



UNDERSTANDING THE MAHARASHTRA SHOPS AND ESTABLISHMENTS (REGULATION OF EMPLOYMENT AND CONDITIONS OF SERVICE) RULES 2018

Saumya Dev

Associate



INTRODUCTION

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 ("**Act**") has been brought into force with effect from December 19, 2017. It regulates the employers – employee relationship, the service conditions including the hours of work, payment of wages, overtime, leave, holidays etc.

With the enforcement of the new Act, the erstwhile, Maharashtra Shops and Establishments Act, 1948 stands repealed. The new Act seems to be in consonance with the Model Shops and Establishment (Regulation of Employment and Conditions of Service) Bill, 2016 ("**Model Bill**") approved by the Central Government.

In furtherance to the enforcement of the Act, the Government of Maharashtra vide notification dated March 23rd, 2018 has released the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 ("**Rules**").

The framework of delegated legislation such as rules and notifications under the local shops and establishments act ("**S&E Act**") prescribe the particulars with respect to procedure for registration, formalities during closure of establishments, the format of registers and records to be maintained by the organisations and the nature and frequency of intimations/disclosures to be made to the authorities.

This article attempts to analyse the symphony of the Act and the Rules in complementing and clarifying the trajectory sought by the new Act.

APPLICABILITY

The provisions of the Act are not applicable to workers occupying position of confidential, managerial or supervisory character in an establishment. Labour and employment laws such as the Industrial Disputes Act, 1947 ("**ID Act**"), local labour welfare funds act and even some S&E Acts have a similar exclusionary category of workers encompassing personnel who carry out work which is of managerial or supervisory character and such employees are excluded from certain or all entitlements envisaged under these acts. For instance the ID Act protects workmen from unfair dismissal, unfair labour practices and the definition of workmen excludes employees carrying out work which is supervisory or managerial in nature.

However, there was no clear test or criterion for determining whether an employee would be a workman or not and whether the nature of his duties is managerial or supervisory and this aspect had to be decided on a case to case basis and in light of judicial precedents on the subject.

It is in the Rules, that for the first time, the functions which have managerial or supervisory character have been illustrated which include power to sanction leave, award increment, take disciplinary action, to terminate, suspend or dismiss a worker or indulge in policy making decision regarding any aspect of the business or service, conditions of workers.

In this context, please note that the employers under the Act and the Rules will be required to intimate, annually to the Facilitator, the concerned authority under the Act, a list of such persons. This intimation could have de-facto implications on a similar categorisation under the other labour laws including the aspect of whether that person would be treated as workmen under the ID Act.

With respect to workers occupying position of confidential character, the Rules only provide that number of such persons shall not be more than 1 % of the total strength of workers of the establishment subject to a maximum of 50 persons, without clarifying the meaning and scope of what would constitute a position of confidential character. Typically all corporates have their employees (across all hierarchy levels) sign standard employment agreements which contain confidentiality obligations, therefore the practical implementation of this rule will be a challenge.

AUTHORITIES

The previous framework provided for appointment of 'inspectors', as the concerned local authority for ensuring implementation of the provisions of the S&E Act such as registration, inspection, search and seizure. The Act introduces the appointment of Facilitators instead, who would have the power to inspect organisations, similar to the powers of inspectors. However, as a pro employer measure, the Facilitators under the Act would also have the power to advise and assist the employer with ensuring compliance with the provisions of the Act.

The legislative intent of formulating this enabling authority in the form of "Facilitators" is also reflected in the Labour Code on Wages, 2017 ("Code"), which has been approved by the Union Cabinet and has been introduced in the Lok Sabha as on August 10, 2017. The Code modifies and subsumes the framework outlined by the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965, Minimum Wages Act, 1948 and the Equal Remuneration Act, 1976.



The Rules provide that Facilitators shall advise the employers on the irregularities noted by them after inspection but besides that the Rules are silent on how and to what extent that advisory would be rendered. It is not clear if the employer could seek a written clarification from the Facilitators on their queries or perhaps interact with them during fixed public dealing hours. Further, it remains to be seen how this provision of rendering advise would be exercised by the Facilitators and how it would benefit the employers in being complaint.

SIMPLIFICATION OF REGISTRATION PROCESS

The Act and the Rules have made the registration process more fluid and tapered the discretion of authorities by prescribing timelines for issuing the registration certificate.

