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TRILEGAL

Discussion Paper On

Streamlining Multi-State Labour Compliances and Future of Work

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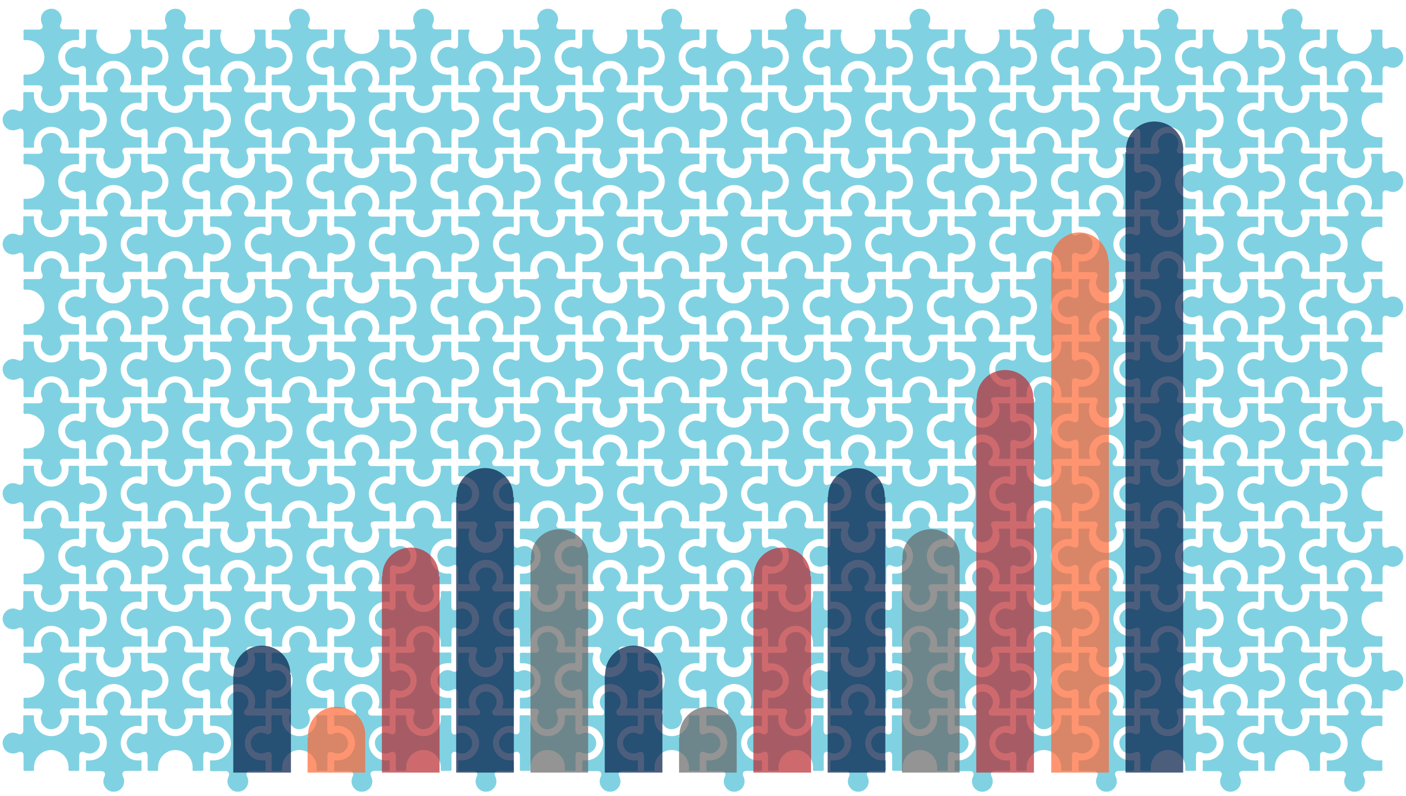

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Preface

The Indian Information Technology and Business Process Management (IT-BPM) industry is one of the largest employment providers in the country. The industry provides employment to nearly 4.5 million people directly and over 10 million people indirectly. The export focus industry operates on a 24*7*365 model to serve its global customers. The agility and flexibility to customize its offerings to the world has been the success mantra for the growth and development of the USD 194 billion[1] industry. The industry is also providing mission critical services to several other industries such as banking, healthcare, insurance etc. and has been given a status of 'essential services' by various state governments in India.

The evolving nature of its services and business requirements including the service delivery models makes this industry quite unique from the other sectors of the economy. For instance, unlike in the case of a manufacturing unit, where majority of the workforce is likely to work and operate from the unit itself, IT employees could be deployed anywhere in the country or other geographies to serve their clients. Similarly, even within the services segment, wherein majority of the services companies such as banks, hospitality, etc. have B2C (business-to-consumer) focus, the majority of the work carried by IT employers is focused on B2B (business-to-business) and works as per the requirements of their clients.

Today, one key challenge which is being faced by the IT establishments specifically those which operate in more than one state is regarding variations in state-specific shops and establishments **(S&E)** laws which govern the working conditions of the workforce employed by them. The S&E laws regulate working conditions related to payment of wages, working hours, health, and safety benefits, opening, and closing hours, leave provisions etc. Such laws are enacted by each state to regulate the working conditions of employees in S&Es that operate within the respective state. However, such provisions may differ from state-to-state. IT establishments are required to seek registration under S&E laws in every state in which they operate and ensure compliance with the provisions of the law.

The variations in working conditions in state-specific S&E laws often create challenges for the employers to adopt uniform working conditions for their employees. The central government in the past attempted to address this challenge by introducing the Model Shops & Establishments (Regulation of Employment and Conditions of Service) Bill in 2016 in consultation with the state governments. The bill was aimed at bringing in uniformity in the provisions of the S&E laws across states/UTs and helping employers adopt uniform HR and leave policies across all establishments in various states and UTs. However, very few states till date have adopted or amended their state S&E law in line with the provisions of Model S&E Bill.

Meanwhile, the central government was parallelly working towards implementing the recommendations of the Second National labour Commission Report, which had proposed rationalizing and simplifying the central labour legislations into four labour codes i.e., Industrial Relations, Wages, Social Security, Occupational Safety, Health and Working Conditions. In line with the recommendations, the central government in 2019 passed the Code on Wages, 2019, which was followed with the passage of the remaining three labour codes in 2020 i.e., the Code on Social Security, 2020, the Industrial Relations Code, 2020 and the Code on Occupational, Safety, Health and Working Conditions, 2020 **(OSH Code)**. Collectively, 29 central labour legislations will be repealed, and their provisions would be consolidated into these four labour Codes. Like in the case of the Model S&E Bill, the four labour codes are aimed at bringing in uniformity as well as reducing the compliance burden on employers.

While the central government is yet to notify the implementation date of the labour codes, it is important for IT employers to assess the impact of these reforms from an operational and compliance perspective, especially due to the fact that the codes for the first time, also contain provisions which so far were governed only by the state S&E laws. For instance, provisions of annual leaves (which are provided for under the S&E laws) can also now be seen under the OSH Code. Similarly, there now exists overlapping provisions with regard to health and safety conditions, accumulation of leave, working hours etc. in both central and state laws.

