

RGICS LEGISLATIVE BRIEF (March 8, 2017)

The Maternity Benefit (Amendment)
Bill, 2016

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KEY MESSAGES

- Private employers may be biased in hiring women during their reproductive years as also indicated by 2014 study – Analysis of the Effectiveness of the Maternity Benefit Act, 1961- conducted by Centre for Social Research backed by National Commission for Women. The least the government could have done was to provide for a non-discrimination clause so that no person is discriminated against in employment for having availed any parental benefits under the law.
- No recognition of paternity leave re-emphasizes traditional gender roles and fails to initiate attitudinal changes towards perception of women as bread earners.
- By excluding adoptive fathers recognized under the Juvenile Justice (Care and Protection) Act, 2015; surrogate mothers recognized under the Draft Surrogacy (Regulation) Bill, 2016; and transgender parent this Bill is biased against parents recognized as such by the Indian laws.
- The amendment is biased against an adopted child above three months of age as in such a case the adoptive mother will not be granted maternity leave.

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PART I. INTRODUCTION

The Constitution of India in its Directive Principles of State Policy directs the State to “make provision for securing just and humane conditions of work and for maternity relief”. In 2015, the Law Commission of India recommended increasing the period of maternity leave under the 1961 Act to 24 weeks and the Indian Labour Conference in 2016 also recommended that the period of maternity leave be increased from 12 to 24 weeks.ⁱ The Maternity Benefit (Amendment) Bill, 2016 was introduced in the Rajya Sabha by Union Labour Minister Mr. Bandaru Dattatreya on August 11, 2016 and passed on the same day. This Bill is currently pending in the Lok Sabha. While Mr. Dattatreya focuses on employability of women asserting that the purpose of the Bill is to increase the working women force; Union Minister for Women and Child Development, Ms. Maneka Gandhi, focuses on child welfare stating that this Bill has its roots in malnutrition as new born children need to be breastfed requiring mothers to be around the child.ⁱⁱ

The Bill also provides for 12 weeks leave for commissioning and adoptive mothers and makes it mandatory to provide crèche facility for establishments where the number of workers is 50 and above. These provisions would be applicable to all establishments employing 10 or more persons as described under the Maternity Benefit Act, 1961. While there is already a provision of 26-week maternity leave for the government employees, most private sector firms offer maximum three months of such leave. Besides, these benefits are not provided in many smaller establishments. The Bill also allows working mothers to exercise work-from-home option, though this is not mandatory and is left at the discretion of the employer.ⁱⁱⁱ

While this Bill maybe considered a welcome provision for understanding the need for maternity leave, it is not at all ideal. There have been several criticisms against it such as encouraging gender stereotypes by identifying childcare exclusively with the mother, restricting maternity benefits only to the organized sector, lack of creating a sound implementation framework. These criticisms are further discussed in detail in the following document.

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PART II: THE POLITICS

The present Bill has not been opposed in its entirety. However, representatives of various political parties have expressed their apprehension for not including paternity leave among other issues. The Bill was passed by a voice vote in Rajya Sabha by members cutting across political lines.

During the Rajya Sabha debate some of the members expressed certain reservations regarding this Bill. Ms. Anu Agha, nominated member in the Rajya Sabha, emphasized that paternity leave must be recognized along with maternity leave as it is important that ‘men do not leave childcare entirely to the mother and then glorify motherhood.’ She further states there should not be ‘overt or subtle pressure on a woman to breastfeed her child’ and this decision should remain with the mother. Some members such as DMK’s Ms. Kanimozhi and BSP member Mr. Satish Mishra were unhappy that the benefits of maternity benefit were not given to surrogate mothers. CPI member, Brinda Karat, expressed concern that this ‘government plans to bring a Bill [Small Factory Amendment Act] that would take smaller sized factories out of its [Maternity Bill] ambit and this will negate the Act’ thus undermining the very purpose of the Act.^{iv}

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PART III: KEY ISSUES

The main issues that are not addressed by this Bill are:

- **Exclusion of women workers in the unorganized sector:** According to a report on maternity protection in India written by the Ministry of Labour and Employment of India and International Labour Organization, only 6 million of 138 million (4.4 per cent) female workers aged 15 to 49 in India work in the formal sector.^v In other words, the Maternity Benefit Act is not applicable to 95.6 per cent of female workers in the reproductive cohort in India.^v Further, it has been reported that at any given time there are 2.97 crore pregnant women in India while the benefits of this amendment would apply to only 18 lakh women. This is because this amendment would only apply to woman working in agricultural, commercial or industrial establishments or shops with 10 persons or more. This excludes women who work from home, at smaller establishments and with no fixed employer.^{vi}
- **Private employers may hire fewer women:** Since many female government employees were already allowed six months of maternity leave it is the private employers who are being mandatorily directed to grant maternity leave. It is plausible that this would adversely affect the hiring policy for female workers in their active reproductive years.
 - (i) **NCW backed study indicates this possible bias:** The Centre for Social Research conducted a study in 2014 for the National Commission for Women titled ‘Analysis of the Effectiveness of the Maternity Benefit Act, 1961.’^{vii} In its recommendation this study states that the principle of grant maternity benefits dependant on employer’s liability is ‘is likely to decrease the amount of women who want to or are able to make use of their maternity rights.’ Further this is contradictory to the general ILO guiding principle no. 67, which states that income security as far as possible should be organized on the basis of compulsory social insurance. Despite this study no changes in this regard has been introduced through this amendment. Rather Ms. Maneka Gandhi insisted on introducing eight month maternity leave without considering the ramifications it can have on hiring of women by private employers.
 - (ii) **Reports suggest employers’ reluctance to grant maternity leave:** It has been reported that pregnant women workers get unexpected poor performance reviews/termination letters or are called for counseling by HR departments for ‘fabricated’ reasons. Further, it is suggested that many organizations internally freeze the number of female employees within their establishment. This would adversely affect the hiring of more females as a female job applicant may be unable to prove such discrimination.^{viii}

