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Analysing developments impacting business

GUJARAT S&E RULES 2020: GOVERNMENT CLOSES THE LOOP AFTER ENACTMENT OF THE NEW FRAMEWORK

3 July 2020

Background

It has been more than a year since the government of Gujarat brought into effect the new Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 (S&E Act 2019). Through the said legislation, the state government attempted to build a regime based on the [model law](#) on shops and establishments released by the Government of India.

While a detailed analysis of the S&E Act 2019 is set out in our previous [ERGO](#), some of the important changes introduced by the statute vis-à-vis the Gujarat Shops and Establishments Act 1948 (S&E Act 1948) include:

- exemption to small establishments (employing less than 10 workers) from the provisions of the statute (barring few requirements such as intimation of the details of the establishment upon commencement of business and intimation of closure of the establishment);
- doing away with the distinction between 'commercial establishment' (which would not include shops, theatres, hotels, places of public amusement / entertainment etc.) and 'establishment' (which would include commercial establishments along with shops, hotels, places of public amusement / entertainment etc.) for the purpose of providing different conditions of work, and instead envisaging a comprehensive term 'commercial establishment' (which would also include the business of banking, insurance, hospitals, clinics, technical or professional consultants etc.);
- enhancing the overtime pay for workers in establishments (other than hotels / restaurants which were already subjected to higher overtime pay) from 1.5 times the ordinary rate of wages to twice the ordinary rate of wages;
- allowing the Inspector to pass an order permitting women workers in an establishment to work between 9 PM and 6 AM in cases where the Inspector is satisfied that there are arrangements pertaining to rest room, night crèche, toilet, safety, protection from sexual harassment and transportation from the establishment to the doorstep of their residence; and
- enhancing the general penalty for non-compliance from INR 250 to INR 50,000.

Thus far, however, the government had not notified the rules that would govern the granular aspects of the S&E Act 2019. However, on 23 June 2020, the state government finally unveiled the Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2020 (S&E Rules 2020).

The new rules

- Registration process: The S&E Rules 2020 provide that an application for registration (to be filed by an employer having 10 or more workers) shall be made as per Form A, whether online or otherwise. While the portal where an online application can be filed is not prescribed, it appears that the employer can file the application on the state government's [eNagar portal](#).

Notably, even as the state government did away with the distinction between commercial establishments and other establishments such as hotels and places of public amusements in the S&E Act 2019, there is still a difference in the quantum of fee to be paid by each of these categories for registration (INR 500 for a commercial establishment and INR 1,000 - INR 5,000 in case of other establishments).

- Intimation of persons doing confidential work or discharging managerial functions: The S&E Rules 2020 require every employer to inform the Inspector about persons who are occupying positions of a confidential character, in the format prescribed in Form T. Such persons cannot be more than 1% of the total strength of the workers employed in the establishment, subject to a cap of 50 persons.

Likewise, every employer is required to intimate the details of persons performing managerial functions to the Inspector in the format prescribed in Form S. The term 'managerial function' refers to 'all such functions which are inherently supervisory in nature and are bestowed with powers and authority to take all policy and administrative decision in an organisation'. These powers would include power to: (a) sanction leave and award increment; (b) take disciplinary action; (c) terminate the services of or suspend / dismiss a worker; or (d) indulge in policy making decisions regarding any aspect of the business or service, conditions of workers, etc.

Clearly, the above definition has been reproduced from the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules 2018. However, unlike the Maharashtra framework wherein persons occupying positions of confidential character and those performing managerial functions are exempt from the provisions of the relevant statute (hence the need to intimate their details to the competent authority), there is no provision in the S&E Act 2019 providing similar exemptions. It is, therefore, unclear why the Gujarat government has required employers to provide such details to the Inspector.

- Employment of women in night shifts: As indicated above, while employers cannot normally engage women workers in night shifts (between 9 PM and 6 AM) by virtue of S&E Act 2019, the Inspector may, by order, allow them to do so if the consent of the concerned women workers is obtained. The S&E Rules 2020 provide that the consent of the woman worker may be obtained as per the format prescribed in Form J, but their engagement shall be subject to such conditions as may be specified in the order of the Inspector. This leaves the provision rather ambiguous, as it is unclear if and how the employer may seek the Inspector's approval to engage women workers during a night shift.

