

HR Law Hotline

July 21, 2022

50% OF EMPLOYEES IN INDIAN SEZs ALLOWED TO WORK FROM HOME

- The Ministry of Commerce & Industry's Department of Commerce notified the Special Economic Zones (Amendment) Rules, 2022 on July 14, 2022¹.
- The amendment introduces Rule 43A allowing *IT-ITeS* entities operating in Special Economic Zones ("**SEZ**") to permit employees (including contractual employees) to work from home ("**WFH**") or any place outside SEZ.
- At any given point of time the number of employees WFH should not exceed 50% of total number of employees, including contractual employees.

The Department of Commerce ("**DoC**") of the Indian Ministry of Commerce and Industry has notified the Special Economic Zones (Amendment) Rules, 2022 ("**SEZ WFH Amendment**"). The SEZ WFH Amendment introduces rule 43A allowing *IT-ITeS* entities operating in SEZ to permit employees (including contractual employees) to WFH or any place outside the SEZ. The SEZ WFH Amendment lays down guiding rules on the aspects of WFH which *inter alia* includes permission requirement from the SEZ Development Commissioner ("**DC**") to allow eligible employees to WFH, cap on the number of employees who can be permitted to WFH and regulation on movement of SEZ unit² equipment for enabling employees to WFH.

BACKGROUND

The Special Economic Zones Act, 2005 ("**SEZ Act**") was enacted to provide for establishment, development and management of SEZ for promotion of exports and incidental matters. The SEZ Act provides the following guiding principles³ that the Central government is required to keep in mind while notifying SEZ:

- generation of additional economic activity
- promotion of exports of goods and services
- promotion of investment from domestic and foreign sources
- creation of employment opportunities
- development of infrastructure facilities
- maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States.

The Special Economic Zones Rules, 2006 ("**SEZ Rules**") were subsequently notified to regulate the economic activities carried out within SEZ. Prior to the SEZ WFH Amendment, proviso (i) to rule 43, SEZ Rules⁴ allowed SEZ units to permit following categories of employees to WFH:

- employees of *IT/ITeS* SEZ units and *IT/ITeS* units registered as Other Service Providers with the Department of Telecommunications ("**OSPs**")⁵
- employees who are temporarily incapacitated
- employees who are travelling and
- employees who are working offsite

The aforesaid proviso to rule 43⁶ also mandated certain conditions to be followed by SEZ units in order to enable eligible employees to WFH, which are as follows.:

- a regular employee of a SEZ unit, who has been issued identity card as per provisions of SEZ Act shall be authorised to undertake work pertaining to that SEZ unit.
- the work to be performed by an employee permitted to WFH shall be as per the services approved for the employing SEZ unit, and the work must be related to a project of such SEZ unit.
- the employing SEZ unit shall provide laptop or desktop and secured connectivity (for e.g. Virtual Private network, Virtual Desktop Infrastructure) to establish a connection between the employee who is permitted to WFH and work related to the project of the SEZ unit.

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- the SEZ unit shall ensure export revenue of the resultant products or services to be accounted for by the SEZ unit to which the employee is tagged.
- where an employee ceases to be part of the project of the SEZ unit, the employee shall be un-tagged from the SEZ unit and the SEZ unit shall surrender the identity card to Specified Officer⁷ of the SEZ ("Specified Officer").
- list of employees working from home along with their ID number, asset identification number (of laptops, data card etc to be carried outside SEZ premises) to be submitted before the Specified Officer.

However, there remained lack of clarity with respect to some aspects of WFH arrangement in case of SEZ units. These aspects included the limit / proportion of employees that can work remotely, duration for which SEZ units can be permitted to have such arrangements and applicable compliance requirements. In this background, DoC has intervened with SEZ WFH Amendment to lend clarity on at least some of the aspects.

KEY FEATURES OF THE AMENDMENT

The SEZ WFH Amendment omits the erstwhile provision of SEZ Rules governing WFH⁸ and introduces rule 43A. The new rule 43A basically allows SEZ units to permit certain employees (including contractual employees) to WFH or work from any place outside the SEZ. Consistent with the previous position, employees of SEZ units who are permitted to work from outside SEZ as per SEZ WFH Amendment are:

- employees of IT/ITeS SEZ units
- employees who are travelling
- employees who are working off-site
- employees who are temporarily incapacitated.

