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Changing Terms of Employment (India)

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A Practice Note dealing with the legal and practical considerations that arise when an employer wishes to change the terms of an employee's (or a number of employees') employment contracts in India. This Note addresses what changes an employer is permitted to make and whether an employer can make any unilateral changes.

An employee's terms of employment change during their employment. For example, annual pay increases and promotions are likely to constitute changes to the employment contract.

Occasionally, however, either the employer or the employee may wish to make changes to the employment contract that the other party may not want to accept. This Note focuses on how the law in India regulates the way in which employers may make changes to terms of employment and the remedies available to the employee when the employer makes unilateral changes to their employment contract.

Terms of Employment

In India, employment relationships may be express or implied. It is not mandatory to have a written employment contract. There is no prescribed format for an employment contract.

There is no legal definition of "terms of employment" under India's labour laws. Terms of employment are typically determined by:

- Employment contracts.
- Employer's human resources (HR) policies.
- Applicable laws.

Some Indian states, such as Karnataka and Delhi, require employers to issue appointment orders providing certain information in their terms of employment (Section 6A, Karnataka Shops and Commercial Establishments Act, 1961; Section 34, Delhi Shops and Establishments Act, 1954).

There are laws in India governing:

- Payment of wages, bonus, and gratuity.
- Minimum wages.
- Minimum requirements on leaves, holidays, and working hours.
- Resolution of industrial disputes.

The Industrial Employment (Standing Orders) Act, 1946 (Standing Orders Act) applies to all factories and commercial establishments in certain states, including Karnataka, Haryana, and Tamil Nadu. The Standing Orders Act requires covered employers to follow certain minimum standards for employment conditions, which are set out in model standing orders. Employment conditions covered by the model standing orders include:

- Classification of workmen.
- Publication of working hours, holidays, pay days, and wage rates.
- Shifts.
- Work from home.
- Attendance.
- Rights and liabilities of employers and workmen.
- Transfer policy.
- Medical aid and examination.
- Secrecy.
- Disciplinary action.
- Grounds of suspension and termination from employment.
- Redressal mechanisms.

(Sections 2(g) and 3(2), Standing Orders Act.)

The Standing Orders Act covers workmen (non-managers) in 'industrial establishments' (as defined under Payment of Wages Act, 1936) employing at least 100 workmen. However, the definition of

covered employees may vary based on state specific amendments.

Employers typically execute employment contracts with employees that stipulate the terms of employment. Employers also include additional employment service conditions in their HR policies. Indian employment contracts typically contain provisions outlining an employee's:

- Probation period.
- Duties and responsibilities.
- Remuneration.
- Confidentiality obligation.
- Assignment of intellectual property.
- Restrictive covenants, including:
  - non-compete;
  - non-solicitation of the employer's employees and clients; and
  - non-disparagement.
- Conflict of interest.
- Termination of employment.
- Return of company's property upon termination.

If India's labour laws are more favourable to the employee, they will override the contractual terms.

Permitted Changes

In India, changes permitted by law to the terms of employment depend on the nature of the terms of employment:

- **Statutory Entitlements.** Terms under statutory entitlements cannot be changed. Employers can give employees equal or more beneficial terms of employment.
- **Terms in Employment Agreements.** Employers cannot make unilateral changes to the agreed terms in an employment agreement, unless the terms of the employment agreement allow the employer to do so. Changes to an employment contract need employee consent with provision of sufficient consideration. (Section 10, Indian Contract Act, 1872 (ICA); see Changes with Consent.)

The Standing Orders Act requires covered employers to formulate and have certified standing orders containing certain terms of service for their workmen (Sections 3 to 5, Standing Orders Act; see Terms of Employment). To amend their certified standing orders, the employer needs approval of the labour authorities. To obtain this approval, the employer must submit draft standing orders to the Certifying Officer. (Section 10, Standing Orders Act.)

