

INDIAN EMPLOYMENT LAW LABOUR LAW AND CONTRACT LAW

**- MS Shyan SDE (Admn)
RTTC RAJPURA**

FOREIGN DIRECT INVESTMENT

- India today allows investment in mostly all sectors and remains one of the most attractive emerging markets.
- A foreign investor whilst making investment in India has to make itself aware of the complex labour laws in India. The Indian labour laws place considerable restrictions on the freedom of an employer to reduce work force, dismiss its employees, close down factory etc.
- In order to understand the nuances of Employment / Labour & Industrial law it would be pertinent to differentiate between the law applicable to executive & management (white collar) job and workmen (blue collar) job.

Knowledge of Law provisions ...

LABOUR LAWS

- **Apprentice Act 1961**
- **Contract Act 1872**
- **Contract Regulation & Abolition Act 1970**
- **Employees Provident Fund Act 1952**
- **Factories Act 1948**
- **Industrial Dispute Act 1947**
- **Industrial Standing Order Act 1946**
- **Minimum Wages Act 1948**
- **MRTP & PULP Act 1972**
- **Payment of Wages Act 1936**
- **Payment of Gratuity Act 1972**
- **Trade Union Act 1926**
- **Workmen's Compensation Act 1923**

Knowledge of Law provisions ...

BUSINESS LAWS

- Companies Act 1956
- Income Tax Act 1948
- Air Pollution Act 1981
- Water Pollution Act
- Bombay Sales Tax Act 1959
- Central Sales Tax Act
- Central Excise Act 1944
- Custom Act 1944
- Consumer Protection Act 1986
- Essential Commodities Act 1955
- Environmental (Protection) Act 1986
- Monopolies & Restrictive Trade Practices Act 1969
- Foreign Exchange Regulation Act 1973

SOME IMPORTANT LABOUR LAWS APPLICABLE TO WORKMEN

- In India several labour laws regulate various conditions of work, wages, service, labour relations and other such related matters and for the present presentation we will discuss the complex labour laws in the Organized sector in India. Some of the relevant laws which are discussed here are as follows:
- The Industrial Disputes Act, 1947;
- The Factories Act, 1948;
- Shops and Establishment Acts of various states;
- The Contract Labour (Regulation and Abolition) Act, 1970;
- The Trade Unions Act, 1926;
- The Workmen's Compensation Act, 1923;
- The Employees' Provident Funds and Miscellaneous Provisions Act, 1952;
- The Employees' State Insurance Act, 1948;

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THE INDUSTRIAL DISPUTES ACT, 1947 (IDA)

- IDA - is an Act to make provision and settlement of Industrial Disputes with the objective to maintain industrial peace and economic justice.
- IDA categories employees into workman and non-workman.
- Section 2 (s) of IDA defines workman.
- “Workman” means any person employed in any industry to carry out manual, skilled and unskilled, technical, operational, clerical or supervisory work for hire or reward.
- The definition specifically excludes – persons employed in managerial or administrative capacity and also those persons (otherwise falling within the definition of workman)

THE WORKMEN'S COMPENSATION ACT, 1923

An Act to provide for the payment by certain classes of employers to the workmen of compensation for injury by accident.

- Employer is liable to pay compensation to the employee in case of injury arising out of and in the course of his employment.
- The liability to pay compensation is independent of any neglect or wrongful act of the employee.
- This liability springs out of relationship of master and servant. It is not a liability which arises out of tort.
- However, employer shall not be liable if injury does not exceed 3 days or the workmen was under influence of drugs/alcohol, willful disobedience of rules and safety guards. However, these limitations not applicable in case of death of the employee.
- Workmen shall be deemed to have been injured in case of contracting occupational disease in the course of his employment.
- The Schedules under the Act detail the amount of compensation for different type of injuries.
- Provides for one-time payments in case of death and in case of permanent disablement, compensation is made depending on the percentage of loss of earning capacity.
- Once an employee elects to file proceedings under this Act he cannot file civil suit for damages thus the Employer is protected from double proceedings.

TRADE UNIONS ACT, 1926

This Act provides for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions

- Seven or more persons can get together to form a Trade Union.
- In order for the Trade Union to register it has to have at least ten percent or one hundred of the workmen which ever is less as its members.
- Section 9 - On registration the Registrar will issue a Certificate of Registration.
- Section 19 – agreement between members will not be void or voidable merely by reason that the object of the agreement amounts to restraint of trade.

