INTERNATIONAL LAWYERS NETWORK

SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT AUSTRALIAN COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Sexual harassment is conduct of a sexual nature, a sexual advance or a request for sexual favours that is unwelcome, where a reasonable person having regard to all the circumstances would have anticipated the person harassed would be offended, humiliated or intimidated.

What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is governed by both Federal and State/Territory laws.

At a Federal level:

- The *Sex Discrimination Act 1984* is the primary source of sexual harassment law in Australia. It defines sexual harassment and makes it unlawful in the context of employment, membership and professional organisations, clubs, education, provision of goods, services and accommodation, and Commonwealth laws or programs. The Australian Human Rights Commission deals with claims made under this Act.
- The *Fair Work Act 2009* prohibits workplace bullying, defined as repeated unreasonable behaviour towards a worker which creates a risk to health and safety. Repeated sexual harassment can constitute bullying. The Fair Work Commission deals with bullying claims (plus bullying-related victimisation or constructive dismissal claims).

At a State/Territory level:

- State and Territory Equal Opportunity laws also govern sexual harassment. For example, the Victorian *Equal Opportunity Act 2010* makes sexual harassment unlawful, and complaints under the Act are dealt with by the Victorian Equal Opportunity and Human Rights Commission. Each State/Territory has largely similar schemes.
- State and Territory work health and safety laws can apply where sexual harassment results in a physical or psychological injury. Victims can seek compensation for their injury where certain injury thresholds are met, and negligence can be established.

What actions constitute sexual harassment?

The types of conduct which constitute sexual harassment in each Australian jurisdiction are largely the same. Unwelcome conduct of a sexual nature which would reasonably be anticipated to offend, humiliate or intimidate can include isolated or repeated incidents of:

- staring or leering;
- unnecessary familiarity, such as deliberately brushing up against you or unwelcome touching;
- suggestive comments, jokes or innuendo;
- insults or taunts of a sexual nature;

- intrusive questions or statements about your private life (including at job interviews);
- displaying posters, magazines or screen savers of a sexual nature;
- sending sexually explicit emails or text messages;
- inappropriate advances on social networking sites;
- accessing sexually explicit internet sites;
- requests for sex or repeated unwanted requests to go out on dates;
- attempts at sexual intercourse or some other overt sexual connection;
- kissing;
- statements of a sexual nature, either verbal or written and either made to a person or in their presence;
- behaviour that may also be considered to be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

Mutual attraction, flirtation, friendship or relationships which are welcome do not constitute sexual harassment.

Can sexual harassment occur between two members of the same sex?

Yes. There is no requirement that the harasser and the person harassed be of different sexes or genders.

Are employers required to provide sexual harassment training for their employees?

There is no legal requirement to provide sexual harassment training, nor for an employer's sexual harassment policy to be legally binding. However, not doing so may render an employer vicariously liable for sexual harassment committed by its employees or agents.

What are the liabilities and damages for sexual harassment and where do they fall?

A perpetrator may be civilly liable; and may also be criminally liable if their conduct constitutes a criminal offence such as stalking or sexual assault. An employer may validly dismiss a perpetrator due to their sexual harassment, but procedural fairness must be afforded to avoid unfair dismissal claims against the employer.

Employers, prospective employers and contracting agencies can be held liable for:

- Sexual harassment by employees or agents; including where harassment occurs outside of the workplace but "in connection with a person's employment" - for example, at employer-sponsored events, work-related social functions or business trips.
- Failing to provide a safe working environment under the various State/Territory work health and safety Acts. Cases under this regime usually involve a serious psychological injury caused by the harassment, and there is a continuing trend of awarding high damages for pain, suffering and loss of enjoyment of life.
- Not properly investigating a sexual harassment complaint, including by victimising or taking adverse action against the complainant, failing to abide by their policies, or not affording the parties procedural fairness.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The onus is on the person harassed to prove that the conduct occurred; was of a sexual nature; was unwelcome; and was such that a reasonable person, having regard to all the circumstances, would have anticipated the possibility the conduct would offend, humiliate and/or intimidate.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The same laws apply regardless of who the perpetrator is. However, an employer is able to be held vicariously liable for harassment committed by supervisors or co-workers.

What are the potential defences employers have against sexual harassment claims?

An employer will escape vicarious liability under the *Sex Discrimination Act* where it took "**all reasonable steps**" to prevent sexual harassment. Merely having a sexual harassment policy is insufficient: an employer should implement the policy, train its employees on how to identify and deal with sexual harassment, and take appropriate action to handle instances of sexual harassment to demonstrate all reasonable steps were taken. Whether steps were "reasonable" will depend on the nature of the employer - for example, small businesses may not be held to the same standard as large companies.

An employer may also be able to argue in claims brought under the *Fair Work Act* that the harassment was **not in connection with employment**, and therefore the employer is not vicariously liable. Harassment occurring outside of work must have a sufficient connection with employment for an employer to be liable. For instance, conduct occurring while a manager is at an employee's house for a social occasion is unlikely to be in connection with employment; but the same conduct during a work-sponsored business trip would likely be connected with employment.

Who qualifies as a supervisor?

Regardless of the role title of the person who harasses an employee in the workplace or in connection with work, that person will be held liable. There is a broad concept of the harasser in Australian legislation, and the law does not treat supervisors any differently. However, the various Commissions may look less favourably on a sexual harassment claim against a senior or supervisory employee, for example by awarding higher damages.

Furthermore, the *Sex Discrimination Act* requires the relationship between the two persons to be taken into account when determining if conduct was harassment. This may include considering their power dynamic, hierarchy or working relationship.

How can employers protect themselves from sexual harassment claims?

The most important protection is to take "all reasonable steps" to prevent sexual harassment in the workplace. The best way of so doing is to put in place a comprehensive sexual harassment policy, train employees in that policy, state that the employer will not tolerate sexual harassment, and discipline or terminate those who breach the policy.

Does sexual harassment cover harassment because of pregnancy?

Pregnancy-based complaints more commonly fall under anti-discrimination law. However, it is possible for sexual harassment to occur in the context of pregnancy. Such claims would proceed the same way as any other sexual harassment claim.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. The law does not distinguish as to who is protected based on sexual orientation or gender identity.

What is prohibited retaliation?

The *Sex Discrimination Act* prohibits "**victimisation**": where a person subjects, or threatens to subject, the person harassed to any detriment because they have lodged or propose to lodge a complaint with the Australian Human Rights Commission. A defence is available if the allegation is proved to be false and not made in good faith. State/Territory equal opportunity laws contain similar provisions.

Further, the *Fair Work Act* prohibits "**adverse action**" against an employee because they have made a complaint or claim about sexual harassment to the Fair Work Commission. Adverse action includes dismissing the employee, discriminating against them, or otherwise altering the employee's position to their detriment. If an employer does take or threaten to take adverse action, a person can bring a claim under the "general protections" provisions of the Fair Work Commission, and potentially be reinstated or compensated.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

Conduct is only sexual harassment where it is unwelcome. Consensual, welcome relationships - even between a supervisor and their subordinate - are unlikely of themselves to constitute sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. Employers can be vicariously liable for the actions of agents. Agents include people who work on the same premises but have a different employer, contractors, partners, and representatives of the employer or trade unions. For example, if John – a cleaner at the cleaning company which is contracted to clean your office – sexually harasses your employee Sarah while he is at your office, you as the employer can be held vicariously liable if you have not taken reasonable steps to prevent harassment.

What is the #MeToo movement?

The #MeToo movement is a social, cultural and political women's rights movement centred on sexual harassment and assault. As in many other countries, the #MeToo movement in Australia continues to impact the professional world. There has been a marked increase in seminars, training sessions, media coverage and awareness of rights and responsibilities under sexual harassment laws. Hall & Wilcox has experienced an increase in employers seeking up to date advice on their obligations, and also continues to witness the trend of increasing damages for victims' compensation for pain, suffering & loss of enjoyment of life.

How is the #MeToo movement impacting the law in your jurisdiction?

Although no laws have yet been changed as a direct result of #MeToo, several law reform topics are receiving attention in the mainstream media. These include: reform to defamation laws to enable victims to more easily "name and shame" their perpetrator, increasing the time limit to lodge complaints with the Australian Human Rights Commission, reviewing the 30-year-old *Sex Discrimination Act,* creating a process for urgent interventions to stop harassment, special protections for sexual harassment whistleblowers and much more. Of particular relevance is the debate around streamlining Australian sexual harassment laws – including the *Fair Work Act* and *Sex Discrimination Act* – to ensure accessibility, efficiency and clarity for both victims and employers.

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CANADIAN: QUEBEC COMPANIES NEED TO KNOW

Quebec has long been considered the California of the East and a pioneer in adopting some of the most far-reaching obligations with respect to harassment in the workplace in its widest form, as well recourses and remediation provisions "with teeth".

Legal Provisions that Apply

In adopting its *Charter of Human Rights and Freedoms* ["*Charter*"] in 1975, seven years before the adoption of its federal equivalent, the Quebec legislature established (i) the fundamental right of every person to the safeguard of "his dignity, honour and reputation" (s 4) and (ii) that "[e]very person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on […] sex, gender identity or expression, pregnancy, sexual orientation […]" (s 10). The *Charter* also provides that "[d]iscrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right." (s 10). By 1982, with the adoption of s 10.1, the legislature provided that "[n]o one may harass a person on the basis of any ground mentioned in section 10". In so doing, it created a separate and distinct quasi-constitutional right to be free of sexual harassment or harassment because of sexual orientation, expanded in 2016 to cover, as well, harassment because of gender identity.

When the *Civil Code of Québec* was replaced in 1994, the provisions governing the contract of employment contained a positive obligation on every employer to take all appropriate measures, *inter alia*, "to protect the health, safety and dignity of the employee" (art 2087).

With the coming into force, in 2004, of new labour standards legislation regarding psychological harassment (ss 81.18–81.20 of the *Act Respecting Labour Standards*, hereinafter "*QLSA*"), defined as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee" (s 81.18), it was in some circles criticized for legislating civility in the workplace. In the years since its adoption, it has become part of the social and economic fabric of the Quebec employment landscape. At the same time, it has become a minefield for employer-side employment lawyers and their clients.

In 2018, the Quebec legislature amended ss 81.18 and 81.19 *QLSA*, *inter alia*: (a) by specifying that "psychological harassment" includes "verbal comments, actions or gestures of a sexual nature" and (b) providing that not only must employers take reasonable action to prevent psychological harassment, including sexual harassment, putting a stop to it whenever they become aware of such behaviour, but must adopt and make available to their employees a psychological harassment prevention and complaint processing policy that includes sections on behaviour that manifest in comments, actions or gestures of a sexual nature.

All of the above are considered matters of public order, either by specific provision of law or through case law and, as such, cannot be avoided or contracted out of. All of the above is buttressed by the right instantiated in the *Charter* at s 4, by the right of every person "to the safeguard of his dignity, honour and reputation".

Dignity being the status or quality of being worthy of honour or respect, and a sense of pride in oneself and self-respect, the Supreme Court of Canada, in two seminal cases, *Janzen* [*Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252] and *Robichaud* [*Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84] held that "sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being" [*Janzen*].

In *Janzen*, the Supreme Court distanced itself from the quid pro quo — hostile environment distinction caused by sexual harassment, relied upon in U.S. courts — adopting the precept that sexual harassment which creates a hostile or offensive environment for members of a particular sex is as demeaning and disconcerting as the most abhorrent of racial epithets.

As can be seen in Quebec, sexual harassment or the prohibition thereof has multi-levelled sources, grounded in both statute, the *Civil Code* and quasi-constitutional *Charter* rights.

Remediation and the Piper Pays the Price

With respect to psychological harassment and now sexual harassment in the workplace, the primary respondent is not the perpetrator, but rather the employer. In that context as well, the employer's responsibility pursuant to ss 81.18 et seq. *QLSA* is not only vis-à-vis his own employees, including management, but indeed anyone having access to or being present in or at the workplace. That is not to say that the actual perpetrator is absolved of responsibility. It is rather that he who has the "deep pockets", e.g. the employer, pays the price, first and foremost.

Psychological harassment, including by definition sexual harassment as well as independently, may also be made the subject of a workmen's compensation claim.

The prohibitions and obligations regarding psychological harassment are set out in the *QLSA*, which normally *does not* apply to senior executives. By exception the provisions of ss 81.18–81.20, and 125.3 et seq. regarding psychological harassment and the statutory recourses that pertain *do* cover them.

Objective of the Provisions Regarding Psychological Harassment

Some have said that the objective of the legislature in prohibiting psychological harassment was to create a new platform for redress because (i) the employee's recourse for violation of the employer's obligation to protect and safeguard the dignity of the employee was considered too costly and too long, and (ii) because it wished to oblige the employer to make changes "upstream", whatever the source, indeed at the source, to avoid the perpetuation of the situation.

Remedies

There are numerous arrows to an employee's bow in seeking redress. The most efficient from the employee's point of view, and costly from the employer's point of view, are complaints filed either

pursuant to ss 123.5 et seq. of the *QLSA*, and complaints pursuant to ss 124 et seq. thereof. Here's why. Both of these recourses allow an employee to receive free legal advice and representation by attorneys in the employ of the CNESST, the agency that oversees the *QLSA*, and seek compensatory, moral and punitive damages, and, in the case of termination of employment, compulsory reinstatement, plus interest costs, and, if there is some kind of psychological impairment, costs of support with no defined end.

Prior to the latest amendments to the *QLSA*, an employee had 90 days to file a complaint of psychological harassment after which it became "time-barred" or "prescribed". The time bar has now been lengthened to two years. However, since the time bar begins to run from "the latest manifestation" thereof, in the case of repeated conduct, proof may be led spanning years with all the attendant headaches of disproving the alleged conduct if it's the employer who is your client.

Such complaints are heard and decided by the Administrative Labour Tribunal, unless the employee is covered by a collective bargaining agreement. The provisions of the *QLSA* respecting psychological harassment are deemed incorporated into any and all collective bargaining agreements, and, as such, are heard necessarily and exclusively by a grievance arbitrator who would have equivalent remedial powers.

As is the case in many jurisdictions, administrative tribunals or commissions are less reluctant to push the envelope to advance the law in favour of the victim or alleged victim than the civil courts might be.

Five years after introduction of the original legislation, the Commission des normes du travail ("Commission"), the Administrative Labour Tribunal's predecessor examined the experience with the relevant provision and found:

- For the five-year period (June 2004–June 2009), the Commission received 10,095 complaints;
- 95% of the complaints related to psychological harassment in the form of repeated conduct;
- 73% of the complaints involved a person in "position of authority";
- 63% of the complaints were filed by women;
- 355 of the complaints were settled through mediation at the Commission stage;
- 911 complaints were referred to the Commission, but 723 were dealt with in out-of-court settlements;
- Between June 1, 2004 and March 31, 2010, the Commission rendered 108 decisions. Of those, 36 decisions (33.3%) concluded that the employee was the object of psychological harassment (35 complaints were granted because the employer failed in his obligation set out at s 81.19 and one complaint was denied, even though actual harassment had been found, because the employer had fulfilled his obligations). Correspondingly, 72 decisions (66.6%) concluded that the employee was not the object of psychological harassment in the workplace;

The upshot of all of this is, in my view, that such complaints are almost a free lottery ticket for employees, lodged in the hope of forcing the employer to settle, knowing full well that since litigation will cost the complainant nothing, while litigation can cost the employer his back teeth.

These recourses do not supplant the remedies provided for by the *Charter*, as pursuant to s 123.6 *QLSA*, with the complainant's consent, when the matter might involve "discrimination" pursuant to ss 10 or 10.1 of the *Charter* (see above), the recourses may be doubled up by transmitting that complaint to the Quebec Human Rights Commission for investigation and prosecution before the Quebec Human Rights Tribunal.

Settlement Considerations

As statistics show, the vast majority of psychological harassment complaints have been settled out of court. Settlement of psychological harassment complaints based on alleged conduct which might approach the level of sexual assault, as defined by the Canada *Criminal Code*, may be particularly problematic.

In Canada, sexual assault generously interpreted can constitute an indictable offence, (what in the U.S. may be referred to as a felony). It is the Crown or prosecuting attorney who gets to decide whether to proceed by way of indictment or by way of summary conviction.

