

Mutual termination agreement and release (employment)

Q&A: India

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India specific information concerning the key legal and commercial issues to be considered when drafting mutual termination agreements for use internationally.

This Q&A provides country-specific commentary on [Practice note, Mutual termination agreements \(employment\): International](#), and forms part of [Cross-border employment](#).

See also [Standard document, Mutual termination agreement \(employment\): International](#), with country specific drafting notes.

Form of settlement

1. In your jurisdiction, how can parties record a mutual termination agreement between them?

In India, mutual termination is achieved by executing a mutual separation agreement between the parties.

2. What is the name used for the type of agreement that records the termination of employment where a current or former employee agrees to waive or settle a claim (or more usually, all possible claims) against the employer in return for a payment?

The agreement that records a mutual termination of employment and a waiver and release of claims (in consideration of receipt of an ex gratia payment) is known as a mutual separation agreement.

For former employees, a waiver and release of claims letter is typically used instead of a mutual separation agreement. This letter may also serve as a reminder of the ex-employee's post-termination obligations towards the company (for example, non-disclosure of confidential information, among other things). (It should be noted that it is unlikely that an employee whose contract is being terminated against their will, will agree to sign a waiver and release letter.)

However, it should be noted that a waiver of one's statutory rights (that is, the right to sue or right to enforce one's statutory claims) through a contract or otherwise is void in India. Therefore, while it is common to include a waiver of statutory claims clauses in the

separation documents, as a deterrent, such a provision is not in fact enforceable.

Statutory obligations

3. Are there any legal requirements for employment termination agreements in your jurisdiction?

No, there are no specific legal requirements for employment termination agreements in India.

In India, the most common form of employment separation is either:

- An employee resignation (at the behest of the employee).
- Termination of employment (at the behest of the employer).

While there is legislation governing termination of employment, it does not cover the scenario of mutual separations very clearly. Mutual termination of employment is typically achieved in India through mutual separation agreements executed between the employer and employee, and such agreements remain largely untested in Indian courts.

Scope of settlement

4. Are there any restrictions on the type of disputes which can be settled by parties in an agreement on termination of employment?

Yes; the statutory rights of either party (for example, payment of wages, and payment of gratuity under law) cannot be waived contractually, and any attempt to do so will be void (*section 28, Indian Contract Act 1872*). While employment-related disputes covered by the Industrial Disputes Act 1947 can be resolved through statutory processes of conciliation, arbitration or litigation, certain non-protected terms of employment related to confidentiality obligations and non-compete obligations, among other things, are contractual obligations in nature, and so cannot be waived.

Other than this, there are no legal restrictions on the types of disputes that can be addressed by parties in a mutual separation agreement.

There are no statutory requirements in relation to claims or disputes that should be expressly referred to in the mutual separation agreement.

Timing of settlement

5. In your jurisdiction, when should the termination agreement be provided to the employee?

As mentioned in Question 3, mutual separation agreements remain largely untested in the Indian courts, and there are no specific legal requirements pertaining to them. The process is therefore largely driven by market practice; typically, mutual separation agreements are provided to the employee at the time of resignation/termination of employment.

A copy of the mutual separation agreement is typically shared with the employee as part of the employer's separation discussions with them. Employers have flexibility as to the timeline.

Pre-agreement negotiations

6. Does "settlement privilege" and/or "without prejudice" apply to termination negotiations and the settlement terms in your jurisdiction?

While the common law concept of "settlement privilege" and "without prejudice" is recognised under the Indian Evidence Act 1897 in relation to civil disputes, the provisions of that statute do not apply directly to proceedings before the industrial tribunals and labour courts (which are the relevant bodies in relation to employment matters).

While there are cases where the Indian courts observed that offers and counter offers made to resolve disputes amicably would generally be without prejudice to the rights and contentions of the parties, there is no jurisprudence on this subject, especially when it comes to termination negotiations and related settlement terms.

