

Rights of Persons with Disabilities in India and Other Jurisdictions

Ius Laboris is the world's largest global HR and employment law firm alliance. In this article, member firms outline the laws in their respective countries concerning disabled rights.

OVERVIEW

According to the World Health Organisation, more than one billion people in the world currently experience disability, of which approximately 200 million experience considerable disability in functioning. Such people typically suffer from poor health, lower educational achievements, limited economic opportunities and higher rates of poverty. Hence, initiatives undertaken to improve the lives of people with disabilities, through progressive legislations and/or policies by different local governments and NGOs, are relevant to all corners of the world.

The UN Convention on the Rights of Persons with Disabilities (the “**Convention**”) was adopted during the sixty-first session of the General Assembly on December 13, 2006, and came into force on May 3, 2008. The objective of the Convention was to promote, protect and ensure the enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity. As per the Convention, persons with disabilities are essentially those who have long-term physical, mental, intellectual or sensory impairments, which hinder their full and effective participation in society on an equal basis with others.

Countries such as India and Mexico were amongst the first to have ratified the Convention

in the year 2007 itself, while most others including United Kingdom of Great Britain (“**UK**”), France and Ukraine ratified the Convention during subsequent years. Below is an outline of the laws / legal position prevailing in each of these countries concerning the rights of disabled persons.

INDIA

In implementation of its obligations under the Convention, India enacted the Rights of Persons with Disabilities Act, 2016 (the “**New Act**”) and the rules there under (the “**Rules**”) in 2017. The New Act replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (the ‘previous Act’), which covered only seven disabilities. The New Act covers more than 15 disabilities including dwarfism, acid attack victims, intellectual disability and specific learning disability. It defines a ‘person with disability’ as someone with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his / her full and effective participation in society equally with others. This definition under the New Act has been formulated using the text included in Article 1 of the Convention.

Under the New Act, persons with at least 40% of a disability (referred to as “persons with benchmark disability”) are entitled to certain

benefits. One such benefit is that at least 4% of the total number of vacancies in Indian Government establishments in specified categories (and 1% in certain others) are required to be reserved for their employment.

OBLIGATIONS ON PRIVATE ESTABLISHMENTS IN INDIA

While Indian private establishments are exempt from reserving jobs for persons with disabilities, the New Act requires them to adhere to a slew of obligations. The term 'private establishment' has been very widely defined to include a company, firm, factory or such other establishment. This would include the Indian presence of any foreign company, be it a liaison office, branch, subsidiary or a joint venture. The New Act makes it unlawful for an establishment to discriminate against a person on the ground of his or her disability unless it can be proved that the discriminating act in question is a proportionate means to a legitimate objective. The Rules make the "head" of the establishment responsible for ensuring that this provision of the New Act is not misused to the detriment of disabled persons.

The New Act requires establishments to prepare and publish an Equal Opportunity Policy (the "EOP") for persons with disabilities. A copy of the same is required to be registered with the State Commissioner or the Central Commissioner. The EOP must *inter alia* contain: (a) details regarding amenities and facilities put in place for persons with disabilities; (b) lists of posts identified for such persons; and (c) details of training, promotion, allotment of accommodation and provision of assistive devices and barrier free accessibility for such persons. Further, these establishments must appoint a liaison officer to look after the recruitment of persons with disabilities including the provisions and amenities for disabled employees. Such appointment is to be notified in the EOP. Furthermore, the establishments are required to maintain records relating to persons with disabilities enumerating the following:

- i. the number of disabled persons employed and the date of commencement of their employment;
- ii. the name, gender and address of employee(s) with disabilities;
- iii. the type of disability that such employee(s) are



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- iv. suffering from;
- iv. the nature of work being performed by such employee(s); and
- v. the type of facilities being provided to the disabled employee(s).

The establishments are further required to produce the aforesaid records for inspection as and when called upon to do so by the relevant authorities.

The Rules prescribe adherence to standards concerning physical environment, transport and information & communication technology applicable to disabled employees.

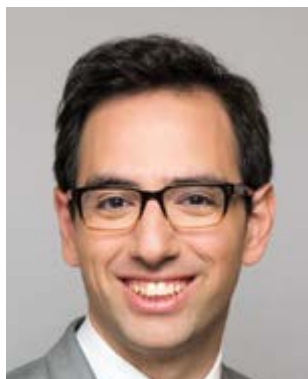
COMPLAINTS AND PENALTIES

The Rules also lay down the procedure for dealing with complaints relating to discrimination. Complaints about exploitation of persons with a disability can be made to the Executive Magistrate and the local police. Violation of any provision of the New Act invites fines and penalties and in certain cases makes directors and senior officers of an establishment personally liable.

