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# Maternity Benefit Law in 2021: An Analysis

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## ABSTRACT

*After the introduction of 4 new labour codes in 2019 and 2020, maternity benefit under various legislation has been consolidated into a single code. But how the maternity benefit went through a change over 100 years in our country and what are the changes from the Maternity benefit act 1961 and The Employees' State Insurance Corporation Act 1948 and how far the code fulfils its role to provide single-stop social benefit of all kind including maternity benefit to both organised and unorganised sector in the year 2021. Also to put forward few suggestion as to make the code really work and make a comparative study around the globe to bring the best practices in maternity and paternity leave.*

**Keywords:** *Maternity, Code on Social Security 2020, Labour Codes, Paternity.*

## I. INTRODUCTION

Like all the social sector legislation like old-age pension, gratuity, provident fund, health benefits, disability benefit, maternity benefit also arose out of the industrial era in the 18<sup>th</sup> century England where the working class was pressurised in the factories and a new social-order emerged which led the workers who worked on their farms or somewhere in the country to demand social security from their employers. In India, the demands were raised after the 1<sup>st</sup> world war and rise of class movement in India with formation of AITUC in 1920 and rise of leaders like M.N. Joshi, Vallabh Bhai Patel, B.P. Wadia and others. Among the class of social welfare schemes, need of maternity first by the way of a bill in the central legislative assembly then by Bombay provincial government then examined by the royal labour commission of 1929, then various committees and provisions of our Constitution demanded the need for central maternity benefit in the form of Maternity Benefit Act 1961<sup>2</sup>.

Need for maternity benefit was there as mother is often discarded for role in the economy and as a worker to her special needs, she bears a child, she feeds the child, cleans the house, cooks for her family, look after their emotional needs and after putting so much work as an “invisible labour= unpaid, unrecognised labour” if she is denied paid maternity leave from her employer or every time she bears a child she is fired from her job, that would be disastrous and atrocious

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<sup>2</sup> Maternity Benefit Act (No. 53 Of 1961)

for an economy, country and a society in general by just confining women in their myopic role. With the turn of a new decade in 2021, the 4 new labour codes, including the code on social security 2020<sup>3</sup>, India looks to match global economic powers and make India a global hub. After 60 years of passing of the maternity benefit act, India should look forward to providing global standard of employer-employee relations in India. But des the new code on social security a leap forward from the Act of 1961? Does India still confine women in their limited role in the society? What could more be done to further improve the legislation in the field of maternity benefit or parents' benefit.

Apart from just economic point of view and protecting the rights of the women as a worker the health of the mother and the health of the baby is important for nation building, therefore like the other schemes of Government of India like MAA (Mothers absolute affection) promoting breastfeeding and promoting the health of the nation. Maternity benefit also promotes the scheme indirectly by giving mother the opportunity to be there for her child and furthering the cause. Maternity benefit has dual aspect to give economic security as well as health security to the nation.

## **II. MATERNITY BENEFIT THROUGH ITS HISTORY**

In India working class movement only started after first world war, when the war time measure pushed the limits of the working class and they started asserting their rights, there were several collective agreements between the unions and different employers to provide a package of social security rights including gratuity to the employees.

It was in the year 1924 M.N. Joshi tried to introduce a maternity benefit legislation for women in factories, mines, and tea estates immediately before and after the childbirth and making provision for maternity allowance by local government but was rejected on the want of that the time was not ripe.

Bombay took the lead of enacting maternity benefit in the 1929 and M.P in the year 1930, Royal Commission on Labour, 1929 recommended the act for the whole country on the lines of these two acts.

Karachi session resolution of 1931 of the Indian National Congress relating to fundamental rights of the people and rights of the labour had protection of women workers and especially providing for leave during maternity.

There were series of different acts by different states after this and the 1<sup>st</sup> central act the mines

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<sup>3</sup> The Code on Social Security (No. 36 Of 2020)

maternity benefit act of 1941 which provided for payment of maternity benefit to women at rate of half a rupee per day for a period of 4 weeks before and 4 weeks after the delivery.