7. Can pre-termination agreement negotiations become legally binding in any circumstances?

No.

8. Should the agreement specifically state that it is without prejudice and subject to contract as set out in **Standard document, Mutual Termination agreement (employment): International, clause 13**? Are these concepts understood in your jurisdiction?

The concepts of settlement privilege and without prejudice are typically understood in the context of the Indian civil law of evidence, but the agreement need not state that it is without prejudice and subject to contract.

Given that mutual separation agreements in India are typically executed after all the termination negotiations between the parties, they do not have to be specifically qualified with a "without prejudice and subject to contract" clause. Employment termination-related negotiations with employees typically take place verbally, but are then finalised with the execution of a written mutual separation agreement.

Parties

9. What information needs to be included about the parties at the start of the agreement?

There is no legal requirement in this respect. However, as a matter of practice, the following information about the parties would usually be included at the start of the agreement, to avoid any ambiguity:

- Names of the parties.
- Addresses.
- Taxpayer PAN (permanent account number) for individuals/CIN (corporate identity number) for companies.

Termination Date

10. Can the parties agree any date when the employment will end (Standard document, Mutual termination agreement (employment): International, clause 1)?

Yes, the parties can mutually agree on a date of separation when the employment will end, which can be on a date before the expiry of the contractual notice period. In this event, the employee will be paid in lieu of the unexpired period of notice; this is a requirement under Indian federal and state labour statutes, and will be the case even if not mentioned in the terms of employment.

The employee can be placed on garden leave during the notice period. The terms of the garden leave can be agreed on in the mutual separation agreement irrespective of whether this was provided for in the terms of employment (though it is common practice in India to include a garden leave clause in employment agreements, especially for mid- and senior-level employees).

11. Can the employee be placed on garden leave prior to the Termination Date (Standard document, Mutual termination agreement (employment): International, clause 3)? If so, can any untaken annual leave or time off in lieu be offset against the garden leave period.

Yes, the employee can be placed on garden leave before the Termination Date (and this is common practice; see Question 10). (The Bombay High Court has clarified that garden leave provisions can only apply to a period preceding the termination of employment, and not after termination of employment of an employee (*VFS Global Services Private Limited v Mr. Suprit Roy* [2008 (2) BomCR 446].))

Legally (under various state-specific shops and establishments acts, and under the Factories Act 1948) an employer cannot compel an employee to use their leave, so it is at the employee's discretion to use up their leave as the employee chooses. As a result, the employer cannot set off any unused annual leave against the employee's notice period and/or garden leave period.

Severance payment

12. What must be included in the amount paid to the employee under the mutual termination agreement at Standard document, Mutual termination agreement (employment): International, clause 4 in your jurisdiction? How are the various amounts calculated?

Ex gratia severance/retrenchment compensation

Where an employee is "retrenched" (terminated by the employer), they are entitled to severance/retrenchment compensation calculated at the rate of 15 days' pay for every year of service in excess of six months where:

- They are categorised as a "workman" under Indian labour laws (that is, not an employee engaged in managerial and administrative capacities or in a supervisory capacity, and not drawing monthly salary exceeding INR10,000).
- They have been employed for at least a period of 240 days.

(Section 25F, Industrial Disputes Act 1947.)

Since mutual terminations are akin to a resignation (and accordingly not "retrenchment" under Indian labor laws), strictly speaking, this statutory severance payment entitlement does not become payable in case of mutual terminations. However, to achieve an amicable separation, it is common practice for amounts mirroring a statutory severance payment to be factored into an ex gratia payment to the employee under the mutual separation agreement.

While the ex gratia amount will vary depending on multiple factors (for example, the type of industry, nature of work performed by the employee, years of service), the market practice is generally to offer one month's pay for every completed year of service (that is, additional pay of 15 days per year).

Other payments

In addition to an ex gratia payment, the severance payment will also need to include:

- Payment in lieu of notice (which is also factored into the ex gratia amount where the employee separates with immediate effect).

