

UNDERSTANDING INTRICACIES OF MATERNITY BENEFIT (AMENDMENT) ACT 2017

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Abstract

In order to promote women's participation in the workforce, the Maternity Benefit Act was introduced in 1961 later it was amended in 2017 to include aspects that were missing in the 1961 Act. This particular research paper focuses on the importance of the Maternity Benefit (Amendment) Act 2017, its provisions like creche facilities, discrimination between biological and adoptive mothers, and its impact on the workforce.

Key Words:

Adopting Mothers, Maternity Benefit Act¹, Creche Facilities, Income Tax Act², Paternity, Informal Sector.

Introduction

The first Central Act called the Indian Mines Maternity Benefit Act³, of 1941 was enacted to provide women with payment for a period of 4 weeks before and 4 weeks after the delivery. It was in the sphere of the Employees' State Insurance Act, of 1948. Maternity Benefits became more important after the adoption of the Constitution in 1950. Many Benefits are provided to women under the Constitution of India under Article. 15, Article 39, Article 42, Article 46 and Article 47. Later, the Maternity Benefit Act, of 1961 was introduced with objectives like protecting the dignity of women's motherhood by providing her and her child with complete care. It assured women of spending quality time with her children without worrying about losing their jobs. It also safeguarded

¹THE MATERNITY BENEFIT ACT (AMENDMENT) ACT, 2017, § No. 6, Acts of Parliament, 2017 (India).

²THE INCOME-TAX ACT, 1961, § 80D, No. 43, Acts of Parliament, 1961 (India).

³THE INDIAN MINES ACT, 1941, § Section 2 (d), No. XIX, Indian Legislature, 1941 (India).

working women to remain self-supporting and financially independent. There were various areas that were missing in the 1961 Act which was covered by the Maternity Benefit (Amendment) Act, of 2017.

The 2017 Amendment was brought in after the 259th Law Commission Report and received the assent of the President on the 27th of March 2017 and became effective in April. It was amended in accordance with the Central Civil Services Rules, whereby the duration of leave entitlement increased from 12 weeks according to the 1961 Act to 26 weeks as per the 2017 amendment. Further, it also introduced leave for adoptive and surrogate mothers. Finally, the amendment mandated that every establishment with 50 or more employees shall have the facility of creche⁴.

The 2017 Amendment Act brought many new changes to the 1961 Act, that protects women's employment during maternity, with paid absence and related benefits. Like its original, the amendment covers establishments employing 10 or more persons and women who work at least 80 days in the 12 months immediately preceding to the expected date of delivery. However, for women who are expecting after having 2 children, the length of the leave remains unchanged at 12 weeks. It is significant and in line with the World Health Organisation guidelines. The original legislation lacked provisions for adoptive mothers but after the amendment, it also extended to the adoptive and commissioning mothers by providing them with 12 weeks of leave from the date of adoption. Commissioning mother means a biological mother who uses her egg to create an embryo planted in any other woman or surrogate mother.⁵ The paid maternity leave can be availed 8 weeks before the anticipated date of delivery. Before the change, the paid leave was for 6 weeks. The Act has also introduced provisions relating to "work from home" that can be used after

⁴THE MATERNITY BENEFIT ACT (AMENDMENT) ACT, 2017, § Section 11A, No. 6, Acts of Parliament, 2017 (India).

⁵ Id. At Section 2 (ba).

the end of the 26-week leave period. Depending on the nature of the work, a woman can use these services on terms that are cooperatively agreed upon by the employer. The amended law also provides for compulsory childcare (creche facility) in every institution with at least 50 or more employees. The employer must also allow 4 visits per day which must also include rest time.

The Maternity Benefit (Amendment) Act, of 2017 also falls in line with international conventions like the Maternity Protection Convention, 2000 (No 183)⁶ which makes 14 weeks of maternity benefit mandatory.

