Executive Compensation & Employee Benefits

Contributing editor
Marc Trevino

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GETTING THE DEAL THROUGH

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Sources of rules and practice

1 Provide an overview of the primary sources of law, regulation and practice that govern or affect executive compensation arrangements or employee benefits.

Employee benefits and compensation in India are regulated by various statutes and regulations, the main ones being as follows:

- the Constitution of India;
- the Companies Act 2013 (for managerial remuneration);
- the Indian Contract Act 1872;
- the Securities Contract (Regulation) Act 1956;
- the Banking Regulation Act 1949;
- the Foreign Exchange Management Act 1999;
- the Reserve Bank of India (RBI) Guidelines on Compensation of Whole Time Directors/Chief Executive Officers/Risk Takers and Control Function Staff, etc, 2010;
- the Listing Agreement of the Securities and Exchange Board of India (SEBI) (the Listing Agreement);
- SEBI (Share Based Employee Benefits) Regulations 2014 (the SEBI Regulations);
- the Payment of Gratuity Act 1972;
- Shops and Establishments Acts of various states;
- the Equal Remuneration Act 1976;
- the Employees' Compensation Act 1923; and
- the Ministry of Corporate Affairs' Voluntary Guidelines for Corporate Governance 2009.

Various other labour statutes, including the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Employees' Provident Fund & Miscellaneous Provisions Act 1952, the Payment of Bonus Act 1965 and the Employees' State Insurance Act 1948, are also applicable in determining employee benefits, but these are applicable to the category of employees known as 'workmen' (as defined in the Industrial Disputes Act 1947) rather than to executives and employees at managerial level, who fall under the category of 'non-workmen'.

2 What are the primary government agencies or other entities responsible for enforcing these rules?

The government agencies or entities responsible for enforcing the aforesaid legislations and rules have been designated under the specific legislation and include the RBI and SEBI, as well as various labour departments.

Governance

3 Are any types of compensation or benefits generally subject to specific corporate governance requirements or approval by shareholders or government?

Certain types of compensation and benefits provided to executives of a company are regulated as follows. According to the provisions of the Companies Act, if the proposed managerial remuneration payable by a public company to its directors (including managing directors, full-time directors and managers, as defined in the Companies Act) in respect of any financial year exceeds 11 per cent of the net profits of that company for that financial year, the company would need the approval of its shareholders and the central government.

Further, in the following scenarios, approval is required from the shareholders of the company in a general meeting if:

- the remuneration payable to any one managing director, full-time director or manager exceeds 5 per cent of the net profits of the company and, if there is more than one such director, the remuneration exceeds 10 per cent of the net profits to all such directors and managers taken together; and
- the total remuneration payable to directors who are neither managing nor full-time directors exceeds 1 per cent of the net profits of the company (if there are managing or full-time directors or managers at the company), and in any other case 3 per cent of the net profits.

The aforesaid situation will vary in the case of a company having no profits or inadequate profits in a financial year, for which the Companies Act lays down further limits on remuneration.

Further, as per clause 49 of the Listing Agreement (applicable to listed companies), all remuneration including maximum number of stock options granted to non-executive directors or independent directors of listed companies is required to be fixed by the board of directors and approved by shareholders in general meeting.

These conditions are not applicable to private companies or unlisted companies.

4 Under what circumstances does the establishment or change of an executive compensation or benefit arrangement generally require consultation with a union, works council or similar body?

Executives of a company fall under the category of non-workmen, and an establishment is not required to consult with a union or a similar body for changes in executive compensation or benefit arrangements.

Changes in compensation and provision of benefits to non-workmen are typically governed by the Shops and Establishments Act of the state in which the company is situated, and the employment contracts as entered into with the company or as per the company policy, if available.

