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Top 10 Strategies for Employers in India to Mitigate the Risk of Discrimination Claims

Compliance and Ethics

Diversity and Inclusion

Law Department Management

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Key highlights:

- Indian laws have set protections for certain categories of employees against discrimination in the workplace.
- Employers should have or put in place redressal mechanisms to address discrimination claims and train their personnel.
- Employers should also ensure they have a defensible process for the collection and processing of personal information, including sensitive data.

In the era of increasing diversity, workplaces have begun to evolve to have a more inclusive and diverse workforce. It has become crucial that employers conduct their businesses in a manner devoid of any bias, prejudice, and discrimination. However, despite the well-reasoned intentions of an employer, situations arise in which affected employees claim that they have been unfairly treated and discriminated based on their caste, religion, gender, sex, disabilities, or health.

In this article, we list ten good practices that employers in India may adopt to mitigate risks of discrimination-based claims arising out of incidents in the workplace, particularly when it concerns certain classes of employees, such as women, persons with disabilities, transgender persons, employees from minority communities, and HIV+ persons.

1. Have robust anti-discrimination policies in place

In India, companies' anti-discrimination policies are often vague and general in that they do not adequately demonstrate companies' vigilance in ensuring equality and equal opportunities in the workplace. Notably, there are laws in India that have been enacted to specifically secure the interest of protected classes of employees through the formulation of detailed policies.

As per the Rights of Persons with Disabilities Act, 2016 (RPDA), the equal opportunity policy framed by the employer is required to be detailed to expressly state the kind of facilities and amenities provided to persons with disabilities by the company, the provision of assistive devices and barrier-free accessibility to the employees who classify as persons with disability, a list of posts that would be suitable for persons with disabilities in the establishment, and the manner adopted by employers to select persons with disabilities for various posts, among other things.

Similarly, as per the Transgender Persons (Protection of Rights) Act, 2019 (the "TPA") and rules thereto, the employer must formulate a detailed equal opportunity policy which addresses, *inter alia*, the provisions made by the company to ensure infrastructural facilities, the safety and security of the transgender persons, hygiene amenities, and steps taken by the employer to protect the gender identity of the transgender persons.

Effective equal opportunity and anti-discrimination policies entail specificity. These would involve setting broad goals by the employer towards diversity and inclusion (with implementation of the policy by the employees) and the actionable items against each of these goals, such as ensuring effective implementation through periodic workshops. Further, such policies should be applied uniformly across the workforce inter alia by identifying minor, moderate, and grave deviations of the policies and possible administrative or disciplinary actions applicable to each of the deviation categories.

2. Have a clear grievance redressal mechanism

Whether as part of the equal opportunity and anti-discrimination policies or otherwise, the employer should formulate a detailed grievance redressal mechanism that clearly lays down the types of complaints that the policy addresses, the modes of filing a complaint, and the procedure that would be implemented to ensure grievances are addressed.

The employer should encourage its employees to actively report instances of discrimination, for example through regular communications. The company's policy should also lay down the ways in which the complainant's identity would be kept confidential, the members that would constitute the grievance redressal committee, and a strict timeframe in which the employer would resolve the grievances.

To some extent, the statutory regime identifies the necessity for such grievance redressal mechanisms. The TPA and the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (the "HIV Act") requires that establishments (to which these laws become applicable) appoint a complaint officer to deal with grievances arising out of violation of their provisions.

Employers are also mandated to constitute an internal committee to look into complaints of sexual harassment filed by women as per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redress) Act, 2013. Formulating a clear and detailed grievance redressal mechanism

would instill confidence in the employees and would provide them with an avenue towards getting their claims addressed.

In our experience, because the above-mentioned grievance redressal mechanisms are internal to an organization, those mechanisms typically involve employees who may not always be equipped to investigate grievances and complaints. It is, therefore, advisable to prepare bluebooks for such committees, through external counsel where appropriate, that would enable them to deal with complex practical situations without having to meet undesired consequences (in situations where an incident is reported but the complainant does not wish to cooperate any further with the investigation).

3. Maintain pay parity

We have observed that matters pertaining to compensation and other benefits provided to employees give rise to discrimination claims. In several instances, this emanates from the fact that remuneration and other compensation aspects are individually negotiated prior to onboarding, which may result in pay disparity within the same role.

