

Labor & Employment Law Strategic Global Topics

Sexual Harassment Law in the
workplace around the world

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In this issue, we focus on:

Sexual Harassment Law in the workplace around the world

Editorial		3	
Argentina	5	Hungary	24
Australia	6	India	25
Austria	7	Italy	26
Belgium	8	Luxembourg	27
Canada	9	Mexico	28
Chile	10	Netherlands	29
China Mainland	11	New Zealand	30
Colombia	12	Norway	31
Croatia	13	Peru	32
Cyprus	14	Poland	33
Czech Republic	15	Portugal	34
Denmark	16	Romania	35
Ecuador	17	Republic of Serbia	36
Finland	18	Singapore	37
France	19	Slovak Republic	38
Georgia	20	Spain	39
Germany	21	Sweden	40
Greece	22	United Kingdom	41
Hong Kong	23	Ukraine	42

Editorial

We would have thought that, in 2018, the topic of sexual harassment would no longer attract sufficient interest for a global hot topics newsletter.

Yet, the events coming to light in 2017 prove the contrary: employers need to be even more vigilant than ever to ensure that employees feel safe at work, and free from both quid pro quo (direct) and also hostile environment (indirect) harassment. The significant risk to corporations, not only with respect to employment law litigation, but also damage to the image and reputation of a corporation especially in our social media world, requires the involvement of all key stakeholders.

CEOs, General Counsels, Human Resource Directors and Managers all need to be engaged in this effort to eradicate for once and for all this persistent problem.

In this edition, we feature the laws of 38 countries on the topic of sexual harassment.



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Argentina



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Sexual harassment in the workplace

An employer should protect a worker's dignity as established by the Constitution, which upholds the right to "decent and equitable labor conditions" (Article 14 of the Argentine Constitution). As such, the principal not only has the legal right to take actions to protect the worker's integrity, but this is even a requirement derived from the principle of good faith (Employment Contract Law, Section 63 and related sections).

Moreover, the employer should protect the physical and psychological integrity of its employees while they perform their duties, an obligation that originates from the employer's general obligation to provide safety and the principle of indemnity, established in Section 75 and related sections of the Employment Contract Law.

Jurisprudence defines sexual harassment in the work environment as persecuting or inconveniencing a worker based on sexual reasons, a persecution that is based on the worker's condition as a payroll employee and the ensuing supervisory or hierarchical relationship. The latter is a situation that implies a matter of discrimination in the workplace for a worker who refuses sexual advances or propositions and produces a change in labor conditions, dismissal or any other form of outrage to the person as a human being and a worker, implying a personal restriction to the freedom of choice.

In this regard, in terms of labor case law in Argentina, sexual harassment has been addressed in situations where the affected employee attributes blame to the employer due to the employer's actions (or omissions) in the unfortunate event, which is grounds for indirect dismissal and for the subsequent claim for compensation for dismissal without cause.

In a case of doubt, regarding the interpretation of the law and the facts, labor judges are required by law to rule in favor of the worker.

In turn, those affected by situations of sexual harassment may lodge an ancillary claim for moral damages arising from the reprehensible conduct, especially when the employer did not perform the expected conduct of protecting the victim and isolating and investigating the harasser.

In this regard, courts have ordered compensation for moral damages, for instance, to a worker who considered herself dismissed and whose supervisor was found to have inflicted grave verbal harassment as well as abuse of authority. This was found to have caused serious damage to the worker, and this damage was aggravated by the fact that the employer was aware of the improper conduct and did not adopt measures to curb the behavior of the employee in question (*B.H.J. vs. Alavera S.A.*).

Although the Argentine labor system regulates severance pay for dismissal under Section 245 of the ECL, it is understood that this compensation redresses, in principle, all damages derived from an arbitrary dismissal (its purpose is to provide reparation for all types of property and non-property damages originating in the loss of employment) – but this does not include material and non-material damages arising from unlawful conduct by an employer that may be simultaneous to the act of dismissal.

Nowadays, diligent action from employers in cases of labor harassment reports is extremely important, for which reason protocols should be established that in general stipulate that the harasser be first isolated and then investigated, and finally dismissed, if responsibility is proven.

Thus, in addition to limiting the likelihood of claims for compensation and moral damages, the employer should adopt an evolved position and build a better working world, in line with the social function that companies should fulfill in the community, according to the current legal provisions.

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Australia

Sexual harassment laws in Australia

Australia's framework of sexual harassment laws stems from both commonwealth and state jurisdictions. The Sex Discrimination Act 1984 (Cth) (SDA) is the predominant legislation so for the purposes of this article we have focused on it. However, as there are also laws in each state that cover, or at least touch on, the issue, it is advisable to consider the law in the relevant state jurisdiction in addition to the SDA to decide on an optimal course of action in any particular circumstance of alleged sexual harassment.

What constitutes sexual harassment?

Sexual harassment is defined in the SDA to be unwelcome sexual behaviors and conduct, such as an unwelcome sexual advance, request for sexual favors or other unwelcome sexual conduct, which a reasonable person could anticipate would make someone feel offended, humiliated or intimidated.

Sexual harassment can be physical or verbal and may be direct or indirect behavior that can be of single or multiple instance.

Various factors will be considered in the assessment of behavior that constitutes sexual harassment.

The age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, color, or national or ethnic origin of the person alleging an act of sexual harassment are all relevant factors to be weighed.

The relationship between the person alleging sexual harassment and the person who engaged in the conduct will also be considered, as well as any disability of the person harassed or any other relevant circumstance.

Some examples of unwanted behavior that may be found to constitute sexual harassment include: unnecessary and intrusive questions or statements about another person's personal life; unnecessary sexual inferences and references; sexual insults; unnecessary staring or lingering; deliberate, unnecessary physical

encounters, such as unwanted body contact; displaying pictures, posters, magazines or screen savers of a sexual nature; sending sexually explicit emails or text messages; inappropriate advances on social networking sites; requests for sex; and repeated unwanted requests to go out on dates.

When is sexual harassment unlawful?

The SDA makes it unlawful for a person to sexually harass another person in a number of environments, such as the workplace, educational institutions, and the commercial goods and services/accommodation industries.

An SDA complaint alleging unlawful sexual harassment can be made to the Australian Human Rights Commission (AHRC). If the AHRC cannot resolve the matter by conciliation, the person alleging the sexual harassment can make a civil claim in the Federal Court of Australia.

The burden of proof lies with the person alleging the unlawful sexual harassment to prove that "on the balance of probabilities" the sexual harassment occurred.

Sexual harassment in work environments and vicarious liability

Sexual harassment in the workplace is unlawful and can be committed by a work colleague, a client, or other people in a working relationship with the alleged victim. Sexual harassment can occur in the course of work-related activities either in the workplace or in external work environments such as work training courses, work-related travel, work conferences and work functions (e.g., client networking events or office and Christmas parties).

Ultimately, a person who sexually harasses another person is liable for his or her conduct. However, in Australia, employers can also be held vicariously liable for acts of sexual harassment by their employees or agents.

Employer prevention of sexual harassment and defense to vicarious liability

Sexual harassment claims are on the rise in Australia and are frequently settled much

more than court awards as employers do not want the commercial risk of publicity.

An employer should have an understanding of sexual harassment laws and should use various mechanisms to ensure that all employees, and others who are connected to the workplace or work-related activities are aware of their rights and obligations.

It is best practice for employers to have a policy that covers sexual harassment and to provide employees with training on the policy. Such a policy should account for the nomination of a representative who is responsible for accepting incident reports and providing the necessary assistance and guidance to a victim of sexual harassment.

In some circumstances, the presence of such a policy and associated training will give weight to an employer's defense to a vicarious-liability claim. For a successful defense, an employer must demonstrate that it took all reasonable steps to prevent sexual harassment.

When is sexual harassment a criminal offense?

Some acts of sexual harassment are criminal offenses in Australia. Examples include: sexual assault; indecent exposure; stalking; and sexually explicit telephone calls and letters, emails or text messages.

Under the various Australian state criminal laws, if an employer reasonably suspects that a serious indictable criminal offense has occurred, the employer is obliged to notify the police and advise the sexual harassment victim to report the incident to the police.

Under criminal law, the burden of proof for criminal sexual harassment has a higher threshold than unlawful sexual harassment under the SDA. It lies with the crown prosecutor to prove "beyond reasonable doubt" that the accused committed criminal sexual harassment.

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Austria



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Sexual harassment in the workplace

Under Austrian law, sexual harassment in the workplace is not only considered a form of discrimination but also can be a criminal offense. Relevant provisions are found in the Equal Treatment Act (GlbG) for the private sector, the Federal Equal Treatment Act (BGlbG) for the public sector and the Criminal Code (StGB).

Civil law

Under civil law, sex-related harassment is defined as unwelcome, inappropriate, insulting, degrading or offensive sex-related behavior within the workplace with the purpose or effect of creating an intimidating, hostile and humiliating work environment for the harassed person.

It is also defined as treatment of a person in a less favorable way because this person rejects or accepts acts of sexual harassment.

All kinds of actions, verbal and non-verbal as well as physical, may fulfill the criteria. Not only the physical but also the mental integrity of individuals are to be protected under these rules.

According to case law, physical contact against the will of the employee or repeated sexual advances, sexual jokes, pressure for sexual favors or offensive propositions may be considered sexual harassment.

The offender may be the employer, another employee or a third party (e.g., a customer or business partner). The law applies not only to harassment that takes place during the employment relationship but also before or after (e.g., during the recruiting process).

The claim can be raised against the offender himself or herself, of course. But it can also be raised against the employer if he or she culpably refrained from taking appropriate actions to stop the harassment or to protect the employee from further harassment. To file a claim against the employer (if the employer is not the offender), the employer would have to be aware of the offense and be obliged (out of his or her duty of care) to take countermeasures.

If the employee raises a claim of discrimination based on sex, he or she must furnish prima facie evidence of the offense. The alleged offender must then provide evidence that the claim is not true.

If the victim suffered harm, she or he may seek damages. Further, the victim may also seek damages for humiliation suffered. Compensation for such humiliation must not be less than €1,000.

Criminal law

The Austrian Criminal Code prohibits sexual harassment. Of course, criminal law stipulates much stricter criteria. Further, it is not sufficient for the victim to furnish prima facie evidence. Conditional intent is a prerequisite for conviction by criminal courts.

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Belgium

Sexual harassment: definition

The law of 4 August 1996 regarding well-being at work states that any employer must take the necessary measures to prevent psychosocial risks at work.

According to this legislation, “sexual harassment at work” is, alongside moral harassment, a form of psychosocial risk.

Sexual harassment is defined as “any undesired verbal, non-verbal or physical conduct having a sexual connotation with the purpose or effect of compromising the dignity of the person or creating a threatening, hostile, insulting, humiliating or offensive environment.”

Unwelcomed sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an employment, unreasonably interferes with a work performance or creates a hostile work environment.

Examples that were recognized as sexual harassment at work in Belgian case law are cases where the employer requires the employee to wear “sexy” clothes, says that he will pay a salary on condition of certain sexual favors, or speaks in inappropriate terms about his female coworkers. Finally, sexual harassment is also deemed to be a form of discrimination based on gender.

Applicability

The law of 1996 regarding well-being at work applies to all employers within the private sector, irrespective of the type of business. Employees working under the authority of the employer are protected by the legislation. Trainees and students are deemed to be “regular” employees.

Internal procedure

According to Belgian law, the employer must adopt an internal procedure within the company following specific rules. This is to create a work environment that prevents psychosocial risks, including sexual harassment, and to provide the employees with the opportunity to report instances of psychosocial risk internally. The purpose of this internal procedure is to set out a process that can be followed to resolve the issue internally. From the moment there is a formal complaint made by an employee regarding sexual harassment, they (as well as the witnesses) are protected against retaliation.

Claims

Employees who believe they are a victim of sexual harassment can also directly make a claim to the social inspectorate, the labor courts or the criminal courts.

The existing internal procedure within the company is not a pre-requirement for the immediate introduction of a case before the courts. However, if an employee is suing his employer in a legal procedure without first having followed the internal procedure of the company, the labor court can require the employee to first complete the internal company procedure.

Evidence

The employee only needs to demonstrate a presumption of sexual harassment. No hard evidence is required from the employee. The burden of proof then lies on the employer to show that there has been no sexual harassment. Specific rules apply to procedures brought before the criminal courts.

Sanctions

The following sanctions can be imposed:

- (i) Indemnities can be granted to compensate the actual loss or a lump sum indemnity amounting to up to six months' gross salary (capped at a certain amount).
- (ii) The harasser can also be ordered to stop the sexual harassment.
- (iii) The employee can require that some measures be imposed on the employer to respect the legislation regarding well-being at work.

A labor court could, in certain circumstances, also order that the judgment handed down be published or posted inside or outside the premises of the employer.

Besides civil sanctions, criminal sanctions – i.e., a fine or a prison sentence – can also be imposed.

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Canada



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Workplace sexual harassment

Like most employment-related matters in Canada, sexual harassment (as opposed to criminal sexual assault) is **individually legislated by each of the provinces and territories** (the Federal Government legislates only in respect of employment matters in industries that are deemed “federal undertakings”).

In many jurisdictions, **sexual harassment has been statutorily defined**. In the jurisdictions where there is no such definition, courts look to the **common law and the applicable human rights legislation to develop a working definition** of sexual harassment.

Although not every jurisdiction has legislation specifically addressing sexual harassment, **all jurisdictions require that employers maintain the health and safety of their workers**. This may mean, for example, **investigating and addressing instances of sexual harassment**.

All jurisdictions also have human rights legislation setting out a list of protected grounds that ultimately prohibits sexual harassment.

In all of these scenarios, sexual harassment must be proven on a balance of probabilities.

