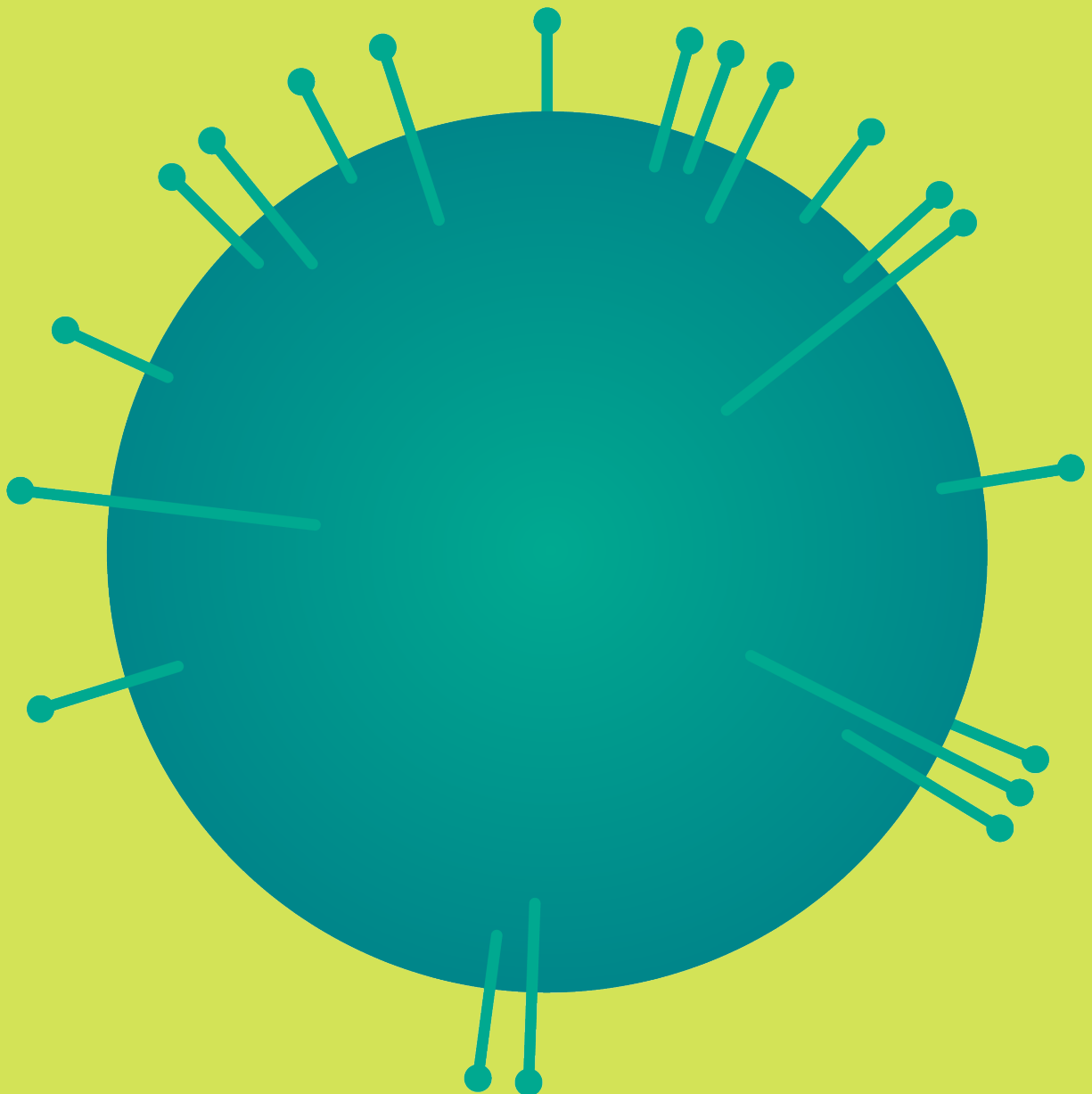


Rödl & Partner

GLOBALLY ACTIVE

LABOUR AND EMPLOYMENT LAW INDIA



Human resources are at the centre of globalisation strategies of any company. At the same time, this poses special challenges. Hardly any business unit is so strongly affected by the typical national regulations of a country than human resources.