The problem is the offence of compounding an indictable offence. S 141(1) of the *Criminal Code* provides that "[e]veryone who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years".

It may very well be that a non-disclosure agreement as part of a settlement agreement could be considered "valuable consideration", rendering the signatories to such agreements and any person aiding or abetting its signature liable to prosecution (on parties to offences, see s 21 of the *Criminal Code*). When drafting provisions in settlements out of court, when the subject matter of psychological harassment is sexual in nature, it may be more than prudent to take all of this into account.

As an aside, those of us who represent employers, when asked to draft "Protocols of Return to Work" following particularly violent strikes in which criminal complaints had been laid, protocols requiring the retraction of same, may have had occasion to worry about this concept of "compounding an offence" in the past.

Other Considerations

There are other considerations to be taken into account regarding settlements that are perhaps peculiar to Quebec. Matters that are declared to be matters of public order are of two kinds: public order of direction, or public order of economic protection. The Canada Supreme Court has already ruled that while one cannot waive matters of public order of direction, one can properly release or waive rights or recourses of economic protection, provided the waiver is executed *only after the right is acquired*. Most provisions of the *QLSA* and of those parts of the *Civil Code* have been determined to be of "economic protection". As far as sexual harassment is concerned, I would say that since there is a distinct societal

interest in its prohibition, a settlement that includes a complete waiver of rights that derive from the *Charter*, and particularly rights deriving from s 10.1 thereof regarding sexual harassment, might not be bulletproof.

Conclusion

And if my views differ from those of my betters, I differ with deference.

For more information, contact Theodore Goloff at ILN member, Robinson Sheppard Shapiro at tgoloff@rsslex.com.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT COLOMBIAN COMPANIES NEED TO KNOW

What constitutes sexual harassment?

In Colombia there is no specific regulation from a labor law perspective that defines which acts and/or behaviors could imply sexual harassment. However, Colombia, as part of ILO (International Labor Organization), has been using the definition that this organization provided in the following terms:

"a sex-based behavior that is unwelcome and offensive to its recipient. For sexual harassment to exist these two conditions must be present."[1]

ILO has also indicated that sexual harassment may take two forms:

1) Quid Pro Quo: when a job benefit, such as a pay rise, a promotion, or even continued employment, is made conditional on the victim complying to demands to engage in some form of sexual behavior.

2) Hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim[2].

What body of law governs sexual harassment in your jurisdiction?

- Article 210A of the Colombian Criminal Code typifies sexual harassment as a crime.
- Law 1010 of 2006 regulates the measures to prevent, correct and punish labor harassment and other behaviors within the framework of employment relationships. This provision, however, only mentions briefly sexual harassment as a category of labor harassment, but it does not indicate specifically which acts and/or behaviors could imply sexual harassment.
- Recent judgments from the Colombian Supreme Court of Justice about this topic which indicate actions and behaviors that constitute sexual harassment at work.
- ILO guidelines.

What actions constitute sexual harassment?

Sexual harassment implies a wide range of actions that could range from suggestive comments about appearance or how some dresses, to physical abuse. According with ILO, the following behaviors qualifies as sexual harassment:

- PHYSICAL: Physical violence, touching, unnecessary close proximity.
- VERBAL: Comments and questions about appearance, lifestyle, sexual orientation, offensive phone calls.

[1] Declaration on Fundamental Principles and Rights at Work. Sexual Harassment at Work Fact Sheet. ILO. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf.
[2] Ibid.

- NON-VERBAL: Whistling, sexually suggestive gestures, display of sexual materials[3].

Can sexual harassment occur between two members of the same sex?

Yes. Judgment No. SP107-2018 from the Colombian Supreme Court of Justice established that sexual harassment is a crime that could be committed against any person, regardless gender or sexual orientation.

Are employers required to provide sexual harassment training for their employees?

There is no obligation from the employers to provide sexual harassment training to employees in Colombia. However, and according with Law 1010 of 2006, companies are obligated to create a Connivance Labor Committee who is in charge of receiving and attending the possible mobbing complaints and present recommendations to the manager, like conferences or trainings to the employees in order to prevent and correct behaviors of labor harassment.

What are the liabilities and damages for sexual harassment and where do they fall?

There are two different scenarios in which damages and penalties for sexual harassment can occur:

Criminal Law: A person found guilty for acts of sexual harassment could be condemned to one (1) to three (3) years of imprisonment. Once the judgement is made, the victim may be entitled for compensatory damages.

Labor Law: A company is entitled to terminate the labor contract with fair cause to the employee that is committing acts of sexual harassment. The victim could also present a claim before the Labor Ministry. This entity could impose fines to the aggressor and even to the employer if it is proved that the company tolerated this behavior.

Finally, and for the victim that had to quit or was fired because of sexual harassment, it will be entitled to the indemnification payment for the termination of the labor contract without fair cause.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The first step to follow when employees believe that they have been sexually harassed is to present a complaint with the respective evidence before Human Resources and/or the Connivance Labor Committee. The company has the obligation to investigate and define the action plan in order to correct and punish sexual harassment at the workplace. If the company tolerates the behavior or fails to take prompt remedial action, the employee could present the complaint directly before the Labor Ministry or a Labor Judge.

[3] Ibid.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Yes, pursuant Article 4 of Law 1010 of 2006, the predominant position that the aggressor has in society, like position, economic status, power or dignity, is an aggravating circumstance in order to correct and punish sexual harassment at the workplace.

What are the potential defenses employers have against sexual harassment claims?

The potential defenses employers have against sexual harassment claims are the following:

- Appropriate operation of the Connivance Labor Committee within the company.
- The Connivance Labor Committee exercised reasonable care to prevent and correct promptly any harassing behavior according with the proceeding stablish in Law 1010 of 2006.
- The employee did not present any complaint before the Connivance Labor Committee and/or Human Resources. In that way it was impossible for the employer to have knowledge of the situation.
- The employee did not pay attention to any preventive or corrective measures provided by the Connivance Labor Committee.
- The complaint submitted by the employee has no reasonable or factual basis. In this case, the Labor Judge could impose fines to the employee.

Who qualifies as a supervisor?

Pursuant Law 1010 of 2006, individuals who work as managers, heads, director or other in position and direction in a company or organization, can be active subjects or authors of labor harassment.

How can employers protect themselves from sexual harassment claims?

Employers must create and ensure the appropriate operation of the Connivance Labor Committee. This Committee should implement accessible complaint procedures for employees in order to report sexual harassment behaviors. Employers should have a sexual harassment policy and schedule talks and conferences for the employees to be aware of this type of harassment at the workplace.

Does sexual harassment cover harassment because of pregnancy?

No, this type of behavior is forbidden, and it is regulated in other Colombian Labor provisions as well as several rulings of the Constitutional Court and of the Supreme Court of Justice.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

As explained in answer No. 4, sexual harassment does not differentiate gender or sexual orientation. However, if the behaviors against the victim are based on discrimination criteria rather than sexual harassment acts, the employee could submit a complaint to the Labor Connivance Labor Committee arguing labor discrimination which is another type of harassment at the workplace.

What is prohibited retaliation?

Article 11 of Law 1010 of 2006 establish special protection measures in order to prevent retaliation actions against an employee for reporting an incident of sexual or any other type of labor harassment or for participating in an investigation of a harassment complaint.

The first measure is the lack of effect of the employer's decision to terminate the labor contract of the victim who had submitted a complaint. This protection will be effective within the following six (6) months after the complaint has been filed, as long as the competent administrative, judicial or control authority verifies the reported situation.

There are other measures for public officials and employees who render services for State entities.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not considered as sexual harassment. However, internal working rulings usually indicate the obligation to report this kind of relationships in order to prevent a possible conflict of interests.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

No. The employer will be only liable for actions or omissions of persons under its responsibility and care.

What is the #MeToo movement?

The MeToo movement was founded in 2006 in the United States as an initiative to help and support victims of sexual violence. It was initially focused on young women of color with low resources.

This movement went viral from October 2017 when some Hollywood actresses started to use the hashtag #Metoo in order to make public in social media cases of sexual harassment committed by the movie producer Harvey Weinstein.

The goal of this huge movement is to tell the victims they are not alone and encourage them to take action against their perpetrators.

How is the #MeToo movement impacting the law in your jurisdiction?

In Colombia, the #MeToo movement has not had an impact at the same level as in the United States, but in any case, sexual harassment has begun to be questioned publicly, mostly by women, whose voices have been started to be heard by the government.

It is important to mention that in 2008 Colombia issued a law intended to protect women, but in our opinion, it has not had the expected impact.

For more information, contact Iván Cardona Restrepo at ILN member, VGCD Abogados at icardona@vgcd.co.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CYPRIOT COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Sexual harassment is any undesirable conduct of a sexual nature, expressed either by words or deeds, which has the purpose or effect of violating the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment, during the person's employment or vocational training or during the person's access to employment or vocational training. Harassment can be any undesirable conduct associated with a person's sex, which has the purpose or effect of violating the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment.

What body of law governs sexual harassment in your jurisdiction?

Section 12 of the Equal Treatment for Men and Women in Employment and Vocation Training Law (205(I)/2002) (herein after "**the Law**") strictly prohibits any actions or omissions, either of a legal entity or a natural person, which is either recurring or non-recurring, which constitute sexual harassment.

What actions constitute sexual harassment?

Sexual harassment can take many forms, including:

- Engaging in unwelcome sexual conduct towards an individual, including offensive comments, touching or sexual propositions.
- Conditioning a performance evaluation, promotion, salary increase, vacation or other job benefit on an individual's submission to sexual demands.
- Repetition of jokes or other remarks with sexual content.
- Taking or failing to take personnel action as a reprisal against any individual for rejecting sexual advances.
- Repeated references to a person's body, face, sexual preferences, sexual performance.
- Display of objects, posters, cartoons or pictures of a sexual nature.
- Displaying, sending, forwarding, downloading or otherwise distributing sexual materials via Internet, computer or e-mail.

Can sexual harassment occur between two members of the same sex?

Yes, as the Law prohibits any actions which constitute harassment or sexual harassment, if the harassment is based on sex.

Are employers required to provide sexual harassment training for their employees?

Employers are not required by Law to provide training for their employees in matters relating to sexual harassment, although it is considered a good practice.

What are the liabilities and damages for sexual harassment and where do they fall?

Anyone who has been in breach of the Law in matters relating to sexual harassment can bear both civil and criminal liability.

In Civil procedures, the Employment Tribunal Court will award damages on the basis that it is just and reasonable to do so and the damages awarded will cover all the damage suffered by the applicant as a result of the violation of the Law by the respondent. The damages cover material damages, physical and moral damages.

In Criminal procedures, if the perpetrator is a natural person then he will face a fine or a penalty of up to 6 months imprisonment or both and in cases where the perpetrator is a legal entity will face a fine up to €10.570.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must show that the actions were (1) unwelcomed by him or her; (2) of a sexual nature and (3) of such nature, form and intensity which can reasonably violate the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive environment for the person who is being sexually harassed according to a first instance case (*NEKTARIAS VERESIE v. MICHALIS MICHAEL and another, Application No. 556/11. 20/12/2017*).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Current legislation does not provide a distinction between supervisors and co-workers in matters relating to sexual harassment. The Law strictly prohibits any actions which can constitute sexual harassment and the only distinction made is between a natural and a legal person. However, in case the offence is committed by a co-worker, the supervisor can be deemed to be jointly liable provided they did not take all adequate measures to prevent it.

What are the potential defenses employers have against sexual harassment claims?

The law imposes an obligation on the employer to take active measures in protecting their employees from any actions or omissions that constitute sexual harassment. This can be done by issuing a Sexual Harassment Policy informing their employees about sexual harassment and the measures that must be taken to prevent such behavior from happening. Moreover, the employer, as soon as he becomes aware of any sexual harassment taking place in the workplace, must take all reasonable steps and corrective measures to stop any harassing behaviour from re-occurring.

If the employer takes all the above measures and he/she can prove that all the said measures were taken adequately, then it can potentially be used as a defence against sexual harassment claims, provided that the employer was not the perpetrator.

Who qualifies as a supervisor?

Although the Law does not provide a definition for a supervisor, it can be said that a supervisor, in cases involving harassment claims, is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed.

How can employers protect themselves from sexual harassment claims?

Employers should devise and provide all employees with a copy of a sexual harassment policy and implement accessible complaint procedures for employees who believe they are being subject to or witness sexual harassment and take all the necessary and reasonable steps in dealing with such claims as soon as they become aware of them.

Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under the Equal Treatment for Men and Women in Employment and Vocation Training Law.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The Law strictly prohibits sexual harassment claims which are based solely on sex and makes no reference or distinction in relation to sexual orientation and/or gender identity. However, if a person who is gay, lesbian, bi-sexual or transgender is being harassed due to his/her sex then this action is prohibited under the Law, irrespective of their sexual orientation and/or gender identity.

What is prohibited retaliation?

Employers may not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. A claim for retaliation may be made even if the underlying complaint of harassment is unfounded.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

The Law defines sexual harassment as “any unwelcome by the recipient behavior of a sexual nature”.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

The Law does not confer such liability on an employer.

What is the #MeToo movement?

Although the #MeToo movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especial workplace misconduct, to step forward and take action against their perpetrators in countries worldwide and especially in the United States of America, such movement has yet to been founded in Cyprus and to this day there is no movement battling sexual harassment.

For more information, contact Marlen Triantafyllides (marlen@triantafyllides.com), Christina Kotsapa (christina@triantafyllides.com), or Alexandros Panayi (Alexandros@triantafyllides.com) at ILN member, Antis Triantafyllides & Sons LLC.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CZECH COMPANIES NEED TO KNOW

What constitutes sexual harassment?

In the sense of Czech law, *sexual harassment* is a special type of harassment as a general term.

Act No. 198/2009 Coll., on Equal Treatment and Legal Protection Against Discrimination (the Anti-Discrimination Act) defines *sexual harassment* as any unwanted conduct of a sexual nature (i) taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment, or (ii) which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is namely the subject of civil law. Some definitions and general questions are governed by the Anti-Discrimination Act. Questions particularly related to labour law are further regulated by Act No. 262/2006 Coll., the Labour Code.

What actions constitute sexual harassment?

Pursuant to the Anti-Discrimination Act: Sexual harassment can take many forms, including:

- Unwanted conduct of a sexual nature,
    - taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment, or
    - which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

Examples of such conduct include:

- Repeated long-term aggressive, sexually coloured remarks that are obviously unwanted by one person;
- Various non-verbal acts (such as pictures of nude women on walls in a predominantly male environment which may create a threatening atmosphere to colleagues in the same workplace);
- Repeated sending of jokes and images with a sexual subtext over the internet against the addressee's will;
- Unpleasant verbal sexual expression, offers, allusions;
- Physical contact (excessive hair stroking, attacks, etc.);
- Enforcing sexual contact, sexual extortion, in extreme cases even rape.

However, relationships at the workplace are not examples of sexual harassment. Sexual harassment must be undesirable. Not even flirting is considered sexual harassment, provided that it is accepted by the other party. If flirting is not accepted, it must be stopped immediately. It always depends on the actual circumstances.

Can sexual harassment occur between two members of the same sex?

Yes.

Are employers required to provide sexual harassment training for their employees?

Pursuant to the Czech Labour Code, employers are obliged to inform employees on measures whereby the employer ensures equal treatment of male and female employees and prevents discrimination. In consequence, employers must prepare mechanisms that ensure equal treatment and the protection of their employees from sexual harassment. However, each employer ensures the equal treatment individually and there are no general rules on how to proceed provided by law.

What are the liabilities and damages for sexual harassment and where do they fall?

Pursuant to the Labour Code, employers are obliged to ensure equal treatment and non-discrimination. If the employer fails to ensure such conditions, it may be fined up to CZK 1 million (i.e., circa EUR 40,000).

In the event of a violation of the rights and obligations following from the right to equal treatment or discrimination, the affected person has the right to claim before the courts, in particular, that the discrimination be refrained from, that the consequences of the discriminatory act be remedied and that (s)he be provided with appropriate compensation. If the remedy is not sufficient, the harmed person also has the right to monetary compensation for non-material damage.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must show that he or she was subject to unwelcome sexual harassment.