Employer obligations

Many jurisdictions across Canada have specifically legislated to require employers to **implement policies addressing how to report and investigate incidents of sexual harassment in the workplace**. In jurisdictions such as Ontario, employers are also statutorily required to conduct appropriate investigations into incidents of sexual harassment. That said, even in

jurisdictions where these obligations are not specifically codified, an employer has a duty to maintain the health and safety of its workers, which, depending on the circumstances, likely requires employers to implement sexual harassment policies and conduct investigations into incidents of sexual harassment.

Manner of investigations

As a result of the increased number of investigations by employers into sexual harassment, courts have provided guidance on how to properly conduct an investigation. Some of the marks of a proper investigation include:

- ▶ The investigator remaining **independent** and unbiased
- ▶ Giving adequate **notice of allegations** to the respondents
- ▶ Maintaining **confidentiality** to the greatest extent possible
- ▶ Completing an investigation in a **timely manner**
- ▶ Making findings grounded in **objective criteria**

Sanctions and interpretation by courts

With the recent increase of awareness of sexual harassment in the media, these matters also have been increasingly litigated. As a result, sexual harassment has become one of the top issues in employment law.

That said, there is ongoing debate as to whether sexual harassment constitutes a stand-alone civil tort in Canada. As such, employees making a claim of sexual harassment will generally be required to do so in the applicable human rights tribunal (as opposed to the courts, unless there is an ancillary civil claim).

Historically, courts and tribunals have ordered damages against the employer in favor of the employee in the following categories:

- ▶ **Lost wages:** loss of employee compensation (past lost wages are most commonly ordered, but future lost wages may also be ordered in extenuating circumstances)
- ▶ **Wrongful dismissal:** damages for constructive dismissal resulting from an employee’s “resignation” after being sexually harassed
- ▶ **General damages:** injury to dignity, feelings and self-respect
- ▶ Punitive damages
- ▶ **Costs of future care:** damages relating to expenses such as therapy care

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Chile

Sexual harassment in Chilean labor law

The Chilean Constitution (Article 19) guarantees to citizens “the right to life and physical and mental integrity. In addition, a guarantee of privacy and the honor of the person and their family is guaranteed,” among other fundamental rights.

Moreover, Chilean Labor Code (Article 2) establishes that “relationships should be based on a treatment compatible with the individual’s dignity.”

Consequently, sexual harassment is considered as a conduct contrary to an individual’s dignity and affects the employment relationship in its essence.

Sexual harassment is understood in labor matters as “any requirement of sexual nature made improperly, by any means, not consented by who receives it and which threatens or impairs their employment status or opportunities at work.” Therefore, the law considers the term as meaning sexual behavior, unwanted by the affected worker, performed in a work relationship that violates the dignity of the employee, whatever the position occupied by the harassed employee or the harasser inside the company.

The law requires that a company’s internal policy or code of conduct shall include a written procedure of complaint, investigation and sanction of the sexual harassment, which must respect the rules on investigation established in the law. This procedure must be made known to employees.

The employee may file the complaint with the company or with the labor authority in any case, and both have 30 days to investigate. If the complaint is filed at the company, the employer must immediately take protective measures to safeguard those involved, such as separation of physical spaces and changes to working hours.

The report of the investigation and its conclusions must be communicated to all parties involved: employer, complainant, the subject of the complaint and the labor authority. The employer shall implement measures and corresponding sanctions, from a written warning to dismissal for serious legal cause against the employee denounced.

Moreover, the law contemplates a special procedure to protect employees against sexual harassment or any kind of breach of fundamental rights granted by the Constitution in their employment relationship, called the “Protection of Fundamental Rights.”

Chilean jurisprudence (High Courts) established criteria to evaluate the existence of sexual harassment:

- ▶ It is up to the person to determine the type of behavior that is acceptable to him/her from whom it comes.
- ▶ The actions must exceed flirting, gallantry or treatment that can be considered normal in the respective workplace-culture coexistence.
- ▶ The consent of the recipient is essential to determine if sexual harassment occurred.

- ▶ Suppositions or a plaintiff’s statements are not enough; sexual harassment behavior must be proven; evidence and background information must be considered.
- ▶ The gravity of this behavior must be such that it affects the victim and breaks the employment relationship.

The law also addresses defamation or malicious accusation of sexual harassment, establishing that if the Labor Court denies the employee’s claim and it is proven that it was false with the intention to injure the defendant’s honor, the accuser shall pay a damage indemnity to the defendant, among others legal actions.

Chilean Labor Law protects an individual’s dignity through the prohibition of any form of sexual harassment in the employment relationship and guarantees a special procedure to protect employees against these conducts.

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China Mainland



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Legal basis

In mainland China, the legislation on sexual harassment has recently progressed. However, it has not formed into a normalized system yet.

On 28 August 2005, the revised Law on Protection of the Rights and Interests of Women of China (LPRIW) prohibited for the first time sexual harassment targeting women. It also entitled victims to issue complaints to the employer or the relevant governmental authorities.

Later, several local rules regarding the implementation of the LPRIW, including Beijing's and Shanghai's, clarified the notion of sexual harassment to be performed in forms of speech, images, electronically transmitted information, physical acts, etc.

More broadly, China laws and regulations have not addressed workplace sexual harassment at any extent currently.

Interpretation of cases

There is no judicial interpretation at a national level regarding the notion of sexual harassment. In 2015, the Zhongshan Intermediate People's Court in Guangdong Province summarized the constitutive requirements of sexual harassment in its judgment:

- 1) The act shall be of sexual nature.
- 2) The act is unwelcomed by the victim and is damaging to his or her dignity.
- 3) The act may result in the victim feeling threatened, hostile and shamed at the workplace.

Through this judgment, it was the first time in mainland China that sexual harassment was concretely defined for judicial practice.

Burden of proof

According to the Civil Procedure Law of China, the accusing party shall be responsible for providing evidence supporting its allegations. As a result, the victim of sexual harassment shall bear the burden of proof. However, when sexual

harassment is bound to an alleged crime, i.e., indecency, the burden of proof shall be assumed by the public prosecution organ. When the crime belongs to private prosecution, the victim will still bear the burden of proof.

It should also be noted that the Supreme People's Court of China requires the employer to bear the burden of proof in all disputes concerning employees' termination. Therefore, if an employee was terminated due to alleged workplace sexual harassment, the employer shall provide relevant evidence during labor dispute arbitration or court proceedings to prove the termination legality. If the employer is unable to provide relevant proof, the termination will be deemed as illegal.

Sanctions – civil and criminal

From the civil perspective, the Law of Penalties for the Violation of the Public Security Administration of China stipulates that a person who repeatedly transmits pornographic, humiliating, intimidating or other information to disturb another person's daily life, shall be detained for no more than five days or be fined no more than CNY500. If the circumstances are deemed serious, the perpetrator shall be detained for no less than five days but no more than 10 days and may, in addition, be fined no more than CNY500.

From the criminal perspective, even if sexual harassment has not been a separate crime under the Criminal Law of the PRC, the person who conducts sexual harassment may be accused of the crime of insult, indecency or intentional injury, and shall accordingly be convicted under relevant criminal provisions.

Moreover, the Special Provisions on Labor Protection of Female Employees (SPLPFE) requires the employer to prevent any sexual harassment targeting their female employees in the workplace. For such purpose, several local rules require the employer to establish a relevant complaints

and investigation system. The SPLPFE also stipulates that if an employer infringes on the legitimate rights and interests of any female employee leading to a prejudice, it shall be obligated to pay compensation. If the action of the employer, the managing personnel directly in charge or other directly responsible personnel is constituting of a crime, criminal liabilities will be pursued.

Litigation – passive

Litigations of sexual harassment in mainland China are on the rise but are overall passive. Most victims may believe that litigation could become public and thus lead to reputational damages. Regarding workplace sexual harassment, the employer may also be concerned about brand damage and actively seek to privately settle sexual harassment claims.

Tips for employers

It is strongly advised for employers not to go public with, nor advertise, any termination of an employment contract linked to sexual harassment using the parties' real names, even when such termination is fully legal. If made public, the employee may have the right to accuse the employer of reputation-rights infringement, and claim relevant compensation for sustained losses.

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Sexual harassment in the labor market

The fundamental rights of equality and freedom established in the Political Constitution of 1991 are the main sources of the legal and judicial evolution for sexual harassment policy.

However, it was not until 2006 that legislators issued Bill 1010, which specifically regulates labor harassment, including sexual harassment.

Some of the notable conducts of labor harassment banned by the bill are:

- ▶ Labor abuse
- ▶ Labor persecution
- ▶ Labor discrimination
- ▶ Labor disruptions
- ▶ Labor inequality
- ▶ Labor vulnerability

These conducts have sanctions for employees and employers.

The bill includes the following penalties: disciplinary faults for public officials, labor contract terminations, economic sanctions between two and ten minimum legal wages and paying 50 percent of the cost of any medical treatment received by the employee as a result of the harassment.

In 2008, Congress issued Bill 1257, which includes the abuse of labor position as a felony.

The bill established a punishment of imprisonment for one to three years.

A victim of labor sexual harassment in accordance with the mentioned regulations, has different ways to argue his or her case:

1. Internal disciplinary process: presented to the human resources department of the company. If this process doesn't address the issue, the victim can start a labor judicial process.
2. Criminal judicial process: in this process the victim must present the case to the district attorney, who will then conduct an investigation.

The Constitutional Court issued Ruling T265 of 2016 enforcing its precedent, indicating that every labor sexual harassment is a violation of the International Human Rights law.

In accordance with international obligations (Convention of the Elimination of All Forms of Discrimination Against Women -CEDAW) the state must push for elimination of discrimination against women and establish public institutions to take positive actions on this issue.

Also, the Inter-American Court of Human Rights has said that the processes of labor sexual harassment are violated when the investigation is not begun immediately, seriously and impartially.

It is important to mention that the difficulty of the evidence of the conducts of labor sexual harassment requires the state to act in every direction in order to establish through the administrative and judicial entities the necessary measurements to

prevent and sanction any action or practice of violence against women.

Considering the burden of proof, the victim must provide all the evidence highlighted in the testimony.

Although most cases of labor sexual harassment are against women, many men are victims as well. However, many cases are not effectively presented against the administrative or judicial entities.

In conclusion, it is important to mention that the fundamental rights and the international agreements are relevant in order to establish internal regulations and to provide the pertinent actions against labor sexual harassment.

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Croatia



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Sexual harassment

Croatian legislation provides a definition of sexual harassment through several pieces of legislation.

The Anti-Discrimination Act, an act relating to the matter of discrimination in general, defines sexual harassment as “any verbal, non-verbal or physical unwanted conduct of sexual nature with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.”

The Criminal Act and Act on Gender Equality provide a very similar definition.

The Anti-Discrimination Act and Act on Gender Equality prescribe misdemeanor fines ranging from HRK5,000 (approximately €670) to HRK40,000 (approximately €5,300) for those creating a hostile, degrading or offensive environment or hurting another person's dignity by performing an act of sexual nature. Fines for legal entities range from HRK30,000 (approximately €4,000) to HRK350,000 (approximately €46,670). Furthermore, the Criminal Act prescribes imprisonment for up to one year for the offender. Additionally, the Criminal Act states that in the event of the employee being offended, humiliated, abused or otherwise disturbed at work, resulting in the disruption of the employee's health, the offender could be punished by imprisonment for up to two years.

The Croatian Labor Act does not provide a definition of sexual harassment but imposes a general obligation for the

employer to protect employees' dignity during their working hours against acts of superiors, coworkers and people with whom the employee interacts on a regular basis while performing his/her tasks and duties.

Furthermore, employers of at least 20 employees are obliged to appoint a person who would be authorized (in addition to the employer) to receive and deal with complaints related to the protection of employees' dignity.

Under the Labor Act, the procedure for the protection of employees' dignity, including in sexual harassment cases, starts with a complaint to the employer or the appointed person. Within eight days, the complaint should be examined and necessary measures should be taken to stop and prevent further sexual harassment. If the employer does not take proper measures or if the measures are clearly improper, the employee has the right to stop working until his/her protection is ensured, with an additional condition for the employee to seek court protection before the competent court, within the following eight days. While not working, the employee has the right to compensation, but if the court determines there was no sexual harassment and the employee should not have stopped working, the employer could reclaim the relevant compensation.

Protection before the competent court could be sought for one or more of the following: (i) determination of sexual harassment, (ii) court order to desist with harassment and eliminate consequences,

(iii) compensation for damages, (iv) publication of judgment in the media.

An employee seeking protection before the court in a sexual harassment case represents a labor dispute. This implies application of specific rules, whereby the employee only needs to make probable the occurrence of sexual harassment, while the burden of proof that the sexual harassment did not occur is on the employer.

However, in contrast to the arguably wide and detailed statutory regulation of this subject matter, there seems to be no publicly available and sufficiently specific case law that could clearly help with assessing the occurrence of sexual harassment at work in Croatia. The lack of court judgments also makes it difficult to determine the level of enforcement of the rules on sexual harassment.

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Cyprus

Legal framework on sexual harassment

The phenomenon of sexual harassment in the workplace is treated under the Equal Treatment of Men and Women in Employment and Professional Education Law of 2002 (205(I)/2002) (hereinafter referred to as “the Law”).

According to article 2 of the Law, sexual harassment is behavior of a sexual nature, expressed verbally or physically, with the purpose or effect of infringing on the dignity of the recipient, especially when creating an intimidating, hostile, humiliating or offensive environment in employment or professional education or training, or in access to employment or professional education or training.

The Law applies to all employees, with respect to all activities related to employment, subject to exceptions as provided in article 4.

The law provides for sexual harassment claims to be issued and served either under civil or criminal law proceedings. The competent court under civil law proceedings is the Industrial Disputes Court (“the Court”). Nonetheless, the jurisdiction of the Court is confined only to awarding equitable and reasonable damages covering incidental damages. The equivalent criminal court has the jurisdiction to impose a fine up to €4,000 or up to six months’ imprisonment.