- Any contractual bonus or arrears.
- Statutory payments such as gratuity and payment against encashment of unused and accumulated annual leave, as applicable.
- A gratuity, where the employee has completed a certain length of service, under the Payment of Gratuity Act 1972.

13. Under local laws, how do the amounts payable to the employee vary depending on whether the employment is terminated with or without cause? Please cite any relevant statutory provisions.

No-cause terminations in India are not permissible; at-will employment is not recognised, and so employment termination can **only** be with cause (or on account of misconduct). As a result, the termination payments will depend on whether the termination is for misconduct or otherwise:

- Where termination payout is for reasons other than misconduct, this will trigger payments such as:
 - severance/retrenchment compensation of 15 days' pay for every year of service in excess of six months (for "workmen" category individuals who have been in continuous service for at least 240 days) (see Question 12);
 - payment in lieu of notice (minimum one month);
 - gratuity (if the employee has completed at least five years' continuous service);
 - leave encashment; and
 - and any other payments owed under the contract.
- Where termination is for misconduct, no severance/retrenchment compensation or payment in lieu of notice will be payable, but the other types of payment listed above will typically be applicable.

Since mutual separations are generally treated as voluntary resignations in India, severance/retrenchment compensation and payment in lieu of notice are not applicable in such separations, which are generally factored into the ex gratia amount payable as a consideration to the separating employee to achieve an amicable separation.

The mutual separation agreement does not need to be amended.

14. Are taxes payable on the payments made to employees on termination in your jurisdiction? If so, does this need to be stated in the agreement?

Yes; while retrenchment compensation up to INR5 lakhs paid to a "workman" on termination of employment (see Question 12) is not subject to income tax deducted at source under the Income Tax Act in the case of a resignation or mutual separation, all other compensation on termination is treated as profits in lieu of salary, which is considered to be taxable income. This is not dependent on the date of termination of employment, irrespective of the employee's notice period. Contractual payments received on termination of employment will attract tax liability.

There is no legal requirement to state specifically that taxes will be payable against the retrenchment compensation. Employers typically include a statement that payments under the mutual separation agreement will be subject to tax withholding, for clarity.

15. In your jurisdiction, are there any time limits imposed by law on when payments need to be made to employees on termination?

Wages

The Payment of Wages Act 1936 (POWA) states that, where a person's employment is terminated by or on behalf of the employer, the "wages" earned by the employee must be paid before the expiry of the second working day after the day on which the employee's employment is terminated. However, it should be noted that the applicability of the POWA to commercial establishments varies in different states.

It may be possible to take the view that a mutual separation is not technically an "employment termination" by the employer, and therefore should not trigger this obligation under POWA.

However, there are specific requirements for the timescale of payment of all "wages", defined widely so as to include "any remuneration payable under any award or settlement between the parties":

- Seven days (for employers with up to 1,000 employees).
- Ten days (for employers with 1,000 or more employees).

It should be noted that the Code of Wages 2019 (Wage Code), which has been notified but not yet made effective, will subsume POWA once made effective. Under the Wage Code, payments of wages where the employee has triggered end of the employment will also have to be made within two days; this will also cover mutual separations, as they are not treated separately under Indian law.

Gratuity payments

Gratuity payments must be paid to an eligible employee within 30 days from the date of termination (*Payment of Gratuity Act 1972*).

State-specific requirements

The state-specific shops and establishments acts (which apply to commercial establishments located in particular Indian states) may also prescribe a time limit within which wage and termination payments need to be made to employees. For example, in some of the state-specific shops and establishments acts, payment of wages representing the employee's untaken leave must be made within two days of termination of employment.

16. In your jurisdiction, are there any limitations on the scope of the release clauses with respect to existing and future claims, whether known or unknown, as set out in [Standard document, Mutual termination \(employment\): International, clause 8](#)?

