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Consent under the OSH Code 2020: Boon for Empowerment or Curse of Burden

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ABSTRACT

The rights of labour class such as health, working condition, and their safety has always been a matter of concern not just at the level of establishment itself but at a national level. To tackle with these concerns the government has come up with the “Occupational Safety, Health and Working Conditions Code 2020” (hereinafter referred to as OSH Code, 2020). The code aims at prescribing the standards for the working conditions, health and safety measures, and special provisions for women. The code consolidates 13 existing laws. An important provision under this code is related to the word “consent” of women working beyond regular working hours. This article delves into the interpretation of word "consent", and explores whether these provisions are a boon or a curse for women at workplace. The word “consent” encompasses within itself some essentials like voluntary mutual agreement, educated decision-making, express documentation, and the ability to cancel the consent without any repercussions. On the other hand, challenges such as lack of awareness, mental coercion, uneven enforcement mechanism can undermine these protections provided under the OSH Code, 2020, thus exposing the women to exploitation. This article explores the legal and also the practical implications of all these essential elements, whether they truly benefit women or they inadvertently create new challenges, thereby offering a comprehensive analysis of the OSH Code’s impact on women’s rights and safety in the workplace. The article also discusses about the responsibilities of employers in maintaining compliance with this code and the role of regulatory authorities in monitoring adherence to these provisions.

Keywords: *Consent, Empowerment, Extended Work Hours, Women’s Rights, Occupational Safety.*

I. INTRODUCTION

From being nurtures to becoming breadwinners, women have entered the realm the working class in India. Female participation in the labour force and right to decent work environment is

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very much essential for an inclusive and sustainable development of the country.³As per the latest report of periodic Labour Force Survey (PLFS) 2021-22 women's workforce participation was 32.8 percent female of working age of fifteen years and above and which was 23.3% in 2017- 18.⁴The gender gap in the working class has slightly narrowed. To bridge this gap, the Indian government introduced various codes such as, The Code on Social Security 2020⁵, The Code on Wages, 2019⁶, OSH Code, 2020⁷. The OSH Code, 2020 aims at providing detailed measures for health and safety of the workers in a given establishment. The code prescribes special provisions for women including the safety measures to be followed in an establishment. Sec43 of the code gives women the freedom to work beyond the working hour. Sec43 makes it mandatory for employers to take consent of women before assigning them to work at night shift. Although the code has not been implemented so far, but states like Haryana, Odisha, Telangana, Madhya Pradesh, Tamil Nadu, Andhra Pradesh, Himachal Pradesh, Uttar Pradesh have established rules that are in line with sec43 of the code. The rules encourage diversity at workplace. The provisions that prohibit employment of female employees in night shifts have been considered to be violating their right to work and denying them equal opportunity as their male counterparts.⁸An important provision under the code is related to the word "consent" of women working beyond regular working hours. This article delves into the interpretation of word "consent" as the code does not define it, and explores whether these provisions are a boon or a curse for women at workplace. The word "consent" encompasses within itself some essentials like voluntary mutual agreement, educated decision-making, express documentation, and the ability to cancel the consent without any repercussions. On the other hand, challenges such as lack of awareness, mental coercion, uneven enforcement mechanism can undermine these protections provided under the OSH Code, 2020, thus exposing the women to exploitation. This article explores the legal and also the practical implications of all these essential elements, whether they truly benefit women or they inadvertently create new challenges, thereby offering a comprehensive analysis of the OSH Code's impact on women's rights and safety in the workplace. The article also discusses about the responsibilities of employers in maintaining compliance with this code and the role of regulatory authorities in monitoring adherence to

³ Ministry of Labour and Employment, "Female Labour Utilization in India" 36 (April 2022)

⁴ Ministry of Labour and Employment, "Female Labour Utilization in India" 12 (April 2022)

⁵ The Code on Social Security available at, <https://vvgnli.gov.in/en/code-social-security-2020>

⁶ The Code on Wages, 2019 available at: https://labour.gov.in/sites/default/files/thecode_on_wages_as_introduced.pdf (last visited on July 15, 2024).

⁷The Occupational Safety, Health and Working Conditions Code, 2020, available at: <https://labour.gov.in/whatsnew/occupational-safety-health-and-working-conditions-code-2020-no-37-2020> (last visited on July 15, 2024)

⁸ Nishith Desai, "Female Employees Working in Night Shift in India – Recent Updates", available at: <https://www.nishithdesai.com/NewsDetails/10628>

these provisions.