There is no statutory requirement for the employer to consult with their employees or the trade union before submitting the draft standing orders to the Certifying Officer. However, it is best practice to ensure there are no issues with the certification.

Upon receipt of the draft standing orders, the Certifying Officer sends copies to either the concerned trade union or workers' representative body (if there is no trade union) notifying them of the draft standing orders and requesting objections (if any) within a prescribed time limit. Any amendment to the certified standing orders needs to be accepted by the employer and the trade union or workers' representative body, which may require the employer to engage in employee consultation. (Section 10, Standing Orders Act; see Consultation.)

Section 9A Notice Requirement

Section 9A of the Industrial Disputes Act, 1947 (ID Act) requires employers proposing to adversely change certain service conditions of covered workmen to provide a 21-day notice of the proposed change to both:

- The impacted workmen.
- The labour authorities in a prescribed manner.

For this notice requirement, covered workmen are employees engaged in manual, unskilled, skilled, technical, operational, or clerical work that is primarily non-managerial, non-administrative, and non-supervisory in nature. (Section 9A, ID Act.)

Changes to the following conditions of employment trigger the notification requirement:

- Wages, including the period and mode of payment.
- Contribution paid, or payable, by the employer:
  - to any provident fund or pension fund; or
  - for the workmen's benefit under any law currently in force.
- Compensatory and other allowances.
- Hours of work and rest intervals.
- Leave with wages and holidays.
- Starting, alternating, or discontinuance of shift working, if not in accordance with standing orders.
- Classification by grades.
- Withdrawal of any customary concession, privilege, or change in usage.
- Introduction of new rules of discipline or alteration of existing rules, except if provided in the standing orders.
- Rationalization, standardization, or improvement of plant or technique which is likely to lead to retrenchment of workmen.

- Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation, process, department, or shift, if not caused by circumstances out of the employer's control.

(Fourth Schedule, ID Act.)

Non-compliance with Section 9A of the ID Act renders the change of terms effected *void ab initio* (*Workmen of the Food Corp. of India v. Food Corp. of India*, 2 SCC 136 (1985)).

The notice requirement does **not** apply when a change to the protected conditions of employment is either:

- Pursuant to a settlement or award.
- For government employees for whom civil services rules apply.

(Section 9A, ID Act.)

Employers are prohibited from adversely changing any condition of service during the pendency of any dispute before a court of law (Section 33, ID Act).

In certain states, if there is a change to conditions of service, the employer must serve a copy of the notice of change under Section 9A of the ID Act to the concerned secretary of the registered trade union, if such trade union exists.

Collective Bargaining

In India, collective bargaining is prevalent in unionized industries like manufacturing. Unionization is still at an early stage in the services and information technology (IT) industries. In select locations, such as Pune, Chennai, and Hyderabad, employers may expect unionization among IT sector employees as there have been reported incidents of protests by unionized employees in these locations.

Collective bargaining is legally recognized through various statutory provisions. For example, the ID Act states that any settlement other than a conciliation is binding on the parties, thereby recognizing settlement of industrial dispute through collective bargaining (Section 18, ID Act).

When formulating conditions of employment, employers with unionized employees covered under the Standing Orders Act are required to submit copies of their proposed standing orders to the representative trade union. The labour authorities certify the standing orders submitted by the employer only if there are no objections from the trade union. (Section 5, Standing Orders Act.)

If an employer has unionized employees and there is a prior collective bargaining agreement (CBA) in place, the governing CBA mandates the employer to consult with the trade unions that are parties to the CBA prior to changing any terms of the CBA. There are primarily three types of such CBAs in India:

- **Bipartite (or voluntary) agreements.** Bipartite agreements are binding under the ID Act and formed by voluntary negotiations between the employer and the concerned trade union. These agreements are implemented without much friction because they are negotiated voluntarily. (Section 18, ID Act.)
- **Dispute settlements.** Settlements, arising from a dispute, involve the employer, the trade union, and the conciliation officer. The content of a settlement is limited to the issues raised in the dispute. If the parties reconcile, then the conciliation officer withdraws, and the parties decide the terms of the settlement. Otherwise, the conciliation officer applies their judgment and finalizes the terms of the settlement, incorporating the demands of both parties to the maximum extent possible. (Section 10, ID Act.)
- **Consent awards.** Parties voluntarily arrive at consent awards during the pendency of a dispute at the adjudicating authorities (for example, labour courts and industrial tribunals). The consent awards are included in the binding award pronounced by the adjudicating authority. (Sections 10 and 18, ID Act.)

