

Rules & Regulations Review

Draft Rules under Code on Social Security, 2020

Key Features of the Rules

- ◆ The Draft Rules provide for the registration of establishments required to pay provident fund and employees' insurance benefits to workers. It also specifies detailed procedures for payment of various benefits such as insurance, gratuity, and maternity benefits.
- ◆ The Draft Rules specify the manner of constituting various social security organisations (under the Code) and the conditions of service of members of these organisations.
- ◆ The Draft Rules also provide for Aadhaar-based registration of construction workers, unorganised workers, and gig and platform workers. Migrant construction workers will be entitled to benefits in the state where they are working.

Issues and Analysis

- ◆ The Draft Rules do not specify rules for certain matters where the central government has the rule-making power. These include matters related to employee compensation, misuse of benefits, and payment of gratuity.
- ◆ The Code provided that every establishment with 50 employees or any number of employees prescribed by the central government should have a crèche. The Draft Rules mandate every establishment with 50 or more *women* employees to provide for a crèche. The Draft Rules change the category of employees for an establishment to have a crèche.
- ◆ The Draft Rules provide for a quorum (minimum number of members to be present) for a meeting of any social security organisation. In case of insufficient quorum, the meeting will adjourn by an hour, after which business may be transacted. It may be argued that such a short time period may not be reasonable for securing the attendance of members.
- ◆ The Draft Rules provide that a new employee must be registered with his Aadhaar number for insurance under ESIC. This may violate the Puttaswamy judgement which provides that Aadhaar number may only be made mandatory for expenditure on a subsidy, benefit, or service incurred from the Consolidated Fund of India.

In 2019, the central government consolidated 29 central laws regulating various aspects of labour into four codes. These Codes regulate: (i) wages, (ii) industrial relations, (iii) social security, and (iv) occupational safety, health and working conditions. All these Codes have been passed by Parliament.

The Code on Social Security, 2020 provides measures to ensure access to health care and provision of income security to workers. It replaces nine laws related to social security, including the Employees' Provident Fund Act, 1952, the Maternity Benefit Act, 1961, and the Unorganised Workers' Social Security Act, 2008. Following the notification of the Code on Social Security, 2020, the government circulated the Draft (Central) Rules to the Code on November 13, 2020, for public feedback.

KEY FEATURES

These Draft Rules will apply to all central sector establishments. These include: (i) railways, mines, oilfields, and banking companies, and (ii) establishments carried on by or under the authority of the central government.

- **Organised sector schemes:** Under the Code, the central government may notify various social security schemes for the benefit of workers, including employee provident fund (EPF), employees' state insurance (ESI) benefits, gratuity, and maternity benefits. The Draft Rules provide for the registration of establishments required to pay EPF and ESI benefits to workers. It also specifies detailed procedures for payment of these benefits. For example, it specifies the contribution rate under the ESI scheme to be: (i) 3.25% of employee wages as the employer's contribution, and (ii) 0.75% of wages as the employee's contribution.
- The Draft Rules provide that there shall be a crèche facility in every establishment with 50 or more women employees. Further, it provides detailed procedures for application and payment of gratuity.
- **Social Security Organisations:** The Code provides for the establishment of several bodies to administer the social security schemes, such as the Central Board of Trustees to administer the EPF scheme, and an Employees State Insurance Corporation to administer the ESI Scheme. The Draft Rules provide for the manner of constituting these organisations, the composition of various sub-committees under these organisations and specifies their power, functions, and term. It also provides for the manner of transacting business, the quorum for conducting meetings, frequency of meetings, and the fee and allowances of members of such organisations.
- **Exemptions:** The Code provides that the central or state government may exempt an employer or an establishment from any or all of the provisions of the Code or schemes framed under it. The Draft Rules provide that such an exemption may be granted if: (i) the employees of an establishment receive benefits similar or superior to the benefits granted by the EPF or the ESI scheme, or (ii) the establishment has been complying with the EPF or the ESI scheme for three years continuously before making the application for exemption and has not defaulted in payment of contribution during such period, among others.
- **Building and construction workers:** The Code provides for the payment of a cess for the welfare of construction workers and their registration to avail benefits. The Draft Rules provide for Aadhaar-based registration of construction workers on the portal of the central or state government or the state welfare boards. When a construction worker migrates from one state to another, he will be entitled to benefits in the state where he is working. The Rules also specify the procedure for self-assessment and payment of cess by the employer. Further, it provides that delay in payment of cess will invite a penalty of 1% every month.
- **Unorganised workers, and gig and platform workers:** The Code provides for the registration of unorganised, gig and platform workers to avail any benefits under any social security scheme. Gig workers refer to workers outside of the traditional employer-employee relationship (e.g., freelancers). Platform workers are workers who earn money by providing specific services to organisations or individuals through online platforms. Unorganised workers include home-based and self-employed workers. The Draft Rules provide for Aadhaar-based registration including self-registration by unorganised workers, gig workers and platform workers on the central government portal.
- Gig and platform workers will be eligible to register if they are between the age of 16 and 60. Gig worker's companies will need to pay a monthly contribution. Delay in such payment will invite 1% penalty every month. Further, it will be the responsibility of the state government, the unorganised workers' board, or the aggregators or contractors to register eligible unorganised workers, gig workers, or platform workers who are not registered under the ESI or EPF schemes on the central government portal.

