

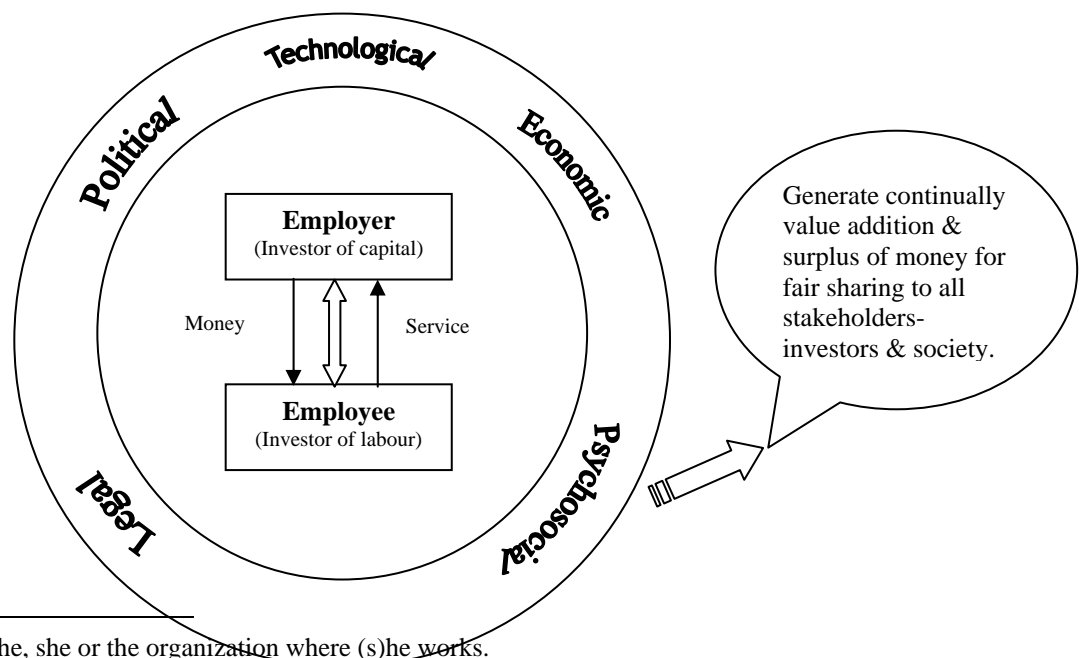
# Recruitment and Termination of Employment by Employer

## A Managerial Perspective

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1. **Introducing Note:** Before directly going into the subject of hiring and firing provisions in the Nepalese labour laws, it is essential to understand the employment system as a whole with its influencing environmental factors and their current status in the country. A managerial perspective, in general, and human resource management views in particular is also included to review the issues of hiring and firing of the employees by the employers.
  
2. **Employment System – A Conceptual Framework:** Universally, we can claim that work is a defining feature of human existence. Everybody among us work for our family and our society as well as for the future generation. We work in the form of home working, self-employment or wage employment. The modern day employment system has distinctly shown two classes of workers- the employers, who invest capital and employees who invest labour. Employer considers employee as a people who work for him<sup>1</sup> and in return, employer pays fair money. On the other hand, employee consider employer as means to earn money for his and his family’s living and so he deliver his services to the employer. Employment system is a sort of bondages in which both employers and employees are knitted together for generating some valued outputs and make mutually an environment of human existence. The bondage is not so simple like one time buying or selling a product by two parties. It is rather an environment of a complex co-existence with economic, technological, social, political and legal balance. The important fact is to have an efficient and effective employment system in enterprise that can promote sustainability and growth of the enterprise and contribute to the national development as well as provide social justice to all people- whether they are classified as employers or employees.



<sup>1</sup> He, here means he, she or the organization where (s)he works.

3. **Employment Agreement in Nepal:** In Nepal, different types of employment agreement prevail between employer and employees within the employment system. Some of them are:
  - a. **Verbal agreement:** With minimum understanding of service required from the employee and compensation to be paid by the employer to the employee for his service verbal agreements are made. Examples prevail in most of the agriculture work, domestic work, petty construction work, retail shops, micro enterprises, etc.
  - b. **Formal contract:** Mutually agreed service contract with the terms and condition spelled out for the job to be done, compensation, and the time of expiry of the contract is made. Examples are found in medium and large private companies who hire skilled and professional employees, particularly from other countries.
  - c. **Appointment letter:** Appointment letters explaining the terms and conditions to follow the service rules of the institution are provided by the employer to the employee for a permanent job. Examples exist in public sector companies, established large companies and multi national companies.
  - d. **Probation employment:** Employment agreement on probation basis as temporary, *badli*, apprentice is provided verbally or in writing by the employer to employee. It applies to low skilled workers in most of the organised companies.
  