The primary type of CBA entered by employers and trade unions is a memorandum of settlement, which is legally binding under Section 18(1) of the ID Act.

Whether the employer can change the employment conditions of employees protected under the CBA depends on the terms of the CBA. The employer may extend these changes to all covered employees if both:

- The employees are members of the legally recognized trade union that is a party to the CBA.
- The CBA contains a provision allowing for unilateral changes by the employer.

A settlement binds the members of the union when executed between the management and the registered union. If a settlement is reached during conciliation proceedings, it also binds non-members. (*P. Virudhachalam & Ors. v. The Management of Lotus Mills & Anr.*, 1 SCC 650 (1998).) The individual workman is not an independent party to an industrial dispute separate from the union. For instance, the ID Act focuses primarily on disputes that involve the rights of workmen as a class. (*Ram Prasad Vishwakarma v. Chairman Industrial Tribunal, Patna & Ors.*, AIR 1961 SC 857.)

Changes with Consent

Employee consent is generally required for changes to the terms of an employment contract. Consent may be:

- Express or implied.
- Oral or written.

(Section 9, ICA.)

In practice, employee consent is generally in express, written terms to avoid disputes and to prove legitimacy of consent.

Employers cannot unilaterally make materially detrimental changes to contractual terms of employment. However, an employer may decide to make unilateral changes when both:

- The employment contract states that the employer has a unilateral right to implement changes to the contractual terms.
- The proposed changes do not conflict with applicable laws.

In any event, changes to conditions of employment covered under the Fourth Schedule of the ID Act require a 21-day notice to the impacted workers and labour authorities in a prescribed manner (Section 9A, ID Act; see Section 9A Notice Requirement). If an employer implements any changes to these protected service conditions, obtaining employee consent may help mitigate the associated legal risk.

To ensure that a change is enforceable, consideration is generally necessary for consent when a change of employment terms is to the employee's detriment (Section 2(d), ICA).

Under Indian contract law, there are no provisions on the sufficiency of valid consideration for executing amendments to employment contracts. Consideration may be financial or non-financial. Continued employment is not valid consideration because the right to continued employment exists by virtue of the original employment agreement.

Employers must adhere to the general principles of consideration in India. Valid consideration:

- Can pertain to the past, present, and future.
- Need not be adequate.
- Must be real and not illusionary.

(Section 2(d), ICA.)

Unilateral Changes by the Employer

Employers can unilaterally change non-contractual terms of employment if they are not protected under the Fourth Schedule of the ID Act. Changes to company policies may be brought about unilaterally by the employer unless they are contractual terms or statutory entitlements.

Employers cannot unilaterally make changes to the employee's contractual terms of employment unless the changes are in the employee's favour. The ICA requires the consent of both parties and payment of consideration as a pre-condition for any contract, including amendments to existing contracts (Section 10, ICA).

Regarding the conditions of service under Section 9A of the ID Act, an employer may make unilateral changes to the specified terms if the necessary procedures are followed (see Section 9A Notice Requirement). However, an employer cannot adversely change an employee's conditions of service if there is any pending dispute relating to those service conditions (Section 33, ID Act).

Employees may refuse to accept a unilateral change to their employment terms and continue to work under protest.

The doctrine of acquiescence is an equitable doctrine under which a party's conduct may amount to assent when a party:

- Has a right.
- Witnesses their right impacted in an adverse manner.
- Does not actively or passively protest during and after such violation.