Labour codes now contain a majority of the provisions that can be found under state-specific S&E laws. Given the significant overlap, an interesting question which has started to emerge and perhaps, needs to be examined is whether there is need to have state-specific S&E laws since the employers would anyway be obligated under the central laws (when they come into effect) to ensure compliance with those provisions.

This question is all the more important due to the fact that majority of the companies in the IT sector are also considering adopting hybrid working model, wherein an employee could be working from a state which could be a different from the place of employment. Therefore, a question may arise, under which law, the working conditions of such employees will get governed.

This consulting paper is an attempt to discuss and seek industry suggestions mainly around two aspects i.e., '*Challenges faced by multi-state establishments with varying state labour laws'* and *'The 'future of work': Regulating remote work and provision of employment benefits'* and what could be the potential way forward to address these emerging concerns.

This paper has been led by my colleague Deepak Arora and developed with the support of our knowledge partner Trilegal, led by Swarnima (Partner – Labour and Employment) and her colleagues Amulya Chinmaye and Manisha Munda. We look forward to the discussions with industry, government, and subject matter experts on this. Do share feedback at policy@nasscom.in

Ashish Agarwal | NASSCOM
Vice President and Head of Public Policy

Introduction

The new labour codes have consolidated 29 central labour laws into 4 codes, i.e., Code on Social Security 2020, Occupational Safety, Health and Working Conditions Code 2020, Industrial Relations Code 2020, and Code on Wages 2019, taking a step towards uniformity. However, companies having offices across India **(multi-state establishments)** continue to face administrative and compliance challenges due to the varying employer-obligations and employee-benefits under state labour laws. These concerns will only increase with the information technology **(IT)** and IT-enabled services **(ITeS)** sector's adoption of different remote working models. So there is, a pressing need to closely assess:

- the issues that multi-state establishments are struggling with, and identify ways to streamline state-specific labour compliances; and

- whether the existing labour laws are prepared to regulate the emerging flexible working models or whether a new law is needed.

With an aim to further the objective of 'ease of doing business' in India, this paper aims to deliberate on these issues and ascertain avenues for resolution, while being mindful of the equilibrium between the central and state governments' legislative powers, and labour welfare.

Issues

1. Challenges faced by multi-state establishments with varying state labour laws

The working conditions in IT/ITeS establishments are governed by state-specific shops and establishment **(S&E)** laws. Variations in entitlements under S&E laws (such as leave, working hours, holidays, etc.) have posed considerable challenges for multi-state employers - both, when administering benefits and when handling inter-state employee-transfers. The Union Cabinet approved a model S&E Bill[2] in 2016 with the purpose of guiding state governments to standardize employment benefits under S&E Laws. However, this has not been successfully implemented so far. A few companies have identified practical workarounds to iron out the inconsistencies, such as providing harmonized benefits that comply with the most beneficial entitlement under S&E laws applicable across their office locations. Needless to say, such workarounds are associated with a greater employment cost.

Furthermore, the upcoming labour codes are poised to create an additional element of conflict, resulting in more irregularities in compliance. For instance, under the labour codes, workers can carry forward up to 30 days' annual leave and even encash some unused leaves annually. This is inconsistent with carry forward entitlements under S&E laws of some states (45 days in Karnataka and Maharashtra, and 60 days in Telangana). Also, in most states, S&E laws contemplate encashment only at the time of exit. Chapter 1 of this paper sets out other examples of such inconsistencies.

The apparent and impending conflict between S&E laws and the central labour codes will make it difficult for employers to assess their exact statutory obligations and benefits to be offered to employees. While the Indian Constitution[3] provides a mechanism[4] to resolve a deadlock between central and state laws, judicial interpretations of the constitutional provisions may result in additional financial liabilities for employers.

Given this, and to eliminate ambiguities and non-compliances that are bound to arise when the labour codes are notified, Chapter 1 also discusses some solutions to ease administrative challenges for employers, and to take steps towards enabling effective compliance.

2. The 'future of work' - Regulating remote work and provision of employment benefits

The COVID-19 pandemic has been an eye-opener on the use of flexible working models. Employers across the world are rethinking the 'future of work' and many are considering implementing remote or hybrid working models permanently. Undoubtedly, these new working models have benefits for employers and employees alike. However, given the federal structure and state specific labour laws, it could trigger additional compliance obligations for employers.

In fact, there are multiple judicial precedents requiring employers to comply with labour laws of the state where the employee actually worked, even when the company had no physical establishment in that location - this could include S&E laws, professional tax and labour welfare fund laws that are applicable in the employees' place of work. An interesting debate that has surfaced is whether this judicial position (of complying with labour laws of the employee's place of work) applies only when the employer mandates remote working, or whether it applies even when employees voluntarily request to work remotely in states where employers have no commercial intent to conduct business. In some jurisdictions (like the United States), courts are taking cognizance of these questions when assessing an employers' obligations. However, Indian courts have not had the occasion to consider these issues yet.

Until then, and with new working patterns looming on the horizon, employers need to consider legal issues before implementing permanent remote or hybrid working models. From a policy perspective, what also needs to be considered is whether existing laws are prepared to regulate remote or hybrid work and employment issues connected with such models (such as tracking working hours, providing social security and leave benefits, ensuring health and safety, etc.)

In this context, Chapter 2 of this paper discusses the benefits of remote or hybrid working for employers, employees and state government/civic bodies. It takes stock of the legislative and judicial developments in other jurisdictions in this domain and assesses if existing laws are adaptable to newer working models or if a dedicated law needs to be enacted. It also discusses a few options that could be explored to streamline and ease compliance for employers in India, while being mindful of not impinging on the legislative powers of the central and state governments.

CHAPTER 01

Challenges Faced By Multi-State Establishments With Varying Labour Laws

1.1 Problem Statement

Unquestionably, the IT/ITeS industries play a crucial role in boosting India's economy. Over the years, various factors, including real estate and optimal labour costs, have heavily contributed to the creation of IT hubs in various states by many of the world's largest multi-national companies **(MNCs).** In most states, S&E laws (which govern the working conditions of IT/ITeS employees) were enacted when India was largely an agrarian economy and employers generally operated from a single state. Variations in employer obligations or employee entitlements across S&E laws were not an issue for such single state establishments.