The New Act stipulates a monetary fine of Rs 10,000/- for the first violation and fines between Rs. 50,000/- and Rs. 500,000/- for subsequent violations. If the violation is committed by a company, both the entity as well as the person(s) responsible for the conduct of the business of the company would be liable. Directors, officers and managers of a company would be individually liable if it is established that the violation was committed with their consent, or is attributable to their negligence.



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Failure by an establishment to provide required information, documents or records (as required under the Act) is an offence under the New Act. The monetary fine provided for each such offence by an organisation is Rs. 25,000/-. An additional fine of Rs.1,000/- would be applicable for each continuing day of such failure or refusal, as the case may be.

The Act also imposes criminal liability on anyone who within public view insults or intimidates a disabled person with the intention of humiliating such person. This would also apply to such actions within a workplace. The punishment provided for such an offence is imprisonment for a term between 6 months to 5 years and fine.

Prosecutions for offences under the New Act are triable by a Sessions Court which is required to be notified by State Governments for each district as a 'Special Court'.

UKRAINE

In Ukraine, the current legislation provides for a set of mechanisms aimed at protecting disabled persons' rights in the workplace.

Firstly, the Ukrainian Constitution, Labour Code and Protection of Disabled Persons Law ensure that individuals with disabilities have equal rights at all times. Discrimination based on disability is strictly prohibited. Disability cannot be used as a ground for hiring or dismissals, unless the state of the individuals' health (to be proven by medical and expert evidence) prevents them from

carrying out their work duties or poses a threat to the safety of others.

Secondly, employment of individuals with disabilities has been further incentivised with the mandatory employment quota which has been stipulated by the Protection of Disabled Persons Law. Companies with 8 - 25 employees are required to employ at least one individual with a disability. For companies with more than 25 employees, this figure increases to 4% of the total workforce. Failure to comply with the foregoing quota incurs a heavy fine.

Thirdly, the Fund for Social Protection of Disabled is a very effective institution in Ukraine. The Fund is a 'not for profit budget organisation' which provides financial support to ensure that adequate measures are taken for the protection of disabled persons from a social perspective, and also that suitable mechanisms are put in place to enable them to effectively undertake their work.

Moreover, there is a range of further guarantees, preferences and privileges for disabled persons. Pursuant to the Labour Code, there is no probation period for those with disabilities. Disabled individuals are entitled to receive full annual leave whenever convenient to them. The duration of such leave increases to a minimum of 26 days, when compared with other employees who, in general, receive 21 days. Furthermore, upon request by the disabled employee, employers are required to provide them with the opportunity to work part time. It is strictly prohibited to demand that such persons work any overtime and on night duty without their full prior consent. Finally, employers must create favorable conditions of work and services (transport, buildings and medicines), which are required to be accessible and usable for disabled persons.

UK

In the UK, the Equality Act 2010 prohibits disability discrimination in the workplace. It covers all types of workers (employees, self-employed, agency staff, partners and those undergoing vocational training) and applies to all stages of work from recruitment to post-employment victimisation.

A 'disability' for these purposes means a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to

carry out day-to-day activities. This is a wide-ranging definition that also includes conditions such as chronic back pain or clinical depression.

The act enumerates and prohibits various types of discrimination:

- less favourable treatment because of a disability. This is not capable of 'justification' (see below);
- unfavourable treatment of disabled persons for reasons arising from their disability – unless the treatment is justified;
- indirect discrimination (where the employer applies a provision, criterion or practice to everyone which puts a disabled person at a particular disadvantage). Indirect discrimination can be justified;
- harassment;
- victimising an individual for complaining about discrimination or for assisting someone else who is complaining.

Certain behaviour which would otherwise be discrimination could be justified in certain circumstances. Justification means that the act or omission is a proportionate means of achieving a legitimate aim and it is a defence.

The act also obliges employers to make 'reasonable adjustments' if a practice or a physical feature of their premises puts a disabled person at a substantial disadvantage. This means that the employer is obliged to take reasonable steps to avoid the disadvantage. Examples of adjustments might include wheelchair ramps, adjusting hours of work, or delegating some duties to another worker. There could be circumstances in which an employer may argue that it is unreasonable to be expected to make such an adjustment. For instance, if it is too expensive given the size of the employer or simply not practical given the needs of the business. If the disabled person's hours or duties need to be reduced, it is lawful to reduce their pay to reflect this.

FRANCE

In France, employees with any form of disability cannot be discriminated against in any manner, whether during the hiring process, or when they are actually employed.