If the court deduces the discriminatory behaviour of the defendant, the court will transfer the burden of proof to the Employer pursuant to the Code of Civil Procedure. This means that the defendant (Employer) will be required to prove that there has been no discriminatory conduct on its part and, if so that it was in compliance with the law.

In the event that the sexual harassment has a more serious form, it can be considered a criminal offence committed by the harassing person and shall be investigated by the police. In such cases, the harassment must fulfil the features of particular criminal offences such as extortion, restriction of personal freedom or even rape. In the case of a criminal offence, it is the harassing person who shall be sued (such law suit does not exclude potential claim for parallel responsibility of the Employer).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Czech law does not expressly distinguish between sexual harassment from a supervisor or a co-worker. However, it is more likely to fulfil the condition of unwanted action "which could be legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationship" when made by a supervisor.

What are the potential defenses employers have against sexual harassment claims?

The employer has the obligation to ensure protection against sexual harassment. Thus, if the employer proves that it took all of the measures necessary to avoid sexual harassment, it cannot be found liable or can at least limit its responsibility.

Who qualifies as a supervisor?

The Czech Labour Code defines a supervisor (or managerial employee) as those employees who are authorized, at the individual management levels, to determine and impose working tasks on subordinate employees, organize, direct and control their work and give them binding instructions to this end. The head of an organizational unit of the State is or is also deemed to be a managerial employee.

However, Czech labour law, and Czech labour law case law, do not distinguish between a supervisor and a regular co-worker for the purposes of sexual harassment.

How can employers protect themselves from sexual harassment claims?

An employer needs to have internal measures to avoid sexual harassment and should inform its employees about such measures and ensure they are followed.

Does sexual harassment cover harassment because of pregnancy?

Pregnancy might be a reason for discrimination under Czech law. Harassment because of pregnancy, however, is not directly considered as sexual harassment.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. Czech law does not differentiate in regard to sexual orientation.

What is prohibited retaliation?

Czech law does not foresee any possibility for the employer to take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. Further, it is considered an offence if an employer affects or disadvantages an employee because he/she lawfully asserted his/her rights and claims arising from labour law relations, or if the employer did not negotiate upon the employee's request a complaint concerning rights and obligations arising from the employment relationship (including any claimed sexual harassment).

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not prohibited by Czech law. However, if there is any doubt, such relation is more likely to be "legitimately perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships" which might fulfill the features of sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Generally, no. However, the employer is always obliged to ensure measures to avoid sexual harassment. Thus, we cannot exclude that an employer would be held liable or co-liable for actions of third parties who are in business contact with its employees if it has not taken necessary and reasonable measures to avoid sexual harassment. To date, there is no case law in such sense.

What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especially workplace misconduct, to step forward and take action against perpetrators.

How is the #MeToo movement impacting the law in your jurisdiction?

There is currently no direct impact of the #MeToo movement on Czech law. However, we cannot exclude any future impact following to the spread and development of the #MeToo movement.

For more information, contact Adela Krbcová at ILN member, PETERKA PARTNERS at krbcova@peterkapartners.cz.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT ENGLISH COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

UK update 2019

The #MeToo movement continues to encourage women to speak out about unacceptable behaviours that they encounter at work here in the UK.

A number of high-profile UK individuals have been accused of sexual harassment and their employers alleged to have allowed such behaviour to take place or created a culture in which it is tolerated. Big name businesses have suffered considerable reputational damage as a result.

The UK Government is now responding and has announced a range of measures to address the issue. A clear emphasis has been placed on requiring employers to take responsibility for and tackle sexual harassment when it arises. The message is loud and clear - turning a blind eye to harassment is no longer acceptable.

So, what is the UK Government doing in practice?

Government Report

The Women and Equalities Committee (**WEC**) carried out an inquiry into sexual harassment in the workplace and published its findings in July 2018. The Government published its own report in response on 18 December 2018.

Action

The most notable consequence of the report is that the Government has asked the Equality and Human Rights Commission (**EHRC**) to create a statutory code of practice dealing with sexual harassment in the workplace. This is a formal document that UK employers will be required to consider, and those employers will be criticised if they do not follow it. Although we have yet to see the exact content and requirements of the code, it is expected to set out detailed guidance to help employers better understand their legal responsibilities, set examples of best practice and protect staff against sexual harassment.

Some other action points from the report have now been implemented. For example, a legislative amendment was introduced on 6 April 2019 increasing the maximum penalty for an "aggravated" breach of employment law from £5,000 to £20,000. Serious incidents of sexual harassment could amount to such a breach – for example if an employer fails to take necessary action despite being aware of a pattern of sexual harassment.

This is a significant increase as, generally speaking, compensation awards in employment claims rise by only a small amount year on year. A 400% increase demonstrates that this is a topic the Government is taking seriously.

Further consultation

The Government also set out a number of matters for further consultation (some of which are already in progress). These include:

- new measures to protect interns and volunteers (who have been identified as particularly vulnerable groups in the workplace);
- the possibility of extending Employment Tribunal (**ET**) time limits to bring claims under the Equality Act 2010 from three to six months, which include claims relating to sexual harassment;
- better regulations around the use and content of non-disclosure agreements (more of which below); and
- strengthening and clarifying the law on third party harassment, which has received considerable press attention in the UK recently thanks to an undercover report on the President's Club male only charity event hosted at the Dorchester Hotel. The report alleged repeated inappropriate behaviour towards female hostesses working at the hotel by male attendees. Provisions under the Equality Act 2010 which were designed to protect individuals (the hostesses, working for the hotel) against harassment by third parties (the event attendees) were actually repealed in October 2013. However, we suspect there will be a move to require that employers have strategies in place to prevent it following this and other incidents.

No further action

The Government has rejected some recommendations for change, however. For example:

- a proposal to give ETs the power to award an increase in compensation in cases where the employer failed to comply with the proposed statutory code of practice on sexual harassment will not be pursued; and
- a proposal that legal costs should automatically be recovered by a successful claimant in harassment cases has also been dropped. This would have represented a significant shift in the ET cost regime, where each party is usually responsible for their own costs, win or lose.

NDAs

Non-disclosure agreements (**NDAs**) and confidentiality clauses are routinely included in employment settlement agreements that deal with harassment allegations but have faced sharp criticism following revelations that Harvey Weinstein used them to "hush up" numerous victims, including his Personal Assistant.

The WEC launched an enquiry into the use of NDAs on 13 November 2018. The Government also commenced a consultation on this issue in March 2019 and is already proposing legislative changes.

These changes include a requirement that settlement agreements must make it clear that allegations may be disclosed to the police or other law enforcement agencies in any circumstances. Previously, most settlement agreements allowed such disclosures only where they were "required by law" which prevented many victims from raising concerns. It is alleged that this has allowed perpetrators to escape liability for their actions and even to commit repeat offences.

Solicitors in the UK have also been warned by their regulator that NDAs and confidentiality clauses must not be used improperly in settlement agreements. That is not to say that NDAs and confidentiality provisions no longer have a place in negotiated exits; they do, and they are often valued by the employee as much as the employer. However, caution must now be exercised when using such clauses. We recommend that:

- language used in confidentiality clauses should be clear and comprehensible – set out in plain English what can and what cannot be disclosed;
- specific wording is included which confirms that the employee is not prevented from making a disclosure to the police or law enforcement agencies; and
- only legally enforceable provisions are included.

Conclusion

The number of sexual harassment complaints has increased noticeably in recent years and we have assisted a number of clients in dealing with allegations, often made against high profile or management figures. Investigating these sensitive issues is a difficult task; the accused typically deny any wrongdoing and it is rare that any clear written or other documented evidence exists that confirms one version of events over another.

As such, the most common outcome remains that one party exits under the terms of a settlement agreement – an often-uneasy truce usually accompanied by a financial payment of some sort.

In an effort to avoid such disputes arising, or to mitigate the damage if they do, well-advised employers have been undertaking a risk audit in relation to harassment issues. Staff handbooks, equal opportunity and bullying/harassment policies should be reviewed to ensure that they are up to date and fit for purpose in the current environment. Those organisations that do not already have such policies should be putting them in place.

Employers should also give thought to delivering training on the topic of harassment to employees – especially to management level employees who tend to have the greatest opportunity to commit such offences or to be the target of allegations that are made.

Another common step is to review workplace entertainment to consider whether they are appropriate for the modern age. Staff and business development events carried out in many industries remains heavily focussed around alcohol – an environment that breeds the sort of actions that might lead to incidents and allegations of harassment or other inappropriate behaviour. Moving away from alcohol

driven events is a sensible and increasing feature and can only help in reducing the risk of the workplace claims – harassment and otherwise. Not to mention the health and productivity benefits that may result.

Finally, employers should be ensuring that harassment policies and procedures that are in place are enforced. Action should be taken to address any concerns that are raised and "top down" commitment from influential figures is a must. Management should be encouraged to address issues proactively – taking steps if they witness any inappropriate behaviour, even if no complaint is raised.

Those looking for a silver lining in the cloud cast by the current sexual harassment commentary might find it in the fact that a business's positive approach and response to these issues could well become a marketable feature. With harassment set to remain on the news agenda in coming years, being able to demonstrate to customers, potential customers, employees, potential employees and other business contacts that proactive action has been taken could be a significantly marketable feature for many companies.

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2018 Edition: Sexual Harassment in the Workplace: What English Companies Need to Know

What constitutes sexual harassment?

In England and Wales, it is unwanted conduct of a sexual nature which has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

The victim also has protection from being treated less favourably because they have rejected or submitted to unwanted conduct of a sexual nature. See the answer to the question about prohibited retaliation below.

Separately there is protection for harassment related to sex (gender) and sexual orientation, gender reassignment as well as other protected characteristics. The scope of this Q&A is to consider sexual harassment as set out above.

What body of law governs sexual harassment in your jurisdiction?

The Equality Act 2010 applies to most sexual harassment which occurs in the workplace or is related to employment. The Protection From Harassment Act 1997 may also be relevant but is intended to apply where any harassment or conduct occurs generally and not specifically related to work or employment.

What actions constitute sexual harassment?

See the answer to the first question above. Sexual harassment typically is associated with unwanted conduct or behavior of a sexual nature which violates dignity or creates an intimidating or degrading environment.

A wide range of actions can therefore constitute sexual harassment, but common examples include:

- unwanted physical conduct or "horseplay", including touching, pinching, pushing and grabbing;

- continued suggestions for social activity after it has been made clear that such suggestions are unwelcome;
- sending or displaying material that is pornographic or that some people may find offensive (including e-mails, text messages, video clips and images sent by mobile phone or posted on the internet);
- unwelcome sexual advances or suggestive behaviour (which the harasser may perceive as harmless); and
- jokes of a sexual nature.

Can sexual harassment occur between two members of the same sex?

Yes. Most complaints regarding harassment involve members of the opposite sex but there is no requirement for this.

Are employers required to provide sexual harassment training for their employees?

No.

In most cases, employers are vicariously liable for the actions of their employees and so, where sexual harassment occurs at work or is related to work, usually the victim will raise a complaint or pursue a claim against the employer as well as the individual perpetrator.

Having completed sexual harassment training and/or having anti-harassment policies in place will help an employer in defending harassment claims.

What are the liabilities and damages for sexual harassment and where do they fall?

Damages in England and Wales are typically compensatory rather than punitive. As such, an employee is entitled to recover any financial loss they have suffered as a result of sexual harassment. If the employee has remained in work, there will often be no loss and so limited compensation (see below).

If the employee resigns following an incident of sexual harassment, or the incident involves the termination of their employment, they will suffer a loss of salary. The employee is entitled to pursue compensation for this loss – which will usually be the lost net salary from the date of termination until a time when it can be expected that they will find a new role of equivalent remuneration with a new employer. There is no cap that applies to this compensation and it is not unusual for employees to seek many years' worth of lost salary where they allege sexual harassment.

In addition, employees that have suffered sexual harassment are entitled to seek compensation for "injury to feelings". The compensation to be awarded for injury to feelings falls within three bands:

- an award in the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;
- an award in the middle band should be used for serious cases, which do not merit an award in the highest band; and

- an award in the top band would be made in the most serious cases, such as where there has been a lengthy campaign of harassment. Only in the most exceptional case should an award for injury to feelings exceed the top of this band.

The value of the bands has recently been increased as follows:

- awards in the lower band will be between £900 and £8,600;
- awards in the middle band will be between £8,600 and £25,700; and
- awards in the upper band will be between £25,700 and £42,900.

The employer and any personal defendant will be liable for any compensation awarded on a joint and several basis – meaning that the successful claimant would be entitled to recover 100% of the compensation from any of the respondents. Typically, the employer is the target in this respect as they will be more likely to be able to pay the compensation.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe they have been sexually harassed must show that (1) the perpetrator engaged in unwanted conduct of a sexual nature and that (2) the behaviour had either the purpose or effect of either violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The employee does not need to have made the perpetrator aware that the conduct was unwanted.

When considering what effect the behaviour had, the Employment Tribunal (the courts in England and Wales that hear complaints of sexual harassment in the workplace) will take into account the victim's subjective view. However, the Employment Tribunal will also consider whether it is reasonable for the conduct to have that effect.

A one-off incident is enough to establish sexual harassment. The employee does not need to establish a course of conduct.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

In short, no. For the purposes of the legislation in England and Wales, an employer is usually vicariously liable for the acts of an employee in the course of their employment (subject to the employer establishing a successful defence, as discussed below). The seniority of the employee is not a relevant consideration.

What are the potential defenses employers have against sexual harassment claims?

An employee who is subject to sexual harassment can bring their claim against the individual perpetrator and/or their employer. An employer will have a defence against a claim for sexual harassment if it can show that it took "all reasonable steps" to prevent the employee from carrying out the offending behaviour or from doing anything of that description.

The employer must have taken these steps before the harassment occurred. Relying on its response to an employee's complaint of sexual harassment will not be enough to successfully defend a claim.

The Employment Tribunal will consider (1) the steps the employer took and (2) other steps it was reasonable for the employer to take, when deciding if the employer is vicariously liable for the acts of its employees.

Therefore, employers should take steps to protect themselves in this respect, which is discussed further below.

Who qualifies as a supervisor?

Not relevant in England and Wales.

How can employers protect themselves from sexual harassment claims?

Employers should proactively take steps to prevent behaviours which amount to sexual harassment. These will usually include:

1. having an equal opportunities policy and an anti-harassment and bullying policy;
2. keeping those policies under review and proactively making staff aware of them;
3. training managers in these types of issues, including how to identify them and deal with them;
4. dealing swiftly and effectively with complaints of sexual harassment, making sure the complainant is supported and that the perpetrator is subject to suitable disciplinary action.

The Employment Tribunal have made clear that simply having a policy in place will not be enough to defend claims of sexual harassment. Employers must ensure staff are informed and policies are effectively implemented.

Does sexual harassment cover harassment because of pregnancy?

No. Pregnancy and maternity are not relevant for the purposes of establishing sexual harassment.

However, employees do benefit from other protections against discrimination on the grounds of pregnancy and maternity.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. Sexual harassment in England and Wales relates to unwanted conduct of a sexual nature and will apply regardless of the sexual orientation of the harasser or the victim.

Harassment related to sexual orientation is also prohibited.

What is prohibited retaliation?

Retaliation in England and Wales is known as "victimisation". Employers are prohibited from subjecting someone to a detriment (i.e. disadvantaging them) because they have or intend to (or are suspected of having or intending to):

1. allege sexual harassment has taken place;

2. bring proceedings in relation to sexual harassment; or
3. given evidence/information in relation to a complaint.

Protection does not apply to individuals who have made false statements in bad faith. However, those who have made false statements in good faith will be protected from victimisation.