5 Are any types of compensation or benefit arrangements prohibited either generally or with senior management?

Under Indian law, no company can offer loans or give any guarantee or provide any security in connection with any loan to its directors or to any other person in whom the director has an interest, except in the following cases:

- where such director is a managing director or a full-time director and such proposed loan is either a part of the conditions of service extended by the company to all its employees, or pursuant to any scheme approved by its shareholders by passing a special resolution; or
- such company is in the business of extending loans or giving guarantees or securities for the due payment of any loan.

Further, under the Companies Act, the above restrictions shall not apply to a private company satisfying all of the following conditions:

- if no other body corporate has invested any money in the share capital of the company;

- if the borrowings of the company from banks, financial institutions or any body corporate are lower than twice the amount of paid-up share capital or 500 million Indian rupees; and
- if there are no subsisting defaults in repayment of such borrowings at the time of making such transactions.

Further, as per the Banking Regulation Act 1949, banks are prohibited from entering into any commitment to grant any loans or advances to or on behalf of any of its directors, or any company or firm in which any of its directors has an interest as a partner, manager, employee or guarantor. As per recent RBI guidelines, however, banks have been permitted to give loans to the chairperson or managing director or CEO (who are not employees of the bank) and whole time directors of the lending bank for purchasing a car, personal computer, furniture, constructing or acquiring a house for personal use, festival advance, and credit limit under a credit card facility without seeking prior approval of RBI, provided that such loans form part of the compensation or remuneration policy approved by the board. Restrictions have also been imposed on making loans and advances to relatives of the chairman, managing director or directors of the bank.

Further, where a company has no profits or inadequate profits in any financial year during the tenure of a managerial person, it may pay remuneration to a managerial person not exceeding the limits as provided under Schedule V of the Companies Act without any approval from the central government.

6 What rules apply to compensation of non-executive directors?

Compensation for non-executive directors of listed companies has been prescribed by SEBI under the Listing Agreement governing listed companies. As per the Listing Agreement, all fees or compensation paid to non-executive directors (including independent directors) must be fixed by the board of directors and receive prior approval from the shareholders of the company. However, the requirement of obtaining such prior approval of shareholders does not apply to payment of sitting fees to non-executive directors, if the same is made within the prescribed limits under the Companies Act (ie, 100,000 Indian rupees). Further, the limit for the maximum number of stock options to be granted to the non-executive directors in a financial year must also be approved by the shareholders. Independent directors are not entitled to any stock option.

The compensation packages for non-executive directors in the case of private sector banks are governed by the RBI Guidelines. As per these guidelines, the compensation policy for non-executive directors should be formulated by the board of directors in consultation with the remuneration committee of the bank, and such compensation must not exceed 1 million Indian rupees per annum for each director.

In addition to the aforesaid compensation, banks may pay sitting fees to non-executive directors and reimburse their expenses subject to compliance with the provisions of the Companies Act for participation in board meetings and any other statutory meeting.

Non-executive directors of companies other than listed companies and private banks are entitled to a sitting fee for attending meetings of the board or committees. The said fee has to be decided by the board and should not exceed 100,000 Indian rupees per meeting per director. The aforesaid provision is applicable to non-executive directors of private limited companies and unlisted public companies.

Disclosure

7 Must any aspects of an executive's compensation be publicly disclosed or disclosed to the government?

Yes, executive compensation in listed companies must be disclosed in the annual report of a company as per the provisions of clause 49 of the Listing Agreement. Clause 49 mandates that all elements of a director's compensation package be disclosed in the annual report and should include salary, benefits, bonuses, stock options, pension, fixed-component and performance-linked incentives and service contracts.

The disclosure is also required to contain the criteria for making payments to non-executive directors and the number of shares and convertible instruments held by non-executive directors in its annual report. Alternatively, this may be published on the company's website and reference made thereto in the annual report.

Companies having paid up equity share capital not exceeding 100 million rupees and with a net worth not exceeding 250 million rupees, and whose equity share capital is listed exclusively on the small and medium enterprises (SME) platform and the SME-institutional trading platform, are not, however, required to make the aforesaid disclosures. The foregoing is not applicable to private companies.

