Hiring Expatriates In India - What You Must Know!

Introduction

The opening of the Indian economy is a key contributor to its growth and success. Many foreign companies have established their operations either in the form of wholly-owned subsidiaries or JVs with Indian companies. The large skilful workforce has also played a strong role in attracting foreign corporations to India. However, in certain sectors, foreign companies prefer to send their expatriate employees for limited periods, largely to kick start and manage in the initial years. During the period of assignment of an expatriate, the company[1] in India is required to provide such individuals certain benefits under Indian laws analogous to those provided to the Indian employees. As with any country, prior to sending an expatriate to India, certain immigration requirements too have to be fulfilled.

This newsletter is divided into two parts. The first part discusses about immigration and the necessary visa to work in India. The second part focuses on the mandatory benefits that an Indian establishment must provide to **all** its employees, even expatriates.

1. Immigration

Depending on the nature of the Indian assignment, a foreign citizen can apply for either a *business* or an *employment* visa. Expatriates coming for employment will have to obtain an employment visa. The Indian embassy grants employment visas only to highly skilled/qualified individuals and such an expatriate must also draw a salary in excess of USD 25,000[2] which may include allowances paid in cash and perquisites which are included for the purpose of calculating the income-tax on the total salary.

Prior to sending an expatriate, the company must assess the approximate time frame for completion of the assignment. The Indian embassy/consulates have strict guidelines on the duration for which employments visas are granted which depends on the nature of work that is to be carried out by the expatriate. In case the expatriate is not **(a)** seeking employment in the software or information technology enabled sector in India[3] or **(b)** coming to India on a bilateral agreement between his government and the government of India, then he shall usually be granted a multiple entry visa for a maximum of two years or for the period of assignment, whichever is less. Upon arrival in India, the foreigner is required to register with the local Foreigners Regional Registration Officer (**"FRRO"**) within 14 days.

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[1] The words *company*, *employer* and *establishment* have been used interchangeably in the newsletter

[2] Please see FAQs relating to work related visas issued by India (*http://mha.nic.in/pdfs/work_visa_faq.pdf- visited on February 20, 2012*)

[3] A foreigner seeking employment in the IT sector can be granted an employment visa for either the duration of the assignment or three years, whichever is less

It is important to note that the Indian embassy/consulate may exercise its discretion and grant an employment visa to a foreign national falling under any category for a one year period, to be renewed annually by applying to the local FRRO.

Apart from employment, expatriates can come to India to purchase or sell industrial or commercial products, attend board or general meetings, technical meetings or discussions, recruit manpower, to establish and/or explore the possibility of establishing an industrial/business venture, participate in an exhibition or trade or business fairs, to transact business with Indian suppliers/potential Indian suppliers and/or to monitor the progress of the work, conduct and develop business in connection with a project in India. For such purposes, a business visa for a period of five years or a shorter duration with a multiple entry facility is granted. Depending on the nature of the business, the Indian embassy/consulate sometimes attaches a stay stipulation of six months for each visit. If no stay stipulation is provided, then the expatriate is required to register with the local FRRO within 14 days of entering India.

2. Benefits under the Indian social security system

While benefits to be provided to an expat may involve around various things, we have discussed only the key benefits under two legislations: **(a)** The Employees' Provident Funds and Miscellaneous Provision Act, 1952 (**"EPF Act"**), and **(b)** The Maternity Benefit Act, 1961 (**"Maternity Act"**).

2.1 Employees Provident Fund

This is a social benefit provided to employees whereby a fixed contribution is made by both the employer and the employees in a fund or trust. The EPF Act regulates the contributions made by employer and employee under the Employees' Provident Fund Scheme, 1952 (**"EPF Scheme"**). The provisions of the EPF Act are applicable to **(a)** every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and **(b)** to any other establishment employing twenty or more persons or class of such establishment as may be notified by the Central government in the Official Gazzette. An expatriate working with such an organization is required to become a member of the EPF and, along with the employer, is required to make payment for the contribution towards his EPF.

Membership: As per the EPF Scheme every international worker (expatriate), except an excluded employee is eligible and is required to become a member of EPF. Excluded employees are international workers who contribute to the social security schemes in their country of residence or origin and with whom India has entered into a Social Security Agreement (**"SSA"**) on reciprocity basis, enjoying the status of detached worker(s) for the period and terms as specified in the SSA. This means that in case of countries with which India has not executed a SSA,[4] international workers from such countries will not qualify as "excluded employees" and will be required to become members of the EPF.

[4]At present, India has entered into a SSA with Belgium, Germany, Switzerland, Luxembourg, France, Denmark, Republic of South Korea and Netherlands

<u>Contribution</u>: The law requires both the employer and the expatriate to contribute to the PF at the rate of 12% of the basic wages, dearness allowance including cash value of any food concession and retaining allowance.[5] In certain cases, it has been seen that organizations that are not required to register with the EPF voluntarily create trusts and contribute to PF for all its employees. In case such organizations have expatriate employees, then they too must contribute for such expatriates (*that are not covered under a SSA*) at the rate mentioned above.