- Part-time employment: The S&E Rules 2020 provide that an employer is permitted to engage a worker as a part-time worker, although in such a case, the maximum number of hours of work in a day would be 5 hours.
- Notice of weekly holiday: Unlike the S&E Act 1948 which provided that every shop and commercial establishment shall remain closed on one day of the week, the S&E Act 2019 allows shops / commercial establishments to remain open on all days of the week subject to them allowing every worker a weekly holiday of at least 24 consecutive hours. Pursuant to the same, the Gujarat S&E Rules 2020 provide that the employer would be required to display a notice (in the format prescribed in Form K) at a conspicuous place on the work premises showing the day of rest given to workers. Further, the employer is required to share a copy of such notice with the Inspector, electronically or otherwise.
- Notice of accumulated leave: Under the S&E Act 2019, the workers completing at least 240 days of employment in the establishment in the previous year are entitled to an earned leave equivalent to one day for every 20 days of work performed (~18 days). Further, workers are permitted to accumulate earned leave of up to 63 days. Pursuant to these provisions, the S&E Rules 2020 provide that the employer / manager is required to display a notice (in the format prescribed in Form O) by the 31st of January each year which would provide names of the workers who have reached the maximum accumulation limit. The notice would also state that no further leave can be carried forward. A copy of such notice is also required to be given to each concerned worker.
- Detailed provisions on crèches: The S&E Act 1948 did not contain provisions on crèches. However, the S&E Act 2019 provides that every shop or establishment employing 30 or more *women workers* would be required to maintain a crèche. A group of shops / establishments may, however, provide a common crèche within a radius of one kilometer, *if* permitted by the Inspector through an order.

The S&E Rules 2020 provide more detailed rules, stating that the crèche shall not be situated in close proximity to that part of the shop / establishment wherein processes causing excessive noise are carried on. Further, the crèche shall have adequate bedding facilities for each child, sufficient seating arrangement for mothers, sufficient supply of toys for older children and an adjoining washroom. The provision requires the crèche to be supervised by a woman in-charge who will be assisted by an adequate number of female attendants.

- Provisions for compounding of offences: Not many labour laws in India contain provisions for compounding of offences. Interestingly, the proposed labour codes at the Central level have incorporated compounding provisions which are subject to certain conditions. The S&E Act 2019 also allows for compounding of offences which are not punishable with imprisonment. The facility is, however, not available in case of an offence committed for the second time or thereafter *within a period of 5 years* from the date of commission of a similar offence (which was compounded or in respect of which the person was convicted).

The S&E Rules 2020 provide that the accused may file an application for compounding of an offence in the format prescribed in Form R. The Compounding Officer will, on receipt of the application, examine the documents produced and the nature of breaches under the S&E Act 2019 and pass an order within 7 working days of receipt of the application. The compounding fee will be determined basis the seriousness of the breach and the evidence on record.

- Others: In addition to the above, the S&E Rules 2020 make provisions for notifying changes in the particulars of the registration certificate, intimating closure of the establishment, duties of the employer pertaining to cleanliness, precautions against fire, latrines and canteens, issuance of leave book to workers, furnishing of annual return, maintenance of registers etc.

Comment

The notification of the S&E Rules 2020 has certainly brought about clarity in terms of procedural compliances under the S&E Act 2019. However, as indicated above, the state government has replicated few provisions from the erstwhile provisions or from the legal framework existing in Maharashtra without much cogent rationale.

As for deployment of women during night shifts, the S&E Act 2019 read with the S&E Rules 2020 do not provide much flexibility, since much depends on the order of the Inspector allowing establishments to engage women in this manner. This comes at a time when few states such as Karnataka are allowing women workers to be engaged during night shifts in factories, subject to their consent and provision of adequate safety and transportation arrangements. Further, the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2017 also allows women to be engaged in commercial establishments during night shifts subject to the abovementioned conditions.

Likewise, the state government should have balanced the needs of employees with the cost concerns of establishments by allowing 2 or more establishments to set up a common crèche without the requirement of permission from the Inspector.

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