The courts examining the criteria of the offense of sexual harassment have clearly stated that the first criterion as to what extent the behavior is unwanted is subjective; what matters, they said, is how the behavior has been perceived by the recipient. The offender’s intention is irrelevant. It must be noted that the expression of dissatisfaction by the recipient does not need to be explicit but should be presumed from the overall attitude of the recipient. There must be indications that the behavior of the offender is unwanted by the recipient. However, tolerance of unwanted behavior does not mean that the offense of sexual harassment cannot be established. Additionally, consent obtained by threats or under duress is not valid.

The second criterion is the nature of the behavior. According to case law, unwanted behavior is considered sexual if it involves (a) a sexual element, tone or hint, such as compliments, whistles and flirting and (b) is expressed verbally or by physical conduct.

The third criterion is the creation of an intimidating, hostile, humiliating or offensive environment. If the victim has reasonably experienced the behavior of the offender as insulting, hostile and humiliating, this would suffice as unacceptable sexual harassment.

Article 12(1) of the Law prohibits any form of sexual harassment by the employer or supervisor or colleague of the victim

or any other employee. Additionally, a complaint filed by a victim of sexual harassment cannot be used as the basis for any decision that will adversely affect the victim. Examples include termination of employment or denial of opportunities for promotion.

Therefore, the Law is explicit that employers are obliged to take measures that protect their employees from any act or omission that constitutes sexual harassment. An employer is liable for the offense of sexual harassment if he or she fails to take all necessary precautions to protect employees. Furthermore, an employer is liable irrespective of whether he or she was aware that an offense occurred.

During civil court proceedings, the burden of proof is on the accused to prove that there was no violation of the Law. In criminal court proceedings, the accuser must prove beyond a reasonable doubt that the accused violated the Law.

Currently, the litigation on sexual harassment is arguably passive. Nonetheless, it is important that cases are coming to the surface, which could trigger more victims of sexual harassment to file a complaint in civil or criminal courts.

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Czech Republic



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Legal protection against sexual harassment under Czech law is split into several areas. From the perspective of the interference of human rights, it is governed by constitutional law. According to the Charter of Fundamental Rights and Freedoms, every person has the right to demand that his or her human dignity, personal honor and reputation be respected and protected. At the same time, everyone has the right to be protected from any unauthorized and unwelcome intrusion into their private lives. All other areas of law go into greater detail concerning this basic rule of protecting human dignity with respect to specific circumstances.

Labor law

The Labor Code considers sexual harassment as a form of discrimination. Any form of discrimination in labor relations is prohibited. The terms, such as harassment, sexual harassment and persecution, are further delineated, described and regulated in the Anti-Discrimination Act. These types of unwanted behavior are defined as an intended effort to demean and humiliate the dignity of a person by creating an intimidating, unfriendly, debasing and abusive work atmosphere. Sexual harassment can be expressed verbally, non-verbally or physically. The biggest problem usually is ascertaining whether the relevant acts have discriminatory character. This boundary is usually rather vague, and obviously this uncertainty and lack of physical evidence makes proving sexual harassment very difficult, often even impossible. In the case of filing a

complaint against someone who is accused of engaging in behavior of a sexual nature that is unwanted by the recipient at the workplace, the burden of proof lies on the accused person (provided that the victim can prove the occurrence of the behavior). Unfortunately, there is currently a lack of case law in Czech courts focusing specifically on sexual harassment; however, helpful information about the approach of Czech courts can be found in numerous decisions dealing with discrimination generally.

Civil law

According to the Civil Code, the personality of an individual, including all of his or her natural rights, is protected. Every person is obliged to respect the free choice of an individual to live as he or she pleases. Also, the dignity of a person, as well as the right to live in a favorable environment and with respect, honor, privacy and expressions of a personal nature, enjoys particular protection.

An individual whose personal rights have been affected or violated has the right to claim that such unlawful conduct be refrained from by the perpetrator. Again, the toughest challenge is proving the existence of the unwelcome behavior. Civil complaints are rarely filed, insofar as in such cases the burden of proof lies on the plaintiff. Moreover, interpretations by the courts are little to non-existent.

Criminal law

Certain forms of sexual harassment or sexual assault are prohibited by the Penal Code. Depending on the specific circumstances, behavior such as rape, extortion or stalking (the latter is described as pursuing another person for an extended period of time, threatening him or her, or people close to him or her, with violent bodily harm or other injury). In such cases, the perpetrator can be sentenced to imprisonment for up to one year or receive a restraining order with respect to the victim. In criminal cases, the burden of proof lies on public prosecutors. Due to the risk of danger to society, there are many more verdicts in these kinds of cases.

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Denmark

What is sexual harassment?

Under Danish law, sexual harassment is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in relation to a person's gender with the purpose or effect of violating the person's dignity – primarily by creating an intimidating, hostile, degrading, humiliating or offensive environment. Danish law therefore corresponds to the definition of sexual harassment in the Equal Treatment Directive (Directive 2004/113/EC).

Danish courts have ruled that the following actions constitute sexual harassment:

- ▶ Invitations to sex or sexual acts
- ▶ Touching breasts or between someone's legs
- ▶ Dirty jokes
- ▶ Patting buttocks and thighs
- ▶ Verbal advances

According to Danish case law, there is no lower threshold for what is held as sexual harassment, therefore, under Danish law, any kind of unwanted sexual behavior may constitute sexual harassment.

Statutes prohibiting sexual harassment

Three Danish statutes prohibit sexual harassment – the most important being the Danish Act on Equal Treatment of Men and Women as regards Access to Employment.

The Danish Gender Equality Act stipulates the same definition of sexual harassment as the Danish Act on Equal Treatment of Men and Women mentioned above. The latter ensures equal treatment in the workplace (in recruitment and during employment), whereas the Danish Gender Equality Act promotes gender equality in society in general.

Finally, the Danish Penal Code also prohibits sexual harassment but does only apply to the most serious cases of sexual harassment.

Employer's obligation

Under Danish law, the employer is obliged to ensure equal treatment of all employees and not permit any form of discrimination. Further, the employer must ensure that employees have the opportunity to perform their work without interruption. Consequently, the employer must take any steps necessary to prevent sexual harassment.

Sanctions

In Denmark, an employee may be awarded compensation from the employer if there is a breach of the Danish Act on Equal Treatment of Men and Women.

Under current case law, the maximum amount of compensation has been DKK100,000; however, compensation typically amounts in the range of DKK5,000 to DKK50,000.

If the employer terminates the employment relationship due to the employee objecting to sexual harassment, the employee is entitled to compensation. Compensation depends on the employment period and the circumstances of the case but will normally amount to between 6 and 12 months' remuneration.

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Ecuador



Fernanda Checa

Ecuador's evolution on labor sexual harassment legislation

The development of the subject of sexual harassment in the labor context has been unhurried in the Ecuadorian legal and judicial systems.

One of the first developments was a decision issued by the Ecuadorian Constitutional Court (2016) in the context of a Protection Action filed against an alleged unjustified labor termination. The Court states that most of the efforts of the Government imply the creation of policies that seek to prevent and eliminate violence against women in a domestic context. Additionally, it is stated that there are few regulations and policies to prevent and eliminate sexual harassment in the labor context. Thus, there is little legal and judicial documentation and information related to this topic.

On the other hand, Ecuadorian Supreme Court (2012 and 2016) considered harassment, abuse while in a position of authority and the offering of a labor contract with better conditions in exchange for sexual favors to be instances of criminal behavior.

On November 9, 2017, a law that aims to prevent harassment in the workplace was issued, and it reformed the Ecuadorian Labor Code.

The new law established the definition of harassment as a behavior that affects human dignity, that is committed in the workplace and that results in abuse, humiliation or threatens the labor relationship. It is evident that the definition includes sexual harassment in the workplace. Behaviors that include such characteristics should be denounced before the Ecuadorian Labor Authorities, which will evaluate the matter.

Likewise, Ecuadorian labor law prescribes that an employer has an obligation to terminate the labor relationship with an employee if it's demonstrated that the employee incurred harassment against a co-worker or the employer. The employee can also terminate the labor relationship whenever the employer or their legal representatives harassed the employee through action or omission (ignoring and not stopping an ongoing harassment behavior).

In order to end the labor relationship, the employer or employee must file a request before the Ecuadorian Labor Authorities. If the request demonstrates fault, the Ecuadorian Labor Authorities could order a compensation and a public apology.

If the employer is found guilty, the employee will have the right to be compensated with one year's salary.

In addition, the recently issued law states an obligation for the employers to establish policies to avoid and prevent labor harassment (including sexual harassment).

Additionally, Ecuadorian Criminal Code considers sexual harassment a crime punishable by one to three years in prison.

Ecuadorian law for public service is also strict in regard to this crime and states that any individual who has been condemned with crimes such as sexual harassment will be impeded from occupying an official position in government or public institutions. The same law establishes that sexual harassment is a motive for dismissal for public servers.

In the Ecuadorian legislation, the general disposition regarding the burden of proof is that the party that files a claim or lawsuit must present evidence to sustain his/her claims. The same applies in criminal cases in which the prosecutor must prove the claims against the presumed perpetrator. Nevertheless, both parties can use any evidence that is not illegal or unconstitutional to sustain their claims. In the context of complaints filed before the Labor Authorities in Ecuador, the party that files the complaint alleging harassment must present proof, and the accused party can file evidence.

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Finland

Hidden issue brought to the daylight

The issue of sexual harassment has become a globally viral topic, with the latest #MeToo campaign drawing attention more than any before. Due to public revelations, the issue has piqued the interest of the Finnish media as well. The scope of such problems in the workplace has been brought to light, with recent campaigns on sexual harassment initiated by employees working in different industries in Finland.

Sexual harassment has been determined in the Equality Act (609/1986), according to which sexual harassment means verbal, non-verbal or physical unwanted conduct of a sexual nature by which a person's psychological or physical integrity is violated intentionally or factually, in particular by creating an intimidating, hostile, degrading, humiliating or offensive atmosphere. The intention of the offender is not of relevance; rather, the experience of the subject of the harassment is decisive as to whether such behavior is considered sexual harassment.

In the Occupational Safety and Health Act (738/2002), employees are obligated to avoid any harassment or other inappropriate behavior toward other employees. Employers have a general obligation to take care of the safety and health of their employees while at work by taking the necessary measures. An employer has a duty to take action once the harassment or other inappropriate behavior in the workplace is known. Overall, the employer has both supervisory duty of the ongoing situation in the workplace as well as a duty to act in individual cases.

In addition to criminal sanctions toward the offender, a work-safety offense is criminalized in the Criminal Code of Finland (39/1889), whereby the employer or its representative may be sentenced to a maximum of one year of imprisonment if they intentionally or negligently violate any work-safety regulations – or make possible the continuation of a situation contrary to work-safety regulations by neglecting to monitor conduct in the workplace. The same conduct or negligence may also be deemed as work discrimination. In addition to criminal sanctions, civil sanctions may be sentenced as compensatory damages toward the suffering party.

In criminal cases, as per the Code of Judicial Procedure (4/1734), the burden of proof is with the plaintiff, i.e., the prosecutor or the complainant. The evidence on a criminal case must be sufficient – the court cannot be left with reasonable doubt on the innocence of the accused.

When assessing specific cases in the courts, the same conduct may be recognized both as a work-safety offense and work discrimination, as they have somewhat overlapping rules. On the level of the Supreme Court, the litigation practice has not been very active. The reason for that may be that interpretation of the rules as such is not unclear and cases are more dependent on evaluation of evidence.

As alarming cases have been revealed, the Finnish Parliament has recently held a discussion on the severity of the phenomenon. Further, labor-market organizations were invited by the Ministry of Economic Affairs and Employment and Ministry of Social Affairs and Health to discuss sexual harassment on 18 December 2017. The intention was to gather proposals on measures that the Finnish Government as well as labor organizations and their stakeholders may take to prevent sexual harassment in workplaces. Main issues which came up in discussions were the values of the workplace as well as working methods in accordance with early involvement principles. Such methods should be a part of culture in workplaces. The next steps would be to contemplate how these issues are put into concrete actions in workplaces.

Companies and labor-market organizations have also reacted to the campaigns by announcing that sexual harassment should not be tolerated in the workplace and that companies and organizations are taking concrete measures to advance harassment-free working environments for everyone.

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France



Roselyn Sands

Sexual harassment in the workplace in France

The recent global movement by millions of women to share their stories of sexual harassment and abuse had an impact in France as elsewhere in the world. Several French campaigns, similar to the popular hashtag “#MeToo”, created a public debate leading to new measures under French law. The new measures however did not address the workplace; rather, the creation of a new criminal law to address women’s harassment on the street!

As to the workplace, French law regarding sexual harassment remains the same as it was in 2012.

A broader definition of sexual harassment in the workplace since 2012

Sexual harassment was originally defined in French labor law as an act of a sexual nature. However, this definition was broadened in 2012.

Today, sexual harassment is defined by Article L. 1153-1 as “recurring remarks or behaviors with sexual overtones which:

- ▶ Infringe upon the employee’s dignity because of their degrading or humiliating character; or
- ▶ Create an intimidating, hostile or offensive situation against him/her”

Furthermore, the definition of sexual harassment seeks to prevent “any kind of serious pressure, even not recurring, with the real or apparent aim of obtaining an act of a sexual nature, whether the act is sought for the benefit of the perpetrator of this pressure or for the benefit of a third person”.

It is important to note that this definition of sexual harassment is not limited to hierarchical relationships. It applies as well between colleagues, among third parties (clients, providers, relatives of the employer).

As a result, the actual definition of sexual harassment corresponds to potentially countless situations and concerns every actor at the workplace.

The employer’s obligation to address sexual harassment

As a general principle, the employer is under a strict obligation to provide a working environment that is free of hazards to an employee’s health and safety. Case-law has, in recent years, emphasized the employer’s obligation to ensure the employee’s protection against sexual harassment.

