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LEGAL ALERT

MANDATORY REQUIREMENTS FOR RETRENCHMENT UNDER EMPLOYMENT LAWS IN INDIA

By Sunil Kumar and Bhanu Harish

It is common for corporates to carry out termination of employees who do not meet their performance requirements, or are found wanting in their conduct or are incapable of working in teams. HR units often act in a rush thinking all they have to do is to invoke the terms of the employment contract regarding termination. Not surprisingly, terminations are carried out with little or no idea of the requirements of the governing legislations in India. This is even more typical in the case of subsidiaries of foreign companies who often overlook that employment laws in India are based on legislations which override contractual terms of employment. This memo aims to highlight that the issue of *termination simpliciter* is a tricky business, and the prevailing impression that it is a simple case of hire and fire, is flawed and fraught with legal implications. The governing legislations have mandatory provisions for notice for termination of workmen, or employees who are non-workmen. Some of the legislations are State specific (e.g. Punjab, or Maharashtra, or Tamil Nadu, depending on the State) and have different requirements of notice for employees who are terminated by way of removal simpliciter or by way of dismissal for misconduct. In the case of large units doing manufacture, there are requirements to obtain permission from State Governments in certain cases.

Retrenchment, as commonly understood is termination of an employee on the grounds of surplus labour or incapacity of employees due to some economic grounds. However, the Industrial Dispute Act, 1947 (the "ID Act") is the governing legislation for "retrenchment", which takes the wider view of termination of employee as against the ordinary meaning of the term retrenchment. Section 2(oo) of the Act states that "*retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include –*

(a) voluntary retirement of the workman or

(b) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;

(c) termination of the service of a workman on the ground of continued ill-health."

It may be noted that the ID Act states that termination by way of retrenchment can be for any reason whatsoever. The Supreme Court in Delhi Cloth and General Mills Co. Ltd. v. Sambu Nath Mukerji and others also followed this interpretation of the definition and held that even "striking off the name of the workman from the rolls" for being absent without leave is "retrenchment". Hence, the reasons of termination are not limited to any particular class of reasons, and need not be only on economic grounds such as redundancy, etc.

Apart from the issue of definition, what is critical is that an employer must carry out retrenchment (other than dismissal on grounds of misconduct), as per the requirements of section 25F of the ID Act. This provision provides for the employer to fulfill certain conditions before retrenching any employee. It states that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

The condition given under section 25F(c) states requires the employer to give notice to appropriate government in addition to the other two conditions. What is important to note is that the notice must state the reason for retrenchment of the employee and the notice must be issued as is prescribed in the rules framed under the Act.

Further, in the case of the employers of industrial units, who have employed one hundred workmen or more on an average per working day for the preceding twelve months are required to comply with certain different conditions. What is critical to note is that unlike notice requirements of section 25F, the employer is required under section 25N to make application along with the reasons of intended retrenchment to the State Government for seeking its prior permission to retrench the employee. The State Government has the discretion to grant or withhold such permission after making enquiries. Hence, a simple termination as per the contract of employment can prove disastrous in the event the termination is challenged.

Every State also has a legislation called The Shops and Establishments Act which contains provisions for notice for termination of

employment either with or without cause. Some States simply do not allow terminations except on grounds of proven misconduct or indiscipline. The notice requirements under these legislations are also mandatory and need to be carefully studied in each case. Notice requirements and conditions of this legislation must be strictly observed lest breach of the prescribed procedure leads to the termination being adjudged as invalid. Employee terminations are the most litigated battle fields for employers.

What is not appreciated by employers is that the whole effort of terminating an employee's service by way of retrenchment is a waste if the requirements of notice as prescribed in the law are not observed. Invariably, employees approach the labour courts and after a long litigation, the termination is set aside by the labour court on the ground that the termination was not valid in law, and is therefore treated as ab initio void. Generally, the court insists on reinstatement of the employee with full payment of back wages.

Finally, retrenchment, particularly when several employees are terminated on grounds of surplus labour or redundancy must be based on the principle of last-in-first-out. It means that the employer shall retrench the workman who was the last person to be employed. In such cases, employers must not be unduly hasty in refilling the vacant position immediately after the last termination.

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