

PROCEDURE FOR ISSUE OF SHARES UNDER SCHEME OF EMPLOYEE STOCK OPTION PLAN [ESOP]

*{Section 62(1)(b) read with Rule 12 of the Companies
(Share Capital and Debentures) Rules, 2014}*

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Relevant Sections, Rules and Forms at a Glance

Particulars	Section(s), Rule(s) and Name of e-Form(s)
The Companies Act, 2013	Sections 39, 46, 62, 88, 117, 118, 173, 178, 179 and 403
The Companies (Share Capital and Debentures) Rules, 2014	Rules 5, 12 and 19
The Companies (Management and Administration) Rules, 2014	Rules 3, 5 and 24
The Companies (Prospectus and Allotment of Securities) Rules, 2014	Rule 14
The Companies (Registration Offices and Fees) Rules, 2014	Rules 7, 8 and 12
Secretarial Standard-1 of ICSI	Clauses 3, 4, 5, 6, 7 and 8
Secretarial Standard-2 of ICSI	Clauses 1, 3, 4, 5, 6, 7 and 17
e-Forms to be filed	MGT-14 (in case of public company) PAS-3 (when option is exercised by employee)

Significant Relevant Approvals and Requirements

- ❖ Nomination and remuneration committee resolution wherever applicable
- ❖ Board resolution
- ❖ Special resolution

- ❖ Option can be given to employees of the company or holding or subsidiary company with limitations
- ❖ Separate special resolution in case of grant of option to employees of subsidiary or holding company or grant of option to identified employees, during any one year, equal to or exceeding 1% of the issued capital, excluding outstanding warrants and conversion of the company at the time of grant of option
- ❖ Gap of a minimum period of 1 year between the grant of options and vesting of option
- ❖ Option granted to employees shall not be transferable to any other person and it shall not be pledged, hypothecated, mortgaged or otherwise encumbered or alienated in any other manner
- ❖ Freedom to determine the exercise price in conformity with the applicable accounting policies
- ❖ Entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised in case of unlisted public company, except Nidhi company, Government company or wholly owned subsidiary company

55.1 PROCEDURE WITH CHECK POINTS

S. No.	Particulars
1.	<p>Ensure that—</p> <ul style="list-style-type: none"> • the shares shall be issued only to the employees of the company and employee means: <ul style="list-style-type: none"> (a) a permanent employee of the company who has been working in India or outside India; or (b) a director of the company, including a whole time director but excluding an independent director; or (c) an employee, as defined in clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company, but does not include— <ul style="list-style-type: none"> (i) an employee who is a promoter or a person belonging to the promoter group; or (ii) a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company. <p style="margin-left: 40px;">Provided that in case of a startup company the conditions mentioned in (i) and (ii) above shall not apply upto ten years from the date of its incorporation or registration. {Section 62(1)(b) read with rule 12(1) of the Companies (Share Capital and Debentures) Rules, 2014}.</p> • that issue of employees stock option scheme shall be passed by passing a special resolution and separate resolution of shareholders shall be passed in case of grant of option to employees of subsidiary or holding company or grant of option to identified employees, during any one year, equal to or exceeding 1% of the issued capital, excluding outstanding warrants and conversion of the company at the time of grant of option {Rule 12(1) read with rule 12(4) of the Companies (Share Capital and Debentures) Rules, 2014}.

S. No.	Particulars
	<p>The subscribers, who are individuals in the Memorandum of Association (MOA) shall be deemed as first directors until the directors are duly appointed by the members in accordance with Section 152 of the Companies Act, 2013 and rules made thereunder (Section 152 of the Act).</p> <ul style="list-style-type: none"> • Not the person intended/proposed to be appointed a director of a company has a valid Director Identification Number (DIN) under section 174 or any other number as may be prescribed under section 174 of the Companies Act, 2013, however, in case of first directors of a new company, the DIN up to 3 (three) persons can be obtained through incorporation with integrated form SPICe+ (INC-32) (Section 152 of the Act read with rule 152 of the Companies Incorporation Rules, 2014). • Not a total number of directors, at least one director has stayed in India for a total period of not less than 182 days during the financial year. Provided that in case of jointly incorporated companies, residential status shall be determined proportionately. However, it is not required in case the director is appointed by the Central Government or State Government (Section 152 of the Act). • A person, who is intended to be appointed, shall not be eligible for appointment, if he/she has any disqualification for appointment under section 164 of the Act (Section 164 of the Act read with companies provisions a government company and regulations in COA 2012 about COA 2012). • A person proposed to be appointed as a director in a company other than a company registered under Section 8 (non-profit company) of the Companies Act, 2013 (Section 152 of the Act) <ul style="list-style-type: none"> - shall not hold office as a director including any alternate directorship in more than 20 companies including directorship in dormant companies. - shall not hold office in more than 10 public companies including the private companies which are holding or subsidiary of public companies.
2.	In case of one person company, an individual being sole member is deemed to be the first director of the company, if the articles of association has not mentioned the names of first directors (Section 152 of the Act).
3.	Forms created in writing, on or before appointment, from the appointed director to act as director in the company as Form 208-2 (Part 2 of the Companies Appointment and Qualification of Directors) Rule, 2014.
4.	Forms in electronic in writing, on or before appointment, from the appointed director as Form 208-2 regarding that he/she is not disqualified under Section 164 of Companies Act, 2013, to act as a Director (Section 164 of the Act read with rule 17 of the Companies Appointment and Qualification of Directors) Rule, 2014.
5.	The particulars of first directors to be integrated with Form SPICe+ (INC-32) at the time of incorporation of company.

For the detailed procedure, please refer Company Law Procedures & Compliances by Dr. Sanjeev Gupta, 2nd edn, 2021. You can buy from your bookseller or online at www.bharatlaws.com

[COMPANY LAW Procedures & Compliances \(in 2 vols.\)](#)