**Recommendation of B.P Adarkar<sup>4</sup>** - As a special officer in 1943 appointed by the 3<sup>rd</sup> labour minister conference, Government of India to work out the scheme of health insurance for industrial workers, Adarkar made the following recommendation:

- a) He emphasized a uniform scheme of maternity in place of scattered maternity benefits acts
- b) Also framing of unified and integrated scheme of health maternity and employment

Therefore, Maternity benefit was brought into ambit of The Employees' State Insurance Act, 1948<sup>5</sup> (ESI Act) where a woman is entitled to maternity benefit after fulfilling the minimum contributory condition.

Thereafter, adoption of the constitution on 26 November 1949 and the same coming into force on 26 January 1950, there were various provisions dealing with maternity benefits and the same made the demand for a central maternity legislation even stronger.

### **III. PROVISIONS OF THE INDIAN OF CONSTITUTION<sup>6</sup> DEALING WITH MATERNITY BENEFITS:**

- a) Entry 24 of concurrent list Schedule 7 – welfare for labour including condition of work, provident fund, employer's liability, workmen's compensation invalidity, old age pension and maternity benefits
- b) Article 15 – Prohibition of discrimination on the ground of religion, race, caste, sex, or place of birth
- (3) Nothing in this article shall prevent the state from making any special provision for women and children
- c) Article 42– The state shall make provision for just and humane condition of work and maternity relief
- d) Article 47- Duty of the state raise nutrition and standard of living and to improve public health

In the year 1961, the central government enacted the maternity benefit act in view to reduce disparities under various state maternity legislations and repealing provision of plantation

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<sup>4</sup> Tripartite Labour Conference, Report On Health Insurance, 1944

<sup>5</sup> The Employees' State Insurance Act (No. 34 Of 1948)

<sup>6</sup> The Constitution of India.

labour act 1951, mines maternity act 1941 and various states act. Also, though India has not ratified the ILO conventions, but at the time of enactment of the 1961 act the central government took view of the convention no. 3 of 1919 and convention no. 103 of 1952.

**(A) International Commitments-** On the international front India have signed few agreements like CEDAW and being the being member of ILO since 1919, though India may not have ratified all the convention, but they have an influencing power to the government to enact its rules, legislation, and schemes.

**1. The Philadelphia Charter of 1944<sup>7</sup>** - It recognised the solemn obligation of ILO included provisions of maternity benefit too.

**2. ILO conventions** – Though India has not ratified any one of the above but being the founding member of ILO from the start, these have an influence on the policy making in the country

1<sup>st</sup> of them being the Maternity Protection Convention (no.3)<sup>8</sup> adopted in year 1919,

2<sup>nd</sup> of the convention being (103)<sup>9</sup>,1952 deals with 6 weeks of maternity protection before and after childbirth, such a worker should receive cash and medical benefits also and should not be discharged during her leave.

3<sup>rd</sup> convention<sup>10</sup>, maternity protection convention 183(2000) provided that pregnant and breastfeeding women should not work prejudicial to their health, Maternity leave of 14 weeks with compulsory 6 weeks after birth, further leave in case of illness and complications, cash benefit not to be less than 2/3<sup>rd</sup> pf previous earning and no discrimination and unlawful termination of employment, one-two breaks for breast-feeding women.

Other recommendation of ILO namely, Maternity Protection(agriculture) Recommendation (12) 1921, Maternity Protection Recommendation (95) 1952 and Maternity Recommendation (191),2000 all supplementing the above conventions and providing different medical cash and leave benefits to the women like the Recommendation (191) 2000 provides for cash and medical benefit, health protection and nursing breaks.