In fact, employers have a duty to ensure that the working conditions meet the needs of the employee in accordance with his / her disability. This must be done in conjunction with the occupational doctor whose

role is to provide the employer with recommendations. Of course, any changes in the employee's working conditions or environment, in this particular context, would not be considered as a discriminatory act, whenever they are reasonable and justified.

The employment of disabled persons is strongly encouraged by public stakeholders. Accordingly, as a general rule, any employer with more than 20 workers has a general obligation to have at least 6% of its workforce composed of disabled employees.

However, in practice, this general requirement may be fulfilled through other means such as subcontracting work to companies that employ disabled individuals for certain tasks. For instance, if a company is unable to meet the 6% threshold, which is often the case, it is possible to enter into a contract with a third-party that hires employees with disabilities.

Companies hiring disabled workers may also benefit from public funding, depending on the seriousness of the actual disability, particularly to ensure the working conditions and the environment are suitable for the employee.

Disabled workers are also protected by specific rules in relation to termination of their employment contract. As a general rule, their legal notice period is longer and in redundancy cases, when determining which employees must be dismissed, disabled workers are protected from such dismissal.

In addition, employers that employ more than 50 workers who are unionised have an obligation to negotiate on a regular basis (every year, failing an agreement that provides otherwise) specific issues relating to the quality of the work environment and gender equality. This obligation includes a requirement to negotiate on the integration of disabled workers in the workplace, their working conditions and benefits as well as the measures implemented to inform all employees about disability related issues.



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MEXICO

In Mexico, there are no affirmative action requirements or quotas that employers must observe when hiring employees; however, there is a tax incentive for employers who do in fact hire disabled persons. They can claim deduction in respect of 100% of a disabled employee's salary, provided that the disability is partial and equal to at least 80% of the individual's normal abilities or if the individual is blind. To qualify for this incentive, the disability must be certified by the Mexican Institute of Social Security.

Even though employers are exempt from providing jobs to individuals with disabilities, Mexican Federal Labor Law stipulates that employers with 50 or more employees must adapt the workplace to accommodate employees with disabilities, regardless of whether someone with a disability works at the company or not. Any failure on this count may provide grounds for an inspection authorised by the Ministry of Employment and Social Welfare, which may then result in a fine.

Federal Labour Law also defines what benefits workers are entitled to if they become ill or disabled as a result of activities taken place at work. The level of benefits would depend on the classification of the disability, which could be total, partial or permanent.

Mexican Social Security is required to provide disabled employees with access to clinical care, physical therapy and rehabilitation, hospitalisation if required, orthopaedic devices and prosthetics to replace limbs, or other body parts, if they have been affected due to a workplace incident. In such instances, it is important to note that companies are required to pay injured or ill employees their full regular wage for a period of up to three months, beginning on the day on which the disability was certified by the Mexican Institute of Social Security. After the said ninety day period, employers can request that medical personnel examine the employee's disabilities to determine whether the injuries or illnesses will cause a permanent disability or not. If the injury does become permanent, the employment relationship can be legally terminated and compensation to the employee would then be paid in full by the Mexican Institute of Social Security. Needless to say, claims cannot be made for injuries that occur as a result

of a worker being under the influence of drugs or alcohol while in the workplace, if the injury is self-inflicted or is the result of a suicide attempt.

Workers' compensation in Mexico, through the Federal Labor Law, identifies four hundred types of workplace injuries and indicates the percentage of permanent disability allowance granted for each. Furthermore, according to Mexico Federal Labor Law, more than one hundred and fifty illnesses and diseases are considered to be occupational in nature.

CONCLUSION

While Indian private establishments are exempt from the legal obligation of hiring persons with disabilities, the New Act still imposes stringent obligations on them. There are high fines and penalties for contravention of the New Act which could also apply to officers, directors and managers of such establishments. Foreign companies with Indian branches and subsidiaries may not anticipate such onerous obligations, and should be particularly cautious to ensure compliance.

Overall, the New Act and the Rules feel like an attempt by the government to over-regulate. The legislation does not fit with the Modi Government's philosophy of 'Minimum Government and Maximum Governance'. While upholding the legal rights and interests of disabled persons, the legislature could have chosen a path more persuasive than punitive. Legislations in the UK, France, Mexico and Ukraine seem less onerous and the Indian Parliament would do well in taking a leaf out of them to introduce amendments that tone down the penal provisions in the new Rights of Persons with Disabilities Act. ■

This article has been prepared by member firms of Ius Laboris, the world's largest global HR and employment law firm alliance.

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