

LEGAL GUIDE

Retrenchment and layoff under employment laws of Nepal

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This legal guide explains the provisions for retrenchment and layoffs under Nepal's labor laws, detailing the procedures, grounds, and conditions that enterprises must follow for each mechanism.

Background

The Labor Act 2074 (2017) makes the provision of retrenchment and holding of labors in reserve as mechanisms to address the issue of fixed operating costs of labor management in cases where the number of labors is required to be cut-down for situations (as defined in the laws) beyond the control of the Enterprise. This Note provides a brief account of the legal provisions relating to retrenchment and reserve in Nepal, and serves as a practical legal guide to the enterprises in order to proceed with any of these mechanism(s) under laws.

The following relevant laws have been reviewed for the purpose of this Note:

- a. Labor Act, 2074 (2017) [the “Labor Act”], and Labor Rules, 2075 (2018) [the “Labor Rules”] [collectively referred to as the “Labor Laws”],
- b. Contribution based Social Security Act, 2074 (2017) [the “SSF Act”],
- c. Social Security Act, 2075 (2018) [the “Social Security Act”].

Retrenchment

Retrenchment (कटौती) refers to the process of cutting down the labor force by means of termination. Such termination usually takes a permanent form unless the situation(s) discussed in paragraph 7 of the table below exists. The Labor Laws have set out the grounds in which retrenchment can be done, the procedure required to be followed, as well as some key conditions to carry out the process as discussed herein.

Grounds for Retrenchment

Sub-section (1) of Section 145 of the Labor Act has maintained that retrenchment may be carried out in case of existence of one or more of the following grounds:

- a. When the enterprise faces financial difficulties,
- b. When the workers become redundant due to the merger of two or more enterprises,
- c. When the enterprise needs to be partially or completely closed down for any reason.

Procedure and Conditions

The detailed procedure and conditions of retrenchment as per the Labor Laws are highlighted in the following table. Please also refer to Annexure-2 for summary of the processes/steps:

S.N.	Procedure/ Conditions	Details	Remarks
1.	Notification requirement – 30 days' prior notice to be provided to: (i) Labor Office, and –(ii) Active trade unions or Labor Relation Committee [the "LRC"].	The notice should include: a) reason(s) for retrenchment, b) anticipated date of retrenchment, and c) estimated number of labors to be retrenched.	<ul style="list-style-type: none"> – This constitutes a mandatory notification requirement. – Post the 30 days' notice of retrenchment, discussions with the active unions/LRC are required to be done. Therefore, the notice may include a call for the active unions or LRC to be present for necessary discussions on retrenchment.
2.	Discussions with active unions or Labor Relation Committee	The agendas during such discussions should include: a) alternative(s) to retrenchment, b) conditions and basis for selection of labors for retrenchment.	<ul style="list-style-type: none"> – Such discussions constitute a mandatory requirement under Section 145 of Labor Act. These agendas should be sufficiently covered as Section 145 of the Labor Act seems to have maintained discussions on these agendas as a necessary requirement to initiate retrenchment. – If an agreement can be reached through such discussions, retrenchment should be done within the procedural and substantive framework of such Agreement.

S.N.	Procedure/ Conditions	Details	Remarks
3.	Deadlock situation [if the unions refuse to appear for discussions or an Agreement cannot be reached]	<p>In such a deadlock situation, the Enterprise can notify the Labor Office and proceed with retrenchment. Selection should be made on the following priority order:</p> <p>(a) Foreign labors,</p> <p>(b) Those labors who have been awarded more punishments comparatively for misconducts,</p> <p>(c) Labors whose standard of work performance is rather weak,</p> <p>(d) Labors who have been appointed at last out of the labors engaged in the same type of work.</p>	<p>– Even if an agreement is not reached, compliance with other procedural and substantive provisions of labor laws regarding retrenchment (as discussed below) should be ensured.</p>
4.	Order of Selection of Labors for Retrenchment	<p>Selection should be made on the following priority order:</p> <p>(a) Foreign labors,</p> <p>(b) Those labors who have been awarded more punishments comparatively for misconducts,</p> <p>(c) Labors whose standard of work performance is rather weak,</p> <p>(d) Labors who have been appointed at last out of the labors engaged in the same type of work.</p>	<p>– If it is necessary to retrench the labors who were appointed earlier, instead of making retrenchment in the order so specified as to retrench those who have been appointed at last, retrenchment may be made by setting out the reason for the same.</p> <p>Special Condition for Members of Collective Bargaining Committee and Trade Union Officials:</p> <p>– Last in the priority order of retrenchment (cannot be retrenched earlier even by setting out the reason as specified above).</p>