Further, as per the Companies Act, companies (including private limited companies) are required to make a disclosure in their director's report pertaining to the compensation of all executives whose remuneration exceeds the following thresholds:

- if employed throughout the financial year, was in receipt of remuneration for that year that, in the aggregate, was not less than 1.2 million rupees;
- if employed for a part of the financial year, was in receipt of remuneration for any part of that year at a rate that, in the aggregate, was not less than 850,000 rupees per month; and
- if employed throughout the financial year or part thereof, was in receipt of remuneration in that year that, in the aggregate, or as the case may be, at a rate that, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by him or herself or along with his or her spouse and dependent children, not less than 2 per cent of the equity shares of the company.

Employment agreements

8 Are employment agreements required or prevalent? If so, what provisions are common?

Yes, certain state-specific statutes such as the Delhi Shops and Establishments Act 1957, the Karnataka Shops and Establishments Act 1961 and the Andhra Pradesh Shops and Establishments Act 1988 require an employer to issue an employment letter covering limited aspects. Moreover, it has been held by various courts that failure to issue appointment letters to an employee would amount to an 'unfair labour practice'. Even as a matter of practice, written employment contracts are generally executed between the employer and the employee, which set out the terms and conditions of employment. The employment contracts generally used in India contain the following information:

- name and address of the employer and employee;
- title of job or nature of work;
- place of work;
- hours of work;
- probationary, confirmation and notice period;
- transfer;
- date of commencement of employment;
- remuneration and other benefits;
- leave entitlement;
- details of termination and consequences of termination;
- any non-compete, confidentiality and non-solicitation provisions; and
- dispute resolution, etc.

Incentive compensation

9 What are the prevalent types and structures of incentive compensation? Do they vary by level or type of organisation?

Although the compensation structures and practices followed by different companies and industries vary, executive pay packages tend to contain four basic components: base salary, annual bonus, stock options and long term incentive plans.

In addition to these basic components, some companies provide other benefits, such as health insurance, life insurance, travel and housing allowances, and executive retirement plans.

While certain parts of an employee's compensation may depend upon his or her position within the organisation, companies in India are placing more stress on the performance factor in determining their executives' compensation. Practically speaking, the majority of companies consider the education and experience of an individual as one of the criteria for determining compensation, along with other factors such as ability and responsibilities. Companies also consider market and economic conditions important in determining executive compensation and therefore compensation can vary according to the sector in which the company operates.

10 Are there limits generally on the amount or structure of incentive compensation? Are there limits that adversely affect the tax treatment of the employer or the executive?

Yes, there are limits on overall managerial remuneration in the case of absence or lack of profit in the company and on the total compensation and remuneration payable by a public company to its directors, including managing director, full-time directors and managers. These limits do not, however, apply to private companies.

Any upward change in the overall limits must be approved by either the central government or by the shareholders' meeting of the company.

These compensation packages and remuneration can be bifurcated into different tax-friendly components of which the tax exemptions and deductions can be availed of, as per Indian income tax law.

11 Is deferral and vesting of incentive awards permissible? Are there limits on the length or type of vesting and deferral provisions?

Deferral of incentives is an arrangement in which a portion of the executive's compensation is paid at a date after which the income was actually earned by the executive. The same is practised in India and some examples of deferred compensation common in India are pensions, retirement plans and employee stock options. The main reason behind deferral of incentives is the taxation benefit derived by executives as tax on such benefits is required to be paid at a later date. While designing compensation plans, companies seek to ensure that there is a balance between fixed pay and variable or deferred pay.

With regard to the vesting of awards, Indian companies follow two types of schemes for stock options: employee stock options schemes (ESOS) and employee stock purchase schemes (ESPS). While the minimum vesting period prescribed by the SEBI Regulations is one year, most companies provide a time frame of two to five years for employees to exercise their vested options.

