

Q & A



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Our company is engaged in the research, development and marketing of pharmaceutical products. Can the variables paid in the form of sales incentive for sales employees and affiliate bonus for non-sales employees be considered in lieu of the Statutory Bonus?

In terms of Section 31A of the Bonus Act, the employees may enter into an agreement or settlement with their employer for payment of an annual bonus, linked with production or productivity in lieu of payment of bonus, based on profits under the Bonus Act. Section 31A further provides that any such settlement or agreement shall be null and void to the extent it purports to deprive the workers of their

right to receive minimum bonus under Section 10 of the Bonus Act.

Therefore, we are of the view that your company may have an agreement with its employees to pay them bonus, based on their productivity in lieu of the bonus payable under the Bonus Act subject to a minimum bonus of 8.33% of their respective 'salary or wage'. Further, it is advisable to have a separate specific agreement for every accounting year in view of the judgment of the Gujarat High Court in *S.G. Pharmaceuticals Vs. Sarabhai Chemical Staff Association* (1998) 3 GLR 2508.

In our opinion, such an agreement would have to be prospective as the employees cannot be made to agree to forego their statutory bonus for any past period in lieu of bonus based upon performance / productivity.

Our company (MNC) has appointed an individual as a trainee for a period of six months and paid Rs10,000/- as consolidated stipend and also deducted PF @ 12%. Now we would like to absorb him as a regular employee. Can we pay him basic salary less than the stipend amount i.e. 10,000/-? This will reduce the PF contribution for both the employee and the employer.

Please note that the term 'employee' has been defined under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act") to mean "any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person ... (ii) engaged as an apprentice, not being an apprentice under the Apprenticeship Act, 1961 or under the standing orders of the establishment".

We understand that the trainee referred to in your query is not an apprentice under the Apprenticeship Act, 1961 as provident fund is not deductible from the stipend paid to an

apprentice under the said Act. Thus, the trainee in question is an employee for the purposes of EPF Act.

Please note that section 12 of the EPF Act prohibits an employer to reduce, whether directly or indirectly, the wages of any employee or the total quantum of benefits in the nature of old age pension, gratuity, provident fund or life insurance to which the employee is entitled under the terms of his employment, express or implied, with a view to reduce the employer's liability for payment of any contribution under the EPF Act. Therefore, your company would be required to pass the test under section 12 if it proposes to pay a basic salary that is less than the consolidated amount of the stipend on which provident fund was deducted.

Our company is covered under the Punjab Shops and Commercial Establishments Act, 1958. Please clarify whether our employees can carry forward their earned leaves to the subsequent years?

Please note that according to Section 14 of the Punjab Shops and Commercial Establishments Act, 1958, if there are earned leaves which have not been availed in any calendar year, the employee can carry forward such unavailed leaves to the next year, however, the employee cannot carry forward more than 30 days earned leaves to the next calendar year. For example, if an employee is entitled to 21 days of earned leaves in a year and he does not avail of any earned leaves in that year, during the second year he will be entitled to 21 days earned leaves plus another 21 days of earned leaves, i.e. 42 days of earned leaves in the second year. However, if the employee does not avail of the 42 earned leaves during the second year, during the third year he shall be entitled to 21 days earned leaves (for the third year) plus 30 days earned leaves out of the 42 days of earned leaves. In other words, 12 days of his earned leaves will lapse in the third year. **HC**

Maternity Benefits (Amendment) Bill, 2016 - Does It Meet The Expectations?

- BY K.V.SINGH AND ANKITA RAI

Battling the shackles of a patriarchal society, the participation of women in the country's workforce has witnessed an exponential growth. However, the prevalent archaic labour laws have been lagging in keeping pace with this change. Maternity benefits in particular, have been sadly inadequate, which has acted as a deterrent to the inclusion of women in the nation's labour force. Economic and social distress, more than often, forces women to continue to work for a living up to their very last days of pregnancy. Defying their body requirements, many women resume working immediately after childbirth, which not only impedes their overall health, but also prevents them from meeting the exclusive breastfeeding requirements of the young infants of 24 weeks, as recommended by WHO.