Additionally, there is protection for victims of sexual harassment from being treated less favourably either because they have rejected or submitted to the sexual harassment. For example, if an employee rejects the sexual advances of her boss and is then turned down for a promotion because of her rejection, she will have been treated less favourably.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

For sexual harassment to be established in England and Wales, the conduct must be unwanted. It must also be established that it was reasonable for the complainant to consider the conduct to have the effect of creating an intimidating, hostile etc. environment. Whilst a complaint of sexual harassment could arise even where there is a consensual relationship, it may be more difficult to establish that the conduct was unwanted or that it was reasonable for the complainant to consider it had such effect.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Potentially, yes. Currently there is uncertainty as to when liability for harassment by third parties will arise. In circumstances where an employer was on notice of the risks of harassment (e.g. where there have been previous complaints about the actions of a client) and has failed to take appropriate action, there is a reasonable prospect that the employer will be found at fault.

In any event, employers can take steps to avoid liability (or harassment occurring in the first place) which would include: having a policy on harassment; notifying third parties that harassment is unlawful and will not be tolerated (for example by displaying a public notice); express terms in contracts with third parties requiring them to adhere to the harassment policy; encouraging employees to report incidents and taking appropriate action to deal with a complaint.

What is the #MeToo movement?

The #MeToo movement has been used by victims of sexual harassment (both male and female) to support one another and to make it clear to the wider society that such behaviour will not be suffered in silence. It has been widely used on social media and in the wider media for victims of sexual harassment to share their experiences and lend support to others. It has highlighted the prevalence of sexual harassment, particularly in the workplace.

How is the #MeToo movement impacting the law in your jurisdiction?

Currently there has been no legislative change, however the Equality and Human Rights Commission (**EHRC**) has made a number of recommendations to the UK Government to introduce new laws.

The EHRC issued a report on 27 March 2018 which followed a call for evidence in relation to sexual harassment in the workplace. Its recommendations include mandatory duties on employers to protect employees from harassment and victimisation and uplifts on compensation to be awarded for non-compliance. The EHRC has also suggested that the time limits for bringing complaints in an Employment Tribunal should be increased from three months (from the last act of harassment or last in a series of such acts) to six months and for time to run, where appropriate, from the exhaustion of any internal complaints procedures. With the UK Government busy with Brexit negotiations, it is difficult to anticipate what steps may be implemented and in what timescale.

Also, again whilst there has no change in the law, the use of non-disclosure agreements (NDAs) has come under scrutiny in the wake of the #MeToo movement particularly as a result of concerns that alleged victims of harassment by Harvey Weinstein had been asked to sign NDAs, with the effect that allegations were suppressed, and the alleged harassment could continue undeterred. Use of NDAs in sexual harassment situations therefore now carries the risk of further adverse publicity and criticism for employers.

The Solicitors Regulation Authority (SRA) issued a warning notice on 12 March 2018 on the use of NDAs with the effect that inappropriate use of NDAs could amount to professional misconduct for lawyers. The SRA are particularly concerned that NDAs are not used in a manner that could result in suppression of complaints to law enforcement agencies. As a result, lawyers are expected to take extra care when advising on NDAs (whether standalone or in a settlement agreement) and to ensure they are not used inappropriately.

For more information, contact Mike Tremeer (mtremeer@fladgate.com), and Caroline Philipps (cphilipps@fladgate.com) at ILN member, Fladgate LLP.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT FRENCH COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Sexual harassment is defined as 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, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Using any form of pressure, which could be one-off, for sexual favors for the harasser or for a third party is deemed to constitute sexual harassment.

What body of law governs sexual harassment in your jurisdiction?

Both the Criminal Code and the Labor Code are relevant to the issue of sexual harassment. The provisions prohibiting sexual harassment were created by the law n°92-1179 of November 2nd, 1992 relating to sexual abuses in employment. Those provisions were modified by the law n° 2012-954 of August 6th, 2012 relating to sexual harassment and by the law 2014-873 of August 4th, 2014.

The definition and the sanctions relating to sexual harassment are defined by law in the Labor Code (articles L. 1153-1 and following) and in the Criminal Code (art. 222-33).

The law n°2018-771 of September 5th, 2018 and its ordinance n°2019-15 of January 8th, 2019 sets out new obligations for employers regarding sexual harassment.

Since January 1st, 2019:

- Employers with at least 250 employees must appoint a resource person to guide, inform and support employees in combating sexual harassment and sexist conduct (art. L. 1153-5-1 of the Labor Code). In practice, this could be the Human Resources Director or a member of this department or an employee responsible for the prevention of psychosocial risks in the company.
- In all companies, regardless of their workforce, a sexual harassment adviser must be appointed within the Works Council ("Comité Social et Economique" – art. L. 2314-1 of the Labor Code). The Works Council must appoint an adviser among its members tasked with combating sexual harassment and sexist conduct. The adviser is appointed in the form of a resolution adopted by a majority of the members present, for a period that will end with the expiry of the mandate of the elected members of the Works Council.

The address and telephone number of these contact persons must be provided by any means, to employees, in the workplace as well as on the premises or at the door of the premises where the recruitment is made.

What actions constitute sexual harassment?

Case law gives examples of the type of behaviors which could be deemed sexual harassment.

Sexual harassment is defined by taking into account:

- The facts committed;
- Their frequency;
- Their effect on the victim;
- The objective of the harasser.

Examples of unwanted conduct of a sexual nature:

- Suggestive comments about appearance or clothes or asking an employee to wear a dress to show her legs[4];
- Repeated requests for a date with someone who is not interested (gifts, calls, texts…)[5];
- Standing or sitting too close to someone, following an employee or blocking his or her way[6];
- Sexual, suggestive, insulting or obscene comments even if the victim asked the harasser to stop[7];
- Pressure to obtain sexual favors[8] ;
- A proposal of an employer to an employee who is suffering from sunburn to sleep in his room as he could "relieve her"[9];
- Sexual blackmail during an interview or for the assignment of a promotion.

Sexual harassment at work is not only between an employee and a line manager. It could be between colleagues (not necessarily with a hierarchical link) or between an employee and a client for example (*see the question below about supervisors versus co-workers*).

Can sexual harassment occur between two members of the same sex?

Yes.

Are employers required to provide sexual harassment training for their employees?

The employer has a general obligation to protect the physical and mental health of the employees (art. L. 4121-1 of the Labor Code).

[4] Court of Appeal of Reims, Employment Chamber, 19 December 2008, n°06/0186
[5] French Supreme Court, Employment Chamber, 28 January 2014, n°12-20.497 or French Supreme Court, Employment Chamber, 3 March 2009, n°08-02.976
[6] French Supreme Court, Employment Chamber, 14 September 2016, n°15-14.630
[7] French Supreme Court, Employment Chamber, 7 August 2012, n°2012-15
[8] French Supreme Court, Employment Chamber, 18 February 2014, n°12-20.497
[9] French Supreme Court, Employment Chamber, 17 May 2017, n°15-19.300

The employer has an obligation to prevent sexual harassment and to combat its development within the workplace. This obligation is one of strict liability. The employer has to take all the necessary measures to forestall, avoid and punish any situation of sexual harassment (Article L. 1153-5 of the Labor Code). For this reason, the internal regulations of the company ("*règlement intérieur*") have to mention the provisions relating to sexual and moral harassments.

Preventative measures may include training or information concerning sexual harassment (which can be possibly organized with the participation of the labor inspectorate, the occupational physician or the employee representatives). Such training may address the following issues:

- what constitutes sexual harassment;
- what can be the consequences on people: psychological trauma, impossibility to come back to work…;
- what can be the disciplinary measures: the harasser can be dismissed for gross misconduct without any severance payment;
- the means available to the employee representatives to combat sexual harassment: for example, the "alert procedure": the employee representative can trigger the alert procedure in case of sexual harassment to alert the employer. The employer has to proceed immediately to an investigation and to take all the measures to stop the sexual harassment. If the employee representatives and the employer do not agree, the matter is referred to the labor inspectorate;
- how victims can denounce the facts: talk to the occupational physician or to the employee representatives, exercise the alert procedure or the right of withdrawal (if the employee considers that he/she is in danger, he/she can use the right of withdrawal and stop working while the employer takes the necessary measures to stop the conduct);
- role of the occupational physician: listen to the employees and propose measures to the employer, such as the transfer of the victim to another department for example;
- role of the labor inspectorate: the labor inspector can conduct an investigation in the company to check if a situation of sexual harassment exists by collecting statements from the employees. If the labor inspector witnesses a situation of sexual harassment, he/she can oblige the employer to take any measures to stop this situation.

What are the liabilities and damages for sexual harassment and where do they fall?

The employer must sanction the employee who has committed harassment (Article L1153-6 of the French Labor Code). The exact sanction applied depends on the severity of the harassment, but the sanction could extend to a disciplinary dismissal for gross misconduct with immediate effect.

Employees who are victims of sexual harassment may sue their employer before the Labor Court (civil jurisdiction) and / or before the Criminal Court (criminal jurisdiction).

As regards civil courts, pursuant to Article L. 1154-1 of the Labor Code, legal action may be brought by a person who considers himself/herself to be a victim of sexual harassment or discrimination for having

suffered or refused to suffer such harassment or for having testified or reported such facts. This person may be an employee, a candidate for employment, an internship or a training period within the company.

Pursuant to Article L. 1154-2 of the Labor Code, the representative trade unions in the company may also take legal action with the consent of the victim employee.

Before the civil court, the employee may claim damages in compensation for his/her losses from the perpetrator, the employer or both. The employee can also take the initiative to terminate his/her employment contract at the fault of the employer.

In the case of criminal courts, the action may be brought by any employee or candidate for employment who is the victim of sexual harassment or discrimination related to such acts. Furthermore, any association which has been regularly declared for at least five years at the time of the events and which proposes by its statutes to fight discrimination based on sex, moral or sexual orientation, may exercise the rights recognized to the victim with regard to discrimination committed as a result of sexual harassment. The association is only admissible in its action if it can justify having received the written agreement of the person concerned.

Article L. 222-33 of the Criminal Code punishes sexual harassment with imprisonment of 2 years and a fine of 30,000 euros (this is a maximum).

Those penalties may be increased when harassment is committed:

- By a person who abuses the authority conferred on him/her by his/her functions (employer or hierarchical superior for example);
- On a minor under 15 years old;
- On a person of a particular vulnerability due to age, illness, infirmity or physical or mental disability, pregnancy, apparent or best known by the perpetrator;
- By several persons acting in the quality of author or accomplice.

In those cases, the penalty is increased to 3 years' imprisonment and a fine of 45,000 euros.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The burden of proof is not the same before the civil and criminal courts.

Before the civil court, the employee, the candidate for a job, an internship or professional training in the company must present some factual elements suggesting and not necessarily evidencing sexual harassment (some behavior has to be repeated, some other one-off is sufficient). It is then the employer's responsibility to prove that no sexual harassment has been committed.

Before the criminal courts, the accused is presumed innocent. The burden of proof rests on the victim/prosecution and the judge decides on the basis of his or her intimate conviction.

In any event, the victim must report elements of the offence, namely repeated sexual comments or behaviour that:

- Either violate the dignity of the victim because of its degrading or humiliating character;
- Either create an intimidating, hostile or offensive situation against him/her.

The decision rendered by the criminal court has civil *res judicata* effect. The civil judge cannot ignore what has been decided by the criminal judge. For example, if the criminal judge dismisses the complaint, the Labor court cannot reach a finding of harassment.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The employer has a specific obligation to protect any worker in the workplace. He must therefore prevent possible sexual harassment, but the law does not specify the quality of persons who may be guilty of sexual harassment. The harasser may therefore be the employer, a superior, a colleague, but also a client or a customer, for example. It is not necessary to demonstrate the existence of a subordinate relationship between the victim and the perpetrator. However, abuse of authority may be regarded as an aggravating circumstance (*see the question above about liabilities and damages*).

What are the potential defenses employers have against sexual harassment claims?

Given the strict liability obligation to which the employer is bound, its liability is often engaged since the responsibility lies on the employer to take preventive actions to combat the occurrence of acts of sexual harassment. Case law generally considers that in so far as it is bound by an obligation of strict liability, the employer is liable as soon as an employee is the victim of harassment, even if it has taken measures to put an end to it.

However, more recent decisions on moral harassment have admitted that if the employer manages to demonstrate that it has implemented measures pursuant to articles L. 4121-1 and L. 4121-2 of the Labor Code (risk prevention measures, information and staff training measures, setting up of a more appropriate organization and means, etc.) and that it had taken measures, to put an end to a situation of sexual harassment, as soon as the employer became aware of it, then its liability might not be retained (French Supreme Court, Employment Chamber, *01-06-2016, n° 14-19.702 and* French Supreme Court, Employment Chamber, *5-10-2016 n° 15-20.140*). Even if those decisions constitute an evolution in the Court's appreciation of the employer's liability, the fact remains that the obligation which weighs on the employer is very heavy.

According to the doctrine, those decisions could be applicable to sexual harassment, however, no such ruling has been rendered to date. In defense, the employer can provide evidence for instance that:

- it put in place all preventive measures and acted immediately as soon as he became aware of the harassment;
- the facts do not, in themselves, constitute sexual harassment;
- the facts have nothing to do with the employee's work and therefore with his employer.

Who qualifies as a supervisor?

In France, the supervisor is someone who has the power to hire, fire, demote, promote, and discipline the employees. However (*see the question about supervisor versus co-worker above*), in France, the subordination link isn't necessary to qualify the sexual harassment. The harasser could be the employer, the supervisor or a coworker. The abuse of authority could only be an aggravating circumstance.

How can employers protect themselves from sexual harassment claims?

The employer must implement the preventive and information measures provided for, in particular, in articles L. 4121-1 and L. 4121-2 of the Labor Code and recall the provisions on sexual and moral harassment in the internal regulations. He can also work closely with other actors such as the Labor Doctor or the Health, Safety and Working Conditions Committee or the workers representatives to implement:

- employee training;
- an appropriate and effective policy;
- information;
- communication;

to combat harassment and/or to encourage employees to speak out.

Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth or related to health problems are unlawful and sanctioned by the Labor Code and the Criminal Code.

Sexual harassment against a pregnant woman is an aggravating circumstance pursuant to Article 222-33 of the Criminal Code (*see the question above about liabilities and damages*).

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The law protects all the employees whatever their gender or sexual orientation.

Discrimination based on gender or sexual orientation is prohibited and sanctioned by the Labor Code and the Criminal Code.

What is prohibited retaliation?

Article L. 1153-2 of the French Labor Code provides that "*No employee or candidate for recruitment, internship, professional training period in a company, may be sanctioned, dismissed or be the subject of any direct or indirect discriminatory measure, in particular with regard to remuneration, training, reclassification, assignment, qualification, classification, professional promotion, transfer or renewal of contract, for having suffered or refused to suffer sexual harassment*" and Article L. 1153-3 provides that "*No employee may be sanctioned, dismissed or discriminated against for testifying or reporting sexual harassment*".

Any provision or act contrary to those provisions is void.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No. In France, sexual harassment within the meaning of Article L. 1153-1 of French Labor Code is when the facts are suffered by the victim which means that the victim is not consenting. A consenting relationship can't be considered as sexual harassment. However, a consenting relationship can turn into one without consent: in that case, sexual harassment may be established.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

In the event that an employer's employee sexually harasses a third party (customer, supplier, etc.) at work, the employer has to take sanctions against the harasser. If it does not, the harassed third party could claim damages from the employer.

What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social networks. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especially workplace misconduct, to step forward and take action against their perpetrators.

In France, following the #MeToo movement, the #BalanceTonPorc (meaning "Squeal on your pig") movement has been created and spread all over the social media platforms prompting victims of sexual misconduct at work or in private life to speak out against sexual harassment and to raise awareness of continued tolerance of sexual harassment. The French journalist Sandra Muller (based in New York) has created the #BalanceTonPorc movement on Twitter by denouncing sexual and inappropriate remarks. Following this movement, investigations are underway against some public figures.

How is the #MeToo movement impacting the law in your jurisdiction?

The "#BalanceTonPorc" movement has had a significant impact on social networks. Opinions are divided in France on this movement which both serves to free the voice of victims but also generates excesses and consequences that can be disastrous on alleged harassers. Social networks have been transformed into Courts, forgetting the principle of the presumption of innocence.

Of course, the movement conveys a message to harassers that victims are no longer afraid to speak out and this message can cause attitudes to sexual harassment to evolve.

Nowadays, sexual harassment has to be judged by the Court. Between 2002 and 2003, the parties had the possibility to do a mediation. This possibility has been removed with the Law n°2003-6 of January 3rd, 2003 as the legislator considered that sexual harassment is too serious and imposed the Court process.

