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India has often been an ideal location for talent hunt by global enterprises, boasting a significant pool of skilled workers across sectoral requirements. While not uncommon, in the recent past, Indian market has seen an increasing demand from foreign players looking to engage or hire workforce from India. This edition of the JSA Employment Newsletter sheds light on one of the commonly preferred routes by global players in recruiting talent from India, and provides a brief roundup of some key regulatory developments through amendments, notifications, orders and other updates in the employment space in India. We also discuss some recent judicial precedents across several employment legislations.

Talent hiring through an 'Employer of Record' ("EOR")

The existence of a large and diverse talent pool in India with comparatively lower labour costs has led to an increasing number of foreign companies looking to invest in Indian workforce. While not uncommon, recent trends reveal an increased count in the number of foreign companies using services of an EOR to recruit talent on its behalf for support with their regular operations. In instances where foreign companies have no immediate plans of setting up operations in India, EOR based hires enable them to engage Indian talent without the need to immediately set up an Indian entity or commence active on-ground operations in India. Below, we provide an understanding of what this means, and the benefits and drawbacks of such an arrangement under the existing legal framework in India.

a) What is an EOR and how does the arrangement work?

An EOR is a service provider that assumes the legal and operational responsibilities of an employer for a (client) company's workforce, and manages compliance, payroll and administrative tasks associated with their employment, while allowing their client to focus on its operations and growth. An arrangement of this nature is generally captured through a services or similar agreement. EOR handles talent identification and management including employment compliances and payroll functions and receives 'service fees' from the client for its manpower support services. Project and work allocation is typically handled directly by the foreign company. Where setting up India operations is potentially envisaged, foreign companies may, by way of an enabling clause in their services agreement or otherwise, provide for the transition of EOR employees to their own rolls.

b) What are the benefits?

EORs allow organizations to hire talent globally by minimizing the red tape involved in incorporating subsidiaries, enabling them to onboard resources in new markets swiftly and compliantly. In essence, the client company enjoys some of the benefits of establishing an Indian entity without having to incur similar costs and compliance burdens, and in less time.

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c) What are the risks and how can one mitigate them?

While using an EOR may be an effective way to start engaging talent, foreign companies should be wary of inadvertent tax and legal consequences arising out of such arrangements. It is imperative for companies opting for this arrangement to be thorough with their homework on Indian tax and employment regulatory issues, and most importantly, whether the EOR identified is compliant with applicable laws. It is critical to structure the manpower arrangement in a manner such that foreign companies are not prone to misclassification risks and claims, where EOR direct employees are construed as the engaging entity's employees. Another risk is that of disruption of business, if the EOR faces legal issues or closes down. Some of the key considerations in choosing and contractually implementing an EOR option to mitigate potential risks, are set out below.

d) Key Considerations:

1) Foreign employer should exercise caution in engaging EOR hires particularly when it has existing employees on its rolls in India. In such cases, individuals engaged through an EOR may have claims relating to parity of pay and benefits in comparison with those employees and depending on the nature of work performed (similar, or arguably similar to those of regular employees), risk of misclassification claims cannot be ruled out.

2) It is relevant for the foreign employer to undertake its diligence on whether the EOR is a duly registered and established legal entity, and whether it holds necessary licences to conduct its operations including provision of manpower support.

3) Another crucial check would be to assess and confirm that the EOR is operating in compliance with extant Indian employment laws, including compliance with wages, paid holiday requirements, working hours rules and social security benefits. EORs, as primary employers, should not be in default with statutory licenses and registrations, both at an entity (operational) as well as manpower (hiring and deputing) level.

4) Foreign employers should make appropriate determination on whether it would be necessary to have provisions like confidentiality, IP (intellectual property) rights assignment clauses and non-solicitation with the individuals engaged. Depending on the nature of work, these may or may not be necessary. However, if required, companies need to consider how these protections can be secured contractually and enforcement issues due to lack of privity of contract with the individuals engaging in a breach.

5) Checks and balances on whether the EOR provides transparency and cooperation in HR (human resource) administration, compliances and costs, should be examined.

6) Foreign employers should also make determination on whether their contract with the EOR should enable transitioning of (EOR) employees, to ensure continuity of business.

7) Navigating 'Permanent Establishment' risks

Separately, foreign players should be aware and cautious of potential Permanent Establishment ("**PE**") risks likely to trigger in such cases, where a company's operations in a foreign country might lead to classification of having a taxable presence in India. This is relevant to note here since the EOR route is often utilised by many foreign companies as a way around the PE risk. Even while using an EOR, it is important to be watchful of certain triggers of PE classification other than the obvious one of establishment of a physical office. A few noteworthy triggers are (a) employing a local workforce which has the authority to negotiate or conclude contracts, and (b) conducting sales and significant engagement with the local market in India.