The employer’s obligation takes place at two different levels:

1. Before a case of sexual harassment occurs

The employer must provide warnings and training in order to prevent sexual harassment. These actions notably include providing prevention and sanctions regarding harassment in the company’s internal procedures (“règlement intérieur”) and to post in the work premises the legal rules relating to harassment.

2. In case of sexual harassment

The employer is obliged to put an end to the sexual harassment which occurs inside its company and to sanction their perpetrators.

Even if the employer remains free to choose the disciplinary sanction of these acts, the risks of repeated offense could require it to terminate the employment contract of the perpetrator. Finally, the employer has an obligation to protect both victims and witnesses of sexual harassment retaliation.

A dismissal of the victim or witness, for complaining of sexual harassment, could be considered as null and void, and the employee would be reinstated in the company.

Two different legal procedures for the employee’s claims

1. Before the Labor courts

The employee who is victim of sexual harassment is entitled to damages, from:

- ▶ The harasser
- ▶ The employer as well, on the ground of its strict liability to protect the physical and moral health of its employees

In this case, the burden of proof for the employee is lightened: only certain elements that indicate the possible existence of sexual harassment have to be provided by the employee. The burden then shifts to the perpetrator or the employer.

2. Before the criminal courts

The harasser is exposed to criminal sanctions, which can amount to two-year-maximum prison sentence and a fine amounting to €30,000 maximum.

Despite a strict legal framework, only one woman out of 20 dares to sue her harassers and her employer for sexual harassment. This is certainly due to the fact that 90% of complaints are dismissed without an investigation. As such, women have the sentiment that they are not taken seriously.

As a consequence, if changes need to be made, it is in the mindset of French people and society rather than in French law. In this respect, President Macron has announced that the main objective of his five-year mandate will be to promote gender equality, and the Secretary of State for equality between men and women has launched several political actions. Certainly, French society is still evolving and will certainly progress to eradicate this persistent problem, and ensure that the women and others in the workplace are not exposed to harassment on the basis of sex.

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Georgia

Sexual harassment

Georgia has ratified the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (“Convention”) as of 1 September 2017.¹ The Convention imposes obligation on a State to harmonize its legislation and guarantee the prescribed degree of protection of women.²

Legal basis

According to the Convention, the States shall take the relevant legislative measures and ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person is subject to criminal or other legal sanction.³

There is no separate Georgian law governing sexual harassment. However, it falls within the scope of Law of Georgia on Gender Equality (“Equality Law”).

Namely, Art. 6(1)(a) of the Equality Law prohibits harassment and coercion of a person with the purpose or effect of creating an intimidating, hostile, humiliating, degrading or offensive environment as a form of act of discrimination in labor relations. Furthermore, Art. 6(1)(b) explicitly prohibits sexual harassment as any

unwanted verbal, non-verbal or physical behavior in labor relations as indicated in Art. 6(1)(a) above.

This means that in Georgia, sexual harassment is a kind of discriminatory act⁴ and such explicit prohibition is limited only to the scope of labor relations.

Enforcement procedures

Notwithstanding the prohibition of sexual harassment in labor relations, the applicable laws of Georgia do not impose any effective criminal or administrative sanctions/punishment on the offender. The absence of such sanctions impedes the enforceability of the legislative guarantees and hinders the prevention of sexual harassment in the Georgian community.

Claims arising out of sexual harassment are generally pursued in accordance with the procedures set forth for the claims of discrimination.

In light of the above, one may consider that Article 142 of the Criminal Code of Georgia, which imposes sanctions for grave discriminatory acts, may be applicable to cases of sexual harassment.

It is worth noting that the recent amendment to the Criminal Code of Georgia introduced the notion of stalking as a criminally condemned wrongdoing.⁵

However, it is sometimes questionable whether sexual harassment falls under the scope of such notion.

Burden of proof

The Civil Procedure Code of Georgia sets forth the special rule for allocating the burden of proof in matters relating to discrimination.⁶ Upon filing a claim, a claimant shall present to the court those facts and evidence that provide grounds to assume that a discriminating action has been committed.

From this moment, the burden of proof shifts to the defendant and the defendant shall, thereafter, prove that no discriminative act has taken place.

Litigation

The level of litigation in Georgia regarding the issues of sexual harassment is still passive.

It is worth noting that in the course of one of the recent cases, the Public Defender of Georgia provided the Court with the *Amicus Curiae*, emphasizing the scarcity of litigation practice on the matter of sexual harassment.⁷

¹ matsne.gov.ge/ka/document/view/3789678.

² Art.4(1) of the Convention.

³ Art.40 of the Convention.

⁴ Amicus Curiae p.2, para.5, see: ombudsman.ge/uploads/other/4/4672.pdf.

⁵ Art.1511 of the Criminal Code of Georgia.

⁶ Art.3633 of Civil Procedure Code of Georgia.

⁷ Amicus Curiae p.1, para.2, see: ombudsman.ge/uploads/other/4/4672.pdf.

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Germany



Dr. Karsten Umnuss

Sexual harassment in Germany – an important topic

In Germany, the issue of sexual harassment was discussed intensively after the attacks during the 2015-16 New Year's Eve celebrations, mainly in Cologne's city center but also in other German cities, such as Hamburg.

The legal basis for these rules

The legal basis for rules regarding sexual harassment are stipulated in the German Criminal Code (Strafgesetzbuch). Following the aforementioned attacks, Germany updated its laws, broadening the definition of sexual assault to include any sexual act that a victim declines through verbal or physical cues. Previously, German law required a victim to physically resist his or her attacker. Until November 2016, there were no statutory criminal provisions that expressly protected against sexual harassment. The attacks led lawmakers to add a paragraph clarifying groping as an independent category of sex crime, making it possible to prosecute groups for this crime. Before that, indictments submitted were related to sexual assault, insults or stalking.

Burden of proof

The principle of *in dubio pro reo* (Latin for "when in doubt, for the accused") means that a defendant may not be convicted by the court when doubts about his or her guilt remain. The burden of proof in civil proceedings shall rest with the claimant (the victim).

Sanctions – criminal and civil

Sexual harassment offenders shall be liable to imprisonment not exceeding five years or a fine. In especially serious cases, the penalty shall be imprisonment from three months to five years. Sexual harassment may only be prosecuted upon request, unless the prosecuting authority deems that prosecution is required because of special public interest.

The amount of the claim for compensation in a civil proceeding depends on the gravity of the violation.

Litigation

In light of the recent incidents in Germany, one gets the feeling that there are more litigation proceedings now, but there are no statistics available yet to prove this. In addition, many victims do not file complaints.

Other interesting matters in Germany on sexual harassment

Sexual harassment is also an issue in the workplace. Many victims do not dare to make sexual harassment public. They are afraid to lose their job, of receiving blame themselves and of being accused of damaging the reputation of a colleague or boss. Furthermore, many employees are poorly informed about their rights. They do not know that their employer is required to protect them from sexual harassment in the workplace, and many employers do not seem to be aware of this duty either. Nonetheless, German law is quite powerful when it comes to workplace sexual harassment. The German General Equal

Treatment Act, introduced in 2006, grants employees considerable rights and makes clear precisely what constitutes sexual harassment.

Beyond the most obvious and serious cases involving physical assault or worse, sexual harassment in the workplace, according to the law, means: unwanted physical contact, leering, lewd looks, sexual comments, sexist jokes or the displaying of pornographic material. The legal obligation on the part of employers to deal with allegations appropriately and to protect employees is also clear, yet there are still legal gaps that need to be closed.

One is the fact that bringing a claim of sexual harassment, according to the German General Equal Treatment Act, must happen within two months of it taking place. The period is unfortunately quite short, as victims need time to consider taking legal action, particularly if they are traumatized or concerned about job security.

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Sexual harassment in the workplace

The legal basis

Following the general principle of Greek labor law, the employer has a generic precaution obligation to protect its workforce from any harmful action. Thus even if there was no specific legislation related to sexual harassment in the workplace, Greek labor law includes the basic principles of protecting employees from any harmful action.

The prohibition of sexual harassment in the workplace is regulated in Greece by Law 3986/2010, which incorporated Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Based on this framework, any discrimination (direct or indirect), or any harassment or any sexual harassment in the workplace is prohibited.

Sexual harassment is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Within this framework the employee is protected from sexual harassment deriving either from his/her employer or his/her superiors or his/her colleagues.

Interpretation by the courts

Generally, Greek case law has not systematically dealt with the issue; however, based on the few cases available, the basic outcome may be categorized as follows:

1. Greek courts examined the issue of sexual harassment mainly in the concept of an unlawful termination introduced to the court by a female employee who challenged her termination as a result of her refusal to accept the employer's inappropriate abusive behavior (Supreme Court of Justice 631/2008, 1655/1999).
2. Furthermore, Greek courts judged that sexual harassment shall be considered as an infringement of the personal rights of the employees (Supreme Court of Justice 1655/1999).
3. In addition, Greek courts judged that the employer is obliged to protect the employee from any kind of sexual harassment caused by her/his colleagues by taking any necessary protective measures (Athens Court of Appeal 4937/2001).

Reverse burden of proof

Pursuant to Article 24 of Law 3896/2010, a reverse burden of proof is introduced. More specifically, in the event of a complaint raised by an employee before a Greek court or public authority, it is the employer and not the employee that needs to prove that no sexual harassment took place. Said reverse burden of proof does not apply during penal proceedings.

Sanctions

In case of violation, the employee may either submit a complaint before the Greek Labor Inspectorate or the Greek Ombudsman or proceed with a claim before the Greek courts.

The nature of the employee's complaint depends on the specific facts of each case, which may vary from requesting to be indemnified for the moral damages caused due to the abusive behavior, or in the event of unlawful termination to be rehired or in the event he/she receives unequal remuneration to receive the adequate level of salary.

Furthermore, it should be noted that there are provisions providing for administrative fines against the employer due to non-compliance; such fines range from €500 to €50,000. Finally, according to the provision of Article 337 of the Greek Penal Code, sexual harassment in the workplace constitutes a penal offense leading to the sanction of up to three years' imprisonment and a minimum fine of €1,000.

Litigation

It appears that sexual harassment has not been systematically interpreted by Greek courts, and this issue seems to be mainly connected with local customs. In any case, the legal framework and the establishment of the reverse burden of proof are a move nearer to a culture of intolerance toward an intimidating, hostile, degrading, humiliating or offensive working environment.

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Hong Kong



Renee Mark

With the recent spotlight on high-profile individuals dominating international headlines for alleged sexual harassment in and out of the workplace, the demarcation for what constitutes “sexual harassment” becomes a crucial question.

Sexual harassment occurs when a person engages in conduct of a sexual nature that is unwelcomed. In Hong Kong, the law against sexual harassment in the workplace is governed by the Sex Discrimination Ordinance (Cap. 480 of the laws of Hong Kong)(SDO), which stipulates that it is unlawful for any person (whether he or she is an employer or an employee at an establishment in Hong Kong) to sexually harass a man or woman who is seeking to become employed or who is employed in the same establishment. The SDO largely recognizes two forms of sexual harassment, namely (1) “quid pro quo” harassment and (2) “hostile environment” harassment.

“Quid pro quo” harassment refers to situations where a person inflicts on another unwelcome sexual advances, unwelcome requests for sexual favors or other unwelcome conduct of a sexual nature, whereby a reasonable person (whether male or female) would have considered such act or conduct to be offending, humiliating or intimidating. An example of this is when a supervisor demands his subordinate to tolerate his sexual advances in order to maintain her position within the company. “Hostile environment” harassment refers to unwelcome acts or conduct of a sexual nature that creates a hostile or intimidating work environment for an individual. Such acts would include the sending of obscene or explicit content to co-workers through email or making sexually suggestive comments or jokes.

The SDO does not provide an exhaustive list of what constitutes “conducts of a sexual nature.” Nevertheless, Hong Kong case law has provided guidance on what acts or conduct would constitute sexual harassment, which includes written or oral statements as well as direct and indirect actions. Unlike other jurisdictions, the Hong Kong Equal Opportunities Commission has historically received very few complaints relating to sexual harassment, which may be attributed to unfamiliarity with the law or general apathy toward such claims. Generally, in order to succeed in a claim for sexual harassment in Hong Kong, the burden of proof for complainants can be quite high and therefore the difficulties substantiating such claims may have discouraged them from being brought forward. As held in the case of *Chan vs. Tamara Rus* in 2000, the test in determining what constitutes “unwelcome conduct” is both subjective and objective.

When dealing with sexual harassment in the workplace, employers are exposed to a real risk of vicarious liability as it is often difficult to explicitly control an employee’s behavior in the course of his or her employment (especially if such an employee is not working under the direct supervision of the employer). To this end, any act from an employee may be considered as sexual harassment without an employer’s knowledge, therefore employers may be subject to claims of negligence in failing to deal adequately with harassment or even possible offenses of assault and battery.

To mitigate against such risks, employers are encouraged to provide a detailed policy in the staff handbook (as well as comprehensive training) to educate employees on what sexual harassment is,

as well as to teach employees on how to deal with sexual harassment complaints. With employment policies and handbooks, sexual harassment policies should be culturally sensitive to accommodate cultural differences in different jurisdictions. To that end, policies should be country-specific (as much as possible) to ensure that unwelcome acts and conducts are strictly monitored. Employers may also wish to request their employees to sign forms of acknowledgments to indicate that they have understood the policies and have handbooks in place to prevent sexual harassments. Further, training should be provided to employees so they are aware of their personal liability for sexual harassment to deter such acts.

Employers should also note that with the amendment of the SDO in 2014, the sexual harassment law now extends to make it unlawful for customers to sexually harass those who work as a service or goods provider. This law aims to cover a wider range of circumstances in which employees may be subject to unlawful sexual harassment, such as incidents where an employee is faced with a customer making crude jokes or sexual comments, or if the employee is inappropriately touched by a customer. With this law, employers should also be mindful that they can still be vicariously liable for the actions of their employees should it be found that their employee has sexually harassed a service or good provider in a business environment. Under these circumstances, training should be provided to employees to avoid inappropriate behavior when dealing with others.

