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Evolving HR Law

Giving GCs Sleepless Nights?

GCs will need to increasingly focus on HR strategies and HR lawyers will have to be more proactive, responsive, accessible, business-oriented and innovative



India stands on the cusp of a new HR law era. The government has proposed replacing several major national labor legislations with four codes - codes on wages, industrial relations, social security & welfare, and safety & working conditions.

With globalization, the labor market in India has undergone tremendous changes; however, labor laws have failed to keep pace. Presently, labor laws in India are a hotchpotch of almost 140 legislations (besides all rules, regulations, orders, and circulars issued under each of these legislations) at the national & state levels. Several of these laws were enacted during or prior to India's independence, and were meant for the industrial sector. While this may feel like a paradise for us HR lawyers, it is not conducive to commerce or growth. In fact, it is unfortunate that while labor laws in India were designed to promote progress, they have ended

up becoming a stumbling block. The rise of the informal (unorganized) sector, is the fallout.

The government's vision and effort to rationalize and consolidate the plethora of labor laws, is commendable. It may direct us towards a utopian economy. The proposed codes will make it easier for employers to comply with the law and for authorities to regulate it. They will also eliminate the confusion caused by differences in definitions and applicability provisions. Lesser number of laws to comply with along with better implementation, should help position India as a business-friendly destination and increase its rankings in the World Bank's Ease of Doing Business survey.

Care must be taken to ensure that the codes strike a balance between making labor laws business-friendly while not compromising workers' welfare and safety. The codes should

focus on fostering employment, increasing productivity and reducing unemployment, rather than simply being a consolidation of current laws - else the medicine may be worse than the disease! Ensuring this balance in our political economy will continue to remain a challenge for the government.

While employers and employees in India, and the international community closely track these changes to the legal landscape, we discuss select HR law issues that, in our experience, GCs must focus on:

1. Sexual harassment allegations: The Supreme Court's judgment in the case of *Vishaka vs. State of Rajasthan* (1997) is considered a landmark ruling on employers' obligations in relation to sexual harassment. The Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, has helped increase awareness and bolstered confidence among female employees to report incidents of sexual harassment. The media has also helped the cause by actively reporting these allegations, especially those involving founders and senior management.

News reports of the organization's inability to prevent or redress sexual harassment at the workplace, leads to serious reputational risks - all the good work and culture built over the years could be jeopardized. Therefore, GCs must ensure that a culture of gender sensitivity and zero tolerance is instilled in their organizations, and help drive this message from the top. The sexual harassment policy and processes should be simple and easy to understand, and complaints must be dealt with quickly and with the utmost confidentiality. Training to sensitize employees (and the ICC) on sexual harassment must be conducted regularly. Further, adequate safety and security of female employees must be ensured while at work and travel during the graveyard shift.

India still has a long way to go in terms of sexual harassment law. In the recent case of *Doyle v. Zochem Inc.* (2017 ONCA 130), the Ontario (Canada) court awarded three types of damages against the employer

for terminating an employee for raising a complaint of sexual harassment - normal damages for wrongful dismissal, moral damages and damages for the employer's violation of human rights. While this jurisprudence in India is still developing, GCs should help build an anti-harassment culture by ensuring that the first part of the law on 'prevention' is comprehensively complied with.

2. Confidentiality breaches and employee fraud: GCs are aware that extensive use of technology, flexible working arrangements, bring your own device culture, and increased job mobility, have resulted in increased instances of confidentiality breaches and employee fraud. Further, certain job functions might lead employees to inevitably disclose proprietary information to new employers.

While confidentiality clauses in employment contracts are fairly generic, it is advisable to ensure that such clauses are comprehensively drafted and that the obligations persist in perpetuity post-employment. Since prevention is better than cure, especially in such matters, it is advisable to restrict physical access, require authorization, monitor systems' usage, etc. GCs may also do well to set up robust processes, including confidential and anonymous ethics hotlines and whistle-blowing channels (in the absence of a codified law), to help detect such incidents.