The provisions with regard to pension and retirement benefits are provided in questions 32 to 34.

12 Can it be held that recurrent discretionary incentive compensation has become a mandatory contractual entitlement?

With regard to executives and non-workmen, there are no legal provisions mandating that recurrent discretionary incentives provided to employees will become a contractual entitlement over time. Companies do tend, however, to provide the same as a part of their company policy and the compensation or incentive package of the executives. Once certain benefits have been provided to employees repeatedly, they are generally not withdrawn by the company unless there are compelling reasons for this, such as economic conditions.

Labour laws are generally read in a pro-employee manner and in furtherance of such intention, companies also tend to take a conservative view in favour of the employees, including non-workmen.

13 Does the type or amount of incentive compensation awarded to an executive potentially affect the compensation that must be awarded to other executives or employees?

Generally, the type or amount of incentive compensation awarded to one executive does not affect the compensation being provided to other executives or employees.

The compensation awarded to executives may vary depending on various factors such as the qualification, type of work, experience and responsibilities and availability, and is governed by the company policy or its service rules in that regard.

14 Is it permissible to require repayment of incentive compensation under certain circumstances? Are there circumstances under which such repayment is mandatory?

The primary objective of providing incentive compensation to executives and employees is to reward them when the organisation grows in profitability and value over time. Profitability of the company and potential and performance of an employee, etc, are factors that influence incentive compensation. However, there are no provisions under present Indian laws wherein the incentive compensation, which has already been paid, would have to be repaid to the company by an employee, except in cases where such incentive compensation was received fraudulently.

Equity-based compensation

15 What are the prevalent forms of equity compensation awards in your jurisdiction? What is a typical vesting period?

There is a variety of equity incentive plans – or, as is more commonly referred to in India, employee stock option plans (ESOPs) – available to employees in India and some of the most prevalent ones are:

- ESOS: this scheme grants a right to employees to buy shares of the employer company at a predetermined price;
- ESPS: this scheme provides employees with the right to purchase company shares, usually at a discount from the fair market share value;
- restricted stock unit: under this plan, employees are entitled to receive company stock on a specific date in the future, subject to fulfilment of certain conditions, such as tenure of employment;
- restricted stock award: under this plan, an employee receives an award of stock subject to certain underlying conditions (if the underlying conditions are not met, the shares are forfeited);
- stock appreciation right (SAR) or phantom equity plan: these plans do not actually allot the company's stock to the employees, but reward employees with compensation that is tied to the performance of the company's stock. The employees are allotted notional shares or units at a predetermined price and once the vesting conditions are fulfilled, the employee is paid the cash equivalent of the net gain;
- general employee benefits scheme (GEBS): this scheme entitles employees to welfare such as health benefits, hospital care or benefits at the time of accident, sickness, etc; and
- retirement benefit scheme (RBS): this scheme allows for providing benefits to employees post retirement, entitling them to cash, health insurance etc.

However, the SEBI Regulations are silent on the aspect of both GEBS and RBS as being cash-based or equity-based. Since the Regulations are silent on any restrictive implementation of GEBS and RBS, apart from a cap (ie, total value of the shares of the company or shares of its listed holding company should be under 10 per cent of the book value or market value or fair value of the total assets of the scheme, whichever is lower, as appearing in its latest balance sheet) on the total value of both schemes, companies have some freedom and flexibility in administering the schemes.

There are some less frequently used programmes like performance share plan, performance unit plan and deferred compensation system.

Vesting ESOPs usually come with a vesting period and employees can exercise these rights only after such period is over. In the event that the employee leaves the company before the vesting period is over, the employee may lose his or her rights over the company's shares. The SEBI Regulations prescribe a minimum vesting period of one year in the case of ESOSs and SARs and a minimum lock-in period of one year in the case of ESPSs, along with certain other conditions to be followed with regard to ESOPs.