The Maternity Benefit (Amendment) Act, 2017

The Maternity Benefit (Amendment) Act, of 2017 has brought changes to the Maternity Benefit Act, of 1961. The primary objective is to regulate the employment of women during the period of childbirth. This will increase women's paid maternity leave from 12 to 26 weeks. Up to 8 weeks can be taken before the anticipated date of delivery. It also provides childcare facilities to every establishment with 50 or more employees. The employer must allow 4 visits per day to such premises, which will also include intervals for rest. The cost of the creche benefits provided by the establishment will be solely borne by the employer which is the major negative point of this Act. It also allows women the option to "work from home"⁷ which can be availed by the women employees as per the nature of the work and with the terms mutually agreed by the employer after the maternity leave. Women with at least 2 or more children get reduced entitlements. In addition, the amendment introduced a 12-week leave for surrogate and adoptive mothers. Thus, with the revised provisions, India is third behind the list of countries after Canada and Norway in awarding maternity benefits.

⁶ C183- Maternity Protection Convention, 2000 (No. 183), <https://www.ilo.org> (Sept. 1, 2023).

⁷ THE MATERNITY BENEFIT ACT (AMENDMENT) ACT, 2017, § Section 3 (5), No. 6, Acts of Parliament, 2017 (India).

Creche Facilities

With the amendment, the importance of providing creche has been made mandatory to encourage women to return to work without being concerned about their children being unattended. According to Section 11A⁸, any establishment with 50 or further employees will have a creche facility. This has stirred numerous doubts and discussions about whether the provision will be applicable to establishments with 50 or more female employees or with 50 or more employees. As the section mentions 'employees' the facilities will be applicable to establishments with 50 or more employees inclusive of males and females. The term 'employee' is used to make the provision gender-neutral because child rearing is the responsibility of both father and mother. Therefore, even if the establishment only has male employees still the facility will be provided so that fathers can bring their children to the childcare.

Further, this section protects the objective of Section 48 of the Factories Act, of 1948⁹, which mentions that factories with more than 30 female workers are provided with such facilities. So, if the factory has less than 50 employees but at least 30 female workers then it is mandatory for such a factory to provide creche facilities with suitable rooms for the use of children under the age of 6 years. Such accommodation shall be in clean and sanitary condition and under the charge of the women trained in the care of children and infants.

Section 11A is made in such a way that it doesn't render Section 48 of the Factories Act, of 1948 ineffective. If Section 11A had used 50 or more female employees then Section 48 of the Factories Act would have lost its effect as factories having more than 30 workers but less than 50 would have done away with the providence of creche.

⁸ Id. At Section 11A.

⁹ THE FACTORIES ACT, 1948, § Section 48, No. 63, Acts of Parliament, 1948 (India).

The companies that are in the services industries do not have large areas where they can set up such facilities so the employers can take help from third-party companies who provide such facilities locally. It should be ensured that such a facility is within a distance of 500 meters. Currently, there are only 2 states that have implemented The Maternity Benefit (Amendment) Act, 2017 strictly. This is Karnataka and Haryana.

The employer has to ensure that such a facility has adequate ventilation and suitable toys and furnishing. There should be sufficient space between each area so that the movement of small children and elders can be done without interference. The materials used in creche should be safe and no harmful things should be present that may harm the child during the movement.

Who bears the cost of such creche facilities?

The Act does not define anything about who would be bearing the responsibility of maintaining the creche. So is it the employer or employee who would be bearing such cost or the State Government? Neither the Maternity Act nor the Factories Act talks about it. So, The Ministry of Labour and Employment¹⁰ clarified that it is the employer that needs to take care of the running of such facilities.

Is there any Income Tax Exemption on creche facilities?

There is a huge question of whether the expenses barred by the employer come under tax deduction or are exempted. As per the Income Tax Act¹¹, there is no impunity extended by the government on creche facilities provided by the employer. Deduction under Section 80DDB of the Income Tax Act can be claimed if the amount is spent on medical treatment of certain diseases or ailments. Such reimbursement is taxable as gratuities. However, medical

¹⁰Reg. _creche_ rules, <https://labour.gov.in> (Sept. 2, 2023).

¹¹THE INCOME-TAX ACT, 1961, § Section 80DDB, No. 43, Acts of Parliament, 1961 (India).

expenses during gestation and post-pregnancy are not covered and hence you cannot claim a deduction.

If the government supports the employers who are giving such facilities, then it reduces the burden on them. And it will encourage other companies to provide such facilities. Similarly, they are implementing the Employees Provident Fund Act and the Payment of Bonus Act. The government should create a corpus fund to partially sponsor the cost to be barred by the employer from providing such benefits. They should also try to create uniformity in labour laws regarding Maternity benefits. The acts such as Central Civil Services (Leave) Rules, 1972; Factories Act, 1948; Unorganised Workers Social Security Act, 2008; Employees State Insurance Act, 1948 all have differences in benefits and financing.

