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Employment Reorganisation Roadmap

India

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Contents

1. Employee representation

1.1 What are the main forms of employee representation involved in restructurings?

A “workman” is a person employed in any industry to do manual, unskilled, skilled, technical, operational, clerical or supervisory work. Workmen can be represented by the following during the consultation process:

– trade union representatives (where a trade union is recognised), or

– a works committee composed of workmen and members of the employer’s management (in industrial undertakings with 100 or more workmen).

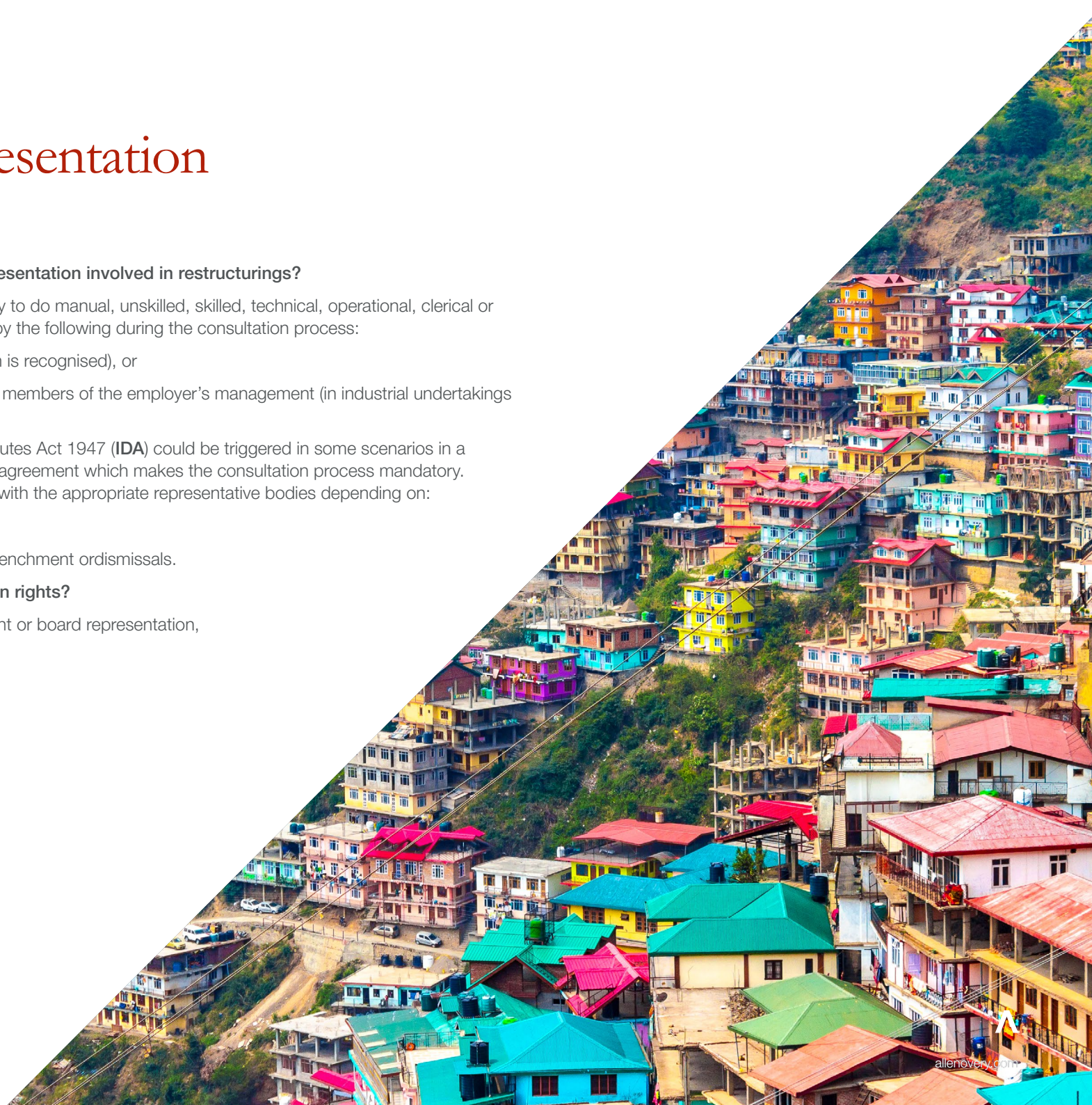
Consultation obligations under The Industrial Disputes Act 1947 (**IDA**) could be triggered in some scenarios in a restructuring process – for example, if there is an agreement which makes the consultation process mandatory. Such a process may also need to be undertaken with the appropriate representative bodies depending on:

– the nature of the restructuring exercise, and

– whether the restructuring is likely to result in retrenchment ordismissals.