4. **External Environment of Employment System:** The employment agreement practices are very much guided by the external environment of the employment system.
  - a. **Economic environment:** The economy and the economic growth of the country, the dominating sector of the economic activities and the supply/ demand situation of the labour force are some major factors contributing to decide the types of employment agreement. The recent globally accepted liberalized and deregulation economic policy of the government is also showing the symptom of changes in the employment system. In Nepal, the economic growth is not satisfactory, the major dominating sector for employment is agriculture, micro-enterprises, public sector, tourism and few export item manufacturers, and there is always surplus of unskilled labour in the market.
  - b. **Technological environment:** Technological intervention is very much aligned with the economic growth of any country. New technology has not yet been used in Nepal that changes the scenario in employment system in Nepal. Very few manufacturing companies are using automated machines. Information and computer technology have been introduced by multinational banks that are presently affecting some employment pattern shift.
  - c. **Political environment:** After restoration of the democracy in the country in 1990, three powerful political parties are governing the country. Naturally, the strategies and approaches of these parties for the economic development and social justice to the people influence the employment system, too. The official transcript of the strategy of these parties can be observed from their respective election manifestos. Nepali Congress who was in the government for maximum period during the last decade has emphasized that it believes in providing economic independence and enhancing private sector's role in

increasing national income as well as employment opportunities<sup>2</sup>. Like this, the Nepal Communist party (UML) who is in the main opposition in the government for longer period has opined that it is committed to improve the national economy through developing the productive power of the country and eradicating *shoshan*, discrimination, and harassment prevailing in the society<sup>3</sup>. Similarly, the Rastriya Prajatantra Party who is always playing a vital role in making decisions in the parliament stressed that in one hand it will promote competitiveness, capability and efficiency of enterprises and in another hand, it will also focus on millions of small enterprises existed in the country to create national enterprises and capitol.<sup>4</sup> The policies of the government and the legal instruments enacted to regulate the activities are supposed to be guided by these manifestos of different political parties. Besides, the insurgency of the Maoists group has created new industrial environment with uncertainty and security. The employment system is influenced by these strategies and policies of political parties as well as problems created by Maoists group.

- d. **Psycho-social environment:** One very important factor that decide the employment system is individual traits and group behaviours of employers and employees which are derived from the culture and value system of the society where they belongs to. In Nepal, the corporate work culture is not yet matured enough. The employers and employees both are recently shifted from agricultural and trading occupation. Most of the employers are originated from agricultural sector where the feudal hierarchical society prevails and from the trading sector where short term value system of the *baniya* prevails. The employees have come from the rural agriculture sector leaving the plough and spades at their villages. It is definite that these psychosocial traits of both employers and employees influence the employment system in general and employment agreement in particular.
- e. **Legal environment:** Legal instruments are developed to regulate the activities so that the goal and objectives of the nation is achieved without any hindrances from the people involved in those activities. And, the instruments thus made for developing national economy and enterprises, and promoting social justice to the employees influence the employment system in the country. In Nepal, the employment system is governed mainly by the Labour Act, 2048 (1992).

5. **The Labour Act, 1992:** The Labour Act applies to workers and employees of establishments where at least 10 workers or employees are employed, unless the establishment is situated in the industrial estates established by the governments. There is a distinction between workers and employees working as technical and administrative functions. The important provisions of employment and termination are spelled out in Sec. 4, 7, 10, 11, 15, 23, 37, 51, 52, 53 and 73. To understand the hiring and firing mechanisms provided in the Act, we have to identify the legal provisions for specific areas like employment agreement, termination of employment, dismissal and procedural safeguards, severance pay and avenues for redress.

- a. **Employment agreement:** Workers and employees are appointed to a classified post by the general manager, rather than hired on the basis of a contract of employment. Workers and employees, including those engaged in any piece rate or contract work, must be granted a permanent appointment after they complete one year (240 days) of uninterrupted

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<sup>2</sup> Election Manifesto of Nepali Congress, 2056 B.S., page 3.

<sup>3</sup> Election Manifesto of Nepal Communist Party of Nepal (UML), 2056 B.S., page 25.

<sup>4</sup> Election Manifesto of Rastriya Prajatantra, 2056 B.S., page 17.

service and if their performance, honesty, discipline, dedication to work, attendance and so are satisfactory. So, the appointment letter is mandatory. Besides, for increase in production and service, or if there is a need to appoint for any specified work workers, or employees may be appointed on a contract basis for a fixed term. Probationary period is generally one year for permanent employees.