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Hungary

Sexual harassment

In Hungary, there is no special law or a common legal definition of sexual harassment.

According to Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, sexual harassment is considered a type of harassment of equal treatment mostly based on gender.

According to Act C of 2012 on the Criminal Code, sexual force or rape may be considered felonies.

If someone has a sexual harassment complaint, he or she has three main options: the procedure of the Equal Treatment Authority, civil litigation and criminal litigation before the court.

Procedure of Equal Treatment Authority

The procedure of the Equal Treatment Authority is free and specifically designed for harassment such as sexual harassment. A person can submit complaints only against his or her employers, instead of the individuals committing the harassment, as the authority can only initiate proceedings against entities in cases of work-related sexual harassment.

The party initiating the procedure needs to demonstrate only that the sexual harassment happened, while the employer needs to prove that it fulfilled the requirements of the equal treatment against him or her.

If it is proved in the course of the procedure that the employer violated the principle of equal treatment, the authority may order that the state of infringement be terminated, forbid the continuation of the violation, or order that its final decision declaring the

infringement be made public and impose a fine between HUF50,000 to HUF6 million. In such cases, the procedural costs must be covered by the offending party.

However, the authority may not establish financial compensation and may not order the restoration of the employee's original status (e.g., it may not oblige an employer to give a complainant his or her original position).

Civil litigation

In civil litigation proceedings, the complainant can seek compensation for emotional distress from the co-worker accused of sexual harassment.

During the civil litigation proceedings, any fact must be proved by the party whose interest is the fact to be proved real.

If it is proved that the sexual harassment happened, the person committing the sexual harassment must pay compensation for emotional distress in the amount defined by the court based on the claim of the complainant.

Criminal litigation

Criminal proceedings can be initiated if the sexual harassment was so serious that it is considered a felony according to the Hungarian Criminal Code.

During the lawsuit, the prosecutor must prove that the accused committed the felony.

Depending on the circumstances of the case, the accused may face imprisonment if he or she is found guilty.

Promising development in court practice

It is not typical in Hungary to sue someone for sexual harassment, especially at workplaces. Unfortunately, according to studies, detection and reporting of such cases are low and the risk of stigmatization is high in Hungary. Nevertheless, there may be some promising signs of change in social attitudes due to recent global scandals, backed by the emerging practice of the Hungarian labor courts approving the lawfulness of termination of employment on the grounds of sexual harassment.

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India



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Protection of women against sexual harassment at workplace

With an increasing number of women joining the workforce, Indian lawmakers have codified the law on prevention of sexual harassment at workplace. Until 2013, there was no legislation in India dealing with complaints of sexual harassment at the workplace and these complaints were handled like other cases of sexual harassment under the Indian Penal Code, 1860 (IPC). The guidelines laid down by the Supreme Court in *Vishaka and Others vs. State of Rajasthan and Others* (1997) in respect to prevention of sexual harassment at workplace was a temporary measure, as more often than not, it was observed that these voluntary guidelines were not being followed diligently by the organizations.

Legislative framework

The Government, in its endeavor to curtail instances of sexual harassment at the workplace and provide women with a safe working environment, enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, effective from December 9, 2013. The provisions of the Act, together with certain provisions of IPC (such as Section 509, word, gesture or act intended to insult the modesty of a woman; and Section 354A, sexual harassment and punishment for sexual harassment), are aimed at preventing cases of sexual harassment at the workplace and also providing adequate redressal to women who have been subjected to sexual harassment at the workplace. To ensure effective implementation of the Act, the Government launched SHE-Box Online Complaint Management System, which enables an aggrieved woman (whether employed in the private or public sector)

to file an online complaint of sexual harassment at the workplace. The Act requires organizations employing 10 or more employees to constitute an Internal Complaints Committee (ICC) for the purpose of conducting an inquiry into complaints filed by women and empowers them to determine the punishment and compensation if the allegation is proved.

Sexual harassment

The definition of sexual harassment under the Act, being an inclusive definition, encompasses unwelcome acts or behavior such as physical contact, demand for sexual favors and sexually colored remarks. As the scope for interpreting the definition is wide, female employees could misconstrue an unwelcome act to be of a sexual nature whereas the same could be mere misconduct on the part of the accused employee with no sexual connotation. Therefore, the onus falls on the ICC to carefully and independently examine facts of the case. It has been noticed that depending on the cultural background of the aggrieved woman, the sensitivity and mindset for perceiving an act or behavior usually differs. Recently, the Delhi High Court made an observation in a case that physical contact or advances would constitute sexual harassment provided such physical contact is a part of the sexually determined behavior and mere accidental physical contact, even though unwelcome, would not amount to sexual harassment. The Act provides punishment for false or malicious complaints; therefore, female employees must be cautious when filing a complaint of sexual harassment.

Redressal mechanism

Once a complaint is lodged as per the Act, all involved parties are given reasonable opportunities to be heard and the inquiry committee can adopt its own procedure for conducting inquiry in conformity

with the principles of natural justice. The burden lies on both parties to prove their case and once a complainant has established conduct, the accused must demonstrate that his behavior was sexually determined. During pendency of an inquiry, an aggrieved woman may, through the committee, request the employer to (i) transfer her/the accused to another workplace, (ii) sanction leave up to a period of three months, or (iii) restrain the accused from assessing her work performance. Upon completion of the inquiry, if accusation(s) are proved, the employer must (a) take such action as prescribed in its service rules for misconduct, and (b) deduct from the salary of the accused a sum the committee determines appropriate to be paid to the aggrieved woman. If a case for sexual harassment is lodged under the relevant sections of IPC, the accused can face imprisonment that may extend up to three years, or fined, or both.

It is remarkable that in this era of gender equality, the Act does not provide protection in cases where a man is subjected to sexual harassment at workplace. As per the Act, only an "aggrieved woman" can file a complaint of sexual harassment, but nowhere does it allow the same for an aggrieved man. While the majority of victims of sexual harassment are women, the incidents of men being exposed to harassment at workplace cannot be ignored either. Unfortunately, though this Act has failed to provide protection to men, it has been successful, to a great extent, in attaining its objective of providing women with a safe working environment and an effective redressal mechanism.

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Italy

Sexual harassment in Italy

Italian laws

In Italy, the definition of sexual harassment in the workplace is covered in article 26, par. 2 of legislative decree no. 198/2006, known as the code of equal opportunities.

In line with the definition provided by the European Directive 2006/54/EC, it is an “unwanted conduct with a sexual connotation, expressed in physical, verbal or non-verbal ways, taking place with the purpose or effect of violating the dignity of a person and of creating an hostile, degrading, humiliating or offensive environment,” and it is legally equated to gender discrimination, under par. 1 of the same article.

With regard to criminal law, a specific definition of sexual harassment does not exist, so criminal courts usually apply article 660 of the criminal code related to harassment or disturbance of people.

Interpretation of the courts

In Italy, there are few cases of sexual harassment before the courts, mainly because of the psychological reluctance of the victims in denouncing such events. For this reason, courts used these few cases to define sexual harassment, both on civil and criminal levels.

Civil courts have established that sexual harassment occurs when there are two main elements. One is the undesirability of the conduct: an external, non-consensual, unwanted and objective intrusion in the personal sphere of the victim in a sexual way. The other is the violation of dignity caused by the intentional behavior of the harasser.

On the other hand, Italy’s Criminal Court of Cassation has defined concrete aspects of the sexual harassment that “occurs only in presence of vulgar sexual expressions or invasive and insistent courtship acts other than sexual abuse.”

Burden of proof

According to art. 19 of the above-mentioned European Directive and to the legal equation between sexual harassment and discrimination in the Italian legislation, art. 40 of legislative decree no. 198/2006 places on the defendant the burden of proof. He or she must prove the non-existence of discrimination when the appellant has provided the judge with “factual elements also deduced from statistical data suitable to found, in precise and concordant terms, the presumption of the existence of acts, pacts or discriminatory behaviors by reason of sex.” In other words, although the alleged victim is required to provide precise facts, a lower degree of certainty of the facts is allowed because such events often occur without witnesses.

Sanctions

In cases of sexual harassment, under article 38 of the legislative decree no. 198/2006, the employer is liable both contractually and non-contractually for the reimbursement of the related material and non-material damages. This is according to, respectively, articles no. 2087 and 2043 of the civil code. Moreover, regarding to non-contractual liability, if the sexual harassment is done by another employee, the employer is also liable under article 2049 of the civil code for failure to fulfill his duty of supervision and control.

On the criminal side, since a crime of sexual harassment does not exist and the Criminal Court of Cassation includes sexual harassment in article 660 of the criminal code, the applicable punishment for the harasser is detention of up to six months or a fine of €516.

Litigation in numbers

According to a recent ISTAT (National Institute for Statistics) survey, the number of women who have suffered sexual harassment or blackmail in the workplace is 1,400,000, or 8.9% of current or past workers, including women seeking employment. Only one woman out of five talked about their experience, and only 0.7% of them reported the matter to the police. For this reason, the number of civil and criminal cases is very small and it is hard to get an idea of the real extent of the phenomenon for very different reasons: social blame, strong hierarchy in the workplace, shame, fear of losing employment and fear of not being believed.

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Luxembourg



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Sexual harassment

Legal basis

Since 2000, the Luxembourg Labor Code has included a chapter about sexual harassment from article L.245-1 to article L.245-8. In addition, the Grand Ducal Regulation of 15 December 2009 sets a general framework about harassment and violence at the workplace.

Sexual harassment is defined in art. L.245-2 as any behavior based on sex by which the dignity of a person at the workplace is affected, provided that one of the three following conditions is met:

- ▶ the behavior is misplaced, excessive and hurtful;
- ▶ refusing or accepting the behavior has affected the employee's rights in matters of professional training, employment, continuance of employment, professional promotion, remuneration or any other decision relating to employment;
- ▶ the behavior creates a feeling of intimidation, hostility or mortification for the victim.

The prohibited behavior may be physical, verbal or non-verbal.

The provisions of the Labor Code concern employees but also trainees, apprentices, pupils and students who work during school holidays.

Then, these provisions apply to sexual harassment that happens in the occasion of employment relationship, it comprises external contacts of the company with whom the employee can be led to work with (customers, suppliers, etc.)

Interpretation by the courts

The Court of Appeal of Luxembourg in a judgment dated March 9, 2006 explained that the notion of sexual harassment is mainly subjective in the person of the victim. Each person shall determine themselves which behavior he/she wants to accept and which behavior he/she judges appropriate. Indeed, sexual harassment shall be regarded as offensive and unwelcomed by the person subject to this behavior. This conduct of sexual nature, whether deliberate or involuntary from its author, is not important. If the person subject to this conduct is embarrassed by it, this must be considered as sexual harassment.

Burden of proof

As the element of intent is presumed, the burden of proof falls on the presumed author of the conduct of sexual harassment. The victim shall bring evidence that he/she has been victim of sexual harassment, whereas the author of the behavior shall provide counter-evidence.

Sanctions

The employer has an obligation to put an immediate end to any act of sexual harassment that he is aware of. He must conduct an internal investigation. In accordance with the Grand Ducal Regulation of 15 December 2009 concerning harassment and violence at the workplace, the employer has to respect, "the rights of the defense" which means that he has to gather the plaintiff and the perpetrator of the acts

of sexual harassment. Then, he will be free to choose which measures to take against the perpetrator until the termination of his employment contract (as sexual harassment constitutes a serious misconduct regarding labor law). In case of non-intervention of the employer, the victim can request an injunction against him before the court in order to cease some behavior, with the threat of a periodic penalty payment.

The injured employee can refuse to continue the execution of his/her employment contract. The termination is based on gross misconduct from the employer and this latter can be sentenced to pay damages.

There is no offense of sexual harassment in the Luxembourg criminal law. Parliamentary work explained that common law offers sufficient protection for the victim, who can plead rape, intentional assault and battery, indecent assault, public indecency, insults, slander and defamation.

Litigation

In Luxembourg, the litigation based on sexual harassment is quite passive.

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Mexico

Prevention and investigation of sexual harassment

Sexual harassment has been largely regulated by the relevant Mexican laws. Labor laws and also civil and criminal laws determine different consequences and remedies for the offender and the victim that include damages and imprisonment.

From a labor standpoint, the Federal Labor Law (FLL) considers sexual harassment a form of workplace harassment.

It is defined as a type of violence that does not necessarily involve subordination between the offender and the victim, and in which there is an excessive use of power that results in defenselessness and risk to the victim.

The difference with workplace harassment resides in the fact that in the sexual offense a hierarchical relationship does not necessarily exist.

As stated by the Mexican Supreme Court, that illegal conduct can occur in one or a series of incidents, and affects the self-esteem, integrity, freedom and health of the victim.

It is commonly accepted by the legal community that sexual harassment has two types:

- ▶ *Quid pro quo*: sexual favors as a condition of employment benefits
- ▶ Hostile work environment: verbal or physical sexual conduct that can be reasonably determined as offensive to the victim

Due to the broad definition of a hostile work environment, it is possible to conclude that sexual harassment cannot occur only in the workplace. It can be

from any co-worker, employee, officer or even a third-party agent linked to the company (e.g., clients, customers and business partners).

Consequences and penalties

If the offender is an employee, the company can terminate the employment contract without being liable to pay severance. Additionally, the victim can make a claim for civil remedies and criminal responsibility.

From an employer perspective, punitive damages and fines can arise if the company does not take appropriate measures to prevent, investigate and sanction sexual harassment. Fines can range from US\$200 to US\$19,900, approximately.

Best practice

There is no specific procedure set forth by the FLL that companies shall follow to prevent, investigate and sanction sexual harassment. However, the Supreme Court has issued a manual that can be considered an effective and good benchmark.