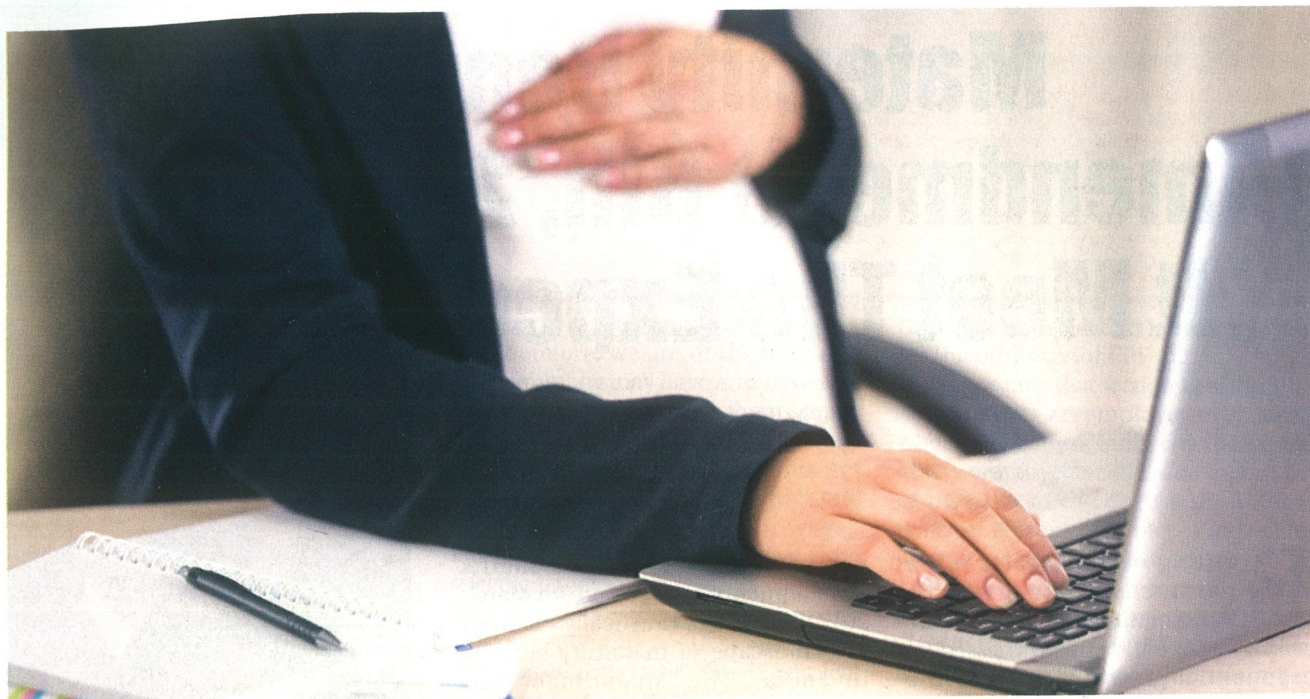
Article 42 of the Indian Constitution directs the State to provide just and humane conditions of work and maternity relief. Indeed, the importance of the same cannot be understated, as access to maternity benefits reduces risk of infant mortality, aids in preventing postpartum depression and stress in new mothers, whilst encouraging women to return to work, which in turn allows firms to attract and retain the best talent. Immediately subsequent to Women's Day, pursuant to the recurring suggestions of the 44th, 45th and 46th Session of the Indian Labour Conference along with requests by the Ministry of Women and Child Development, Lok Sabha