**3. CEDAW<sup>11</sup>**- Convention on the elimination of all forms of discrimination against women 1979, signed by India in 1980, Article 11(2) thereof,

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<sup>7</sup> International Labour Organisation, The Declaration Of Philadelphia,1944

<sup>8</sup> International Labour Organization, Maternity Protection Covention,1919(No.3)

<sup>9</sup>International Labour Organization Maternity Protection Convention(Revised),1952(No.103)

<sup>10</sup> International Labour Organisation, Maternity Protection Covention,2000(No.183)

<sup>11</sup> United Nations, Convention on the Elimination Of All Form Of Discrimination Against Women,1979

To prevent discrimination on the ground of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures:

- a) to prohibit, subject to the imposition of sanction, dismissal on the ground of pregnancy or of maternity leave and discrimination in
- b) introduce maternity leave with pay c) childcare facilities d) protection to women during pregnancy in types of work proved harmful to them

**(B) National Commissions on labour-** Till date there have been two national commission on labour first one submitted its report in the year 1969 and the second one in the year 2002 recommendation different suggestions w.r.t maternity benefits.

**1) NCL (1969) - Gajendragadkar commission<sup>12</sup>** -recommended a scheme of central fund may be evolved on the same line as suggested for workmen's compensation.

**2) NCL (2002)- Ravindra Verma commission<sup>13</sup>** recommended:

- a) In organised sector the existing maternity benefit should be extended to be applicable to all women workers.
- b) Welfare funds and area-based schemes as to extend the provision to the unorganised sector.
- c) Different social sector schemes should be clubbed together like the PF scheme, compensation, gratuity, and maternity to avoid multiplicity.

It was the 2<sup>nd</sup> national commission on labour recommendations that were taken into consideration while consolidating and enacting the 4 new labour legislation in the 2019 and 2020 including the Code on Social Security 2020 which contains provisions of maternity benefit.

Therefore, first looking at the provision of employee's state insurance corporation act 1948 then moving to maternity benefit act 1961 with amendment of 2017 and finally arriving at Code on social security we can have a complete idea of maternity benefits in our country.

### **(C) Employee State Insurance Corporation Act 1948**

Employee State Insurance Corporation Act 1948 was introduced to bring uniformity and a single central legislation providing a group of social sector benefits to contributing employees including the maternity benefit, with major provisions of maternity benefit being:

**1. Applicability-**The Act applied to all factories to including those belonging to the

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<sup>12</sup> Government Of India, Ministry of Labour (1969). Report Of The National Commission On Labour

<sup>13</sup> Government Of India, Ministry of Labour (2002). Report Of The National Commission On Labour

government whereon 10 or more people are employed on any day of the preceding 12 months with a wage ceiling of 21000 per month from January 1, 2017.

**2. Maternity benefit** -It is provided under section 46(b) of the Act , payable to women in the form of periodical payment in the case of confinement or miscarriage or sickness arising out of pregnancy confinement, premature birth of child or miscarriage on the certification of a an authority specified by the regulation for a period of 26 weeks at the standard benefit rate or 25 whichever is higher qualifying condition being that the woman paid contribution to the ESI fund under the act for at least 70 days in the two immediately preceding contribution periods.

**3. Medical bonus** -Bonus is of rupees 2500 and medial benefit is also provided under the act but only to contributing women.

**4. Bar to other legislations**- Under section 61 of the act there is a bar in case of a person is entitled to get benefit under the act by Employees' State Insurance Act, the person is not authorised to get similar benefit under the maternity benefit act 1961.

#### **(D) Maternity Benefit Act 1961**

Even after the maternity benefit was available to contributing employee under the ESIC Act, the central government enacted the legislation to include even those women who are not included under the conditions and wage-ceiling required under the ESIC Act.

**1. Applicability**-Maternity benefit act applies to every establishment being a factory, mine or plantation including any such establishment belonging to government and to every shop an establishment in which 10 or more employees are employed on any preceding day in last 12 months, there is no wage ceiling to be applied.

**2. Condition**-Qualifying condition of a women claiming maternity benefit is if she has worked in an establishment of the employer for a period not less than 80 days in the preceding 12 months from the date of her expected delivery.

**3. Maternity Benefit**-Women are entitled to daily average wage for a period of 12 weeks (enhanced to 26 weeks), daily average wage is calculated as average of women's wage payable to her for the day on which she has worked during the period of 3 calendar months immediately preceding the date she absents or minimum wage whichever is higher.

**4. Medical bonus** – Bonus is of 3500 is also given to the women under the act but there are no provisions for medical benefit as under the ESI Act 1948.

