

## HR Law Hotline

March 29, 2017

### MATERNITY LEAVE IN INDIA INCREASED TO SIX MONTHS

- Maternity leave increased from 12 to 26 weeks.
- Female employees with at least two children continue to be entitled to 12 weeks of maternity leave.
- Maternity leave of 12 weeks for female employees adopting a child below 3 months and for commissioning mothers.
- Employers having at least 50 employees to provide creche facility.
- Working mothers may be entitled to work from home.
- Effective date of the amendment yet to be notified.

The wait finally ends! Maternity leave in India stands increased to 26 weeks for the private sector. The effective date of the amendment will be separately notified.

After enactment of the stringent law on prevention of sexual harassment of women at workplace in 2013, the Indian government has now given female employees another reason to rejoice. With this development, maternity leave to be offered by private employers in India has been brought at par with that of government employees in India. It is significant to note that India now surpasses many European and Asian countries in terms of maternity benefits being provided to working mothers.

Following enactment of the Maternity Benefit (Amendment) Act, 2017 ("**Maternity Amendment Act**") on March 27, 2017, the law also (a) extends maternity benefits to commissioning and adopting mothers, (b) mandates employers to provide creche facilities at the establishment, (c) allows women to work from home in certain cases and (c) requires employers to inform female employees at the time of their joining about maternity benefits available to them.

#### A. BACKGROUND

The Maternity Benefit Act, 1961 ("**Maternity Act**"):

1. regulates employment of women in establishments before and after child-birth;
2. provides for maternity leaves and certain other benefits such as leave for miscarriage or medical termination of pregnancy, leave with wages for tubectomy operation, payment of medical bonuses etc.;
3. is applicable to factories, mines, the circus industry, plantations and shops and establishments employing at least 10 employees ("**Covered Establishments**"), except female employees who are covered under the Employees' State Insurance Act, 1948 ("**ESI Act**");
4. provides maternity benefits to female employees working in specified establishments and excludes women in the unorganized sector;
5. entitles female employees in Covered Establishments to receive maternity benefits if they have worked with the employer for at least 80 days in the 12 months immediately preceding the date of expected delivery ("**Eligible Employee**").

In addition to the Maternity Act, certain other labour laws in India also provide for maternity benefits. The ESI Act provides for payment of wages to an insured woman, during her 26 week maternity leave. Women employed in newspapers or working as journalists are also entitled to maternity leave of 3 months under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. Similarly, female employees working in factories are entitled to 3 months of maternity leaves with full wages under the Factories Act, 1948.

Over the past few years, there has been a continual demand to improve maternity benefits being provided to female employees in order to ensure that infants are provided with wholesome and proper care and nourishment. The Universal Declaration of Human Rights (UDHR) (1948) pronounced the special rights of children for the first time by providing that "*motherhood and childhood are entitled to special care and assistance*". The General Assembly in 2003 opined that "*early childhood is a crucial period for the sound development of young children. Missed opportunities during these early years cannot be made up at later stages of the child's life*<sup>1</sup>."

The first legally binding international document concerning child rights was *the Convention on the Rights of the Child, 1989*, which was also ratified by India in 1992. The Convention required its member states to *ensure to the maximum extent possible child survival and development*<sup>2</sup>, *render appropriate assistance to parents and legal*

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guardians in the performance of their child rearing responsibilities and ensure the development of institutions, facilities and services for the care of children<sup>3</sup>. As per the standards set out by the International Labor Organisation (ILO) in the Maternity Protection Convention, 2000<sup>4</sup>, member states have been recommended to provide atleast 14 weeks of maternity leave. The Maternity Protection Recommendation, 2000 of the ILO recommends a longer period of 18 weeks for maternity leave.