The legislation on harassment has not fundamentally changed since the movement but has been reinforced and improved. The law n°2018-703 of August 3rd, 2018 has introduced new prohibitions of sexist violence, such as cyber harassment or upskirting, and has improved prevention.

Upskirting (defined as "the fact of using any means to perceive a person's intimate body parts which such person, due to his/her clothing or presence in a private place, is hiding from view, where this is done without such person's knowledge or consent") can also occur in the workplace. This offence is punishable by one year's imprisonment and a fine of 15,000 euros (art.226-3-1 of the Criminal Code).

Street harassment and more specifically sexist insults, defined as imposing on a person any comment or behavior with a sexual or sexist connotation that either violates his/her dignity because of its degrading or humiliating nature, or creates an intimidating, hostile or offensive situation against him/her is now prohibited by law.

Sexist insults constitute an offence punishable by a fine of 750 euros (art. 621-1 of the Criminal Code). The fine shall be 1,500 euros where the offence is committed by a person who abuses the authority conferred on him/her by his/her duties or against a minor under fifteen years old or against a person whose particular vulnerability, due to his/her age, disease, infirmity, physical or psychological disability or pregnancy, is apparent or known to the perpetrator for example.

Since the law came into force, 447[10] fines have been imposed, but the Government considers that considerable work remains to be done to address online harassment.

For more information, contact Catherine Broussot-Morin at ILN member, Reinhart Marville Torre, cbroussot-morin@rmt.fr.

[10] Figures provided by the Government as at 30 April 2019.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT HUNGARIAN COMPANIES NEED TO KNOW

What constitutes sexual harassment?

In the Hungarian law, sexual harassment is covered by the general definitions of harassment stipulated by the Act CXXV of 2003 on Equal treatment ("**Equal Treatment Act**") and by the Act C of 2012 on the Criminal Code ("**Criminal Code**").

Pursuant to the Equal Treatment Act, a conduct of sexual or non-sexual nature violating the dignity of a person qualify as harassment if its purpose or effect is to create an intimidating, hostile, degrading, humiliating or offensive environment and it is in connection with the protected characteristic of such person (e.g. sex, sexual orientation, religion, belief etc.).

As opposed to the Equal Treatment Act, the Criminal Code aimed to criminalize harassments more serious in nature. Thus, harassment as a criminal offense occurs if a person engages in conduct intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person arbitrarily, or if a person pesters another person on a regular basis. It can be seen that while an action in its own may constitute harassment under the Equal Treatment Act, the Criminal Code punishes only actions carried out on a regular basis.

What body of law governs sexual harassment in your jurisdiction?

The Equal Treatment Act and the Criminal Code are the main laws regulating sexual harassment.

What actions constitute sexual harassment?

Sexual harassment defined in the first question can take verbal, non-verbal or physical forms as well. According to the relevant practice the following actions may constitute sexual harassment:

- Telling or otherwise sharing sexually explicit or demeaning jokes;
- Comments on appearance or dress;
- Use of indecent nicknames;
- Insulting or obscene comments;
- Messages, e-mails or phone calls with sexual or obscene comments;
- Seeking for close physical contacts;
- Displaying sexually explicit magazines or cartoons, or calendars showing individuals in bathing suits or underwear; and
- Posting sexually offensive content on social media sites etc.

Can sexual harassment occur between two members of the same sex?

Yes, sexual harassment can occur between two members of the same sex.

Are employers required to provide sexual harassment training for their employees?

There is no specific regulation which would oblige the employers to provide sexual harassment training. However, the employers are required to provide secure, harassment-free working environment, and they are required to protect their employees in case of harassment. Therefore, it is recommended to provide sexual harassment training for the employees.

What are the liabilities and damages for sexual harassment and where do they fall?

It depends on the type of sexual harassment committed (criminal offence or unlawful act) and the type of the authority conducting the procedure regarding the sexual harassment case.

In case of the infringement of the Equal Treatment Act, the procedure may be initiated against the employer before the Equal Treatment Authority. The authority may order the termination of the injurious situation, restrain the prohibitor from future infringements, it can impose fines and publish its decision.

Employees seeking damages for sexual harassment before civil court, may be entitled to compensation. The amount of the compensation varies widely.

If the harassment qualifies as a criminal offence, as a main rule, the perpetrator shall be punishable by imprisonment not exceeding two years.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that they have been sexually harassed must prove that they were subject to sexual harassment which caused disadvantage or there is an imminent danger for suffering disadvantage.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

If the perpetrator is a supervisor who had abused its dominant position, the consequences can be more severe.

What are the potential defenses employers have against sexual harassment claims?

The employer may dispute that the action violates the dignity of the person or is in connection with the protected characteristic of the person. Moreover, it may show that it did everything within its power, and everything that can be reasonably expected after becoming aware of the sexual harassment. Moreover, the employer should do everything that can be reasonably expected to avoid and prevent sexual harassment.

According to the recommendations of the Equal Treatment Authority, the employer may:

- impose proportionate penalties, in serious cases, terminate the employment of the perpetrator;

- have sexual harassment trainings;
- prepare sexual harassment policies;
- notify the person subject to harassment, that no punishment will be applied against an employee for reporting an incident of sexual harassment or for participating in an investigation;
- record the communication between the parties;
- involve external experts (e.g. mediator) if necessary, etc.

Who qualifies as a supervisor?

The supervisor is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed.

How can employers protect themselves from sexual harassment claims?

According to the recommendations of the Equal Treatment Authority, the employer may:

- impose proportionate penalties, in serious cases, terminate the employment of the perpetrator;
- have sexual harassment trainings;
- prepare sexual harassment policies;
- notify the person subject to harassment, that no punishment will be applied against an employee for reporting an incident of sexual harassment or for participating in an investigation;
- record the communication between the parties;
- involve external experts (e.g. mediator) if necessary, etc.

Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under the Equal Treatment Act.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The regulations cover sexual harassments of gay, lesbian, bi-sexual, and transgender persons as well.

What is prohibited retaliation?

Employers shall not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship cannot be considered as sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes.

What is the #MeToo movement?

“The #MeToo movement is movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especial workplace misconduct, to step forward and take action against their perpetrators."

How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement originally started in the U.S. has had an impact on the assessment of sexual harassment issues in Hungary too. As a positive impact of the movement, sexual harassments conducted decades ago were revealed and procedures were initiated. However there have been no changes in regulation on sexual harassments in the Hungarian law.

For more information, contact Katalin Perényi (kperenyi@jalsovszky.com), Ágnes Bejó (abejo@jalsovszky.com), and Anilla Gondi (agondi@jalsovszky.com) at ILN member, Jalsovszky Law Firm.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT INDIAN COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

IMPACT OF #METOO IN INDIA – WHAT HAS CHANGED

In July of last year, we covered critical aspects of sexual harassment laws in India under a collaborative paper covering multiple international jurisdictions titled *"Sexual Harassment in the Workplace: What Your Company Needs to Know."*

Since then, internationally, new laws have developed and concepts and critical aspects of the laws that exist have been examined, reviewed and elaborated. This growth is often attributed to the #MeToo movement arising as a giant wave in the US in October 2017 and leading to similar waves in other countries.

In India the media coverage gained momentum with an Indian actor's allegations against a co-star. It has led to rising awareness and revolution against any and all forms of sexual harassment at workplaces across occupations.

While art and media have been at the centre of attention, the government too had its share of unwanted attention with a minister (from the media) resigning to take legal recourse against allegations.

We take a fresh look at the impact of #MeToo in India.

The Good

Stage 1-Recognition of Law: While #MeToo has not led to the development of new laws in India, it has, perhaps, more importantly brought into focus that India has robust laws against sexual harassment. This in turn has stoked conversation across industries where previously there was silence concerning sexual harassment.

The law against sexual harassment at workplace has been a work in progress – the first avatar being the compulsory guidelines of the Supreme Court of India and the current avatar as an enacted law.

Stage 2 – Implementation of Law: In the wake of knowledge that laws exist, #MeToo has led to widespread recognition that certain practices which are deemed as the 'culture' of a workplace and hence tacitly allowed by a shrug of shoulders will no longer be tolerated. This recognition is not only in narrative but indicated in statistics. As per reports, cases of sexual harassment at Indian workplaces increased 54% from 371 in 2014 to 570 in 2017. A little past mid-2018, 533 cases of sexual harassment were reported across the country.

The evolution is not only in action being taken by the sexually harassed, but in employers taking increasing cognizance of their responsibilities. The law provides for training. More and more corporates are conducting training not simply annually but at regular intervals for the training to be meaningful and relevant. These widespread training sessions that are being conducted are on the one hand for everyone

at workplace and on the other for the Internal Complaints Committees. The training is oriented both for sensitization as well as empowerment – progressively centering around breaking of societal and gender stereotypes and not as a nod to bring about awareness of the law.

Stage 3 – Going Beyond the Minimum Expected: It also has brought about conversation if companies can, and want to, go beyond the limitation of law. A complaint concerning sexual harassment at the workplace needs to relate to an episode which happened, at the most, 6 months prior for the ICC to investigate (though criminal law allows for a longer period). A small number of corporates are also examining what they can do in cases raised beyond 6 months. In the wake of #MeToo, corporates are wishing to be active in providing the right environment for women and not merely defending when queries are raised. What more can we do to be better, as opposed to what can we do to not look bad, is also trending.

The Other Side

The appetite for instituting formal proceedings is still low – be it before the ICC or before courts. If the accused used to silence the victim out of intimidation linked to job security before, the lengthy court proceedings in India which are the norm could end up silencing the employee who may have worked up her courage.

The #MeToo accusations not being within the formal domain often lead to counter of defamation if the accused is publicly named and shamed and additional court proceedings.

Also, the impact of training on the ICC is a work in progress. There is mistrust concerning the neutrality of the ICCs. The Indian National Bar Association, a non-profit organisation, queried 6,047 survey participants across India in 2016 and around 67% of the respondents responded with a "no" when asked if Internal Complaints Committees dealt fairly with complaints. More recently, an employee accused of sexual harassment and under committed suicide with the end note being that he could not have survived the shame of suspension and future negativity. Here the actions of the ICC were considered by the wife of the deceased (who was also an employee at the same organisation) as being excessive.

The Next Movement

Where the #MeToo campaign would continue to be relevant, and perhaps more so, would be instances of sexual harassment of men at workplaces as the general workplace law in India presently does not cover such instances.

End Word

If employees can access the available law and justice and not turn to social media in anonymity or otherwise; if the ICCs formed to take cognizance of complaints are trained and sensitized to efficiently deal with complaints; and if actions against abusers of their positions, result in a decline in instances, and hence statistics, we would have travelled a long way.

This would mean that both society and legal system finally allow for unapologetic, quick and deserving action against those who are accused and, often, with power.

For ultimately the #MeToo campaign would have truly served its purpose when it is no longer the catchphrase and trend that it is.

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2018 Edition: Sexual Harassment in the Workplace: What Indian Companies Need to Know

What constitutes sexual harassment?

India recognises that what constitutes sexual harassment at the workplace are acts and behaviors of a sexual nature which are intrinsically linked to any of a range of negative experiences. These range from interference with work to creation of a hostile work environment to implied or explicit promises and threats related to a person's treatment at a workplace i.e. quid pro quo.

The Ministry of Women and Child Development, Government of India (**MOW&CD, GOI**) has succinctly identified five parameters of workplace sexual harassment, viz., sexual, subjective, unwelcome, impact and power.

What body of law governs sexual harassment in your jurisdiction?

Workplace sexual harassment is governed primarily by the legislation titled The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Act), 2013 (referred to generally as "**POSH"**) and the corresponding Rules of the same year.

In addition, there is a separate specific regulation which governs sexual harassment in higher educational institutions viz. the UGC (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015.

Further, with time to time amendments, the law covering criminal offences viz. Indian Penal Code, 1860 also seeks to protect against sexual harassment by providing for punishment for offences constituting sexual harassment.

What actions constitute sexual harassment?

Sexual Harassment is constituted of unwelcome acts or behavior (whether directly or by implication) related to implied or explicit promises and threats of preferential or detrimental treatment in either present or future employment and creation of an offensive and health risk environment for women.

Indian laws refer to such unwelcome acts or behavior being any of the following

- physical contact and advances;
- demand or request for sexual favors;
- making sexually colored remarks;
- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

The MOW&CD, GOI goes a step further to elaborate for concerned persons and organizations that the below behaviors would also *inter alia* constitute sexual harassment at the workplace:

- Serious or repeated offensive remarks, such as teasing related to a person's body or appearance.
- Inappropriate questions, suggestions or remarks about a person's sex life.
- Displaying sexist or other offensive pictures, posters, mms, SMS, WhatsApp, or e-mails.
- Invasion of personal space (getting too close for no reason, brushing against or cornering someone).
- Persistently asking someone out, despite being turned down.
- Stalking an individual.
- Controlling a person's reputation by rumour-mongering about her private life.

Can sexual harassment occur between two members of the same sex?

Neither POSH nor criminal laws envision the same and hence on the face of it same-sex sexual harassment is not covered.

POSH protects women as is evident from its title. Men, as aggrieved party, are not covered within the scope of POSH. The rationale for the law, as set out in the statement of objects and reasons and the preamble, is to ensure a woman enjoys the fundamental rights enshrined in the Constitution of India including the right to equality, right to life, right to live with dignity and practice profession. The background of the law *inter alia* was to promote an enabling working environment for women.

Whether, this woman-centric law covers harassment of one woman employee by another woman is not tested. The statute refers to the person who is accused as a 'respondent' and at a number of places refers to 'him' and 'his'. Additionally, the law prescribes the constitution of the 'Internal Committee' to look into complaints of sexual harassment and implicit in the prescription of the constitution, with a predominance of women members, is the understanding that the victim is a woman and the person accused is a man.

Similarly, the criminal law provisions presume that offences are against women and that the accused is a man – these include stalking, voyeurism and sexual harassment.

The exception to the above general position is the protection expressed in the UGC Regulations.

While the UGC Regulations are similarly titled (i.e. referring to protection of women employees) and not only define an 'aggrieved woman' but also provide for a similar Internal Committee as provided for in POSH, there is recognition of all genders being covered by the UGC Regulations. The definition of 'aggrieved woman' is in fact not used and the reference throughout the regulations is to either "aggrieved person" or an "aggrieved party". Additionally, there is recognition of the respondent/accused person being either a male or a female.

An identified and key responsibility of Higher Educational Institution stipulated in the UGC Regulations is to "***act decisively against all gender-based violence perpetrated against*** *employees and students of* ***all sexes*** *recognising that primarily women employees and students and some male students and students of the third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation".*

Finally, the UGC Regulations recognises vulnerable groups and seeks for supportive measures to be put in place for such vulnerable groups which includes those whose sexual orientations may make more vulnerable.

Are employers required to provide sexual harassment training for their employees?

POSH prescribes that every employer must organize workshops and awareness programs at regular intervals for sensitizing employees with the provisions of POSH as well as orientation programs for members of the Internal Committee.

Indian judicial precedents have also highlighted the need for organization of workshops to continue with creation of awareness of the vulnerability of women given that men may view sexual conduct in a vacuum without full reference to social setting or underlying threats of violence that a woman may perceive.

What are the liabilities and damages for sexual harassment and where do they fall?

An 'aggrieved woman' would be entitled to compensation determined by the Internal Committee based on its assessment of the trauma, pain and distress suffered by the victim, loss of career opportunities and medical expenses incurred by the victim be it for physical or psychological suffering. Since the compensation is deducted from the pay of the person held guilty of sexual harassment, the income and financial status of such person is also a determining factor for the Internal Committee in arriving at the sum payable. Such sums can also be recovered from a former employee by legal proceedings.

In addition to compensation payment, the person deemed guilty of sexual harassment could be subject to actions ranging from requiring a written apology to withholding of promotion or pay increment to undergoing counselling sessions or carrying out community service.

Employers/companies' liabilities relate to failure to follow processes for implementation of policies against sexual harassment and could range from approximately USD 735 for the first offence to loss of business license for subsequent ones.