Foreign companies should carefully consider the nature of work they plan to engage an Indian workforce for and the manner of operating through an EOR to mitigate risk of such PE classification risk effectively.

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Regulatory Updates

Central government amends the Apprenticeship Rules, 1992 ("Apprenticeship Rules")

Pursuant to powers under Section 37(1) of the Apprentices Act, 1961, Ministry of Skill Development and Entrepreneurship vide notification dated April 19, 2024, has issued the Apprenticeship (Amendment) Rules, 2024 ("**Apprenticeship Amendment Rules**"), with effect from April 19, 2024, to amend certain provisions of the Apprenticeship Rules. Apprenticeship Amendment Rules provides for, inter alia, (a) minimum duration of apprenticeship to be of 3 (three) months and maximum being 2 (two) years; and (b) minimum qualification required for such apprenticeship varies across group types, but now accommodates people who have minimum qualification of passing 8th and 10th for most trade groups.

State government of Puducherry launches ServicePlus portal for amendment of registration certificate

Labour Department, Government of Puducherry vide an office order has launched online services for amendment of registration certificate under the Building and Other Construction Workers Act, 1996 ("**BOCW Act**") through a Government of India web-based application ServicePlus portal (URL: serviceonline.gov.in). Pursuant to the said order, with effect from March 27, 2024, all applications with respect to amendment of registration certificate and issuance of amended registration certificate under BOCW Act will exclusively be carried out through ServicePlus portal.

Central Government issues revised rates of variable dearness allowance ("VDA") for employees across sectors

Office of Chief Labour Commissioner, Ministry of Labour and Employment vide order dated April 1, 2024, has revised the rates of VDA with effect from April 1, 2024, for employees employed in various sectors including agriculture, mining, construction and maintenance, loading and unloading, cleaning, watch and ward and other related services. This revision in VDA rates is based on the latest average CPI for industrial workers. Notably, the notification focuses on following worker categories: (a) unskilled, (b) semi-skilled / unskilled supervisory, (c) skilled / clerical and (d) highly skilled.

State government of Haryana repeals Industrial Disputes (Amendment and Miscellaneous Provisions) (Haryana Amendment) Act, 1957 ("Amendment Act")

State government of Haryana vide notification dated March 26, 2024, has published the Industrial Disputes (Amendment and Miscellaneous Provisions) (Haryana Amendment) Repeal Act, 2024 ("Repeal Act") to repeal the Amendment Act. The notification clarifies that the Repeal Act will not affect (a) any other enactment in which Amendment Act was applied, incorporated or referred to; (b) validity, invalidity, effect or consequences of anything done or suffered, or any obligation or liability, or any indemnity already granted under the Amendment Act; (c) any principle or rule of law, form or course of pleading, practice or procedure or existing usage, custom, office or appointment, irrespectively the same may have been in any manner affirmed or recognized or derived by, in or from Amendment Act; and (d) revive or restore any jurisdiction, office, custom, liability, right or other matter or thing not now existing or in force.

State government of Tripura removes mandatory registrations under Tripura Shops and Establishments Act, 1970 ("Tripura S&E Act")

Labour Directorate, Government of Tripura vide memorandum dated April 26, 2024, has deleted Section 16 of Tripura S&E Act by way of Tripura Shops and Establishment (Fifth Amendment) Act, 2021 in order to promote ease of doing

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business in the state of Tripura. Post deletion of Section 16 of Tripura S&E Act, no shopkeeper or employer is required to obtain or maintain registration under Tripura S&E Act.

Union Territory of Ladakh introduces Ladakh Rights of Persons with Disabilities Rules, 2024 ("Ladakh PwD Rules")

Administration of Union Territory of Ladakh vide notification dated March 28, 2024, has introduced Ladakh PwD Rules to ensure rights and entitlements of persons with disabilities in the Union Territory of Ladakh. Ladakh PwD Rules aim to streamline the process of applying for a certificate of disability, ensuring compliance with online application procedures specified by the Government of India. These rules provide for setting up of the Union Territory Committee for Research on Disability, as well as rules for limited guardianship for persons with disabilities ("**PwD**"). Certifying authorities are designated to issue certificates of registration to institutions as well as certificates of disability, with clear guidelines for the assessment process.

Government of India enhances reservation of PwD quota

Apprenticeship Training Division of Ministry of Skill Development and Entrepreneurship *vide* letter dated March 20, 2024, has enhanced the reservation of PwD quota from 3% to 4% for 5 (five) categories of benchmark namely (a) locomotive disability, (b) blindness, (c) deaf, (d) autism and (e) multiple disabilities. Accordingly, the said letter provides trade eligibility list of 140 (one hundred forty) designated trades (engineering and non-engineering) under Apprenticeship Training Scheme as per Rights of Persons with Disabilities, 2016.

