



# India - Women at workplace: new legal framework



ASIA

In line with its commitment to ensure gender parity in India, the Government has, in the past years, put a special focus on women's economic empowerment by introducing key reforms to encourage women's workforce participation across sectors in India.

Achieving gender equality and empowerment of all women is of prime importance for India which still has one the lowest (and declining) women's labor force participation rates in Asia<sup>1</sup>.

Although there already were various labor laws in India providing benefits and security to female employees<sup>2</sup>, the Government has passed several laws to provide women a better and safer work environment to encourage women to join or remain in the workforce.

Below is an overview of these statutory enablers and new obligations cast on employers.

## ■ I. THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017

Entered into force on 1 April 2017, the Maternity Benefit (Amendment) Act, 2017 ("Revised Act") enhanced the maternity benefits already available under the Maternity Benefit Act, 1961 ("MB Act").

<sup>1</sup> 35% in 1990 and 27% in 2017, where China had a rate of 61% in 2017 (Source: Labor force participation rate, female (% of female population ages 15+) (modeled ILO estimate), International Labour Organization, ILOSTAT database)

<sup>2</sup> such as the Equal Remuneration Act, 1976, the Factories Act, 1948 or the Employees' State Insurance Act, 1948

### 1. Maternity Leave

Under the Revised Act, duration of **paid maternity leave** available to women employees<sup>3</sup> having not more than two children has been increased from 12 to **26 weeks**. Adopting and commissioning mothers are also entitled to maternity leave of **12 weeks** from the date on which the child is being handed over to the mother.

With such increase, the Revised Act has vaulted India to the third position in terms of number of weeks given as maternity leave, after Canada and Norway.

### 2. Work from home provision

The Revised Act introduced the notion of work from home when "nature of work assigned to a woman is of such nature as she may work from home". In such a case, the employer may allow her to do so after availing her maternity leave under terms and conditions to be agreed between the employer and the employee.

### 3. Nursing breaks

Every woman who returns to duty after delivery of a child shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work **two breaks** of the prescribed duration for nursing the child until the child attains the age of fifteen months.

### 4. Provision of crèche facility

<sup>3</sup> it being women employed in any capacity, directly or through any agency, both in organized and unorganized sectors as clarified by the Ministry of Labour and Employment (vide notification No. S-36012/03/2015-SS-I dated April 12, 2017)

From 1 July 2017, every establishment having **50 or more employees** shall provide **crèche facility**.

This provision has sparked a lot of debates and discussions among employers on whether the provision is to be interpreted to be applicable in establishments with **50 or more female employees** or on establishments with 50 or more employees. Since the term 'employee' has not been defined in the Revised Act, every place of business having **50 or more employees** (irrespective of the number of women employees) is required to comply with this requirement.

### To be noted:

- Section 48 of the **Factories Act, 1948** also requires factories **with more than 30 female workers to have a crèche**. Therefore, even if a factory has less than 50 employees but has at least 30 females, such factory will be under the obligation to have a crèche under the Factories Act, 1948.

- Section 23 of the new **Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017** provides that every establishment wherein 50 or more workers are employed shall provide a crèche for the use of children of such workers.

In spite of the fact that the crèche facility provision was made effective on 1 July 2017, the Revised Act has not prescribed any details or manner of instituting or maintaining a crèche in an establishment. Therefore, the Ministry



of Labour and Employment (“**MoL**”) issued a circular dated 17 November 2017, wherein State governments have been requested to frame and notify rules prescribing amenities and facilities required to be provided.

On 12 February 2018, the MoL published the draft Maternity Benefit (Crèche in the Mine Establishments) Rules, 2018 (“**Draft Rules**”) extending the Mines Crèche Rules, 1966 (“**Crèche Rules**”) to mine establishments covered by the MB Act.

