

## HR Law Hotline

November 16, 2006

### MORE THAN AFFIRMATIVE ACTION REQUIRED FROM THE PRIVATE SECTOR?

As per newspaper reports, private sector companies have been told to expect "some harsh measures" on the job reservation policy for socially backward communities, by the Minister for Commerce and Industry, the Government of India, ("**Government**") earlier this week. The Minister indicated that the Government is examining the feasibility of making such a provision mandatory.

While a reservation policy already exists for government jobs and public sector companies, in an effort to extend the benefits of liberalization and globalisation of the Indian economy to the socially and economically challenged section of population ("**Special Class**"), the Government has, over the last few months, been proactive in pursuing the introduction of employment reservations into private sector industries and elite educational institutions as well.

An empowered Group of Ministers ("**GoM**") was set up a few months ago to discuss the modalities of introduction of such reservations and had suggested to the Government that fiscal incentives could be used to encourage industry to offer employment to the Special Class. The report and recommendations of the GoM were scheduled to be released on November 14, 2006, but the GoM sought an extension. The GoM also approached the Attorney General of India on questions relating to the eligibility of certain categories of individuals to employment reservations, and to discuss a recent Supreme Court judgment that excludes the "creamy layer" of the Special Class from the benefits of reservation.

While representatives of the industry chambers have offered to voluntarily implement affirmative action such as training for the Special Class, they have spoken out against mandatory reservation in the private sector. The Chairman of the Confederation of Indian Industries ("**CII**"), stated, after the meeting with the GoM, that "we (the CII) have made it clear that we are against quotas. We are against reservation. Any move to impose this through legislation will be unfortunate".

Article 335 of the Constitution of India ("**Constitution**") empowers the Government to make policies for reservation of posts only for public employment, i.e. employment by the "State". Under the Constitution, the term "State" covers institutions such as the Parliament of India, the state legislative assemblies, the civil services, government-owned public sector units, public educational institutions, private bodies performing state-like functions, etc.

The private sector is not included within the definition of the term "State" unless it performs a function similar to a governmental function. Therefore, currently, there is no provision in the Constitution to make any reservation policy mandatory for the private sector. However, the Constitution Amendment Bill 152 of 2005 ("**Bill**") has proposed that Article 335 be amended to include private sector industries within its scope.

Meanwhile, Mr Veerappan Moily, the Head of the Administrative Reforms Commission has proposed the inclusion of Muslims, a minority religious community in India, into the category of "Other Backward Classes" ("**OBCs**"), which is one of the categories covered under the existing reservation policy for government jobs and public sector employment. Such classification of the categories entitled to reservation benefits are likely to apply to the private sector as well if the job quota reservation policy is made mandatory.

Separately, the Finance Ministry is also considering giving tax sops to companies that would voluntarily subscribe to affirmative action, thereby making a conscious effort to provide jobs to the Special Class.

It remains to be seen whether the Bill will be passed, in what form, and whether the controversy currently raging over merit-based entitlement versus equal opportunities in private educational institutions, where reservation is sought to be introduced, will spread to the private corporate sector as well. It also remains to be seen how well the private sector responds to taking up the challenge of affirmative action.

- Rina Kamath & Shreya Rao

#### Sources:

- Quota may be on top of minister's mind; Cos told to get ready for some harsh steps, *Economic Times, Mumbai edition*, (November 15, 2006)
- Now, Moily wants quota for Muslims, *Economic Times, Mumbai edition*, (November 14, 2006)
- GoM recommendations on affirmative action to be finalised on November 14, *Economic Times, Mumbai edition*, (November 14, 2006)

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- Creamy layer: Attorney General's opinion sought, *Hindu* (November 15, 2006)
- Govt, industry chambers to meet on reservation issue on Wednesday, *PTI* (November 15, 2006)
- GoM recommends fiscal incentives, *The Hindu Businessline*, (March 27, 2006)

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