developments (including market practice) relating to employee share plans over the last year.**
- **Any official proposals for reform of any laws which will affect the operation of employee share plans.**

#### Trends and developments

Share options are yet to become an important component of employees' compensation structures in India. This is partly because promoters and entrepreneurs in traditional sectors often resist employees becoming shareholders.

Promoters and entrepreneurs are also concerned by the ESOP tax regime, which has seen a number of changes in the last several years. It is hoped that the new Direct Tax Code will introduce a stable tax regime for ESOPs and ESPPs, increasing their popularity.

Global mergers and acquisitions have resulted in issues such as the exchange of existing vested and unvested options with new options. In certain situations, foreign companies may also choose to substitute different options or make cash payments for underwater options in order to incentivise employees. Such exchanges or substitutions may lead to complex tax issues in India.

#### Reform proposals

There are no major proposals for reform of the law on employee share plans.

## CONTRIBUTOR DETAILS

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- Advised Beceem Communications on employment law issues on its acquisition by Nasdaq listed Broadcom Corporation.
- Assisted Chegg on employment law issues for its acquisition of Cramster.
- Advised Arcot Systems on employment law issues in its acquisition by Nasdaq listed CA Technologies.
- Advised GoAhead Software on employment and labour law issues in its acquisition of a division of Emerson Electric.

**Qualified.** India, Bar Council of Karnataka, 2010**Areas of practice.** ESOPs and compensation structuring; tax.**Recent transactions.** Advised an Indian listed company in formulating a stock appreciation rights plan for its employees.