

# HR Law Hotline

December 27, 2017

## HAPPY NEW YEAR! NEW LABOUR LAW FOR INDIA'S COMMERCIAL CITIES MUMBAI AND PUNE

- Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 has been made effective from December 19, 2017.
- As a result, the *erstwhile* Maharashtra Shops and Establishments Act, 1948 stands repealed.
- Majority of the obligations under MSEA 2017 apply to establishments employing at least 10 'workers'. Limited reporting requirements for smaller establishments.
- MSEA 2017 replaces the definition of 'employee' with 'worker'. Individuals engaged through an agency and persons in positions of confidential, managerial or supervisory nature, are excluded.
- Besides revision to provisions relating to leaves, holidays, overtime, etc., certain new requirements such as provision of a crèche facility, canteen, etc. have been introduced.
- Enhanced penalties for non-compliance and contraventions.
- Rules to MSEA 2017 are yet to be published.

The State Government of Maharashtra has ensured that the State continues to remain at the forefront of development and reform by becoming the first Indian State to overhaul its 70-year-old labour law for shops and establishments. Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 ("**MSEA 2017**") has been made effective from December 19, 2017 and replaces the *erstwhile* Maharashtra Shops and Establishments Act, 1948 ("**MSEA 1948**"). Maharashtra has two of the leading commercial cities, Mumbai and Pune, besides other important cities like Thane, Navi Mumbai, Aurangabad, Nasik and Nagpur. In fact, Mumbai is considered as the commercial capital of India.

### BACKGROUND

Each Indian State has implemented a law on employment and working conditions for shops and commercial establishments operating in that State. With a view to make these shops and establishments laws more contemporary and uniform throughout the country and enhance ease of doing business in India, the Central Government had in July 2016<sup>1</sup> introduced the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2016 ("**Model SEA**"). States could voluntarily adopt it by making suitable modifications based on state-specific requirements. In view of this, Maharashtra State has introduced MSEA 2017 which largely adopts the provisions contained in the Model SEA.

### COMPARATIVE ANALYSIS (HIGH-LEVEL)

#	Provision	Old Provision (MSEA 1948)	New Provision (MSEA 2017)
1.	<b>Applicability</b>	<ul style="list-style-type: none"><li>■ Applicable to all establishments in Maharashtra irrespective of the number of employees.</li><li>■ Applicable to every 'employee'<sup>2</sup> and covers individuals employed whether directly or through an agency.</li><li>■ MSEA 1948 had separate definitions of 'establishment' and 'commercial establishment'.</li><li>■ MSEA 1948 is not applicable to factories engaging in manufacturing activities to which the Factories Act, 1948 applies.</li></ul>	<ul style="list-style-type: none"><li>■ Applicable to all establishments in Maharashtra that employ 10 or more 'workers'<sup>3</sup>.</li><li>■ The definition of 'employee' has been replaced by 'worker', which excludes persons occupying 'positions of confidential, managerial or supervisory character'<sup>4</sup>.</li><li>■ One consolidated definition of 'establishment' which specifically includes various businesses, professions and trades.</li><li>■ MSEA 2017 is not applicable to factories engaging in manufacturing activities to which the Factories Act, 1948 applies.</li></ul>
2.	<b>Registration</b>	<ul style="list-style-type: none"><li>■ Registration is mandatory for all shops and commercial establishments irrespective of the number of employees.</li><li>■ All establishments are required to make an application for registration in the</li></ul>	<ul style="list-style-type: none"><li>■ No registration required<sup>6</sup> for shops and commercial establishments having less than 10 workers<sup>7</sup>.</li><li>■ Establishments having valid and subsisting registrations under the MSEA 1948 will not</li></ul>