Objectives of the Study: The study has following objectives:

- To understand the definition of the word employee and employer and their relationships;
- To interpret sec66 of the Factories Act, 1948;
- To analyse and interpret the meaning of the word “consent” and its components under the OSH Code, 2020;
- To understand legal and practical implications of all the essential elements of consent;
- To understand the employer’s responsibility in providing safe working conditions to women.

Chapterisation plan:

The study comprises of five heads which are as follow:

The First head discusses the definition of the word employee and employer and their relationships, the Second head interprets sec66 of the Factories Act, 1948, Third head conceptually analyse the meaning of the word “consent” and its components. Fourth head helps to understand the legal and practical implications of all the essential elements of consent, fifth head helps to understand the employer’s responsibility in providing safe working conditions to women.

(A) Definition of Employee and Employer: - The regulatory framework in India that governs the interaction between an employer and employee is being significantly altered by the OSH Code 2020. It is essential to comprehend these definitions in order to apply labour welfare rules. Employers and employees are currently addressed by the FA, 1948 and the IDA, 1947, even if the OSH Code 2020 is not yet in effect. It is crucial to comprehend the employer-employee relationship in light of the numerous rulings rendered by the Supreme Court of India.

In *WDTA vs The Management*,⁹ the court observed that the object of the Industrial Dispute Act, 1947 (hereinafter referred to as IDA, 1947) was designed to encourage measures for guaranteeing and maintaining good relations and amity between employers and workers. Additionally, it is noted that the nation's progress depends on industrial peace and concord, both of which are dependent on the social and economic advancement of labour.

⁹ AIR 1958 SUPREME COURT 353. (*Workmen of Dimakuchi Tea Estate vs The Management of Dimakuchi Tea Estate*)

It is crucial to understand the terms "employer" and "employee" independently in order to fully understand the fundamental idea of this relationship.

(B) Employee

Sec. 2(t) of the OSH Code, 2020 defines an "employee" as a person who works for a company and receives remuneration, with the exception of apprentices under the Apprentices Act, 1961. This definition includes skilled, unskilled, semi-skilled, manual, operational, supervisory, managerial, administrative, technical, clerical, or any other type of work, regardless of whether the job terms are explicitly stated. The government can also designate someone as an employee, but this does not include Armed Forces members.

Anybody who works as a manager in a mine, or is appointed by the owner, or agent, or manager, or with the management's knowledge, whether paid or not, is considered an employee in the context of mines. This includes operating, maintaining, repairing, or servicing any mining machinery; loading minerals for dispatch within the mine premises; working in any mine office; handling and transporting minerals up to the dispatch point; gathering and transporting sand to the mine; developing the mine (apart from regular buildings, roads, wells, or unrelated construction); and providing welfare, health, sanitation, or security services in the mine (excluding residential areas).

To receive benefits under the Act, an employer-employee relationship must be established. Thus, it is crucial to determine who qualifies as an employer and employee under the Code.

In the **Management of Reserve Bank of India vs. Their Workmen**¹⁰, the Supreme Court interpreted the concept of a "workman" under the IDA, 1947 which is similar to the definition of "employee" under the FA, 1948. The SC held that the designation of any employee is not conclusive; rather, the nature of duties performed by the person is the primary factor in determining their status as a workman (or employee) under the Act.

(C) Employer

According to Section 2(u) of the OSH Code 2020, an "employer" is defined as any person who, directly or indirectly, employs one or more employees in an establishment, either on their own behalf or on behalf of another individual. In cases where, the establishment is operated by a Department of the Central or the State Government, the designated authority specified by the head of the respective department will be considered the employer. In the absence of such a designation, this responsibility falls on the department head. The Chief Executive of the local

¹⁰ AIR 1996 SUPREME COURT 1241

authority is acknowledged as the employer for establishments under its management. The term also includes:

- Control exercised by a person over the affairs of any other establishment;
- The owner, agent, or manager as mentioned in Sec. 67 in case of mine;
- Contractors.
- Legal representatives of a deceased employer.

The term "employer" under the FA, 1948, in India is often subject to judicial interpretation. Establishing an employer-employee relationship is essential for providing relief to workmen under the Act.

In case of **BWSSB v. A. Rajappa**¹¹, the Supreme Court addressed the definition of "industry" under the IDA, 1948 which is closely related to the employer-employee relationships in factories. The SC interpreted industry based on the triple test and ruled that the term "industry" includes any systematic activity coordinated by between employer and employee for the production and/or distribution of goods and services.

The SC in **Regional Director, ESI Corporation v. P. K. Mohan**¹², clarified the definition of "principal employer" under the ESI Act, 1948 which often overlaps with the FA, 1948. The court held that a principal employer is responsible for the welfare of employees, including those working under a contractor within the factory premises.