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- **No recognition of paternity leave:** The NCW backed report^{ix} (mentioned above) recommended in 2014 that paternity leave must be legally recognized to initiate attitudinal change towards ‘gender-balanced approach to care-giving and unpaid domestic work.’ Despite this recommendation the amendment does not provide for paternity leave. The reluctance is expressed in Ms. Maneka Gandhi’s statement reasoning that paternity leave would be ‘just a holiday’ for men as they wouldn’t do anything to take care of the child.^x This statement exemplifies deep seated prejudice to view men as care-givers and refrains from dismantling the male breadwinner model. Not only does it stereotype women into their traditional gender roles it is also a wasted opportunity to bring gender parity at the workplace by recognizing that child care is the responsibility of both parents and not just the mother.
- **Benefits restricted for adoptive mothers based on age of the adopted child:** This Bill provides for 12 weeks of maternity leave for an adoptive mother only if she adopts a child who is below three months. Not only does this provision overlook the rigorous adoption procedures under the Juvenile Justice (Care and Protection of Children) Act, 2015 that would make it difficult to adopt a child below three months it also does not borrow from the Guidelines Governing Adoption of Children, 2015 which provide adoptive leave to parents irrespective of the age of the child.^{xi} Has the focus of lawmakers only been on children that need to be breastfed? Are the needs of a grown up child adopted in a new household any less than a newborn requiring nutritional enrichment? By taking such a restrictive view not only are the provisions of this Bill biased against the adoptive mother but also defeat the larger vision of welfare of all children irrespective of age.
- **Bias against adoptive fathers, single parents and surrogates:** The Bill While including adoptive mothers for provision of maternity leave benefits this Bill ignores that the Juvenile Justice (Care and Protection of Children) Act, 2015 allows ‘single persons’ to adopt. This Bill is discriminatory towards adoptive fathers and transgender persons who may adopt as well by not accounting for a leave for them.^{xii} Further, one of the reasons for introducing maternity leave for working women was so that their body could ‘heal’ and ‘repair’ itself post childbirth. But the Bill provides for maternity leave of 12 weeks for only a commissioning mother i.e. a biological mother who uses her egg to create an embryo implanted in any other woman. Would such ‘other woman’ not need leave from work to heal and repair her body after child birth? As the draft Surrogacy (Regulation) Bill, 2016 does allow altruistic surrogacy there is no reason why a surrogate mother engaging in an altruistic service, recognized by law must be excluded from maternity benefits that every other mother will receive. Thus, this Bill is fraught with bias against fathers in general and adoptive fathers in particular, transgender parent as well as surrogate mothers.

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PART IV. THE [PROPOSED] BILL

The present Bill was introduced to achieve twin objectives – one, preventing child malnutrition by allowing working women to stay at home for breastfeeding and two, increase the participation of women in the work force. The proposed amendments are as follows:

- **Increased duration of maternity leave:** The Maternity Benefit Act 1961 provided for 12 weeks of maternity leave for women employed in factories, mines, shops and establishments with 10 or more employees, and other notified establishments. This Bill increases the maternity leave period to 26 weeks. However, a woman who has two or more children will only be entitled for a maternity leave of 12 weeks.
- **Adoptive and commissioning mothers are entitled to maternity leave:** The Bill provides maternity leave of 12 weeks to adoptive mothers i.e. a woman who legally adopts a child below three months of age and commissioning mothers i.e. a woman who uses her egg to have a surrogate child. In both cases the 12-week period of maternity leave will be calculated from the date the child is handed over to the adoptive or commissioning mother.
- **Mandating establishment of crèches:** The Bill requires that every establishment with 50 or more employees must provide crèche facilities within a prescribed distance. The woman will be allowed four visits to the crèche in a day and this will include interval for rest allowed to her.
- **Option to work from home:** The Bill states that after the period of maternity leave the employer may allow the women availing such leave to work from home for a period that is mutually decided by them. This is not a mandatory provision and depends on the nature of work assigned to her and the discretion of the employer.

