

## HR Law Hotline

June 13, 2023

### DEI SERIES: PART 1: FEMALE EMPLOYEES WORKING IN NIGHT SHIFT IN INDIA - RECENT UPDATES

- Several states including Telangana, Madhya Pradesh and Tamil Nadu have issued notifications making it possible for commercial establishments to employ female workers in the night shift.
- The state of Haryana has revised the conditions that commercial establishments need to follow in order to require female employees to work in the night shift.
- The states of Himachal Pradesh, Odisha, Andhra Pradesh and Uttar Pradesh recently notified the conditions for exemption to factories from application of Section 66(1)(b) of the Factories Act, 1948

Accommodation of diversity at workplace cannot be realised without awarding the equal opportunity to all individuals. Legal provisions prohibiting employment of female employees in night shift have been argued as denying the female employees the same opportunity as their male colleagues.

As per case law, employers cannot deny job to women workers citing night work.<sup>1</sup> This is consistent with the findings of the Madras High Court in its 1999 judgement<sup>2</sup> wherein Section 66(1)(b)<sup>3</sup> of the Factories Act, 1948 ("FA") was held unconstitutional.

In a bid to provide for inclusive workspace, multiple states continue to issue notifications making it possible for employers to employ female employees in the night shift<sup>4</sup>. The notifications also lay down several safety and security measures that the employers will need to ensure in order to avail themselves the benefit of the exemption.

#### List of recent state-level notifications

| Sr. No. | Indian state | Date of notification | Notification permitting employment of female employees in night shift  | Night shift timings | Applicability of notification |
|---------|--------------|----------------------|--|---------------------|-------------------------------|
| 1.      | Haryana      | February 21, 2023    | Notification <sup>5</sup> ("Haryana notification") reaffirmed its permission for commercial establishments to employ female employees in night shift and provided for necessary safeguards with respect to safety and security of female employees are ensured. However, the condition for exemption under Section 30 <sup>6</sup> of Punjab Shops and Commercial Establishments Act, 1958 ("PSCEA") has been revised. | From 8 pm to 6 am.  | Commercial establishments     |
| 2.      | Odisha       | October 31, 2022     | Notification <sup>7</sup> ("Odisha notification") exempted commercial establishments from the application of Section 23 <sup>8</sup> of Orissa Shops and Commercial Establishments Act, 1956 ("OSCEA"). This entails that the commercial establishments in Odisha can employ female  | From 10 pm to 6 am. | Commercial Establishments     |

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employees in night shift.

|    |                  |                  |  |                       |                           |
|----|------------------|------------------|--|-----------------------|---------------------------|
| 3. | Telangana        | October 13, 2022 | Notification <sup>9</sup> (" <b>Telangana notification</b> ") exempted commercial establishments from the application of Section 23 <sup>10</sup> of Telangana Shops and Establishments Act, 1988 (" <b>TSEA</b> "). This entails that the commercial establishments in Telangana can employ female employees in night shift.  | From 8:30 pm to 6 am. | Commercial establishments |
| 3. | Madhya Pradesh   | August 1, 2022   | Notification <sup>11</sup> (" <b>MP notification</b> ") allows all the commercial establishments to employ female employees in the night shift by exempting commercial establishments from application of Section 25 <sup>12</sup> of Madhya Pradesh Shops and Establishments Act, 1958 (" <b>MPSEA</b> "). The exemption is subject to certain conditions with respect to security and safety of such female employees. | From 9 pm to 7 am.    | Commercial establishments |
| 4. | Tamil Nadu       | June 2, 2022     | Notification <sup>13</sup> (" <b>TN notification</b> ") permitted the shops and establishments registered under Tamil Nadu Shops and Establishments Act, 1947 (" <b>TNSEA</b> ") employing 10 or more individuals to operate 24*7 for a period of 3 years.   | From 8 pm to 6 am.    | Commercial Establishments |
| 5. | Andhra Pradesh   | October 26, 2022 | Notification <sup>14</sup> (" <b>AP notification</b> ") permitted factories in the state of Andhra Pradesh to employ female employees by exempting factories from application of Section 66(1) (b) of the FA.  | From 7 pm to 6 am.    | Factories                 |
| 6. | Himachal Pradesh | August 12, 2022  | Notification <sup>15</sup> (" <b>HP Notification</b> ") permitted factories in the state of Himachal Pradesh to employ female employees by exempting factories from application of Section 66(1) (b) of the FA.  | From 7 pm to 6 am.    | Factories                 |
| 7. | Uttar Pradesh    | May 27, 2022     | Notification <sup>16</sup> (" <b>UP notification</b> ") permitted factories in the state of Uttar Pradesh to employ female employees by exempting factories from application of Section 66(1) (b) of the FA.   | From 7 pm to 6 am.    | Factories                 |

