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THE NEW LAW ON DISABILITY: WHAT DOES IT MEAN FOR INDIAN CORPORATES?

1. INTRODUCTION

The Rights of Persons with Disabilities Act, 2016 (the “**Act**”) and the Rights of Persons with Disabilities Rules, 2016 (the “**Rules**”) came into effect on April 19, 2017 and June 15, 2017, respectively (together, the “**Disability Law**”). The Disability Law replaces the old Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and the rules made thereunder.

The Disability Law is modeled on the United Nations Convention on the Rights of Persons with Disabilities (ratified by India on October 1, 2007), and is significantly more robust and effective than the, up to now, existing legislation governing disability in India.

2. SIGNIFICANT CHANGES

2.1 Definition of ‘Persons with Disability’

The scope of the term ‘*persons with disability*’ has been enlarged considerably under the Disability Law. The old statute had a limited list of seven (7) disabilities within its ambit. The current Act contains a broad and inclusive definition of ‘*persons with disability*’, which includes all persons with any long-term physical, mental, intellectual or other sensory impairment that hinders their full and effective participation in society equally with others.

The Act also provides a list of twenty-one (21) specified disabilities, which, if present in any individual to a degree greater than forty per cent (40%), will be categorized as a ‘*benchmark disability*’. Persons with such benchmark disabilities are entitled to additional benefits under the Disability Law. Further, the Act also identifies a separate category of persons with benchmark disabilities requiring high support needs such as physical, psychological and intensive support, and confers additional benefits upon them.

2.2 Extension of provisions to Private Establishments

One of the highlights of the Disability Law is the extension of its applicability to private establishments. A *private establishment* includes a company, firm, cooperative or other society, association, trust, agency, institution, organization, union, factory or such other establishments as the appropriate Government may, from time to time, notify.

While a number of significant obligations continue to rest with the Government and its instrumentalities, some obligations nevertheless extend to private establishments, which we highlight below:

- Private establishments are now required to notify an ‘*equal opportunity policy*’ preferably on their website, or at a conspicuous place within their premises. The policy also needs to be registered with the authorities appointed under the Act.

- The policies of establishments with less than twenty (20) employees shall specify the facilities to be provided to persons with disabilities and policies of establishments with more than twenty (20) employees shall, in addition, provide a list of posts identified for persons with disabilities, the manner of their selection, provisions made for assistive devices, and barrier-free accessibility, among others.
- Further, private establishments with twenty (20) or more employees shall appoint a *Liaison Officer* in each of the establishments to oversee the appointment of persons with disabilities and the facilities and amenities provided to them.
- Private establishments shall maintain records of persons with disabilities employed by them, which shall state the nature of their work and the facilities made available to them.
- The intent of the Disability Law is to create a barrier-free environment for persons with disabilities, and in this context, '*standards of accessibility*' have been laid down to remove such barriers in physical environments, transportation, technology and communication systems.
- Existing workplaces and other public buildings (Government or private buildings used or accessed by the public at large) are expected to comply with the *standards of accessibility* within a period of five (5) years. With specific regard to physical environment, private establishments are required to adhere to the *Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons with Disability and Elderly Persons*, issued by the Ministry of Urban Development in February, 2016.
- Educational institutions that are recognized or funded by the Government are required to provide inclusive education to children with disabilities and remove barriers in matters of admissions, physical environment and assessment, among others. Every child between the ages of six (6) and eighteen (18) years, with a benchmark disability, has the right to free education in a neighbourhood school or a special school of his or her choice.

3.3 Redress Mechanisms and Penalties

An aggrieved person under the Disability Law (a person who has been discriminated against on the basis of his disability) may approach the head of the establishment and such head of the establishment will be under an obligation to initiate action required by the provisions of the Act or, if necessary, justify the act of discrimination as a proportionate means of achieving a legitimate aim.

The aggrieved person may also approach the Chief Commissioners or State Commissioners appointed under the Act (the "**Commissioners**"), who are required to dispose of the complaint within a period of sixty (60) days (thirty (30) days in exceptional circumstances). The Commissioners may also initiate their own action against the establishment or its employees in respect of any acts of discrimination in such establishment.

Private establishments that fail to comply with the provisions of the Act or any rule made thereunder shall be liable to a fine of up to INR 10,000 (Indian Rupees Ten Thousand), for the first offence, and a fine of not less than INR 50,000 (Indian Rupees Fifty Thousand) which may extend up to INR 5,00,000 (Indian Rupees Five Lakhs) for subsequent offences.

