

Eligibility conditions for appointment of managerial personnel

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Key managerial personnel (KMP) meaning

The term key managerial personnel was introduced in the Companies Act, 2013 (the Act). Key managerial personnel (KMP), in relation to a company, means:

- i) The chief executive officer or the managing director or the manager;
- ii) The company secretary;
- iii) The whole-time director;
- iv) The chief financial officer; and
- v) Such other officer as may be prescribed.

Appointment of KMP

The Act has also mandated the appointment of KMP. Accordingly, every listed company and every other public company having a paid up share capital of ten crore rupees or more shall have whole-time KMP. The paid up share capital includes both equity and preference share capital. The term “paid up share capital” has also been defined in the Act and it only includes the amount credited as paid up in respect of shares of the company but does not include any other amount such as share application money, advance for shares and so on.

The Act provides that if the office of any whole-time managerial personnel is vacated, the resulting vacancy shall be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy. However, there is no clarity within which time a company is to appoint the managerial personnel if such company subsequently lists its securities and becomes a listed company, or where the paid up share capital is increased beyond the prescribed limit of rupees ten crore and more. There are private companies or public companies which list debt securities and fall under the category of listed company and, on a plain reading of the Act and its Rules, such companies also require to comply with the provisions of compulsory appointment of KMP.

Appointment of managing director, whole-time director or manager (managerial personnel)

A company may appoint both managing director and whole-time director but it cannot appoint or employ at the same time a managing director and a manager. The appointment of managing director or manager shall not be for a term exceeding five years at a time, and such condition is now also extended to appointment of whole-time director. Further, it is also one of the conditions that no reappointment shall be made earlier than one year before the expiry of the term of a managing director or whole-time director. The Board of directors may initiate the proceedings for reappointment of a managerial personnel but such reappointment cannot be approved by the shareholders one year before the expiry of the term.

Age limit of managerial personnel

The Act has now reduced the minimum age for appointment of an individual as managerial personnel from twenty-five to twenty.

The Act has also imposed a condition for an upper limit of age of a person as seventy for appointment as a managerial personnel. The appointment of such a person who has attained the age of seventy years may be made by passing a special resolution, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person. One step further is that such a person who has been appointed well before seventy years cannot continue his position on attaining the age of seventy unless approved by shareholders.

Besides, the age limit criteria as discussed, the Act has also included the following, as bars for a person being considered for appointment as managerial personnel:

- a) Is an undischarged insolvent or has at any time been adjudged an insolvent;
- b) Has at any time suspended payment to his creditors or makes or has at any time made a composition with them; or
- c) Has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

Conditions attached to Schedule V

It is also important to seek the confirmation from an individual who is to be considered for appointment as managerial personnel without Central Government's approval. Such conditions are governed under Schedule V of the Act.

- Schedule V to the Act has added (a) The Competition Act, 2002; and (b) The Prevention of Money Laundering Act, 2002, in the list several

Acts under which no person had been sentenced to imprisonment for any period or to a fine exceeding one thousand rupees for the conviction of an offence.

- If a person has been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
- It is the responsibility of the individual, where he is a managerial person in more than one company, that he draws remuneration from one or more companies subject to ceiling provided in Schedule V. Interestingly, there is no ceiling on payment of remuneration to a managerial personnel in a private company or unlisted public company (other than subsidiary of listed company) and, therefore, such condition is attached only to a person who is appointed as managerial person in more than one public listed company.
- He is resident of India. An explanation is attached to this condition: Resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India --
 - a) For taking up employment in India; or
 - b) For carrying on a business or vacation in India.

However, the above condition is not applicable to companies in Special Economic Zones (SEZ) as notified by the Department of Commerce from time to time.

It is also a condition that a person, being non-resident in India, shall enter India only after obtaining a proper employment visa from the concerned Indian Mission abroad. For this purpose, such person shall be required to furnish, along with visa application form, profile of the company, the principal employer and terms and conditions of such person's appointment.

Notice of meetings

The Act has also made it mandatory that a notice convening Board or general meeting for considering the appointment of managerial personnel shall include the terms and conditions of such appointment. In addition, the remuneration payable details need to be included in the said notice. The interest of any director in such an appointment also needs to be included the said notice. There is no need for prior approval of shareholders; and all that is required is that the approval needs to be taken at the first general meeting immediately after the appointment of managerial personnel. Any

resolution passed through postal ballot is also resolution passed at a valid general meeting and, therefore, if there is any postal ballot process immediately after the appointment of managerial personnel by the Board of directors, the approval needs to be taken through the postal ballot conducted immediately after such appointment. However, where an appointment of managing personnel is not approved by the shareholders, any act done by him before such approval shall not be deemed to be invalid.

The time limit prescribed for return to be filed with the Registrar of Companies for appointment of managerial personnel has been brought down from ninety days to sixty days from the date of such appointment.

Penal provisions

Interestingly, if a company fails to comply with the appointment of managerial personnel, it is not only that the company is liable for penal provisions; also, every director and other KMP which includes the company secretary (CS) and chief financial officer (CFO) are liable for penal provisions. Since it is the duty of the Board of directors to fill up such appointment, what needs consideration is the including of CS and CFO for penal provisions.

Conclusion

The appointment of managerial personnel has been introduced in the Act with some new provisions such as:

- a) Notice of Board and general meetings to include the terms and conditions of such appointment;
- b) The appointment of whole-time director is also not more than five years at a time;
- c) The explanatory statement to contain the reasons for appointment of a person over seventy years of age.

At the same time, matters that need to be reconsidered include the time limit for appointment of managerial personnel when such issue is first applicable to a company, such as when it becomes a listed company or its paid up share capital is increased to ten crore rupees or more. Similarly, the provisions on appointment of managerial personnel should be only for listed companies whose shares are listed and are tradable, not for companies whose debt securities are listed. The penal provision should exclude CS and CFO since they are not the officers who have powers to appoint managerial personnel.

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