Meanwhile, the state of Karnataka has come up with amendment<sup>17</sup> to the Karnataka Shops and Commercial Establishments Act, 1961 making it possible for commercial establishments to employ women workers in night shift

provided certain safeguards are ensured by the employers. The state of Maharashtra has added a provision<sup>18</sup> to the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 allowing commercial establishments to employ female employees in night shift subject to employers obtaining consent in prescribed form.

We have provided below a summary of conditions to be complied by employers in select Indian states to avail the benefit of exemption notification in those states.

#### NIGHT SHIFT IN ESTABLISHMENTS IN STATE OF HARYANA

The Haryana notification has revised the conditions for grant of exemption under Section 30 of PSCEA. Employers are required to approach the labour authorities for exemption for up to one year at least 30 days prior to the commencement of the period for which exemption is sought. At the end of the one year period, the employer is required to apply for renewal.

The Haryana notification emphasizes on compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**PoSH Act**"). Some of the obligations are:

1. Provision of transport facilities for women employees engaged in night shift from their residence to office and back, with security guards and CCTV cameras.
2. Maintenance of transport registers for night shift vehicles to be provided for commutation of female employees from their homes to workplace.
3. Submitting a copy of the annual reports under the PoSH Act to the Haryana Labour Commissioner.
4. Female employees to be permitted to raise issues of sexual harassment in workers meetings and other appropriate forums, written or in electronic form in a complaints box.
5. Female employees to be made aware of their rights by prominent notification of guidelines on the subject.
6. A copy of the consent/ declaration from each female employee (including security guards, supervisors etc.) agreeing to work between 8 pm and 6 am to be obtained in writing with a copy forwarded to the Haryana Labour Commissioner.
7. Mandatory provision of proper lighting inside the establishment as well as outside.
8. Female employees to be employed in batches of not less than 10 with:
  1. the total of the female employees employed engaged in night shift to be at least 2/3rd of the total strength,
  2. 1/3<sup>rd</sup> of the strength of supervisors to be women.
9. Mandatory provision of sufficient women security at entry and exit.
10. Mandatory provision of separate canteen to female employees if number of female employees exceed 50.
11. Mandatory provision of medical facilities as prescribed.
12. Female employees engaged in night shifts to have a monthly meeting through their representatives with principal employer (this obligation seems to extend to contract workers) once in 8 weeks as grievance day.
13. A half yearly report to be sent to the Haryana Labour Commissioner (LC) on details of employees engaged during night shifts (with immediate report to LC and police in case of an untoward incident).

#### NIGHT SHIFT IN COMMERCIAL ESTABLISHMENTS IN STATE OF ODISHA

The Odisha notification has exempted commercial establishments from application of Section 23 of OSCEA. Employers may engage the women workers to work in a night shift subject to the conditions laid down in the Odisha notification. Prior consent of the women workers to work after 10 pm and before 6 am is a prerequisite. The Odisha notification provides for following obligations for the employers:

1. Employers are required to obtain written consent from women employees.
2. Employers are required to take necessary steps to prevent sexual harassment. Further the employer is directed to maintain a complaint mechanism in the factory itself as prescribed in PoSH Act.
3. Employers are required to provide for transportation from their residence to workplace to women workers.
4. Employers are required to provide transport facilities to and from the residence of the woman employee, free of cost and with adequate security and GPS tracking and monitoring.
5. Employers are required to obtain bio-data of each driver and conduct pre-employment screening of the antecedents of all the drivers employed on their own. As regards the driver employed through outsourcing, the establishment shall ensure to its satisfaction that the collection of bio-data and preemployment screening of the antecedents of the drivers is carried out by the service provider.
6. The schedule of route of pick-up and drop shall be decided only by the supervisory office of the establishment. In case of exigencies, change of drivers/ routes/ shifts shall be allowed only with prior knowledge of supervisory officers/ employees.
7. There is requirement to ensure sufficient supervision during work hours and journey thereof.
8. During the night shift not less than 5 women shall be allowed work in the premises or a particular department.
9. Employers are required to provide rest rooms, toilets, and washing facilities with adequate water supply separately for women employees so as to secure privacy, toilets, washrooms, changing-room, drinking facilities and light near workplace.

#### NIGHT SHIFT IN ESTABLISHMENTS IN STATE OF TELANGANA

The Telangana notification exempts the commercial establishments from application of Section 23 of TSEA permitting all establishments in Telangana to require women employees to work in night shifts between 8:30 pm and 6 am, subject to certain conditions that inter alia include:

1. Consent of women employees shall be obtained in writing to work in night shifts.
2. Establishment are required to provide transport facilities to and from the residence of the woman employee, free of cost and with adequate security and GPS tracking and monitoring.
3. Employment of women employees are to be on a rotational basis.
4. Safety and security measures to include provision of shelter, rest rooms, lunchrooms, night creches, ladies' toilets, adequate protection of privacy, dignity, honour and safety, protection from sexual harassment, employment of at least 5 women employees together.
5. The relaxation permitting engagement of women employees in night shifts shall not apply to a woman employee during the period of 16 weeks before and after her childbirth, of which at least 8 weeks shall be before the expected childbirth or for any additional period specified in a medical certificate as may be necessary for the health of the woman employee and her child.
6. Adequate posting of security guards.
7. Ensuring security in transportation by-
  1. obtaining biodata of each driver.
  2. conducting pre-employment screening of their antecedents,
  3. deciding schedule of the route of pick-up and drop by the employer's supervisory officer,
  4. not sharing personal details of the women employees to unauthorised persons,
  5. providing security guards at workplace and night shift vehicles when women employees are picked up first or dropped off last,
  6. random checking of vehicles on various routes as possible and monitoring of the vehicles in a control room/ travel desk.

#### **NIGHT SHIFT IN ESTABLISHMENTS IN STATE OF TAMIL NADU**

Employers employing at least 10 individuals have been permitted to avail of the exemption to operate 24\*7 for a period of 3 years provided the following compliance are undertaken:

1. Women employees shall not be required to work beyond 8 pm on any day in normal circumstances, provided that the employer after obtaining written consent of the women employees shall allow them to work between 8 pm and 6 am, subject to providing adequate protection of their dignity, honour and safety.
2. Transport arrangements shall be provided to the women employee who works in shifts. A notice to this effect shall be exhibited at the main entrance of the establishment indicating the availability of transport.
3. Every employee shall be given one day holiday in a week on rotation basis, and the details of every employee shall be provided in 'Form S' added to the Tamil Nadu Shops and Establishments Rules, 1948 and shall be exhibited by the employer in a conspicuous place in the establishments.
4. Employer shall exhibit details of the employees who are on holiday/leave, on daily basis, in a conspicuous place in the establishments.
5. Employer shall not require or allow any person employed to work therein for more than 8 hours in any day and 48 hours in any week and the period of work including over time shall not exceed 10.5 hours in any day and 57 hours in a week.
6. Employees shall be provided with restroom, wash room, safety lockers and other basic amenities.
7. Employer employing women employees shall constitute Internal Complaints Committee against sexual harassment of women under PoSH Act and the said Committee shall be operative.