FACTORIES ACT , 1948

- Employers are required to follow stringent licensing and safety measures.
- Factory is defined as a place where 'manufacturing process' is carried out using 10 workers using electrical power or 20 workers without power.
- 'Manufacturing process' also includes petrol pumps, retail workshops, handicraft industries etc.
- Post Bhopal tragedy (Union Carbide case) special chapter (IVA) has been added making disclosures mandatory for hazardous processes.
- The working hours, leave , weekly days off and wages are similar to Shop and Establishment Acts- this is discussed later herein.
- Under the Act the “occupier “ is responsible for all compliances and in the case of an incorporated company the Director on the board of the company must be designated for the purpose of an “occupier”. Failing which all directors could become liable.

SHOPS AND ESTABLISHMENT

- In India most States have a legislation (Shop and Establishments Act) in place which regulate aspects such as working hours, leave with pay, overtime etc.
- Shop and Establishments Act apply to shops, commercial establishments, banks, insurance companies, hotels, restaurants, software companies and other service providers. However, they do not apply to factories as Factories Act, 1948 governs that conditions.
- The establishment are required to register in each city under the Act. Some of the salient features is discussed herein of Bombay Shop and Establishment Act, 1948 (“BSA”) which are akin to the enactment of other States.
- Working hours for 48 hours per week spread over 6 days is permitted. Overtime payment is made at the double normal hourly rate.
- Employee who has worked minimum 240 days will become eligible for 21 days paid leave and employee is not allowed to accumulate more than 42 days leave.
- BSA also has provisions regarding toilets, hygiene etc. and makes provisions for maternity benefits etc.

THE CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

- An Act to regulate employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith
- Allows Employers (principal Employers) to use Contractors for supply of labour.
- It applies to establishments employing twenty or more persons.
- It does not apply to establishments where nature of work is intermittent or casual.
- Principal Employer as well as the Contractor have to register themselves.
- The Contractor has to provide amenities and facilities which include canteens, rest-rooms, first-aid facilities etc.
- In case the Contractor fails to provide the facilities the Principal Employer will have to provide the same and adjust and recover the expense from the Contractor.
- Both the Principal Employer and the Contractor have to maintain Registers and Records of the Contract Labour employed.
- The appropriate Government in consultation with the Central and State Board can prohibit employment of contract labour in any process, operation and establishment- if it is of the view that it is perennial in nature, the work can be carried out by regular workmen.

WORKMAN V/S NON-WORKMAN

- The Labour can be broadly classified in two main categories i.e. unorganized sector and organized sector.
- Unorganized sector includes small establishments and employment relationships of irregular duration and not regulated by any of the labour laws. For e.g. Artisans, petty shopkeepers, hawkers etc.
- Organized sector is identified by specified/fixed operating conditions laid down by various labour law.
- Workman derives certain rights and benefits from the various labour and industrial laws in India.
- Non-workman is defined as employees carrying out managerial and administrative work and their terms of employment is essentially derived from the contract drawn up between the Company.

NON-WORKMAN IN PRIVATE SECTOR

- Primarily, none of the Labour Laws apply to non-workmen and service condition of such employees are governed by the respective contracts and general service conditions (if existing).
- In case of termination, courts cannot reinstate the Employee.
- Employee only has recourse for damages.
- Courts in India are conservative in awarding damages and punitive damages are rarely awarded.

SOCIAL SECURITY LEGISLATIONS

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPFA).

- EPFA applies to establishments and factory employing 20 or more persons.
- Employee drawing salary upto Rs.6,500/- per month has to become member of the provident fund.
- EPFA in provident fund scheme provides wherein 12% is contributed by both the employee and the employer with administration charge of 1.5%.
- In Pension/Superannuation fund scheme a part of the contribution to the provident fund (8.33%) is diverted to this scheme.
- The Deposit Linked Insurance Fund Scheme is for providing Life Insurance benefits. The employer contributes 0.5% and 0.01% towards administrative cost of the basic wages.

