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India targets labour rights balance with new Industrial Relations Code

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Intending to simplify India's tangled network of labour laws, Narendra Modi's government's Industrial Relations Code (IR Code) is one of four comprehensive new codes designed to make the world's fifth-largest economy more attractive to foreign investors and business. But what balance does this codification strike between the rights of employers and employees?

Labour reform has been on the national government's agenda since 2002, when the Second National Commission on Labour recommended consolidating the nation's existing central laws into codes, and it is easy to see why. With close to 150 laws and rules at the state and national level and a complex web of definitions for such terms as "worker", "employer", and "industry" across various statutes, Indian labour law is a challenging and often confusing landscape to navigate for employers and employees alike.

"Some of India's labour laws were enacted during the British era when it was primarily an agricultural and industrial nation," Vikram Shroff, the Mumbai-based head of HR Law at Nishith Desai Associates, tells IEL. "Obviously, it led to confusion when those laws were being applied to the progressive service sector that did not exist at that time."

> It is easier to comply with four codes with consistent definitions

"At present, there are multiple central laws, which have overlapping and sometimes contradictory definitions [and this] has resulted in varying interpretations and a lot of ambiguity," adds Swarnima, a partner in Trilegal's Bangalore office. "The four new codes, including the IR Code, address this issue by doing away with the multiplicity of definitions. This move is also part of the government's focus on the ease of doing business in India."

A desire to reframe India as a business-friendly country is one of the main drivers for codification. "Historically, India has been lagging in the World Bank's annual ease of doing business rankings, with labour laws being one of the areas that urgently needed reform," explains Shroff. "We often come across situations where employers were not even aware of the fact that there is a labour law in a specific area that needs to be complied with, even if they would have genuinely been able to comply.

"It is easier to comply with four codes with consistent definitions," he continues. "Hopefully, over time, the awareness will increase, making it easier for employers to comply with the new codes. It is also going to positively impact India's image in the international community, that the country is progressive and able to bring about reforms of labour laws."

Consolidation or reform?

To a foreign observer, it may be difficult to tell whether the IR Code represents a consolidation or a reformation of India's existing laws. "While first impressions are that it is a consolidation, a more comprehensive review suggests there have been quite a few changes made to the laws as part of this process, and which impacts all employers," offers Shroff. "It may, however, be unfair to call this process truly a reform and we recognise the difficulties faced by the government in changing the labour laws."

"It is, to a great extent, a consolidation of existing laws," says Swarnima. "There are aspects of the code that are certainly noteworthy. As a first, I am happy that there is finally a gender-neutral term to refer to the workforce – 'workers' – having done away with the age-old term 'workman'. While the meaning and scope of the new term is largely the same, it is about time we start having gender-neutral references

in our laws."

Swarnima also points to the IR Code mandate that employers recognise unions, including in India's fast-growing service sector, which historically has been largely immune to union activity. "Traditionally, unionism has been commonplace in the manufacturing space. It is only in recent years that unions in the information technology sector have gained traction. It is still to be seen whether the recognition obligation will provide such unions with a stronger foothold," she adds.

"The introduction of a single negotiating union or a negotiating council as a sole bargaining agent is definitely a step in the right direction, since there will be more focused discussions between the employers and one worker representative body rather than multiple parallel negotiations."

Existing labour laws' emphasis on manual compliance – specifically, physical maintenance of records and registers – is described by Swarnima as "an evergreen pain-point for employers" that may now be removed with the IR Code's introduction. "There has been a consistent demand to digitise compliances and the code makes room for employing technology in compliance. Draft standing orders can now be electronically submitted to the authorities for certification. Even applications for seeking government approval for lay-off or retrenchment can be made online. These changes are small steps but are surely business-friendly."

Striking a balance

Conventional wisdom suggests that there would need to be trade-offs of employee protections for India to achieve its goal of creating a business-friendly environment. So how far does the code go to protect workers' rights and raise them to international standards, while also creating an attractive environment for investors?