Practically speaking, most companies in India use a vesting period of up to three years for the options or stock, and such awards are generally based on the tenure of the employee and not employee performance.

16 Are there forms of equity compensation that are tax-advantageous or disadvantageous to employees or employers?

The forms of equity compensation provided above are definitely tax advantageous for employees as well as for employers, as lower taxes are paid on such awards in comparison with cash awards given to employees, which attract higher rates of tax.

17 Does equity-based compensation require registration or notice? Are exemptions, or simplified or expedited procedures available?

Generally, no registration or notice for ESOPs is required, but the ESOP plan must be approved by the shareholders of the company by passing a special resolution with an explanatory statement. Also, an ESOP register is required to be maintained by the company providing such benefits. Further, in the case of a listed company, where a trust has been set up, the trust deed must be filed with the stock exchange in India at which the shares of the company are listed. It should also be borne in mind that prior approval from shareholders is required before the granting of such schemes or the modification of existing schemes. The board of directors, in the director's report, must provide the details of such ESOP plan.

18 Are there withholding tax requirements for equity-based awards?

In India, benefits derived from ESOPs are taxable as part of the income of the employee and are treated as perquisites. The perquisite's value is calculated as the difference between the fair market value of the share on the date of exercise of the option by the employee and the exercise price paid by the employee. Accordingly, an employer is required to calculate the benefit under the ESOP (including the same as part of the salary) and withhold or deduct tax in respect of any arising tax liability.

19 Are inter-company chargeback agreements between a non-local parent company and local affiliate common? What issues arise?

The RBI now permits employees of Indian subsidiaries of foreign companies to acquire shares of the foreign holding company. Thus, in order to provide employees with the option of holding shares of the non-local parent company and to make it tax efficient for the company, some Indian affiliates enter into chargeback agreements with their respective parent companies.

The issues that arise relate to transfer pricing under the Indian Income Tax Act 1961 (the IT Act) and service tax on the reimbursement under indirect tax laws in India.

20 Are employee stock purchase plans prevalent or available? If so, are there any frequently encountered issues with such arrangements?

ESPSs are quite popular in India. The SEBI Regulations define an ESPS as 'a scheme under which a company offers shares to employees, as part of public issue or otherwise, or through a trust where the trust may undertake secondary acquisition for the purposes of the scheme'. Further, the shares issued under an ESPS must be locked in for a minimum of one year from the date of allocation except in the following situations:

- where shares are allocated by a company under an ESPS in lieu of shares acquired by the same person under an ESPS in another company that has merged or amalgamated with the first company, the lock-in period already undergone in respect of shares of the transferor company should be adjusted against the lock-in period required under this sub-regulation; and
- the ESPS is part of a public issue and the shares are issued to employees at the same price as in the public issue.

Some of the issues that arise with regard to ESPSs relate to the requirement of obtaining approvals from shareholders in certain circumstances and the various disclosures and compliances required towards ESPS under the SEBI Regulations, the Companies Act, the Foreign Exchange Management Act, the IT Act, etc.

Employee benefits

21 Are there any mandatory benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Labour statutes determine the benefits that should be provided by the employer to its eligible employees.

Some of the most important employee benefits that are statutorily required to be provided to an employee include the following:

- entitlement of paid leave (annual, sick and casual), accumulation of annual leave and right of encashment of annual leave by an employee at the time of termination;
- enrolment of eligible employees under the Employees' Provident Funds and Miscellaneous Provisions Act (ie, employees earning wages of up to 15,000 rupees per month) and required contributions by the employer with the concerned provident fund department;
- maternity benefit to women workers (under the Maternity Benefit Act 1961, which also regulates the employment of women workers before and after childbirth);
- payment of a gratuity (after completion of five years of continuous service) to be paid by the employer to the employee at the time of termination of employment, etc (under the Payment of Gratuity Act);
- enrolment of eligible employees under the Employees' State Insurance Act (ie, employees earning wages of up to 21,000 rupees per month) and the deposit by employers of the required contributions into a bank duly authorised by the Employee's State Insurance Corporation; and
- entitlement of compulsory bonus to eligible employees (ie, employees earning wages of up to 21,000 rupees per month) as per a recent amendment under the Payment of Bonus Act.

