Section VIII: Others

This section discusses an important aspect of organisational governance: conflict of interest. The chapter explains what conflict of interest is and how one can ensure that the organisation is not adversely affected by such conflicts.

We also briefly discuss the law related to two important benefits for employees: provident fund and gratuity. Gratuity is now compulsory for all non-profit organisations with 10 or more employees. However, applicability of provident fund to non-profit organisations is not as clear. Still if you have provident fund or are planning to introduce it, this chapter will provide you an overview.

Conflict of Interest[1]

In the movie '*Aakhri Rasta*[2]' Amitabh Bacchan plays a double role: he is the father and he is also the son. The father comes out of jail after 20 years and is all set to take revenge on a few people, including a minister.

In the meanwhile, the son has grown up to be a police officer. He is responsible for security of the Minister. He then comes to know that the criminal hunting the Minister is his own father! He is now torn between his sworn duty and love for his father. With some help from the story-writer, he is able to balance the two and comes out with a clean conscience.

Similar conflicts of interest exist in our day-to-day work. Fortunately, for most of us, they do not require Amitabh's daring stunts.

What is conflict of Interest

A conflict of interest occurs when you are torn between two loyalties. It is a peculiar situation to be in. A very honest person will wonder whether he / she helped one party at the expense of the other. He / she will also worry whether others will think bad things about him / her. On the other hand, a dishonest person is more fortunate – he / she doesn't ever have to worry about conflict of interest!

Many professions have well-defined policies to handle this. For example, an auditor can not take up an audit where he or she owes more than Rs.1,000 to the client. Similarly, a judge can not give judgment in a case where one of his / her relatives is involved.

No similar procedures exist in the NGO sector. NGOs are today assuming an increasingly important role in the society. This will eventually bring media attention to how they work themselves. Conflict of interest is an area where much can be done.

Some of the provisions related to conflict of interest already exist in the Income Tax Act. These have been discussed under 'Key Person Transactions and Income Tax' on page 210.

Examples

Conflict of interest can occur at any level and at any time. Some examples from the NGO sector will help us understand this better:

At Board Level

- The NGO purchases a piece of land from a trustee or his / her relative.
- The NGO appoints the Chief Functionary's spouse as a consultant.

At Operating Level

- Taxis are regularly hired from a firm owned by the Administrator's brother-in-law.
- Agency's Program staff accepts consulting assignment from one of the grantee NGOs.

In Grant making

- The Program Officer makes a grant to an NGO just before end of his / her tenure and then joins the NGO as director.
- Grants are made to NGOs where the Agency's Director or staff or their relatives hold positions[3].

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[1] Based on AccountAble 53: Conflict of Interest
[2] Hindi phrase, meaning 'The Last Option'
[3] This problem does not arise if the position is held ex-officio

Implications

Conflict of interest is not bad in itself. In today's society when people have multiple responsibilities, this is natural. Things like networking and working together on issues also increase chances of a person occupying two positions.

However, if conflict of interest is not handled properly, it can lead to loss of money, image or reputation. In some cases, it may also result in civil or criminal proceedings.

Managing Conflict of Interest

In the normal course of work, all decisions are properly scrutinised. Also most such decisions help the organisation move forward at an optimum cost. Later, the implementation of the decision is also monitored quite carefully.

However, this process may be short-circuited in some situations. This is more likely when a conflict of interest exists. The person who is interested in the transaction may influence the decision-making or monitoring.

It is not necessary that this will always happen. Also in some cases, the interested person might help in getting a better deal or service.

Even so, having a proper conflict of interest policy will help manage the problem. This policy could be built around the following two principles:

1. Disclosure of Interest

In the Corporate world, all directors have to give a list annually. This list includes names of all their relatives and concerns in which they or their relatives are interested.

In the NGO world, this can be extended a little. All persons in key positions could disclose their interest in other organisations / concerns. In some cases, their close relatives may be running an organisation. The name of such organisation should also be included.

The concept of key positions covers all people who are involved in the decision-making and monitoring process. Examples include trustees, directors, managers, senior executives, etc.

2. Role in decision-making and monitoring

Once the disclosure of interest is on record, we can take the next step. This is to make sure that the interested person does not go through the Amitabh syndrome! How to do this?

Normally, such persons should not involve themselves in the particular decision. They should also avoid getting involved in the subsequent monitoring process. Obviously, they would also avoid informal lobbying for or against the decision.