In short, the manual says that in order to characterize a conduct as sexual harassment, the following actions shall be taken:

- ▶ Distinguish the type of sexual harassment from other types of conduct associated with the employment
- ▶ Determine the circumstances in which the conduct occurred
- ▶ Evaluate the role of the alleged victim
- ▶ Use the standard of the reasonable person
- ▶ Identify the relevance or significance of the offender's intention

- ▶ Evaluate the dynamics of the power relationship between the offender and the victim
- ▶ Incorporate an in-house ombudsman and retain professional outside counsel assistance
- ▶ Analyze the harassment mechanics to determine the sanction
- ▶ Suggest an alternative dispute resolution method
- ▶ Assign a sanction in proportion to the conduct

If companies follow such actions, the exposure to punitive damages and fines can be reduced.

It is quite common for companies to have an anti-sexual harassment protocol, including clear regulations in the employee handbook, complaint systems and ombudsman structure.

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Netherlands



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Sexual harassment

Since the amended EU Sex Equality Directive was transposed into Dutch law in 2006-07, sexual harassment has been explicitly prohibited under national legislation. The Dutch civil code's General Equality Treatment Act (GETA) and the act on equal treatment of men and women (ETA) stipulate that the prohibition of a direct distinction includes the prohibition of harassment and sexual harassment.

Pursuant to the Dutch civil code, article 646 sub 8 of book 7, sexual harassment is defined as any form of verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

This definition is very similar to the definition found in the Equal Treatment Directive 2006/54/EC. However, in the Dutch provision the term "unwanted" is left out. The Dutch Government believed that the word would place a heavy burden of proof on the victim to show that sexual harassment was indeed (subjectively) unwanted. Leaving out the term "unwanted" offers more protection to victims of sexual harassment. Removing this objective element makes sexual harassment an offense whether it is unwanted or not. Nonetheless, the Dutch Supreme Court, in a judgment on July 10, 2009, interpreted the definition of sexual harassment in such a way that it left the accused leeway to demonstrate subjective arguments.

The scope of the prohibition of sexual harassment covers employment. The Labor Conditions Law of 1994, an employment health and safety law, states that the employer shall operate a policy aimed at preventing employment-related

psychosocial workload, which is described as: factors direct or indirect, including sexual harassment, in an employment situation that cause stress.

The prohibition of sexual harassment also extends to areas such as goods and services, and in the field of primary and secondary education. However, outside the workplace, sexual harassment is not criminalized as a separate offense in the Netherlands and is only prosecutable in criminal law.

Interpretation by the courts

Since 1984, there have been several cases based on sexual harassment. It appears from case law that a variety of legal actions have been taken. Precedents related to sexual harassment are case-oriented. Court rulings are determined mainly by the relevant facts and actual circumstances of the case.

Case law further demonstrates that a breach of the duty of care under the Labor Conditions Act may result in the employer's liability for material and immaterial damages and high compensation during termination proceedings.

Burden of proof

In employment cases of sexual harassment, we can distinguish between cases involving an employer and an employee, where a shift in the burden of proof applies, and cases involving two employees, which are subject to the "normal" burden of proof.

As mentioned, under labor law the burden of proof shifts from the employee to the employer in sexual harassment cases.

The relation between an employer and an employee is framed in such a way that the employee enjoys a certain level of protection. In practice, when the employee gathers enough facts to justify his or her claim, a judge may decide to reverse the burden of proof, which leaves the employer

with the burden of showing lack of conclusive evidence of sexual harassment.

Legal actions/sanctions

For all cases related to sexual harassment involving rape or other sexual assault, criminal law procedures are applicable. Sexual harassment in itself is not a criminal offense.

When the employer is the accused, the accuser may opt for one of these legal procedures: (1) start legal proceedings against the employer in civil or administrative labor court, stating that the employer has not met his or her duty of care toward the employee. The employee may claim damages/compensation; or (2) request that the court terminate the labor agreement and initiate compensation proceedings, seeking payment because of the employer's culpability.

Even if the employer is not the accused, the employer still may be held liable based on the duty-of-care standard – the employer's responsibility to prevent harm to the employee.

To summarize, the Dutch Government has given a clear definition on sexual harassment in national legislation. However, case law does not provide a clear-cut answer to whether the definition of sexual harassment can be interpreted objectively. Therefore, it is highly recommended that employers take measures to prevent damages by evaluating the risks in assessment reports and building an effective case with regard to the specific incident.

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New Zealand

Protections against sexual harassment in New Zealand

What is sexual harassment?

Employment-related sexual harassment is governed by the Employment Relations Act 2000 (ERA) and the Human Rights Act 1993 (HRA). An employee has been sexually harassed if their employer (or representative) directly or indirectly makes a request of that employee for sexual activity along with an implied or express promise or threat of preferential or detrimental employment treatment, or a threat about their employment status.

An employee also has been sexually harassed if, by the use of language, visual material or physical behavior of a sexual nature, the employer (or representative) directly or indirectly subjects the employee to behavior that is unwelcome or offensive and (by its nature or through repetition) has a detrimental effect on the employee's employment, job performance or job satisfaction.

The HRA contains similar provisions but goes further to cover partnerships, vocational training and union membership.

Is sexual harassment by a client or colleague covered?

If an employee is sexually harassed by another employee or client, the employee can make a complaint to their employer. The employer must investigate any complaint and, if it's substantiated, must take all practicable steps to prevent any repetition. If the employer does not do this, and the harassment is repeated, the employer effectively steps into the harasser's shoes and the employee may bring a claim against the employer, as if the employer were the harasser.

What must an employer do upon receiving a complaint?

Employers must undertake a reasonable investigation into sexual harassment

complaints. Where the harassment relates to alleged conduct of a colleague, the employer will need to balance their duty toward the complainant with their duty of good faith toward the complaint subject, as well as the requirements of natural justice.

All information relevant to the complaint, including the identity of the complainant and any witnesses, will be put to the complaint subject for a response before any decision is made. Employers are entitled to make decisions on the basis of the balance of probabilities, but their duty to undertake a reasonable investigation will also be influenced by the potential impact of a finding of sexual harassment against the complaint subject (i.e., the greater the impact, the greater the importance of conducting a full and fair investigation and the more certain an employer must be of their conclusions).

What action can employees take?

If a claim is not resolved by the employer, an employee has two options:

- ▶ Bring a personal grievance claim against their employer under the ERA
- ▶ Bring a claim under the HRA

The employee must choose one avenue; they cannot bring both claims at once.

Claims under the ERA will first proceed to mediation (usually provided through the Ministry of Business, Innovation and Employment mediation service) and if the claim cannot be settled at that level, will proceed to an Employment Relations Authority hearing. The authority's decision may be appealed to (or heard afresh (de novo) by) the Employment Court. Damages available include a loss of remuneration (e.g., if the employee resigned in response to the harassment), injury to feelings or recommendations about the action the employer should take (which can include the transfer of the harasser, disciplinary action against the harasser or rehabilitative action) or about any other action that the

employer could take to prevent further harassment.

Claims under the HRA are first investigated by the Commissioner. The Commissioner may decide to mediate the complaint, talk with the parties about a settlement, take no further action or refer the complaint to the Human Rights Review Tribunal (HRRT). If the employee is not satisfied with the Commission's response to the complaint, the employee may also escalate their claim to the HRRT. The HRRT makes decisions on a similar basis to the Employment Relations Authority and its decisions may be appealed through the High Court. The HRRT has wide discretion to grant remedies it considers reasonable, but like the authority, the most common awards are for lost remuneration and injury to feelings. A number of HRRT decisions have been publicized recently for awarding damages for injury to feelings at a much higher level than similar awards by the Employment Court. Previously, most sexual harassment claims have been brought under the ERA (rather than the HRA) because the process tends to be simpler and faster, but recent awards have caused some employees to reconsider these decisions. Employees will also have the option of raising the conduct through the police, where it constitutes a criminal offense such as assault or criminal harassment.

Sexual harassment claims in the courts are relatively rare in New Zealand. Most employers take an allegation of sexual harassment extremely seriously and work hard to ensure that their internal investigations resolve the issue.

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Norway



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Legislation

Sexual harassment is prohibited in Norway and employees have a right not to be subjected to harassment or other improper conduct, including sexual harassment (Gender Equality Act § 8 and Working Environment Act § 4-3 (3)).

Employers have a statutory duty to “prevent” and “attempt to avert” the occurrence of sexual harassment at the workplace and in connection with work. This obligation is expressly stated in the Gender Equality Act § 25. It is also implied in the employer’s obligation in the Working Environment Act §§ 3-1 and 4-1 to provide a “fully satisfactory” working environment and ensure the employees’ physical and mental health and welfare. The same duty applies to the management of organizations and educational institutions.

The obligation to prevent sexual harassment involves taking action so that such harassment does not occur in the first place, and putting procedures in place to deal with instances of sexual harassment if they occur. This can involve issuing guidelines and policies or attitude campaigns and training programs to stop harassment, and establishing internal complaint or control systems and procedures. (Since 2017, all businesses with more than five employees are required to have internal whistle-blower procedures.) Other preventive measures may be to organize the business in a particular way; for example, to ensure that sexualized or pornographic images are not on office and other facility walls.

The strategy will vary from business to business depending on the size, nature and complexity of the organization or workplace, and the composition of the workforce. At a minimum, however, the employer should make it clear that sexual harassment will not be tolerated at the workplace, and inform about the negative impact of such harassment for both the victims and the working environment.

The duty to “attempt to avert” sexual harassment involves addressing challenges and alerts about harassment if and when they arise to stop the harassment from continuing. The obligation arises only if the employer has been alerted about the sexual harassment. The obligation to attempt to avert does not require that the employer actually prevented the harassment.

Alerts of sexual harassment

An employee who becomes aware of harassment at the workplace has a statutory duty to notify the employer and the safety representative (Working Environment Act § 2-3(2)(d)).

Employees also have a statutory right to report “censurable conditions,” including sexual harassment (Working Environment Act § 2A-1). Such alerts can be raised by the victims of sexual harassment or others who observe or otherwise become aware that a colleague is harassing or being harassed. Employees who raise an alert about sexual harassment are protected against retaliatory action provided they “proceed responsibly” (Working Environment Act § 2 A-2).

Enforcement

The prohibition against sexual harassment is enforced by the courts. The Equality and Discrimination Ombudsman, however, is responsible for enforcing the obligation of employers to prevent and attempt to avert sexual harassment. An alert can also be sent to the Labor Directorate.

Sanctions

Sexual harassment can constitute justifiable grounds for disciplinary action, including dismissal and summary dismissal.

Breach of the provisions of the Working Environment Act can also lead to fines.

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Sexual harassment

Current context:

In 2016, the National Superintendence of Labor Inspection (SUNAFIL) received 626 cases of sexual harassment in the workplace across the country.

Sexual harassment in Peru is regulated by Law No. 27942, Law on Prevention and Punishment of Sexual Harassment, as well as by its regulation approved by Supreme Decree No. 010-2003-MIMDES.

These regulations are applicable to public and private work centers; educational, police and military institutions; and to other relations of subjection regulated or not by labor law. Additionally, recently the Ministry of Labor published the Practical Guide for Prevention and Punishment of Sexual Harassment in the workplace for the private and public sector.

Regulations

In general, the regulations establish the constitutive elements of sexual harassment and its demonstrations, investigation and prevention procedures, responsibilities, and sanctions, among other relevant aspects.

It is important to note that before its modification, the former text of the law only protected and prevented sexual harassment produced in hierarchical relationships. Now, the regulation considers two types of sexual harassment: typical, which occurs in a hierarchical relationship, and environmental, which does not require the existence of a hierarchical relationship to occur.

The application of the referred regulation has been delimited in the labor field by the Supreme Court. In a precedent of mandatory compliance, the court established the interpretative meaning of certain articles of Law No. 27942. Therefore, the court pointed out that in order to determine if a behavior qualifies as sexual harassment, judges must take into account the following elements: conduct related to sexual topics, conduct rejected directly or indirectly by the victim, and affectation of the victim's employment by the harasser.

Proof of sexual harassment

There is no doubt that proving sexual harassment is one of the most difficult issues. The law establishes that the victim must prove his or her statements. Indeed, the victim should be able to generate a reasonable doubt in his or her favor so that the complaint can be admitted. On top of that, the Practical Guide expands the assumptions by allowing the testimony of the victim to be considered as valid evidence to weaken the aggressor's presumption of innocence.

Furthermore, the parties may provide the evidence they deem appropriate. Even the confrontation between the parties is allowed, provided that it is requested by the alleged victim. It stands to reason that considering sexual harassment can be expressed in an implicit or explicit way, a more protective way in favor of the victim would be to reverse the burden of proof, establishing that it is the alleged aggressor who has to prove a harmful behavior was not committed.

Punitive measures

Punitive measures applicable in cases of sexual harassment deserve special focus. Regarding the private labor regime and depending on the severity of the behavior, the harasser may be sanctioned with a reprimand, suspension or dismissal.

The victim of sexual harassment can take legal actions by requesting the cessation of hostility or claiming a compensation payment equal to a severance payment. This last option implies the termination of the employment relationship.

In addition, criminal or civil legal actions can be taken against the harasser. In the latter case, the payment of an indemnity can be requested.

Employers obligations

Finally, the employer must establish an investigation procedure, and preventive and punishment measures of sexual harassment, as well as provide training to its employees on this matter. If the employer does not comply with this, it may be punished with a fine of up to PEN182,250. Likewise, if an appropriate investigation procedure is not established, it will be jointly and severally liable with the harasser.

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Poland



Michał Balicki

Legal basis

The Polish Labor Code provides a definition of sexual harassment for the purpose of anti-discrimination provisions. According to Article 183a § 6 of the Code, sexual harassment includes any form of unwanted conduct of a sexual nature, or referring to a person's sex, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, including verbal, non-verbal or physical conduct. Such sexual harassment is treated as discrimination on the grounds of sex.