Of these benefits, the last two are only extended or given to workmen. While there is no statutory bar on withdrawing the voluntary benefits given by an employer over and above statutory ones, companies typically issue a notice to the employee before doing so.

22 What types of employee benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Employee benefits prevalent for executives include performance bonuses, stock options and other discretionary benefits or perquisites, such as life insurance or retirement plans, free lunches, holidays, company cars, leisure facilities, club memberships and child education allowance.

Certain incentives or benefits (such as rent allowance, conveyance allowance, medical reimbursement and child education allowance) are exempt from tax liability either fully or to the extent allowed under the prevailing IT Act and the rules thereunder.

Termination of employment

23 Are there prohibitions on terminating executives? Are there required notice periods? May executives be dismissed without cause?

Certain state-specific Shops and Establishments Acts stipulate that employees can only be terminated by the employer for 'reasonable cause' by giving one month's notice or wages in lieu thereof. In many states, however, such provisions do not apply to employees engaged in a confidential capacity or employees occupying positions of management. In the said scenario, such executives may be terminated in accordance with the terms and conditions of their employment contracts.

In practice, employment contracts provide for termination by either party 'without cause' by giving a notice. Such clauses have, however, been challenged by employees before the courts in India.

In a case of termination for misconduct, the cause would have to be established by the employer by conducting an enquiry as per the procedure laid down under the relevant Shops and Establishments Act prior to terminating the contract of the employee.

24 Are there statutory or mandatory minimum severance requirements in your jurisdiction? Are there any other mandatory, post-employment benefits?

Non-workmen are entitled to notice periods, or notice pay in lieu thereof, as per the relevant Shops and Establishments Act and the terms of their contracts. There are no statutes in law governing severance pay to non-workmen, but a non-workman is entitled to any encashment of unused leave, gratuity or any other contractual benefits as may be agreed upon between the parties.

25 What executive severance payment level is typical?

There are no principles or statutes in law regarding severance pay to high-level executives. Such packages are usually governed by the contracts of employment or negotiations with the individuals concerned, or company policy, if any. Typically, executives receive their gross salary as severance payment, and executives generally also receive pro rata severance pay on their annual wage. Severance payments increase in the case of termination resulting from a change in ownership or a corporate takeover. Such uncertainties (ie, change in control) are usually adequately safeguarded by golden parachute clauses. Golden parachute clauses generally extend pay and benefits such as severance pay, stocks, bonuses, heath and insurance benefits from one to five years.

26 Are there limits on dismissal for 'cause'? Are there any statutory limits on 'constructive dismissal' or 'good reason'? How are 'cause' or 'constructive dismissal' defined?

As per various state-specific Shops and Establishments Acts, dismissal of an employee by an employer can only be for reasonable cause (such as redundancy, organisational restructuring or closure) by giving one month's notice or salary in lieu thereof.

Dismissal can also be on account of misconduct (such as poor performance, wilful insubordination or habitual neglect of work) and can occur with immediate effect after such misconduct has been established by an enquiry.

The definitions of 'constructive dismissal' or 'good reason' have not been provided under Indian statutes.

27 Are 'gardening leave' provisions typically used in employment terminations?

The Indian courts in several judicial precedents have refused to enforce post-termination restrictive covenants or clauses of employment. Non-compete clauses as well as clauses styled as 'gardening leave' are considered 'restraints of trade' and thus void under Indian contract law. In practice, however, it is common to include such covenants in India in employment contracts as they have a deterrent value and prevent employees from engaging in competing activities post-employment. Typically, the time varies from three to six months.