Mark R. Simmons[4] offers a five-point solution to managing conflict of interest:

1. Establish a clear tone at the top that conflicts of interest should be avoided, if possible.
2. Identify those areas of work which have high risk for conflict of interest.
3. Establish an organisation-wide policy (see below) on how conflicts of interest should be identified and handled.
4. Educate directors, officers and employees on the subject.
5. Perform periodic reviews to evaluate effectiveness of established policies.

[4] Internal Auditor at Rensselaer Polytechnic Institute, e-mail: mrsciacfe@aol.com

Registers and Records

No such discussion can be complete without a register popping up on the scene. Here we need at least two:

1. **Disclosure Register:** Contains listing of relatives, concerns, etc. for each key person. Each key person's listing is started on a new page and is dated.

2. **Transaction Register:** Contains listing of all transactions valued[5] at (say) Rs.20,000 or more. It also shows which key person was interested.

Additional information on these transactions can be kept in the Minutes' Book. Another useful place is the approval letter. The letter can summarise the conflict of interest and summarise how it was tackled.

Designing a Conflict of Interest Policy

How to design a suitable policy for yourself. Firstly, we should recognise that conflict of interest can not be eliminated. It can only be discouraged or managed. Herrington J. Bryce[6] offers an interesting structure in five parts: commitment, prohibition, money value, transparency, and corrective action.

Bryce's suggestions are made in the US context where Boards are relatively strong. Further, NGOs' work is regulated more effectively than in India. Therefore, some of this may not be directly applicable to the Indian situation.

1. Commitment to duties:

- The duty of undivided loyalty to the NGO / Agency
- The duty of care
- Prohibition against self-dealing
- Need for accountability and stewardship

2. Prohibitions:

- The NGO / Agency will not loan money or property to a board member.
- The NGO / Agency will not sell or buy or lease land or buildings from a board member without court approval.
- The NGO / Agency will not do business with a board member in a way that is unfair to itself.

3. Transparency:

- Each trustee must disclose possible points of conflict.
- Such trustees should not be present when the matter is discussed.

4. Money Value:

Also consider the amount involved. For example, if the total value of all such transactions with a board member in a year exceeds Rs.20,000, then:

- The goods or services must be provided to the NGO at actual, reasonable or discounted value.

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[5] Cumulative value for each key person in a year

[6] Financial and Strategic Management for Nonprofit Organisations, 3rd edition. Jossey-Bass Publishers, San Francisco, USA

- Details of the transaction must be disclosed to the Board. The concerned member can not participate in discussion or voting.
- Detailed minutes of the transaction must be kept.
- The transaction must be authorised by 2/3 of the voting board. Persons who have themselves sold services or goods to the NGO in last one year, can not vote on this transaction.
- The attorney general (similar to Charities Commissioner in Mumbai) must be notified in advance.
- If the transaction exceeds Rs.2 lakhs, then it must be published in a local newspaper.

5. Corrective Action:

The policy should also provide for corrective action, when unfair transactions are discovered later:

- A transaction showing conflict of interest can be voided later if it is seen to be in bad faith.

As discussed earlier, this coverage can be extended to other key persons.

In practice, many key persons have found this sort of policy useful in another way. It offers them a readymade excuse to say ‘no’ to their friends, relatives and associates!

Moonlighting

Moonlighting is an American term. It may sound very romantic but it simply means holding two jobs. One job is done during the day and the second is done in the night.

Moonlighting is not very common in a job-market like India. However, things are changing, especially in the metros. There are people who take up a part-time job or do some extra consultancy assignments. How to deal with these?

As always, there are at least two ways. One is to simply prohibit all employees from having other jobs. If you can do this, there is no need to read further.

In principle, a second job should be discouraged for full-time employees. Sometimes, however, there may be a situation where you can not meet the employee’s financial or intellectual needs. In such cases, you may want to allow people to take up other jobs. For this you will need a ‘moonlighting policy’. This should address four basic issues:

1. **Disclosure:** All employees must be willing to disclose necessary details of the secondary assignment / job.
2. **Approval:** The employee should discuss the second job with his / her supervisor before accepting it. Secondly, written permission must be taken for all such jobs / assignments.
3. **Interference:** The second job / assignment should not mean that you have to change work hours for the person. Also you should not have to change work schedules to accommodate the second job.
4. **Conflict of interest:** The employee should be able to maintain confidentiality at both places. Further, the employee should not promote the work of second employer / client at your cost.

Additionally, the employee must agree to always disclose any ‘moonlighting’ that they do.

Provident Fund[7]

As NGOs grow larger and more formally organised, questions such as minimum wages, provident fund, gratuity start coming up. What are the legal requirements and pitfalls in these matters?