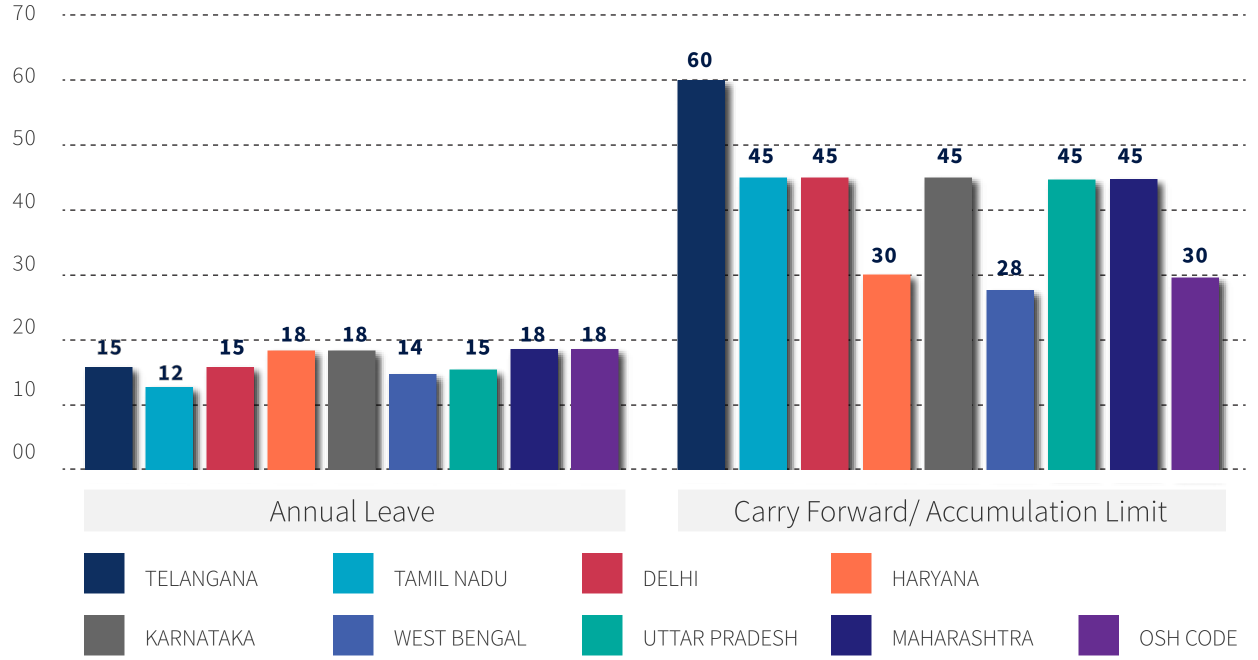
As businesses have diversified across India, 'commercial establishments' (including IT companies) have still had to comply with state-specific S&E laws. Differences in working conditions in such laws (as indicated in the graphs on page 07) have been prominent for decades and have posed innumerable challenges for multi-state establishments.

Existing Challenges

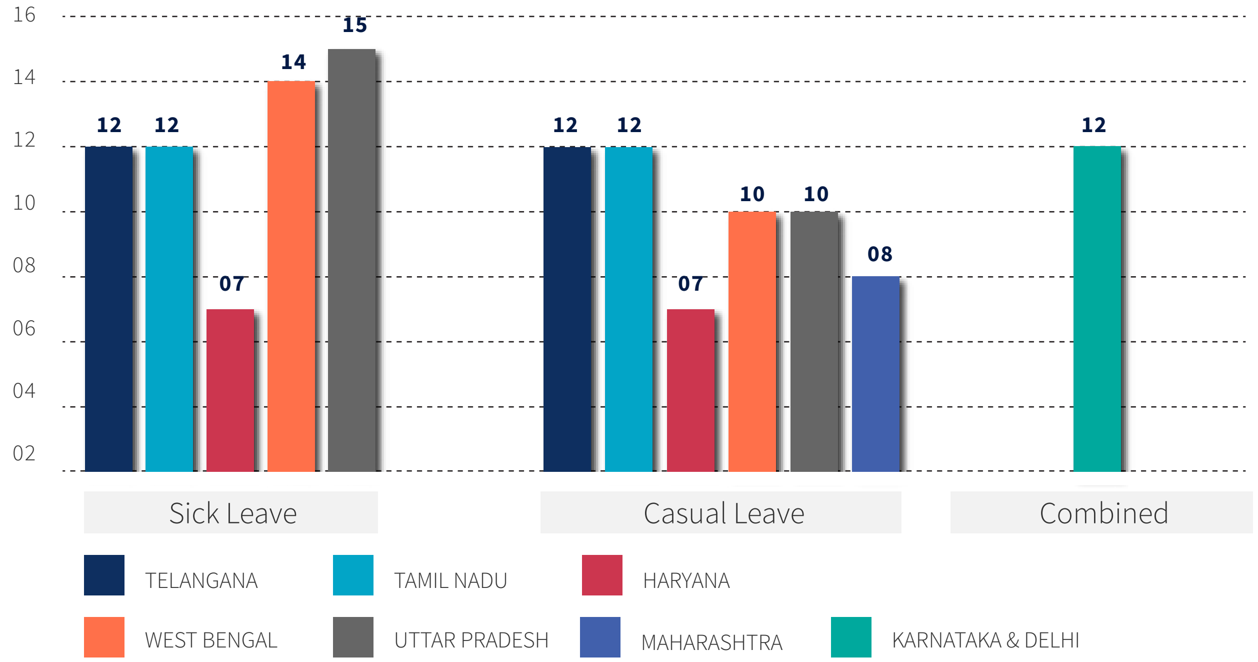
Specifically, managing leave and working hours across offices in different Indian states has been a consistent pain-point. Example, *while some states offer no sick leave (like Maharashtra[5]), a few others provide for up to 15 days' leave for illness. West Bengal[6] permits a carry-over of 56 days' sick leave, while others allow unused sick leave to lapse at the end of the year. Similarly, in terms of annual leave entitlements, Tamil Nadu[7] provides for 12 days' annual leave, whereas Telangana[8] offers 15 days, and many others offer 18 days. Annual leave carry-forward ranges from 28 days (in West Bengal) to 60 days (in Telangana).*

Such variations also prove onerous in *inter-state employee transfers* - more so when employees are to be transferred to a state with less beneficial statutory entitlements, and employers may need to reconcile the current benefits with the lower entitlements offered in the new office location.

Annual Leave and Carry Forward/ Accumulation Limits (in days)