1.2. Is there a system of employee participation rights?

Employees/workmen have no right to management or board representation, unless a collective agreement provides otherwise.



2. Process on business sales

2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

There is no law which provides for automatic transfer of employees. Individual employee consent would be required for transferring employment from the seller to the buyer as part of the business sale.

The IDA (which covers only workmen) does have an enabling provision on a transfer of the entire undertaking (ie including plant and machinery, employees etc). This applies when the buyer recognises past service and offers terms of service "as favourable" as existing terms. If these conditions are met, it could be argued that a workman's consent is not required to transfer employment to the buyer. However, there are conflicting judicial precedents on this issue: even if the business sale can be classified as a transfer of an undertaking under the IDA, the position on obtaining workmen's consent is contentious.

It is therefore advisable to obtain employees' consent (from both workmen and non-workmen) before transferring their employment to the buyer's entity.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

There is no automatic transfer of employees or workmen (see answer to **2.1**). Therefore, there is no specific test to determine which workmen or group of employees would transfer. This is at the discretion of the parties where employee consent is being obtained for the transfer.

That said, if the business sale can be classified as a transfer of undertaking under the IDA and the intention is to proceed without obtaining workmen's consent for the employment transfer (despite the ambiguous position), the employees who are principally employed in that undertaking would be transferred.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

There is a transfer of an undertaking under the IDA if an entire business moves as it is (ie including plant and machinery, employees etc) to new management (see previous answers).

Although the IDA has provisions on the transfer of an undertaking, it is silent on the requirement to obtain the consent of individual workmen to the transfer. There are conflicting court rulings on this. Employers are therefore advised to seek the consent of workmen to transfer their employment to the new employer. If the offer is accepted a workman will not be eligible for retrenchment compensation provided the following conditions are met:

– the new employer recognises the workman's continuity of employment, and

– the terms and conditions of service applicable to the workman after the transfer are no less favourable than those applicable to them immediately before the transfer.

If workmen refuse to transfer to the new employer, they would continue to be employed by the current employer. The employer may consider terminating the employment on grounds of redundancy. In such a case, the employer must observe certain notice and compensation requirements under the IDA. Please see **section 6 – Process on individual dismissals** for further information on retrenchment.

Non-workmen fall outside the scope of the IDA, and individual consent would need to be obtained for the transfer. If they refuse, their employment will continue and the employer will need to decide whether to terminate it on grounds of redundancy after following due process.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

There are no obligations to consult workmen and their representatives on the transfer of the business itself, unless specifically provided for in an agreement between the employer and the workmen, relevant works committee or trade union. However, individual employee consent would need to be obtained for the transfer of their employment (see previous answers).

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

– An employer could face civil and/or criminal liability (depending on the nature of the non-compliance) for contravening the notice requirements to terminate employee services under the IDA. Every director or management member responsible for the contravention faces civil or criminal liability, unless it can be proved that the contravention occurred without the knowledge or consent of that director or management member. Please see **section 5 – Process on collective dismissals** and **section 6 – Process on individual dismissals** for further information on penalties.

– If a prior agreement exists between management and representatives requiring notice or consultation before the business transfer, then a breach of the agreement could result in the court setting aside the transfer, awarding damages for breach and ensuring compliance with the consultation requirements as per the agreement.

– If employee consent to transfer employment is not obtained, courts may also reinstate workmen (with or without back pay) with the seller or order it to pay retrenchment compensation to the workmen.

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

There is no obligation to give notice to, or consult, employees or workmen and their representatives in relation to a direct share sale, unless this is provided for in any agreement with the relevant workmen, works committee or trade union.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to give notice to, or consult, employees or workmen and their representatives in relation to an indirect share sale, unless this is provided for in any agreement with the relevant workmen, works committee or trade union.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

There is no automatic transfer of employees or workmen in any of these scenarios (see **section 2 – Process on business sales**).

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

If an initial outsourcing or insourcing is likely to result in retrenchment, it will trigger an obligation to issue a notice for consultation (see **section 6 – Process on individual dismissals** for further information on retrenchment). This is an advance notice (of 21 to 42 days depending on the location) to be given to the workmen or trade union and the jurisdictional labour authorities.