Courts have taken proactive action to curb inaction - in one case punitive damages of approximately USD 247,000 was imposed for failure to constitute Internal Committee and the resultant mental and emotional distress suffered by the aggrieved woman. Reinstatement and payment of back wages have also been ordered in certain cases.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

For a successful claim, a clear complaint supported by evidence including witness account is the key.

The complaint should indicate the improper and/or offensive conduct, which was directed at the complainant, that the conduct was at the workplace as described in POSH and the complainant experienced harm. There are guidelines concerning details to be provided in the complaint such as timelines, description etc. The employee needs to timely file a complaint in writing, preferably within 3 months of the incident.

Since the trained Internal Committee is statutorily equipped with powers of a civil court, including the right to summon witnesses and requiring the production of documents and provision of opportunity to challenge findings, a lucid narrative of the incident by the complainant will be the fundamental factor to prove the account to a judicious Internal Committee and succeed in the claim.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

POSH does not distinguish on the basis of hierarchy although harassment related to promises and threats of preferential or detrimental treatment in employment would likely stem from a supervisor as opposed to a co-worker. Given that POSH aims to protect women from a hostile work environment arising out of a range of conduct, a co-worker could equally be held accountable.

What are the potential defenses employers have against sexual harassment claims?

Claims under POSH are against the person accused of engaging in sexual harassment. However, employers as organizations have been held responsible for failure to implement POSH and a healthy working environment.

An employer, as an organization or as the management of the organization, can best defend by proactive compliance with POSH. It is for the employer to implement the duties prescribed for employers in letter and spirit without looking for options of narrow compliances for form sake. This proactive compliance could range for real and frequent training and induction of the Internal Committee and employees, treating sexual harassment as a misconduct and not just setting up an Internal Committee but appointing to such committee qualified and truly eligible members aware and experienced in dealing with matters of sexual harassment.

Who qualifies as a supervisor?

The term used in India is ‘employer’ which is defined as meaning any person responsible for the management, supervision and control of the workplace. It could include a person or board or committee in charge of formulation and administration of polices of the organization. In a hierarchical chart, it would include any person whose promises and threats related to employment would likely affect an employee.

How can employers protect themselves from sexual harassment claims?

Response same as the question about defending against claims above i.e. be proactive and real in creating a safe working environment as prescribed by law, principles of natural justice and judicial precedents.

Does sexual harassment cover harassment because of pregnancy?

It may. Sexual harassment at the workplace includes interference with work and creation of a hostile work environment. It includes unwelcome acts or behavior including any unwelcome verbal conduct of a sexual nature. It is a subjective experience and may be considered objectionable by the pregnant woman. Offensive remarks, such as teasing related to a person's body or appearance are included.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Response same as for the question about harassment between members of the same sex.

What is prohibited retaliation?

This is not a concept covered under POSH.

However, as a principle of justice, should adverse action be taken by an employer for making a complaint of sexual harassment, the courts would be pro-active in protecting complainants from such action. An adverse action which was seen as founded on the making of the complaint but disguised as an appraisal of work outcome has been set aside and reinstatement and back wages ordered.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

While it is consensual, depending on the facts and change in circumstances from consensual to non-consensual, it may constitute sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes, as definition of workplace is wide, and employer's duty comprises a duty to providing a safe working environment which includes safety from persons coming into contact at the workplace.

How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement is impacting the law by drawing focus to the law for those who are unaware. A vast majority of the discussion concerning the social media campaign time and again draws attention to the existing law. Although evolving from long standing Supreme Court compulsory guidelines, the Indian legislation is in any event quite recent and comprehensive media reports on the #MeToo movement makes employers and employees cognizant of the rights, duties and liabilities attached to prevention, prohibition and redressal of sexual harassment.

For more information, contact Dimpy Mohanty at ILN member, LexCounsel Law Offices (dmohanty@lexcounsel.in).

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT DUTCH COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Sexual harassment occurs if someone shows verbal, non-verbal or physical behavior with sexual connotation which aims at and results in the affection of the dignity of the other person. This is in particular so if a threatening, hostile, offensive, humiliating or hurting environment is created. No justification for such behavior exists, which means that sexual harassment is not allowed whatsoever. Whether it is considered to be sexual harassment is to a large extent dependent on the answer to the question whether the behavior was unwanted.

What body of law governs sexual harassment in your jurisdiction?

The prohibition on sexual harassment is included in article 1a Gender Equality Act, an implementation of Directive no. 2002/73/EC. Article 1a of the General Act on Equal Treatment also explicitly includes a prohibition on sexual harassment, an implementation of Directive 2004/113/EC. Apart from that, the prohibition on sexual harassment is laid down in article 7:646 of the Dutch Civil Code.

What actions constitute sexual harassment?

Sexual harassment can be expressed in a number of different ways. For example, by making suggestive remarks, unnecessarily touching, leering, displaying pornographic images at work, sexual assault and rape, but also sexual blackmail can be at issue, to such an extent that the likelihood of promotion and decisions about the work depend on the rendering of sexual services.

Can sexual harassment occur between two members of the same sex?

Yes. There is sexual harassment if the behavior has a sexual connotation and the other one is affected in his dignity. This can also occur between two employees of the same sex. The concept harassment must be interpreted objectively. The perception of the victim and the intention of the perpetrator are not a determining factor as to whether or not sexual harassment can be assumed.

Are employers required to provide sexual harassment training for their employees?

No, there is no requirement to offer training for prevention of sexual harassment. In article 3 paragraph 2 of the Working Conditions Decree, a specific provision is laid down which is directed at the employer, who has the obligation to pursue a policy aimed at the prevention of, and, if this is not possible, at the protection of employees as much as possible against sexual harassment. Offering training to the employees under certain circumstances could be part of the policy that must be pursued by the employer, but a general statutory obligation for the employer to do so is lacking.

What are the liabilities and damages for sexual harassment and where do they fall?

Should an employee as a result of sexual harassment become unfit for work, the employer must continue to pay 70% of the wages of this employee, in principle over a period of up to 104 weeks. If the employer has failed in his duty of due care towards the employee, as a result of which sexual harassment could occur, then the employee can also claim a compensation from the employer. There can be material as well as non-material damage. Material damage for example can exist of costs incurred by the employee because of psychological help. Under such circumstances there are no fixed amounts granted to the employee as a compensation for immaterial damage he has suffered, but practice has shown that the amount of a compensation - in so far it is paid – is rather low.

If the manner in which the employer has acted can be qualified as seriously imputable, the employee can submit a request to the sub district judge asking to terminate the employment agreement and to grant him a fair compensation. Should the judge do so, then it cannot or hardly be assessed beforehand what the amount of the damages will be, because it is a fairness judgment. The amounts of fair damages that are awarded in practice so far vary from practically nil to € 628,000. - gross.

If an employee commits the offense of sexual harassment, this could be a reason for the employer to terminate the employment. If the employee has acted seriously imputable, this may among other things entail that the employee is not entitled to the statutory severance pay, which amounts to a maximum of € 79,000. - gross or an annual salary.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

If an employee says that he has been sexually harassed, the following applies. The employee must state facts and give evidence, or at any rate give plausible reasons, that can support the presumption of sexual harassment. If the judge cannot conclude from the alleged facts that there is a presumption of distinction, he will reject the claim or the request. But if the judge can conclude from the alleged facts that actually there is such a presumption, the burden of proof will be reversed. It is then the accused person who will have to prove that there was no sexual harassment.

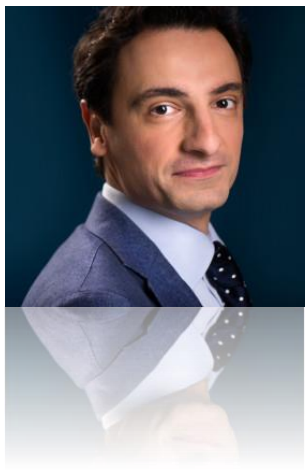
It is dependent on the concrete circumstances of the case which facts must be put forward and which facts must be proven in the event of a defense. It is up to the judge to decide whether certain facts can lead to a presumption of distinction.

If an employee accuses the employer of violation of the duty of due care and wishes to receive a compensation as a result thereof, because the employer did not do enough to prevent and combat sexual harassment, it is up to the employer to show that he complied with the working conditions obligations imposed on him and that he reacted timely and adequately to the harassing behavior and that he took corrective measures. If the facts alleged by the employee give rise to the presumption that the employer violated the obligations imposed on him (pursuant to the Working Conditions Decree), it is up to the employer to prove that he actually acted correctly. Should he fail to do so, it will have been proven that the employer violated the duty of due care.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

No. If an employee wishes to put forward a claim against the perpetrator, the employee must make the same facts plausible and the allocation of the burden of proof is the same, irrespective whether the perpetrator was a colleague or supervisor. If the employee wishes to tackle the employer because of a wrongful act or because of violation of the duty of due care, then in principle there is also no difference between a situation in which a colleague or instead thereof a supervisor was the perpetrator. I can imagine though that it may be assumed that the duty of due care was violated by the employer, if the employer could be identified with the supervisor, for example because the supervisor is director/major shareholder.

What are the potential defenses employers have against sexual harassment claims?



If a supervisor or employee has committed the offense of sexual behavior, this is always in conflict with the law. There can be no objective justification for sexual harassment. If the employee claims a compensation from the employer, then the employee can base his claim on various grounds: violation of a duty of due care by the employer, acting in contravention to good employership and/or committing a wrongful act.

An employer may put up a defense against the claim based on violation of the duty of due care by arguing that he took all measures necessary to prevent sexual harassment. Other defenses are that the employee did not sustain the damage during the performance of his work (for example because the sexual harassment took place outside of working hours or outside of the work area), that no damage has been sustained or that the damage was significantly caused by a deliberate act or conscious recklessness of the employee himself. In a situation where sexual harassment is at issue, it is hardly conceivable that the latter defense has any chance of succeeding.

Against the claim on account of a wrongful act, the employer can put forward similar arguments. The employer can also defend himself by arguing that there was no increased likelihood of committing a wrongful act (the sexual harassment) because of the instruction the employer gave to the 'perpetrator' (the employee) for carrying out his work – in view of the fact that committing the offense of sexual harassment is entirely distinct from the employee's performance of duties - and/or that the employer under his legal relationship did not have any control over the behavior of the employee that formed the basis for the mistake. The employer can also defend himself by arguing that there is no causal link between the behavior of the perpetrator and the damage that was allegedly sustained.

Who qualifies as a supervisor?

There is an authority relationship between an employer and an employee if the employer has the power to give instructions with regard to the working discipline. Decisive factor is whether the employer can give instructions to the employee with regard to organizational matters, such as the regularity of the

work and the place where the work must be carried out. It is for instance also relevant whether the employer decides on the holiday arrangements and whether the employer can dismiss the employee.

Sometimes it is laid down in the employment agreement who is the supervisor. More often this is mutually agreed upon between the employer and the supervisor involved and apart from that it also appears from the organizational structure within the organization of the employer. A supervisor is someone to whom the authority has been given to request or instruct the employee to carry out certain tasks. The concept “supervisor” is no legal term.

How can employers protect themselves from sexual harassment claims?

Pursuant to the Working Conditions Decree, the employer is obligated to conduct a proper working conditions policy, which must contain a policy aimed at the prevention and, if that is not possible, a limitation of psychosocial workload and therefore sexual harassment. This means that the employer must take preventive as well as repressive measures and that he must act against sexual harassment. A preventive measure is drawing up and displaying a policy about sexual harassment, appointing a person of trust, raising awareness, maintaining a complaints handling scheme et cetera. A repressive measure is taking disciplinary measures if an employee, which it is hoped will not occur, commits the offense of sexual harassment, such as reprimanding or, in extreme cases, dismissal.

Does sexual harassment cover harassment because of pregnancy?

Distinction on the basis of pregnancy, childbirth and motherhood is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Distinction on the basis of heterosexual or homosexual orientation is laid down in Dutch legislation and rules as a separate form of forbidden distinction.

What is prohibited retaliation?

If an employee submits a claim, the employer must proceed to an investigation. Having an investigation carried out by the employer himself is advised against, because for an employer it is rather difficult to carry out an investigation that is objective and unbiased. Moreover, the outcome will be that the employer must de facto eventually stand on the side of one employee or the other.

If the external investigation shows that there has been sexual harassment, there could be a reason for disciplinary measures or dismissal. It is nonetheless of importance to prevent that the accused is already considered to be the perpetrator before this has been shown by the investigation. Moreover, the employee who reported the sexual harassment may not be put into a disadvantageous position by the employer. The employer must also respect the privacy of the employee and in principle, the data about the report may not be shared with others.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

In the event of a consensual relationship there will generally not be a behavior that aims at or results in the affection of the dignity of the other. Also, the behavior with a sexual connotation will normally be wanted if there is a consensual relationship. Because according to the Supreme Court the answer to the question whether or not there is sexual intimidation is significantly dependent on the desirability or undesirability of the behavior from the part of the 'victim', it will be unlikely that there is sexual harassment in the event of a consensual relationship.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes.

What is the #MeToo movement?

The #MeToo movement asks attention for men and women who have been sexually harassed and/or face or have faced sexual violence. A lot of victims dare not report this, because they fear not to be believed. For that reason, it was only clear how many men and women faced sexually transgressing behavior. The #MeToo movement is an attempt to alter this and to achieve a reversal.

How is the #MeToo movement impacting the law in your jurisdiction?

Employers, as well as the government, pay more attention to the prevention and combat of sexually transgressing behavior. In 2018, the Ministry of Social Affairs and Employment pays extra attention to raise awareness under employers with regard to sexual harassment and the importance of a secure working culture, amongst other things, by organizing gatherings. An investigation is also carried out at the instruction of the Ministry of Social Affairs and Employment into the strengthening of the role and position of persons of trust and possibilities are looked at to strengthen the position of the person of trust in practice.

In the field of employment law, the #MeToo movement seems to lead to a more stringent approach where sexual harassment is concerned. However, not all forms of sexual harassments may be subject to the heaviest penalty. Practice shows that judges still judge whether the sanction that is imposed is in accordance with the seriousness of the undesired behavior and that all circumstances of the case must be taken into account, such as the company culture, the manner in which supervisors act and the length of the employment.

For more information, contact M.J. de Coninck (deconinck@plasbossinade.nl) and Damir Lacevic (lacevic@plasbossinade.nl) at ILN member, PlasBossinade advocaten notarissen.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT PHILIPPINE COMPANIES NEED TO KNOW

1. What constitutes sexual harassment?

As per *Republic Act No. 7877,*[11] **work, education or training-related sexual harassment** is committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainer, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment, demands, requests or otherwise requires any sexual favor from the other, regardless of whether the demand, request or requirement for submission is accepted by the object of said act.

As per *CSC Resolution No. 01-0940*,[12] the administrative offense of sexual harassment is an **act, or a series of acts, involving any unwelcome sexual advance, request or demand for a sexual favor, or other verbal or physical behavior of a sexual nature**, committed by a government employee or official in a work-related, training or education related environment of the person complained of.

2. What body of law governs sexual harassment in your jurisdiction?

Republic Act No. 7877, otherwise known as *An Act Declaring Sexual Harassment Unlawful in the Employment, Education or Training Environment, and for Other Purposes,* governs sexual harassment in the Philippines.

In relation hereto, the Civil Service Commission (CSC) issued *CSC Resolution No. 01-0940* which applies specifically to officials and employees in the government.

3. What actions constitute sexual harassment?

Under the *Republic Act No. 7877:*

In a work-related or employment environment, sexual harassment is committed when:

1) The sexual favor is made as a condition in the hiring or in the employment, re-employment or continued employment of said individual, or in granting said individual favorable compensation, terms, conditions, promotions, or privileges; or the refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee;

[11] REPUBLIC ACT NO. 7877, *An Act Declaring Sexual Harassment Unlawful in the Employment, Education or Training Environment, and for Other Purposes,* 14 February 1995.
[12] CSC RESOLUTION NO. 01-0940, *Administrative Disciplinary Rules on Sexual Harassment Cases*, May 21, 2001.

2) The above acts would impair the employee's rights or privileges under existing labor laws; or

3) The above acts would result in an intimidating, hostile, or offensive environment for the employee.