Case Law Ratios

Karnataka High Court strikes down the applicability of employees' provident fund benefits to international workers

The High Court of Karnataka in its recent judgement has struck down para 83 of the Employees Provident Fund Scheme, 1952 and para 43A of the Employees' Pension Scheme, 1995 ("**Amendment(s)**"), covering international workers, as wholly arbitrary and unconstitutional. The court ruled that the Amendments exceeded the scope of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and that its treatment of international workers was not in parity with that of Indian workers. For a detailed analysis, please refer to the JSA Prism of May 20, 2024.

Supreme Court holds denial of childcare leave to mother of disabled child is a violation of duty under the Constitution of India

In ***Shalini Dharmani v. The State of Himachal Pradesh***[1] on April 22, 2024, the division bench of the Supreme Court passed an order directing the State Himachal Pradesh to review its policies on 'Child Care Leave' for working women, with particular focus on those caring for children with special needs. The Supreme Court in its order, laid emphasis on the constitutional right of women to participate in the work force (under Articles 14, 15 and 21 read with Article 19(1)(g)) and the State's duty as a model employer that this constitutional entitlement is protected. For a detailed analysis, please refer to the JSA Prism of April 29, 2024.

[1] SLP (C) No. 16864/2021

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Supreme Court upholds regularization of contract workers based on perennial nature of work

In ***Mahanadi Coalfields Ltd. v. Brajrajnagar Coal Mines Workers' Union***[2] on March 12, 2024, the Supreme Court upheld the award passed by the Industrial Tribunal, Rourkela, Odisha ("**Industrial Tribunal**") and held that denial of regularization of workers involved in similar nature of work is not only artificial distinction but also wholly unjustified. The appellant in this case had already made permanent 19 (nineteen) out of 32 (thirty-two) contract workers on account of their work related to bunkers for operating chutes in mines, being similar to those performed by other permanent employees. Accordingly, the Supreme Court held that 13 (thirteen) workers left out were also carrying out similar nature of tasks and thus are required to be made permanent, with back wages.

Karnataka High Court denies 'workman' status to executive secretary

In ***Smt. Bhuvaneshwari v. Management of M/S Ambuthirtha Power Pvt. Ltd.***[3] on April 8, 2024, Hon'ble High Court of Karnataka at Bengaluru held that an 'executive secretary' handling day-to-day work of chairman and managing director including taking care of travel, renewal of passports, processing of VISA, processing of bills to accounts department does not qualify as a "workman" under the Industrial Disputes Act, 1947 ("**ID Act**").The court clarified that the above mentioned work is discharged in a managerial capacity and clerical work, if any, is only incidental to the principal work. The court re-affirmed that the dominant nature of one's duties needs to fall within one of the stipulated categories to be classified as a 'workman' under the ID Act.

Jammu and Kashmir High Court re-affirms 'equal pay for equal work' principle

In ***Jagdish Kumar v. State (UT of J&K)***[4] on March 3, 2024, Hon'ble High Court of Jammu & Kashmir and Ladakh at Jammu re-affirmed the basic facets of 'equal pay for equal work' principle. The court, referring to the Supreme Court's judgement *in* ***State Bank of India & Anr. Vs M. R. Ganesh Babu & Ors. 2002 (4) SCC 556*** observed that equality is not to be based in designation or nature of work, but on several other factors like, responsibilities, reliabilities, experience, confidentially involved, functional need and requirements commensurate with the position in hierarchy and the qualification required.

[2] Civil Appeal No(s). 4092-4093/2024.
[3] WP No. 49982/2018
[4] 2024 SCC OnLine J&K 179

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Employment Practice

JSA has a team of experienced employment law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our key areas of advice include (a) advising on boardroom disputes including issues with directors, both executive and non-executive; (b) providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance; (c) providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals; (d) advising on compliance and investigations, including creating compliance programs and policy, compliance evaluation assessment, procedure development and providing support for conducting internal investigations into alleged wrongful conduct; (e) designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs; and (f) advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

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19 Practices and 19 Ranked Lawyers	12 Practices and 42 Ranked Partners **IFLR1000 APAC Rankings 2023** --- Banking & Finance Team of the Year --- Fintech Team of the Year --- Restructuring & Insolvency Team of the Year	Among Top 7 Best Overall Law Firms in India and 9 Ranked Practices --- 11 winning Deals in IBLJ Deals of the Year --- 12 A List Lawyers in IBLJ Top 100 Lawyer List
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