The notice would need to be issued to workmen or the trade union and the concerned labour authorities would need to be copied. During this notice period, the workmen could raise a formal dispute (before labour courts or industrial tribunals) regarding the proposed outsourcing and insourcing.
Until such formal dispute is resolved, the outsourcing or insourcing cannot be implemented.

In the case of a change of supplier, no notice or consultation obligations are triggered.

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

There is no definition of collective dismissal under the IDA. However, special rules apply to dismissals resulting from:

– the closure of an undertaking – these rules depend on whether the closure is a Chapter V-A or Chapter V-B closure (see answer to **5.2**), or

– redundancies which arise for reasons other than a closure of establishment – in these cases, individual dismissal requirements and general rules on retrenchment (see **section 6 – Process on individual dismissals**) must be followed.

Note that the information provided is based on the IDA. While this is the most significant legislation in India relating to employment restructuring, there is specific state legislation which regulates dismissal procedure. The application of this legislation may vary from one state to another and may be contingent on the type of employment (for example, in some states it does not apply to management employees). Dismissal procedure under this legislation usually depends upon the duration of employment.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

Chapter V-A closure

The provisions in this chapter of the IDA apply to all undertakings, subject to certain exceptions (which are not relevant for the purposes of this report). The procedures applicable on collective dismissals resulting from the closure of an undertaking under this chapter are:

– The employer must serve the closure notice on the appropriate government 60 days prior to the intended date of closure.

– –Compensation is payable to workmen who have completed one year's continuous service (interpreted as 240 or more days of service).

The compensation must be calculated according to the number of completed years of service. There are certain exceptions which permit non-payment of the compensation, but these apply in very limited circumstances.

A "closure" for this purpose under the IDA refers to the permanent closure of a business, where an undertaking shuts down completely and the employer has no intention of reviving it.

Chapter V-B closure (applicable to factories, mines or plantations with generally 100 or more workmen)

The provisions in this chapter of the IDA apply mainly to undertakings in the manufacturing sector. However, this chapter does not apply to undertakings which have fewer than 100 workmen (or 300 in some locations) on average per working day. The procedures applicable on collective dismissals resulting from the closure of an undertaking under this chapter are:

– The employer must make an application for prior permission, at least 90 days before the effective date of the intended closure, to the appropriate government authorities, stating clearly the reasons for the closure. A copy of this application must also be served simultaneously on the representatives of the workmen in a prescribed manner.

– The government authorities, after making such enquiries as they think fit and after giving the employer, the workmen and persons interested in such closure a reasonable opportunity of being heard, may, by order and for reasons to be recorded in writing, grant or refuse such permission.

– If the government authorities do not communicate the order granting or refusing permission to the employer within 60 days from the date on which the application is made, permission is deemed to have been granted on the expiration of the 60 day period.

– The amount of compensation payable to the workmen on closure of an undertaking under this chapter must be calculated based on the number of years of service of the workmen concerned.

As for a Chapter V-A closure, a "closure" for this purpose under the IDA refers to the permanent closure of a business where an undertaking shuts down completely and the employer has no intention of reviving it. In respect of redundancies which arise for reasons other than a closure of establishment, individual dismissal requirements and general rules on retrenchment
(see **section 6 – Process on individual dismissals**) must be followed.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

Yes. Strict obligations apply where dismissals result from the closure of an undertaking (see answer to **5.2**).

In respect of redundancies which arise for reasons other than a closure of establishment, individual dismissal requirements and general rules on retrenchment must be followed (see further **section 6 – Process on individual dismissals**).

5.4. When are these obligations triggered?

In a Chapter V-A closure, a closure notice must be served on the government authorities prior to an intended closure. In a Chapter V-B closure, an application to obtain permission of the competent authorities must be made, and a notice served on the employee representatives, prior to an intended closure (please see previous answers for applicable timescales etc).

For obligations in respect of redundancies which arise for reasons other than a closure of establishment, please refer to individual dismissal requirements and general rules on retrenchment (see further **section 6 – Process on individual dismissals**).