28 Is a general waiver or release of claims on termination of an executive's employment normally permitted? Are there any restrictions or requirements for the waiver or release to be enforceable?

Waiver or release of statutory claims or benefits is not permitted by entering into a contract. Accordingly, an employment agreement waiving the statutory benefits of an employee may be considered voidable and can be challenged on the ground that the consent of the employee for the said contract has been obtained by coercion owing to disparity in the bargaining position of the employer and the employee.

Waiver of contractual benefits may, however, be enacted subject to agreement between the parties.

Post-employment restrictive covenants

29 What post-employment restrictive covenants are prevalent? What are the typical restricted periods?

The post-employment restrictive covenants usually present in employment contracts in India are non-compete, non-solicitation of employees and customers, non-disclosure of confidential information and trade secrets, non-poaching and non-disparagement. Generally, restricted periods may vary from one year to five years.

30 Are there limits on, or requirements for, post-employment restrictive covenants to be enforceable? Will a court typically modify a covenant to make it enforceable?

Non-compete post-employment provisions must be considered in light of section 27 of the Indian Contract Act, which stipulates that an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is void. A restrictive non-compete covenant extending beyond the term of service is unenforceable, irrespective of the reasonableness of such restrictions, except in cases involving sale of goodwill. Accordingly, Indian courts have determined that post-termination non-compete restrictions are unenforceable.

Although covenants with respect to post-employment non-solicitation and non-disclosure of confidential information and trade secrets may be enforced depending upon the circumstances of each particular case, evidence adduced by the employer and the parameters under which the clause is drafted will be taken into consideration.

31 What remedies can the employer seek for breach of post-employment restrictive covenants?

The remedy available to an employer for breach of restrictive covenants such as non-solicitation is to claim damages for losses suffered by the employer on account of such breach.

Where confidential information or trade secrets are concerned, an employer may also approach a competent court to seek an injunction so that the employee does not disclose the employer's confidential information or use trade secrets, or to claim damages for losses suffered by the employer as a result of misuse of such information.

Pension and other retirement benefits

32 Are there any required pension or other retirement benefits? Are there limits on discontinuing voluntary benefits that have been provided?

Yes, employees are provided with the benefits of a pension, the Provident Fund Scheme and a gratuity under the provisions of the Employees Provident Funds and Miscellaneous Provisions Act 1952, the Employees Pension Scheme 1995, the National Pension Scheme, the Employees' Deposit-linked Insurance Scheme 1976 and the Payment of Gratuity Act, respectively.

Voluntary or non-statutory benefits, once provided, are generally not discontinued. Given the competitive market and anti-discrimination laws in place, most companies try to continue the benefits being offered to their employees to retain talent.

33 What types of pension or other retirement benefits are prevalent for executives? Are there tax or other financial incentives or disincentives for any employee benefit arrangements?

Most executives are provided with provident fund benefits voluntarily and a gratuity as per the terms of the corresponding legislation. Some companies offer superannuation plans to selected employees but these are not currently very popular since they have a long vesting period and funds can only be withdrawn after a certain time.

Pension plans are popular with government employees but very few private companies offer such plans in India.

Certain tax incentives are available to both employers and employees under employee benefit arrangements; for instance, a gratuity is tax-free up to 1 million rupees; contributions to the national pension scheme reduce tax liability up to 15,000 rupees; and the interest and final amount under the Provident Fund Scheme is tax-deductible.

34 May executives receive supplemental retirement benefits?

Yes, employers like to provide certain additional benefits to their most valued employees, mostly in the form of private provident funds (as opposed to such funds under the Employees Provident Fund Organisation), post-employment insurance policies and post-employment medical care.