- b. Termination of employment:** The management may compel to retire worker or employee who attained the age of 55 years. However, the service of the employee or worker may be extended up to another 5 years if he or she is indispensable to the operation of the establishment. Besides, any worker or employee who illegally engages in rioting, or directly or indirectly instigates others to do so, in an establishment other than the one in which he or she is working, or in government office may be dismissed from service by the Department of Labour.
- c. Dismissal:** The termination of employment at the initiative of the employer is dismissal or in a rough terminology it is firing employee. It is lawful to terminate the employment of any worker or employee who has not recovered from an occupational accident within a year. However, it is unlawful to fire any worker or employee unless specific procedures are strictly followed as mentioned in the Labour Act or its subsequent rules.

There is some provision in the Act for layoffs and payoffs of employees on special circumstances. Besides, If remain absent from the work for more than 30 days without notice the management can dismiss any employees or workers.

Any employee or worker committing thirteen types of the misconduct specified in the Act, may be ultimately dismissed from the service. However, some specific procedure has to be followed. Immediate dismissal action can be taken for those who are involved in misconducts like (1) causing physical injury or harm, tying up or detaining the general manager, or engaging in destructive activities within the establishment in respect of any labour dispute or any other issue, or (2) any criminal offence involving moral turpitude for which the worker or employee is convicted or imprisoned. Employee or worker involved in other eleven types of misconduct has to be punished twice before dismissing him.

- d. Procedural safeguards:** A notice of imminent termination on disciplinary ground, explicitly referring to the alleged misconduct and the punishment that might be imposed, must grant a reply period of seven days within which the employment relationship cannot be terminated. If the worker or the employee concerned does not submit an explanation within the time limit prescribed, or if the explanation submitted by him is not found to be satisfactory, he may be punished for misconduct.
- e. Severance pay:** Permanent workers or employees who have served for at least three years and whose employment is terminated are entitled to a lump-sum gratuity the amount of which increases with seniority. However, those dismissed from service by the employer or the Department of Labour for any of the misconduct are not entitled to this gratuity.
- f. Avenues for redress:** An employee subject to disciplinary measure (including dismissal) may file a complaint with labour office within 35 days from the date of receipt of the dismissal notice. He or she can appeal to the labour court against the decision of the labour office within 35 days after receiving notice of the decision.

## 6. The Coverage and Impact of the Labour Law

- a. **Coverage:** It is estimated that only 7% of the total workforce is covered by the Act. Out of 11 million economically active population only about 8 hundred thousand employees falls within the jurisdiction of this law. Moreover, there is no empirical research conducted till now to estimate how many employees are hired as permanent employee with written formal contract or with appointment letter and how many are working with just verbal agreement only. One can estimate, with very limited information that at present there are only about 3 hundred thousand employees or workers in Nepal who are the target group for discussion on the issue of hire and fire mechanism.
- b. **Employment agreement:** The employers are of the opinion that once the employee becomes permanent the efficiency decreases and liabilities increases. So the tendency of employing workers in probation basis (not making permanent employees, changing names and places after 240 days) is increasing. Besides, the tendency is also increasing to outsource the jobs to contractors even if the job is of permanent nature operating within the premises of the establishment (examples are security guards, internal material handling, packaging and finishing, etc.). This ease down the firing of any employees as there will not be any permanent nature of employment relationship. On the other hand, workers are not aligned with the objective and philosophy of the organization and the tendency of becoming permanent is increasing so that nobody can fire them and enjoy less work with more benefits. This has resulted in prioritising trade unions activities in pressing employers for providing appointment letters to all employees. This conflict is clearly observed when industrial dispute arises in the country. Besides, the tendency of hiring skilled manpower and professionals from India is increasing due to this mechanism.
- c. **Termination of employment:** The tendency of expanding the services of the employees and workers beyond 55 years of age. Those who have worked for 55 years without any problems are valuable for the establishment. However, from the employees side they feel unsecured at the adult age, they feel why they cannot work for another 5 to 10 years.
- d. **Dismissal:** Firing a permanent employee is a difficult job. Not hiring an employee on a permanent job and firing at any time is an easy job. Those establishments who are operating profitably are utilizing this strategy. The impact is loss in employee's ownership of and affection towards establishment thereby loosing productivity or inner strength of the establishment to move forward for its long-term sustainability and growth.
- e. **Procedural safeguards:** The employees are safeguarded against unfair or unjust termination through pre-notification. Thus, employers are reluctant to take actions because of trade union's threat. Many of the individual's indiscipline action cases are becoming collective union's cases. There is a dearth of trust among employers and employees in most of the establishment.
- f. **Severance pay:** Many permanent employers are very much relieved with this system. However, as only the permanent employees get this benefit of severance pay after regular termination, the tendency to retain most of the employees in temporary basis or on daily wages, or outsource the job to a particular *Thekedar* exist.
- g. **Avenues for redress:** The information on the cases lodged and settled at the Labour court indicates that the cases of reinstatement of the labour top the list with about 27%. There were 64 cases from previous year and 61 cases during the year 2000/2001 regarding

reinstatement totalling 125 cases. Out of these cases, 52 cases were settled during the year by cancelling 22 initial decisions and 6 accepting initial decisions<sup>5</sup>. There is a relief for employees having enough avenues for redressing. However, this has created problems to the employers to take actions against employees who are not performing as per the expected standards.