(*Chairman, State Bank of India v. MJ James*, 2 SCC 301 (2022).)

Acquiescence may either be direct (with full knowledge) or indirect (when the right holder does not enforce their right) (*Prabhakar v. Joint Director, Sericulture Department*, 15 SCC (2015); *Chairman, State Bank of India v. MJ James*, 2 SCC 301 (2022)). Indian courts consider on a case-by-case basis whether an employee's non-refusal to a change in their employment terms is treated as the employee having accepted the change.

Labour courts, which generally favour employees, might require both:

- The employer to prove sufficiency of notice and that the employee has full knowledge of the change.
- The employee's active acquiescence to the change, including:
  - absence of resistance; or
  - continued employment.

However, the risk associated with an employer treating an employee's deemed acquiescence as the employee having accepted the change is high and may lead to litigation in the future.

Contractual Clauses Enabling Unilateral Changes

Employers must take special care to ensure employment contracts are both:

- Water-tight.
- Providing necessary flexibility to the employers.

An employment contract may include a clause allowing the employer to make unilateral changes. However, such clause may not be valid, especially if the employer changes a material term of employment.

In general, employers cannot unilaterally make materially detrimental changes to employment terms, including changes relating to:

- Compensation.
- Title.
- Termination.
- Restrictive covenants.

(Fourth Schedule, ID Act.)

For detrimental changes to protected terms of employment under the Fourth Schedule of the ID Act, employers need to comply with the notice requirement under Section 9A of ID Act (see Section 9A Notice Requirement).

Changes to non-material and non-critical terms of employment that do not generally impact the overall employment relationship may be permitted according to the terms of the employment contract.

In practice, an employment contract should contain a clause allowing the employer a unilateral right to change the employment terms from time to time.

Changes to Employee's Duties

Employers may unilaterally change an employee's duties to the extent the change is:

- Reasonably required from a business perspective (the change is justifiable).
- Not part of disciplinary action.

If the change is part of a disciplinary action, a separate process needs to be followed.

Changes to Employee Benefits

Employee consent is required before an employer can make detrimental changes to benefits provided under an employment contract.

An employer can unilaterally change non-contractual benefits. However, certain benefits provided by the employer for a long period of time may become a custom, practice, or norm in the organization, making it harder for the employer to change unilaterally.

Under the Fourth Schedule of the ID Act, the employer must follow the prescribed process under Section 9A of the ID Act to make changes to the conditions of service (which include certain benefits) (see Section 9A Notice Requirement).

Non-Contractual Policies

To retain greater flexibility to make future changes, employers may include certain employment provisions in company policies, including provisions on leave, benefits, and bonus.

The employer may make unilateral changes to non-contractual policies without the employee's consent. However, if the policies contain protected service conditions under the Fourth Schedule of the ID Act, the employer needs to follow the prescribed process under Section 9A of the ID Act to make the changes (see Section 9A Notice Requirement).

Additionally, if the service conditions are contained in the employer's standing orders, the trade union or workers' representative body needs to agree to the change before the employer can amend its standing orders (see Permitted Changes).

Employee Remedies When a Unilateral Change Has Been Imposed

If an employer makes unilateral changes to the employment contract terms, the employee may sue the employer by way of a civil remedy for contractual breach. The employee may seek damages or restitution of status quo. (Section 73, ICA.)

If the employer fails to comply with the requirements of Section 9A of the ID Act, the proposed changes are invalid and not enforceable (see Section 9A Notice Requirement).

An employee may also raise an industrial dispute according to the procedure provided under the ID Act, claiming restitution of the changed service condition. The dispute is first taken up for conciliation before a conciliation officer. In the case of failure of conciliation, the failure report is forwarded to the appropriate government authority (for private employers, this is typically the state government). The government authority considers the report and may refer the dispute for adjudication to either the labour court or industrial tribunal, as applicable. The court may either accept the employee's demand or the dispute can end in a settlement on terms mutually agreed between the employer and employee. (Sections 2A and 10, ID Act.)