Employees should be reminded of their confidentiality obligations upon separation and an undertaking be obtained, since Indian law does not prevent the departing employee from joining a competitor or working on a project for the same client.

3. Disparagement on social media: Employees have started resorting to venting their ire on

social media even before utilizing their employers' grievance redressal mechanism. Organizations today face tremendous reputational risks from misinformed social media crusaders.

Therefore, it is imperative that GCs issue clear guidelines on employees' social media use that include the do's & don'ts, while representing the organization in an official capacity or when using its name. Exit documentation should mention the employee's obligation not to disparage or defame the organization. While the



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Indian Penal Code may treat defamation as a criminal offense, in a country where there are millions of active social media users, damage is usually done in a few minutes.

4. **Dealing with trade unions:** The relationship between employers and trade unions in India remains cordial and peaceful, barring a few (one-off) incidents. In the services sector, there has not been any significant trade union activity. GCs in these sectors have not had the need to deal with trade unions as yet; however, that may soon change.

In May 2016, the Tamil Nadu labor authorities clarified that employees of IT & ITeS organizations can form trade union to seek redressal of their grievances. Previously, employees in these sectors never felt the need to unionize or bargain collectively. In the event of an economic downturn, employees may quickly unionize themselves and institute class action suits for unfair labor practices, unlawful termination, wage and hour claims, social security (provident fund) contributions, discrimination, misclassification, contract labor permanency, etc.

GCs should ensure that their organizations have a robust and responsive grievance redressal mechanism to help employees resolve their concerns. As part of the management, GCs should help foster a culture of transparency and an inclusive approach to potentially fend off trade union activity.

5. **(Never-ending) compliances and increasing penalties:** Most labor laws require the employer to maintain numerous registers, display information, file forms, etc. Considerable efforts have been made by the government to rationalize these compliances and to allow employers to maintain files electronically, including by way of the recent Ease of Compliance to Maintain Registers under various Labor Laws Rules, 2017. But more needs to be done since certain non-compliances could trigger criminal implications - hopefully, the labor codes will help resolve this problem.

In addition to providing 26 weeks of maternity leave, the Maternity Benefit Act, 1961 requires the employer to provide for crèche facilities. Maternity leave has now been extended to adopting mothers and commissioning mothers. The Rights of Persons with Disabilities Act, 2016 currently only requires a private employer to implement an equal opportunities policy.

Monetary penalties for non-compliances continue to increase. For example, the Employees' Compensation Act, 1923 has recently increased the penalty to ₹50,000, which amount may be extended to ₹100,000. The Sexual Harassment Act goes a step further by canceling the business license or registration in case of repeat non-compliance.

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Given the increased vigilance by labor enforcement authorities, compliance remains a major cause of worry for GCs. Directors and CEOs can be held responsible for non-compliance of labor laws. The Companies Act, 2013 requires the Board of Directors to certify compliance. GCs must implement appropriate systems and use compliance checklists and experts. They should conduct compliance audits including of their third-party contractors and staffing services agencies for their contract laborers.

6. **Robotics at the workplace:** The 'job killer' robots are coming, whether or not they will be regulated or taxed! Industrialization 4.0, consisting of self-learning software, advanced analytics, algorithms, cloud computing, 3D printers, drones and of the Internet of things, will render several repetitive tasks redundant, especially in labor intensive countries like India. Technology is displacing jobs everywhere - even we lawyers are at risk. While we continue to search for what humans can do that robots cannot, the pace with which the transformation may occur will leave many unprepared.

GCs will need to help embrace technology and anticipate re-skilling needs and potential layoffs. Given that in industrial establishments, over 100 (or 300 in certain states) workmen require government permission for lay-offs and closure, it remains a challenge in India.

The dynamics of functioning in this evolving HR landscape will require GCs to increasingly focus on HR legal strategies. It will require us HR lawyers to be more proactive, responsive, accessible, business-oriented, research-focused and innovative. And with those robots around, we may never work alone!



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