The Sixth Central Pay Commission<sup>5</sup> of India made a recommendation in 2015 to relax the period of maternity leave to six months for Central Government employees, which was considered and subsequently implemented<sup>6</sup>. This was in line with the guidelines issued by the World Health Organization<sup>7</sup> as well as the Indian Ministry of Health and Family Welfare stating *inter alia* that a baby needs to be nursed by the mother for a minimum period of six months. In a few States, the respective State Governments<sup>8</sup> have also relaxed the period of maternity leave for State Government employees and have also provided for an additional child care leave for a period of 730 days (approximately 2 years)<sup>9</sup> in special circumstances, to look after their children when they are grappling with serious diseases. Last year, fulfilling the electoral promise, the State of Tamil Nadu has announced 9 months (270 days) of maternity leave for State government employees as opposed to the earlier limit of 6 months (180 days)<sup>10</sup>.

Other State Governments are also seeing demands from employee unions for a like change to be implemented in their States<sup>11</sup>. It is also interesting to note that a number of leading companies had already voluntarily amended their policies prior to the Maternity Amendment Act to increase maternity benefits and provide various new-age benefits such as adoption leaves, surrogacy leaves, paternity leaves etc<sup>12</sup>.

B. FEATURES

The important revisions to the Maternity Act as a result of the Maternity Amendment Act are as follows:

- 1. Increase in Maternity Leave: Maternity leave for Eligible Employees has been increased to 26 weeks (as against the previous 12 weeks limit) in case of women having less than two surviving children. In other cases, the existing period of 12 weeks shall continue to apply. Out of the 26 weeks, not more than 8 weeks can be taken before the date of expected delivery, whereas earlier, the pre-natal period was prescribed to be not more than 6 weeks.
- 2. Commissioning<sup>13</sup> and Adopting mothers: Maternity benefit has now been extended to commissioning and adopting mothers. A female employee adopting a child below 3 months of age and commissioning mothers shall be entitled to 12 weeks of maternity benefit from the date the child is handed over to them.
- 3. Creche facility: Employers having at least 50 employees will be required to provide creche facility either individually or as a shared common facility within such distance as may be prescribed by rules. The employer shall also be required to allow four visits a day to the creche including the interval for rest allowed to her.
- 4. Work from home: Employers may allow Eligible Employees to work from home on a case to case basis depending on the nature of work. The conditions governing such work from home may be mutually agreed between the employer and the employee.
- 5. Written intimation: Every employer shall be required to inform, in writing and electronically, to every female employee at the time of commencement of employment about the benefits available to her as per the Maternity Act.

C. MATERNITY BENEFITS ACROSS THE WORLD

#	Country	Maternity leave
1.	Argentina	<ul style="list-style-type: none"><li>■ 90 days (3 months) paid maternity leave at the rate of 100% of wages</li></ul>
2.	Australia	<ul style="list-style-type: none"><li>■ 52 weeks (12 months) of unpaid leaves with an option to take an additional 12 months/1 year with the consent of the employer.</li><li>■ Parental leave can be split between the parents so long as total leave taken by both of them does not exceed 24 months.</li><li>■ Special maternity leaves (unpaid) may also be availed by an employee over and above the aforementioned parental leave.</li></ul>
3.	Belgium	<ul style="list-style-type: none"><li>■ 15 weeks (approximately 3.5 months) of paid leaves at the rate of 82 percent of the employee's salary for the first 30 days and 75 percent for the remainder subject to a maximum salary prescribed by the government.</li></ul>
4.	Brazil	<ul style="list-style-type: none"><li>■ Mandatory 120 days of paid leaves at the rate of 100% of wages with additional 60 days at the option of the employer.</li><li>■ Companies that choose to grant the additional 60 will have the right to a tax benefit equal to the amount of the salary of the employee during this extension period.</li></ul>
5.	Canada	<ul style="list-style-type: none"><li>■ Varies between 15-17 weeks (depending on the province) of paid maternity leaves.</li><li>■ Maternity leave benefits are paid out by the federal government through</li></ul>

Employment Insurance.

- The employee will receive wages equal to 55 per cent of the employee's average weekly pay up to a maximum amount which is set by the government each year.