Other provisions of Polish law may be applied to sexual harassment. According to Article 111 of the Polish Labor Code, an employer shall respect the dignity and other personal rights of an employee. Under this provision, the crime of sexual harassment harms the inherent, inalienable and superior value of every human being, which is his dignity.

Remedies

The main remedy against sexual harassment is a civil law action on protection of personal interests. However, Polish law protects only against illegal actions jeopardizing the personal interests. It is illegal to act contrary to both the law and the principles of community coexistence. Article 24 § 1 of the Polish Civil Code provides the presumption of illegality. Thus, the burden of proving

the premises evading illegality rests on the person who violated personal rights (Article 6 of the Civil Code). In case of sexual harassment in the employment relationship, the burden of proof rests on the employer.

In consequence of the above provisions, even if it is found that there has been a violation of personal interests, it is not obvious that the employer will be liable for the infringement. In the case law of the Polish Supreme Court, there is an extensive catalog of grounds that exclude illegality of jeopardizing personal interests. The Supreme Court stated that the illegality of action is excluded in the following cases: the action is in line with the law, it is undertaking a subjective right, it is taken to protect the deserving own interest, the plaintiff allowed the action, specific provisions exclude or limit protection of personal interests, or the demand for protection is contrary to the principles of community coexistence.

The aggrieved party (i.e., employee) may demand pecuniary compensation or a payment of an adequate amount of money for a specified community purpose. Non-material liability for sexual harassment manifests itself in the following claims in a civil law action on protection of personal interests: for abandoning activities that jeopardize the personal interests of an employee and for performing activities necessary to remove the consequences of the infringement.

In practice, the Supreme Court in its judgment dated October 8, 2009 (ref. No II PK 114/09) expressed an opinion that for assessing that a breach of the employee's dignity occurs, it does not matter whether an employee treated the specific behavior of the person representing the employer as infringement of his/her personal interests. However, the employee's reaction to such behavior may be important in the process of assessing whether the violation of dignity objectively occurred.

It should be also noted that an employee who has lost his or her job in connection with sexual harassment is entitled to appeal to a labor court to declare a notice of termination ineffective or to order reinstatement. Instead of those claims, the court may award compensation for the employee.

Criminal liability

Some actions considered to be sexual harassment are penalized by the Polish Penal Code. However, this does not apply to all behaviors of this nature. Unlawful acts in the field of criminal law shall be considered in particular: rape, insult and defamation, abuse of the dependency relationship, violation of bodily integrity, mistreatment or violation of employee rights.

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Portugal

New laws and new standards for companies on preventing sexual harassment

In Portuguese labor law, sexual harassment is considered a specific type of workplace bullying. Whereas the legal definition of workplace bullying in general is “unwanted behavior perceived as abusive” regardless of its nature, sexual harassment is, specifically, the unwanted behavior “of sexual nature,” perceived as abusive.

Sexual harassment may constitute a criminal offense, but only if the facts in question meet the requirements of specific criminal acts (e.g., rape, sexual coercion, sexual exposure), since, under Portuguese law, workplace sexual harassment is not in itself a criminal offense.

To address concerns on the labor implications of sexual harassment, a new legal framework has recently been enacted – Law no. 73/2016 of 16 August – which considerably raises the bar in terms of the duties imposed on employers for the prevention of abusive behavior, as well as of the consequences for not complying with those duties. It is now mandatory that each company adopts a code of conduct for the prevention of workplace bullying, including harassment, and the company will be liable for any occupational ills affecting its employees that result from these behaviors; liability for non-material losses was already in place.

Very few cases have been brought to labor courts on account of sexual harassment that led to publicly announced decisions. This may be due to settlements being reached before a final decision or, more likely, because harassment victims prefer

not to act legally against their employers. In any case, proof is notoriously difficult for the employee, who has the full burden of proof that the harassment took place – even if intent is not required to be verified; a perception of abuse is sufficient. The new legislation, however, established a “protected witness” framework, according to which both the affected employees and the witnesses they identify cannot be the object of disciplinary action by the employer on account of their participation in the procedures. In addition, all disciplinary sanctions may be applied to the referred persons up to one year after the complaint/testimony; this can result in compensation up to at least 10 times the value of lost wages if such sanctions are in fact considered abusive by the court.

Since employers are now liable for all costs arising out of occupational ills caused by harassment (although the burden of proof still rests with the employee), it is possible that the role of sexual harassment in the context of occupational issues will grow.

Also, a company allowing abusive behavior toward its employees is subject to fines by the Portuguese work inspection authority (ACT), which will now also maintain a public record of companies sanctioned on that account; reputational damage is, therefore, also something to be considered.

In view of the new legislation, companies are showing interest in implementing anti-harassment frameworks.

This is thought to be the most effective approach not only to comply with legal requirements in this matter but also to prevent, address and stop any abusive behavior at an early stage, thus avoiding the escalation of a situation and reducing the damages for which the company may be held liable later.

These frameworks should include anti-harassment policies and tools to prevent and combat sexual harassment, such as: a code of conduct – mandatory to companies with more than six employees; a protected complaint mechanism; awareness and policy training of employees; and reporting and research structures to reliably investigate the complaints and provide adequate follow-up.

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Romania



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Sexual harassment – general consideration

Romania does not lack the legal framework sanctioning sexual harassment nor the institutions or authorities to enforce these provisions. Despite this reality, we have not identified official statistics on the extent of harassment nor a relevant number of cases dealing with sexual harassment handled by the competent authorities (including competent courts). However, according to unofficial studies made by NGOs,¹ sexual harassment is present in a significant proportion especially because in Romania there is high tolerance for sexist behavior, a low level of information on this matter and a patriarchal culture.

Criminal sanctions

The Romanian Criminal Code defines sexual harassment as the following: repeatedly claiming sexual favors while in a labor relationship or a similar relationship, if the victim was intimidated or placed in a humiliating situation.

Thus, the aggressor and the victim should be: (i) part of a work group either as colleagues or as manager and subordinate. (in the typical situation both people have an employment relationship with the same employer); or (ii) individual contractors collaborating for the purpose of providing

services (e.g., lawyers, public notaries working in the same office). Of the essence for this criminal offense is the repeated actions of the aggressor that scare or offend the victim. If the actions of the aggressor do not have these effects on the victim, there is no criminal offense. Moreover, the aggressor should act intentionally with the purpose of obtaining sexual favors from the victim.

This criminal offense is sanctioned with imprisonment from three months to one year or with fines. The criminal proceedings start with the victim filing a complaint and not ex officio (i.e., the proceedings are not initiated by the competent authorities in the absence of this complaint).

As per the Romanian Criminal Procedure Code, the complaint needs to be filed within three months of the day the victim became aware of the criminal deed. Moreover, the burden of proof in a criminal proceeding belongs to the prosecutor (who may also act upon the requests of the victim/suspect/other parties).

Other relevant legal provisions

Sexual harassment is also regulated and sanctioned by other pieces of legislation concerning the prevention and sanctioning of all the cases of discrimination as well

as by some meant to ensure the equal chances and treatment of women and men. The latter sanction as an administrative offense the harassment in general (including the behavior determined by sexual orientation) as well as the discrimination based on sexual criteria. The administrative fines that may be applied in these cases may reach RON100,000 (approximately € 21,000).

Conclusion

Sexual harassment may have significant damaging consequences both on the victim of the aggression, and on the company where he/she is employed, due to reputational hazard or decrease in the productivity of the people involved. Raising awareness of harassment as well as the applicable legal framework may help to diminish its negative implications.

¹ For details, please refer to <http://centrulfilia.ro>

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Sexual harassment at work according to Serbian regulations

In accordance with Serbian labor law, sexual harassment at work is considered to be any verbal, non-verbal or physical behavior aiming at, or representing, a violation of the dignity of an employee or someone seeking employment.

The behavior is described as causing fear or creating a hostile, degrading or offensive environment.

The procedure for protection from harassment – of any kind – is determined by the Law on Prevention of Harassment at Work.

In accordance with this law, an individual act is not considered harassment; the behavior toward the subject must happen more than once.

The perpetrator of sexual harassment at work can be the employer (if the employer is an individual); someone acting on behalf of the employer (e.g., a director), if the employer is a legal entity; or another employee or group of employees.

According to the harassment law, the subject of harassment can initiate (i) an internal procedure of protection from harassment with the employer and (ii) court proceedings.

However, unless the alleged perpetrator is an individual who is the employer or an individual who carries out the duties of an employer on behalf of a legal entity (usually the person listed on the company registry as the director), the employee is not entitled to initiate court proceedings prior to initiation of the internal procedure for protection with the employer.

Internal procedure

The internal procedure of protection from harassment at the employer is initiated by submission of a request for mediation by the employee who is claiming harassment. The employer is obliged to propose the procedure within three days of submission of the request. The procedure is closed to the public and any data that is collected must be kept confidential. The mediation procedure must be completed within eight working days from the day the mediator is chosen (this can be extended to a maximum of 30 days).

The statute of limitations for initiation of the mediation procedure is within six months of the alleged harassment.

Courts

Court proceedings can be initiated if the perpetrator of the harassment is an individual who is the employer or the person who is responsible for carrying out the duties of an employer. The statute of limitations for internal procedures apply here as well. Additionally, if the subject of harassment is not satisfied with the outcome of the mediation procedure performed at the employer, court proceedings must be initiated within 15 days from the day of completion of the mediation procedure.

If the claimant, during the course of the proceedings, has made it likely that the claimant has been the subject of sexual harassment, the burden of proof lies with the defendant.

According to the provisions of this law, the claimant may request termination of harassment and compensation for damages caused by such treatment.

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Workplace sexual harassment

The Protection from Harassment Act

Sexual harassment in the workplace falls under the scope of the Protection from Harassment Act (PHA), which was introduced in Singapore in 2014 to provide a range of criminal sanctions and civil remedies to protect people from harassment, stalking and other antisocial behavior.

Where a person causes harassment, alarm or distress to another person by using threatening, abusive or insulting words or behavior, he may be guilty of a criminal offense under Section 3 of the PHA. The penalty is a fine not exceeding \$5,000 or imprisonment for a term not exceeding six months – or both. Illustration (a) of Section 3 makes clear reference to a situation of workplace sexual harassment, referring to “X loudly and graphically describ(ing) to the other co-workers X’s desire for a sexual relationship with Y in an insulting manner.”

Unlawful stalking of another person is also a criminal offense under Section 7 of the PHA, with a similar penalty of a fine or imprisonment. Illustration (a) of Section 7 refers to the situation of workplace harassment, which is when “Y repeatedly sends emails to Y’s subordinate (X) with suggestive comments about X’s body.”

Section 11 of the PHA creates a statutory tort of harassment, such that the victim

of sexual harassment may commence a civil lawsuit against the perpetrator. The burden of proof in such a civil lawsuit is on the balance of probabilities. The remedies available to the victim include damages or a protection order against the perpetrator. Section 14 of the PHA clarifies that the common law tort of harassment is abolished.

Ministry of Manpower’s advisory guidelines

The Ministry of Manpower in Singapore (MOM) has issued a Tripartite Advisory on Managing Workplace Harassment, which operates as a “soft law” for the prevention and management of workplace harassment, including sexual harassment.

The Advisory contains good practices that employers are strongly encouraged to adopt. Firstly, employers should develop a formal harassment prevention policy in order to display a zero-tolerance stance toward harassment. Secondly, employers are encouraged to provide information and training on workplace harassment for the employees, human resources (HR), line managers and supervisors. Lastly, employers are urged to implement reporting and response procedures to handle workplace harassment cases, including, for example, anonymous whistleblowing mechanisms and investigation procedures.

Press reports of workplace sexual harassment

In 2016, the Chief Executive Officer of the National Kidney Foundation (NKF), a large non-profit health organization in Singapore, was fired from his position due to “personal indiscretion involving a male employee.” It is notable that the time between the incident and the termination of the CEO’s employment was remarkably short: within a week from when the sexual act was committed, the NKF board held a meeting to discuss the matter, a disciplinary hearing was convened and the NKF board formally terminated the CEO.

Another case, in 2013, involved a senior male lawyer who committed various immodest acts toward his female secretary, on the pretext that they needed to get a room in a hotel while they surveyed the venue for a client. The Law Society of Singapore struck the senior lawyer off the roll as part of its disciplinary proceedings, in view of the grave dishonor he brought to the legal profession.

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Slovak Republic

Sexual harassment

Under Slovak law, sexual harassment is unacceptable, anti-social behavior. Slovakia has enacted several laws to promote sexual equality and prevent discrimination on the basis of gender.

The issue of sexual harassment is covered in the Anti-discrimination Act and, to an extent, in the Labor Code. The Anti-discrimination Act defines sexual harassment as verbal, non-verbal or physical behavior of a sexual nature, the intent or effect of which is, or may be, a violation of the dignity of a person and creates an intimidating, degrading, disrespectful, hostile or offensive environment.

Possible recourse for victims of sexual harassment

Legal remedies are provided mainly by the Anti-discrimination Act, which establishes specific types of sexual-harassment disputes, referred to as anti-discrimination disputes.

Victims of discrimination may seek civil judicial relief, including injunctive relief involving an order to the harasser, equitable remedies, and monetary damages.

In sexual harassment cases, the victim does not have to bear the burden of proof; the burden is on the alleged harasser to prove that he or she is not guilty. However, because of the sensitive nature of such disputes, most cases are settled out of court.

Criminal liability for sexual harassment

If the alleged sexual harassment is particularly egregious, the Criminal Code may apply. Under the code are special provisions on “dangerous harassment,” such as stalking or long-term harassment that puts someone in fear for their life or health, or that of their children, or that “significantly impairs” their quality of life.

