

HR Law Hotline

December 27, 2022

INDIAN IT/ITES - EMPLOYEES IN SEZs ALLOWED TO WORK FROM HOME UNTIL DECEMBER 31, 2023

- The Ministry of Commerce & Industry's Department of Commerce has substituted the rule 43A of Special Economic Zones Rules, 2006 by notifying the Special Economic Zones (Fifth Amendment) Rules, 2022.
- The substituted rule 43A eliminates the requirement for IT/ITeS entities operating from Special Economic Zones to obtain permission from the Development Commissioner for allowing work from home to the employees.
- The substituted rule 43A also simplifies the regulatory requirements for implementing WFH arrangement and does away with the limit with respect to proportion of employees of SEZ units¹ who can be allowed to WFH.

The Department of Commerce ("DoC") of the Indian Ministry of Commerce and Industry has substituted the rule 43A of Special Economic Zones Rules, 2006 ("SEZ Rules") by notifying the Special Economic Zones (Fifth Amendment) Rules, 2022 ("SEZ Fifth Amendment") on December 8, 2022². The SEZ Fifth Amendment simplifies the complex requirements for units in Special Economic Zones ("SEZ") which permitted their employees to work from home ("WFH").

Previously, on July 14, 2022³, the DoC had notified the Special Economic Zones (Third Amendment) Rules, 2022 ("SEZ Third Amendment") introducing rule 43A that allowed IT/ITeS entities operating in SEZs to permit employees (including contractual employees) to WFH or any place outside the SEZ. Please see our hotline on the SEZ Third Amendment available [here](#). This included requirements like framing WFH policy, submitting a proposal to the Development Commissioner ("DC") and sharing a list of employees who have been allowed to WFH with the DC. SEZ Third Amendment also provided for a limitation on proportion of workforce who can be allowed to WFH. DoC had also issued certain guidelines providing Standard Operating Procedure⁴ ("SOP") for implementation of rule 43A of the SEZ Third Amendment.

In September 2022, there were news reports speculating that union government was considering extension of work from home (WFH) to 100% of the workforce in all Special Economic Zones (SEZ) in order to boost services exports and to tackle shortage of manpower.⁵

BACKGROUND

The SEZ Third Amendment had removed the erstwhile provision of Special Economic Zone Rules, 2006 ("SEZ Rules") governing WFH⁶ and introduced rule 43A. Rule 43A allowed units in SEZs to permit certain employees to WFH or work from any place outside the SEZ. Consistent with the previous position, SEZ Fifth Amendment allows SEZ units to permit following categories of employees to WFH or from anywhere outside the SEZ:

- employees of IT/ITeS SEZ units
- employees who are travelling
- employees who are working off-site
- employees who are temporarily incapacitated.

The SEZ Fifth Amendment clarifies that the expression "employees" will include *"all persons employed on the rolls of the SEZ unit or under a direct contract or where SEZ unit is the principal employer under a contract with another organisation where such persons are expected to report on a day-to-day basis for work to the SEZ unit and the SEZ unit administers the control on their attendance."*

SEZ Fifth Amendment relaxes the regulations which were introduced by SEZ Third Amendment to permit employees of SEZ units to WFH.

KEY FEATURES OF THE SEZ FIFTH AMENDMENT

The key features of new rule 43A, *inter alia* includes:

- the facility for WFH or from any place outside the SEZ may cover all the employees of the SEZ unit.
- where the SEZ unit permits its employees to WFH or from any place outside the SEZ, it shall intimate the same to the DC through an email on or before the date on which the facility to WFH or from any place outside the SEZ is permitted.
- where the SEZ unit has permitted its employees to WFH or from any place outside the SEZ, before the date of