Indemnification

35 May an executive be indemnified or insured for claims related to actions taken as an executive, officer or director?

As per the provisions of the old Companies Act 1956, a company was not permitted to indemnify its directors and officers and there was an express restriction to this effect therein. A company could indemnify its directors and officers only for liabilities incurred in a matter in which they are acquitted or discharged, or judgment is given in their favour.

There is, however, no such express restriction under the new Companies Act and it is now possible for directors and officers to obtain indemnities from their company. Thus, companies prefer to obtain directors' and officers' insurance policies in India. It is pertinent to note that such policies typically do not cover claims arising out of fraud, wilful misconduct and other forms of dishonest acts.

Change in control

36 Under what circumstances will an asset sale in your jurisdiction result in an automatic transfer of benefit obligations to the acquirer?

In the event of an asset sale in India in which a company or business division thereof is acquired, its employees are not automatically transferred to the acquirer by operation of law. The rights of the employees in question vary significantly depending upon whether they are workmen or non-workmen. The acquirer is under an obligation as per the Industrial Disputes Act to provide transferred workmen with continuity of service and terms of employment that are no less favourable than their earlier terms of employment.

Executive and managerial-level personnel fall within the category of non-workmen and their rights in the case of an acquisition are governed purely by the terms and conditions of their employment contracts. The acquirer can execute fresh employment contracts with retained executives, which need not contain the same benefit obligations. Typically, however, the acquirer will offer the same terms and conditions of employment to retain certain executives.

37 Is it customary to provide for executive retention or related arrangements in connection with a change in control?

There is no law requiring that executive retention or related arrangements be made in connection with a change in control. Practically speaking, however, in order to prevent disputes and claims from employees during or after an acquisition or a change in control, companies in India have started incorporating provisions relating to executive retention, either directly in employment contracts or by executing separate executive retention agreements with high-level executives and key employees.

38 Are there limits or prohibitions on the acceleration of vesting or exercisability of compensation in a change in control? Are there restrictions on 'cashing-out' equity awards?

Companies sometimes offer accelerated vesting in a change-of-control situation to certain key employees, and the prohibitions or terms and conditions of the same are governed by agreements between the company and its employees and the terms and conditions of the acquisition, merger or amalgamation. Acceleration is usually a negotiable term depending upon the role and position of the employee in the organisation.

'Cashed-out' equity awards are subject to capital gains tax, except in the case of listed companies.

Multi-jurisdictional matters

39 Do foreign exchange controls rules apply to the remittance of funds, or the transfer of employer equity or equity-based awards to executives?

Foreign exchange controls in India as prescribed under the Foreign Exchange Management Act, the amendments made thereto and the rules made thereunder are applicable on all foreign exchange transactions. Thus, the foreign exchange control rules would be applicable to and govern the remittance of funds, transfer of employer equity and equity-based awards to executives.

40 Must employment agreements, employee compensation or benefit plans, or award agreements be translated into the local language?

There is no law in India that requires the translation of employment-related documents, including employment agreements, into the local language and accordingly, there is no penalty for not translating such documents into the local language or the employee's native language.

41 Are there prohibitions on tax gross-up, tax indemnity or tax equalisation payments?

There are generally no prohibitions on tax gross-up and tax equalisation payments in India. As per the relevant taxation laws in India, all taxes grossed up are included in the income of the employees to ascertain their tax liability. Tax equalisation policies are common in Indian companies and India has also entered into treaties with various countries to grant double taxation relief to foreign employees working in India and Indian employees working abroad. Tax indemnity may be governed by the terms of the employment contract.

42 Are choice-of-law provisions in executive employment contracts generally respected?

The choice of law in an employment contract between an Indian employer and an Indian employee should be Indian law. The Supreme Court of India has held that if both the parties to a contract are Indian, they cannot derogate from Indian law. Therefore, the choice of two Indian parties to choose a foreign law is not recognised. However, in a contract between an expatriate employee and an Indian employer, the parties may choose foreign law as the governing law, and the same would generally be respected by Indian courts.

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