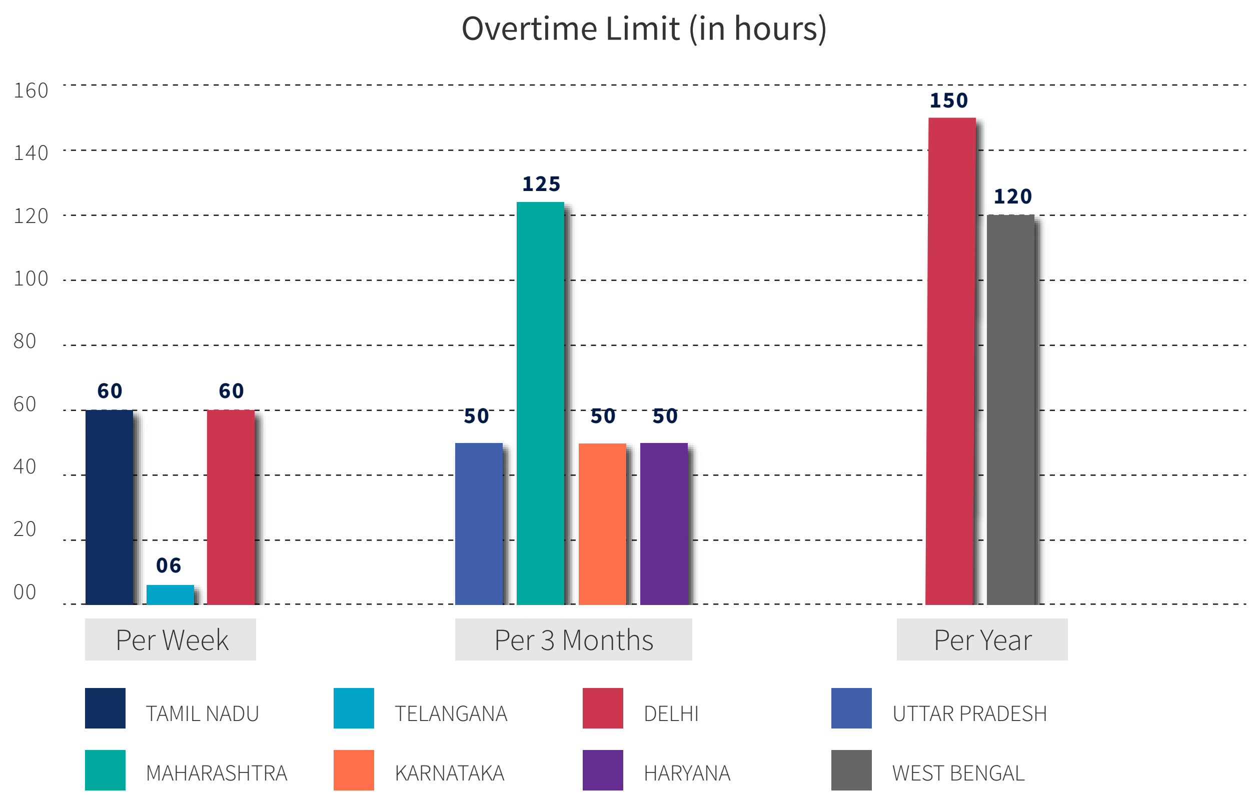
Sick leave and Casual Leave Entitlements (in days)



If the variations in working conditions are reassessed and eliminated, it will certainly address challenges for companies operating out of multiple states. The current spirit of the Indian 'labour reforms' needs to venture beyond the central laws and examine the challenges employers are facing at a micro level, when conducting business in India. Currently, in the absence of a central legislation on working conditions and with the state-specific variations, employers have had to strike a balance between compliance, uniformity and administrative convenience – more often by harmonizing and offering the best of the benefits across states. This, of course, comes with an increased cost.

Labour codes: The unfinished agenda

While employers may have identified workable solutions (albeit the cost impact), the upcoming labour codes now introduce a central law – the Occupational Safety and Health and Working Conditions Code, 2020[9] (OSH Code), which will also regulate working conditions (working hours, annual leave, leave encashment, employment of women in night shifts, notice period prior to termination, etc.) for commercial establishments. Employers will therefore not only need to assess the obligations under the different S&E laws but also under the OSH Code. This is bound to throw up additional challenges. Example *the OSH Code allows an employee to carry forward up to 30 days' annual leave to the next year and encash any additional leave at the end of the year. This contradicts most S&E laws which allow any leave in excess of the carry forward limit to lapse – encashment is generally only contemplated at the time of exit. Given the obligation to comply with both S&E laws and the OSH Code, employees could potentially claim encashment of annual leave (which would have lapsed) on an annual basis after the codes are notified.*



The codes also require employers to take prior consent to make employees work overtime hours, which is not the case in most S&E laws. S&E laws however prescribe a specific limit on the overtime hours that can be worked (which differ across states). See graph for variations in overtime limits.

Such conflict between the central labour codes and the S&E laws will further aggravate the issue and make compliance difficult.

Constitutional reprieve not adequate

Article 254[10] of the Indian Constitution (which contains the doctrine of repugnancy) prescribes a mechanism to resolve conflicts between central and state laws. In case of inconsistency between state law and central law, the central law will prevail, and the state law will become void to the extent of the conflict. An exception to this is that state law will prevail only if it is passed after the central law and has been granted Presidential assent. It is important to note that the applicability of this principle is not as simplistic as central laws in general prevailing over state laws. **Courts have required that the central and state laws must be in *'direct conflict'* and that the *'inconsistency must be absolutely irreconcilable'*[11]. The situation should be such that it becomes impossible to obey one without disobeying the other. If there is no direct collision and there is room to apply them parallelly, then there is no repugnancy[12].**

Given this position, the need to closely assess obligations under multiple state and central laws and arrive at a harmonious interpretation continues (and this often results in extending the more beneficial provision). To illustrate, while the Karnataka S&E law[13] allows carry forward of 45 days' annual leave, the OSH Code will permit only 30 days - however, it will allow employees to encash annual leaves in excess of 30 days at the end of the calendar year. Applying the harmonious rule of interpretation, one could argue that employees in Karnataka should be allowed to carry forward 45 days annual leave (per the S&E law) and be permitted to encash leaves *in excess of 45 days* (since the OSH Code contemplates annual encashment). This would not only pose an administrative challenge but also have a significant cost impact for employers (who are already wary that their financial liabilities will soon multiply under the labour codes).

The variations/conflicts in employee entitlements under the OSH Code and the S&E laws will certainly increase ambiguities on the precise law to be adhered, and most likely result in inconsistent market practices amongst organizations - with some complying with the central law, others with the S&E laws, and a few others adopting the most economical provisions under both central and state laws. The eventual outcome would be authorities penalizing employers for non-compliance (either with central law or state law) and a spate of related litigations.

Given the above, there is a pressing need to identify solutions before the codes come into effect to prevent imminent conflicts and ease compliance.

1.2 Potential Solution

a) Having all state governments adopt the Model S&E

Over the years, employers in the IT/ITeS sector have faced many challenges when implementing S&E laws. Early on, issues such as rigidity in opening-closing hours, restrictions on employing women at night, need for annual renewal of S&E registration, etc. were significant concerns for employers. Industry bodies made several representations to the central and state governments to highlight these issues and request for more business-oriented regulations.

Due to the multiple representations received, the Ministry of Labour and Employment had published the draft of a model S&E Bill for public comments in 2015. The objective was to request all state governments to adopt the model law and bring uniformity in working conditions across India. Tripartite consultations were also held amongst trade unions, employer-associations and state governments. On considering all the proposals, the Union Cabinet approved the 'Model S&E (Regulation of Employment and Conditions of Service) Bill, 2016'[14]. Some salient features of the model S&E bill are -

- Permission to operate on all 365 days of a year, and flexibility in opening and closing hours (including permission to employ women in night shifts).
- Health and safety obligations (such as clean drinking water, washrooms, creche, first-aid, canteen, etc.)
- Single/common registration by obtaining a Labour Identification Number (LIN).
- Exemptions to highly skilled workers (example, IT employees from the daily and weekly working hours, subject to a maximum of 125 overtime hours per quarter).
- Around 18 days' annual leave, and 12 days' sick and casual leave together. Maximum leave accumulation of 45 days.
- 3 national holidays and 5 paid festival holidays.

Employers welcomed the model bill as its provisions were more attuned with the changing business requirements. Even the central government acknowledged that adoption of the model bill would ease doing of business and generate employment opportunities in India.