Further in **DC Investment (P) Ltd. v. P. K. Prathapan**¹³, the SC emphasized the importance of employer's supervision and control over the workers while addressing employer-employee relationships and managerial control within a factory setting. Therefore, if an employee is under the employer's supervision and control, they are entitled to the benefits of welfare provisions.

(D) The Employer-Employee Relationship

The onus of proving the employer-employee relationship is on the workmen.¹⁴ Furthermore, the workmen's claim cannot be upheld in the absence of an employer-employee relationship.¹⁵ If the employee's name appears on the muster roll, the employer-employee relationship will exist; if not, it will not.¹⁶ Again, if contract labour is paid by the contractor, there is no employer-

¹¹ AIR 1978 SUPREME COURT 548. (Bangalore Water Supply & Sewerage Board v. A. Rajappa).

¹² (2000)IILLJ231RAJ

¹³ AIR 2005 SUPREME COURT 1624,

¹⁴ Madan v. Anmol Financial Services Limited, 2019 (161)FLR 679 (Delhi HC).

¹⁵ Pragati Engineers Workers Association v. National Highway Authority of India, 2019LLR 496 HP HC.

¹⁶ Ram Chandra Ram v. Central Coalfields Ltd

employee relationship between them and the main employer.¹⁷

(E) Consent in the Employer-Employee Relationship

Consent plays a crucial role in the employer-employee relationship, particularly in terms of agreements regarding working conditions, terms of employment, and dispute resolution. The concept of consent is pivotal in ensuring that both parties—employer and employee—enter into and maintain a fair and mutually beneficial relationship.

II. LEGAL FRAMEWORK

A number of laws and regulations, such as the FA, 1948, the IDA, 1947, and the OSH Code 2020, regulate the legal framework of consent in workplace interactions. These laws guarantee that consent is acquired and upheld during the duration of employment by outlining the rights and obligations of both employers and employees.

(A) Interpretation of Section 66 of the Factories Act, 1948

Section 66 of the FA, 1948, imposes additional restrictions on the employment of women in factories to supplement the existing provisions. It stipulates that women are not eligible for any exemptions from Section 54, which sets daily labour hours (Clause a). Women are prohibited from working in factories outside the hours of 6 A.M. to 7 P.M., although the State Government can vary these limits through notifications, provided that no woman is employed between 10 P.M. and 5 A.M. (Clause b). However, the appropriate government i.e. the State Government may vary the limits laid down in clause (b) for any factory, provided that no such variation authorizes the employment of any woman between the hours of 10 P.M. and 5 A.M.

The question related to the legal validity of section 66 (1) (b) came before the court in **Omana Oomen case**,¹⁸ the issue was regarding the legal validity of the denial of appointment to women employees by F.A.C.T. Ltd. on the basis of the requirement to work night shifts, citing sec. 66(1)(b) of the FA, 1948. The Court held that sec. 66(1)(b) of the FA, 1948 should not be used to discriminate against women in employment solely based on gender. The Court ruled that discrimination against women in the workplace on the basis of gender alone is prohibited under FA, 1948 Section 66(1)(b). It is also noted that other women had been employed in similar roles and male employees were working day shifts, indicating that the denial of employment based on night shifts alone was unjustifiable.

The court suggested that the company could have sought permission as per the proviso to sec.

¹⁷ National project construction v. P. O. industrial Tribunal

¹⁸ AIR1991KER129

66(1)(b) to accommodate women in day shifts, which it failed to do. The rationale behind the judgement is the constitutional principles of equality and non-discrimination. It emphasised that while protective labour laws are necessary, they should not become tools for perpetuating gender biases or denying equal employment opportunities to women. The court highlighted the need to interpret and apply protective provisions in a way that upholds gender equality and ensures fair treatment in employment practices.

(B) Sanuja v. Kerala State Beverages Corporation Ltd.

In this case, rule under Kerala State Beverages Corporation Ltd, prohibiting women from being employed in liquor shops was challenged. The Kerala High Court struck down the arbitrary rule prohibiting women from working in liquor shops, citing Article 14, 15, 16 and 19 of Constitution of India. The court determined that these regulations were discriminatory and had no legitimate connection to the nature of the work or the general welfare. The ruling affirmed the fundamental values of equality and non-discrimination against employment restrictions based on gender. The Court stressed that rules prohibiting certain genders from employment must have a valid basis and shouldn't propagate prejudices or stereotypes in society. The court's decision aimed to ensure that women have equal opportunities in employment, aligned with the constitutional guarantees of equality and non-discrimination.