Any contractual waiver or release of claims pertaining to the employment relationship and/or cessation of employment may not be enforceable in an Indian court of law; this is because any provision in an agreement is void if it:

- Restricts a party to it absolutely from enforcing their rights under or in respect of any contract.
- Discharges any party to it from any contractual liability so as to restrict any party from enforcing its rights.

(Section 28, *Indian Contract Act 1972*.)

However, these clauses are frequently included anyway, for their deterrent effect.

References

17. Is it common in your jurisdiction, to include a mutually agreed reference in the termination agreement? Can the wording of the reference be set out in a Schedule and can an employer decline to give the agreed reference if new circumstances come to light as set out in [Standard document, Mutual termination agreement \(employment\): International, clause 7](#)?

No, it is not common to include a mutually agreed reference in the mutual separation agreement.

However, employees are typically issued an experience/service certificate which they then submit to prospective employers; this is typically just a confirmation of the dates and nature of the job performed by the employee.

In some cases, the issue of a service certificate will be a statutory requirement, depending on the laws applicable to the employer. This requirement is contained in the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act 1946, the applicability of which will have to be determined based on:

- The nature of the establishment/industry.
- The number of "workmen".
- The state where the establishment is located.

18. Does a reference need to be filed with any government authority?

No.

Confidentiality

19. Are there any formalities or requirements to ensure that the confidentiality clause at [Standard document, Mutual termination agreement \(employment\): International, clause 6](#) is valid and enforceable in your jurisdiction?

Typically, the confidentiality clause in mutual separation agreements is a mere reiteration of the existing obligations contained in the employment agreement and/or the proprietary information and inventions assignment agreement executed by the employee at the time of commencement of employment.

To avoid the potential challenge of the restriction on the employee's right to seek employment being looked on by the courts as too broad or ambiguous, leading the clause to be ineffective, employers should ensure that the information to be protected is clearly defined, to the extent feasible and reasonable in terms of its coverage.

Restrictive covenants

20. Can restrictive covenants be included in terms of the settlement? Are such clauses enforceable in your jurisdiction? What are the key things to be taken into consideration to ensure that the restrictive covenants are valid and enforceable?

Yes, restrictive covenants can be included in the mutual separation agreement. However, it should be noted that a post-termination non-compete clause is not enforceable, as it is considered to be a "restraint of trade" under Indian contract law principles, as enunciated by the Supreme Court in *Percept D'Mark (India) Pvt. Ltd. v Zaheer Khan & Anr.* (AIR 2006 SC 3426). Inclusion of a restrictive covenant may still have the effect of moderating the ex-employee's behaviour, even if it is not legally enforceable. Its inclusion is also merited because this is to some extent a developing jurisprudence, and as per the judgment in *Niranjan Shankar Golikari v Century Spg. & Mfg. Co. Ltd.* ((1967) 2 SCR 378), a restrictive covenant may be enforceable in certain limited circumstances where it is not too harsh or unconscionable, and employers tend to include such covenants to be able to posit if necessary that there were non-compete restrictions on the employee post-termination of employment in case of litigation.

Separability / severability

21. In your jurisdiction, are separability clauses commonly incorporated within mutual termination agreements to avoid the entire agreement being held void or unenforceable due to the illegality, invalidity or unenforceability of a part of the agreement?

Yes.

Execution Formalities

22. What are the formal requirements for executing a valid termination agreement in your jurisdiction? Do the terms of settlement require court approval? Does the agreement or any reference need to be filed as a matter of public record?

Under Indian stamp duty law (the Indian Stamp Act and state-specific stamp duty enactments), any "instrument" (which includes an agreement) which confers a right or creates an obligation, must be stamped at or before signing (stamping of the document basically connotes payment of a small amount of duty to the government).

An un-stamped or under-stamped (that is, where the payment is less than the correct amount) instrument may not be admissible as evidence in a court, and the court may at that stage re-direct the parties to adjudicate the document (which means calculation

of the stamp duty and penalty on it), which could significantly delay the enforcement.