KEY ISSUES AND ANALYSIS

Rules on several provisions of the Code not specified

The Code empowers the central government (as the appropriate government) to frame rules for establishments under its authority, and for certain establishments such as railways, mines, and banks, among others.¹ Further, the Code gives the central government the exclusive powers to make rules on certain other matters. The purpose of empowering the government to make rules on certain matters is to allow them to specify operational details of how provisions under the Code may be implemented. However, the Draft Rules do not contain provisions on some of these matters. This may hinder the implementation of the corresponding provisions of the Code.

Code:
 Clauses
 21(1),
 57(1,2,3,4),
 58(1),
 77(3)(a),
 82(4),
 89(1),
 92(1,3),
 93(3), and
 148
 Rules: Rule
 36

Matters where the central government (as the appropriate government) is empowered to frame rules include rules on writing off dues, proceedings before the Employees' Insurance Court, and time limit for paying construction cess. However, the Draft Rules do not specify rules on some of these matters. For example, the Code permits establishments with at least 100 employees to maintain a separate provident fund for their establishments, if the employer and majority of employees agree. The manner of maintaining this account will be prescribed by the central government. In the absence of rules, it is unclear how such establishments may maintain a separate provident fund account. Similarly, the Code states that the appropriate government can deprive an entity from any benefit under the Code if it has misused the benefit. The rules will specify the manner for determining the misuse of benefits. However, the Draft Rules are silent on how such determination will be made. Therefore, it may be difficult to enforce the provisions related to the misuse of benefits by an establishment until the rules are notified.

Further, the Code exclusively empowers the central government to make rules for certain matters. For example, it empowers the central government to make rules for certain matters related to employee compensation in the case of occupational injury or disease. These include rules on: (i) the rate of default interest payable on compensation, if the compensation is delayed, and (ii) the form, manner, and fee to send an application to a competent authority to claim compensation. However, the Draft Rules do not specify rules on any employee compensation matter. This may affect the rights of the employees to seek compensation under the Code. Note that under the Workmen's Compensation Act, 1923, the central government had notified the Workmen's Compensation Rules 1924.² The 1923 Act provided a minimum interest rate to be paid on delayed compensation.³ The 1924 Rules covered the manner of recording a memorandum indicating that compensation has been settled by agreement, and the form and manner to send an application to claim employee compensation.

Certain matters left for regulation rather than rule-making

Rules: Rule
 22 and
 25(2)

There are certain matters where the Code has empowered the central government to make rules, however, the Draft Rules have left the matters to be decided through regulation. These include: (i) the amount of funeral expenses to be paid by the Employees' State Insurance Corporation (ESIC) for a deceased insured person, and (ii) the form of application for appeal against the decision of a Medical Board before a Medical Appeal Tribunal (which can be made by an insured person or by the ESIC). The latter category includes appeals against decisions of the Board related to: (i) whether an accident resulted in permanent disablement, or (ii) whether the extent of loss of earning capacity can be assessed provisionally or finally.