Maharashtra was the first state to revamp its 1948 law and enact a new S&E law in 2017 in line with the model S&E bill. Gujarat soon followed suit. Some states only selectively amended their S&E laws to align with a few provisions with the model S&E bill - for instance, Karnataka and Tamil Nadu increased the leave carry forward / accumulation limits to 45 days. That said, the instances of alignment with the model S&E bill are far and few between. This is because the model S&E bill is truly a 'model'. States can either adopt it (in entirety or with modifications) or not adopt it at all. As it lacks binding force, many states have not taken measures towards alignment. Thus, employers continue to face hardships with the varying S&E obligations in each state.

Standardizing benefits across states will enable employers to manage their business operations smoothly and will result in increased investments in different states. The model S&E bill has already laid the foundation for unifying working conditions across the country. Since the Union Cabinet has approved it after consultations with the relevant stakeholders, the most feasible option would be for the central government to urge state governments to adopt the model S&E provisions. If each state government recognized the benefits of uniformity and took proactive measures to implement a new S&E law (or even amend their existing S&E laws) in line with the model S&E bill, the hardships faced by multi-state employers can be resolved to a great extent.

Overcoming Challenges -

While the central government could appeal to state governments to implement the model S&E bill, it cannot impinge on their legislative autonomy by mandating adoption of the model S&E. Further, currently, S&E laws in some states provide for more generous benefits, example, in Telangana employees can accumulate up to 60 days' annual leave while the model S&E provides for a 45 day carry forward limit. In Tamil Nadu and Telangana, employees are entitled to 12 days' sick leave and 12 days' casual leave (i.e., 24 days in total), while the model S&E law allows only 12 days' sick and casual leave *together.* Given this, an attempt to reduce the current benefits could be met with some resistance. However, the key lies in convincing and apprising each state government of the advantages - specifically, that having uniformity in working conditions would not only ease business operations for employers but is also likely to boost employment opportunities in their jurisdictions (as also acknowledged by the central government).

Homogeneity in working conditions could mean increased employment costs in some states. For instance, if Haryana aligns with the model S&E law, annual leave encashment in the state would be increased from 30 days to 45 days (resulting in higher exit payouts). Therefore, employers will need to weigh the cost impact against the positives of having uniformity in working conditions across states. Many multi-state employers are already offering harmonized benefits and hence, there may not be a significant cost impact with having uniformity in working conditions.

b) Amending S&E Laws to only address issues not addressed in the OSH Code

For over seven decades, the Factories Act, 1948[15] (being a central law) has successfully regulated the working conditions in the manufacturing space. The absence of such central law on working conditions in shops and commercial establishments resulted in the enactment of state-specific S&E laws. However, the new labour codes are now poised to change this position.

Specifically, the OSH Code (once notified) would regulate multiple aspects of employment (including working hours, leave, conditions in relation to women working at night, overtime payments, etc.). The term 'establishment' under the OSH Code covers *all trades, businesses, occupations and industries.* Therefore, all provisions on employment conditions under the OSH Code will apply to establishments covered under the S&E laws (including IT/ITeS companies). Inspectors-cum-Facilitators appointed by *state governments* would have the ability to enforce the OSH Code against employers in their *respective jurisdictions.* Thus, the implementation of provisions on working conditions under the OSH Code would be akin to the implementation of some existing central laws such as those on minimum wages, payment of statutory bonus, payment of wages, etc. However, as discussed in the Problem Statement, there would be considerable overlap and conflict between the labour codes and S&E laws.

Given this, and since the OSH Code is set to regulate working conditions across the country, there is a strong need to streamline the S&E laws and eliminate the provisions that are already addressed in the labour codes. For this, state governments could either *amend the existing S&E law* to repeal the conflicting provisions or *consider implementing a new S&E law* that overrides the existing law.

In either scenario, the amended S&E or the new S&E could serve as a broad framework to regulate matters not covered under the OSH Code and/or retain certain essential provisions under the existing S&E laws. For instance, the labour codes do not have provisions on sick or casual leave (except for sales promotion employees). Thus, state governments could retain the provisions on sick and casual leave.

However, to avoid variations in the entitlements across states, state governments could use the opportunity of streamlining S&E laws to require employers to provide a minimum consolidated leave entitlement of 'X' days - and allow employers and employees to agree on the bifurcation of the consolidated entitlement into different pools of annual leave, sick leave and casual leave (provided the annual leave accrual and carry forward limits are at least at par with the OSH Code).

Key S&E provisions that governments could retain

- Sick and casual leave
- Registration of a shop/establishment
- Notice prior to termination
- National and festival holidays
- Penalties

Overcoming Challenges -

This solution requires legislative changes to be driven by each state government, which may be pose a challenge. Further, the possibility of only some states governments implementing the solution (and other governments pushing back) cannot be overruled. Thus, as with solution (a), it would be important to make representations to the state governments and emphasize the advantages of having uniformity. If a few state governments adopt this solution, that could serve as precedent and propel other state governments to follow suit.

c) An exclusive law on working conditions for the IT/ITeS sector

Most S&E laws were primarily introduced to regulate the service conditions in banks, hotels, cinemas and other small-medium scale establishments. Law makers across various states did not contemplate the growth of the IT/ITeS sector. Despite this, given the wide definition of commercial establishments, the S&E laws govern IT/ITeS establishments. Many state governments (e.g., Karnataka, Telangana) have recognized the unique needs of the sector and have granted exemptions from provisions like working hours, holidays, employing women at night, opening/closing hours to enable the establishments to operate on a 24*7*365 basis. However, variations in state-specific S&E laws still pose challenges for employers in the sector.

The central government can also consider implementing an exclusive law to regulate employment conditions in the IT/ITeS sector. Sector-specific laws are not new to India - working journalists' laws[16], sales promotion employees' law[17], mines[18] and dock workers' laws[19], building and other construction workers' laws[20] are a few examples of sector - specific labour laws. Globally, we see governments regulating working conditions in niche domains (for instance, the Call Centre Code, 2002 in Victoria, Australia[21]). India could explore having a specific law on service conditions of the 4-million odd workers in the IT/ITeS sector. The law could also emulate few provisions of the S&E laws, such as registration, exemptions to employees in positions of management or supervision, health and welfare provisions, (electronic) record-keeping, etc. Further, while this could be a central law, state governments could be authorized to frame rules to implement/enforce the law in their jurisdictions.

If this approach is adopted, it will be critical to put forth strong reasons why IT/ITeS as a sector is distinguishable from the other sectors governed by S&E laws and/or the OSH Code and hence, requires a separate law. There have been instances where courts have deliberated on the constitutional validity and the need for a special law. For instance, when the need for an exclusive law on the working conditions of journalists was questioned, the Supreme Court upheld the constitutional validity on the ground that journalism is a highly specialized profession which has sectoral hazards such as low job security, high-pressure work environment, round-the-clock availability to deliver news, inability to quantify their output unlike in other industries, etc.[22] A similar statement of reasons will need to be put forth to bring out the unique requirements of the IT/ITeS sector.

Another complexity of the Indian Constitution and legal jurisprudence is that to the extent two laws can be read *harmoniously* and can be complied with *simultaneously,* both laws will apply[23]. That is, the state-specific S&E laws could still apply to the IT/ITeS sector despite the enactment of an exclusive central law. Example, say, the exclusive IT/ITeS law provides for 12 days' sick and casual *together.* By applying the harmonious interpretation rule, one could argue that employees in Chennai or Hyderabad are still entitled to 12 days' sick leave and 12 days' casual leave (total 24 days) given the more beneficial entitlements under the S&E laws.