In such cases, the company (as well as all persons in charge of and responsible for the conduct of its business) shall be deemed guilty of the offence. Further, if an offence has been committed with the consent, connivance or neglect of any of the officers of the company, including directors and managers, they shall also be deemed guilty of such offence.

Establishments that fail to provide any books, accounts, documents or other information to the concerned authorities pursuant to an investigation shall be liable to a penalty, which may extend to INR 25,000 (Indian Rupees Twenty Five Thousand) for each failure to produce the required records. In case of continuing offences, the fine may extend to INR 1,000 (Indian Rupees One Thousand) for each day of the continued failure or non-compliance.

4 COMPLIANCES

With the Disability Law in force, the obligations of private establishments will now specifically include:

- (a) the framing, publication and registration of the *equal opportunity policy*;
- (b) the modification of internal policies with reference to recruitment practices being aligned with the *equal opportunity policy*;
- (c) the appointment of a *Liaison Officer* (only for establishments having twenty (20) or more employees); and
- (d) compliance with the *standards of accessibility*.

5 LIKELY IMPLICATIONS

Although the enlargement of the scope of the term '*persons with disability*' is a laudable step, the need for certification of disabilities under the Act has been limited to persons with only specified disabilities and benchmark disabilities. The Disability Law defines a '*person with disability*' as any person having any kind of impairment, which hinders his *effective* participation in society equally with others. The absence of the need for certification of such disabilities could potentially lead to persons with minimal impairments claiming benefits under the Act, even if such impairments do not hinder their *effective* participation in society.

The above, coupled with the fact that any insult to a disabled person in a place within public view may be construed as an intentional act of humiliating the person based on his disability, may make establishments extremely cautious in their interactions with persons with any disabilities.

Given that the penalties for such acts are extremely high, and the burden of proof to show the absence of such a negative intent (or to prove the legitimacy of such an act) is on the establishment, the intent of the Act (to create an environment without discrimination) might, in practice, have the opposite effect.

Another relevant provision is the need for ensuring that all physical infrastructure and information technology infrastructure of establishments, matches the requirements of the *standards of accessibility* notified by the Government from time to time. Existing establishments have been given a time period of five (5) years to comply, but new establishments will be required to comply with the requirements under the Disability Law from day one. However, it is not clear whether the *onus* of complying with this provision will be on the owner of the building or on the occupiers who fall under the category of '*establishments*'. It therefore remains to be seen where the primary responsibility of complying with this obligation will fall.

Furthermore, *private establishments* have been defined in the broadest way possible, and include *any* company, firm, trust, association and union (amongst others). Smaller establishments may not be in a position to incorporate some of the changes required by the Disability Law, without affecting the scope of their operations or, in some cases, potentially ceasing operations. Thresholds in relation to capitalization requirements or the number of employees would perhaps help the Disability Law achieve its object without disproportionately affecting smaller establishments.

IndusLaw View:

Although the new Disability Law is a reformative law and is definitely a step in the right direction, significant questions remain in relation to its practical implementation. The inclusion of *private establishments* within the scope of the Disability Law creates compliance requirements for a number of organizational entities for the first time in India: however, the absence of *thresholds*, specifically in the context of the *standards of accessibility*, may deter smaller establishments from employing persons with disabilities. Further, the broadened scope of the term '*disability*' along with the fact that certification requirements do not apply in all cases could potentially lead to the misuse of the Act.

The Act also leaves a lot to be done by the Government in terms of coming up with policies and schemes for its effective implementation and the furtherance of the object of the Act. For instance, the Act enables the Government to come up with schemes to incentivize private establishments to ensure that five percent (5%) of the total workforce of such establishments constitutes persons with benchmark disabilities. While no schemes or incentives exist as of today, it will be worthwhile to keep an eye open for the schemes introduced. Further, even with such incentives in place, the employment of persons with disabilities is left to the discretion of private establishments. The Disability Law does not mandatorily require private establishments to employ disabled persons as part of the total workforce.

Other areas where schemes from the Government are expected to unfold include schemes for disability pension, caregivers' allowance, insurance and other such social security schemes for persons with disabilities. The Government has also been entrusted with the responsibility of developing schemes and policies to ensure that consumer products manufactured and distributed in India are universally designed for general use by persons with disabilities.

Whilst gaps exist and the Government needs to act on various fronts to ensure the effective implementation of the Act, it cannot be denied that the Disability Law is a gentle nudge to the private sector in India, reminding it that persons with disabilities constitute a significant chunk of the population and could contribute effectively to Indian establishments.

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