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The Payment of Gratuity Act, 1972

- It applies to factories, mine, oilfield, plantation, port , railway, Shops and Establishments employing ten or more persons.
- Applicable to employees who have rendered continuous service for five years.
- Employees with less than five years will be entitled in case of death or disablement.
- Employer has to pay within 30 days from the date it becomes payable to the employee.
- Total amount of gratuity payable shall not exceed Rs.3,50,000/- to 10 Lakhs unless there is a contract to the contrary.
- Compulsory insurance is necessary towards gratuity from Life Insurance Corporation, unless employer exempted from the Government.
- Gratuity is calculated at the rate of 15 days wages for every completed year of service or a part thereof exceeding six months.

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The Employees' State Insurance Act, 1948

- The contribution under this Act of an employee comprises of contribution payable by the employer and the employee.
- Presently every insured employee and his employer have to pay the Employees State Insurance Corporation at the rate of 1.75% and 4.75% respectively of the wage of the employee.
- Under the Act, the employer is liable to pay compensation to workmen incapacitated due to an accident arising out and in the course of employment.

VOLUNTARY RETIREMENT SCHEME (VRS)

- VRS is also popularly known as 'golden handshake'.
- Allows industrial establishments to shed work force without contravening labour laws.
- In the nature of self induced retrenchment and is a legal way to downsize.
- In M&A allows companies to downsize the target company, however in preparation of the VRS certain technicalities are involved.
- VRS payment is generally based on years of service.
- At the same time the company cannot compel the workers to accept VRS and it has to apply uniformly and cannot be applied selectively.

NON-COMPETITION AND PROTECTION OF CONFIDENTIAL INFORMATION

- Under section 27 of the Indian Contract Act, 1872 an agreement which is in restraint of trade is considered as void.
- However, the courts are loathe to problems faced by the employers and have recognized the need to protect confidential information. The Supreme Court in the case of *Niranjan Shankar Golikari v. Century Spg. & Mfg. Co. Ltd.* reported in AIR 1967 SC 1098 held that when an employee for a term binds himself not to take employment during that term it will not be hit by section 27 and restrained the employee from serving anywhere else for the duration of the agreement.
- The Indian courts have in cases of “non-compete clause” in employment agreement differentiated them as in during the term and after the term of employment.
- Terms which restrict employment after the expiry of the agreement the courts have applied the ‘reasonableness’ test and the view has been that the livelihood cannot be taken away and therefore would be hit by section 27.

WHEN TERMINATION OF EMPLOYMENT IS ILLEGAL IN LAW

- Workmen get protected under various legislations in India. Under section 9A of IDA it becomes difficult to vary the terms and conditions of the workman.
- It will be illegal to retrench and lay off if statutory conditions are not fulfilled and prescribed compensation is not paid to the workmen.
- In certain cases Appropriate Government's prior permission is also required.
- Termination of employees not workmen will be governed by the terms of their appointment letter / employment contract and follows, any termination not as per their contract may be construed to be illegal.

DRAFTING OF EMPLOYMENT CONTRACTS FOR COMPANIES SETTING UP OPERATIONS IN INDIA

- Identify the long term requirement of employees.
- Identifying the workmen and employees not covered under definition of workmen, respectively.
- Local laws of the State should be borne in mind while drawing up the contracts
- Issue appointment letters which clearly define the employment terms and conditions.
- Employment contracts, where necessary, should be put in place with clauses for wages, benefits, non-compete, confidentiality, term, termination etc.
- Depending on the requirement, use fixed term contracts for workmen.
- The terms and conditions of the employment should be clearly explained to employees before execution and should be drafted without any ambiguity.

FIXED TERM CONTRACTS- SECTION 2(OO) (BB)

- It applies to workmen under a contract for fixed term and termination of such workmen would not amount to retrenchment.
- The Supreme Court in the case of *Harmohinder Singh v kharagh canteen, Ambala reported in (2001) 5 SCC 540* has held that an employee's services could be terminated on the basis of a stipulation in his contract fixing a particular tenure or period beyond which the employee would be discharged.
- The Supreme Court in the case of *Morinda Co-operative Sugar Mills v Ram Krishna reported in (1995) 5 SCC 653* has held that seasonal workers by their nature of employment would be covered under section 2(oo) (bb).
- Recently, the Supreme Court in the case of *Kishor Chandra Samal v Divisional Manager, Orissa State Cashew Development Corporation, reported in JT 2005 (10) SC 46* has held that even if there were repeated contracts issued for successive terms spread over several years, so long as each contract was for a fixed period, section 2(OO) (bb) would apply, and termination of employment would stand excluded from the definition of "retrenchment".