Successful international HR strategies take into account the company's "core values", options offered by the local rules and having to observing the local legal framework.

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We in India

In 2007 Rödl & Partner opened the first branch in India. The most populous democracy in the world remains one of the key growth engines for internationally operating companies. For much needed Infrastructure improvements there are just as interesting entry opportunities as for the traditional industrial sector, like spectacular large-scale projects of the German economy have recently proven.

At our offices in Delhi, Mumbai and Pune and our offices in Chennai, Bangalore, Ahmedabad and in our own India team in Germany, multilingual specialists for foreign Investments in India work together to provide holistic advice on all issues of law, taxation, BPO and auditing.

Introduction

Labour and employment regulations in India are significantly different from other similar jurisdictions with its very own distinctive features.

Labour laws, regulations, rules and policies are constantly evolving to adapt the rapid changes in workplace due to technology advancement, digitalisation, and mobility in general and in the Indian context all the more in the backdrop of the Indian Government's initiative to make the Indian business environment investor friendly.

It is essential for the foreign companies to know the local relevant laws and the latest changes in this field in order to avoid any future risks and liabilities triggered by the business activities in India.

General Framework

KEY LABOUR AND EMPLOYMENT LEGISLATIONS

In India there is no single code on the labour and employment laws covering all aspects of labour and employment related matters.

Both the Central and the State Governments have the power to legislate on the subject of employment and labour relations. In addition to the Central enactments, each State Government has enacted State-specific legislations and further rules pursuant to the Central legislations leading to complexities.

In order to provide clarity and to boost ease of doing business, major labour law reforms are planned by the Indian Government.

Applicability of these laws depend among others on the industry sector, size of the establishment, type of work carried on by the employee and / or salary thresholds.

The key labour and employment legislations in India can be classified in the following categories:

- laws relating to working conditions, conditions of service and employment;
- laws relating to wages;
- laws relating to social security; and
- laws related to industrial relations.

CATEGORISATION OF INDUSTRIES

Indian labour and employment laws divide "industry" into 2 broad categories, namely, factories (i.e. manufacturing units) and establishments (i.e. non- manufacturing units).



Factories	Establishments
The Factories Act, 1948 (“Factories Act”) defines the term “factory” to mean any premises (a) wherein 10 or more workers with the aid of power or 20 or more workers without the aid of power are or were working on any day of the preceding 12 months; and (b) wherein manufacturing process is being carried on.	The existing law relating to the regulation of labour employed in establishments (other than factories) is embodied in State-specific-Shops and Commercial Establishments Acts (“S&E Acts”). As per the provisions of various S&E Acts, the term “establishment” generally means any shop and commercial establishment where goods are sold or services are rendered to customers. However, it is relevant to note that where shop or establishment is carrying on any activity which is falling under the purview of any “manufacturing processes” then provisions of the Factories Act shall apply to it.

CATEGORISATION OF EMPLOYEES



Employees are classified into 2 broad categories – workmen (i.e. blue- collared employees) and non-workmen (i.e. white-collared employees).

Workmen



The expression “workman” is defined to mean any person who is employed in any industry to do any manual, unskilled, skilled, technical, operational or clerical work, or who is employed in a supervisory work with salary threshold.

Non-workmen

This category covers all other employees not falling in the above category.

Internal accounting



PRE-EMPLOYMENT PROCEDURE

No specific rules exist which govern the recruitment, interviewing, screening and hiring procedure to be followed by companies in private sector.

The employer is free to devise its own policies regarding appointment procedure. The recruitment policy so devised, however, should not violate the fundamental rights (such as right to privacy, right to equality, etc.) of the applicants.

Before employing a candidate, the employers in India generally conduct pre-employment inquiries and background checks in order to ascertain the suitability of the applicant for the job. No specific laws concerning such inquiries exist in India.

However, such inquiries should be conducted only after obtaining prior written consent of the candidate in order to ensure compliance of any right to privacy and / or data protections laws which may apply.



TERMS OF EMPLOYMENT AGREEMENTS

The term of the employment can be temporary or permanent as agreed between the parties.