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- commencement⁷ of the SEZ Fifth Amendment and permits its employees to WFH or from any place outside the SEZ under rule 43A, it shall intimate the same to the DC through an email by January 31, 2023.
- the SEZ unit shall not be required to submit the lists of employees who are allowed to follow WFH or from any place outside the SEZ, but shall maintain in the unit the lists of employees who had been permitted to WFH or from any place outside the SEZ and shall be submitted for verification whenever is required by the DC.
 - the facility to WFH or from any place outside the SEZ shall be admissible if the SEZ unit continues to operate from the premises as per its Letter of Approval.
 - the work to be performed by the employee permitted to WFH under rule 43A shall be as per the services approved for the SEZ unit, and the work should be related to a project of the SEZ unit.
 - the SEZ unit shall ensure export revenue of the resultant products or services to be accounted for by the SEZ unit to which the employee is tagged.
 - where an employee ceases to be part of the project of the SEZ unit, the employee shall be un-tagged from the SEZ unit and the SEZ unit shall surrender the identity card as per the SEZ Rules.
 - the SEZ unit may provide to an employee duty-free goods, including laptop, desktop, and other electronic equipment needed by the employee to WFH or from any place outside the SEZ and the same shall be allowed to be taken outside the SEZ without payment of duty or integrated goods and services tax on temporary basis. The SEZ unit while opting for the facility of WFH or from any place outside the SEZ shall ensure that such duty-free goods are duly accounted for in the appropriate records as per the extant rules and are available for verification, if necessary.
 - the temporary removal of such duty-free goods shall be allowed for a period commensurate with the validity of the facility for WFH or anywhere outside the SEZ. If the SEZ unit fails to bring back the duty-free goods into the SEZ within the specified period, the duty applicable on such goods shall be paid by the SEZ unit.
 - the permission granted to WFH or from anywhere outside the SEZ shall be applicable upto December 31, 2023.

NDA OPINION

With new rule 43A, the SEZ Fifth Amendment makes it possible for SEZ units to allow WFH without any strength related limitation by substituting several requirements introduced by SEZ Third Amendment. The SEZ Third Amendment restricted the proportion of workforce who can be permitted to WFH to a maximum of 50% of workforce strength of SEZ unit. There was a room for relaxation vis-a-vis this limit only for '*bonafide*' reasons subject to DC approval. SEZ Fifth Amendment completely does away with this limit.

The SEZ Fifth Amendment no longer requires SEZ units to submit a proposal for implementing WFH arrangement as was required under SEZ Third Amendment. Accordingly, it eliminates discretionary aspect which required DC approval to implement the WFH arrangement. Although, an intimation requirement continues to be applicable.

The procedural complications have been simplified to a large extent. SEZ units are no longer required to submit a specific list of employees who are allowed to follow WFH for DC approval. Instead SEZ units are required to maintain the lists of WFH employees which may need to be submitted to DC for verification as and when required. This will provide employers with flexibility to implement hybrid working arrangement which has become popular since the outbreak of pandemic.

The permission for WFH or work from anywhere outside SEZ under the SEZ Fifth Amendment has been granted only until December 31, 2023. Accordingly, at this point, there remains lack of clarity on whether the SEZ units will be able to continue with similar arrangement post December 31, 2023.

The SEZ Fifth Amendment reflects the government's intention to play a facilitative role in the acknowledging the changing business scenario. We would like to congratulate the authorities on the progressive and welcome changes introduced by the SEZ Fifth Amendment.

– Vivek Ilawat, Sayantani Saha & Vikram Shroff

You can direct your queries or comments to the authors

¹ Sec. 2(zc), SEZ Act, defines "*Unit*" to mean a unit set up by an entrepreneur in a Special Economic Zone and includes an existing Unit, an Offshore Banking Unit and a Unit in an International Financial Services Centre, whether established before or established after the commencement of Special Economic Zone Act, 2005

² <http://sezindia.nic.in/upload/uploadfiles/files/Rule%2043A.pdf>

³ <https://egazette.nic.in/WriteReadData/2022/237284.pdf>

⁴ <http://sezindia.nic.in/upload/uploadfiles/files/Instruction%20110.pdf>

⁵ <https://www.livemint.com/news/india/govt-considers-allowing-100-wfh-in-sezs-11663082654106.html>

⁶ Proviso (i), Rule 43, SEZ Rules (prior to SEZ Third Amendment)

⁷ December 8, 2022

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