What is Provident Fund?

The word Provident is closely related to the word Prudent. Both have been in use since the 14th - 15th century. Both can be traced back to the Latin word *Providere*. The Latin *Providere* originally meant *foresee*. Later on, it was used to mean exercise foresight by making preparations. 'Provident Fund' thus means: saving some funds for the future.

Provident Fund has been compulsory for most organisations in India since 1952. It was meant as a social security measure for workers in the organized sector. It is also available on optional basis to other organisations and individuals. The PF scheme covers more than 1.85 crore employees in over 140,000 establishments. The corpus of the PF Trust is about Rs.55,000 crores. It is controlled by the 50 Trustees who form the Central Board of Trustees. Most of the investments are in Government bonds and securities.

Obviously, the Provident Fund pie has become very large and very sweet — everyone wants a piece. Proposals to release this money into private investments and other similar bright ideas have been floating around for some time now. In the present scamage, it is difficult to say how long this money will remain safe.

Does it apply to you?

PF Act applies only to organisations (including NGOs) which have more than 19 employees. Also they should be producing some specific items. Or they should be involved in some specified activity. Some of these (relevant for NGOs) are given in the list.

Who are employees

Employees include teachers in NFE schools also. All schools run by an NGO would be taken together.

It does not matter whether payment to employees is made as salary or as honorarium. Part-time or temporary employees also have to be counted. Casual labour need not be counted as employees.

Some of the covered items / activity

1. Paper, stationery
2. Printing (including screen printing)
3. Herbal / Ayurvedic medicines
4. Cane, bamboo, coir or leather items
5. Canned items (sauce, pickles, etc.)
6. Hospitals
7. Textile, garment factories
8. Credit-based NGOs (NBFCs)
9. Schools / NFE centers, etc.

Exemption for

- Cooperative Societies, with less than 50 employees. They should not be using power to run the machines;
- NGOs which run mainly on Government Grants;
- New organisations — for the first three years.

Deductions and Deposits

Monthly Deductions

Once PF becomes applicable, you have to deposit some amount each month. This amount comes both from employee and the employer (NGO).

- 10% of employee's monthly salary is deducted.

[7] Based on AccountAble 32: Provident Fund

- Additional 1.67% is contributed by the employer (NGO).
- The NGO also has to deposit 8.33% for the Pension Fund.
- For certain cases the employee's and employer's contribution is as much as 12%.
- Calculate contribution on the basis of actual salary drawn during a month. Salary means basic wages, dearness allowance (including food concession allowed) and retaining allowance (if any).
- Round it off to the nearest rupee.
- Generally, employees drawing monthly salary of Rs.6,500 or more are not covered under this EPF scheme.

The NGO also has to deposit additional amounts as 'Employee's Deposit Linked Insurance' and as 'administrative charges'.

Depositing the amount

After deducting the PF amount, you have to deposit it within 15 days:

- Prepare separate cheques or bank drafts for contribution and administrative charges. Pension Fund amount should also be paid by separate cheque.
- Cheque / draft should be in the name of P. F. Commissioner.
- Use separate PF challans for depositing each type of contribution.
- Deposit the cheques in State Bank of India or Reserve Bank of India.

Provident Fund

10% from employee

1.67% from employer

Pension Fund

8.33% from employer

1.16% from Government

Filing Returns

PF involves a lot of paperwork. Some organisations tie up with a retired employee from PF Department to complete this. Some of the forms are:

1. **Monthly Return** of contributions should be filed in **Form No. 6**. Give names of members, their P. F. account number and contributions made both by employer and employee.
2. **Annual Return** of contributions should be filed in **Form No. 6-A**.
3. **Renewal** of contribution card of members should be done in **Form No. 3**.
4. If an **employee leaves,** inform the PF Department in **Form No. 3-A**.
5. **Form No. 2** should be filled by the members for **nomination**.
6. When a **new employee** joins, file **Form No. 5**.

Penalties

Some of the penalties for violating PF Act are:

Offense	Prison	Fine
Not depositing employee's contribution	One year - three years	Rs.10,000
Not paying inspection fees or administration charges	Six months - three years	Rs.5,000
False statement to avoid PF payments	Up to one year	Rs.5,000

Getting Your Money Back

Getting your money back from the PF commissioner can be a problem. There are various forms, procedures, and conditions. Broadly, money can be withdrawn in following ways:

- By applying for a loan or advance
- By paying LIC premiums through PF Department
- By leaving India permanently
- By getting retrenched
- By retiring from service
- By dying...