(C) Treasa Josfine vs. State

In this case, the issue of denying a woman the opportunity to be recruited as a safety officer was brought before the Kerala High Court. The FA, 1948's Section 66(1)(b) application, which was used to reject her employment on the basis of only her gender, was the main source of contention. Gender equality in job possibilities is upheld by the Kerala High Court's finding that Section 66(1)(b) of the FA, 1948 cannot be used to reject employment on the basis of gender alone. The court underlined that narrow interpretations of labour regulations should not support gender discrimination because cultural developments have acknowledged women's skills in the modern workforce. The court observed that the objective of Section 66(1)(b) is to protect women from hazardous working conditions rather than to bar them from employment opportunities where they are qualified and willing. The judgment emphasized the evolving societal norms and the constitutional mandate of equality and non-discrimination. It recognized the changing roles of women in various sectors, including safety and security roles, and emphasized that labour laws should be interpreted in a manner that promotes gender equality and empowers women in the workforce. The court's decision aimed to strike a balance between protective labour laws and ensuring equal opportunities for women in employment.

III. ANALYSIS AND INTERPRETATION OF THE WORD “CONSENT” UNDER THE OSH CODE, 2020

(A) Definition of “Consent” under OSH Code, 2020: -

- The word “consent” has nowhere been defined under the Code, but it lays emphasizes on the importance of voluntary agreement in matters relating to working conditions, safety practices or hours of work. It is pertinent to understand the meaning of the word “consent” because the Code attempts to secure informed consent from the female workers. Generally, the word consent means to give permission or assent to do something; while agreeing to do something a person should have full knowledge as to what he/she is giving permission to do so. Consent is when a person willing accepts the proposal of the other person. Consent can be given in written form as well as orally.
- As per sec13 of The Indian Contract act defines “consent” as “two or more persons are said to consent when they agree upon the same thing in the same sense”.¹⁹ The concept of “consent” is based on the Latin legal maxim “consensus ad idem”. It means “agreement to the same thing” of “meeting of minds”.²⁰ So, to give consent means to have apt understanding of the agreement for which persons are agreeing to do and it should be the same matter on which persons are consenting.
- The consent given should be a free consent. As per sec14 of ICA, 1872, Consent is free when it is not caused by the following:
 - coercion,
 - undue influence,
 - fraud,
 - misrepresentation, and
 - mistake.²¹

Free consent ensures the validity and enforceability of the act for which the party has consented.

- Consent is of two types either expressed or implied.²²The expressed consent is called the explicit consent where there is an unambiguous agreement between the two parties and there is a clear communication of the same between the parties. The consent should

¹⁹ The Indian Contract Act, 1872, s. 13.

²⁰ The Indian Contract Act, 1872, s. 13.

²¹ The Indian Contract Act, 1872, s. 14.

²² The Indian Contract Act, 1872, s. 9.

be communicated in such a manner and language which is known to both the parties.

- Implied consent is where the agreement is given through some action or inaction which is inferred through the given circumstances, indicating that a person has agreed on the proposal.
- For informed consent, it is necessary that there is awareness among the workers about the nature of work they are going to perform, associated risk involved in such work and the safety measures that the employer is supposed to take. It is also essential that the workers comprehend the information provided to them regarding their duties and working conditions and moreover the consent must be given without any coercion or undue influence from employees.

The word 'consent has been defined as "an act of reason accompanied with deliberation, the mind weighing, as in balance the good or evil or either side consent supposes three things a physical power, a mental power and a free and serious use of them." If by acts and conduct are allowed otherwise freely and seriously without any objection for which consent is required consent will be implied.

IV. ESSENTIAL COMPONENTS OF CONSENT

Voluntary Mutual Agreement between the employer and the female employee: - For voluntary mutual agreement, it is necessary that there has to be an agreement. Sec2(e) of ICA, 1872 defines agreement as “every promise and set of promises forming consideration for each other is an agreement”.²³ Thus, promise here is an assurance that one party makes to the other to do or refrain from doing something. Most often, an agreement is an exchange of promise, which means party promises to do or refrain from doing something for a consideration. Consideration means anything of value that is exchanged between the parties to a contract.²⁴ In order to make that promise enforceable the promise has to be supported with consideration. Moreover, for consent it is required that there is a voluntary mutual agreement, which means that the terms and conditions in a contract between the parties should be agreed in the same sense by both the parties. There has to be “consensus ad idem” i.e. meeting of minds.²⁵ For consent, it is also required that the consent should be of voluntary nature. It means that there should be no coercion, undue influence, misrepresentation or mistake.