There are no legal requirements as to the form and content of employment agreements. However, general rules governing contracts as laid in the Indian Contract Act, 1872, are applicable on the employment agreements as well.

Though oral agreement is valid, for practical purposes an employment agreement should be in writing in order to maintain clarity in employment relationship and also as proof. The employer and employee are free to agree on the terms of their relationship.

However, both the employer as well as employee are required to ensure that the terms of the contract do not contradict with the provisions of law. Therefore, it is recommended in general to follow and include the minimum working conditions as defined by law for the workman category.

Certain S&E Acts impose a statutory obligation on the employer to specify and communicate in writing certain terms and condition of employment to its employees.

This may include among others, job responsibility and place of work, probation period, confirmation procedure, working hours, leave entitlement, salary and other statutory benefit entitlement, transfer provision, non-compete and confidentiality, etc.

The complexity and extensiveness of provisions of the employment agreements differ for different levels of employees. In practice most companies draft Human Resource policies providing common workplace rules and regulations thereby assuring consistency and uniformity within the organisation.

Typically an employment relationship in India begins by issuing of appointment / offer letter followed by an employment agreement with provision of probationary period.

Generally, the employers in India issue a written confirmation letter to the employees upon successful completion of the probation period.

Important Statutory Provisions

PROBATION AND CONFIRMATION

There are no express regulations concerning probation periods for employees in India. The Model Standing Orders prescribed under the Industrial Employment (Standing Orders) Act, 1946 prescribe 3 months as probation period, which can be extended up to 1 year. In practice, employment contracts usually provide for a probation period varying from 3 to 6 months, depending on the designation of the employee concerned. During probation period, a contract may be terminated by either party without notice.



WORKING HOURS AND OVERTIME

The maximum number of working hours for employees prescribed under S&E Acts may range between 45 and 48 hours spread on 6 days in a week. For work above the maximum prescribed time, the worker is entitled to payments of twice the ordinary rate of pay as overtime wages.

The Factories Act and S&E Acts prohibit women from working in night shifts. Night shifts for women are allowed only after obtaining express consent from the concerned authorities. However, certain States have done away with such permissions, subject to meeting of certain compliances by the concerned employers. These conditions usually include provision of transport services with security personnel, maintenance of record of all women employees who leave beyond the prescribed working hours and provision of other security measures.

LEAVES

In general, employees are entitled to paid annual leave at the rate of 1 day for every 20 days of work performed in the previous calendar year, provided the employee worked for 240 days or more in the previous calendar year.

Apart from earned leave which can be accumulated and carried on in the next year, the Factories Act and the S&E Act provide for sick leave and casual leave with wages to employees. The number of sick leaves and casual leaves vary from State to State. Unlike earned leave, sick and casual leaves cannot be accumulated and lapse if not availed in a particular calendar year.

In practice leaves vary as per sector, region and internal policies of an establishment. Leave entitlement therefore vary in the range of 20 and 30 days paid leave per year including casual and / or sick leave.

MATERNITY LEAVE

Starting May 2017, female employees are entitled to maternity leave with wages for a period of 26 weeks for the birth of the first 2 children and maternity leave with wages for a period of 12 weeks, if the female employee already has 2 surviving children.

12 weeks of maternity leave entitlement is now also extended to a commissioning mother and female employee adopting a baby below 3 months.

HOLIDAYS

Requirement of giving a weekly off to employees is mandatory. In addition to this there are 3 paid national holidays in India mandatorily to be allowed to all employees – Republic Day (26 January), Independence Day (15 August) and Mahatma Gandhi Jayanti (2 October). In addition

to the said national holidays, some States also provide for an additional holiday, i.e., May Day or Labour Day (1 May). Other than the aforementioned holidays, the State Governments also prescribe a list of public holidays in accordance with local customs and festivals.

Employees in India are generally entitled to 10 - 15 holidays including national holidays depending on their work location. A company usually determines the exact holidays for a year in advance as part of the company policy and depending on local customs and composition / background of employees.

SOCIAL SECURITY REGULATIONS

The main social security regulation in India is the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("PF Act") and various accompanying schemes enacted under the PF Act.