The Crèche Rules already prescribed details on setting up and maintaining crèche facility by mine establishments (such as set up standards, equipment, staff, diet to be followed...). Once enacted, the Draft Rules will bring some additional clarifications on the crèche requirement:

- **Use of crèche:** use is restricted to children of women employed by the mine (under the Crèche Rules) and shall be extended to children of temporary/daily-wage/consultant/contractual workers employed by the mine (under the Draft Rules). **Note:** the Draft Rules refer to ‘workers’, instead of ‘women employed’, which could be construed as including children of male and female workers.

- **Distance:** crèche shall not be more than five hundred meters from the entrance gate of the establishment

However **it is still unclear whether the Draft Rules will apply specifically to ‘mine establishments’ as per its title or would also extend to commercial establishments (non mines).**

It is also to be noted that the Government confirmed, in a 2017 RTI reply, that employers need to bear the complete cost of providing childcare support to its employees.

From a tax perspective, the question of whether the mandatory crèche facility provided by the employer is a taxable benefit in the hands of the employee also arises. As of now, crèche facility provided by employers on a voluntary basis is taxable as perquisite. However, now that the crèche facility is made mandatory, questions are being raised on whether it is taxable in the hands of the employee.

*Although such progressive changes are welcome in India, the issue arises whether such obligations would create apprehension in the minds of employers to employ women owing to financial constraints consequent to providing the benefits.*

## ■ II. THE MAHARASHTRA SHOPS AND ESTABLISHMENTS (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE) ACT, 2017

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (“**S&E Act**”), largely adopting the provisions of the Model Shops and Establishment (Regulation of Employment and Condition of Services) Act, 2016, came into force on 19 December 2017.

The S&E Act, applicable in the state of Maharashtra, contains some protective provisions applicable to women:

- **Working hours for women:** Generally, women workers will be required to work only between 7 a.m. and 9:30 p.m. Female workers can work post 9:30pm so long as (i) they consent and (ii) their employer provides safe transportation from the work site to their residence;

- **Discrimination:** the S&E Act prohibits the

discrimination of women workers in matters of recruitment, training, promotion, and wages.

- **Crèche:** as mentioned above, the S&E Act requires establishment employing more than 50 workers to provide crèche facility. The S&E Act clarifies that a group of establishments can provide a common crèche within a radius of one kilometre, subject to Chief Facilitator’s approval.

- **Sexual harassment:** employers must strictly implement the SHWP Act (see below).

## ■ III. THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION, AND REDRESSAL) ACT, 2013

The Government enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**SHWP Act**”) and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (“**SHWP Rules**”) which lay down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment<sup>4</sup> and enforce the right to gender equality of working women.

It is to be noted that under the SHWP Act, ‘**aggrieved woman**’ is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. Given the definition, the Act does not solely apply to **employees but also to female customers/clients.**

Under the SHWP Act, every establishment employing 10 or more employees must

<sup>4</sup> sexual harassment includes any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature



constitute an **Internal Complaints Committee («ICC»)**. In the event that the employer has multiple administrative units or offices at different locations, the SHWP Act mandates constitution of separate ICC for each such unit or office.

- **Powers of the ICC:** powers of Civil Courts in garnering evidence.
- **Composition:** at least half of the ICC members should be women and it must have:
  - President officer: a senior level woman employee;
  - Members: minimum 2 employees within the organization, preferably committed to the cause of women or who have had experience in social work or have legal knowledge; and
  - External member: a member from a non-governmental organization or association committed to women's cause or familiar with issues of sexual harassment.

The SHWP Act and the SHWP Rules also cast certain obligations on the employer to, inter alia:

- provide a safe working environment
- formulate detailed sexual harassment policies
- display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the ICC
- organise workshops and awareness programmes for sensitising employees on the issues and implications of workplace sexual harassment
- organise orientation programmes for members of the ICC

Each ICC must prepare an **annual report**, including details about the number of complaints received and awareness programmes against sexual harassment that

have been undertaken. The employer is required to monitor the timely submission of reports by the ICC.

If an employer fails to constitute an ICC or does not comply with any provisions contained therein, the SHWP Act prescribes a **penalty of up to INR 50,000**. A repetition of the same offence could result in the punishment being doubled and/or de-registration of the entity or revocation of any statutory business licenses.



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