

HR Law Hotline

June 30, 2017

INDIA'S NEW LAW ON DISABILITY EXTENDS TO PRIVATE EMPLOYERS

- The *Rights of Persons with Disabilities Act, 2016* replaces the *erstwhile Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*.
- The law on protection and prohibition of discrimination of the disabled has come into effect on *April 19, 2017*. The rules thereunder have been made effective from *June 15, 2017*.
- All establishments (including in the private sector) to notify an Equal Opportunity Policy. Employers to register the Equal Opportunity Policy with the State Commissioner or Central Commissioner (as applicable).
- Establishments (including in the private sector) to *inter alia* provide for facilities, benefits and accessible environment for the disabled.

The Rights of Persons with Disabilities Act, 2016 (the "**Disabilities Act, 2016**") along with the Rights of Persons with Disabilities Rules, 2017 (together, the "**Disability Law**") has been enacted by the Indian government¹.

The new Disability Law gives effect to the principles of the *United Nations Convention on the Rights of Persons with Disabilities*². The Disability Law *inter alia* seeks to protect disabled persons from various forms of discrimination, increases measures for effective participation and inclusion in the society, and ensures equality of opportunity and adequate accessibility.

Prior to enactment of the Disabilities Act, 2016, the law governing rights of the disabled were scattered across the Constitution of India³, the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 ("**Disabilities Act, 1995**"), the Mental Health Act, 1987, the Rehabilitation Council Act of India and the National Trust (for welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act, 1999. Although these legislations aimed at safeguarding the rights of persons with disabilities, these legislations did not specifically provide for *equality of opportunity* especially in matters relating to employment.

The Disabilities Act, 2016 has repealed the Disabilities Act, 1995.

KEY FEATURES OF THE DISABILITY LAW

Some of the key features of the Disability Law *inter alia* include:

- 'Disabled persons' have been categorized as: (i) persons with disability⁴; (ii) persons with benchmark disability⁵ and (iii) persons with disability having high support needs⁶.
- The definition of '*person with disability*' under the Disabilities Act, 2016 is an inclusive definition as opposed to the exhaustive definition provided under the Disabilities Act, 1995 and includes 21 types of disabilities as 'specified disabilities'. The Disabilities Act, 1995 covered only 7 types of disabilities.
- While majority of the obligations under the Disability Law are cast upon the appropriate government and/or local authorities; certain obligations/duties are also cast upon establishments (including in the private sector).
- All establishments (including in the private sector) are required to frame and publish an Equal Opportunity Policy.
- It prohibits discrimination of persons with disabilities, unless it can be shown that the act of discrimination was a proportionate means of achieving a legitimate aim.
- Onus has been placed on the government to facilitate the rights of disabled persons. The government is required to *inter alia*, ensure/protect a disabled person's *right to equality, dignity and respect for his/her integrity equally with others; right to personal liberty, right not to be discriminated against; right to live in a community; right to equal protection and safety in situations of risk, armed conflicts, humanitarian emergencies, natural disasters etc.; accessibility to polling stations and material relating to electoral processes; right to access any court, tribunal, authority, commission or body having judicial or quasi-judicial or investigative powers without discrimination; right to own or inherit property (movable or immovable); right to manage one's own financial affairs and access to bank loans, mortgages and other forms of financial credit; right to barrier-free access to healthcare institutions and centres; right to have cultural life and to participate in recreational activities and sporting activities etc.*
- Additional benefits such as right to free education (between the age group of 6 and 18 years), reservation in education, government jobs, allocation of land, poverty alleviation schemes etc. have been provided for persons with benchmark disabilities.
- Reservation in vacancies in government establishments⁷ has been increased from 3% to 4% for certain persons or classes of persons having benchmark disability.

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- i. For ensuring speedy trial, special courts are to be constituted in each district to handle cases concerning violation of rights of persons with disabilities.
- j. Enhanced penalties with a monetary penalty extending up to Rs. 500,000 (~USD 7750) and imprisonment extending up to 5 years.

NEW SET OF COMPLIANCES FOR PRIVATE EMPLOYERS

With the enactment of the Disability Law, private employers shall be required to:

- a. **Frame an Equal Opportunity Policy:** Every establishment shall notify an Equal Opportunity Policy. Such policy shall be displayed on the employer's website, failing which, the same shall be displayed at conspicuous places of the establishment premises⁸. A copy of the said policy shall also be registered with the Chief Commissioner or the State Commissioner, as applicable⁹. The Equal Opportunity Policy shall contain details of the facilities and amenities that the employer will be providing to the disabled employees in order to enable them to effectively discharge their duties in the establishment¹⁰.
- b. **Appoint a Liaison Officer:** Private establishments having more than 20 employees are required to appoint a liaison officer who shall oversee the recruitment of disabled persons and make the necessary provisions and facilities for such employees in the establishment¹¹.
- c. **Identify Posts/Vacancies for Disabled Persons:** Although the Disability Law does not mandate reservation of the disabled in the private sector, private employers are required to identify posts/vacancies in the establishment that would be suitable for disabled persons and include details of the same in the Equal Opportunity Policy of the establishment¹². Further, private establishments receiving incentives from the appropriate government may need to ensure that at least 5% of their work force is comprised of persons having benchmark disabilities¹³.
- d. **Prohibit Discrimination:** The head of the establishment shall ensure that no disabled person is discriminated because of his/her disability¹⁴, except in cases where such act/omission is a proportionate means of achieving a legitimate aim¹⁵.
- e. **Provide Additional Facilities/Benefits:** Private establishments shall take efforts to provide additional facilities to the disabled such as training facilities, assistive devices, barrier free¹⁶ accessibility and formulate additional benefits for the disabled such as preference in transfer, special leave etc¹⁷.
- f. **Revamp Existing Hiring Practices and Policies:** Given the above requirements, employers will now need to revamp their existing hiring practices and modify their HR policies.
- g. **Conform with Accessibility Norms:** All establishments will need to ensure that the building plan/ building structure of the establishment and the physical environment, transport and information and communication technology¹⁸ adheres to the accessibility norms formulated by the government¹⁹. No establishment shall be issued a certificate of completion or allowed to take occupation of a building unless it has adhered to the accessibility norms formulated by the Central Government²⁰.
- h. **Maintenance of Records²¹:** Every private establishment having 20 or more employees shall maintain records containing details of the disabled persons who are employed at the establishment.²²