To avoid such scenario and ensure that the exclusive IT/ITeS law overrides S&E laws, it will be important to (a) ensure that the exclusive law forms an exhaustive code on all aspects relating to working conditions; (b) seek exemptions from state governments on provisions that would inherently conflict with the exclusive law. This would be a significant task (although not unachievable) and would require careful structuring and deliberations with the Central and State Governments.

Overcoming Challenges -

State governments would still be able to use their legislative powers under the Indian Constitution to make state-specific amendments to the central IT/ITeS law. Example, the Haryana state government has amended the Payment of Wages Act, 1936,[24] to entirely remove the monthly salary threshold of INR 24000 for applicability of that statute. Thus, there would be room for state amendments to the exclusive law. However, if the statement of objects and reasons of the exclusive central law is strong and brings out the unique requirements of the sector, the likelihood of state governments amending the central law would be low.

d) Having certified standing orders prevail over S&E Laws

The Industrial Relations Code, 2020[25] (IR Code) will require standing orders (SOs) to be framed for each 'establishment' that has 300 or more workers. SOs, which are essentially service rules, will need to cover various matters relating to employment, such as working hours, leave, holidays, grievance redressal, misconduct, termination, etc. Currently, some states (such as Karnataka) exempt IT/ITeS companies from the applicability of the SO law. However, owing to the broad definition of 'establishment' under the IR Code, even IT/ITeS companies that meet the threshold will be required to frame SOs. The draft SOs will need to be prepared by employers in *consultation* with the trade unions, recognized negotiating union or negotiating council (as applicable). Further, once the draft is submitted, the certifying officer will also invite comments of such unions or the workers' representatives on the draft and give them an opportunity of representation. The draft will then be certified after considering all the representations received.

Despite such a robust consultative process, certified SOs (CSOs) do not have the ability to override statutory entitlements. While CSOs are recognized as *statutorily* imposed conditions of service, Indian courts have held that they do not qualify as *'statutory provisions'* by themselves. That is, if CSOs can be read harmoniously with other labour laws, both the CSO and the labour laws will apply - however, if the CSO is less beneficial than the benefits under a law, the latter will prevail to the extent of such inconsistency.

For example, under the Telangana S&E law, employees are entitled to 15 days' annual leave, 12 days' sick leave and 12 days' casual leave. If the CSO provides for 20 days' annual leave (i.e., more than the S&E entitlement) but only 6 days' sick leave and 6 days' casual leave (which are both less than the statutory entitlement), applying the rule of harmonious interpretation, the employer could be required to offer 20 days' leave (as per the CSO) and 12 days' sick leave and 12 days' casual leave (as per the S&E law). One could argue that this position rather undermines the consultative process. Even under the IR Code, CSOs obtained under the current law will only be valid to the extent that they do not conflict with that Code.

Employers in the IT/ITeS sector have constantly demanded state governments to provide more flexibility, including ability to execute agreements with employees on the employment terms (which are favorable to the business requirements and yet beneficial to employees). Generally, Indian courts are conscious that employers and employees do not enjoy equal bargaining powers - however, unlike most other sectors, IT/ITeS sector employees are highly educated and can make informed decisions on their service conditions. Thus, the concern of inequality in positions is largely unwarranted for this sector.

For instance, MNCs commonly offer non-statutory leaves for paternity, bereavement, etc. in line with their global standards, even though Indian labour laws do not provide for such benefits. Despite these additional benefits, employers need to comply with the minimum leave benefits under the applicable S&E law. A few jurisdictions such as UK, allow employees to contract out of statutory provisions (like weekly working hour limits) subject to some conditions. A similar approach could be considered in India. If Indian labour laws provide similar flexibility and allow employers in the IT/ITeS sector to negotiate the service conditions, it would certainly ease business operations (and thus improve India's ranking in the global index on the ease of doing business).

The consultation framework under the IR Code could be utilized to achieve such flexibility. That is, the government could consider allowing employers to contract out of any provision of the S&E laws in their CSOs. As the process of obtaining CSOs has in-built checks and balances of collective bargaining and scrutiny by the certifying authorities, there would be no scope for employers to impose unconscionable service conditions. The issue of more beneficial statutory provisions overriding the CSOs could be remedied by granting statutory backing for CSOs to prevail over service conditions prescribed in other labour laws. For example, the IR Code could include a provision that a CSO will supersede benefits under other employment laws as long as -

(a) the CSO has been approved by authorities and workers' representatives, and
(b) the terms of service in the CSO are fair (considering the overall employment benefits at the company).

This will ensure that additional discretionary employment benefits offered by IT/ITeS companies are factored in when negotiating the employment terms and accordingly, deviations from some rigid provisions of the S&E laws could be agreed upon.

Overcoming Challenges -

This solution would still require employers to have consultations with employees in each state where they have business operations and the possibility of the consultations yielding different outcomes in each state cannot be overruled. Given this, the issue of varying employment benefits would not be completely resolved. However, if employers are able to obtain CSOs in one state in which they agree on service conditions/benefits that are more attuned to the employees' nature of work and the business requirements, that could be used as a basis to negotiate comparative service conditions in other states where the company has a business presence.

The IR Code does not empower CSOs to supersede other laws on employment conditions. Thus, an amendment would be required to introduce such provision in the IR Code. However, introducing an amendment to the IR Code (which is a new law) could be time-consuming.

The chapter on standing orders in the IR Code applies to establishments having 300 or more workers. Hence, the solution of CSOs preceding other labour laws would not be suitable to smaller establishments.

CHAPTER 02

- The Future of Work -
Regulating Remote Work
and Provision of Employment Benefits

2.1 Problem Statement

Since the onset of the pandemic, the 'future of work' is one of the most discussed and debated issue. Remote working, which initially surfaced as a contingency plan, is now being seen as a permanent working model in the post-pandemic world. Some companies in IT/ITeS sector are weighing the feasibility of a full remote working model, while others are looking at embracing hybrid-working models, such as adopting work-from-anywhere weeks in each month, requiring employees to work on-site for 2 or 3 days a week, identifying specific teams or job roles that could work remotely and so on.

Employers and employees both stand to gain from the remote and hybrid work models. Employees avoid paying high rents in metropolitan cities and work remotely from the comfort of their homes. At the same time, in the absence of geographic constraints, companies are also likely to have greater access to talent across the country. Such flexible working models (for jobs where they are feasible) will no doubt strengthen India's position on the world map as a strong talent pool.

Long-term flexible working models also benefit governments. Reverse migration patterns due to lockdown restrictions has already resulted in a visible reduction in carbon emissions, traffic congestions, utilization of resources such as transport infrastructure, energy consumption etc. Permanent remote working models have huge potential to reduce the burden on the overutilized civic resources in some states and optimize their use.

Commercial benefits and flexibilities aside, when assessing the best way to reconfigure business operations, companies should also review the legal landscape in relation to remote or hybrid working. Most companies are aware that employment benefits differ across Indian states. However, the question that needs close assessment is ***whether the state-specific laws are triggered even when the employee is working from home and the company has no establishment in that state.***

Relevance of employee's 'place of work' when determining applicable employment benefits - Indian courts usually adopt an employee-friendly view in labour litigations. There are multiple precedents where courts have required employers to comply with the S&E laws applicable in the state where the employee worked, even if the company had no business presence in that state.