**5. Bar of ESI Act**- Except where the women are not qualified to claim maternity benefit under the act or receives wages more than the wage-ceiling fixed under the ESI Act 1948, women

claiming benefit under the ESI Act 1948 are not entitled to claim benefit under the maternity benefit act 1961 (section 5A and section 5B).

Therefore, the maternity benefit is provided under the both the acts but there is a condition in section 5A and section 5B of maternity benefit act 1948 and section 61 of the ESI Act 1948 which determine which act applies to women claiming maternity benefit. Also, under maternity benefit act there is no central fund to pay the claimed benefit out of as in the ESI Act 1948 which has ESI fund to which regular contribution are paid and claims are met.

#### **(E) Maternity benefit (amendment) Act 2017<sup>14</sup>**

Maternity benefit act passed in March 2017 and applicable from 1<sup>st</sup> April 2017 made India one of the few countries to provide a 26-week maternity paid leave also had ILO convention 183 in mind while passing the amendment.

**1. Increased maternity leave** – the amendment increased the maternity leave from the period of 12 weeks to 26 weeks up to a maximum of 8 weeks before the expected date of delivery. but with the proviso that women having 2 or more surviving children would only be provided 12 weeks of leave.

#### **2. Maternity leave for adoptive and commissioning mother**

A 12-week maternity benefit is available to both a woman adopting a child below 3 months and a ‘commissioning mother’.

**3. Creche facility** – The amendment makes the creche facility mandatory for every establishment employing 50 or more employees. Women employees would be permitted to visit the crèche facility 4 times during the day.

**4. Work from home**- Where a woman is assigned a work that she can work from home, the same should be allowed by the employer even after the maternity period.

**5. Notify**- Every establishment is required to intimate in writing and electronically to every woman at the time of her initial appointment regarding the benefit available under the act.

#### **(F) Code on social security 2020**

The government enacted the 4 new labour codes keeping in mind the changing global economic scenario and job trends and in order to simplify, amalgamate and provide a single legislation The 4 labour codes in the year 2019 and 2020 are much necessary labour reforms by which 29 central labour laws being consolidated, rationalised and simplified into four labour

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<sup>14</sup>Maternity Benefit (Amendment) Act (No.6 Of 2017)

codes, namely, 1) the code on wages 2019 2) the industrial relation code 2020 3) occupational safety, health and working condition code 2020 and 4) the code on social security 2020 which contains maternity under chapter 6 of the legislation as notified on 29.9.2020.

Code of social security consolidated 9 social legislation into a single code to simplify a single return, single registration and provide a all social benefits under a single act to both organised and unorganised sector, out of the 9 legislation included two are the maternity benefit act 1961 and the employees state insurance act 1948 providing for maternity benefit , though the code contains almost all the same provisions of the repealed acts there are changes as to definition of wages and addition of new definition as gig worker (section 2(35)), platform worker (section 2(61)) and extending social benefit to them too. Major provisions of the code being:

**1. Applicability**-Under chapter 6 containing maternity benefit and chapter 4 which contains Employees state insurance corporation both provide maternity benefit, and their applicability is also same as the repealed acts as prided under the 1<sup>st</sup> schedule of the code, namely applying to establishment including government establishment employing 10 or more on any day of the preceding 12 months.

**2. Wages**-a uniform definition of wages is applicable to all the 4 new labour codes thus avoiding any confusion as to what is included in the wages while paying the maternity benefit. provides a common definition to wages in all 4 codes and the definition of wages in code on wages is like the code on social security to create uniformity and puts to rest different interpretation which may lead to disputes.

Wages under section 2(88) of code on social security and section 2(y) of code on wages include all remuneration whether by the way of salaries allowance or otherwise, expressed in terms of money or capable of being so expressed includes basic pay dearness allowance and retaining allowance if any and does not include bonus house rent allowance pension or provident fund contribution overtime allowance retrenchment allowance commission payable to the employee conveyance allowance.

There is proviso to the wages that if by calculation anything which is not included in wages the sum exceeds one-half of the total remuneration the excess is also included in the remuneration, thus the wages are never less than total remuneration, but this clause may also be notified with any other method of calculation by the central government.