S.N.	Procedure/ Conditions	Details	Remarks
5.	Retrenchment Payment (compensatory payment)	<p>Payment form: One-month basic salary for each year of service; lump sum payment</p> <p>Proportionate payments to employees with less than one year of service.</p>	<p>Exemption:</p> <ul style="list-style-type: none"> - Retrenchment payment is not compulsory of the relevant labors are eligible to obtain Unemployment allowances as per Social Security Laws [Sub-section (8) of Section 145]. - However, it should be noted that neither the SSF as per SSF Act and Rules, or the Social Security Act has made any provision to provide unemployment allowance till date. Therefore, the requirement to pay retrenchment compensation seems to be compulsory as of this date. This compulsory situation may cease to exist in case the Government of Nepal introduces unemployment allowance or similar benefits as a legal entitlement.
6.	Applicability to Contractual Employees	<p>Section 145 of the Labor Act does not differentiate between the nature of employment in case of applicability of retrenchment. Therefore, termination of contractual employees for reason(s) of retrenchment may be done.</p>	<ul style="list-style-type: none"> - Section 145 of the Labor Act does not differentiate between the nature of employment in case of applicability of retrenchment. Therefore, termination of contractual employees for reason(s) of retrenchment may be done. - Section 139 of the Labor Act mandates that no employment may be terminated in any condition except in accordance with the provisions of the Act or the Labor Rules, and also maintains that proper and sufficient reason shall be given when terminating any employment. - Accordingly, Section 140 of the Labor Act maintains that time-based contractual employment be terminated after the expiry of contractual employment, and work-based contractual employment be terminated after the completion of work. Except for these circumstances, contractual employment may be terminated only as per the conditions of Labor Laws, which include: (a) voluntary termination (resignation from employee), (b) on ground of incompetence, (c) on ground of health, (d) on ground of misconduct, and (e) through retrenchment. - Therefore, either one of the other grounds above or retrenchment should be pursued while terminating contractual employment. - Furthermore, the requirement to pay retrenchment compensation should also be considered in case of contractual employees as well. If a labor has been employed in contractual employment for more than one year, the obligation of compensation seems to arise for the period of employment in its entirety.

S.N.	Procedure/ Conditions	Details	Remarks
7	Resumption of Operation	If the Enterprise re-operates within 2 years, or if additional labors are required to be hired; priority to the retrenched labors should be done during appointment.	<ul style="list-style-type: none"> - Mandatory notice requirement after re-operation; - 15 days' notice to return to prior work to be issued to each relevant position; - Notice to be published in national daily and through electronic means, including job portal of ministry; - Labors who come in contact post such notice should be hired based on qualification, experience, work performance etc. based on the necessary number of appointments. <p>Other persons may be hired if:</p> <ul style="list-style-type: none"> - Non-qualification of retrenched employees due to change in technology or production process; or - Due to age limit for compulsory retirement or physical condition of the concerned labors.

Key Considerations for Retrenchment

The decision of retrenchment can be susceptible to litigations, especially in cases where the due procedures have not been followed. The following practical considerations should be noted before proceeding with the decision to retrench employees:

(a) Substantiation of Grounds for Retrenchment:

If the Enterprise decides to proceed with retrenchment of employees on the basis of any of the ground(s) as stated in Paragraph 4 above, the subsistence of any such ground(s) should be sufficiently substantiated. In order to do so, necessity of retrenchment should duly be discussed in the governing body of the Enterprise. Accordingly, a minute of the decision of the Board of Directors or equivalent body should be maintained to that effect.

(b) Strict Adherence to Prescribed Procedures:

The decisions of retrenchment have also been successfully challenged in the Labor Court on account of the failure of Enterprises to adhere to the prescribed procedures. The requirement of notification to the concerned Labor Office as well as the unions or the LRC constitute a compulsory procedural requirement. Additionally, discussions with the unions or the LRC with respect to the possible alternatives and the order of retrenchment should be done adequately, and proper minuting of such discussions be maintained. Similarly, the order of preference as discussed in the table above should be properly followed. If there is no active trade union or if LRC has not been formed, any representing body of the employees should be consulted.

(c) Adequate Consideration of Possible Alternatives:

Although Sub-section (2) of Section 145 of Labor Act seems to include consideration of possible alternatives of retrenchment as one of the agendas to be discussed with the unions of the LRC, and not as a separate substantive requirement, the judicial trend suggests that inadequate consideration of alternatives can be held as a substantive ground on the basis of which the decision of retrenchment can be quashed. Therefore, alternatives should be reasonably considered and proper minuting of the consideration of such alternative(s) be maintained accordingly. Additionally, since the payment of retrenchment compensation is a compulsory legal requirement, financial assessment as to other possible alternatives should be done in the context of the financial implications of such compensatory provision.