It is mandated by law that employers do not discriminate between male and female employees in terms of remuneration where they perform the same work or work of a similar nature. Further, in the case of Rai Bahadur Diwan Badri Das v Industrial Tribunal, Punjab [AIR 1963 SC 630], the Supreme Court of India observed as follows:

> "*It is well known that both industrial legislation and industrial adjudication seek to attain similarity or uniformity of terms of service in the same industry existing in the same region, as far as it may be practicable or possible, without doing injustice or harm to any particular employer or a group of employers*."
>
> Supreme Court of India

Seen in this context, employers should be mindful of pay disparities within the same role that may have the potential of claims of discrimination on other grounds. For instance, an individual who may have joined the organization on an earlier date compared to a new entrant and has an overall lower compensation may allege that this disparity is actually caused by virtue of the employee's caste. Employers should keep records of compensation and benefits across grades, and if there are differences in such benefits and compensation among employees performing similar duties and responsibilities, such differences should objectively be accredited to reasons such as performance.

4. Maintain proper records on performance

In our experience, several claims of discrimination arise after termination of employment effectuated by the employer for reasons of inadequate performance. Often, feedback on performance is either not communicated at all or conveyed through informal or verbal processes that do not work well for employers when such claims are to be addressed before an appropriate forum.

It is critical that employers evaluate the work of their employees in a regular manner and maintain

written records of the same. Employers should also share these evaluation reports with their employees. In cases where there are performance issues, employers should engage in constructive feedback to direct and assist the employee in improving their performance at work. This works towards mitigating, at the very least, the risk of genuine claims that arise from a situation of miscommunication or lack of communication about the reason for parting ways with the employee.

5. Conduct awareness sessions for managerial workforce

There are misconceptions and a general lack of awareness regarding factual understanding and issues faced by transgender persons, persons with human immunodeficiency virus, and persons with disabilities. Reporting managers and functional heads should be made aware of, trained in, and sensitized to these aspects to avoid any form of casual or serious discrimination in the workplace.

Managerial personnel should be sensitized and trained on how to conduct their business while respecting differences as they interact with employees daily. Managers should also be sensitized towards conducting a fair recruitment process, which balances the merit of an employee and representation of employees from disadvantaged categories. This form of training could curb unintentional or subconscious discrimination, potentially reducing claims of unfair treatment in matters relating to promotions and assignment of responsibilities.

6. Seek expert opinions where appropriate

We have seen multiple situations where, on account of lack of information and training, reporting managers or human resources personnel find themselves unable to understand how best to address a grievance from a disadvantaged or vulnerable section of the workforce.

This happens, for instance, when employees with disabilities request for reasonable accommodation at the workplace. In such instances, employers should actively seek an external opinion from the relevant professional before responding to the request or grievance. In the above example, this could be a Diversity, Equity and Inclusion (DEI) expert having experience in dealing with workplace-related matters.

7. Follow a careful process for the collection and use of personal data

Information and documentation relating to the medical records, the physical or mental health condition, and the sexual orientation of an individual would be considered as “sensitive personal data or information” under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

While collection, storage and similar actions pertaining to these protected characteristics are not prohibited under the law, employers should be mindful of their compliance with applicable provisions around data protection. For instance, per the rules mentioned above, employers should obtain the person’s consent, through appropriate policy documentation or otherwise, before the collection of the protected information, and should further ensure that the person has reasonable knowledge about collection of the information, its purpose, and the intended recipients of the information, to enable the person to review the information or revisit consent at any point of time.

Disclosure or transfer of the information provider’s sensitive personal data or information by the employer to a third party would similarly require prior (written) permission by the person. At a broader

level, employers must have a privacy policy accessible to the providers of sensitive personal data or information and make it available on their website.

8. Put together an exit strategy for terminations

At a time when employment terminations across several industries are being widely reported in India and elsewhere, employers should have a well thought-out exit plan that is cognizant of compliance with local rules, including any exit-related restrictions in respect of a protected category of employees. For instance, as per the Maternity Benefit Act, 1961, an employer cannot terminate the services of a woman on maternity leave, irrespective of whether the termination is linked to her maternity leave.