- The PF Act is applicable to the establishments employing 20 or more persons and to the employees whose basic pay is not exceeding INR 15,000 per month
- The employer and employee, both, contribute 12% of the basic salary plus certain other allowances into PF account of the employee (on monthly basis)
- Employers' obligation to contribute to the fund continues to be 12% of INR 15,000 per month even when the salary of the employee exceeds subsequently.

Such covered establishment is also required to register with the respective authorities. Establishments not falling under the scope of the PF Act may voluntarily be a member of the fund.

The employer is liable to deduct and deposit both employer and employee contributions to the fund.

In the event of termination of the services of an employee, the employer may be liable for any shortfall in the contributions which were to be made during the course of employee's employment.

Apart from PF Act, there is also Employees' State Insurance, Act, 1948 ("ESI Act ") which is a self-financing social security and health insurance scheme for Indian workers. It is applicable to all establishments employing 10 or more employees drawing monthly salary up to INR 21,000. The Employer is required to obtain registration under ESI Act. Under this, the employees earning up to INR 21,000 is required to contribute at the rate of 1.75% of the wages, while employer's contribution is at the rate 4.75% of the wages payable in respect of the employees in every wage period.

PROVIDENT FUNDS FOR FOREIGN NATIONALS

The scope of the PF Act was broadened in 2008 to include foreign nationals working in India and Indian nationals working abroad. For this category of workers now included as "international workers" in the PF Act, no salary thresholds apply once the establishment is covered under the PF Act.

A foreign national qualifying as international worker is exempted from social security contributions in India once following conditions are met:

- International worker is a national of a country with which India has a reciprocal Social Security Agreement ("SSA")
- International worker continues to contribute to the social security of his / her home country

GRATUITY



Gratuity is a terminal benefit earned by an employee for services rendered. The right to receive gratuity and the liability to pay gratuity is a contingent right and liability. While a pension amount is usually payable periodically as long as the pensioner (retired employee) is alive, gratuity is paid only once as a lump sum.

The Payment of Gratuity Act, 1972 (“Gratuity Act”) is applicable to all establishments where 10 or more persons are or were employed, on any day of the preceding 12 months.

Every employee irrespective of his/ her salary is eligible to receive gratuity after rendering continuous service for not less than 5 years:

- on superannuation;
- on retirement or termination; or
- on death or disablement due to accident or disease

Completion of continuous service of 5 years is not necessary where the termination of the employment of any employee is due to death or disablement.

For every completed year of service or part thereof in excess of 6 months, the gratuity payable shall be at the rate of 15 days’ wages for each year of completed service based on the rate of wages last drawn by that employee.

The amount of tax-free gratuity payable to an employee is currently capped at INR 2 million (20 lakhs).

Termination of Employment

An employment relationship may terminate on the occurrence of following events:

- automatically on completion of the agreed term; or
- on reaching the age of superannuation of the employee; or
- mutually by signing mutual termination agreement; or
- by either party as agreed in the agreement.

Workmen



The Industrial Disputes Act (“ID Act”) regulates the termination only of workman. The ID Act prescribes a minimum notice period of 1 to 3 months or payment in lieu of notice for the termination of the employment depending on the number of employees in the establishment. In case of termination of a workman, an establishment employing 100 or more workmen must obtain prior permission of the appropriate government.

Employees



For termination of employees other than workmen, the regulations of the S&E Act and the terms of the contract of employment apply.

Third party consent, as in case of workman, is not required by an employer to terminate employment relationship with a non-workman.

Therefore, the employees other than workmen do not have a statutory right to redundancy/severance pay in the event of termination unless it is provided for in their contract of employment or the human resources policy of the employer. For termination of such employee, a minimum period of 1 month of written notice or pay in lieu of notice is required.

TERMINATION FOR CAUSE



Indian labour regulations also recognise termination of employment for cause. The employer may dismiss an individual employee summarily for misconduct without notice. The S&E Acts and the Industrial Employment (Standing Orders) Central Rules lay down acts of the employee which denote misconduct.

However, dismissal for misconduct, except in cases involving moral turpitude and criminal acts, should be preceded by a domestic enquiry. This consists of a show cause notice by the employer, opportunity to the employee to be heard and written record of reasons for dismissal.