6. **China**

- 98 days/ 14 weeks of paid maternity leave *via* insurance
- In case of abnormal or difficult childbirth an extra of 15 days of leaves
- In case of more than one child in a single birth, an extra 15 days for each additional baby delivered
- Additional '*late maternity leave*' of roughly 30 days (depending on location) if the female employee is older than 24 years.

7. **United Kingdom**

- 52 weeks (12 months), paid for up to 39 weeks in the manner below:
  - **First 6 weeks:** 90% of their average weekly earnings (AWE) before tax
  - **Remaining 33 weeks:** a fixed rate by the government or 90% of their AWE (whichever is lower)

8. **France**

- 16 weeks of paid leaves for single birth paid at 100% of salary capped at a particular amount (via social security scheme).
- 34 weeks for twins and 46 weeks for triplets

9. **Germany**

- 14 weeks of paid leaves calculated at the rate of 100% of the employee's earnings without any ceiling (via insurance and employers).
- Extended leave of 12 weeks for premature or multiple births

10. **Japan**

- 14 weeks of paid leaves (6 weeks pre-birth and 8 weeks post-birth) paid at the rate of 66% of the mother's regular salary.

11. **Russia**

- 20 weeks (140 days) of paid leaves divided equally pre and post birth.
- Wages calculated at the rate of 100% of the average earnings, calculated on basis of employment during 24 months before taking leave, subject to a ceiling based on the ceiling on earnings for social insurance contributions established by the state on an annual basis, the actual number of worked days and the length of the leave.
- Maternity leave may be extended to 194 days (approximately 28 weeks) in the event of multiple pregnancies or complications, in which case, 84 days before birth and 110 days after birth may be taken for multiple births (such as twins or triplets) or 86 days after the birth if there are any complications.

12. **Singapore**

- 16 weeks of paid leave at the rate of 100% of the wages up to two children (funded by the employer for 8 weeks and 8 weeks by the government).
- For 3<sup>rd</sup> and subsequent childbirths, the government will pay for the full 16 weeks of maternity leave.

13. **Sweden**

- 480 days (60 weeks) of paid parental leave out of which 420 days are paid at a rate of 80% of the employee's salary up to a prescribed capped limited (*via* social insurance).
- In case of twins, an additional parental leave of 180 days (6 months)

14. **United States of America**

- Employees working in a firm of 50 or more employees who have maintained employment with the same business for 12 months and have accumulated at least 1,250 working hours over those 12 months 12 weeks, shall be entitled to unpaid leave of 12 weeks.

#### D. NEW SET OF COMPLIANCES

In terms of compliances under the Maternity Amendment Act, private employers will now be required to:

1. amend their leave policies/ maternity leave policies to reflect the expanded benefits under the 2017 Amendment Act;
2. include appropriate references with respect to maternity benefits in their employment offer letter / joining docket providing details of maternity benefits under the law;

3. build in systems and policies to allow working mothers to work from home;
4. Provide creche facilities for working mothers and develop the infrastructure for the same;
5. Devise a non-discriminatory performance appraisal system taking into consideration that the fact that the female employee was on maternity leave for 6 months.

Additionally, certain Indian states including Andhra Pradesh, Odisha, Punjab, Rajasthan, Uttar Pradesh and West Bengal which have maternity leave provisions in their state specific legislations, will need to amend those provisions to bring it in line with the Maternity Amendment Act.

Certain other labour laws<sup>14</sup> also provide for maternity benefits to women employees in different sectors which differ in their coverage, benefits and financing. The conflicting provisions in those laws will also need to be amended.

## E. THE HITS...

1. While India's private sector employers lagged behind the government sector and many other countries in terms of providing extended maternity benefits, with the enactment of the Maternity Amendment Act, India has become one of the most progressive countries in terms of providing maternity benefits.
2. The Maternity Amendment Act is definitely a welcome step taken by the Indian government enabling women to combine their professional and personal roles successfully and to promote equal opportunities and treatment in employment and occupation, without prejudice to health or economic security.
3. A survey by the leading industry body, ASSOCHAM<sup>15</sup> suggests that up to 25% of female employees give up their career post child birth. Additional maternity benefits like creche facility, work from home, etc. in addition to the extended paid maternity leaves may see demonstrable results in the form of greater number of female employees returning to work post maternity and greater employee retention over a period of time.