#### **NIGHT SHIFT IN ESTABLISHMENTS IN STATE OF MADHYA PRADESH**

The MP notification gives the liberty to the employers to employ women workers as a whole or in part during the night shift (between 9 pm and 7 am) by exempting commercial establishments from the application of Section 25 of MPSEA. The MP notification further lays down following obligations for the employers:

1. Employers are required to mandatorily comply with the provisions of PoSH Act.
2. There should be a batch of at least 10 women employees working in the night shift and the total number of women workers employed in the night shift should not be less than 2/3<sup>rd</sup> of the total strength with 1/3<sup>rd</sup> of the strength of supervisors to be women
3. Sufficient women security should be provided during the night shift at the entry and exit points along with not less than two female wardens at night working as Special Welfare Assistants
4. Sufficient number of waiting sheds for the women arriving in advance along with separate canteen
5. Separate transport facility under security for pick up and drop from the residence of women worker to workplace and back as well.
6. Additional holiday period from night shift for women workers during menstruation period
7. Employers are required to have a monthly meeting with representatives of women workers on grievance day and then take necessary steps to deal with just and reasonable grievances (there is a confusion with this condition as

'monthly' and '8 weeks' are both used).

8. Employers are required to send a monthly report to Government Labour Officer / Assistant Labour Commissioner about details of the employees engaged in the night shift and also send report immediately in case of an untoward incident to Government Labour Officer / Assistant Labour Commissioner and local police station as well.

Employers are required to pay equal remuneration for equal work to the women employees. The MP notification also requires the employer to provide appropriate medical facilities and make available at any time of urgency telephone connection. Employers employing more than 100 female workers in night shift are also required to maintain a separate vehicle for hospitalization in case of emergency.

#### **NIGHT SHIFT IN FACTORIES IN STATE OF ANDHRA PRADESH**

The AP notification issues clarification on the conditions that employers need to comply with while engaging female employees after 7 pm and before 6 am in factories. The AP notification cites 2001 judgement<sup>19</sup> of Andhra Pradesh High Court that struck down Section 66 (1) (b) of FA. Employers of factories are required to comply with following conditions:

1. Employers should obtain written consent of each woman worker required or allowed to be engaged in the night shifts in advance.
2. No woman worker shall be employed against the maternity benefit provisions laid down under the Maternity Benefit Act, 1961.
3. Adequate transportation facilities shall be provided to all women workers to pick up as well as dropping at their residence.
4. The workplace including passage towards conveniences or facilities concerning toilets, washrooms, drinking water, and entry and exit of women employees should be well-lit.
5. The toilet, washroom and drinking facilities should be near the workplace where such women workers are employed.
6. Employers are required to provide safe, secure and healthy working conditions so that no woman worker is disadvantaged in connection with her employment.
7. Employers are required to comply with the provisions of the PoSH Act.
8. No woman worker shall be allowed or required to work near the machinery in motion without wearing a head cap, apron and suitable overcoat so as to avoid the risk of entanglement of clothes and bodily injury from any moving part.
9. Employers are required to make and maintain suitable arrangements for separate sitting for all women workers obliged to work in the standing position, in order that they may take advantage of any opportunities for rest which may occur in the course of their work.
10. As far as practicable women workers shall not be engaged in any work involving poor ergonomics detrimental to their safety and health.
11. Employers should ensure that the women are not exposed to materials which may influence or affect their menstrual cycles, reproductive health or pregnancy.