Under the old framework, the registration process or its renewal involved issuance of registration certificate after the inspector had satisfied himself of the correctness of the application submitted by the employer. This practically enabled the authorities to take their own time in processing the application, raising any objections and finally issuing the certificate, in spite of all objections being cleared. The Act now prescribes that the facilitator will be required to issue the certificate within 7 days, of his being satisfied of the correctness of the information.

Another interesting aspect with respect to registration of establishments employing 10 or more workers, is the undertaking required by the employer stating that the establishment has obtained necessary licenses, permissions, permit for the conduct of the business and the corresponding registration number of such licenses will have to be specified in the registration application. While under the previous act also the registration had to be sought from the date of commencement of business by establishment which implied that it was assumed such business registrations would have been obtained by the establishments. However, the Rules clarify and highlight this aspect further.

Furthermore, the previous framework had a requirement of intimating the concerned authorities when an establishment is closed for any reason, however no format for such intimation was specified and usually the employer's submitted intimation in a letter format specifying the date and reasons for closure. However, the Rules now prescribe a fixed format for such intimation to dispel any ambiguity.

ESTABLISHMENTS HAVING LESS THAN 10 EMPLOYEES

The applicability of the provisions of the previous act extended irrespective of the number of workers employed in a shop or establishment. However, the provisions of the Act relating to registration, working hours, opening and closing hours, leaves and other welfare provisions etc. only apply to establishments employing 10 or more workers.

Further, the establishments employing less than 10 workers will only be required to intimate and self-certify certain details of the establishments.

Since the key provisions of the Act which regulate working hours, leaves and welfare provisions are not applicable to such establishment and its employees, it was expected that the self-certification requirement for these establishments would require an employer to make appropriate disclosures with respect to the conditions of service governing an establishment and inform the Facilitator on working hours, leaves etc followed by such small establishment. However, the Rules limit the self-certification to basic details of the establishment which are to be intimated at the time of registration such as name of the employer and manager, name of establishment, nature of business, and number of workers along with Aadhaar details of employer. The ambiguity arises as to how will the matters such as working hours, leaves, overtime etc., be governed for employees working in such small establishments falling outside the purview of the Act. The Act no doubt allows flexibility to the employer however; the Act fails to impose any check on the employer of a small establishment.

This approach also seems to be at distance with the self-certification model followed by the government of Maharashtra for the various labour and employment laws. For instance under the 'Self-Certification-cum-Consolidated Annual Returns Scheme for Factories and Establishments' in the State of Maharashtra, the establishments which voluntarily chose to self-certify, were required to disclose details with respect to leaves and holidays provided to the workers.

RECORD KEEPING AND OTHER COMPLIANCES

The Act provides that registers can be maintained electronically. The period of retention of records has been increased by the Rules from 2 (two) to 3 (three) years.

The Act introduces the requirement of submitting annual return to the concerned authority. Under the previous framework, declaration and disclosures with respect to compliances with the various provisions of the S&E Act such as compliance with welfare provisions and working hours etc. were made at time of registration or renewal thereof. The format of annual return prescribed under the Rules captures these declarations to be made annually.

DISPENSING REDUNDANCIES

The Rules dispense with the previously existing requirement of displaying extract of the Act which was barely followed by the establishments.

Further, the Act and Rules further do not require maintenance of records with respect to white washing activities of an establishment, which again was an obsolete provision in the previous framework.

Furthermore, the Act had already dispensed with the restriction on double employment present in the earlier framework. This was a progressive attempt considering the evolving and dynamic work profiles and the Rules further introduce the concept of part time employment and prescribe conditions governing the working hours and wages of such part time employees.

KEY INTRODUCTIONS

Operational timings of establishments

The previous act provided the requirement of having a close day and uniform opening and closing hours for all establishments. However, in terms of the previous act, certain establishments could claim exemption from these requirements. The Act provides freedom to operate 365 days in a year provided workers are given a weekly off and certain other provisions are complied with. It further provides that different opening and closing hours would be prescribed for different categories of establishments, thereby recognising the requirement of flexibility in operational hours depending on the industry needs.