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LAY-OFF AND RETRENCHMENT OF WORKMAN IN PRIVATE SECTOR

- Section 2 (kkk) defines “lay-off” the failure of the employer to provide employment due to shortage of raw material, power etc. but who has not been retrenched.
- Section 2 (oo) defines “retrenchment” as termination of a workman for any reason whatsoever otherwise than voluntary retirement, reaching age of superannuation, non renewal of contract or termination due to continued ill-health.
- Section 2 (oo) (bb) – provides for termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.

CHAPTER VA AND VB OF IDA WITH REFERENCE TO LAY-OFF, RETRENCHMENT, TRANSFER AND CLOSURE

- Chapter VA applies to industrial establishment - in which less than fifty workmen on an average working day have been employed in the preceding calendar month and which are seasonal in character.
- Section 25C- A workman laid-off under this Chapter is entitled to fifty percent of his basic wages and dearness allowance.
- The workman who has been in continuous service for at least one year (a year being defined as 240 days of actual work) is terminated, covered under chapter VA, the conditions listed below will have to be fulfilled.
- Section 25F- Workman cannot be retrenched unless the employer has complied with – (i) giving one months notice in writing, (ii) paid compensation equivalent to 15 days average pay (for every completed year of continuous service) or any part thereof in excess of six months and (iii) notice in the prescribed manner to the appropriate Government.

CHAPTER V B CONTD.

- Chapter VB applies to industrial establishment in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.
- Section 25M – Prohibits the employer to lay- off except with the prior permission of the appropriate Government unless it is due to the shortage of power or due to natural calamity.
- Section 25N – No workman to which this chapter applies can be retrenched until the employer (i) has given three months notice in writing with reasons for retrenchment and (ii) prior permission has been obtained from the appropriate Government ('specified authority').
- An extremely compelling case has to be made out in the application to the appropriate Government, but even so the Government rarely grants this permission.

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TRANSFER AND CLOSURE

- Section 25FF- provides for transfer of an undertaking , whether by agreement or operation of law, in which case workmen are entitled to compensation as if the workman had been retrenched.
- The transferee of the undertaking is not bound to take the employees.
- The transferor is only bound to compensate the workman as if he is deemed to be retrenched