²³ The Indian Contract Act, 1872, s. 2 (e)

²⁴ The Indian Contract Act, 1872, s. 2 (d)

²⁵ The Indian Contract Act, 1872, s. 13.

Thus, according to sec27 of the OSH Code, 2020²⁶ if the employer wants the employee to work overtime, or employer wants to employ female employee beyond working hours (Sec43), or the employer wants women in dangerous operations (sec44), he has to take prior consent from the employee and that consent should be, first, voluntary i.e. without any coercion, undue influence, fraud, misrepresentation or mistake, secondly, employee and employer should mutually agree to the terms and conditions of such overtime work i.e. there has to be ‘consensus ad idem’ which means agree upon the same thing in the same sense.

Challenges: - A research study was conducted by ASSOCHAM on “Night Shifts for Women: Growth & Opportunities”. The said study was sponsored by National Commission for Women (NCW). The study aimed to find the impact of nightshifts. ASSOCHAM believes that certain favourable conditions are required in order to encourage women to work for night shifts. Such conditions are security, monetary compensation and provision of fringe benefits. The above study

Safety Concerns: - the research was conducted in 9 cities, which included namely Delhi, Kolkata, Mumbai, Bangalore, Ludhiana, Ahmedabad, Pune, Hyderabad and Chennai. The result showed that 71.1% do not feel insecure, whereas 28.9% respondents feel insecure in the night shift work. Near about 44 to 45% feel that Bangalore and Ludhiana are highly insecure zones, probably due to the Pratibha’s murder case in Bangalore and gender discrimination in Ludhiana could have played a major role for the insecurity level. Moreover, only 2 % get inhouse self-defence opportunity.²⁷

In Vishaka case the Supreme Court of India laid guidelines to prevent women from sexual harassment at workplace.²⁸

Issue: - The issue that arises is how far does the employer’s responsibility extend in ensuring that the women who has consented to work late hours is safe?

Should the employer provide only the safe transportation or the responsibility extends until the employee reach home?

Social Stigma: - Though our Constitution treats everyone equally, but still according to the survey, 13.5% women who work in night shifts face social and societal problem. Because of night shift jobs they are not able to provide time to their family members, they don’t spend

²⁶ The Occupational Safety, Health and Working Conditions Code, 2020. s. 27

²⁷ The Associated Chambers of Commerce & Industry of India (ASSOCHAM), “Night Shift For Women: Growth & Opportunities”, available at: <https://ncwapps.nic.in/pdfreports/NIGHT%20SHIFT%20FOR%20WOMEN.pdf>

²⁸ Ms. Khushboo Kamal, “Indian Laws on Women’s Safety in Night Shifts”, (2023) available at: <https://aishwaryasandeep.in/indian-laws-on-womens-safety-in-night-shifts/>

quality time with their children, nor attend their school functions.

Issue: - The question arises how can this social stigma be eradicated? The role of employers and the government to effectively address and combat the social stigma comes into picture. What specific actions can be taken to support and empower women in this context?

Health Issues: - By working in night shift, near about 13.3 % employees face mental health tensions. Dependence on their employers for even basic necessities like transportation, meals etc create mental health problems, near about 30% experience backache, some experience continual tiredness and some face digestive disorders, sleep difficulties, frequent cold and cough etc.

Issue: The question that needs to be addressed is the role of employer and government in this regard.

Coercion and Undue Influence: - some women might give consent because of coercion or undue influence being exercised by the employer at workplace.

Issue: - The OSH Code 2020 does not have express provision that addresses coercion or provide any mechanism for women to safely report such issue i.e. absence of whistleblower laws is an issue that needs to be addressed.

Educated decision making: - Educated decision making under the OSH Code, 2020 ensures that the women or workers, make voluntary, educated and autonomous choices about their employment conditions. This ensures that their rights of employees are protected. For informed decision making, it is required that there is full disclosure of information by the employer, there is clear understanding by the employees, there is no coercion i.e. there is an element of voluntariness, capacity to consent, consent has been properly documented, there is well established communication mechanism established between the employer and the employee encouraging the employees to raise their concerns. Thus, following are the essential ingredients for educated decision making: -

- a. Full Disclosure: - Sec43 of the Code²⁹ mandates the employer to disclose complete information regarding the working conditions, risks, benefits and the various rights of the employee. The employer needs to inform the employee about the work hours, safety protocols, potential hazards and compensation for the extra hours to be in by the employee. Further Sec84³⁰ imposes responsibility on the occupier of every factory that is involved in hazardous process to disclose to the workers all information relating to

²⁹ The Occupational Safety, Health and Working Conditions Code, 2020. S. 43

³⁰ The Occupational Safety, Health and Working Conditions Code, 2020. S. 84

dangerous health hazards and what measures does the employer take to eradicate such hazard. The act also states that a policy to be made by the employer with respect to health and safety of the workers and also to draw up emergency plan and detailed disaster control measure and information with regard to same to be shared with the employees working in the factory. The sec further states that if at any time occupier propose to engage in hazardous process, it shall within 30 days before the commencement of such activity, inform the Inspector cum Facilitator about the nature and details of the process.