The courts' decisions have been based on the definition of the term 'commercial establishment' under the S&E law applicable in the employee's state of work. S&E laws in most states define the term to mean 'an establishment which carries on any business, trade or profession or any work connected / incidental to such business / trade / profession.' The courts' rationale is that the definition does not require a 'commercial establishment' to operate from a specific place, premises, location or abode - the emphasis is on the nature of the activity itself and not on the place from where such business, trade, etc. is carried out[26]. On this ground, courts have rejected the argument that an establishment needs to be fixated to a particular location for the S&E laws of such state to apply. As long as an employment relationship is established and the remote workers carry out a mercantile activity for the employer, they would be involved in a 'commercial activity' (which would trigger the applicability of the S&E law of such state)[27].

This judicial principle could have a considerable impact in the context of long-term remote working models. To illustrate, an IT/ITeS company in Gurgaon that employs a remote worker in Chennai will need to comply with the Tamil Nadu S&E law, despite not having an office in that state. Accordingly, the employer would need to offer 12 days' sick leave, 12 days' casual leave and 45 days' annual leave carry-forward to the remote worker in Chennai (whereas, in terms of the Haryana S&E law employees in Gurgaon would only be eligible for 7 days' sick leave, 7 days' casual leave and 30 days' annual leave carry forward). Triggering such additional compliances is not a desirable outcome for many organizations that are looking at implementing permanent remote working models.

This issue is not unique to India but true for most countries that follow a federal structure. For example, in Canada[28], some provinces consider whether an employee's work outside the province is a *continuation* of the work performed in such province (for example attending a meeting). If the work is not a continuation but the employee's physical place of work is in a different province, the employment laws of the employee's province apply. However, this position varies based on the facts and circumstances in which the employee works from a different province. In the United States, courts have considered various factors such as -

(a) *the state where the employment relationship occurred (i.e., location where the employment offer was accepted),*
(b) *whether employees had to travel to the employer's state (and hence, there was some nexus with the employer's state),*
(c) *whether the employer carried out or intended to carry out any business in the employee's state (of remote work),*
(d) *whether the employee placed a request to work remotely or whether the employer compelled the employee to work in another state*[29].

Given this, a key question is whether the Indian judicial position can be limited to scenarios where an employer mandates the employee to work from another state – for example a sales employee working from a location where the company has no office. However, if an employee *voluntarily requests* to work remotely from a state where the establishment has no presence (and no intent to set up a presence), can employers argue that the employee's state law should not apply?

In the Indian context, as noted above, cases have primarily dissected the definition of 'commercial establishment' to determine whether the employee's state labour laws should apply. In states where the statutory definition is not linked to a specific 'premise,' courts have adopted wider and beneficial interpretations. The key assessment in such cases has been whether any systematic activity is carried on by a remote worker - if yes, then the employee's state laws would apply even if the employer had no physical office in such state. However, in some states like Delhi, where the definition of 'commercial establishment' is *specifically connected with a 'premise' where business, trade, etc. is undertaken,* courts have adopted a *narrow interpretation by holding that the S&E law would not apply to an employer located outside Delhi*[30].

Indian courts have not had to consider whether an employer's intent to carry out business in the employee's home state plays any determinative role. So far, the assessment has revolved around the technicalities in the statutory definitions when applying the employee's state laws. Until relevant factors such as an employer's intent is considered, companies would need to be wary of the remote worker's state labour laws becoming applicable to them.

When the beneficial judicial interpretations are applied to the long-term remote working proposals, compliance may become quite challenging since employment benefits vary considerably across Indian states. This is likely to force companies to rethink the use of remote working models - which, as noted above, offers multiple benefits to all stakeholders involved (employer, employee and even the state governments). It is therefore critical for the government to relook at the current labour law framework and design employment laws that foster the growth of the new working models.
The subsequent section ideates the possible approach that could be considered by the government.

Impact of place of work on other labour compliances -

In addition to S&E laws, remote-working models could trigger compliances under other state laws. Some of the less talked about statutes are the professional tax **(PT)** and labour welfare fund **(LWF)** laws. PT laws require employees (engaged in any profession) to pay a tax to the state government. While the requirement is for an employed person to pay the tax, *employers are responsible for deducting PT from an employee's salary and paying it to the state government.* Given how PT statutes of some states are worded, it could be argued that employers would have an obligation to remit PT to the relevant state government where the employees are working. The Calcutta High Court also upheld this view and stated that place of employment is the primary factor to be considered, and not the place where salary is processed[31].

Further, employers have an obligation to make LWF contributions to a state fund (which is used by the government to finance activities that promote labour welfare in the relevant state). Based on the statutory definitions, one could argue that like PT, LWF contributions should be remitted in the state where the remote employee is located (even if the employer does not have an office in such location).

While that is the statutory and judicial position, employers are likely to face practical challenges due to the procedural requirements around remitting PT and LWF contributions. Many states require a local business address (in the state where the employee is located) or submission of locally issued documents such as an S&E or a GST registration certificate which, of course, is a challenge. Therefore, while the law and courts impose certain obligations, the procedural requirements do not pave way for employers to ensure compliance. Hence, in addition to regulating employment benefits of remote workers, there is a need to consider mechanisms to facilitate compliance (see solution 2 in the subsequent section) should there be a need to make contributions in the employee’s place of work.

2.1 Potential Solution

a) Implementing telecommuting laws in India

A few countries (like U.S.A.[32] and U.K.[33]) had regulations or guidelines on teleworking long before the onset of the COVID-19 pandemic. In fact, the International Labour Organization's (ILO) *'Home Work Convention, 1996'*[34] requires member nations to adopt, implement and periodically review a national policy on homeworking, to improve working conditions of homeworkers. Many countries, including India, are not a party to this convention. A specific need to regulate teleworking was not felt since the traditional on-site working models were widely used in most jurisdictions and teleworking was seen as an aberration to such traditional models.

However, the proposals to implement permanent remote working models in the post-pandemic world have reshaped this outlook. Such proposals are catalyzing the enactment (or deliberation) on telecommuting laws across the world. In many countries (including Germany[35], Ireland[36], Spain[37], Mexico[38], Russia[39]), governments, employer associations and worker-unions are increasingly reflecting upon the appropriate legal framework to regulate the new working models. Broadly, teleworking laws implemented (or being implemented) in such countries recognize the flexibility and autonomy that the new working arrangements offer to employees. At the same time, governments are also conscious that remote workers could be deprived of employment benefits and hence, the focus of these laws has been to build adequate protections and strengthen the rights of teleworkers.

With the rising instances of long-term remote working arrangements, the time is ripe to deliberate on the need for a legislative framework that caters to the unique needs of such models. Such specific law is required to protect employees from subjugation, build a healthy work-life balance and enable employers to remotely manage the workforce. Enacting a law on teleworking in India could address a myriad of employment issues which the existing legal framework does not.