## F. ...AND THE MISSES

1. Although the Maternity Amendment Act is expected to benefit ~1.8 million women across the country, the government seems to have overlooked the recommendation of the Sixth Central Pay Commission and has left out a majority of the workforce that works in the unorganized sector<sup>16</sup> in India (estimated to be over 90% of the total workforce).
2. The Maternity Amendment Act has missed out the opportunity to introduce paternity leave and possibly a chance to spread the message that the responsibility of running a family should be of both the parents. Seems like we will need to wait longer for a 'Maternity and Paternity Benefit Act'.
3. Countries such as the UK, Singapore and Australia have introduced various categories of leaves relating to child birth, including parental leave (enabling parents to share the parental leave in the manner suitable for them), paternity leave, family leave etc. where both the parents receive the benefit of leaves at the time of child birth. This, to an extent, helps parents to strike a balance between their careers and personal life and also ensures that the child gets proper care and attention from both the parents especially in his/her initial years of development. Although the steps taken by the government is commendable, the government has missed out this opportunity to catch up with such requirements.
4. Unlike some other countries wherein the costing is borne by the government or shared by the government and the employers or *vide* social security schemes, in India, the cost of maternity leaves (wages during the leave period) is to be borne by the employer (unless the female employee covered under the ESI Act). Additional requirements such as having a creche facility, etc. would also require employers to establish adequate infrastructure in turn leading to more questions and more expenses. To help reduce the financial exposure on the employer, an option could have been provided in terms of part unpaid leave, something that is common in some of the developed nations.
5. There have been some news reports that suggests that the increased maternity leave could act as a deterrent for certain employers for recruiting female candidates. While it is hoped that it is not true, it could unfortunately affect all the good work put in so far to promote diversity and inclusiveness of women at workplaces.
6. Given the objective of the statute, there also does not seem to be a valid justification as to why the law should not apply to establishments having less than 10 employees. The amendment fails to extend the applicability of the statute to all establishments irrespective of the number of employees.
7. The Maternity Amendment Act has not increased the medical bonus amount payable which is currently low and does not match up to the current inflationary trends.

— Preetha S, Nishanth Ravindran, Ajay Solanki & Vikram Shroff

You can direct your queries or comments to the authors

1 Source: Law Commission Report, 2015 (<http://lawcommissionofindia.nic.in/reports/Report259.pdf>)

2 Article 6 of the Convention

3 Article 18 of the Convention

4 India has not ratified this Convention.

5 <http://finmin.nic.in/6cpc/6cpcreport.pdf>

6 Notification O.M. No. 13018/2/2008-Estt. (L) dated the September 11, 2008, Government of India, Department of Personnel and Training (Effective September 1, 2008)

7 [http://www.who.int/nutrition/topics/infantfeeding\\_recommendation/en/](http://www.who.int/nutrition/topics/infantfeeding_recommendation/en/)

8 <http://timesofindia.indiatimes.com/city/allahabad/State-govt-raises-maternity-leave-to-180-days/articleshow/4209332.cms>

9 <http://www.igovernment.in/news/1001517/bihar-increases-maternity-leave-period-to-180-days>

10 <http://indianexpress.com/article/india/india-news-india/tamil-nadu-maternity-leave-enhanced-j-jayalithaa-3991474/>

11 <http://www.thehindu.com/news/national/tamil-nadu/government-employees-highlight-demands/article6814015.ece>

12 <http://www.livemint.com/Companies/UEh7Z1YmHfoP0QrXazscK/Tesco-to-offer-enhanced-maternity-leave-to-its-Indian-women.html>

13 A biological mother who uses her egg to have a surrogate child.

14 Laws such as the Employees' State Insurance Act, 1948, the Factories Act, 1948, Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957, The Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996

15 <http:// ASSOCHAM.ORG/NEWSDETAIL.PHP?ID=4953>

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