Sec85³¹ further imposes responsibility on employer or occupier that is involved in any hazardous process to maintain registers of health records or medical records of employees who are exposed to any chemical, toxic or any other harmful substances and such records are accessible to the workers. The code lays down the responsibility on the state government to prescribes maximum permissible limits of exposure to chemicals and toxic substances.³² Sec89³³ states that if the workers who are employed in any factory that is engaged in hazardous process and he has reasonable doubt regarding any imminent danger in the factory, they can bring notice of the same to the person who is in- charge of the factory or the process. and the concerned person in charge of the factory will take immediate remedial action if he is satisfied about the existence of such eminent danger.

Case: - **Firoz Alam v. State of Chhattisgarh**³⁴

Parties involved: - Public Interest Litigation was filed by the Occupational Health, Safety, Sustainability Association India (OHSSAI) Foundation against the Principal Secretary Ministry- Department of Labour, Government of Maharashtra and others.

Facts: - A steel wire mesh carved in which resulted death of five construction workers and injuries to five others. A safety officer was arrested and it was contended that this arrest was unjust as his role was advisory in nature according to Factories Act.

Issues: The issue involved in the case was that whether the safety officer whose role is considered to be advisory in nature, should be liable and was the arrest justified for the accidents that had taken place. Moreover, there should be clarity of the roles and accountability of different safety officers involved. The need for clarity on the responsibilities and accountability of safety officers in such incidents are required.

³¹ The Occupational Safety, Health and Working Conditions Code, 2020. S. 85

³² The Occupational Safety, Health and Working Conditions Code, 2020. S. 88

³³ The Occupational Safety, Health and Working Conditions Code, 2020. S. 89

³⁴ *Firoz Alam v. State of Chhattisgarh* <https://indiankanoon.org/doc/451786/>.

Analysis: The Factories Act, 1948 mandates safety officers with roles such as advising management on safety measures to be followed, conducting safety inspections and ensuring that there is compliance with the law.

Held: - The court was of the opinion that the advisory role of safety officers does not absolve safety officers of responsibility towards the incident that had taken place. They have active duty to ensure compliance with the law and thus to ensure safety protocols are followed.

Issue: - The issue that needs to be addressed is that how detailed the information provided to employees should be for them to understand the potential risks and benefits.

- b. The manifested act: - For an educated decision making it is required that there should be an act. The act could be a statement (a declaration), a signature or a click on an “accept” icon or a nod of a head. Where there is a ‘promissory statement’ it raises questions with regard to interpretation of the words used in such statements and where it is an action i.e. ‘accept’, sign, it however raises questions on the identity of the actor and also raises question whether the actor understood the meaning of it. The presumption of signing a document or clicking on an ‘accept’ icon, is interlinked with the concept of ‘duty to read’. ‘Duty to read’ is a legal principle that generally means that the parties to the contract are obligated to read and understand the terms and conditions of the agreement before signing the same.³⁵ Thus, each party is responsible for knowing what is written in the contract and cannot later claim that they did not understand the terms of the contract. this doctrine is related to the doctrine of ‘caveat emptor’ which means ‘let the buyer beware’.³⁶ This doctrine means that it is the responsibility of the buyer for making an informed decision and are expected that they conduct their own due diligence before entering into a contract. This intentional manifestation or understanding of the terms and conditions is just one of the requirements for consent. If the consent given lacks voluntariness or knowledge, there is no consent, despite the manifested act.

Thus sec27, 43 and 44 requires consent from the employees (including female employees) and such consent shall be documented and the presumption that arises from an action, signing a document is that the employee has read the document, but if that consent lacks voluntariness or knowledge, there is no consent despite the act of signing.

- c. Understanding or Knowledge:- Various researches have revealed that the human beings

³⁵ “Duty to Read”, available at: <https://www.priorityjustice.com/business-contract-attorney>.