Regulation of rotation of shifts and working hours

This flexibility is however subject to certain conditions specified in the Act and the Rules to safeguard the welfare of workers. The Act sets out the compliance with overtime and working hours requirements for workers. Further, the Rules prohibit overlapping shifts and provide that a gap or rest of at least 12 consecutive hours should be maintained when the shift of workers is changed from a night shift to day shift and vice versa. Regulation of shifts and compliance with working hour requirements was the practise followed by the authorities while providing exemption to establishments to enable them to operate 24x7 and 365 days a year, which has now been codified in the Rules.

Women Employees

Additionally, under the previous framework, the women employees were permitted to work, beyond normal working hours, in exempted establishments, however, the conditions subject to which exemption was granted included ensuring safety of such women employees by providing adequate transport facilities, amongst other things. The Rules crystallise and build on such protectionist measures for women and also require employers to formally obtain consent of such employees in a prescribed format.

Leaves

Further, the Act introduces 8 casual leaves for employees besides the annual leave entitlement of 18 days and also increases the number of holidays to 8 from 4, as provided in the previous framework. The number of accumulated leaves has also been increased from 42 to 45 days. The Rules in this regard, provide a peculiar requirement wherein the employer would be required to notify all workers individually, after every calendar year, when the leaves accumulated by them have reached the maximum limit and cannot be carried forward. This intimation becomes particularly important because under the Act the workers have a right to encash the annual leaves, which were applied for in advance but were refused by the employer. This intimation along with such a corresponding right may have a cascading effect on the leaves encashed by the employees in the establishment.

Welfare Measures

Lastly, the Rules further build on the welfare obligations under the Act by introducing the requirement of forming a Health, Safety and Welfare Committee for establishments having 100 or more workers, which will have parity of representation of both employers and employees. Such safety committees were a typical compliance requirement, under the Factories Act, 1948, for factories engaged in hazardous process, however the Act seems to extend this requirement for commercial establishments as well.

This move seems intuitive of the obligation imposed on employer to undertake necessary measures to prevent accidents and a corresponding penalty imposed on the employers for an accident which causes serious bodily injury or death of worker due to default by employer of the provisions of the Act.

THE CURRENT LACUNAS

Discharge and Dismissal

The provisions on requirement of a mandatory period of notice before dismissal and discharge, is conspicuous by its absence in the Act and the Rules. As a result the provisions of the ID Act which postulates the requirements of notice period or wages in lieu of such notice and severance entitlements would apply to the “workmen” category of employees.

Crèche

Furthermore, the Act outlined the crèche requirement and also stipulated that the establishments could have a common facility within the radius of 1 km from the establishment. In this context, please note that Maternity Benefit Act, 1961, also provides for facility of crèche to be provided by the employer. The draft Maternity Benefit (Crèche in the Mine Establishments) Rules 2018, provide that the Mines Crèche Rules, 1966, shall mutatis mutandis, apply, with some modifications, to establishments on whom the Maternity Benefit Act, 1961 is applicable. These draft rules provide that the crèche has to be within a distance of 500 metres of the establishment. If the draft rules are notified in their present form, it shall lead to legislative inconsistency.

CONCLUSION

The employers will have to modify their existing employee handbook or policies to align it with the provisions of the Act.

The Act and the Rules, by providing operational flexibility in working hours, exemption to certain category of employees, enhanced working hours, formulation of measures to ensure that a workplace is women friendly, improving the leave entitlements, have in essence captured the spirit of the Model Bill, a suggestive piece of legislation, which aimed to i) improving the working conditions of workers (ii) creating many more job opportunities for women and (iii) providing favourable environment for doing business.

Further, the appointment of Facilitators as the concerned authority under the Act, who shall act in the dual capacity of ensuring implementation and also advising employers on issues relating to compliance, is a right step in ensuring effective implementation of this legal framework.

- o Having said that, the moot issue remains the extent and manner, of the implementation of this new legislation, given the gap in theory and practice, which existed in the previous framework.

Our Offices

New Delhi
14th Floor, Dr. Gopal Das Bhawan
28, Barakhamba Road
New Delhi 110 001
T: +91 11 4213 0000
F: +91 11 4213 0099

Mumbai
1st Floor, Bajaj Bhawan
226, Nariman Point
Mumbai 400 021
T: +91 22 49100000
F: +91 22 49100099

E: info@clasislaw.com W: www.clasislaw.com

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