#### **NIGHT SHIFT IN FACTORIES IN STATE OF UTTAR PRADESH**

Employers may engage the women workers to work in a night shift subject to the conditions laid down in the UP notification. Prior consent of the women workers to work after 7 pm and before 6 am is a prerequisite. The UP notification further provides it to be incumbent upon such an employer to provide for inter alia health, safety and security of the women workers working in night shift. The conditions include:

1. Employers are required to take necessary steps to prevent sexual harassment. Further the employer is directed to maintain a complaint mechanism in the factory itself as prescribed in PoSH Act.
2. Employers have to provide for transportation from their residence to workplace to women workers.
3. There is requirement to ensure sufficient supervision during work hours and journey thereof.
4. Women workers in the night shift to be provided with food by the employer.
5. During the night shift not less than 4 women shall be allowed work in the premises or a particular department.
6. Employers are required to ensure toilets, washrooms, changing-room, drinking facilities and light near workplace.
7. Employers should display the rights in a prominent place for creating awareness among the women workers.

The UP notification also makes it possible for employers to send monthly report electronically to the Inspector of the factories of the region with on obligation to report any untoward incident to local police as well.

#### **NIGHT SHIFT IN FACTORIES IN STATE OF HIMACHAL PRADESH**

The HP notification allows employers to employ women workers after 7 pm and before 6 am subject to certain conditions. The exemption granted shall be valid for 3 years effective from August 12, 2022. The employers need to comply with following conditions:

1. Employers need to obtain prior consent of women workers before engaging them in night shift.
2. Employers are required to mandatorily comply with the provisions of PoSH Act.
3. No woman employee shall be required or allowed to work for more than eight hours in any day and 48 hours in any week.

4. No woman employee shall be employed against the maternity benefit provisions laid down under the Maternity Benefit Act, 1961.
5. Adequate transportation facilities along with guard shall be provided to women employees to pick up and drop at her residence.
6. Employers need to ensure sufficient supervision during such working hours and journey thereof.
7. Employers are required to provide lighting not only inside the establishment, but also surroundings of the establishment and to all places where the female employees may move as per her necessity in the course of such shift.
8. Employers are required to provide appropriate medical facilities and also make available at any time of urgency by providing necessary telephone connections and where more than hundred female employees are employed in a shift, a separate vehicle shall be kept for cases of injury or incidental acts of harassment etc.
9. Wherever the employer provides boarding and lodging arrangements for the female employees, the same shall be kept exclusively for the women under the control of women wardens or supervisors.
10. The toilets, washroom and drinking water facilities should be near to the workplace including passage towards conveniences or facilities concerning to these amenities. Further, entry and exit of women employees should be well-lit.
11. Employers are required to provide safe, secure and healthy working condition such that no women employee is disadvantaged in connection with her employment.
12. Employers are required to have a monthly meeting with representatives of women workers on grievance day and then take necessary steps to deal with just and reasonable grievances (there is a confusion with this condition as 'monthly' and '8 weeks' are both used).

## CONCLUSION

The ruling of Madras High Court introduced a paradigm shift with respect to diversity, equality and inclusion at the workplaces. It paved path for multiple states permitting engagement of women employees in night shifts. An individual cannot be denied the equal opportunity to work because of his/her gender. The limitations imposed by statutory provisions like Section 66(1)(b) of FA and similar provisions under state-specific shops and establishments acts fall squarely in violation of the principles enshrined in the Constitution of India.

However, there is no denying that the progressive steps need to accommodate the practical safety and security concerns of female employees. The notifications emphasize this aspect by mandating consent of female employees for engagement in night shifts. Constitution of Internal Complaints Committee in accordance with the PoSH Act has been emphatically stressed to deal with complaints of sexual harassment. Mandatory transportation facility is intended to mitigate safety risk and provide equal working opportunity to female employees. The UP notification appears to be going a step further in requiring the employers to provide food to women workers which is unprecedented.

We would like to congratulate the respective state governments for the welcome measures that resonate with the principles of equality. The presumption that more state governments will follow this route in near future is not entirely shorn of logic. Moreover, such changes will also provide ample opportunities for the employers to contribute towards the 'Social' component of the ESG in turn reflecting in value creation. This is also likely to lead to industry focussing on skilling the female workforce.