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

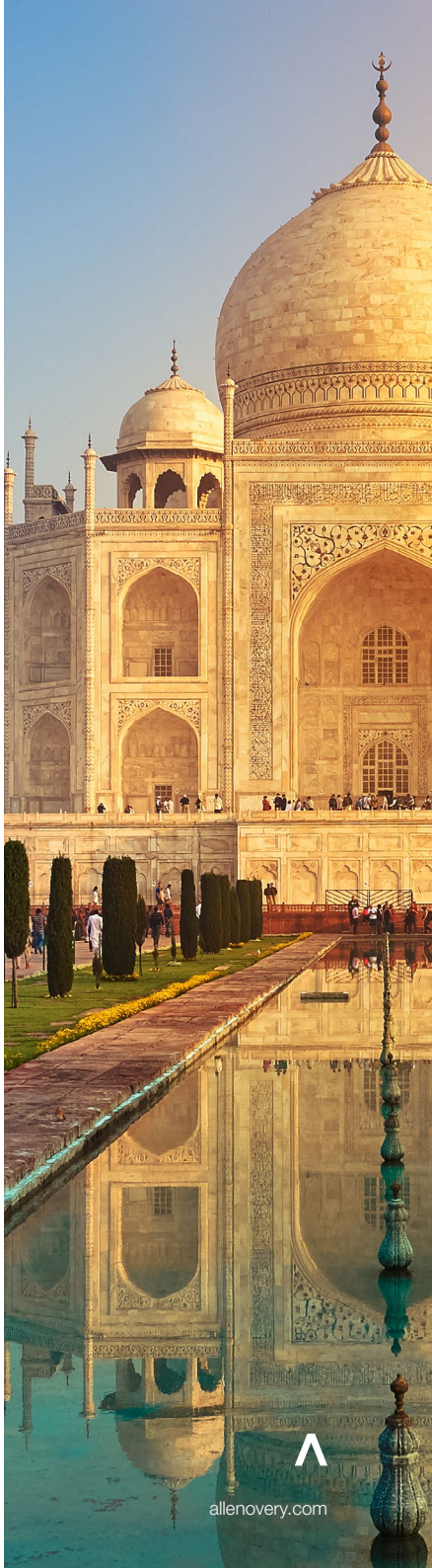
Chapter V-A closure

An employer that implements collective dismissals by closing down an undertaking in breach of the procedures in this chapter will be punishable with imprisonment for up to six months, or a fine of up to INR5,000, or both.

Chapter V-B closure

Where no application for permission for closure is made within the specified time period or where it has been refused, the closure of the undertaking will be deemed to be illegal from the date of closure and the workmen will be entitled to all the benefits under any applicable law as if the undertaking had not been closed down.

An employer that closes down an undertaking without applying for prior permission will be punishable with imprisonment for up to six months, or a fine of up to INR5,000, or both.



In addition, an employer that contravenes an order refusing permission to close down an undertaking will be punishable with imprisonment for up to one year, or a fine of up to INR5,000, or both. Where the contravention is a continuing one, a further fine of up to INR2,000 may be imposed for every day the contravention continues after the conviction.

Every director or management member who is responsible for the contravention of the provisions of the IDA faces civil or criminal liability, unless it can be proved that the contravention occurred without the knowledge or consent of that director/management member.

Please also refer to **section 6 – Process on individual dismissals**, for penalties for non-compliance in respect of other types of redundancies which arise for reasons other than a closure of establishment.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

There is no definition of collective dismissal under the IDA (see answer to **5.1**).

However:

– in the case of multiple dismissals under Chapter V-B (whether for closure or other reasons such as redundancy), there would be obligations to obtain permission of the competent authorities and also serve a notice on the employee representatives, and

– in the case of multiple dismissals under Chapter V-A (whether for closure or other reasons such as redundancy), there would be an obligation to notify the authorities.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

There is no duty on the employer to reach agreement with employee representatives.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

Definition of "retrenchment"

The IDA (under Section 2(oo)) defines retrenchment as: "the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include: (a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuating if the contract of employment between the employer and the workman concerned contains a stipulation in that regard; or (bb) termination of the service of the 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 regard; or (c) termination of the service of a workman on the ground of continued ill-health".

Minimum notice entitlement

Under the IDA, workmen with at least one year's continuous service are entitled to one month's written notice indicating the reasons for retrenchment (or payment in lieu of notice) on dismissal due to retrenchment or the closure of an undertaking.

The notice entitlement increases to three months' notice (or payment in lieu of notice) for workmen in industrial undertakings covered by Chapter V-B. Notice periods may be enhanced by employment contract. However, the notice entitlement of non-workmen is as specified in their employment contract and/or the employer's rules of service.[4] Non-workmen include:

– those employed mainly in managerial or administrative activities, or

– those employed in a supervisory capacity and earning more than INR10,000 a month.