³⁶ “Duty to Read”, available at: <https://www.priorityjustice.com/business-contract-attorney>.

suffer from intellectual barrier, such as biases, difficulty in assessing complex information and Heuristics means that there are mental shortcuts or thumb rule principle being followed by some people. Due to time constraints, they regret the decision that they have made.³⁷ The famous case to depict the same is *Raffles v. Wichelhaus*.³⁸ Thus there has to be mutual assent which means both should agreeing upon the same thing in same sense, in the above case there was no agreement because the buyer and seller were thinking of different ships. The court may adopt two approaches to deal with the problem. The first approach is act- oriented approach, which means your signature means you agreed or intent- oriented approach, which means the court might look at the context and decide you didn't really understand or intend to agree to the terms.

For the consent provision under the OSH Code, 2020, the competent authority should adopt an intent- oriented approach which means that the authority might look at the context and decide you did not really understand or intend to agree to the terms.

- d. Voluntariness: The word 'voluntariness' is difficult to define. An individual who is physically forced to consent an act is not said to act voluntarily. Use of physical force or threat to use physical force means that there is no voluntariness. Thus, use of coercion, undue influence, fraud, misrepresentation is prohibited. Coercion is defined under Sec15, Undue Influence under sec16, Fraud under sec17 of the Indian Contract Act³⁹
- All the above cases show the lack of voluntariness among the employees. Thus, the workers should have autonomy to make decisions based on their personal circumstances and preferences. This includes the right to refuse work that they perceive as unsafe or beyond their capacity.
- e. Capacity: Certain categories of people are incapable of entering into an agreement Thus, employees employed by an establishment should be major, sound mind and not disqualified by law from contracting. Children below the age of 18 years and mentally infirm may escape contracts because courts presume, they lack the ability to meet the knowledge condition necessary for valid contract.⁴⁰
- f. Consent Procedures and Women Safety

³⁷ Nancy S. Kim, "Relative Consent and Contract Law", (2017) available at: https://scholars.law.unlv.edu/cgi/viewcontent.cgi?params=/context/nlj/article/1729/&path_info=pjkk4qgusf67nm40k96i8rvgy8rw665.pdf

³⁸ Dr R.K Bangia, *Contract Law- I*, (Allahabad Law Agency, 2023)

³⁹ The Indian Contract Act, 1872, s. 17

⁴⁰ The Indian Contract Act, 1872, s. 11

- Consent for hazardous work: - Sec43⁴¹ of the Code provides that women shall be entitled in all establishments to work beyond hours of work i.e. before 6 a.m. and beyond 7 p.m. Such working to be allowed only, if necessary, steps are taken with regard to safety, working hours or such other condition to be observed by the employer.
- Sec44⁴² of the Code mandates that where the appropriate Government can assess that particular hazardous activity is taking place in an establishment, the Government may ask the employer to provide adequate safeguards prior to engaging in such activity and involving the women in such activity.⁴³

g. Challenges: -

- Ensuring proper safeguards are taken could be challenging especially in smaller or less regulated establishments. Moreover, continuous monitoring whether the establishments are ensuring proper compliance with the secis required. Understanding ‘what constitutes dangerous?’ could be challenging and may lead to potential inconsistencies in the application of the provision. The word “adequate safeguards’ could be open for interpretation. This makes it necessary that the appropriate government should ask employer to frame proper safeguards. This at the same time can lead to additional costs for employers, challenging the small establishments.
- Sec44 tries to create a safer work environment for women, thereby promoting gender equality, but if it is not carefully implemented, the provision might lead to discrimination. Employers might not hire women for certain roles to evade the additional cost burden that it will impose. Despite, having the legal provision, cultural and social attitudes towards women in certain jobs or hours might pose challenges. Moreover, the secmandates that the women can be allowed to work before 6 am and beyond 7 pm only when consent has been taken. The consent may not be genuine or may not be voluntary due to coercion or undue influence. Safeguards should be prescribed and properly documented to show that the consent is genuine and not the forced consent.
- Working hours and overtime: - Sec27 of the OSH Code states that there shall be paid wages for the overtime work, but this overtime work can only be allowed if there is consent of the worker. Thus, if a female worker is working overtime, consent of the

⁴¹ The Occupational Safety, Health and Working Conditions Code, 2020. s. 43

⁴² The Occupational Safety, Health and Working Conditions Code, 2020. s. 44

⁴³ The Occupational Safety, Health and Working Conditions Code, 2020. s. 44

female worker is mandatory by sec27 of the Act and the female worker will be paid for the overtime work which is twice the rate of wages. The sec further provides that the appropriate government may prescribe the total number of hours of overtime.