Discrimination between biological and adoptive mothers

Section 5(4) was not present in the Maternity Benefit Act of 1961 and was later embedded in the Maternity Benefit (Amendment) Act, of 2017. It states that a woman who legally adopts a child below the age of 3 months or a commissioning mother¹² will be entitled to 12 weeks of maternity leave. Commissioning mothers refer to a surrogate mother and it is defined as a biological mother who uses her egg to produce an embryo implanted in any other woman.

Issues with the Section 5(4)

It is discriminative and arbitrary towards mothers who adopt a child above the age of 3 months. It is also discriminatory towards orphaned, abandoned children above the age of 3 months because as per CARA¹³ regulations, a child is declared legally free for adoption within two to four months of being produced

¹²THE MATERNITY BENEFIT ACT (AMENDMENT) ACT, 2017, § Section 3 (4), No. 6, Acts of Parliament, 2017 (India).

¹³CENTRAL ADOPTION RESOURCE AUTHORITY, <https://cara.nic.in> (Sept. 2, 2023).

before the Child Welfare Committee (CWC). The act allows 26 weeks of paid leave to biological mothers while only 12 weeks for adopted mothers. And no benefit for those who adopt a child above 3 months. Adoptive mothers should also be provided with more weeks or the age of the child should be increased as the adoption procedure is such that it is almost not possible for a mother to adopt a child below 3 months.

A PIL¹⁴ was filed in the Supreme Court¹⁵ that challenged the constitutional validity of Section 5(4) of the Maternity Benefit (Amendment) Act. In this case, the petitioner contended before the court that the 12-week maternity leave provided to adoptive mothers is lower when compared to 26 weeks given to biological mothers and it indeed doesn't stand up to the basic scrutiny of Part III of the Constitution, which is very much imbued to the concept of non-arbitrariness. It also stated that the adoption process, which requires any orphaned, surrendered, or abandoned child will be declared legally free for adoption by the Child Welfare Committee (CWC) under the Juvenile Justice Act, and it cannot be completed within a minimum period of 3 months.

How Maternity Benefits Can Be Provided to the Informal Sector?

Maternity entitlements in the form of wage compensation during gestation and after delivery is an internationally accepted and supported right for all women workers. The legislative framework in India for ensuring such entitlement is currently veritably weak. While the Unorganised Workers Social Security Act, of 2008¹⁶ includes maternity benefits for the unorganized sector¹⁷, no such scheme has been notified by the government.

¹⁴HAMSAANANDINI NANDURI v. UNION OF INDIA &ORS. W.P.(C) No. 960/2021.

¹⁵SUPREME COURT OF INDIA, <https://main.sci.gov.in/> (Sept. 2, 2023).

¹⁶THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008, § Section 3 (1), No. 33, Acts of Parliament, 2008 (India).

¹⁷ Id. At Section 2 (1).

The Janani Suraksha Yojana is notified under this Act but it only provides an incentive for institutional delivery. The only assistance currently present for all women is from the National Food Security Act which promises at least Rs. 6,000 for all pregnant mothers.

The Pradhan Mantri Matru Vandana Yojana restricts its benefit only to the first birth and has reduced the amount to Rs. 5,000. Some states have increased the amount like Tamil Nadu paying Rs. 18,000 from its Dr Muthulaxmi Reddy Maternity Benefits Scheme.

There are numerous sectoral laws, like Building and Other Construction Workers Act, which give maternity benefits to women who are registered through the labour welfare boards. The ground reports have shown that registration is a veritably cumbrous process requiring various evidence which becomes a barrier for such workers to avail the benefit. For informal sector workers, there are no permanent job settings so documents regarding such working periods will be hard to be provided by them. And constant change in the job leads to frequent unemployment. Also, if they are entitled to get similar benefits there is no central authority to monitor whether women are getting the maternity entitlements or not.

The proposed Social Security Code which aims to universalize social security benefits brings all labour laws related to social security together (Fifteen labour laws including the Unorganised Sector Workers Social Security Act and Maternity Benefit Act). The draft divides workers into 4 categories based on economic and social status. The workers have to register for contributory social security benefits, on the quantum of contribution made by them they will fall into a particular order of work. If a worker earns lower than minimum stipend then the state will pay the contribution on behalf of the worker.