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		<p>prescribed format along with the requisite fee to the Inspector having jurisdiction in such area within 30 days of commencement of business.</p> <ul style="list-style-type: none"> <li>■ The term of the certificate under the MSEA 1948 is between 1-3 years, with a prescribed period of fifteen days for making an application for renewal<sup>5</sup>.</li> </ul>	<p>be required to register under the MSEA 2017 until the existing registration expires or becomes due for renewal<sup>8</sup>.</p> <ul style="list-style-type: none"> <li>■ Establishments having 10 or more workers are required to make an online application for registration within 60 days of commencement of business to the Facilitator of the local area along with the requisite fee, self-certified and self-declared documents as prescribed<sup>9</sup>.</li> <li>■ Upon acceptance of the application and verification, a Labour Identification Number will be issued by the Facilitator.</li> <li>■ The term of the registration certificate shall be for a period as requested by the applicant. However, such term shall not exceed 10 years, with a prescribed period of 30 days for making an application for renewal<sup>10</sup>.</li> </ul>
3.	<b>Close Day</b>	<ul style="list-style-type: none"> <li>■ Establishments are required to remain closed on one day of the week<sup>11</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ Establishments can remain open throughout the week without the requirement to be closed for one full day so long as every worker is allowed a weekly holiday of at least 24 hours<sup>12</sup>.</li> </ul>
4.	<b>Opening and Closing Hours</b>	<ul style="list-style-type: none"> <li>■ Commercial establishments shall not open earlier than 8:30 am or close later than 9:30 pm<sup>13</sup>, unless a specific exemption from the State Government has been procured<sup>14</sup>. MSEA 1948 had separate provisions on opening and closing hours of restaurants, residential hotels, theatres and other places of public amusement and entertainment.</li> </ul>	<ul style="list-style-type: none"> <li>■ The MSEA 2017 does not prescribe the opening or closing hours.</li> <li>■ It provides the State Government the flexibility to determine opening and closing hours for different classes of establishments, premises, shopping complexes or malls or for different areas and for different periods, etc<sup>15</sup>.</li> </ul>
5.	<b>Hours of Work, Rest Interval &amp; Spread Over</b>	<ul style="list-style-type: none"> <li>■ Work hours to not exceed 9 hours a day and 48 hours in a week<sup>16</sup></li> <li>■ Rest interval of one hour for every 5 hours of work performed<sup>17</sup>.</li> <li>■ On any normal day, the spread over for commercial establishments shall not exceed 11 hours unless specifically exempted<sup>18</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ Work hours to not exceed 9 hours a day and 48 hours in a week<sup>19</sup> In case of work of urgent nature<sup>20</sup>, working hours or weekly holiday may be relaxed with prior permission of Facilitator.</li> <li>■ Rest interval has been reduced from one hour to 30 minutes for every 5 hours of work performed<sup>21</sup>.</li> <li>■ The spread over duration has been reduced to 10 1/2 hours a day (12 hours on days where the work is intermittent or of an urgent nature)<sup>22</sup>.</li> </ul>
6.	<b>Overtime</b>	<ul style="list-style-type: none"> <li>■ Overtime hours not to exceed 6 hours in a week<sup>23</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ Total number of overtime hours not to exceed 125 hours in a period of 3 months<sup>24</sup>.</li> </ul>
7.	<b>Leaves (PTO) &amp; Holidays</b>	<ul style="list-style-type: none"> <li>■ 5 days of annual leave for every 60 days of work performed provided that the employee has been employed for at least 3 months in a year<sup>25</sup>.</li> <li>■ 21 days of annual leave for employees who have worked for at least 240 days in a year<sup>26</sup>.</li> <li>■ No provision for casual leaves.</li> <li>■ Leave accumulation = 42 days<sup>27</sup> of annual leave.</li> <li>■ 4 holidays in a year.<sup>28</sup></li> </ul>	<ul style="list-style-type: none"> <li>■ 5 days of annual leave for every 60 days of work performed for workers who have been employed for at least 3 months in a year<sup>29</sup>.</li> <li>■ 1 day of annual leave for every 20 days of work performed if an employee has worked for at least 240 days in the preceding calendar year<sup>30</sup>.</li> <li>■ 8 days of casual leave in every calendar year to be credited on a quarterly basis. Such casual leaves shall lapse at the end of the year, if unavailed<sup>31</sup>.</li> <li>■ Leave accumulation = 45 days<sup>32</sup> of annual leave.</li> <li>■ 8 holidays in a year<sup>33</sup>.</li> </ul>
8.	<b>Leave Encashment</b>	<ul style="list-style-type: none"> <li>■ An employee shall be entitled to encash his/her accrued but unused annual leaves upon termination subject to a maximum cap of 42 days<sup>34</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ A worker shall be entitled to encash his/her accrued but unused annual leaves upon termination subject to a cap of 45 days<sup>35</sup>.</li> </ul>
9.	<b>Compensatory Off</b>	<ul style="list-style-type: none"> <li>■ Employees who work on a designated festival holiday shall be provided a</li> </ul>	<ul style="list-style-type: none"> <li>■ A worker required to work on a designated festival holiday shall be provided a</li> </ul>

**Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996**

		compensatory off besides twice the amount of wages. <sup>36</sup>	compensatory off (in addition to double the wages) <sup>37</sup> .
			<ul style="list-style-type: none"> <li>■ If a worker is required to work on his/her designated weekly holiday he/she is entitled a compensatory off within 2 months of such weekly holiday besides twice the rate of ordinary wages<sup>38</sup>.</li> </ul>
10.	<b>Women working in night shifts</b>	<ul style="list-style-type: none"> <li>■ Women employees are prohibited from working beyond 9:30 pm<sup>39</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ Women workers are permitted to work between 9:30 pm and 7:00 am subject to the following conditions<sup>40</sup>:               <ol style="list-style-type: none"> <li>1. The consent of the woman worker has been procured</li> <li>2. Adequate protection of dignity, honor and safety are provided by the employer</li> <li>3. The employer provides adequate protection from instances of sexual harassment at workplace</li> <li>4. Transportation facility is provided to the women workers from the establishment to the doorstep of their residence.</li> </ol> </li> <li>■ The State Government may by notification in the Official Gazette, in the public interest, prohibit or regulate the employment of women workers after 9:30 p.m. and before 7:00 a.m. in such shops, establishments, hotels, restaurants, residential hotels, permit rooms, bars, spa-massage parlours, lodges or any business or any trade or occupation in such area or areas as it may deem fit.</li> </ul>
11.	<b>Double Employment</b>	<ul style="list-style-type: none"> <li>■ Restricts double employment<sup>41</sup>.</li> </ul>	<ul style="list-style-type: none"> <li>■ No such restriction.</li> </ul>
12.	<b>Employment Termination</b>	<ul style="list-style-type: none"> <li>■ Requires an employer to provide:               <ol style="list-style-type: none"> <li>a. 30 days' notice<sup>42</sup> (or wages in lieu of notice) to an employee who has been in continuous employment for a period of not less than a year for dispensing the services of such employee</li> <li>b. 14 days' notice<sup>43</sup> (or wages in lieu of notice) to an employee who has been in continuous employment for a period of not less than 3 months</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>■ No provision relating to employment termination.</li> </ul>
13.	<b>Enforcement &amp; Inspection</b>	<ul style="list-style-type: none"> <li>■ Inspectors are appointed under the MSEA 1948 for implementing the provisions of the statute.</li> </ul>	<ul style="list-style-type: none"> <li>■ Inspectors have been replaced by Facilitators.</li> <li>■ The MSEA 2017 provides for appointment of a Chief Facilitator (for the State) and other facilitators (for each local area within the State).</li> <li>■ The main objective of Facilitators is to advise employers and workers and provide such information as maybe necessary for complying with the MSEA 2017.</li> <li>■ Inspections will be done based on a randomized web-generated inspection schedule and will not be at the discretion of the labour authorities.</li> </ul>
14.	<b>Penalties</b>	<ul style="list-style-type: none"> <li>■ Provides for a minimum fine of INR 1,000 (approx. US\$ 15) and a maximum fine of INR 15,000 (approx. US\$ 230) for violations<sup>44</sup>.</li> <li>■ No imprisonment provision under the MSEA 1948.</li> </ul>	<ul style="list-style-type: none"> <li>■ Provides for enhanced penalties for violation to a maximum fine of INR 500,000 (approx. US\$ 7500) and in the case of a continuing contravention, with an additional fine which may extend to INR 2,000 (approx. US\$ 30) per worker employed. However, the fine amount shall not exceed INR 2,000 (approx. US\$ 30) per worker.</li> <li>■ Provides for imprisonment extending up to</li> </ul>

6 months in cases where an employer is found guilty of contravening the provisions of the act which result in an accident causing serious bodily injury or death of a worker.<sup>45</sup>