This could raise the issue of conflict of interest since the ESIC is also a stakeholder for these provisions. That is, the ESIC is responsible for paying out the funeral expenses for a deceased insured person, and the ESIC may also be a party in the proceedings for an appeal against the decision of a Medical Board. It may be questioned whether it is appropriate for the ESIC to be setting norms in matters where it is also an affected party. Note that in the Employee's State Insurance (Central) Rules, 1950 (to be replaced by these Rules), these matters were specified in the Rules itself and were not left to be decided through regulations. For example, the Rules set the amount of funeral expenses at Rs 10,000.⁴

Some issues on rules related to the provision of crèches

Rules:
 Rules 39(1)
 and 39(3)
 Code:
 Clause
 67(1)

The Code provides that there will be a crèche in every establishment with 50 employees or such number of employees prescribed by the central government. The Draft Rules provide that there shall be a crèche in every establishment with 50 or more *women* employees. Thus, the Draft Rules change the category of employees for an establishment to provide for crèches from 50 employees (in the Code) to 50 *women* employees. Therefore, the Draft Rules may exceed the scope of authority permitted under the parent Act, since the Act only empowers the government to change the number of employees, and not the category of employees.

The Code also provides that the distance within which a crèche shall be maintained will be prescribed by the central government. The Draft Rules provide that the crèche shall be provided within the establishment, or at an "appropriate distance" from the establishment so that it is easily accessible to women employees, including those working from home. It does not define "appropriate distance", which may leave scope for differing interpretations of the term. Further, providing for a crèche which is easily accessible to women "working from home" may create operational issues. For example, if women employees of an establishment work from home and live in different cities, it may be difficult to ensure that there are crèches which are easily accessible from all of their homes.

Note that the minimum guidelines for crèches (under the Maternity Benefit Act, 2017) provide that the crèche should be within 500 metres of the workplace or in the beneficiaries' neighbourhood.⁵ It also provides certain advantages and disadvantages of providing a crèche near a worksite and near the beneficiaries' neighbourhood. A near worksite crèche is convenient as parents can be contacted easily and mothers can easily come to breastfeed

their child.⁵ However, getting the child to the worksite crèche can be difficult especially in extreme weather or if they use public transport. Conversely, it is easier for parents to drop and pick up their child from a neighbourhood crèche. However, mothers may not be able to breastfeed their child at frequent intervals.⁵

Quorum requirements may be unreasonable

Rules:
Rule 12(4)

The Draft Rules specify provisions on how social security organisations set up under the Code may conduct their meetings. One of these rules provides for the quorum (minimum number of members to be present) for business to be transacted at a meeting. This includes the presence of: (i) 15 members for the ESIC, and (ii) 10 members for the National Social Security Board for Unorganised Workers (NSSB). In case of insufficient quorum, the Chairperson of the meeting will adjourn the meeting for an hour and thereafter convene it and conduct business. It may be argued that such a short time period may not be reasonable for securing the attendance of members. Note that this provision differs from the existing rules and regulations governing meetings of the EPFO, the ESIC, and the NSSB.^{4,6,7} The existing Rules require the meeting to be adjourned to another date (up to seven days later in the case of EPFO and ESIC) in case there is insufficient quorum. In case the quorum is inadequate at the next date, the Chairperson of the meeting may proceed with transacting business at the meeting.

Mandatory linking with Aadhaar may violate Supreme Court judgement

Rules:
Rule 19(1),
19(2), and
47

The Code provides that every employee in an establishment registered under the Employees' State Insurance Corporation (ESIC), shall be insured in the manner prescribed by the central government. The Draft Rules provide that the employer of such an establishment must register a new employee for insurance by entering his Aadhaar number on the government portal. An Aadhaar-linked identity card will be provided by the ESIC to the insured person and each of his dependent family members. Further, the Draft Rules provide that every building and construction worker shall be registered on a government portal through Aadhaar for availing various benefits.

This may violate the Supreme Court's *Puttaswamy-II* judgement.⁸ In its judgement, the Court had ruled that Aadhaar number may only be made mandatory for expenditure on a subsidy, benefit, or service incurred from the Consolidated Fund of India. Applying this principle, the Court has struck down the mandatory linking of bank accounts with Aadhaar. Since contribution towards the insurance of employees are only made by the employers and the employees, and contribution towards the benefits for construction workers are made from the cess paid by employers, and not from the Consolidated Fund of India, making Aadhaar mandatory for these provisions may violate the limits on the usage of Aadhaar specified by the judgement.