Dismissal without domestic enquiry may be viewed as unlawful termination by Courts in India. Some instances of misconduct which may justify dismissal after conducting a domestic enquiry are willful insubordination or disobedience, theft, fraud or dishonesty.

SEVERANCE PAYMENTS

Workmen are entitled to a statutory redundancy compensation equivalent to 15 days' pay for each completed year of service and 1 or 3 months' notice (depending on the number of employees in the establishment) or salary in lieu thereof. There is no customary practice in terms of redundancy payments other than the statutory benefits.

However, certain statutory benefits like provident fund and gratuity are available to all the employees post termination, irrespective of employees' category, subject to the eligibility criteria and the applicable laws.

In case of termination with cause the employer is not obliged to pay any compensation to the employee. The gratuity of an employee, whose services have been terminated for causing any damage or loss to the employer's property, is liable to be forfeited to the extent of loss or damage caused.

The gratuity payable to an employee may be wholly or partially forfeited if his/ her services have been terminated for serious misconduct.

As a matter of practice, the employer should ensure that it provides a discharge letter to the terminated employee setting out all the payable amounts towards full and final settlement and receive the employee's acknowledgment on such letter.

CONTRACT LABOUR

The companies and establishments in the manufacturing and service sectors engaging contract labour for performing their ancillary activities like security, house-keeping, maintenance or other activities not forming a part of their 'core operations' are governed under the Contract Labour (Regulation & Abolition) Act, 1970 (the "Contract Labour Act").

The Contract Labour Act is applicable to all establishments including companies in which 20 or more workmen are or were employed on any day of the preceding 12 months through

contractors. Some states in India have amended the Act as far as applicability of the Contract Labour Act is concerned eg. 10 or more workers in case of Gujarat and West Bengal, while in case of Rajasthan, Maharashtra, Haryana, Andhra Pradesh, the Contract Labour Act will be applicable upon employing 50 or more workmen.

The Contract Labour Act requires both the “principal employer” and the contractor to fulfil their respective statutory obligations. Principal employer is the one who employs contract labour through a contractor. One such requirement on the part of the principal employer is to obtain registration under the Contract Labour Act, once the entity falls within the applicability of this.

Collective Bargaining and Role of Trade Unions

TRADE UNIONS



In India, collective bargaining and trade unions play an important role in the traditionally labour intensive sectors but is limited in other sectors. There is no legal obligation on the individual companies or employer associations to participate or accept any trade union led negotiations.

However, under the provisions of the ID Act, the settlement arrived at by process of collective bargaining with the employer has been given a statutory recognition.

Under the ID Act, 2 types of settlements have been recognised:

- settlement arrived in the course of conciliation proceeding before the authority. Such settlements not only bind the member of the signatory trade union but also non-members as well as all the present and future employees of the management; and
- settlement not arrived in the course of conciliation proceedings but signed independently by the parties to the settlement. Such settlements bind only such members who are signatory or party to the settlement.

Trade unions do not hold the upper hand over the employer in terms of policy decisions and law. Indian courts have so far stressed healthy industrial relations declaring as illegal any act of coercion or indiscipline on the part of both trade unions and employers. In practice, the working relation with trade unions is an important factor for successful operations of a business.

WORKS COMMITTEE



Further in India, there is no statutory requirement to have a workers’ representative on the board of an Indian company, although some government-owned companies have workers’ representatives on their board of directors.

Works committee may be formed in establishments with 100 or more workers.

Role of the works committee is to promote good relations between the employer and employees by engaging in dialogue relating to matters of common interest and endeavour to resolve any material difference of opinion in respect of such matters.

The works committee is not intended to supplement the unions for the purpose of collective

bargaining. They are not authorised to consider real or substantial changes in the conditions of service. Their task is only to smoothen any friction that may arise between the workforce and the management on a day-to-day basis. Any agreements of works committee are not binding on either the workers or the employers.