## NEW PROVISIONS:

- **Displaying a list of employees in managerial and supervisory role:** Persons in 'positions of confidential, managerial or supervisory character' would not be included within the definition of 'worker' under the MSEA 2017 and employers would be required to list out names of such individuals on their website and in the absence of a website at a conspicuous place in their establishment. Employers would also have to send a list of such persons to the Facilitator. *This change brings the definition in line with the Industrial Disputes Act, 1947 ("IDA").*
- **Casual leaves:** Employees are entitled to 8 days of casual leaves in a year.
- **Prohibition of Discrimination:** MSEA 2017 introduces a new provision prohibiting discrimination against women workers in matters of recruitment, training, transfers or promotion or wages<sup>46</sup>. *This change brings the provision in line with the Equal Remuneration Act, 1976.*
- **Accrual of earned leaves during maternity:** MSEA 2017 clarifies that women employees shall not be entitled to earn leaves during the maternity leave period, although the period would be taken into consideration for the purpose of computation of the period of 240 days for determining eligibility of annual leaves<sup>47</sup>.
- **Crèche Facility:** Establishments employing at least 50 workers are required to provide and maintain a crèche facility for the use of children of such workers. A group of establishments may jointly provide a common crèche facility provided that the crèche facility is within a radius of 1 km and the prior permission of the Chief Facilitator has been procured<sup>48</sup>. *This provision prescribes the distance for the purposes of the Maternity Benefit Act, 1961.*
- **Canteen:** MSEA 2017 envisages that the State Government shall require establishments employing at least 100 workers to provide and maintain a canteen for the workers. A group of establishments may jointly provide a common canteen with the prior permission of the Chief Facilitator. The rules to the MSEA 2017 may provide greater clarity with respect to this provision.
- **Shift work:** MSEA 2017 allows any department or any section of a department of an establishment to work in more than one shift at the discretion of the employer. If more than one shift is worked, the worker may be required to work in any shift at the discretion of the employer<sup>49</sup>.
- **Identity Cards:** An identity card is to be provided by the employer to each of its workers containing details of the worker, including information on blood group and Aadhar card details. Under the MSEA 1948, an identity card was required to be provided by the employer only to employees of residential hotels, restaurants etc.
- **Records in electronic format:** Employers are now permitted to maintain registers in electronic format provided that the hard copies of such records, duly signed by the employer or his representatives are submitted to the Facilitators upon demand at the time of inspection<sup>50</sup>. This is in tune with the government's earlier initiative to reduce compliance burden through issuance of *Ease of Compliance to Maintain Registers under various Labour Laws Rules, 2017*.
- **Imprisonment, Compounding of offences etc.:** The MSEA 2017 provides for imprisonment for certain offences unlike the MSEA 1948. Employers shall have the opportunity to compound offences that are punishable with fine.

## ANALYSIS

MSEA 2017 is definitely a more business friendly legislation as compared to the previous law, which was enacted in 1948 and did not take into account the needs of the new business models, start-ups, etc. While employers could apply for certain exemptions / relaxations under the previous law based on specific situations, the new law has taken good care of those needs by incorporating the necessary provisions. For e.g, establishments will now be able to remain open on all days of the week although at the same time each employee will be entitled to a weekly holiday. Further, establishments will also be able to employ women in night-shifts if suitable measures for their protection and transportation are ensured. Another big reform that has been introduced by MSEA 2017 is to exempt smaller establishments (employing less than 10 workers) from majority of the provisions, thereby providing the much needed flexibility to such establishments. The thought process behind replacing an 'inspector' with a 'facilitator' is highly commendable.

MSEA 2017 does away with the provisions related to employment termination. Rightly so, since these provisions are already contained in the IDA. MSEA 2017 also remains silent in relation to extending some of the national level laws such as the Industrial Employment (Standing Orders) Act, 1946, Employees' Compensation Act, 1923 and Payment of Wages Act, 1936.

At the same time, given the risk of significantly larger penalties and potential imprisonment risk, there would now be a greater onus on employers to ensure compliance. In terms of immediate action items for employers, given the change in provisions relating to work hours, overtime, leaves, holidays, etc. employers would need to revisit their existing HR practices and policies to ensure compliance with the MSEA, 2017.

This progressive step by the State Government of Maharashtra will help considerably in making the State a more attractive jurisdiction for setting up operations and doing business, thereby generating greater employment opportunities. Other Indian States would be monitoring the results closely as they too will look to adopt a similar approach in the coming years.