Advances

Advances may be refundable or non-refundable. These can be taken only for listed purposes. There are many conditions attached to each of these (para 62-72 of the EPF Scheme). The advance can be taken by filing Form No. 31 with the Regional Provident Fund Commissioner.. Various certificates / documents are also required, depending on the purpose.

Advance is allowed for

1. Purchase of a plot / Flat
2. Construction of House
3. Additions, alteration or improvement to own house
4. Repayment of Housing Loan to Government bodies
5. Closure / lock-out
6. Non receipt of wages for two months
7. Illness of self / Family
8. Marriage of self / son / daughter / sister / brother
9. Post-matric education of son / daughter
10. Damage to the property due to natural calamity
11. Loss of wages due to power-cut
12. Equipment for physically handicapped members

The Pension Scream...

In 1995, the Government introduced a revised Pension Scheme. Under the scheme, the following happens:

- Most of the employer's PF contribution (8.33% out of 10%) will now go to the Pension Fund.
- The Government will contribute additional 1.16% to the fund.
- The employee will get a monthly pension on retirement. On the employee's death, the spouse or children will also get a somewhat reduced pension.
- The employee can commute up to one-third of the pension. The employee can also choose to get the capital amount refunded after death.

The scheme was not appreciated by the Unions and employees. The matter has gone to court. A lot has been written about the rate of return, choice to withdraw and the way employees are being 'short-changed' by the Government.

One key feature of the scheme has not been talked about much. The employer's contribution was earlier going into the Provident Fund. The accumulated balance in Provident fund is withdrawable.

Now most of the employer's contribution will go into the Pension Fund. For all practical purposes, the balance in Pension Fund is not withdrawable.

Thus with one stroke, the Government has indefinitely postponed the refund of half the PF balances. The amount coming into the Pension Fund can now happily be used to finance the Government's debts!

Your own PF Trust

Many people do not feel happy with the way the PF Department is run. Larger organisations sometimes set up their own PF Trust. This helps in speedy settlement of claims for the employee. This is also more beneficial in the sense that the trust is run by your own colleagues. However, it also involves a lot of paperwork.

Registration

To set up your own Trust, you should have at least 100 employees. Then you have to apply to the Regional P. F. Commissioner for permission. The Commissioner may grant you permission if:

- There are more than 99 employees in your organisation;
- The rate of contributions provided in the Trust is at least equal to the PF Act rates;
- Employees will get at least as much benefit as under the PF Act;
- The benefits will be mainly provident fund, pension or gratuity.

You will also need to get the PF Trust approved under the Income Tax Act. Both these procedures can be time-consuming, lengthy and tiring. NGOs with weak hearts should consult their doctors before setting up a PF Trust.

Running the Trust

Setting up the Trust is only the beginning of your problems:

- Provisions of the Act remain applicable to the trust;
- The PF Department may lay down additional conditions;
- You have to establish a Board of Trustees for the provident fund;
- Terms and conditions of service of members of the Board of Trustees should be clear;
- Detailed accounts for each employee’s Provident Fund should be kept;
- Various returns, including Income and Expenditure Account and Balance Sheet have to be filed regularly;
- Trust accounts have to be audited each year;
- Provident Fund moneys can be invested only according to Government rules;
- Administration expenses of the Trust have to be borne by the NGO.

Gratuity

What is Gratuity?

'Gratuity' has been derived from Latin word '*gratus*'. It means pleasing or thankful. English word 'congratulate' has also been derived from this only. Here Gratuity means acknowledgment and positive recognition of services rendered by the employees. Earlier Kings and Knights used to give rewards to their courtiers and general people of the state. The awards were given to them to recognise their valor and good deeds. The same was also aimed at retaining them in the State. The kings or employers were under no compulsion to give these prizes or rewards to their employees or slaves.

This tradition continued for many generations up to 6th decade of Twentieth Century. Till then employees were not sure whether they will get the benefits from their employers. They started feeling insecure about their future as they had a little amount left with them at the time of their retirement. The legal bodies started feeling need to regularise benefits to the employees. They considered the fact that the human resource needs to be recognised in better perspective. Only Provident Fund will not suffice the requirements of employees in future when he / she retires and becomes incapable of earning their bread and butter. The Government thus decided to introduce some provision to regulate such payments. "**The Payment of Gratuity Act, 1972**" was introduced and published in gazette of India on 21.8.1972.