Compliance

COMPLIANCES UNDER LABOUR AND EMPLOYMENT LEGISLATIONS



Apart from obtaining licenses and registrations, making contributions, maintenance of registers, filing of periodical returns, etc. under the applicable labour and employment legislations, the employers in India are also obligated to undertake the following to comply with statutory provisions:

- To ensure that employees work in safe, healthy and sanitary conditions.
- The employers should provide facilities such as rest rooms, first aid appliances and so on to workers employed
- Provide a safe working environment at the workplace which includes safety from persons coming into contact at the workplace
- Formulate clear rules or policies against sexual harassment
- Constitution of ICC (in case the number of employees working in the organization are not less than 10) under the provisions of the Sexual Harassment for Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
- Display (at a conspicuous place), the penal consequences of sexual harassment and order of constitution of ICC
- Conduct workshops and awareness programmes for sensitizing employees of provisions of the Sexual Harassment for Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
- Drafting and implementation of data protection policy
- Drafting and implementation of equal opportunity policy
- Display of abstracts of Payment of Gratuity Act and Maternity Benefit Act

Services Employment Law

IMPLEMENTING THE INDIAN EMPLOYMENT LAW

Our services at a glance:

Drafting Services	>	- Employment Contracts: Drafting or review and amendment of existing contract - Secondment Agreements: For international assignments of employees - Workplace Policies: Drafting of guidebook of policies or stand-alone policies - Drafting of Restraint of Trade Agreements - Drafting of Employee Confidentiality Agreements
Training and Advisory Services	>	- Legislation Summary: Preparation of written summary of particular law - In-house Workshop: Training and Interactive presentation on particular law or changes Advisory Services Prevention of Sexual Harassment at Workplace Workshop for employer and employees - Legal Opinion: Written advice entailing the application of law to facts
Compliance Review Services	>	- HR Due Diligence or Health-check Review from a labour law perspective to check for compliance, as part of a due diligence process or as an ad hoc health-check - Employment laws and regulations compliance Audit Audit to determine compliance with various national laws and local regulations
HR Support Services	>	- Support in hiring, transfer and termination of employees. - Ongoing HR matters in employment relationship - Liaisoning with Labour authorities - Creation of employee trust and benefit structure including stock option schemes - Settlement of labour disputes - Labour litigation

Employment of Foreign Nationals in India

Employment of a foreign national in India is allowed subject to fulfilment of immigration regulations. The Ministry of Home Affairs has issued guidelines governing the issuance of various types of visa and further no general eligibility requirements are laid by the immigration authority in India for obtaining work permit in India. For travelling to India various categories of visa exist. The type of visa issued to a foreigner depends on the purpose of his/ her visit to India.

For foreigners intending to work in India are required to apply for an employment visa ("E-Visa") in the Indian Embassy or Consulate in country of their residence. E-Visas are issued only to highly skilled, specialised or qualified persons and professionals for the jobs for which no local Indian workers are available. The E-Visa is not granted for routine, ordinary or secretarial jobs. Further, the foreigner shall earn a minimum salary of USD 25,000 per annum for grant of E-Visa.

Foreign national holding an E-Visa valid for a period longer than 180 days is required to register himself with the local District Foreigners Registration Officer/ Foreigners Regional Registration Officer, within 14 days of his/ her first arrival in India, irrespective of the actual period of time for which he/ she intends to stay in India.

Apart from labour law aspects, delegation of foreign nationals to India requires careful advance planning of tax and social security aspects depending on the nationality and personal circumstances of the respective individual.

APPLICABILITY OF INDIAN LABOUR AND EMPLOYMENT LAWS TO FOREIGN NATIONALS

Most of the Indian labour and employment laws would apply to the foreign national only if he/ she comes to India as an employee of, or deputation to, an Indian company, or as an employee of the foreign company's branch office or liaison office in India. The said laws would not be applicable to an "independent contractor".