While in an education or training environment, sexual harassment is committed:

1) Against one who is under the care, custody or supervision of the offender;

2) Against one whose education, training, apprenticeship or tutorship is entrusted to the offender;

3) When the sexual favor is made a condition to the giving of a passing grade, or the granting of honors and scholarships or the payment of a stipend, allowance or other benefits, privileges, or considerations; or

4) When the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice.[13]

Under the *CSC Resolution No. 01-0940:*

Work related sexual harassment is committed under the following circumstances:

1) Submission to or rejection of the act or series of acts is used as a basis for any employment decision (including, but not limited to, matters related to hiring, promotion, raise in salary, job security, benefits and any other personnel action) affecting the applicant/employee; or

2) The act or series of acts have the purpose or effect of interfering with the complainant's work performance, or creating an intimidating, hostile or offensive work environment; or

3) The act or series of acts might reasonably be expected to cause discrimination, insecurity, discomfort, offense or humiliation to a complainant who may be a co-employee, applicant, customer, or word of the person complained of.

Education or training-related sexual harassment is committed against one who is under the actual or constructive care, custody or supervision of the offender, or against one whose education, training, apprenticeship, internship or tutorship is directly or constructively entrusted to, or is provided by, the offender, when:

1) Submission to or rejection of the act or series of acts as a basis for any decision affecting the complainant, including, but not limited to, the giving of a grade, the granting of honors or a scholarship, the payment of a stipend or allowance, or the giving of any benefit, privilege or consideration.

2) The act or series of acts have the purpose or effect of interfering with the performance, or creating an intimidating, hostile or offensive academic environment of the complainant; or

[13] *Section 3*, REPUBLIC ACT NO. 7877.

3) the act or series of acts might reasonably be expected to cause discrimination, insecurity, discomfort, offense or humiliation to a complainant who may be a trainee, apprentice, intern, tutee or ward of the person complained of.[14]

In addition, *CSC Resolution No. 01-0940* provides for the following illustrative forms of sexual harassment:

(a) Physical

i. Malicious Touching;

ii. Overt sexual advances;

iii. Gestures with lewd insinuation.

(b) Verbal, such as but not limited to, requests or demands for sexual favors, and lurid remarks;

(c) Use of objects, pictures or graphics, letters or writing notes with sexual underpinnings;

(d) Other forms analogous to the forgoing.[15]

4. Can sexual harassment occur between two members of the same sex?

Yes, the law made no distinction or qualification. Any employee, male or female, may rightfully cry "foul" provided claim is well substantiated.[16]

5. Are employers required to provide sexual harassment training for their employees?

Under the *Republic Act No. 7877:*

Yes, according to *Section 4* of *Republic Act No. 7877,* it shall be the duty of the employer or the head of the work-related, educational or training environment or institution, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment. Towards this end, the employer or head of office shall:

1) Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees or students or trainees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions, therefore.

2) Create a committee on decorum and investigation of cases on sexual harassment. The committee shall conduct meetings, as the case may be, with officers and employees, teachers, instructors, professors, coaches, trainers and students or trainees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment.

[14] *Section 3*, CSC RESOLUTION NO. 01-0940.
[15] *Section 4*, *Id.*
[16] *Philippine Aeolus Automotive United Corp. v. NLRC*, G.R. No. 124617, 28 April 2000, 387 PHIL 250-266.

Under the *CSC Resolution No. 01-0940:*

Yes, according to *Section 60 of CSC Resolution No. 01-0940,* all agencies of the government shall develop an education and training program for their officials and employees and the members of their Committee on Decorum and Investigation to increase understanding about sexual harassment, prevent its occurrence, and ensure proper investigation, prosecution and resolution of sexual harassment cases.

6. What are the liabilities and damages for sexual harassment and where do they fall?

Under the *Republic Act No. 7877:*

According to *Section 4* of *Republic Act No. 7877,* the employer or head of office, educational or training institution shall be solitarily liable for damages arising from the acts of sexual harassment committed in the employment, education or training environment if the employer or head of office, educational or training institution is informed of such acts by the offended party and no immediate action is taken thereon.

Section 7 of the same law provides that any person who violates the provisions of this Act shall, upon conviction, be penalized by imprisonment of not less than one (1) month nor more than six (6) months, or a fine of not less than Ten thousand pesos (P10,000) nor more than Twenty thousand pesos (P20,000), or both such fine and imprisonment at the discretion of the court.

Any action arising from the violation of the said *Act* shall prescribe in three (3) years.

Under the *CSC Resolution No. 01-0940:*

According to *Section 54 of CSC Resolution No. 01-0940,* the head of office who fails to act within fifteen (15) days from receipt of any complaint for sexual harassment properly filed against any employee in that office shall be charged with Neglect of Duty.

Section 55 of the same law provides that any person who is found guilty of sexual harassment shall, after the investigation, be meted the penalty corresponding to the gravity and seriousness of the offense.

In relation to the immediately preceding paragraph, *Section 56* provides that the penalties for light, less grave, and grave offenses are as follows:

A. For light offenses:

1st offense – Reprimand

2nd offense – Fine or suspension not exceeding thirty (30) days

3rd offense – Dismissal

B. For less grave offenses:

1st offense – Fine or suspension of not less than thirty (30) days and not exceeding six (6) months

2nd offense – Dismissal

C. For grave offenses: Dismissal

Lastly, *Section 57* provides that if the respondent is found guilty of two or more charges or counts, the penalty to be imposed should be that corresponding to the most serious charge or count, and the rest shall be considered as aggravating circumstances.

7. What does an employee who believe they've been sexually harassed have to prove for a successful claim?

The employee must establish the elements of the crime. The following are the elements of sexual harassment as defined by law: (1) that the offender has authority, influence or moral ascendancy over victim in a work, training, or education environment; (2) the offender demands, requests or otherwise requires any sexual favor from the victim.

The gravamen of the offense is not the violation of victim's sexuality but the abuse of power of the offender.[17] Any employee, male or female, may rightfully cry "foul" provided claim is well substantiated. There is no time period within which he/she is expected to complain through proper channels.[18] The time to do so may vary depending on the needs, circumstances, and emotional threshold of the employee.

Moreover, it is not necessary that the demand, request, or requirement of a sexual favor be articulated in a categorical oral or written statement. It may be discerned, with equal certitude, from the acts of the offender.[19]

8. Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

If an employee sexually harasses another employee, but the former has no authority, influence or ascendancy over the latter, the harassment may constitute the crime of unjust vexation or acts of lasciviousness punishable under the RPC.

Notably, *CSC Resolution No. 01-0940* no longer requires that the offender should be one with authority, influence or moral ascendancy over the victim hence, it likewise applies when the perpetrator is a co-worker.

9. What are the potential defenses employers have against sexual harassment claims?

The employer's defenses may be the following:

1) The acts were not committed at all.[20]
2) The acts were committed by accident.[21]

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[17] *Id.*
[18] *Id.*
[19] *Bacsin v. Wahiman*, G.R. No. 146053, 30 April 2008, 576 PHIL 138-145.
[20] *Gonzales v. Serrano,* G.R. No. 175433, 11 March 2015 & *Jacutin v. People,* G.R. No. 140604, 06 March 2002, 428 PHIL 508-519.
[21] *Bacsin v. Wahiman*, G.R. No. 146053, 30 April 2008, 576 PHIL 138-145.

3) The victim's evidence did not prove that sexual harassment occurred.[22]
4) The acts committed do not constitute sexual harassment.[23]
5) The charge was filed on the ground of revenge/harassment.[24]

10. Who qualifies as a supervisor?

Section 3 of *Republic Act No. 7877* provides for the persons, in the similar footing with a "supervisor", who may be held liable to commit acts of sexual harassment.

The said section provides that "work, education or training-related sexual harassment is committed by an **employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainer**, or **any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment**, demands, requests or otherwise requires any sexual favor from the other, regardless of whether the demand, request or requirement for submission is accepted by the object of said Act.

11. How can employers protect themselves from sexual harassment claims?

Under the *Republic Act No. 7877:*

For employers to protect themselves from sexual harassment claims, Section 4 of *Republic Act No. 7877* makes the employer or the head of office duty-bound to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment.

Specifically, the employer or the head of Office shall:

1) Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees or students or trainees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions, therefore.
2) Create a committee on decorum and investigation of cases on sexual harassment. The committee shall conduct meetings, as the case may be, with officers and employees, teachers, instructors, professors, coaches, trainers, and students or trainees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment.

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[22] *Libres v. National Labor Relations Commission,* G.R. No. 123737, 28 May 1999, 367 PHIL 180-191.

[23] *Id.* & *Gonzales v. Serrano,* G.R. No. 175433, 11 March 2015.

[24] *Floralde v. Court of Appeals,* G.R. No. 123048, 08 August 2000, 392 PHIL 146-156 & *Office of the Ombudsman v. Medrano,* G.R. No. 177580, 17 October 2008, 590 PHIL 762-781.

In addition, this section requires the employer or head of office, educational or training institution to disseminate or post a copy of this Act for the information of all concerned.

Under the *CSC Resolution No. 01-0940:*

Section 7 of *CSC Resolution No. 01-0940* provides for the creation of a Committee on Decorum and Investigation in all national or local agencies of the government, state colleges and universities, including government-owned or controlled corporations with original charter.

12. Does sexual harassment cover harassment because of pregnancy?

No, harassment because of pregnancy is not expressly covered under *Republic Act No. 7877* or *CSC Resolution No. 01-0940.* However*, Republic Act No. 7910*, otherwise known as "*The Magna Carta of Women,*" prohibits acts of discrimination against women in all its forms.

13. Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes, *CSC Resolution No. 01-0940* somehow protects harassment on the basis of sexual orientation when it classified as a "**less grave offense**" the making of "derogatory or degrading remarks or innuendoes directed toward the members of one sex, or one's sexual orientation or used to describe a person."

14. What is prohibited retaliation?

There is no concept yet of prohibited retaliation under *Republic Act No. 7877.*

However, a similar concept can be found under *Article 118 of the Labor Code of the Philippines* which provides that it shall be unlawful for an employer to refuse to pay or reduce the wages and benefits, discharge or in any manner discriminate against any employee who has filed any complaint or instituted any proceeding under this Title or has testified or is about to testify in such proceedings.

15. Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No, a consensual relationship between a supervisor and subordinate cannot be considered sexual harassment. In one case,[25] the Supreme Court of the Philippines even stated that "Assuming arguendo that respondent never intended to violate RA 7877, his attempt to kiss petitioner was a flagrant disregard of a customary rule that had existed since time immemorial – that intimate physical contact between individuals **must be consensual**."

16. Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes, *Section 5 of Republic Act No. 7877* provides that the employer or head of office, educational or training institution shall be solitarily liable for damages arising from the acts of sexual harassment committed in the employment, education or training environment if the employer or head of office, educational or training institution is informed of such acts by the offended party and no immediate action is taken.

[25] *Gonzales v. Serrana,* G.R. No. 175433, 11 March 2015, 752 SCRA 434.

On the other hand, Section 54 of *CSC Resolution No. 01-0940* provides that the head of office who fails to act within fifteen (15) days from receipt of any complaint for sexual harassment properly filed against any employee in that office shall be charged with Neglect of Duty.

17. What is the #MeToo movement?

According to a Philippine news article entitled *"#MeToo and sexual harassment in the Philippines,"*[26] the real origin of the #MeToo movement was in 2006 when American activist Tarana Burke told fellow sexual assault survivors "me too." Eleven years later came Alyssa Milano's #MeToo tweet on Oct. 15, 2017, making Burke's movement viral and leading to more than 12 million related posts, reactions and comments on Facebook within 24 hours.

18. How is the #MeToo movement impacting the law in your jurisdiction?

According to the same article,[27] "In the Philippines, there have been very few publicized sexual harassment cases in the workplace where the investigations are known by the public. Two of these cases are in the Ateneo and ABS-CBN. It is too early to know whether these are unusual cases or whether these cases are the beginning of a #MeToo movement in the Philippines."

For more information, contact Sonya Margarita Benemerito-Castillo (smbcastillo@kapunanlaw.com) at ILN member, Kapunan & Castillo Law Offices.

[26] Cruz, Efren. "#MeToo and sexual harassment in the Philippines." *The Philippine Star,* 28 October 2018.
[27] *Id.*

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT PORTUGUESE COMPANIES NEED TO KNOW

What constitutes sexual harassment?

Portuguese law foresees two types of harassment:

1. Sexual harassment which is a set of unwanted behaviors perceived as abusive of a physical nature, verbal or non-verbal, with the purpose or effect of gaining advantages, blackmail and even use of force or coercion strategies of the person's will.

2. Psychological harassment which is a set of unwanted behaviors perceived as abusive, practiced persistently and repeatedly aiming to lower self-esteem and ultimately to affect the person's presence at the workplace.

In both cases, victims are involved in situations where they generally have difficulty defending themselves.

What body of law governs sexual harassment in your jurisdiction?

The Portuguese Constitutions protects sexual harassment by foreseeing equality, dignity and foreseeing the prohibition of discriminatory acts.

In respect to ordinary law, since 2003, the Portuguese Labor Code foresees protection against sexual harassment in the workplace - article 29 (amended in 2009) which is included in the chapter for equality and non-discrimination.

In 2017, Law no. 73/2017, of August 16 reinforced the legislative framework for the prevention of harassment at work.

What actions constitute sexual harassment?

- Sexual harassment can take many forms, including:
  - Unwanted sexual attention:
    - Invitations for unwanted encounters;
    - Explicit and unwanted proposal of a sexual nature;
    - Unwanted proposals of a sexual nature through e-mail, messages or social networks;
    - Phone calls, letters, messages, e-mail or images of a sexual nature;
    - Intrusive and offensive questions about sex life.
  - Physical contact and sexual assault:
    - Unwanted physical contacts (touching, kissing or attempting kiss);
    - Assault or attempted sexual assault.

- Grooming:
  - Requests for sexual favor linked to promises of obtaining employment or improving working conditions.
- Sexual innuendos:
  - Suggestive or offensive comments about body;
  - Suggestive comments about appearance;
  - Jokes or comments of sexual nature.

➢ Psychological harassment can take many forms, including:

- Mobbing;
- Intimidation: systematic threats of dismissal;
- Personal humiliation: due to physical characteristics.

Can sexual harassment occur between two members of the same sex?

Yes, there is no difference. What matters is the practice of unwanted behavior regardless of the sex of the perpetrator and the victim.

Are employers required to provide sexual harassment training for their employees?

Following the entry into force of Law no. 73/2017, of August 16, companies (who have seven or more employees) are obliged to adopt a code of conduct to prevent and to combat harassment in the workplace. However, there is no mandatory training.

What are the liabilities and damages for sexual harassment and where do they fall?

Sexual harassment is criminally punished and those who practice that crime may be condemned to a prison sentence of 1-2 years (minimum).

The victim of sexual harassment may too act civilly against the perpetrator of sexual harassment by asking for compensation for physical and moral damages.

In terms of labor relationship, employees are entitled to terminate the employment agreement with fair cause which will entitle them to compensation for the termination of the employment contract.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The burden of proof that sexual harassment hasn't occurred is up to the employer. The employee only has to inform the employer that he or she was a victim of sexual harassment and who the perpetrator is, and it is up to the employer to provide evidence that the harassment has not occurred.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

There is no difference in terms of having fair cause to terminate an employment agreement. What is at issue is the unwanted behaviors towards the victim and not who practices it. Although they occupy

different positions, they are employees of the same company who must sanction this type of behavior. Nevertheless, the severity of the fault is higher if the perpetrator is a supervisor or a manager.

What are the potential defenses employers have against sexual harassment claims?

The employer must prove that it has applied the code of conduct in order to prevent and combat sexual harassment and that a disciplinary proceeding against the perpetrator was applied.

Who qualifies as a supervisor?

A supervisor is the person with the authority and/or management powers to give orders to the employees.

How can employers protect themselves from sexual harassment claims?

Employers, in order to prevent sexual harassment, should adopt codes of conduct and, if necessary, give specific training to all employees.

Does sexual harassment cover harassment because of pregnancy?

Sexual harassment and discrimination due to pregnancy are two different figures and both have different legal regimes, however, both can be applicable at the same time to the same person.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Sexual harassment protection is applied regardless of the gender and sexual orientation.