The rights of non-workmen (who fall outside the scope of the IDA) are usually governed by the terms of their employment contract.

Note that the information provided is based on the IDA. While this is the most significant legislation in India relating to employment restructuring, there is specific state legislation which regulates dismissal procedure. The application of this legislation may vary from one state to another and may be contingent on the type of employment (for example, in some states it does not apply to management employees). Dismissal procedure under this legislation usually depends upon the duration of employment.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

When the dismissal process is triggered under Chapter V-A or V-B, employers should apply the "last in, first out" policy. A seniority list is drawn up and the most junior workmen are retrenched before the more senior ones in the relevant category. Departure from this policy by the employer would need to be supported by well-founded and documented reasons.

If an employer wants to engage employees in job positions that were previously subject to retrenchment, it must first offer these jobs to the retrenched workmen who filled these positions.

Workmen with at least one year's continuous service have the following retrenchment rights under the IDA:

Chapter V-A retrenchment

– one month's notice (or payment in lieu of notice) together with reasons for the retrenchment in writing

– retrenchment compensation at the rate of 15 days' salary for every completed year of service or part thereof in excess of six months, and

– notice in a prescribed manner to be served on the local/appropriate government authorities

Chapter V-B retrenchment

– three months' notice (or payment in lieu of notice) together with reasons for the retrenchment in writing

– prior permission of the appropriate government authorities before giving effect to the dismissal, and

– retrenchment compensation at the rate of 15 days' salary for every completed year of service or part thereof in excess of six months.

The dismissal of non-workmen must be implemented in accordance with the termination clause in their respective employment contracts.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

No special protection is applicable for dismissals implemented following or in connection with a business transfer. The same rules on serving notices and/or obtaining permission of the authorities under Chapter V-A or Chapter V-B (as applicable) would need to be followed for such dismissals.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

Please see previous answers. Workmen with at least one year's continuous service are entitled to severance pay (ie retrenchment compensation and/or notice pay) under the IDA. They may also be entitled to additional payments under other national legislation.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

Non-compliance with provisions pertaining to retrenchment of workmen could result in civil and/or criminal liability. Courts are also likely to set aside the termination and reinstate the workmen (potentially with back pay) if key procedures are not complied with (such as following the "last in, first out" rule, publishing a seniority list or obtaining the required approvals for Chapter V-B dismissals).

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

The IDA recognises members or office bearers of a registered trade union as "protected workmen". The IDA prohibits employers from:

– discharging protected workmen due to their involvement in trade union activities, or

– taking any action (such as dismissing or altering service conditions) against protected workmen when they are involved in an industrial dispute (ie a dispute between an employer and workmen, workmen and workmen or employer and employer).

Additionally, employees availing themselves of maternity leave and those availing themselves of sickness benefit under the Employees State Insurance Act are protected during their absence.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

The IDA lists certain "conditions of service" under Schedule IV (such as starting, altering or discontinuing shift working, withdrawal of customary concessions or privileges, introduction of new rules of discipline etc). To unilaterally change such conditions of service, the employer would need to issue the workmen with an advance notice of change (21 to 42 days depending on the location) with a copy to the labour authorities concerned. In some locations, a collective notice to the affected workmen (posted on the notice board) would suffice. In others, individual notices should be issued in specific places. The rules under the IDA in some states also require a copy of the notice to be served on the secretary or principal office of a trade union.

If no formal dispute is raised within the notice period, the proposed change can be implemented unilaterally. However, if a formal dispute is raised, the change cannot be implemented until the dispute is resolved.

For changes to contractual terms, employee consent would be required.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

Consultation/notice obligations on an individual and/or collective basis may arise depending on the nature of the changes (please see previous answer for further information).

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

No additional restrictions apply if changes are proposed in connection with or following a business transfer.

7.4. What are the penalties for non-compliance with these procedures?

If applicable obligations on consultation/notice are not complied with when changing conditions of service listed in Schedule IV to the IDA, the courts could set aside the change implemented by the employer and/or impose a nominal penalty.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

The IDA provides for layoff (ie temporary suspension of work) of workmen ifthe employer fails, refuses or is unable to provide employment due to natural calamity, shortage of raw material, accumulation of stock, breakdown of machinery etc.

In the case of industrial undertakings covered by Chapter V-A, the employer should pay compensation equal to 50% of the total of basic wages and dearness (ie inflation) allowance for the first 45 days to workmen who have completed one year of continuous service. After the first 45 days, the employer need not pay compensation (if there is an agreement to that effect with the workmen) and may opt to retrench the workmen.