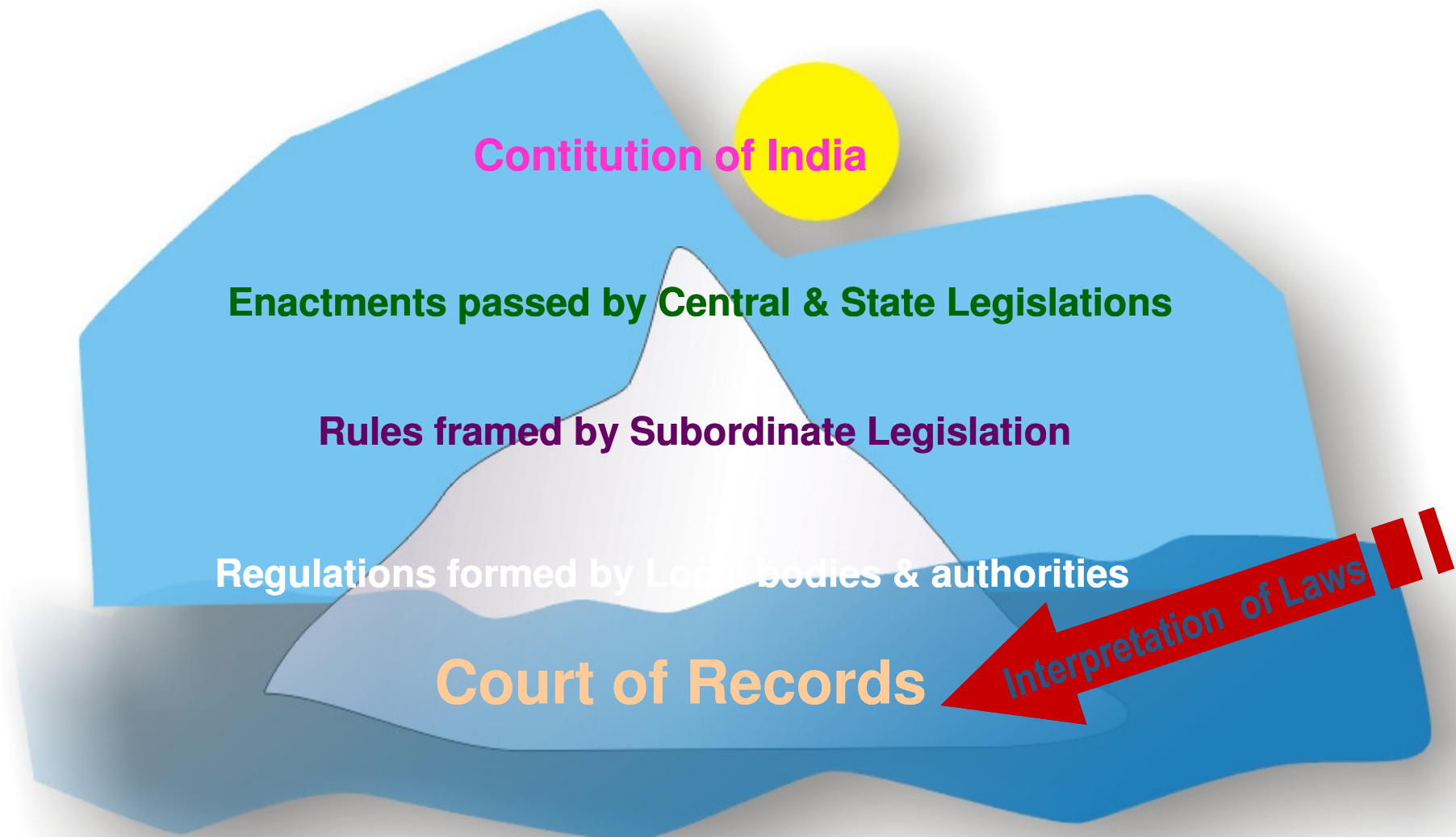
..... CLOSURE – CHAPTER VB

- Section 25-O provides the procedure for closure.
- An employer intending to close the undertaking has to take at least 90 days' prior permission of the appropriate Government.
- If the appropriate Government does not communicate within 60 days, permission will be deemed to have been granted.
- On permission being granted, workman will be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of 6 months.

EMERGING TRENDS IN LABOUR LAW IN INDIA

- There is a change in the mind-set of the courts and it is being seen that the courts are interpreting laws more liberally that is providing the employer more flexibility.
- Several amendments are on the anvil which will give the freedom to the employers by not being required to make an employee permanent, even if the employee has completed 240 days.
- Labour laws in the Special Economic Zone (SEZ) are to be amended substantially with amendment in the Contract Labour (Regulation and Abolition) Act, 1970 which will allow the employers to follow a hire and fire policy under certain conditions.

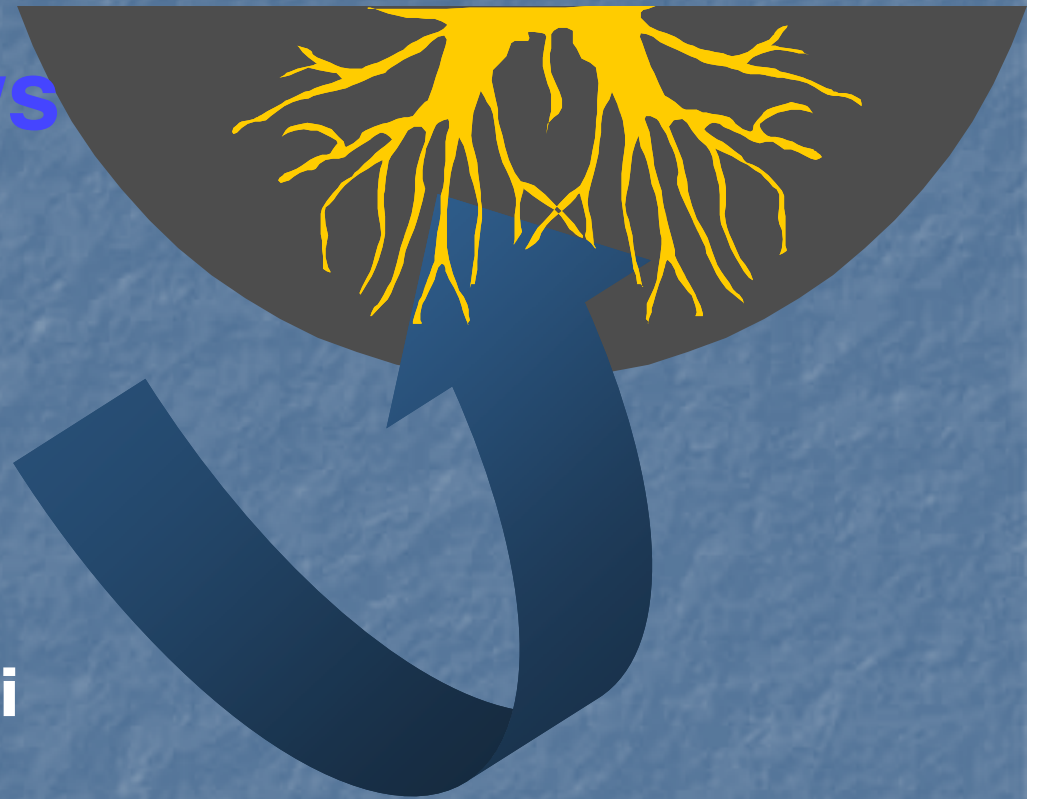
Understanding the Laws ...