Purpose of requiring disclosure of religion in nomination form for gratuity unclear

Rules:
Rule 34(1) -
(4), and
Form III

The Code states that gratuity is payable to certain employees such as those who have completed five years of continuous service, and working journalists who have completed three years. The Draft Rules provide for a nomination form (Form III) in which the employee can appoint nominees who can claim his gratuity in the event of his death. The nomination form requires the employee to provide certain details at the end of the form. This includes his name, sex, religion, marital status, date of appointment, address, and post held. It is unclear why the religion of the employee is relevant for the purposes of filing the nomination. However, note that the existing Payment of Gratuity (Central) Rules, 1972 contain a similar requirement in the form for nomination.⁹

Drafting Errors

The Draft Rules have certain drafting errors. These are:

Rules: Page
1 of the
Gazette
Notification
before the
text; Rule
9(d) and
35(1), and
Form IV

- The gazette notification on the Draft Rules provides for the supersession of certain existing Rules (notified under the Acts which the Code subsumes) such as the Employees' State Insurance (Central) Rules, 1950. The Draft Rules also provide for the supersession of the "Tribunal (Procedure) Rules, 1997". However, these Rules could not be located. This may be a drafting error and the Rules may be referring to the existing Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 (under the EPF Act, 1952).
- The Code states that gratuity is payable to: (i) employees who have completed five years of continuous service, (ii) working journalists who have completed three years, and (iii) fixed-term employees (i.e., employed for a fixed duration) on termination of their contract. The Draft Rules provide that an employee eligible for gratuity can apply for gratuity in Form IV of the Rules. However, the form only provides an option to select completion of service of five years in the organisation or on termination of fixed-term employment. It does not capture the option of completed service of three years in the case of journalists.
- The Code provides for the constitution of the National Social Security Board for unorganised workers, which will have various members including 14 members representing unorganised sector workers and employers. The

Draft Rules provide that the central government *may* seek nomination from the representatives of associations of unorganised sector workers and employers for the Board. The word ‘may’ could be a drafting error, as the Code requires that the National Board *shall* include 14 people representing the unorganised sector.

Comparison of draft Rules with existing Rules

Rules: Rule 9(5), 9(8), 14(4) - (5), 44, 49(2) - (3), and 58(1)

The existing Rules (proposed to be replaced) contained detailed procedures on several provisions of the Code. Similar provisions are absent in the Draft Rules. These include provisions related to data collection requirements, and rates of contribution payable to employees under certain schemes. Further, the Draft Rules vary from the existing rules in certain aspects. For example, the Building and Other Construction Workers’ Welfare Cess Rules, 1998 allowed *trade unions*, assessing officers, or inspectors to file a complaint with the state government for any violation related to returns, rendering false information, or evading payment of cess.¹⁰ However, the Draft Rules do not allow unions to file such a complaint.

We compare the key differences between the existing Rules and Draft Rules in Table 1 below. This Table does not intend to suggest that any missing/modified provisions from existing Rules must be included. The purpose of the table is to identify provisions which have been deleted or modified.

Table 1: Key differences between Existing Rules and Draft Rules 2020

Provision	Existing Rules	Draft Rules
Employees’ Provident Fund (EPF)	<ul style="list-style-type: none"> The Act empowers industrial tribunals to hear PF-related appeals. The central government will notify rules on the form and the manner of filing the appeal. The Rules provide that the place for filing appeals with a Tribunal will be where the cause of action has arisen. An employer must deposit 75% of the amount due from him before filing an appeal before the Tribunal. 	<ul style="list-style-type: none"> The Act contains similar provisions. The Draft Rules provide that the place for filing appeals with a Tribunal will be where: (i) the cause of action has arisen, or (ii) <u>the office of the party against whom relief is sought</u>, is located. The Draft Rules <u>reduce</u> the appeal amount from 75% to 25%.
Maternity benefits	<ul style="list-style-type: none"> The Act allows a woman to appeal before a competent authority. The authority will be prescribed by rules. The Rules define the competent authority to mean the Chief Labour Commissioner (Central). The Rules also specify separate forms for recording: (i) data on employment, dismissal, number of claims and medical bonus payment to women workers, and (ii) details of payments in a year made to such workers. 	<ul style="list-style-type: none"> The Act contains similar provisions. The Draft Rules define the authority to mean one as specified by the central government, but do not specify who the authority would be. Similar forms on data collection are not specified in the Draft Rules.
Gratuity	<ul style="list-style-type: none"> The Act provides for payment of gratuity to employees who have served for five years, with exceptions. Establishments are required to submit forms on opening or closing, or if there are modifications to their name, address, employer or nature of business. Gratuity authority is required to record details related to disputes in payment. These include details of the applicant and employer, amount of gratuity claimed, details of findings, and amount of cost awarded. 	<ul style="list-style-type: none"> The Act contains similar provisions. The Draft Rules do not contain provisions requiring the filing of forms for change or closure of the establishment. The Draft Rules do not contain the form for recording cases related to payment of gratuity.
Building and construction workers’ cess	<ul style="list-style-type: none"> The Act empowers the state government to enter premises and exercise other powers given in the Act. The Rules empower the assessing officer to: (i) enter any establishment, and (ii) direct the employer or any person-in-charge to not remove or disturb any material or machinery for as long as needed for examination. The Rules allow a trade union, assessing officer or inspector to complain to the Board about certain violations (e.g. for evading payment of cess). The Board may refer the complaint to the state government. The Act states that failure to pay cess will attract a default interest of 2% per month until the amount is paid. 	<ul style="list-style-type: none"> The Act contains similar provisions. The Draft Rules modify the powers to provide that: (i) the assessing officer can enter an establishment <u>only with the approval</u> of the Secretary, Welfare Board, and (ii) <u>removes the power</u> to direct the employer to remove or disturb material or machinery. The Rules allow parties to directly file a complaint with the state government; but <u>removes the right</u> of a union to file such a complaint. The Rules <u>change</u> the default interest for non-payment to 1%.
Unorganised Workers’ social security	<ul style="list-style-type: none"> The Act provides for the resignation of Board members. The Rules state that any member can resign by a letter addressed to the Chairperson of the Board. The Chairperson will have the power to accept a resignation from a member, and then must report it to the Board. 	<ul style="list-style-type: none"> The Act contains similar provisions. The Draft Rules <u>change</u> the requirement of addressing resignation to the central government instead (which has the power to accept it). Further, it is <u>not required</u> to notify the resignation to the Board.