However, for women workers, the code is silent on what the guaranteed entitlements are to be given once they make the contribution.

Firstly, women in the informal sector work under multiple employers which makes it complex for them to receive maternity entitlements so similar entitlements should be made universal and wage-linked. Secondly, the state should be involved and cannot be left to the discretion of the employer. This is important so that no woman is discriminated in providing employment, due to the burden of having to pay for maternity benefits. Thirdly, such entitlements should be made available in such a way that they can be availed from any platforms like labour welfare boards, health departments, and Anganwadi centres can be involved so that women can reach any of these agencies to avail of such benefits.

The International Labour Organisation Report

The International Labour Organisation Report¹⁸ surveyed 185 countries to view the progress made by them in terms of protection and support for millions of workers with family responsibilities around the world. It made a benchmark by recommending requirements and principles on maternity protection and workers with family responsibilities. The report also pays attention to the excluded sections like self-employed workers, migrants, workers in the informal sector, and adoptive and LGBTQIA+ parents.

ILO mandates a minimum maternity leave of 14 weeks and recommends increasing it to 18 weeks for recovery and the rest of the mothers. In 2021, the time period for such leave in 120 countries is 14 weeks. While 52 countries provide 18 weeks of maternity leave. However, 64 countries still have such leave below 14 weeks.

¹⁸MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD, <https://www.ilo.org> (Sept.3, 2023).

ILO recommends that the employer should not only be liable for all the cost of maternity leave and there should be a social security or public fund scheme. Only 8 countries have moved away from the employer liability scheme.

It is estimated that it will at least take 46 years to provide minimum maternity benefits in these 185 analysed countries to achieve the Sustainable Development Goals of 2030.

Impact of Maternity on Workforce

India's maternity leave law benefits fewer than 1% of all women. 70% of India's women are not in the labour force. Less than 20% of women in India work at paid jobs and it has been declining in the country because there is no supportive environment with adequate facilities for child care. A significant number of women are in contractual jobs and they leave the workforce as they never get the maternity benefit. Around 70-80% of caring responsibilities are shouldered by women, while the male participation rate in the workforce stands at 80%. As well as The Maternity Act also puts all the burden on employers to bear the cost of providing such benefits which gives rise to discrimination as the employers favor male candidates to work in their establishment. According to a survey, 26% admitted to prefer hiring male candidates while 66% disclosed that the maternity benefit law seriously impacts their hiring against female candidates in many ways. The financial liability puts many employers in the negative mindset, especially in the private sector. The Ministry of Labour and Employment has collaborated maternity benefits with the Employees' State Insurance Scheme¹⁹ to reduce the burden on employers. The ESI prima facie covers all factories but has been extended to other types of establishments by way of state government notifications. The ESI Act 1948 states that female employees must not earn beyond Rs.21,000 per month. However, those who fall

¹⁹DR. SHASHI BALA, IMPACT ON EMPLOYMENT OF THE MATERNITY BENEFIT (AMENDMENT) ACT, 2017: IDENTIFYING THE AFFIRMATIVE INITIATIVE & CHALLENGES IN THE IMPLEMENTATION OF THE ACT, (November 22, 2019, 17:41 PM), <https://vvgnli.gov.in>.

outside this bracket and not under this act have to claim maternity benefits only from their employers.

Firstly, an anti-discrimination policy can be implemented in the workforce related to pregnancy and maternity and a redressal mechanism for the same. Secondly, incentives should be provided to employers who make the working environment a gender-neutral place by including tax rebates or reductions in waiver license fees.

Gender-neutral parenting as a solution

The notion of 'caregivers' is only associated with women, and such work is stigmatized to such an extent that if men take up such duty, then they will be discriminated against by society. This notion is the primary obstruction for male partners to volunteer for household and caregiving work. The Gender Equality Index 2019 published by the European Institute for Gender Equality, showed that male partners rarely avail or no parental leaves. Today women have found emancipation through their work. They are self-dependent and while women have evolved, society still stays in that era where they feel women are the only caregivers. Because of this even after parental leave is available only a few males are willingly availing it. If society can restructure, and start to encourage males to take part in caregiving then there will be no discrimination and burden on women. It will also positively impact women's labour force participation and reduce gender pay gaps to some extent.