**h. Summing up:** Some major impacts on the employment system due to the provisions in the existing Labour Act are listed below, which needs to be supported by research and study. These are just issues for discussion among social partners, with particular interest to the government.

- ✓ There is a perennial conflict between employers and employees on the issues of appointment letter, outsourcing of the job, recruitment of the Nepalese workers, ease on disciplinary action, etc.
- ✓ The employees are not aligned to the business of the employers, thereby resulting low job satisfaction, high turnover and absenteeism.
- ✓ The employers are hesitant to develop the skills of the employees, thereby resulting in low quality and productivity required for long-term sustainability and growth.

**7. UN and ILO Standards:** Because of its economic and social implications, and inspite of legal instruments, the termination of employment by employers or hiring and firing practices is one of the most sensitive issues of debate not only in Nepal but also in the world today. International Human Rights Instruments broadly acknowledge protection against arbitrary dismissal. Article 23 of the Universal declaration of Human Rights<sup>6</sup> recognizes the right of all persons “ to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. Similarly Article 6 of the International Covenant on economic, Social and Cultural Rights<sup>7</sup> recognizes the right of all persons to have the opportunity to gain their living by work which they feel freely choose or accept, and obliges State to take steps for this provision. The International Labour Organization noting the importance of unfair dismissal of employees and the necessity of regulating the labour practices in view of changing global economic and social context have adopted the Convention 158 and the Recommendation 175 regarding the termination of employment in 1982. The Government of Nepal has not yet ratified this convention. Moreover, the Decent Work Agenda of the secretary general of ILO has also given importance to the agenda of employment and job security as a priority agenda.

**8. International Experience:** Various countries have their own legal instruments to cover up this issue of hiring and firing of employees with different approaches. From developed to the developing and least developed countries, the issue is very relevant from the scope of national economy and social justice. It is observed that the regulatory measure alone does not solve the economic and employment problems of the country. The cursory review of the laws of other five countries with different development status – Japan, Singapore, Sri Lanka, India and Senegal indicates that these countries have got their own provisions on the Act regarding the termination of employment as per their economic and social status. However, it seems it has no direct correlation with the respective countries development.

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<sup>5</sup> Records from the Labour Court, 2057/58

<sup>6</sup> Dated 10 December 1948

<sup>7</sup> Dated 19 December 1966

- 9. Managing Human Resources:** When we talk on the issue of employment and termination of employment (hiring and firing) of employees or workers, we have to rethink and decide whether the employees are resources having potential for development or a piece of machine which produces goods or services. Current management practices in many organizations indicate that employees are viewed as valuable investments. However, in Nepal many still view their employees as variable costs of production, while physical assets are treated as investments. When employees are viewed as variable costs, there is little recognition of the firm's contribution to their training or managing the knowledge of the experienced employees. Hence the importance of human resource management in recruiting, retention and retirement (3-R) has to be seen by the employers holistically rather than simply pleading for hiring and firing. Most of the investment management practices for improved retention are<sup>8</sup>:
- a. Organizational cultures emphasizing interpersonal relationship values (team orientation and respect for human being)
  - b. Effective selection procedures (use of job classification, job description and job specification)
  - c. Compensation and benefits (equitable compensation, performance based compensation, pay incentives, valued benefits)
  - d. Job enrichment and job satisfaction (morale survey, needs identification, motivational schemes)
  - e. Practices providing work-life balance (alternative work schedules, security, child education and health)
  - f. Organization direction creating confidence in the future (training and opportunities for personal growth, career development plan)
  - g. Special provision to retain skilled personals
- 10. Issues for Review of Laws:** Hiring and Firing is not a zero and one variable. This means one cannot make legal instruments to either have a lifetime job security or have no security at the job at all. From a managerial perspective, the legal instruments should cover the issues in a very simple manner that facilitates promotion of enterprise development as well as providing social justice to the employee. There are some issues that have to be focused for reviewing the present Labour Act. While reviewing, the impact analysis of existing legal provisions have to be made on the issues highlighted below:
- a) Individual Dismissal
    - ✓ Unfair/unjustified dismissals
    - ✓ Notice before dismissals
    - ✓ Avenues for redress
    - ✓ Remedies in the event of unfair or unjustified dismissal
      - Reinstatement
      - Compensation
    - ✓ Severance Pay
  - b) Collective Dismissal

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<sup>8</sup> Adopted from the book "Strategic Human Resource Management" by Charles R. Greer, Pearson education, Inc. page 18

- ✓ Economic, technical and structural reforms
- ✓ Consultation with workers representation
- ✓ Notifying the authorities