However, in the case of industrial undertakings covered by Chapter V-B, prior permission of the appropriate government is also required for layoff.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The sale of an insolvent business could be structured as a transfer of an undertaking (with the aim of rescuing the undertaking) or a closure (with the aim of permanently shutting down the undertaking).

Where the sale amounts to a transfer of an undertaking, the same rules apply as for a transfer of a solvent business. There is no obligation to consult workmen or their representatives before transferring the business, unless specifically required in an agreement between the employer and the workmen, relevant works committee or trade union. Also, there is no statutory provision for the automatic transfer of workmen with the business, so their consent is required in order to transfer them with the business. If they do not consent, the employer must observe the retrenchment requirements under the IDA. (Please see **section 2 – Process on business sales** and **section 6 – Process on individual dismissals** for further information on notice and other retrenchment rights.)

Where the sale gives rise to a closure, there are no obligations to consult workmen or their representatives, unless specifically required in an agreement between the employer and the workmen, relevant works committee or trade union. This applies to both Chapter V-A and V-B closures. However, for Chapter V-A closures, the employer must serve notice on the government authorities and pay compensation to the workmen affected. Additionally, for Chapter V-B closures, the employer must apply to the appropriate government authorities seeking approval of the closure. A copy of the application must be served on representatives of the workmen. The approval of the government is a condition precedent to the closure being finalised under Chapter V-B. (Please see **section 5 – Process on collective dismissals** for further information on the procedure for closure.)

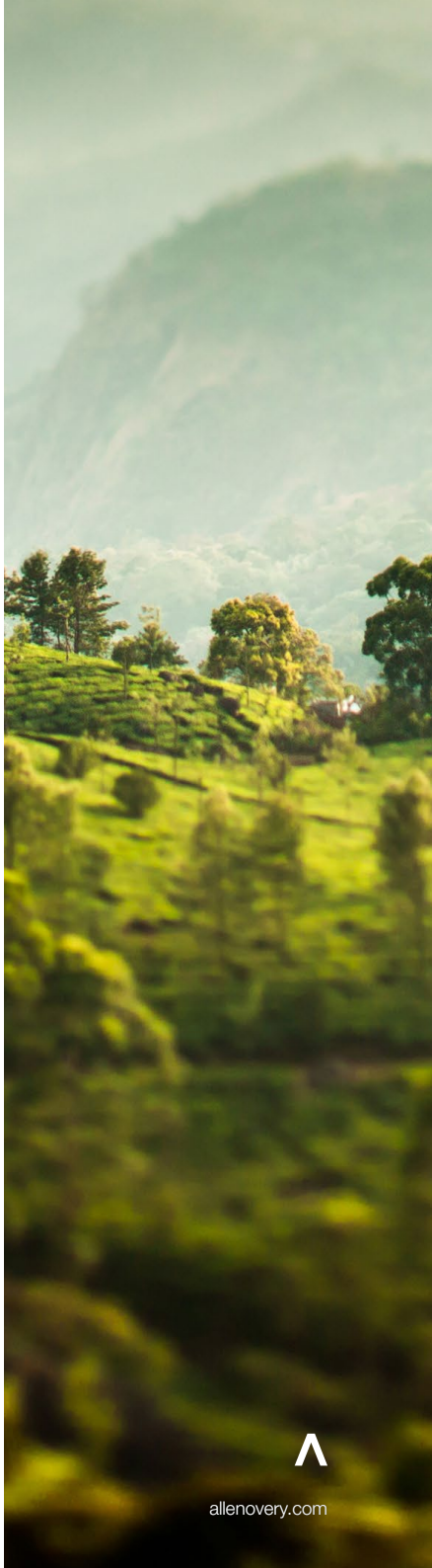
8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

On a sale structured as a transfer of an undertaking, employees/workmen and liabilities relating to them are not automatically transferred by law. The consent of employees/workmen is required in order to transfer them with the business. The conditions associated with the liabilities are subject to negotiations between the parties. The buyer will usually inherit the liabilities, but the conditions on which it does so will depend on the business sale agreement.

Where the sale gives rise to a closure, the liquidator (person appointed to carry out the closure) will settle workmen/employee liabilities from the assets of the insolvent undertaking. Therefore, the liabilities do not get inherited by any third party.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

The same obligations apply as for collective dismissals in a solvent business (see **section 5 – Process on collective dismissals** and **section 6 – Process on individual dismissals**).



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