Such a new law could make provisions for the following :

Employment benefits

As noted in the Problem Statement, Indian courts have required employers to provide benefits to remote workers as per the S&E laws applicable in their states. As it would be an administrative nightmare for employers to offer employment benefits as per the employees' home states, there may be several instances of non-compliance (which of course is not a desirable outcome either for the employers or government's regulatory machineries. A new law that specifically regulates teleworking has potential to address this issue and facilitate compliance (this would also be aligned with the overarching theme of the labour reforms in India). The legislation could include specific rules on the maximum daily / weekly working hours of remote workers, leave entitlements, 'right to disconnect' from work and health and safety conditions. Uniform working conditions for all remote workers (irrespective of location) would enable better management of the workforce.

Definition of 'telecommuting'

Employers are still considering the most feasible flexible working model - while some are looking towards a 100% remote working model, others are exploring a variety of hybrid models. A new law could prescribe the specific scenarios that would amount to 'teleworking' or 'telecommuting' and define the contours of its operation. For example, under the Mexican law, employees who undertake more than 40% of their time at a place of their choice and have a formal teleworking contract in place would qualify as teleworkers.

Handling misconduct in remote working

Since the pandemic, instances of unauthorized absenteeism and job abandonment have increased across sectors. Managers and HR teams have found it extremely challenging to handle such issues as employees work remotely, and therefore, business operations take a hit. Employers have also seen instances of dual employment, where remote workers have been simultaneously employed by more than one organization. Breach of confidentiality, misuse of company assets, non-return of such assets at the time of exit, and failure of employees to serve contractual notice periods are other issues that many companies have had to deal with. A telecommuting law was implemented in New Zealand[40] in 2000's with the belief that a specific legal framework can help employee-morale and decrease absenteeism. Thus, a dedicated law on remote working in India could make provisions to incentivize employee-attendance, performance management, and prescribe mechanisms in which disciplinary actions could be taken against employees, including deductions from salary for loss/damage to assets or for not complying with the contractual notice periods, warnings or terminations post a minimum period of unauthorized absence, etc.

Dispute resolution

Remote working arrangements would result in employees working across different Indian states including those where the company does not have a presence. With this, another contentious issue will be, which state government machinery would be available to redress any employee grievances - whether the adjudicatory fora in an employee's state could be approached for raising any claims against employers, or if they could be compelled to approach the forum in the employer's state. To address this, the new law could perhaps recognize the ability of employers and employees to agree on preferred dispute resolution forum.

Overcoming Challenges -

While a central law could be enacted to regulate teleworking, state governments could still make amendments they deem fit in exercise of their legislative powers under the Indian Constitution - thus, there would be scope for state-specific variations. A solution to this lies in adopting global standards on telecommuting. That is, jurisdictions across the world have realized the need to regulate teleworking and have recently implemented/are implementing dedicated laws on teleworking. If the central law on telecommuting in India borrows from these jurisdictions and thus is at par with international standards and if it is designed to form a comprehensive code that can effectively manage various issues of remote working and enable compliance, then the chances of state governments amending the central law could be mitigated to a large extent.

b) Deploying technology to streamline state compliances, including PT and LWF remittances

As discussed in the problem statement, based on statutory definitions and case-laws, employers could be obligated to make PT and LWF remittances in the state where the (remote) employees work. However, employers could face procedural challenges in implementation due to the need to produce location specific documents and registrations. Repealing the state specific PT and LWF laws or requiring employers to make remittances to state governments where the office is located (instead of the state where the employee works) are both not feasible solutions - this is because:

(a) only state governments can make laws to levy and collect PT (and such tax cannot be imposed through a central law), and

(b) state governments aim to promote labour welfare within their jurisdictions through the LWF corpus.

However, technology could be the answer. For instance, the Shram Suvidha web-portal[41] operated by the central government acts as a single platform for registration, labour inspections and enforcements under central labour laws. This portal is also being upgraded to consolidate registrations and return-filing obligations under the 29 central statutes being repealed by the 4 labour codes. In fact, a webpage on the Shram Suvidha portal also indicates that state governments have expressed an interest to be onboarded to that portal and that related discussions are underway.

Thus, a simple solution would be to shift state-specific PT and LWF registration and payment processes to the Shram Suvidha portal. Alternatively, a new central web-portal could be created for PT and LWF, that allows single registration and a unified payment mechanism. Any revenue generated from PT and LWF payments made on the portal could be re-directed to the individual states where the remote workers are based. This would make it convenient for employers to cover all remote workers under the state legislations and also increase transparency and accountability.

The challenge here would be to apprise each state government of the gaps in the current system, the need to shift to a central platform, and to ensure that the central portal is robust and capable of handling voluminous electronic transactions. If state governments agree to shift their procedural compliances onto an upgraded Shram Suvidha platform or a new central portal to manage PT and LWF compliances, the current gaps between the legal requirements and procedural requirements could be bridged.

Invitation for NASSCOM Member comments

Considering the direct impact of the above issues on the IT/ITeS industry, Trilegal, in association with NASSCOM, organized a discussion with a few members to gather their initial comments and suggestions to address the issues discussed above and mitigate their impact. Their feedback has been assessed and discussed in the Chapters 1 and 2 of this discussion paper. As you will note from the paper, there are varied issues and hence a combination of the various solutions will be most effective.

We invite all NASSCOM members to provide their inputs on the above issues, highlight the specific concerns faced in their respective organizations and share their suggestions on resolving the issues. The feasibility of the comments/suggestions will be reviewed from a legal standpoint, and the aggregated feedback will be shared with the central and state governments for their consideration.

Suggestions can be shared in the format provided below:

Name of the company ....

Name and designation of the personnel providing inputs: ....

Suggestions and comments in relation to Chapter 1: ....

Suggestions and comments in relation to Chapter 2: ....

....

Other remarks: ....

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Established in 1988, NASSCOM, a not-for-profit industry association, is the apex body for the 194-billion-dollar IT BPM industry in India, an industry that had made a phenomenal contribution to India's GDP, exports, employment, infrastructure and global visibility. In India, this industry provides the highest employment in the private sector.

NASSCOM is focused on building the architecture integral to the development of the IT BPM sector through policy advocacy, and help in setting up the strategic direction for the sector to unleash its potential and dominate newer frontiers.

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OUR LABOUR AND EMPLOYMENT PRACTICE

Trilegal provides specialized advice on employment laws in India, and operates a dedicated practice with a focused team that advises top Indian and multinational companies on Indian labour and employment laws. We have one of the most comprehensive employment practice in the country and have been consistently rated as one of India's best labour and employment practices by numerous rating agencies including Chambers & Partners, IBLJ, Asian Legal Business (ALB) and Who's Who Legal.

Trilegal has been the go-to firm for several Fortune 500 companies on the implementation of the labour codes including advice on the impact of the new definition of 'wages,' managing contract worker engagements, streamlining various obligations under the labour codes and more. The employment practice deals with a wide spectrum of employment issues ranging from routine compliance matters to complex senior management negotiations and trade union disputes. The firm is regularly involved in labour audits for clients and frequently assists clients with disciplinary inquiries and termination claims. The firm also has a specialized team of lawyers that work with clients to frame policies and manage sexual harassment issues.

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