Laws of Natural Justice

Foundation for Enforcement of laws

- Usage & Customs
- Human Rights Concepts
- Writs of Habeas Corpus, Mandamus, Prohibition, Certiorari & Quo Warranto
- Caveat AND stay



COURTS: CIVIL, CRIMINAL, INDUSTRIAL/LABOUR, OTHERS

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THE WRITS

HABEAS CORPUS: Order to produce person detained.

MANDAMUS: To demand for some activity or action or performance.

PROHIBITION: Preventing subordinate Courts from exercising jurisdiction.

CERTIORARI: To quashing of decision of lower court or to remove case from lower body.

QUO WANRRANTO: To oust the one who has not legally qualified to hold public office.

CONTRACT REGULATION & ABOLITION ACT 1936

Under Section 7, Registration of Establishment is necessary wherein the labours are employed under contracts. All contractors are expected to get the license under the provisions of section 12 of this Act. Application for such licenses are to be submitted along with the Certificate from principal employer. This application for license contains details like details of work, expected dates of commencement & completion, Maximum number of labours proposed to be deployed. Under Rule 81, Principal Employer is expected to submit returns within 15 days of the commencement of work or completion of work under each contractor in form VI-B. and to send the annual report/ return in Form-XXV before 15th February.

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The authorised supervisor executing The work has to perform statutory duties of examining following documents

- **Muster Roll in Form XVII**
- **Register of Wages in Form XVIII**
- **Register of Deductions in Form XX**
- **Register of Fines in Form XXI**
- **Register of Advances in Form XXII**
- **Register of Overtime in Form XXIII**
- **Wages slip to be given in Form XIX**

All these documents are to be maintained by the contractors under Rule 78. By virtue of sections 16 to 19, the Principal Employer has to provide facilities for the Welfare of contract labours like Canteen, Rest Rooms, Other facilities and First Aid facilities. Responsibility for payment of wages to Labours rests on Principal Employer u/s 21.

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The Principal Employer has to maintain following records

- Rule 74 : Register of Contractors in Form XII
- Rule 75 : Register of Person Employed in Form XIII
- Rule 76 : Employment Card/Form XIV, Contractor to issue
- Rule 77 : Service Certificate in Form XV
- Rule 79 : To display Abstract of Act.

■ **Chapter VI: Penalties and Procedure**

- Section 22 : Obstruction to Inspectors [3 months/Rs 500]
- Section 23 : Contravention of provisions [6 months/Rs 1000]
- Section 24 : Other Offences [8 months/Rs 1000 & Rs 100 per day]
- Section 25 : Offences by Companies

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MINIMUM WAGES ACT 1948

- **CHAPTER I** : Fixing Minimum wages for specified employees under provisions of section 3,4 & 5.
- **CHAPTER II** : Procedure for Revision of rates.
- **CHAPTER III** : Constitution of Advisory Board & Committees under section 7, 8 & 9
- **CHAPTER IV** : Fixing Hours for normal working days under section 13
- **CHAPTER V** : Maintenance of registers and records
- **CHAPTER VI** : Provision related to Claims & Penalties