Suspension of Work and Provisions regarding Reserve/Lay-Off (जगेडा)

Section 15 of the Labor Act provides the scope of suspension of work and holding of labors in reserve (layoff) without engaging them in work for certain period of time. Holding the labors in reserve is a temporary means to cut-down labor costs at the time of force majeure (situations beyond control). The Labor Laws accordingly make the provision for the grounds for holding labors in reserve, as well as the procedures and conditions to be fulfilled thereof.

Grounds for Holding Labors in Reserve

: If any special circumstance arises in the workplace, the employer may suspend the work and hold the worker(s) in reserve (*Section 15 of Labor Act*). In addition to other reasons, workforce can be placed in reserve if the workplace cannot be operated because of the occurrence of any situation beyond control. Such circumstances include shortages of electricity, water, or raw materials, financial difficulties, or inability to reach the workplace or operate the workplace. The key differences between retrenchment and reserve are set out in Annexure-1.

The following procedures and conditions should be noted while keeping the labors in reserve:

1) Continuity of Employment Relationship

Since the employment relationship with the labors held in reserve is deemed to be in continuation during the reserve period, the obligation of the Employer regarding benefits such as social security contributions continue to exist during the period when the labors are held in reserve.

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2) Time period to keep labors in reserve

Maximum 15 days limit. However, in case if labors are to be held in reserve for more than 15 days, consultations should be done with the active unions or labor relation committee.

3) Remuneration for reserve period

- a. Half payment of remuneration (does not say basic) until resumption of work (Section 39);
- b. No requirement of attendance unless specified in the notice on holding the labor in reserve.

The half payment of remuneration indicates the payment of half of full salary (basic salary plus dearness allowances). However, if additional allowances such as TADA or incentives are also being provided, such payments may be excluded from remuneration during reserve period.

4) Notification Requirement (Compulsory) – Labor Rules, Rule 5

Notice should include:

- a. Reason to hold labors in reserve,
- b. Time period,
- c. Name, position, department and job specification of employees to be held in reserve,
- d. Information that half the salary of the employee would be provided during the period held in reserve,
- e. Other information as deemed necessary.

Where only some employees are placed on reserve, Shift basis/rotational system should be applied for the same nature of job; this information also required to be listed in the notice.

5) SSF contributions during period held in reserve

As discussed above, the social security contributions should be made even during the period held in reserve.

In such a case, the question arises whether such contributions should be made based on the calculation of total basic salary or on the basis of payment being made during the period held in reserve. While the SSF has not rejected the receipt of contributions based on the amount actually being paid during situations of other force majeure, there have been circumstances where it has refused to provide the benefits as per its social security schemes citing inadequate contribution of certain period.

Therefore, a notification to the SSF should be made at the time when the labors are held in reserve, and the eligibility of the labors to the benefits of SSF schemes should be discussed with the SSF officials, so that the Enterprise would not need to incur additional social security costs later, which should have been covered by SSF in the first place.

