

## HR Law Hotline

December 04, 2019

### GRAVEYARD SHIFT IN INDIA: EMPLOYERS IN BANGALORE / KARNATAKA PERMITTED TO ENGAGE WOMEN EMPLOYEES AT NIGHT IN FACTORIES

- The Factories Act, 1948 of India in general prohibits women employees from working at night.
- The Madras High Court had previously held that restriction as unconstitutional and violative of the Constitution.
- The State Government of Karnataka has issued a notification enabling women employees in factories to work during night hours, subject to certain conditions.
- Only women employees who are desirous of working at night may be engaged during night hours.
- Factory employers are required to comply with certain health, safety and security conditions while engaging women employees during night hours.

Similar to IT/TeS establishments in the state of Karnataka, employers are now permitted to engage women employees in their factories during night hours, from 7 pm until 6 am.

The Government of Karnataka has issued a notification dated November 20<sup>th</sup>, 2019 ("**Notification**"), enabling women employees in factories to work during night hours, subject to the employer complying with certain health, safety and security conditions. Unlike IT/TeS establishments that need to apply for a specific permission as per the Karnataka Shops and Commercial Establishments Act, 1961 in order to engage women employees at night, all factory employers have been allowed to engage women workers at night. The permission may however be withdrawn by the Chief Inspector for any specific factory in case of a failure on the part of the employer to adopt the necessary health, safety and security measures.

The Notification however clarifies that it is **not** compulsory or obligatory for any woman worker to work in night shifts. Only women workers who are desirous of doing so may be required to work at night and in this respect, a written consent shall be procured from each one of them.

#### BACKGROUND

Section 66(1)(b) of the Factories Act, 1948 ("**Factories Act**") prohibits women employees from working at night. Time and again, it has been argued that such a restriction is an impediment on women employees and restricts them from carrying out a lawful employment. Such a restriction would not just come in the way of liberation of women's rights both socio and economic but is also a major hindrance to their emancipation. In view of the same, the Madras High Court<sup>1</sup> observed that when there is no difference in respect of the work or hours of work or work load between an adult male or woman worker in a factory, there is no reason at all to discriminate between the two, on the ground of sex alone. Neither is there a reasonable classification nor is there any nexus with respect to the objects sought to be achieved by the said provision. Accordingly, Section 66(1)(b) was held to be violative of the fundamental rights enshrined under the Constitution of India.

Having said that, the court in that case also observed that in the absence of any specific regulation or regulatory measures by way of rules or enactments, it would amount to exposing the female workers to unforeseen factors. Therefore, until such time that the Central and State governments come up with appropriate provisions and rules, it would be important for the court to lay down certain guidelines and welfare measures to be followed by employers in engaging women employees at night.

The Karnataka Government has issued the Notification in pursuance of the Madras High Court order.

#### NIGHT SHIFT IN FACTORIES - TERMS AND CONDITIONS

The Notification states that an employer of a factory may engage women workers during night hours, subject to the employer complying with the conditions set out in the Notification. The Notification *inter alia* lists down the following health, safety and security measures:

##### 1. Prohibition of Sexual Harassment:

- Employer shall expressly prohibit sexual harassment in all forms whether it be sexually determined behaviour, sexual remarks, sexual favors, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.
- Appropriate rules and regulations shall be framed by factory managements relating to conduct and prohibiting sexual harassment. The rules and regulations shall provide for appropriate penalties. Necessary amendments to the standing orders may be made to reflect such rules.
- Female employees shall be made aware of their rights by prominently notifying the guidelines on this subject.
- Female employees shall be given opportunities to raise issues of sexual harassment in the workers meeting and

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- e. The employer shall put in place an appropriate complaint redressal mechanism or a Complainants Committee headed by a woman with not less than half of the members as women, besides an external member from an NGO or someone who is familiar with issues relating to sexual harassment.
- f. Provide a special counselor or other support services and ensure confidentiality.
- g. In the event that the sexual harassment has occurred at the instance of a third party, either by an act or omission of the employer, the person in charge of the factory shall take all steps reasonable and necessary to assist the affected person in terms of support and preventive action.
- h. In case of a criminal case, the employer shall initiate appropriate action in accordance with penal laws.
  - i. The employer shall ensure that the victim and witnesses are not victimized or discriminated while dealing with complainants of sexual harassment.
  - j. Wherever necessary and if the circumstances so warrant, the employer shall shift or transfer the perpetrator at the request of the affected worker.
- k. Appropriate disciplinary action shall be taken in the event that the respondent is found to have misconducted.

**2. Transportation:** The employer shall provide transportation facility to the women workers from their residence and back accompanied by security guards including female security guard. The transportation vehicle shall also be equipped with CCTV cameras.