Putting together an exit strategy calls for awareness and tact.
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Further, employers should ensure that their exit plan does not coincide with an ongoing grievance redressal or disciplinary proceeding involving an employee whose services have been identified to be redundant as per the exit plan. In cases where the termination of employees is proposed to be effectuated in such a manner that only a section of the workforce from a department or business function is impacted, employers should ensure that they do not singularly target employees belonging to vulnerable, protected, or disadvantaged classes, but instead effectuate workforce reduction measures in an objective manner.

9. Build suitable social media strategies

Employees, including former employees, may voice their grievances on employment matters (including exit) on social media platforms, which has the potential of causing reputational harm. Employers should have a social media strategy in place and not engage in public disputes. If public statements are deemed necessary, the same should be limited in terms of broadly clarifying that the process undertaken in respect of the concerned administrative decision is in accordance with applicable law and contractual stipulations. Where appropriate, employers may consider issuing internal communications cautioning employees against responding to any public outburst from an individual.

10. Handle notices from labor authorities with care and composure

In instances in which labor authorities get involved on account of a discrimination claim and send a notice seeking clarification from the establishment on an administration decision, the employer may consider seeking an extension of timeline from the labor authorities instead of giving any knee-jerk reactions. The employer should use this extension to collate material, records, and communications with the concerned employee that demonstrate lack of discrimination.

Takeaways for a path forward

It is important to remember that, even though the employers may have the best intentions while implementing an administrative action vis-à-vis their workforce, their actions may still be construed as discriminatory or prejudicial against an employee or a particular category of employees, if the implementation process falls short of the required degree of care and thoughtfulness. Therefore, it is crucial that employers:

- Take affirmative steps to set up adequate internal policies and processes in respect of workforce grievances.
- Possess the required paper trail to demonstrate that any decision with respect to performance or conduct of employees or streamlining of the workforce is carried out in an objective manner.
- Avoid taking an impulsive approach while addressing any claims or actions by an employee on the ground of purported discrimination or bias.

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Anshul Prakash is a partner at Khaitan & Co and leads the employment, labor, and benefits practice group of the firm. Anshul and the practice group under his leadership have won several awards and recognitions over the years being ranked Tier-1 across league tables.

Prakash exclusively advises several prominent domestic and international clients on full suite of contentious and noncontentious employment law and related matters concerning workforce management, social security, industrial relations and trade union strategy, transition due to business transfers, workplace harassment and

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Prakash also leads the firm's thought leadership initiative on advocacy and knowledge sharing in employment and labor law space, and actively shares insights on evolving jurisprudence in the employment and labor law space in several industry publications through numerous articles over the years, print media, and public speaking events organized by industry bodies. Some recent notable literary contributions include contribution to the India chapter of the *International Comparative Legal Guide* to: *Employment & Labour Law* (2020, 2021, and 2022) published by Global Legal Group, Chambers Global Practice Guides Employment 2022 (Asia Pacific), and contribution to the report on Future of Work as part of collaboration between International Bar Association and International Labour Organisation (2018-2019).

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Deeksha Malik is a senior associate in the employment, labor, and benefits practice group and focuses on a range of matters from employment terms and employee benefits to wage restructuring and workforce redundancy. In particular, she works extensively in the area of disciplinary issues, prevention of sexual harassment, and diversity and inclusion. She has also been active on the impact assessment exercises conducted by the practice group in relation to upcoming labor codes. Her major contribution to the practice group also comes in the form of her advocacy, knowledge-sharing and pro bono endeavors. She frequently makes representations to the central and the state governments on labor reforms, including the implementation framework under the labor codes. On the knowledge-sharing front, she has over 40 articles to her credit (co-authored with other colleagues in the practice group) published by Wolters Kluwer, International Bar Association, BW People, Chambers and Partners, People Matters, Human Capital, etc.

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Sana Sarosh is an Associate with the Employment Labour and Benefits practice group at Khaitan & Co. As such, she advises on various contentious and non-contentious employment matters, including compliances and processes for closure and restructuring of operations, and drafting / review of employment agreements and human resources policies. Sana has worked extensively on exit related strategies and compliances in respect of employees across the board including employee exits emanating from role redundancies and

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