– Preetha S, Ajay Solanki & Vikram Shroff

You can direct your queries or comments to the authors

<sup>1</sup> <http://pib.nic.in/newsite/PrintRelease.aspx?relid=146718>

<sup>2</sup> "Employee" means a person wholly or principally employed, whether directly or through any agency, and whether for wages or other consideration, in or in connection with any establishment; and includes an apprentice, but does not include a member of the employer's

family

<sup>3</sup> Section 1(3)

<sup>4</sup> Section 3(11) of the MSEA 2017

<sup>5</sup> Section 7 (2-A) and (2-B) of MSEA 1948

<sup>6</sup> Section 7 of MSEA 2017

<sup>7</sup> However, such establishments need to give an intimation of commencement of business to the Facilitator of the local area within 60 days of commencement of MSEA 2017 or date of commencement of business, by submitting an online application in prescribed form.

<sup>8</sup> Proviso to Section 6 (1) of MSEA 2017

<sup>9</sup> Section 6(1) of MSEA 2017

<sup>10</sup> Section 6(3) of MSEA 2017

<sup>11</sup> Section 18 of MSEA 1948

<sup>12</sup> Section 16 (1) (b) of MSEA 2017

<sup>13</sup> Based on an application, the state government has been issuing an approval letter to allow commercial establishments to work on a 24 X 7 basis and avail the other exemptions

<sup>14</sup> Section 13 of MSEA 1948

<sup>15</sup> Section 11 of MSEA 2017

<sup>16</sup> Section 14 (1) of MSEA 1948

<sup>17</sup> Section 15 of MSEA 1948

<sup>18</sup> Section 17 of MSEA 1948

<sup>19</sup> Section 12 of MSEA 2017

<sup>20</sup> Proviso to Section 12 of MSEA 2017

<sup>21</sup> Ibid

<sup>22</sup> Section 14 of MSEA 2017

<sup>23</sup> Section 14(2) of MSEA 1948

<sup>24</sup> Section 15 of MSEA 2017

<sup>25</sup> Section 35 (1) (a) of MSEA 1948

<sup>26</sup> Section 35 (1) (b) of MSEA 1948

<sup>27</sup> Proviso to Section 35 (1) (b) of MSEA 1948

<sup>28</sup> Section 35 (4) of MSEA 1948: January 26<sup>th</sup>, May 1<sup>st</sup>, August 15<sup>th</sup> and October 2<sup>nd</sup>

<sup>29</sup> Section 18 (4) of MSEA 2017

<sup>30</sup> Section 18(3) of MSEA 2017

<sup>31</sup> Section 18 (2) of MSEA 2017

<sup>32</sup> Section 18 (6) of MSEA 2017

<sup>33</sup> Section 18 (7) of MSEA 2017: January 26<sup>th</sup>, May 1<sup>st</sup>, August 15<sup>th</sup> and October 2<sup>nd</sup> and 4 such other festival holidays as mutually agreed by the employer and workers, to be determined before the commencement of the year

<sup>34</sup> Section 35 (2) of MSEA 1948

<sup>35</sup> Section 18 (5) of MSEA 2017

<sup>36</sup> Proviso of Section 35(4) of MSEA 1948

<sup>37</sup> Proviso of Section 18 (7) of MSEA 2017

<sup>38</sup> Section 16(1) (c) of MSEA 2017

<sup>39</sup> In Maharashtra, there is a general exemption available to IT establishments, whereunder IT/ITeS establishments are permitted to engage female employees at night (8:30 pm to 6:00 am), subject to fulfilment of certain conditions. Therefore, IT establishments in Maharashtra (i.e.; Mumbai/Pune) are not required to procure a specific permission for engaging female employees at night.

<sup>40</sup> Section 13 of MSEA 2017

<sup>41</sup> Section 65 of MSEA 1948

<sup>42</sup> Notice shall not be necessary in case of employment termination for misconduct

<sup>43</sup> Same as above.

<sup>44</sup> Sections 52-57 of MSEA 1948

<sup>45</sup> Sections 29 – 31 of MSEA 2017

<sup>46</sup> Section 13 (1) of MSEA 2017

<sup>47</sup> Section 18 (8) (b) of MSEA 2017

<sup>48</sup> Section 23 of MSEA 2017

<sup>49</sup> Section 16 (1) (a) of MSEA 2017

<sup>50</sup> Section 25(2) of MSEA 2017

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