In certain Indian states, intentional non-stamping is also a criminal offence.

Stamping may be done either by:

- Purchasing a stamp paper of the requisite denomination (and printing the document on the stamp paper).
- Franking of the document by approaching local designated banks.
- Purchasing an electronic stamp (only in certain Indian states).

The stamp duty amount is calculated based on the type of the agreement and the clauses under the applicable state stamping regulations. The state-specific schedule containing prescribed stamp duties for general agreements should be consulted when determining the stamp duty for mutual separation agreements.

Signing

The mutual separation agreement must be signed by both parties (employer and employee). An authorised representative empowered to act on behalf of the employer, either through a power of attorney or board resolution, should be able to execute the agreement on the employer's behalf. Although it is advisable for evidentiary purposes to have a contract attested by witnesses (typically one or two), there is no actual legal requirement for witness signatures. The agreement may be signed either manually or through an electronic signature.

Language

With respect to the language, so long as both parties understand the terms of the agreement, it is acceptable to execute the agreement in English or the local language.

Filing

In case of mutual separation agreements, since they are typically treated as a voluntary resignation (and not a retrenchment), there is no requirement to notify and/or file the agreement with any government authorities.

General

23. Are there any clauses in the Standard document, Mutual termination agreement (employment): International that would not be legally enforceable or not standard practice in your jurisdiction??

The following issues arise:

- Given that a mutual separation agreement is structured as an amicable separation between the parties and not an “employment termination” under Indian labour laws (which has the precise meaning of a unilateral termination of employment by the employer), we suggest deletion of the term “termination” in the agreement, which seems to reflect a unilateral termination by the employer (instead of a mutual separation), and might lead to different legal requirements (see, for example, Question 3 and Question 12). Accordingly, we suggest the use of terms such as “separation”, “employment cessation date”, “separation payment”, for example, instead of terms such as “termination”, “termination date” and “termination payment”, among other things.
- The provisions in [Standard document, Mutual termination agreement \(employment\): International: clause 3](#) regarding offset against untaken leave are not enforceable (see Question 11).
- [Standard document, Mutual termination agreement \(employment\): International: clause 3](#) also has a reference to the employee being subject to non-compete obligations. Post-termination non-compete clauses are not enforceable, but are often still included in employment and separation documents for their deterrent effect.
- As discussed in Question 17, while a service certificate can be issued to a separating employee (separately), it is not usual practice to include a reference in the mutual separation agreement.
- With respect to [Standard document, Mutual termination agreement \(employment\): International: clause 4](#) (Payments), we recommend that the payments be split to indicate the statutory payments and payments due under the employment contract payable to the employee and the ex gratia amount (which is over and above the statutory and payments, and is offered to incentivise the employee to separate amicably and as a consideration of the individual agreeing to abide by the obligations set out in the mutual separation agreement).
- Regarding [Standard document, Mutual termination agreement \(employment\): International: clause 13](#), see the discussion in Question 6 to 8.

24. Are there any other clauses that would be usual to see in a consultancy agreement and/or that are standard practice in your jurisdiction?

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While [Standard document, Mutual termination agreement \(employment\): International: clause 4](#) reflects full and final payments, the additional ex gratia amount offered to the employee in consideration of the mutual separation and the release and waiver of claims needs to be covered specifically (see Question 12 and Question 23).

Post-termination obligations contained in the employment contract or in standalone agreements (such as a proprietary information and inventions assignment agreement) including, for example, non-solicit, non-disparagement, non-disclosure of confidential information of the employer, are typically specified again in mutual separation agreements.

In the event that the employee is placed on garden leave until the employment cessation date, the employee's obligations during the garden leave period are reiterated.

A clause clarifying that the employee will not assign the rights and obligations under the mutual separation agreement is recommended.

Some employers also provide a detailed break-down of the separation payments to the employee (including the full and final settlement amounts and ex gratia amounts) in an annex to the mutual separation agreement.

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