h. Analysis of the above provision: -

Sec27⁴⁴ mandated that the workers be compensated for the extra time they are putting in, which is a strong incentive and the compensation is also fair for the additional hours of work they are putting in. the potential issue which can be foreseen is that despite fixing the fair compensation, the effectiveness of this provision could be a challenge as the effectiveness depends on the proper enforcement mechanism and timely paying the workers. Moreover, flexibility provided to for the calculation of overtime work (daily or weekly, whichever is more suitable to the worker) will create confusion and administrative burden if not communicated or standardized properly within the organization. Further, the requirement of consent mandated by the provision can in actual practice make workers feel pressured to consent to overtime work due to fear of losing their jobs or any other means of coercion can be used to force them to work extra time. Thus, here employers are required to maintain proper proof of documentation which should state that the consent is not caused by coercion or undue influence and the consent should be informed consent i.e. the workers should be informed the time of work they will be subject to when required to work overtime.

The provision further states that the Government “may” prescribe the maximum hours of overtime. This would help in setting the maximum limit, but, however, this part of the provision is not mandatory and further it leads to inconsistency. This means that different state governments will frame different rules and thus inconsistency would prevail in the country and thus effective implementation and monitoring of these limits could be challenging

Revocation of the contract without negative repercussions: - the issue of consent and its revocation is crucial. The provisions under OSH Code, 2020 do state about consent which has to be documented, but it does state about the revocation of consent. Without revocation procedure the employees may feel trapped, which may further lead to increased anxiety, stress and their inability to change their circumstances. Thus, all this can lead to health impacts. Thus, might compel them to work in environment which is not favourable to them. Erosion of trust between employees and management can take place, which can further impact employee engagement, job satisfaction and overall organizational culture. Thus, for fair and supportive work environment it is necessary that revocation of consent provision is introduced and allow

⁴⁴ The Occupational Safety, Health and Working Conditions Code, 2020. s. 27

employees to make their own informed choices about their working conditions. Clear guidelines should be established and procedures for both granting and revoking consent, thus employers can contribute towards transparency and thus respecting the rights of employees.

V. RESPONSIBILITY OF EMPLOYERS

Section 23 of OSH Code, 2020 deals with Employer's Responsibilities. It imposes two-fold responsibilities general and specific.

General Responsibilities

Under the OSH Code 2020, Section 23(1) mandates that employers are responsible for maintaining prescribed health, safety, and the working conditions within their establishments. The Central Government sets these standards, and the employer must ensure these conditions are met, promoting a safe and healthy work environment for all employees.

Specific Provisions

Section 23(2) elaborates on the general responsibilities by allowing the Central Government to prescribe specific provisions that establishments or classes of establishments must follow. These include ensuring cleanliness and hygiene to prevent health hazards and regulating ventilation, temperature, and humidity to create a comfortable work environment. Additionally, employers must maintain an environment free from dust, noxious gases, fumes, and other impurities.

Further, employers are required to implement adequate standards for humidification and air quality, including artificially increasing humidity, ventilation, and cooling in workrooms. Providing safe and potable drinking water is also a critical responsibility. To prevent overcrowding, employers must ensure sufficient space for employees and maintain adequate lighting for safety and productivity.

Sanitary facilities must be sufficient and hygienic, with separate accommodations for male, female, and transgender employees. Effective waste and effluent management systems must be in place to prevent environmental contamination. Lastly, employers are required to implement any other arrangements deemed necessary and appropriate by the Central Government to safeguard the health, safety, and well-being of employees. These comprehensive provisions ensure that the workplace remains safe, healthy, and conducive to employee welfare, reflecting the broader mandate of the OSH Code 2020.

VI. CONCLUSION

The said Code of 2020 represents a significant step towards ensuring safety and wellbeing of

women at workplace. It has very significant provisions, especially concerning mandatory consent provision for late- night work. However, the lack of explicit guidelines on revoking such consent can lead to several drawbacks for employees, including less or diminishing autonomy, increased health risk, potential exploitation. Real life examples highlight the complexities and challenges in implementing such provision and creating awareness about the existing provisions. Challenges such as health risk, social stigma and safety concerns spoil the work life balance. Employers must be proactive in implementing such provisions in true letter and spirit and they should respect the consent provision, provide support to the employees. The true intent of the OSH Code, 2020 is to foster an inclusive and safe working environment for women, thus it becomes imperative that employers, government, policy makers and stakeholders collectively address these gaps. Ensuring compliance will lead to transparency and fairness in consent related processes, thus empower employees especially women in vulnerable sectors to make informed decisions or choices about their work hours and conditions.