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PART V. CRITIQUE OF THE BILL

The first criticism against this Bill is that it is highly unlikely it will succeed in increasing the number of women in the workforce. Despite NCW backed study^{xiii} conducted in 2014 this government has not taken into account the bias against hiring women owing to employer's responsibility of awarding maternity leave and maintaining crèches. The least the lawmakers could have done was to provide for a non-discrimination clause should be added that no person should be discriminated against in employment for having availed any parental benefits under the law.^{xiv} Without this due diligence the government's attempt to introduce these amendments for increasing female work force participation is shallow and empty.

The second criticism is with regard to the lack of recognition for paternity leave. While on one hand the lawmakers assert that increase of maternity leave period will foster rights of working women they do nothing to introduce gender equality at the workplace. By refusing to adopt a gender balanced parental leave policy this Bill makes no effort to break traditional gender roles. This move is also condemned by those fathers who will not have an opportunity to be an involved parent with their newborn child. Holistically, under the garb of introducing a progressive change by increasing the leave period this Bill is regressive in nature as it sidesteps initiating any attitudinal change towards accepting women as breadwinners.

The third criticism is that this Bill creates inherent divisions in granting benefits among the parents and children. Despite recognition of single parents (which could include adoptive fathers) by the Juvenile Justice (Care and Protection) of Children Act, 2015 and surrogate mothers by the Draft Surrogacy (Regulation) Bill, 2016. It further discriminates against children as adoptive mothers adopting a child above three months of age are excluded from the purview of this Act. On what basis is this classification created that ignores the rights of adoptive single fathers, transgender parent, surrogate mothers and children above three months of age waiting for adoption the Bill does not justify.

It can be concluded that this Bill is only a half-hearted attempt that fails to address the concerns of pregnant working women or working women considering pregnancy holistically. More than that these amendments re-emphasize the role of women as child bearers and care givers over their emerging role as bread earners. Not only does it not break any stereotypes it does not initiate any revolutionary change in social perception of women.

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PART VI. BACKGROUND INFORMATION/REFERENCE DOCUMENTS

ⁱ See <http://www.prssindia.org/uploads/media/Maternity%20Benefit/LB%20Maternity%20Benefit%20Bill%202016.pdf> Accessed on 7.3.2017

ⁱⁱ "Maternity Benefit Amendment Bill, 2016 Passed in Rajya Sabha", The Indian Express, August 11, 2016 Available at: <http://indianexpress.com/article/india/india-news-india/maternity-benefit-bill-2016-passed-in-rajya-sabha-heres-how-twitterati-reacted-2969000/> Accessed on 7.3.2017

ⁱⁱⁱ See <http://www.prssindia.org/uploads/media/Maternity%20Benefit/LB%20Maternity%20Benefit%20Bill%202016.pdf> Accessed on 7.3.2017

^{iv} "Rajya Sabha Passes Maternity Leave Bill; Extends Leave to Six Months", The Wire, August 12, 2016 Available at: <https://thewire.in/58661/rajya-sabha-passes-maternity-leave-bill-extends-leave-to-six-months/> Accessed on 7.3.2017

^v Maternity Protection in India: A national assessment, Ministry of Labour and Employment and ILO, August 2012

^{vi} "Maternity Leave Increases to 26 Weeks – But Only for a Small Section of Indian Women", The Scroll, August 13, 2016 Available at: <https://scroll.in/pulse/813888/maternity-leave-increases-to-26-weeks-but-only-for-a-small-section-of-indian-women> Accessed on 7.3.2017

^{vii} Report (2014), Analysis of the Effectiveness of the Maternity Benefit Act, 1961 Available at: <http://ncw.nic.in/pdfReports/NCWMaternityBenefitStudy.pdf> Accessed on 7.3.2017

^{viii} "Longer Maternity Leave may Prompt Companies to Hire Fewer Women – and the Law Needs to Prevent that", The Scroll, August 14, 2016 Available at: <https://scroll.in/pulse/813942/longer-maternity-leave-may-prompt-companies-to-hire-fewer-women-and-the-law-needs-to-prevent-that> Accessed on 7.3.2017

^{ix} See vii

^x "Gender Dynamics Economics in Paternity Leave Worldwide", The Indian Express, August 30, 2016 Available at: <http://indianexpress.com/article/explained/in-fact-gender-dynamics-economics-in-paternity-leave-worldwide-3003016/> Accessed on 7.3.2017

^{xi} Swagata Raha, "Not Only the Mother's Responsibility", The Hindu, August 16, 2016 Available at: <http://www.thehindu.com/opinion/columns/Not-only-the-mother%E2%80%99s-responsibility/article14571598.ece> Accessed on 7.3.2017

^{xii} Swagata Raha, "Not Only the Mother's Responsibility", The Hindu, August 16, 2016 Available at: <http://www.thehindu.com/opinion/columns/Not-only-the-mother%E2%80%99s-responsibility/article14571598.ece> Accessed on 7.3.2017

^{xiii} Report (2014), Analysis of the Effectiveness of the Maternity Benefit Act, 1961 Available at: <http://ncw.nic.in/pdfReports/NCWMaternityBenefitStudy.pdf> Accessed on 7.3.2017

^{xiv} See xii