Consultation

For any proposed changes to the employer's standing orders, the employer must submit draft standing orders to the Certifying Officer (Section 10, Standing Orders Act).

There is no statutory requirement for the employer to consult with their employees or the trade union before submitting the draft standing orders to the Certifying Officer. However, it is best practice to ensure there are no issues with the certification.

Upon receipt of the draft standing orders, the Certifying Officer sends copies to either the concerned trade union or workers' representative body (if there is no trade union). The employer may need to consult with the relevant trade unions (or workers' representative body where applicable) regarding the changes because consent of the trade unions (or workers' representative body where applicable) is required before the Certifying Officer can certify the changes to the standing orders. (Section 10, Standing Orders Act; see Permitted Changes.)

Section 3 of the ID Act contains provisions regarding works committees. A works committee need not be involved with or informed of any changes to employment terms. (Section 3, ID Act.)

If an employer fails to inform or consult with an employee about proposed changes to their employment terms that are protected under the Fourth Schedule of the ID Act, the employee may file an industrial dispute and follow the prescribed process (Section 9A, ID Act; see Employee Remedies When a Unilateral Change Has Been Imposed).

For employers in unionized industries, it is best practice to follow these steps when changing employment terms:

- Hold consultations with the trade union leaders or workers' representatives.
- Negotiate the proposed changes with the trade union leaders.
- Obtain trade union leaders' consent.
- Execute the changes to the employment terms following the necessary procedures.

Disciplinary

Employers may demote an employee as part of a disciplinary sanction if the process follows the principles of natural justice and proves the employee's alleged misconduct. As part of such demotion, the employer may change employment terms like title and remuneration.

Dismissal

The employer may dismiss and subsequently re-hire an employee on new employment terms. There is no specific process that needs to be followed. However, any dismissal needs to comply with applicable law. The process of re-hire is regulated by the same statutes that regulate the process of hire.

India does not recognize "at-will" employment. Employment termination in India can only be for reasonable cause or misconduct, so an employer cannot legally dismiss an employee for refusal to accept a change to employment terms.

If an employer unlawfully terminates the employment, an employee may raise an industrial dispute or claim unlawful termination (Sections 2A and 10, ID Act; see Employee Remedies When a Unilateral Change Has Been Imposed).

Redundancy

Employers cannot make an employee redundant based on the employee's refusal to accept a change to their terms of employment. Refusal to accept a change to the terms of employment is not a reasonable ground for dismissal for redundancy.

If the employer makes the employee redundant for refusing to accept a change to the terms of employment, the employee may raise an industrial dispute or claim unlawful termination (Sections 2A and 10, ID Act; see Employee Remedies When a Unilateral Change Has Been Imposed).

Transfer of a Business

If a business is transferred, the new employer can make changes to the employee's terms of employment if the following three conditions are met:

- There is no break in service.
- The new terms of employment are not less favorable to the employees in any way.
- The new employer must recognize the previous length of service for retrenchment (termination of employment) compensation.

(Section 25FF, ID Act.)

The new employer cannot make changes that are detrimental to the employee's terms of employment without the employee's consent, because this is a condition of transfer (Section 25FF, ID Act). Any breach of the conditions above would be retrenchment by the employer and trigger notice and severance payment (Section 25F, ID Act).

If the new employer adversely changes the employee's terms of employment, the employee may raise an industrial dispute for conciliation and follow certain adjudication steps (Sections 2A and 10, ID Act; see Employee Remedies When a Unilateral Change Has Been Imposed). This would be treated as retrenchment and trigger notice pay and retrenchment compensation (severance) (Section 25F, ID Act).

Changes Across Jurisdictions

Employers in India must comply with the national and state level labour laws irrespective of any group-wide mandate applicable to all their global entities.

It is common for employers to propose and implement changes to service conditions across their global entities when they introduce new global policies, which they align with Indian laws.