The key features of rule 43A⁹, *inter alia* include:

- the SEZ unit shall submit its proposal for WFH to the DC through email or physical application within 90 days from the date¹⁰ of the notification.
- the SEZ unit shall include in proposal terms and conditions of proposed WFH arrangement, including the date from which the permission for WFH shall be utilised and the details of the employees to be covered by such permission for WFH.
- the DC, on receipt of the proposal, if satisfied that the proposal complies with the rule, may grant the permission to the proposal of the SEZ unit for a period of one year from the date of such permission.
- the DC, on receipt of an application for extension of the permission, if satisfied that SEZ unit and employees have complied with the SEZ Rules, may extend the permission not exceeding one year at a time.
- the SEZ unit will have to submit proposal for extension permission of WFH at least 15 days in advance, to the DC, except in case of the employees who are temporarily incapacitated or travelling.
- the proposal for WFH shall cover a maximum 50% of the total employees of the SEZ unit, including contractual employees. The SEZ units shall maintain accurate attendance record of employees for the entire period of permitted WFH and are required to submit the same to the DC, from time to time.
- the DC may permit the SEZ unit to allow a higher number of employees to WFH for any bona-fide reason to be recorded in writing.
- the SEZ unit shall ensure that the work performed by the employee permitted to WFH shall be as per the services approved for such SEZ unit, and the work shall be related to a project of the SEZ unit.
- the SEZ unit shall ensure export revenue of the resultant products or services to be accounted for by the SEZ unit to which the employee is tagged.
- where an employee ceases to be part of the project of the SEZ unit, the employee shall be un-tagged from the SEZ unit and the SEZ unit shall surrender the identity card to Specified Officer.
- the SEZ units can provide laptop, computer, video projection systems, secured connectivity devices to such employees after obtaining permission from Specified Officer to temporarily remove such goods to Domestic Tariff Area without payment of duty or IGST. The duration for movement of assets required for the purpose of WFH will be linked to the WFH duration.

ANALYSIS

In a much-needed move, largely owing to the positive WFH experience during the pandemic, the SEZ WFH Amendment allows WFH to IT / ITeS SEZ units by introducing rule 43A. In so doing, the SEZ WFH Amendment drives home the recognition of WFH arrangement which has gained more relevance since the outset of pandemic. The SEZ WFH Amendment is limiting in the sense that it provides for a maximum of 50% employees to be allowed to WFH that too only the specific industries or employees.

The devil lies in the details. While there is a provision for relaxation by DC allowing higher number of employees to WFH, the SEZ WFH Amendment does not provide the reasons that can be considered '*bonafide*' for such a relaxation. The permission for WFH, which appears to be discretionary, is to be granted for only one year at a time and to be extended only on satisfaction of DC, which again lacks clarity. Moreover, if the SEZ units are able to justify the proposal for such an arrangement, the intervention from DC should happen only in exceptional circumstances. It calls into question the test of managerial prerogative vis-a-vis DC's role in such scenarios.

The SEZ WFH Amendment is also procedurally complicated and it remains to be seen how it will be actioned by the employers and by the respective DCs. For example, the requirement to furnish the details of employees who will be working from home makes it practically challenging for SEZ units to have a flexible hybrid working pattern as they have resorted to since the outbreak of pandemic.

Needless to say that the final position and necessary guidance was long overdue for WFH arrangements in India considering that there is lack of clarity with respect to non-traditional work arrangements. Despite the limitations and the potential challenges ahead to fully comply with the SEZ WFH Amendment, this is a welcome start and we are confident that it will allow the employers in SEZ to contemplate continuous WFH arrangements.

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You can direct your queries or comments to the authors

¹ <https://egazette.nic.in/WriteReadData/2022/237284.pdf>

² Sec. 2(zc), SEZ Act, defines "*Unit*" to mean a unit set up by an entrepreneur in a Special Economic Zone and includes an existing Unit, an Offshore Banking Unit and a Unit in an International Financial Services Centre, whether established before or established after the commencement of SEZ Act

³ Sec. 5, SEZ Act

⁴ Rule 43, SEZ Rules

⁵ OSPs are also subject to OSP Guidelines issued by the Department of Telecommunication as amended from time to time.

⁶ Rule 43, SEZ Rules

⁷ Rule 2(zd), SEZ Rules defines "Specified Officer" in relation to a Special Economic Zone to mean Joint or Deputy or Assistant Commissioner of Customs for the time being posted in the Special Economic Zone

⁸ Proviso (i), Rule 43, SEZ Rules (prior to SEZ WFH Amendment)

⁹ Rule 43A, SEZ Rules

¹⁰ July 14, 2022

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