"The codes keep in mind the interests of all stakeholders including the employers, workers, trade unions, staffing agencies, and government," answers Shroff. "Obviously, with conflicting views and interests, it is impossible for any government to be able to please all stakeholders. It's a mixed bag as such and it is premature to view the code as being entirely in favour of any particular side. It is difficult to say at the moment how the codes will truly impact at ground level."

"There are a handful of provisions that tilt in favour of employers, while others are in favour of workers," agrees Swarnima. "Increased thresholds for lay-offs, a shift to electronic compliance and maintaining the status quo in the calculation of retrenchment compensation all promote employers' interests. At the same time, increasing the potential for collective bargaining and introducing a worker re-skilling fund – funded by employers and government to upskill laid-off workers – are in the employees' interest. Thus, there is some level of balance in the protection of both groups."

While its aim of increasing collective bargaining is certainly favourable to the workers' interests, unions have resented certain aspects of the code, describing it as "anti-worker" legislation and calling for nationwide strikes in opposition to its implementation.

"The root cause of their resentment is two-fold," explains Swarnima. "First, increased thresholds will allow employers to terminate employment without government intervention, giving way to misuse by employers. Second, unions fear the code's express recognition of fixed-term contracts across sectors would be misused by employers to avoid providing regular benefits to such employees."

> "There is nothing to suggest whether the parties will resort to arbitration instead of approaching the courts"

By contrast, employers are unhappy with the increased costs requiring them to contribute to the worker re-skilling fund and with the imposition of compulsory grievance redressal committees (GRCs) for employers with more than 20 employees, a provision which Swarnima describes as "a setback" for businesses.

"There is no room under the IR Code for employers to have alternate grievance redressal mechanisms," she explains. "Many companies already have robust and fairly successful global hotlines and other grievance redressal forums. Many employers hesitate to have a GRC since it would need to have equal representation from the employer and workers on the committee. The concern is primarily to preserve

confidentiality and avoid the possibility of sensitive information being shared with relatively junior employees."

It should be noted that the GRCs could act as a stepping-stone to grievance redressal at an organisational level, as employees could seek recourse via external adjudicatory forums such as approaching a conciliation officer with a complaint or, if conciliation fails, governmental referral to the new industrial tribunals due to replace the existing labour courts.

"This system is comparable with the United Kingdom's, which also allows for disputes to be resolved through mediation, settlements, or employment tribunals," explains Swarnima. "Similar to the current regime, appeals over a tribunal's awards will continue to lie before the High Court and, thereafter, the Supreme Court. Therefore, the dispute resolution mechanism, by and large, will continue to be the same with a noteworthy change being that the process will become more streamlined, a benefit to both employers and employees."

However, with the huge backlog of cases pending in various Indian courts, Shroff does not expect an immediate sea change to the dispute resolution process. "There is also nothing in the codes to suggest whether the parties will resort to arbitration instead of approaching the courts," he adds.

Harmony and consistency

Amid pushback from both employers and unions that remain sceptical of certain provisions, the IR Code's date of commencement remains pending, despite having received presidential assent on 28 September 2020. With that in mind, will the government need to make further amendment or reform before the code can be implemented?

"There are definitely some areas which could have been made more favourable for employers and employees," says Swarnima. "However, despite all the pushback, I do not see substantial reforms of the code anytime soon. If at all, such reform would need to come through an amendment to the IR Code – and I don't expect this to happen."

"At this stage, the government's focus remains on making the codes effective and tracking their implementation," says Shroff. "Obviously, there are other labour laws outside of the codes that continue to apply to employers in India and that remain equally important. The government will also be hoping in due course to bring about some harmony and consistency in terms of the national and state-level labour laws, with overall focus continuing to make India more attractive for doing business, employment generation, and protecting workers' rights.

"India remains a labour-intensive country and the government will always value the contribution of the workforce towards our economy. To that extent, it is unlikely for the government to take away employee rights and protections, a reality of doing business in India. The codification of our labour laws will remain one of the important contributions and highlights of the current government, and it remains to be seen if the labour reforms will indeed help convert India from a developing into a developed nation."