Gender-neutral parenting is an important milestone on the path leading to social and political development.

Paternity Leave

The Central Government introduced the provision in 1999. Due to this, the employees in the government sector are entitled to be paid for paternity leave. They can avail of such leave for a period of 15 days prior to or within the 6

months of the birth of the child. Currently, such benefits are allowed in government jobs as a part of leave rules and in private organizations as a matter of internal policy.

A glance at the countries that provide paternity leave and India fares low on the list, such as Norway (112 days), Sweden (70 days), Iceland (90 days), the United States (84 days), Finland (54 days), Australia (14 days), Spain (15 days), New Zealand (14 days), and Denmark (14 days)²⁰.

There are 68 percent of countries provide less than 10 days of parental leave, while only 11 percent of countries provide more than 2 weeks. Iceland has the longest paternity leave. There are only 8 countries that provide 18 months of parental leave- with the Czech Republic, Hungary, France, and the Slovak Republic providing 36 months of parental leave.

Some bigger companies that provide paternity leave in India are Facebook (17 weeks), Infosys (5 days), Microsoft (12 weeks), Zomato (26 weeks), Novartis (26 weeks), Amazon, Star India provides 4 weeks of paternity leave as well as parental leave to LGBT+ staffs.

Why do we need paternity leave?

If there is paternity leave then it creates a more diverse environment boosting productivity. Second, it will bring a gender-neutral workplace. Thirdly, it provides support to women's careers.

What Needs to Be Done?

- **Cost should be shared by the government:** Companies will not discriminate against women if the government supports the employers

²⁰MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD, <https://www.ilo.org> (Sept.3, 2023).

who provide creche facilities to its employees. There should be a social security or public fund scheme.

- **Priority should be given to providing quality and coverage of creches:** Providing adequate facilities, nutrition, and learning environment for children up to 6 years. The materials used in creche should be safe and no harmful things should be present that may harm the child during the movement. If some companies don't have enough resources to provide such facilities, then the government should lend support to such companies.
- **Regulations regarding the informal sector:** The Maternity Benefit (Amendment) Act, 2017²¹ did not include the informal sector women workers which is almost 93.5% of total women. It is important that the government pays attention to this and makes acts inclusive.
- **Extending Paternity Leaves:** Child rearing should be the responsibility of both parents. Maternity and paternity benefits should be provided on the same scale and the workplace should encourage such initiatives as well as make a cooperative environment where there is no stigmatization towards such leave. There is no mandating paternity leave in private institutions but the New Delhi High Court upheld paternity leave in private schools in Chander Mohan Jain v. N K Bagrodia, 2009.
- **Flexibility in working time for both sexes:** Work-life balance is very important and should be given priority. In Western countries, companies that provide such inclusive environments see high productivity rates and better interactive workplaces.
- **Attitudinal shift:** For inclusiveness and integration of women at all levels there needs to be an attitudinal shift and reorientation of the government policies at execution levels.

²¹Manvendra Singh Jadon and Ankit Bhandari, *ANALYSIS OF THE MATERNITY BENEFITS AMENDMENT ACT, 2017 AND ITS IMPLICATIONS ON THE MODERN INDUSTRIAL DISCOURSE*, 8 ISSN 2278-4332X, 63-84 (2019).

- **Amalgamation of various provisions dealing with organised and unorganised sectors relating to maternity benefits:** All the law relating to organised and unorganised relating to maternity should be amalgamated to uniformly provide benefits across different sectors in India.
- Recognition of rights of adoptive parents, surrogacy commissioning parents, same-sex and LGBTQIA+ parents.

Conclusion

Today women have found emancipation through their work. They are self-dependent and while women have evolved, society still stays in that era where they feel women are the only caregivers. If society can restructure, and start to encourage males to take part in caregiving then there will be no discrimination and burden on women. It will also positively impact women's labour force participation and reduce gender pay gaps to some extent. Maternity protection is a collective responsibility and a public good. It should be available to all women be it organized or unorganized sector. It should be universal and inclusive to all women regardless of the work they do. There should be no discrimination between biological and adoptive mothers. And paternity should be encouraged and not stigmatized because child-rearing is the responsibility of both parents.

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