### **3. Rate and Duration of calculation**

The rate and the duration of calculation is same as the repealed acts under section 32(b) of the code for women covered under ESIC chapter and section 60 i.e., worked for 80 days in the

preceding 12 months and at the rate of 3-months average of minimum rate of wage as fixed by the Code on wages 2019.

(Minimum rate of wage fixed as under the Code on wages is the central floor wage fixed by the central government above which the states may provide for different minimum wages for the act).

#### **4. Maternity benefit under different chapters of the code –**

Section 42(7)(b) of the code and section and section 61 of the code the women is entitled to maternity benefit under either the ESIC chapter 4 section 32 or under chapter 6 section 60 but not both at the same time, thus the maternity benefit is provided for two set of women who may claim benefit under the two provisions of the code depending upon the wage-ceiling, contribution and other condition of the chapter, thus the bifurcation continues from the previous repealed legislations as to providing maternity benefit under different provisions as under the Maternity Benefit Act ( section 5 A and section 5 B ) and ESI Act ( section 61).

#### **5. Inspector-cum-facilitator**

As the payment of gratuity act had a very wide coverage and the controlling authorities and the inspectors who are burdened with other acts of the time the code on social security brings about a uniformity in laws and inspector-cum-facilitator under section 122 have been introduced in all four labour codes whose responsibly inter-alia would include advice to employers and workers for effective compliance of the social security code and a web based random inspection to bring accountability and transparency.

**6. Provision of the amendment act of 2017 and their further enhancement-** Provisions of Amendment Act of 2017 have been included like the enhanced maternity leave under section 60 of the code to 26 weeks, commissioning mother, adoption of child under 3 month and work from home under section 60(5), creche facility under sec 67 have been provided in addition there are new provision namely:

**a) Section 66- nursing break** – Allowing woman to have in addition to rest interval 2 nursing break until child attains age of 15 months.

**b) section 67, second proviso**, that an establishment may avail common creche facility of central government, state government, municipality or private entity or provided by non-governmental organisation or by any other organisation or group of establishments who may pool their resources for setting up of common creche in a manner they agree.

**7. Punishment-** Punishment for maternity benefit is provided under section 133(i) and section

133 (d) for term of 6 months or 50000 or both and in case of subsequent offence the punishment is provided under section 134 as up to 3 years but not less than 2 years and fine of 3 lakh rupees whereas the punishment under maternity act 1961 in event of failure to pay maternity benefit or wrongfully discharging or dismissing the women during her absence with imprisonment of not less than 3 months and fine of 2000 to 5000 therefore the code by extending the punishment from the act which was enacted 60 years ago act as a deterrent to employers who do not comply with act and at the same time fixes the quantum of punishment so as to avoid any confusion

At the same time failure to produce any register was punishable with 1 year or 2000-5000 rupees under the maternity benefit act but now the same is just a fine of 50000 under section 133(e) thus defining the role of inspector-cum-facilitator and reducing the inspector-raj.

**8. Medical Bonus-** Medical bonus of 3500 as under the repealed maternity benefit act remains the same under code under section 64 with power of the central government to notify some other amount.

#### **IV. COMPARATIVE ANALYSIS OF MATERNITY BENEFIT AROUND THE WORLD**

India's step towards providing maternity leave from 12 weeks to 26 weeks up to 2 children is a progressive step putting India on the map with only few nations that offer such long maternity leave, comparing few top countries that provide long maternity leave are:

- 1. Norway-** Maternity leave provided in for period of 54 weeks, but an option to choose 54-week maternity week at 80% regular pay or 44 weeks at 100% regular week, with 44 weeks it means close to 10 months.
- 2. Germany-** maternity leave is provided for 14 weeks at 100% regular pay and the 65% till the child reaches the age of 12months
- 3. Iceland-** the maternity is provided for 5months with additional 2 months which can be shared between mother and the father at the rate of 80% of regular pay
- 4. Japan-** guaranteed maternity leave covers a period of 6 weeks prior to the expected birth date to 8 weeks after giving birth.