The Slovak Act on the Criminal Liability of Legal Persons (“the Act”) introduced direct criminal liability of legal persons (including companies), under which such persons may be convicted and punished for limited types of criminal offenses, including offenses of a sexual nature, such as sexual violence and sexual abuse.

This legislation applies to both Slovak and foreign legal persons, hence it may have complex legal consequences even outside Slovakia.

A legal entity is liable for sexual violence committed by its specific representatives (members of its statutory body, persons performing supervisory activity, and other persons authorized to represent a legal entity or to make decisions on its behalf or on the behalf of employees). The Act includes an exhaustive list of penalties that may be imposed on legal persons. For example, winding-up of the company, forfeiture of property, pecuniary penalty (up to €1,600,000) or prohibition from participating in public procurement.

In conclusion, companies operating in Slovakia should provide effective and functional protection of their employees. Doing so can reduce companies’ risk of criminal liability.

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Spain



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Sexual harassment in the workplace

Spanish law has some rules that specifically regulate the principle of equality or non-discrimination in the workplace. The starting point for any discussion of no discrimination is the Spanish Constitution, which prohibits discrimination on the basis of sex, and the Spanish Workers' Statute and the Organic Law 3/2007, March 22, for effective equality of men and women.

Sexual harassment is described as any behavior performed against any person on the basis of sex, in order to infringe on their human dignity and to create an intimidating, degrading or offensive environment. Employees are protected from being discriminated against on the basis of their sex. In this sense, harassment and sexual harassment are conduct that violates fundamental rights.

Interpretation by the courts and burden of proof

The Workers' Statute provides that any statutory orders, collective bargaining agreements clauses, individual agreements and unilateral decisions taken by an employer that lead to direct or indirect discrimination affecting an employee's salary, working hours or other working conditions, on the basis of sex, will be considered null and void. In these cases, when the principle of equal treatment is breached, the discriminated employee can file a claim before the Labor Courts requesting compensation for damages.

If the company dismisses an employee for any stated reason, when in reality the reason is discriminatory, the employee can file a claim against the company and the harasser, requesting that dismissal be nullified because of a violation of fundamental rights (discrimination on the grounds of sex). In these cases, both actions are cumulative and they will be settled in the same judicial proceeding.

Regarding the burden of proof, in procedures in which the employee files a claim alleging the violation of fundamental rights, the defendant (the employer) bears the burden of proving that the discrimination does not exist. However, the simple assertion that fundamental rights have been violated cannot be considered sufficient proof. The employee must provide evidence of apparent discrimination. If the employer cannot prove the real cause of the dismissal, it will be declared null, and the employee will have the right to be reinstated to his or her position.

Sanctions

The employer must promote working conditions that discourage sexual harassment and has a duty to prevent any harassment in the workplace (i.e., in companies with more than 250 employees, it is compulsory to implement an internal equality plan). Additionally, the employees' representatives of the company must contribute to keeping the workplace free from sexual harassment by informing the company's management of harassing behavior.

Sexual harassment in the workplace, committed by the employer or a colleague, is considered a criminal offense that may be punished by imprisonment or fine.

If the employer is aware of such behavior but does not take the necessary measures to prevent it, the company may be sanctioned with a fine from €6,251 to €187,515, as well as subsidiary sanctions.

Other interesting matters

A significant development in Spain, in this regard, was the publication of the Organic Law 3/2007 for effective equality of men and women, which was the first law in which the principle of non-discrimination was defined. This law has included new dimensions of the equality principle, which include the promotion of balanced representation of men and women on companies' boards of directors. Next came the Spanish Securities Market Commission's Good Governance Code, which recommends that by 2020, at least 30% of the board of directors should be women.

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Sweden

The #MeToo campaign started a movement in Sweden and has gone beyond the entertainment industry. Decades of sexual harassment in the workplace have been revealed with hashtags such as #withwhtright (lawyers), #deadline (journalism), #technicalfault (tech industry), #lettherebelight (church), #academetoo (academia) and #onourterms (insurance), among others. Some argue these campaigns have crushed Sweden's reputation for equality whereas others say that the many campaigns are because of the equality so far achieved in Sweden.

Numerous legal provisions govern the employer's responsibility regarding the work environment and equal rights at the workplace.

According to the Swedish Discrimination Act (Sw. *Diskrimineringslagen*), harassment and sexual harassment are forms of discrimination. The employer has an extensive responsibility to prevent discrimination at the workplace. The employer must regularly take actions toward an equal workplace.

Since 1 January 2017, actions are described in the Discrimination Act and the provisions entail that the employer shall follow a mandatory strategic process in order to be compliant with the rules. Actions shall prevent discrimination and promote equal treatment within the employer's business. Actions also include a policy against sexual harassment.

According to the Swedish Work Environment Act (Sw. *Arbetsmiljölagen*), the employer is responsible for the work environment, which includes proactively providing a work environment free from abusive discrimination.

Sexual harassment

Sexual harassment involves behavior of a sexual nature that insults someone's dignity and personal integrity. Sexual harassment includes comments, words, intrusive looks, unwelcome compliments and advances, invitations and hints.

The person subjected to the behavior decides what is undesirable or insulting. However, it must be clarified to the other person that his/her behavior is perceived as sexual harassment by the recipient. In severe situations, there would be no requirement to clarify.

Employer's obligation

The employer is obligated to investigate and prevent sexual harassment in the workplace. This responsibility includes all employees, interns and contingent workforce.

The employer is responsible for investigating and preventing sexual harassment in all situations that are linked to the employer's business. Hence, the employer's responsibility includes misbehavior during business trips, off-site meetings, Christmas parties and similar occasions.

The obligation to investigate arises immediately when the employer receives indications that sexual harassment has occurred. There is no need for the employee to formally report such events; just a quick note or chat trigger an immediate obligation for the employer to investigate. The investigation and process shall be documented in writing.

Sanctions

The Swedish Discrimination Ombudsman (Sw. *Diskrimineringsombudsmannen*) oversees compliance. The employer must disclose information about measures taken against discrimination at the workplace upon request from the Discrimination Ombudsman. The ombudsman may levy penalties if the employer fails to meet the request. The employer may also face discrimination damages in case of non-compliance.

Surveillance and litigation

The Discrimination Ombudsman has announced a list of 40 major companies across the media, culture and legal industries where it will review company protocols regarding discrimination and harassment as a direct consequence of the #MeToo movement. Litigation has historically been limited. During 2017, only two cases have been brought to the Swedish Labor Arbitration Court (Sw. *Arbetsdomstolen*). Perhaps #MeToo will lead to an increase in litigation activities.

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United Kingdom



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Sexual harassment

In the United Kingdom protection against harassment in the workplace originates from two pieces of legislation – the Equality Act 2010 and the Protection from Harassment Act 1997.

There are three definitions of harassment contained in Section 26 of the Equality Act. The first is the general definition; the others concern “conduct of a sexual nature.”

Harassment is any unwanted physical, verbal or non-verbal conduct related to a protected characteristic (there is a definitive list of protected characteristics, which includes sex) that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her. A single incident can amount to harassment.

Strictly speaking there are two types of harassment relating to sex. One is harassment on the ground of a person’s sex; the other is sexual harassment, which is harassment that involves “conduct of a sexual nature.”

Harassment also includes treating someone less favorably because they have submitted, or refused to submit, to such behavior in the past.

There is no legislative definition of “unwanted conduct of a sexual nature.” According to the Equality and Human Rights Commission, such conduct can include unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic

photographs or drawings, or sending emails with material of a sexual nature.

Both criminal and civil action can be taken against harassment. The burden of proof will depend on which route is taken.

For criminal cases the burden will be on complainants to prove their cases beyond reasonable doubt. In civil cases complainants will only have to prove their cases on a balance of probabilities.

In the case of *Smith vs. Renrod Ltd* in 2015, the courts considered “conduct of a sexual nature.” Ms. Smith worked at a car dealership and claimed she had been sexually harassed by her manager. His alleged behavior included attempting to kiss her, pestering her about her private life and making speculative comments about her sex life and relationship with her boyfriend, who also worked at the dealership.

The court found that despite the culture of sexual banter in the dealership, which both Smith and her manager participated in, the comments went too far. They also noted that in a male-dominated industry, a female employee may feel compelled to join in with the banter and not necessarily take offence at language or conduct that they otherwise would find demeaning.

The following cases were heard before the Equality Act came into force but are still likely to apply to the interpretation of “conduct of a sexual nature,” under the act.

In *Insitu Cleaning Co vs. Heads* in 1995, a remark was made to a woman about her breasts. The employer argued that because a similar comment could have been made

to a man, it did not amount to sexual harassment. The example provided was commenting on a man’s balding head or his beard. The Employment Appeal Tribunal (EAT) held that a remark made to a woman about her breasts cannot be equated to a remark to a man about a bald head, since one is sexual in nature and the other is not.

In *Moonsar vs. Fiveways Express Transport Ltd* in 2004, the claimant gave evidence that during her shift she had been aware on three occasions of male colleagues downloading pornography onto their computers. The claimant had not been shown the images and she had not made any complaint at the time. The tribunal found no discrimination. However, the EAT stated a finding of discrimination, holding that this was treatment that would obviously undermine the claimant’s dignity.

Litigation in this area is relatively low. Over the last three years, in particular, claims have fallen. It is possible that this is linked to the introduction of employment tribunal fees in 2014.

The removal of the fees in July 2017 and the number of high-profile women coming forward with allegations of sexual harassment have brought this topic into the spotlight and may lead to an increase in claims.

If a civil claim is successful, the level of compensation that may be awarded is uncapped. Criminal sanctions will depend on the severity of the harassment.

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Ukraine

In Ukraine, the legislation addressing sexual harassment is rather declarative by its nature and hardly enforceable due to the lack of legal instruments.

The surveys held by public and governmental organizations show that the level of people's awareness on sexual harassment and unwelcome behavior is quite low. Being influenced by the Soviet regime, Ukrainian society holds rather conservative views, preferring not to talk about such actions or believing it is a non-issue.

Having been pushed by the international community, more recently the Ukrainian Government took some actions in this respect. Earlier in December, the Parliament adopted two legal acts on preventing and combating domestic violence, which, among other things, regulate issues related to sexual harassment. This is a significant step forward for the ratification of the Istanbul Convention.

Legal basis

The law of Ukraine on ensuring equal rights and opportunities for women and men defines sexual harassment as actions of sexual character, which are expressed verbally or physically and which humiliate or offend individuals who are in relations of labor, service, financial or other subordination.

The Criminal Code of Ukraine envisages liability for sexual coercion of individuals who are of service or financial subordination (and not the other way around). As such, peer-to-peer and other forms of sexual harassment lay outside of the criminal framework.

Moreover, sexual coercion implies that the perpetrator poses a threat to the victim's current position, for example, by making work conditions worse, paying less salary or causing termination. Quid pro quo sexual harassment is not regarded

as a criminal offense. The employers are not held responsible for hostile working environments or neglecting cases of harassment.

Sanctions

The current sanctions foreseen by the criminal law are immaterial – a fine up to US\$1,500 or six-month imprisonment. When the law on preventing domestic violence comes into force, the fine will be increased up to US\$29,000 or imprisonment of up to two years.

In addition, the victim of sexual harassment may obtain compensation for moral damages under the civil law. The amount of compensation, however, should be substantiated by documented expenses (such as therapy bills).

Separately, disciplinary sanctions may be imposed on the delinquent employee by the employer for breach of the company's internal policies, if any are in place. It is also expected that the changes will be introduced to the labor law, giving the employer additional ground for dismissal of the delinquent employee if the case of sexual harassment is proven in the court.

Court practice

According to Ukrainian General Prosecutor Office statistics, there were zero criminal proceedings on sexual harassment submitted to the courts as of now. Moreover, large numbers of cases are closed at the stage of pretrial investigation. This is due to difficulties in evidence-gathering, non-comprehensive legislation and the inability of the prosecution to build the cases in absence of enforcement mechanisms. With the lack of clarity in the legislation, the Ukrainian courts are also reluctant to adopt precedent-setting decisions.

The majority of harassment cases were filed with the civil courts, where the burden of proof lies with the complainant.

What is more, the majority of harassment claims are counter-claimed for false allegations and, the latter are oftentimes sustained by courts.

Current developments

The recent campaigns in social media, such as #IamNotAfraidtoSay and #MeToo, revealed that society does not wish to tolerate sexual harassment any longer. This should be appropriately supported on the governmental level by developing functioning legal enforcement mechanisms, ratifying international standards and launching awareness-raising campaigns in order to make real changes.

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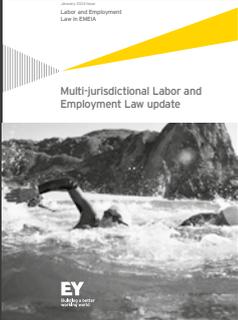
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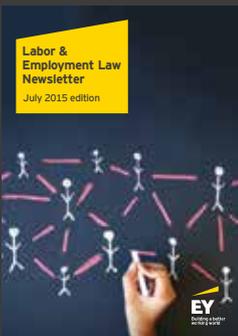
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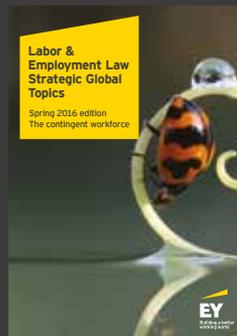
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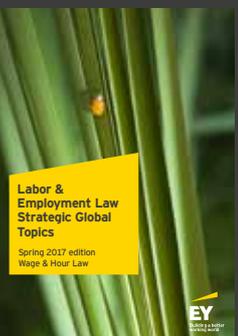
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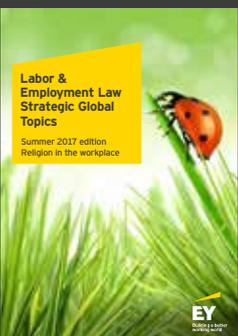
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