<u>Penalty:</u> It is important to bear in mind that if the employer purposefully does not contribute or obstruct payment of contribution, then such employer can be imprisoned for a period of up to one year or required to pay a fine of about US$ 100 or both. If the employer continues not to contribute to the EPF even after conviction, then such an employer will for every subsequent failure to contribute, be punished with imprisonment which may extend to five years but at least for two years with a fine of INR 25,000. Where the defaulting employer is a company, then the person responsible for making such payment will be held liable and punished if he purposefully fails to contribute.

<u>Withdrawal of total contribution (includes international worker)</u>: The most crucial issue related to PF is the withdrawal of the contribution when the expatriates leave the country. However, under the EPF Scheme an expatriate, who is not covered under a SSA, can only withdraw such an amount on **(a)** retirement, at any time after he turns 58, or **(b)** retirement on account of permanent and total incapacity to work due to a physical or mental infirmity. On completion of 58 years of age, the total amount accumulated is credited to the international workers' bank account in India.[6] In other words, in order to receive the total accumulated amount it is mandatory for an international worker to maintain the Indian bank account even after he departs.

On the other hand, an excluded employee may withdraw the total amount standing to his credit in the manner laid down in the SSA. For instance, the SSA between India and South Korea permits early withdrawal subject to fulfilment of prescribed conditions, as applicable to Indian nationals, i.e. withdrawal at retiring at 55 years or due to permanent and total incapacity to work or on migrating from India. The French SSA does not provide for a withdrawal provision on migrating from India, but its "*equality in treatment*" clause does allow the expatriates to withdraw funds prior to leaving India.[7] However, the SSA signed with France only provides benefits to those expatriates who are registered with Centre of European and International Liaisons for Social Security. Due to this clause, many French expatriates in India are still required to contribute to the EPF as the private institution to which they contribute in France is not recognized as a competent agency under the SSA.

The withdrawal clause in the EPF Scheme for the excluded employees is a huge concern as their social security contributions get locked for a long period. However, it is important to note that there are provisions in the EPF Scheme that allow for the contracting

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[5] An allowance payable for the time being to an employee of a factory/establishment during any period in which the establishment is not working, for retaining his services

[6] Please see paragraph 72(3) of the EPF Scheme

[7] A combined reading of the *equality of treatment* clause[7] and paragraph 69(1)(c) of the Scheme allows the *excluded employees* to withdraw funds immediately prior to migration from India for permanent settlement abroad

parties to specify other grounds for withdrawal of funds.[8] This means that more grounds for withdrawal can be added in the future, which leave a possibility of a change of parameters for withdrawal of funds so that the money contributed to the EPF may be withdrawn earlier by expatriates, who at present, are not covered under the respective SSAs.

2.2 Maternity Benefit

The other crucial benefit available is the maternity leave and benefits under the Maternity Benefit Act, 1961 (**"Maternity Act"**) for the women expats. The Maternity Act applies to every organization - factory, mine, plantation - and to every shop or establishment in which ten or more persons are employed or were employed on any day of the preceding twelve months.

Benefits: Establishments are required to provide maternity benefits to the female employees who have worked for a minimum of eighty days in the twelve months immediately preceding the expected delivery. This includes women who are indirect employees. The maximum period for which any woman is entitled to benefits is twelve weeks of which six weeks should precede the date of the expected delivery. Further, during the leave period, the employee is entitled to payment of wages at the rate of average daily wage for the period of the actual absence. The employer must also provide for pre-natal confinement and post-natal care free of charge or provide for a one-time medical bonus of INR 2,500.[9]

Further, in case of miscarriage or medical termination of pregnancy, the employee is entitled to leave of six weeks with wages which commences following the day of miscarriage or termination of pregnancy. Upon return to work after delivery, the employer is required to provide such employees with two breaks of prescribed duration (*this has not been defined under the Maternity Act*) during the course of daily work for nursing the child until the child attains the age of fifteen months.

The foregoing benefits under the Maternity Act are also to be provided to foreign employees who are working in India with an establishment to which the Maternity Act applies. Failure to provide these benefits can lead to the employer being punished with a minimum imprisonment of three months which may extend to one year and with a one-time fine of up to US$ 40[10] but which may extend to INR 5,000.[11]

Conclusion

SSAs relating to expatriates have been a popular topic in recent years. The SSAs are beneficial, but in many cases (*for instance, the SSA with France*) they do not appear to benefit the majority of expatriates.. Therefore, prior to sending an employee to India, organizations must confirm with the social security authorities in their respective countries whether their employee will be considered as *excluded employees* under the applicable SSA. This is important as else the

[8] Please see paragraph 83(6) of the Scheme which substitutes paragraph 69. See the new paragraph 69(4)
[9] Please see section 8 of the Maternity Act
[10] US$ 40
[11] Please see section 21 of the Maternity Act

cost of sending an expatriate for employment to an Indian company increases by 24% (*i.e. 12% contribution to be made by the employer as well as employee*). Coupled with the cost of contributing towards the social security for such employees under the laws of their home country, hiring an expatriate would become increasingly prohibitive unless social security regulations evolve progressively.

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