THE HITS

1. With the increase of industries in India, the role of the corporate sector in generating job opportunities had increased tremendously. For many years now, there has been a pressing need to create awareness amidst the corporate sector to take active responsibility in recognizing the abilities of disabled persons and give them equal opportunities in the job market. By enacting the Disability Law, the Indian Government has succeeded in promoting equal employment opportunity for the disabled in the private sector as well, by casting mandatory obligations on private employers.
2. According to the United Nations, around one billion people live with disabilities globally. Among them, 40 to 80 million live in India²³. Prejudice, coupled with lack of facilities and opportunities, has often curbed them from leading a normal life. Given the mandatory requirement to build equal opportunities for the disabled, the above statistics are likely to reduce in the years to come.
3. The Disability Law aims at addressing the problems faced by the disabled from all dimensions. It includes not just the economic and social rights of the disabled, but also includes justiciable rights of the disabled.
4. Social attitudes and stigma have been a major reason for limiting the opportunities of the disabled whether it be in their social and economic life or even within their own families. Despite the magnitude of the issue, awareness on disability issues have been lacking. To that extent, the government's initiative to conduct, encourage, support and promote awareness campaigns and sensitisation programmes is a remarkable step.
5. The Disability Law is a sign that the government is making a move towards a more inclusive and progressive society, where persons would not be limited by their disabilities. This would ensure that employment standards in India are brought in line with international standards.

AND THE MISSES

1. While the initiative taken by the government in recognizing the needs of the disabled is commendable, there is inadequate clarity on various aspects under the Disability Law, which the government may need to clarify in due course. For instance, the Disability Law requires employers (including in the private sector) to include in their Equal Opportunity Policy, details such as special leaves, accommodation facility etc. that shall be provided to the disabled persons working at the establishment. However, Disability Law does not clarify (a) the quantum of special leaves that need to be provided nor does it mention the purpose(s) for which such leaves may be availed; (b) the standards for accommodation facility etc.
2. The Disability Law does not provide a transition framework or a timeline for ensuring compliance under the Disabilities Act, 2016.
3. The obligations cast upon private establishments under the Disability Law such as providing training to the

- disabled, assistive devices, ensuring accessibility norms etc. would entail additional costs for employers. While government establishments should be able to accommodate these additional costs, the Disability Law does not provide for any incentives to private establishments to enabling them to set-off the costs incurred.
4. Although there is no reservation quota in the private sector, the Disability Law states that '*The appropriate Government and the local authorities shall, within the limit of their economic capacity and development, provide incentives to employers in the private sector to ensure that at least five per cent of their work force is composed of persons with benchmark disability*'. The way the law has been crafted, it is unclear whether it would be mandatory for private sector employers receiving incentives from the government to ensure that 5% of their workforce is comprised of persons having benchmark disabilities.
 5. Although the Disability Law prohibits employers from discriminating against the disabled, the law does not provide for an effective and robust grievance redressal mechanism.
 6. The Disability Law places majority of the onus on the Government to either formulate rules or schemes for the disabled to ensure protection of the disabled. Therefore, in effect, the success of the statute will largely depend on the proactive measures taken by the Government.

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You can direct your queries or comments to the authors

¹ Effective as on April 19, 2017, http://disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20Act_enactment.pdf

² Ratified by India in October 2007

³ Enforceable only against the State/ Centre.

⁴ RPWD Act, section 2(s) "person with disability" means a person with long term physical, mental, intellectual, or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.

⁵ RPWD Act, section 2(r) (r) "person with benchmark disability" means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.

⁶ RPWD Act, section 2(t) (t) "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support;

⁷ The RPWD Act, (k) "Government establishment" means a corporation established by or under a Central Act or State Act or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 2 of the Companies Act, 2013 and includes a Department of the Government;

⁸ Rule 8(2) of the Rights of Persons with Disabilities Rules, 2017

⁹ Section 21 (2) of the RPWD Act

¹⁰ Rule 8(4) of the Rights of Persons with Disabilities Rules, 2017

¹¹ Rule 8(3) (e) of the Rights of Persons with Disabilities Rules, 2017

¹² Rule 8(3) (b) of the Rights of Persons with Disabilities Rules, 2017

¹³ Section 35 of the RPWD Act

¹⁴ Rule 3 (1) of the Rights of Persons with Disabilities Rules, 2017

¹⁵ Section 3 (3) of the RPWD Act

¹⁶ Section 2 (c) of the RPWD Act defines "barrier" as *any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hamper the full and effective participation of persons with disabilities in the society*.

¹⁷ Rule 8 (3) sub-clauses (c) and (d) of the Rights of Persons with Disabilities Rules, 2017

¹⁸ Rule 15 (1) of the Rights of Persons with Disabilities Rules, 2017

¹⁹ Section 44 (1) of the RPWD Act

²⁰ Section 44 (2) of the RPWD Act

²¹ Section 22 of the RPWD Act

²² Rule 9 of the Rights of Persons with Disabilities Rules, 2017

²³ <https://yourstory.com/2016/12/disabilities-bill/>

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