Applicability

The Gratuity is mainly applicable to industries or establishments for business purpose. But in 1997[8], the Government has come out with the provision that Gratuity will be applicable to the Societies and Trusts also:

The provisions are as under:

1. You are employing 10 or more employees;
2. It is applicable for all the employees who are employed on wages in your organisation. There is no limit on wages.

An employee becomes eligible for gratuity when he or she completes five years in service. The employee should be treated in the continuous service if he fulfills following requirements:

1. He has worked for minimum 240 days[9] in a year;
2. If your organisation is seasonal or works for less than 6 days in a week, number of days for calculation will be 190 days in a year.

To determine continuous service for half year, Number of days explained above will be half.

Nomination

Each employee should make nomination after he / she has completed one year of service. The nomination can be made in any of the following manners:

1. If the employee does not have any family, he can nominate any person for the benefits of the gratuity. He can do so in the name of more than one person;
2. If the employee has a family, nomination can be made in the name (s) of family member only;

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[8] Notification reproduced at the end of this chapter

[9] The absence on account of sickness, paid leave, maternity leave lay-off, strike, etc. should be included as number of days served.

3. The employee can alter the name of nominee on his / her discretion. He should give one written application to his employer.

Compulsory Insurance

You should also take insurance for your liability for payment towards the gratuity. This insurance should be taken from the Life Insurance Corporation of India. *The appropriate Government may exempt the organisation from this provision if it has more than 500 employees and established its own Gratuity fund.*

Payment of Gratuity

An employee becomes eligible for gratuity on termination of the employment. He is entitled for the payment of Gratuity within 30 days of the termination of employment. The Gratuity should be paid to the employees even if the employee has not filed any application on his retirement. The application given in the plain paper is also valid claim. The termination of employment is caused on account of followings:

1. Superannuation - retirement on account of attaining maximum age (as fixed at the time of employment);
2. Retirement or resignation;
3. Death or disablement due to accident or disease.

If the termination of employment is because of death or disablement, the clause of "continuous service for minimum five years" will not apply.

The gratuity is paid by any of the following ways:

Normal Retirement

1. To the employee if the employee is retiring on account of superannuation, retirement or resignation or disablement.

In case of death

1. To employee's nominee; or
2. To the heir(s) if no nomination was made;
3. If the nominee or heir(s) is minor – to the controlling authority. The authority shall invest the Gratuity amount for the benefit of such minor. This is done till the time nominee attains the age of maturity.

Calculation of Gratuity Amount

Amount of Gratuity to be paid to the employees is determined as follows:

1. Calculate number of years served by the employee. Period served in excess of six months should be treated as one year;
2. Determine the rate of wages[10] last drawn by the employee;
3. Multiply rate of wages with No. of years served;
4. Now calculate 15 days salary by multiplying the quotient by 15 and dividing by 26[11].

[10] Wages means Basic Salary and Dearness Allowance. It does not include any other allowance or payments.
[11] Determined on the basis of 30 working days reduced by 4 Sundays.

In brief the formula for calculation of Gratuity may be outlined as follows:

$$\frac{\textbf{Rate of Wages X Number of years served X 15}}{\textbf{26}}$$

Example: Assume that one of your employees has retired after serving you for 13 years. He was withdrawing at the time of retirement Rs.4,500 as monthly wages. His Gratuity amount will be calculated as follows:

$$\frac{\textbf{4,500 X 13 X 15}}{\textbf{26}} \quad \textbf{= Rs.33,750}$$

5. The maximum amount of Gratuity payment to an employee is limited to Rs.3.50 lakhs.

Penalties

Gratuity Act has levied some penalties in case of non-compliance with the provisions of the Act. The Penalties are as under:

1. Any employer who does not comply with the provisions of the Act may be punishable with Rs.10,000 as fine (it may extend to Rs.20,000 also) or at least three months imprisonment (this may extend to one year also) or both;

2. Any other person who avoids any payment to be made by himself or helps somebody to avoid such payment, may be punishable with a maximum imprisonment of six months and maximum penalty of Rs.10,000.

If the offence relates to non-payment of any Gratuity amount by the employer, the imprisonment may extend to two years.

Notification

Notification published in Gazette of India, Part II, Section 3, Sub-section (ii), dated 6th September 1997

New Delhi, the 20th August, 1997

S. O. 2218. – In exercise of the powers conferred by clause (c) of sub-sections 3 of section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the trusts or societies, registered under the Societies Registration Act, 1860 (21 of 1860), or under any other law with respect to societies for the time being in force in any State, in which ten or more persons are employed or were employed for wages on any day of the proceeding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification in the official Gazette.

[F. No. S-42011/3/95-SS.II]