WORKMENS' COMPENSATION ACT 1926

- **CHAPTER I** : Definition part
- **CHAPTER II** : Provisions regarding Compensation
- **CHAPTER III** : Various authorities under Act, their powers & procedures
- **CHAPTER VI** : State Govt's power to make rules

INDUSTRIAL DISPUTE ACT 1947

- **CHAPTER I** : EXTENT AND DEFINITIONS- It contains important definitions of Employer, Industrial disputes, Layoffs, Lockouts, Public Utility Company, Retrenchment, Unfair Labour Practice
- **CHAPTER II** : Section 3 to 9 - Authorities under the Act: Works ommittee, Conciliation Officer, Board of Conciliation, Labour Courts, Industrial Courts, Industrial Tribunal, National Tribunal
- **CHAPTER III** : Reference of Dispute, Notice under section 22 & Voluntary Reference of Disputes
- **CHAPTER IV** : Section 11 to 21 Powers & Duties
- **CHAPTER V** : Section 22 to 25 : Strikes & Lockouts
- **CHAPTER VA** : Section 25 A to J Layouts & Retrenchment
- **CHAPTER VB** : Section 26 to 31 Misc Provisions

FACTORIES ACT 1948

- **CHAPTER I** : Preliminaries
- **CHAPTER II** : The Inspecting Staff
- **CHAPTER III : HEALTH: S.11**-Cleanliness, **S.12**-Disposal of waste, **S.13**-ventilation/Temp., **S.14**-Dust & fumes, **S.16**-Overcrowding, **S.17**-Lighting, **S.18**-Drinking Water, **S.19**-Latrines/Urinals, **S.20**-Spittons etc
- **CHAPTER IV: SAFETY: S.21**- Fencing, **S.22**- Work near machinery in motion, **S.23**- Employment of young person, **S.24**- Striking Gear, **S.25**- Self acting m/c, **S.26**- Casing of new m/c, **S.28**-Hoist & Lifts, **S.29**-Lifting m/cs, chains, ropes & lifting tackles, **S.31**-Pressure Plants, **S.32**-Floors, stairs, **S.33**-Pits, sumps, opening in floors, **S.34** - Excessive weights, **S.35**-Protection to Eyes, **S.36A**-Portable electric lights, **S.40A**-Maint. Of buildings, **S.40B**-Safety Officers

FACTORIES ACT 1948

- CHAPTER IVA: Provisions regarding Hazardous Process
- CHAPTER V : **WELFARE:** S.42-Washing Facilities, S.44- sitting facilities, S.45-First Aid appliances, S.46 Canteens, S.47- Rest rooms & Lunch rooms, S.48- Creches
- CHAPTER VI : **WORKING HOURS OF ADULTS**
Sections 51 to 66
- CHAPTER VII: **EMPLOYMENTS OF YOUNG PERSONS**
- CHAPTER VIII: **ANNUAL LEAVE WITH WAGES**
- CHAPTER IX : **SPECIAL PROVISIONS**
- CHAPTER X : **PENALTIES & PROCEDURES**

ACCIDENT REPORTING

Under IE Act: To Electrical Inspector in Form XIII in 48 hrs

Under Factories Act: To Factory Inspector in 48 hrs

Under Indian Boiler Act: To Boiler Inspector in 24 hrs

Under Petroleum Act Nearest Magistrate & Inspector of
Explosives

Under Indian Explosives Act : To Chief Inspector of Explosives

GUILTY OF NEGLIGENCE..... IN

Indian Panel Code : IPC

- **GROSS NEGLIGENCE**
- **CONTRIBUTORY NEGLIGENCE**
- **RESPONSIBILITY/ DUTY TO MANAGE**
- **INJURY RESULTED**
- **INTENTION OF WRONG DOER**
- **RIGHT TO INITIATE ACTION**

Protection of Engineers

Section 80 of Civil Procedure Code: No suit shall be instituted against a public servant in respect of any act purporting to be done in his official capacity until expiration of two months next after notice in writing.

Similar provision exist in IE Act sec. 56

MSEB employee is public servant as per Sec.81 of IE Act 1910.

THANKS !!!