Services Immigration Solutions

FINDING IMMIGRATION SOLUTIONS

Our services at a glance:

Consulting Services	>	- Legal advice: Written advice on international assignments in-bound into India from an immigration law, labour law, company law and tax law perspective
Drafting Services	>	- Outbound and Inbound Secondment Agreements: For the international assignment of employees, and in order to meet certain visa application requirements - Secondment or Global Mobility Policy: Covering all aspects of HR, tax, immigration and employment law in respect of the international assignments of employees
Compliance Services	>	- Visa Applications: Type of visa – determination - Employment Visa Applications: Provide support on filing visa / renewal of visa applications

Services Expat Tax

HANDLING EXPAT TAX ACCORDING TO THE INDIAN REGULATIONS

Our services at a glance:

Consulting Services	>	- International Taxation: International Tax advice and communication with foreign tax offices - Tax Residency: Covering all aspects of tax residency in respect of the international assignments of employees - Indian Taxation: Tax consequences in India according to Indian tax - Taxation of international Stock-options and severance pay - Litigation Services (Court hearings) - Employment Taxation Gross-up calculations and net salary agreements - Permanent Establishments - Transfer Pricing
Compliance Services	>	- Exit and Arrival Interviews: Personal Meeting with Expats - Submission of annual income tax returns for Expats: Mandatory for all Expats - Submission of bi-annual provisional tax returns for Expats: Mandatory for provisional taxpayers - Tax Registrations and Deregistration: Upon arrival / departure from India

Our services in India

- Detailed analysis of the various project risks before the start of the project
- Individual site selection for the implementation of the project
- Providing the right consultants and specialists for individual Questions and topics
- Establishment of a joint venture with an Indian partner
- Assistance in the selection of local senior executives
- Supporting with the project, from the planning to the implementation and Management of the ongoing business



In our offices in Delhi, Mumbai and Pune as well as in our offices in Chennai and Bangalore we provide the following consulting services in German and English language:

LEGAL ADVICE *

- Company Law
- Incorporation of subsidiaries, representative offices and branches
- Joint Ventures, M&A
- Due Diligence
- Mergers, splits, conversions
- Commercial, distribution and customs law
- Franchising
- Public-Private-Partnership
- Concessions and procurement law
- Industrial property rights: patents, trademarks, copyright, know-how and licenses
- Special economic zones, investment contracts
- Strategic Industries, Foreign Investment and Foreign exchange
- General and special contract and Commercial law for investments
- Competition and antitrust law
- Labour and immigration law
- Employee secondments
- Process and arbitration
- Business Criminal Law
- Liquidations and insolvency law
- Real estate and construction law, production sites (Greenfield / Brownfield), environmental law
- Mortgages and lien
- General and Special Administrative Law

TAX LAW, BANKING AND FINANCIAL SERVICES LAW *

Tax Planning / international tax law

- Tax-Indicated Project Design
- Advise on Tax structure / Optimisation of Corporate and Business Group structures
- Tax Due Diligence
- Tax advice on M&A transactions
- Transformation tax law

ONGOING TAX ADVISORY

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- Tax advice on financing
- Taxation of permanent establishment
- Assistance with tax audits
- Tax administration and tax law
- Transfer prices
- Tax advice on the development of sales structures and productions

BANKING AND FINANCIAL SERVICES LAW

- Banking Supervisory Law
- Financial leasing, structuring of leasing products including cross-border leasing
- Tax-based structuring of financial products
- International Trade Finance
- Insurance law

AUDIT *

- Statutory and voluntary audit of annual and consolidated financial statements of stock corporations and partnerships according to the Indian (HB I) or German law as well as in accordance with IFRS and US GAAP (HB II)
- Statutory and voluntary special audits
- Financial Due Diligence
- Company Reviews
- Support with the introduction of new accounting systems
- Conversion to international accounting standards (IFRS and US GAAP)

BUSINESS PROCESS OUTSOURCING

External accounting

- Regular Financial Accounting: Accounting and preparation of Financial statements as per Indian GAAP, payments, document management
- Payroll accounting: personnel management, tax and social security returns
- Preparation of annual financial statements according to international standards accounting standards
- Special balance sheets, interim balance sheet, consolidated financial statements
- Tax compliance

Internal accounting

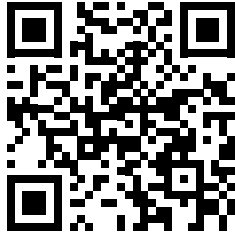
- Controlling and Management Information Systems
- Ongoing internal reporting, outsourcing of internal audit functions
- Budget planning and control, financial analysis

* Consulting Services are rendered by Rödl & Partner together with Indian professionals

About us

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STAY INFORMED

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