Therefore, when we compare India 26-week maternity leave with other nations providing maternity relief we find that India despite being a developing country with a lot of dragging socio-economic condition providing 26-week maternity leave at full pay is progressive step and count as one of the best maternity benefit around the world but at the same time also a burden on the employers of a developing nation who bear the heat of paying it.

## V. STATUS OF PATERNITY BENEFIT

The natural order of relations made only women capable of birthing a child but the social order of different gender roles for men and women put the responsibility of rearing and nurturing primarily on women, there is a line drawn between women as “care-givers” and men as “care-takers” setting the stone rolling for a discussion on such societal demarcations of gender roles, when we think taking care of a new-born, only maternity benefit legislation comes to our mind.

Paternity benefit act or rules do not appear in our country but of one as the **Civil Services (Leave) Rule, 1972, rule 43-A<sup>15</sup>** thereof which provides a leave of 15 days paternity leave during confinement up to 15 days before or up to six months from the date of delivery for a male employee. Around the globe different countries have got rid of myopic view of just having women as caregivers or maternity legislations only, where few examples being

1. **Lithuania-** where the parents can choose to share 156 weeks of leave with 52 weeks at 100% pay or 104 weeks at 70% pay
2. **Sweden-** Parents share 480 days of leave with both parents have 90days of leave at 80% of pay and additional 300 days they can share.
3. **Slovenia-** Fathers are entitled to 12 weeks of paternity leave with 15 days at 100% pay and then 75 days for minimum wage salary.

Therefore, around the globe there are provisions for providing paternity leave, thus moving from the notion that it is the sole responsibility of the mother to provide care and comfort the child, though few MNCs like Zomato and few other employers tried providing paternity leave, the same should be considered as a nation-wide legislation.

## VI. A WAY FORWARD

### (A) A central fund

Unlike the ESI fund out of which the maternity benefits of the women who are covered under the ESI scheme which lifts the pressure off the employers alone as the contribution are made to the fund by the employee too, Maternity Act 1961 nor the chapter 6 of the social security code provide for any central fund as even recommended by the 1<sup>st</sup> National Labour commission<sup>16</sup> putting all the pressure on the employers creating not only the problem for small employers who cannot afford the benefits but also women as stated by the commission “ led to a tendency among some employers not to employ married women and even discharge women

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<sup>15</sup> Ministry Of Personnel, Public Grievances and Pensions, Department Of Personnel And Training, The Central Civil Services (Leave) Rules, 1972

<sup>16</sup> Government Of India, Ministry of Labour (1969). Report of the National Commission On Labour

workers on signs of pregnancy”

### **(B) Scheme for Gig workers, Platform Workers, Self-employed and Unorganised workers**

Various provision in the code relation to gig and platform workers (section 114), and unorganised workers (section109) have been left open to the central government to extend maternity benefit to these employees by the way of notification. Similarly central government may frame schemes for self-employed (section15 (d)) people who may want to get enrolled under the scheme.

### **(C) Paternity Leave**

As discussed above, in India there is only 15 days leave for government employees and no central legislation to extend some form of paternity leave to all workers, code on social security 2020 being an up-to-date act should include the provisions for paternity leave to bring men and women at equal footing in social-order.

### **(D) Maternity Benefit under two chapters under the same code**

Chapter-4 relating to ESI Corporation and chapter 6 relating to maternity benefit , do give a bifurcation to the code which aimed to amalgamate, consolidate 9 legislation into one code providing for a single stop all social legislation code, but providing two set of maternity benefit under ESI on contribution and up to a wage-ceiling and maternity benefit for all others , continue the same provisions of the repealed acts and same may be rectified to provide a single provision for all maternity benefits and a central fund to pay the benefits out of.

## **VII. CONCLUSION**

Code on social security, the maternity benefit act 2017 amendment are all step in a positive way. There is need to consider aspects of a central fund for paying the benefits out of, a single provision for all maternity benefit claim and paternity leave under the code and Central government should frame the necessary schemes for unorganised sector as well by necessary rules the way of notification.

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