Annexure-1

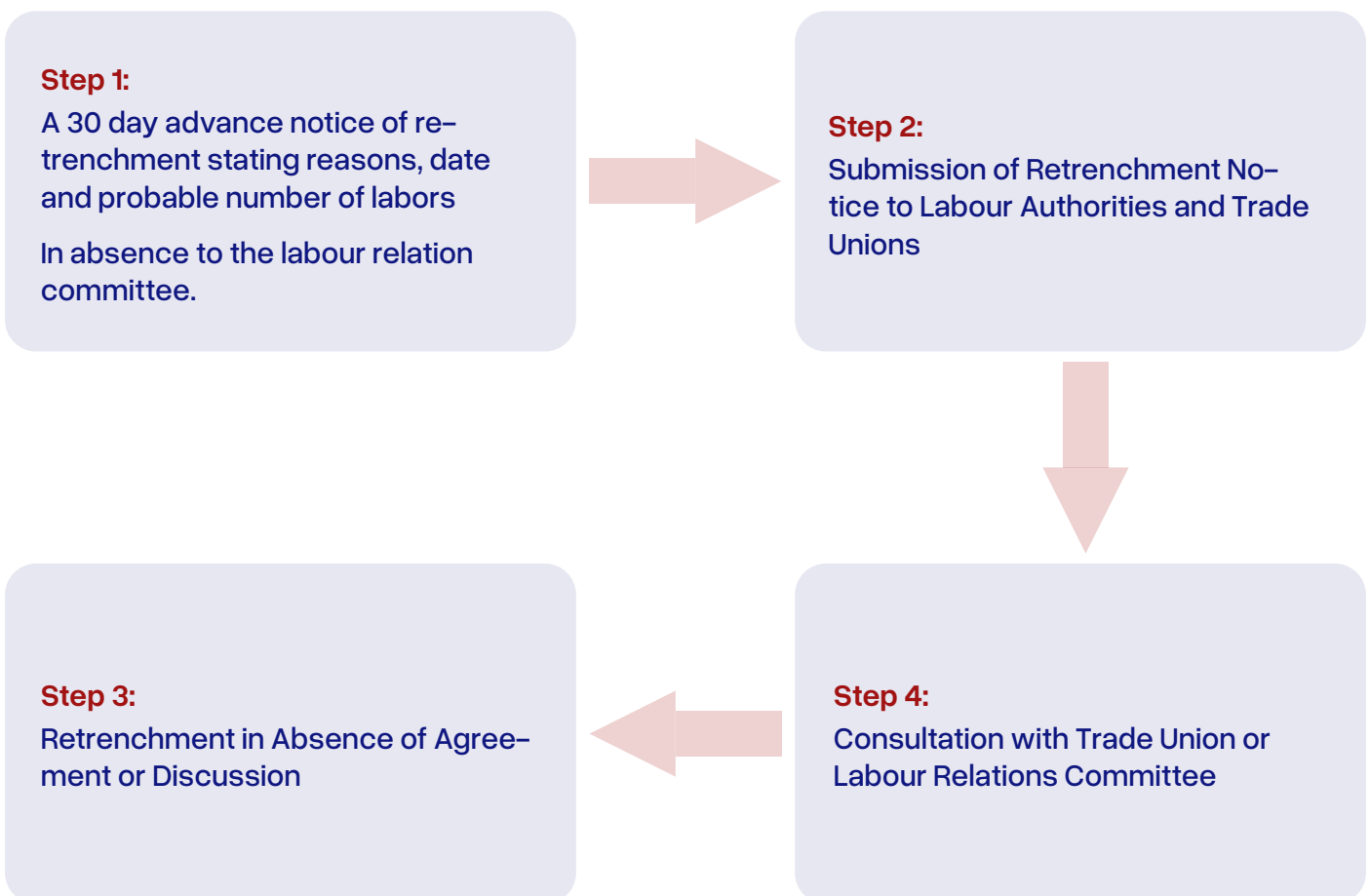
Difference between Retrenchment and Layoff/ Reserve Period under Labour Act, 2017 (Nepal)

S.N.	Aspect	Retrenchment	Layoff /Reserve
1.	Ground	<p>Retrenchment of employees if the enterprise needs to reduce workforce due to economic crisis, modernization, downsizing, merger, or reorganization. (Sec 145).</p> <p>Permanent in Nature.</p>	<p>Temporary stoppage of work due to shortage of raw materials, fuel, power, machinery breakdown, natural disaster, or any cause beyond employer's control. (Sec 146)</p> <p>If any special circumstance arises in the workplace, the employer may suspend the work and hold the worker in reserve.</p> <p>Temporary in nature.</p>
2.	Process	<p>After giving notice, the employer must consult with the trade union or labour relations committee to explore alternatives to retrenchment and to decide the grounds and criteria for selecting employees. Retrenchment may proceed only as per the agreement reached in the discussion.</p> <p>If the trade union or labour relations committee refuses to discuss or no agreement is reached, the employer may still proceed with retrenchment by informing the Labour Office.</p> <p>Order of Retrenchment:</p> <ol style="list-style-type: none"> Foreign labours More punishments Weak performance Last appointment (same kind of work) <p>In case operation resumes within two-years or needs to supply additional labours, preference to the retrenched employees.</p> <p>Any other persons may be employed if the labour who has been retrenched fail to appear in spite of the provided notice.</p> <p>Where the employer does not give notice or does not employ, the concerned labour may, not later than thirty-five days, make an application to the Labour Court.</p>	<ol style="list-style-type: none"> Employment relation continues 10 or more employees, not more than 15 days in reserve. In case more time is required, consult with the authorised trade union or labour relation committee. <p>Rule 5 – Labour Rules (2017) Before placing any employee on reserve, the employer is required to serve a notice to the concerned employee. The notice must include:</p> <ol style="list-style-type: none"> The reason for the layoff, The intended duration of the layoff, Name, position, and job description of the affected worker, A statement confirming the worker will receive 50% of their remuneration during the layoff period, Any other relevant information the employer deems necessary. Where only some employees are placed on reserve, the employer must, as far as possible, implement a rotational system among workers performing similar types of work and indicate this clearly in the notice.

S.N.	Aspect	Retrenchment	Layoff /Reserve
3.	Financial Liability	<p>When retrenching workers, the employer must provide compensation in a lump sum. This is calculated at the rate of one months' basic remuneration for each completed year of service for any employee who has worked at least one year.</p> <p>If the employee has served for less than one year, they are still entitled to compensation, but it must be given proportionately to the length of their service.</p>	The employer shall pay half the remuneration which he/she is entitled to until the work is resumed. (Sec 39)

Annexure-2

Check-List of Retrenchment



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