passed the Maternity Benefits (Amendment) Bill, 2016 on 9th March 2017, which has drastically changed the landscape of maternity benefits in India. The Amendment has brought about several changes, the most prominent being the increase of leave allowed, from 12 weeks to 26 weeks. However, a woman who has two or more children will continue to get only 12 weeks maternity leave. With this development, India has been catapulted to the third position in terms of the number of weeks allowed for maternity leave, behind Norway (44 weeks) and Canada (50 weeks). A point of debate which immediately springs from this provision, is the burden on the employer to bear the cost of such fully paid leave. This increase in costs for the employers could result in widening the already gaping gender gap in the society as employers will prefer hiring male workers. Furthermore, this could have an adverse effect on the competitiveness of industries that employ a higher proportion of women workers. The case of Maternal and child health is for public good, and therefore arguably, the government ought to finance such social security measures. The International Labour Organisation (ILO) Maternity Protection Conventions have stated that employers must not be exclusively liable for such cost and recommend compulsory social insurance or public funds to do the same. Various countries have implemented myriad funding schemes wherein the benefits



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are paid solely by the employer (e.g. Kenya, Pakistan), or by a combination of funds from the employer and the government (e.g. United Kingdom, Germany), or through national social security benefits (e.g. Norway, Australia), while in a few countries, there is still an absence of maternity benefit provisions (e.g. USA). Women in India are already plagued with myriad obstacles and challenges in their journey towards absolute equality, and this provision could further set women behind, as employers would view these



compulsions as an undue burden. Gender equality and women's employment are key policy objectives for the 2030 agenda for Sustainable Development and this facet of the Bill is one that must indeed be closely watched in order to successfully sync its provisions with the true objective of the Bill, vis-à-vis, development of women in the workforce of the nation.

For the first time, the Bill has also provided for women who legally adopt a child below the age of three months and for a 'commissioning mother' to be entitled to maternity leave of 12 weeks from the date on which the child is handed over to her. A commissioning mother has been defined as "a biological mother who uses her egg to create an embryo implanted in another woman." This provision is again open to scepticism, as the Government of India grants adoption leave of 135 days to women government servants on adoption of a child up to one year of age, while The Guidelines Governing Adoption of Children 2015 also requires government and public sector undertakings to provide adoption leave to all adoptive parents working in their offices irrespective of the age of the child. The current Bill, in providing for leave only in case of adoption of a child less than three months, completely overlooks the

rigorous procedure under the Juvenile Justice Act, 2015 which makes it exceedingly difficult, if not impossible, to adopt a child below three months whilst entirely excluding women who adopt older babies or children.

The Bill has introduced further provisions such as providing for a 'work from home' option for women, after having availed the maternity leave, on mutually agreeable conditions, if the 'nature of work assigned' permits. However, what work falls under this ambit has not been specified, and shall be open to interpretation in future. Establishments having 50 or more employees are mandated under this Bill to have a crèche facility, either separately or along with common facilities, which women should be allowed to visit four times a day which 'shall also include the interval for rest allowed to her'.

While the steps taken by the Amendment are laudable, there is indeed one gaping flaw which mars the celebration of such a crucial development. The Bill is embedded with the same archaic androcentric notions of family and workplace, that has been the very root cause of the infamous patriarchal society today. The fact that a child is not the sole responsibility of the mother is ignored by this law, thereby engraving the

stereotype deeper into the mind of society, and enhancing the illusory nature of the 'equal pay for equal work' guarantee, as employers are bound to view these measures as cumbersome. Childcare being a shared responsibility, the option of 'work from home' should be provided to both parents whilst the concept of 'parental leave', (implemented in countries like South Africa and Australia) should also be introduced in order to follow a more egalitarian approach and reduce the gender gap prevalent in society today. Moreover, there is a dire need to bring women in the unorganized sector within the ambit of these benefits, as currently the Act and Bill only extends to cover women employed in establishments with 10 or more employees, leaving the majority of the women workforce such as farmers and women contractual labourers out of its purview.

The laws pertaining to maternity benefits have received a strong nudge in the right direction, which will undoubtedly lead to the betterment of the health, well-being, and growth of the future generation of the country. However, the glaring lacunae must be addressed at the earliest, to ensure a speedy and efficient realization of the laudable goals of the legislature.

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