*The Indian government has codified 29 federal-level labour laws into 4 codes, which are yet to be made effective. The Occupational Safety, Health and Working Conditions Code, 2020 permits establishments to employ female employees, with their consent before 6 am and beyond 7 pm subject to such conditions relating to safety, holidays and working hours or any other condition to be observed by employer as may be prescribed by the labour authorities.<sup>20</sup>*

—Vivek Ilawat, Sayantani Saha & Vikram Shroff

You can direct your queries or comments to the authors

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<sup>1</sup>Treasa Josfine v. State of Kerala, WP(C).No.25092 OF 2020(J) Kerala High Court

<sup>2</sup>Smt. R. Vasantha v. Union of India, [(2001) 1 ILLJ 843 Mad]

<sup>3</sup>Section 66(1)(b) of Factories Act, 1948 provides that no woman shall be required or allowed to work in any factory except between the hours of 6 am and 7 pm

<sup>4</sup>Please note that the timings between which the state-specific legislations prohibit the employment of female employees differ from state to state

<sup>5</sup>[https://storage.rylabour.gov.in/uploads/labour\\_laws/Y 2023/March/W 1/D02/167773 6151.pdf](https://storage.rylabour.gov.in/uploads/labour_laws/Y%2023/March/W%201/D02/167773%206151.pdf)

<sup>6</sup>Section 30 of Punjab Shops and Commercial Establishments Act, 1958 provides that no woman shall be required or allowed to work between 8 pm and 6 am

<sup>7</sup>[https://pareshrm-labour.odi.sha.gov.in/sites/default/files/2022-11/Notification n%20No.%20 8957-LESI% 20dt.%2031 .10.2022.pdf](https://pareshrm-labour.odi.sha.gov.in/sites/default/files/2022-11/Notification%20No.%208957-LESI%20dt.%2031.10.2022.pdf)

<sup>8</sup>Section 23 of Orissa Shops and Commercial Establishments Act, 1956 prohibits the employment of women employees between 10 pm and 6 am

<sup>9</sup><https://karmamgmt.com/wp-content/uploads/2022/10/shops-and-establishment-s-Telangana-Conditions-For-Exemption-s-From-Restriction-s-On-Employing-Women-Workers-During-Night-Shift.-13-10-2022-1.pdf>

<sup>10</sup>Section 23 of Telangana Shops and Establishments Act, 1988 provides that no woman shall be required or allowed to work in any establishment before 6 am and after 8:30 pm.

<sup>11</sup>[http://www.labour.mp.gov.in/KnowledgeSharing/pub lic/View \\_Circular.aspx?id =8973](http://www.labour.mp.gov.in/KnowledgeSharing/pub lic/View _Circular.aspx?id =8973)

<sup>12</sup>Section 25 of Madhya Pradesh Shops and Establishments Act, 1958 provides that no young person or woman shall be required or allowed to work whether as an employee or otherwise in any establishment before 7 am and after 9 pm

<sup>13</sup>[http://www.stationeryprinting.tn.gov.in/extraordinary/2022/317\\_Ex\\_I\\_I\\_2.pdf](http://www.stationeryprinting.tn.gov.in/extraordinary/2022/317_Ex_I_I_2.pdf)

<sup>14</sup><https://www.apindustries.gov.in/APIndus/Data/GO/circular-women%20employment.pdf>

<sup>15</sup>[https://hima.chal.nic.in/WriteReadData/l892s/14\\_l892s/1662182025.pdf](https://hima.chal.nic.in/WriteReadData/l892s/14_l892s/1662182025.pdf)

<sup>16</sup>[https://uplabour.gov.in/LC/MediaGallery/647-36-3-2022-17\(sa\)-2022.pdf](https://uplabour.gov.in/LC/MediaGallery/647-36-3-2022-17(sa)-2022.pdf)

<sup>17</sup>Section 25, Karnataka Shops and Commercial Establishments Act, 1961

<sup>18</sup>Rule 13, Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018

<sup>19</sup>K S Triveni v. Union of India WP 21610 of 1999 (High Court of Andhra Pradesh)

<sup>20</sup>Section 43, Occupational Safety, Health and Working Conditions Code, 2020

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