### 3. Other Health, Safety & Security measures:

- a. The employer shall provide appropriate working conditions in terms of work, leisure, health and hygiene in order to ensure that women are not subjected to a hostile environment or an environment where she may believe to be disadvantaged in connection with her employment.
- b. Proper lighting and CCTV coverage to be ensured not just inside the factory but also surrounding the factory. CCTV footage shall be maintained for a period of at least 45 days.
- c. Not less than 10 women workers shall be engaged in a batch and the total number of women workers engaged in night shift shall not be less than two-third of the total strength.
- d. Sufficient women security shall be provided both at the entry and exit.
- e. Wherever boarding and lodging arrangements are made, the same shall be kept exclusively for women under the control of women wardens and supervisors.
- f. Appropriate medical facilities shall be made available such as necessary telephone connections.
- g. In the event that more than 100 women workers have been engaged in a shift, a separate vehicle shall be kept ready in case of emergency situations such as an injury, incidental act of sexual harassment etc.
- h. During night shift, not less than one-third of the supervisor shift in charge or other supervisory staff shall be women.
- i. The employer shall appoint not less than two female wardens per night shift who shall work as Special Welfare Assistants.

### 4. Amenities and Facilities:

- a. Sufficient number of rest rooms to be provided.
- b. Separate canteen facility to be provided for women workers.

### 5. Other Terms and Conditions:

- a. When a woman worker is rotated from a day shift to a night shift and vice versa, the employer shall ensure that the woman worker is provided at least 12 hours of rest in between the switch.
- b. The employer shall comply with the statutory provisions with respect to hours of work under the Factories Act.
- c. In cases where female contract labourers have been engaged in day and night shifts, once in eight weeks, a meeting shall be organized with the representative of the women workers and the principal employer when the female workers will be given an opportunity to raise any grievances that they may have. The principal employer is expected to address all reasonable grievances.
- d. The employer shall send a fortnightly report to the Inspector of Factories with details of all employees engaged in night shifts and whenever there is an untoward incident, an express report in this respect shall be submitted to the Inspector of factories and the local police station.

### ANALYSIS

Post the Madras High Court decision, there was uncertainty as to whether the decision of the court would apply consistently across the country or would it be applicable only in the state of Tamil Nadu. Accordingly, the validity of Section 66(1)(b) of the Factories Act was questioned again before various other High Courts including the Andhra Pradesh and Karnataka High Courts. However, in the case of *Natural Textiles Private Ltd. v. Union of India*<sup>2</sup>, the Karnataka High Court clarified that when a High Court has already struck down a provision of a central legislation as unconstitutional, the submission that it would be applicable only to the particular state is without any basis, unless and until the said order is set aside by a higher court or by a larger bench.

Although the Madras High Court had listed down certain guidelines to be followed by employers in ensuring the safety and security of women workers and was envisaging the central and state governments to come up with appropriate rules and regulations in this respect, there were no clear-cut rules and regulations listed out by the state governments. The Karnataka State government is one of the first Indian states to come up with an exhaustive list of conditions in this respect. However, the conditions listed out in the Notification appear to be a reiteration of what was originally set out in the Madras High Court judgment in 2000, which to a certain extent may seem irrelevant and unnecessary in the current scenario. For example, in 2000, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**POSH Act**”) was not yet enacted and to that extent, the Madras High Court considered it necessary to set out detailed terms and conditions with respect to protecting women

employees from workplace sexual harassment. However, given that the POSH Act has been enacted in 2013 which already outlines employer obligations in terms of preventing such incidents, the Notification did not need to contain such a reference or in terms of abundant caution, could have simply cross referenced the POSH Act in order to ensure consistency with the current legal requirements.

While on the one hand, the striking down of the night shift restriction under the Factories Act can be seen as a step ahead to ensure equality and prohibit discrimination on the basis of gender, placing onerous conditions upon employers could continue deterring employers from hiring and retaining women workers. For example, the requirement to ensure that the total number of women workers engaged in night shift shall not be less than two-third of the total strength etc. while in the best interest, may not be practically possible to comply with. Further, the Notification states that a woman employee cannot be mandated to work at night and that she may be engaged only with her consent. There is no clarity as to whether this should be a one-time consent or does the woman employee have the flexibility to withdraw her consent at any point in time (after taking up employment) or refuse to take up a night shift as and when she so chooses. Similarly, what if the woman employee is employed specifically for night shift and withdraws her consent subsequently?

While these terms and conditions are primarily meant to promote more opportunities for women while ensuring that their safety is not compromised, placing some of these onerous conditions could place the employer in a difficult situation. Other Indian States are however likely to follow a similar protocol in due course.

– **Preetha S & Vikram Shroff**

You can direct your queries or comments to the authors

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<sup>1</sup> Smt. R. Vasantha v. Union of India; W.P. Nos. 4604 to 4606/1999

<sup>2</sup> Writ Petition No. 50913 of 2003; Decided On: 12.03.2007

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