Employment Exchanges	<ul style="list-style-type: none"> ▪ The Act sets up employment exchanges to provide career services to employers and prospective workers. Public sector establishments and private establishments (with at least 25 workers) must notify vacancies. ▪ The Rules require employers to give details of selection of any candidates to the exchange within 15 days. 	<ul style="list-style-type: none"> ▪ The Act sets up career centres to perform similar functions. The Draft Rules require public establishments and private establishments (with at least 50 workers) to notify vacancies. The Draft Rules also remove the requirement of reporting the selection of workers to the centre.
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Sources: Employees' State Insurance (Central) Rules, 1950; Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997; Employees' Provident Funds Appellate Tribunal (Conditions of Service) Rules, 1997; Employment Exchanges (Compulsory Notification of Vacancies) Rules, 1960; Maternity Benefit (Mines and Circus) Rules, 1963; Payment of Gratuity (Central) Rules, 1972; Cine-Workers Welfare Fund Rules, 1984; Building and Other Construction Workers' Welfare Cess Rules, 1998; Unorganised Workers' Social Security Rules, 2009; Draft Rules, 2020; PRS.

1. The Code on Social Security, 2020, https://www.prsindia.org/sites/default/files/bill_files/Code%20On%20Social%20Security%2C%202020.pdf.
2. The Workmen's Compensation Rules, 1924, https://upload.indiacode.nic.in/showfile?actid=AC_CEN_6_0_00041_192308_1523344685594&type=rule&filename=part1.pdf
3. The Employee's Compensation Act, 1923, <https://www.indiacode.nic.in/bitstream/123456789/2378/1/A1923-08.pdf>.
4. The Employees' State Insurance (Central) Rules, 1950, <https://www.esic.nic.in/Tender/ESIRules1950.pdf>.
5. Guidelines for setting up and running crèche facility under the Maternity Benefit Act 2017, <https://wcd.nic.in/sites/default/files/National%20Minimum%20Guidelines.pdf>.
6. The Employees' Provident Funds Scheme, 1952, https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFScheme.pdf.
7. Unorganised Workers Social Security Rules, 2009, https://labour.gov.in/sites/default/files/Unorganisedworkers%20rules2_0_0.pdf.
8. Justice K.S. Puttaswamy Vs. Union of India, Supreme Court, Writ Petition (Civil) 494 of 2012, September 26, 2018, <https://sflc.in/updates-aadhaar-final-hearing/aadhaar-judgement>.
9. The Payment of Gratuity (Central) Rules, 1972, <https://labour.gov.in/sites/default/files/Rules-1972.pdf>.
10. The Building and Other Construction Workers' Welfare Cess Rules, 1998, <https://clc.gov.in/clc/acts-rules/building-and-other-construction-workers>.

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