What is prohibited retaliation?

Employers should not take any kind of retaliation against an employee that reports an incident of sexual harassment or participates in an investigation of a sexual harassment claim.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

If it is a consensual relationship, it is no longer considered sexual harassment, since this figure is characterized by a set of unwanted behaviors.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. One of the employers' obligations is to ensure safety at work and to prevent employees from being placed in dangerous and undesirable situations.

What is the #MeToo movement?

The #MeToo movement has become a worldwide phenomenon and consists of a movement that deals specifically with sexual violence and it is a framework for how to do the work of ending sexual violence. Although this movement has already been around for years (founded in 2006 by Tarana Burke), it just started gaining international attention after allegations of sexual assault and harassment by Hollywood producer Harvey Weinstein, in October 2017, began dominating the headlines. This powerful movement has put sexual harassment in the spotlight and has empowered survivors of sexual misconduct to step

forward and take action against their perpetrators. The ultimate goal of the movement is to create a cultural transformation.

How is the #MeToo movement impacting the law in your jurisdiction?

The #MeToo movement had a huge impact worldwide and Portugal was no exception.

In Portugal, there is a civil movement that defends equality between genders named “Capazes” which defends women rights. Is not directly linked to the #MeToo movement, but the basis is the same – protect women from sexual harassment, domestic violence, violation of their rights as women and employees, etc.

For more information, contact Sílvia Santos Ferreira at ILN member, MGRA (ssf@mgra.pt).

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT ROMANIAN COMPANIES NEED TO KNOW

In Romania, issues regarding gender discrimination, gender equality (including in the work place) and the banning of sexual harassment, are regulated through a number of legislative acts, such as the Romanian Labour Code, the Romanian Criminal Code and Law no. 202/2002 On Equal Opportunity for, and Treatment of, Men and Women.

As a result of the #MeToo movement, but also as a result of the implementation into domestic law of the undertakings of Romania under international law and international initiatives, in 2018, there were major amendments with regard to Law no. 202/2002 On Equal Opportunity for, and Treatment of, Men and Women ("Law 202/2002").

The amendments to Law 202/2002 were drafted and proposed by the National Agency for Equal Opportunity, a specialized public administration body under the subordination of the Ministry of Labour, Family, Social Protection and the Elderly, that promotes the principle of equal opportunity between men and women in view of eliminating forms of discrimination based on the criterion of sex in all national programmes and policies.

Among the changes introduced by the new amendments to Law 202/2002 is the provision that persons who have been sentenced in a final decision for a criminal offence or who have been sanctioned for discriminatory acts by the National Council for Combatting Discrimination, as well as persons who were previously removed from the position of member of the County Commission for Equal Opportunity, cannot occupy such positions.

One of the most significant changes brought about by these legislative amendments was the introduction of a definition of gender violence, whose legal definition had not been laid down in any previous Romanian legislative text.

Gender violence was defined as violence directed against a woman, or, as the case may be, a man, which is grounded in his/her belonging to a certain sex. Gender violence against women is violence that affects women in a disproportionate manner. Gender violence includes, without limitation, the following acts: domestic violence, sexual violence, genital mutilation of women, forced marriage, forced abortion and forced sterilization, sexual harassment, human trafficking and forced prostitution.

Law 202/2002 does not provide for specific penalties for gender violence, as it has been newly defined in the law, but, given the fact that the concepts that it includes (e.g., sexual harassment, domestic violence, etc.) fall under the scope of criminal offences provided for and sanctioned by the Romanian Criminal Code, we can safely state that gender violence, as a cluster concept, is effectively sanctioned under Romanian law, with the most severe liability, criminal liability.

Moreover, one of the novelties brought about by the above-mentioned amendments consists in the regulation of the general regime of the occupation of expert on equal opportunity and technician for

equal opportunity. It is true that the names of these two occupations do not include specific reference to gender, but, since they are included in Law no. 202/2002, which deals with equal opportunity for, and treatment of, men and women, there is no doubt that such occupations deal with gender equality.

These new amendments will most likely have an impact on certain Romanian employers. According to the new amendments, public institutions and authorities, civil and military, with over fifty employees, as well as private companies with over fifty employees have the possibility of identifying an employee to whom they will allot, through the job description, duties in the field of equal opportunity for, and treatment of, men and women – up to the limit of the budget existing for expenses related to salaries or hiring an expert on/technician for equal opportunity.

Therefore, for the time being, the hiring of an expert/technician in the field of equal opportunity is not yet mandatory for the Romanian employers mentioned above. However, this new provision opens up a path, in our opinion, for good practices in the field of gender equality in the workplace.

According to the new amendments, the expert/technician in equal opportunity or the person appointed with duties in the field of equal opportunity between men and women will have the following responsibilities:

a) He/she will analyse the context of the occurrence and evolution of the phenomenon of gender equality, as well as the failure to observe the principle of equal opportunity between men and women and he/she will recommend solutions in view of complying with this principle, according to the law;

b) He/she will formulate recommendations/observations/proposals in view of preventing/administering/remedying the risks that may lead to a breach of the principle of equal opportunity between men and women, in compliance with the principle of confidentiality;

c) He/she will propose measures regarding the insurance of equal opportunity for, and treatment of, men and women, and will assess the impact thereof on men and women;

d) He/she will draft action plans regarding the implementation of the principle of equal opportunity between men and women, which should include at least: active measures for the promotion of equal opportunity for, and treatment of, men and women, and the elimination of direct and indirect discrimination based on gender, measures regarding the prevention of and combat against harassment in the work place, measures regarding the equality of treatment with respect to remuneration policy, job promotion and access to decision-making positions;

e) He/she will draft, provide grounds for, assess and implement programmes and projects in the field of equal opportunity for, and treatment of, men and women;

f) He/she will grant specialized advice for the application of the provisions of national and EU legislation in the field of the equal opportunity between men and women.

Although the legislative framework already existed as far as the prevention of the acts the #MeToo movement has focussed on and Romania has continued in moving forward with the implementation of

subsequent legislative measures, there is still a long way to go before such a cultural change is successfully assimilated on a large scale in Romanian society.

For more information, contact Cosmina Romelia Aron (aron@peterkapartners.ro) at ILN member, PETERKA & PARTNERS.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT SCOTTISH COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

Background

As part of last year's Labour & Employment group paper, "Sexual Harassment in the Workplace: What Your Company Needs to Know", we briefly considered how the #MeToo Movement has impacted upon UK law.

At present, the movement continues to inform public and political discussion and promote awareness with regard to sexual harassment. In the UK, topics at the forefront of discussion include ethical considerations and the enforcement of non-disclosure agreements in the context of sexual harassment.

Against this backdrop, the Women and Equalities Committee (the Committee) published a report on Sexual Harassment in the Workplace, on 25th July 2018. The report invites the UK Government to implement a range of specific measures designed to alter workplace culture in respect of safety and dignity of employees.

Unfortunately, the UK Government response must be viewed, broadly, as a disappointment. In the US, pressure from the #MeToo Movement has helped bring about legislative and pragmatic change including the introduction of new local and state laws on mandated harassment policies, training and non-disclosure agreements. Conversely, the UK Government response to the Committee's report demonstrates a reluctance to take proactive steps and implement the legislative changes required to properly address sexual harassment in the workplace.

For example, the Government has just recently issued a consultation paper seeking views on the possible introduction of new measures to prevent the misuse of non-disclosure agreements in situations of workplace harassment or discrimination. However, rather than following the Committee's recommendation to introduce stricter limitations on the use of confidentiality clauses, the consultation approach focuses on clarifying existing limitations. The closing date for responses is 29th April 2019.

Below, we consider the Committee's findings and recommendations as well as the UK Government response.

Committee Recommendation #1: Introduce a New Mandatory Duty and Code of Practice

Introduce a mandatory duty for employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be unlawful and the EHRC should be able to enforce substantial financial penalties, in the event of a breach. The new duty should be accompanied by a statutory code of practice. The code should be reviewed by tribunals in evidence, in determining whether an employer had breached its duty to protect

employees. Tribunals should then have discretion to apply a 25% uplift in harassment claims where there has been a breach of a mandatory element of the code.

Government Response #1: Introduce a New Mandatory Duty and Code of Practice

The Government highlighted employers' existing duty to protect employees from victimisation and harassment in the workplace – pointing out that the Equality Act 2010 ('the Act') outlaws workplace harassment with respect to a protected characteristic and that, under s109, employers are liable for acts of harassment carried out by employees in the course of their employment unless the employer can show that they have taken 'all reasonable steps' to prevent the unlawful behaviour. It noted that the Committee's evidence suggested that employers do not know what 'reasonable steps' should be taken.

To address this issue, the Government confirmed its intention to publish a statutory code of practice (discussed later) but did not support the introduction of a mandatory duty or the option of applying a compensation uplift. It reasoned that the code of practice would have the same impact – placing greater onus on employers rather than individuals. It vowed to gather evidence and consult further on the potential benefits of introducing a mandatory duty.

Committee Recommendation #2: Public Sector Risk Assessments

Introduce a specific duty under the existing Public Sector Equality Duty (PSED) requiring relevant public sector employers to conduct risk assessments with regard to sexual harassment and to put in place measures to mitigate any perceived risks. Action plans should detail how harassment investigations would be conducted and set out penalties for perpetrators.

Government Response #2: Public Sector Risk Assessments

The Government highlighted the Civil Service's ongoing review of workplace conducted and its intention to publish specific policy and guidance with regard to sexual harassment, which would be made available to all Civil Service Organisations before the end of 2018.

However, the Government rejected the proposal to introduce a new specific duty under the existing PSED – highlighting that the PSED already requires employers to have 'due regard' to the requirement to eliminate harassment in their role as an employer.

Committee Recommendation #3: Positive Duty to Prevent Third Party Harassment

Introduce legislation placing a positive duty on employers expressly to protect workers from harassment by third parties and to ensure that employers can be held liable if they fail to take reasonable steps to protect staff from third party harassment.

Government Response #3: Positive Duty to Prevent Third Party Harassment

The Government noted that recent case law (particularly Unite the Union v Nailard) has the potential to alter the common law position on employers' liability for third party harassment. Therefore, the Government proposed to consult on how best to strengthen and clarify the existing laws, rather than introduce a positive duty at this stage.

Committee Recommendation #4: Protection for Interns and Volunteers

The Committee recommended extending the Act's existing protections relating to harassment in the workplace to interns and volunteers.

Government Response #4: Protection for Interns and Volunteers

The Government highlighted existing safeguarding provisions in the charity sector and its ongoing work with the Charity Commission - focused at strengthening those protections.

The Government acknowledged that in many cases involving sexual harassment, volunteers and interns would not satisfy the tests for employability status and would therefore not enjoy the same protections as employees under the work-related provisions of the Act. However, it noted some broader protections available under other existing legislation. It vowed to ensure that these existing protections were better understood and to gather evidence on whether additional protections were required, but ultimately rejected the recommendation to introduce additional protection at this stage.

Committee Recommendation #5: Awareness-raising Campaign

The Committee recommended that the Government collaborate with ACAS, the EHRC and employers on an conducting a sexual harassment awareness campaign.

Government Response #5: Awareness-raising Campaign

The Government agreed to work with ACAS, the EHRC and employers to raise awareness regarding appropriate workplace behaviours and individual rights and to consider increasing public information and campaign activity in this respect.

It highlighted the LGBT action plan, under which ACAS and the Government Equalities Office will ensure that LGBT harassment is included in any sexual harassment policies and guidance that they issue.

Committee Recommendation #6: Duty for Regulators

Introduce a requirement for all regulators to put an action plan in place, setting out steps they will take to ensure that the employers they regulate take action to protect workers from sexual harassment in the workplace.

Government Response #6: Duty for Regulators

The Government rejected imposing a blanket duty on all regulators. It highlighted that different regulators have different remits and that some have a purely technical focus. It vowed to liaise with each regulator directly to ensure they take appropriate action to address sexual harassment in their sector.

In support of this position, it highlighted the current efforts of the EHRC – a key regulator in this area – in developing a robust programme aimed at tackling sexual harassment.

Committee Recommendation #7: Improved Remedies for Employment Tribunals (ETs)

Improve the remedies that ETs may award and amend the costs regime, as it deters individuals from bringing cases forward - the default position should be that, where an employer loses a discrimination case in which sexual harassment is alleged, the employer should be required to pay the employee's costs. Furthermore, enable ETs to award punitive damages.

Government Response #7: Improved Remedies for Employment Tribunals (ETs)

The Government asserted that the existing remedy structure represents a significant deterrent to employers and offers compensation to victims. It stated that the tribunal forum was not intended to be punitive and that awards should be proportionate – the tribunal's function is to compensate for any detriment suffered and to restore victims to the state they would have been in, had the relevant incident(s) not occurred. The Government also noted that the tribunal can deviate from this default position in certain circumstances.

It acknowledged the concern that victims may be dissuaded from pursuing claims due to costs but considered this a double-edged sword; it argued that victims may be similarly dissuaded by the prospect of paying an employer's costs, in the event their claim in unsuccessful. It also highlighted existing resources which can help alleviate the cost burden of pursuing ET claims, such as Legal Aid and publicly funded advice.

However, it did agree to bring forward legislation to raise the maximum cap on aggravated breach awards from £5,000 to £20,000. It is also considering placing an obligation on employment judges to consider the use of these sanctions, where an employer is found to have repeatedly breached employment law.

Committee Recommendation #8: Extend Time Limit for Bringing Claims

Extend the time limit for lodging tribunal claims relating to sexual harassment from 3 months to 6 months. This time period should not commence until the relevant employer's internal complaint and grievance procedures have concluded. More broadly, there should be a review of the time limits in all discrimination cases.

Government Response #8: Extend Time Limit for Bringing Claims

The Government noted that an ET has the power to grant a time extension if it considers it 'just and equitable' to do so and highlighted data suggesting that tribunals frequently grant these extensions.

The Government rejected the Committee's suggestion, to halt the countdown until any internal complaint or grievance procedure has reached conclusion, highlighting a number of perceived practical difficulties.

The Government noted that the Law Commission had initiated a consultation on Employment Law Hearing Structures and encouraged interested parties to engage with this on the wider point of extending time limits in respect of discrimination cases.

Committee Recommendation #9: Greater Protection for Complainants

Protections available to complainants of sexual harassment and/or sexual violence in an employment context should be brought in line with those available to complainants bringing similar claims in a criminal justice context. It cited several examples: lifelong anonymity; access to special measures, for example, not to be cross-examined by an alleged perpetrator; and regular and specialist training on sexual harassment for tribunal judges.

Government Response #9: Greater Protection for Complainants

The Government noted that ETs already have discretion to put in place special measures similar to those available in criminal proceedings and that tribunals also have both the technology and knowledge to do so.

Committee Recommendation #10: Statutory Questionnaire

Introduce a statutory questionnaire, with a view to developing standardised questions to be used in respect of sexual harassment allegations.

Government Response #10: Statutory Questionnaire

The Government rejected this proposal, highlighting the earlier use of Statutory Questionnaires introduced with the Sex Discrimination Act 1975. The Government highlighted the Committees' own finding that use of these questionnaires in pre-hearing disclosures was inefficient and problematic.

The Government highlighted the existing non-statutory process and associated guidance available through Acas. It also noted that information gathered through this process could be used as evidence.

Committee Recommendation #11: Reintroduce Wider Powers for ETs

Reintroduce the ET's power to make wider recommendations to employers in discrimination cases.

Government Response #11: Reintroduce Wider Powers for ETs

The Government rejected this proposal, highlighting the introduction of the new statutory code of practice and noting that the powers were not, at the time, considered to be particularly effective.

Committee Recommendation #12: Unethical Use of NDAs

The Committee made several recommendations in respect of NDAs:

- New legislation requiring the use of standard, approved confidentiality clauses;
- Make it an offence for an employer or of their professional advisor to propose a confidentiality clause designed or intended to prevent or limit protected disclosures or disclosure of a criminal offence; and

- Make it a clear professional disciplinary offence for lawyers advising on confidentiality agreements to include provisions that could reasonably be regarded as unenforceable.

Government Response #12: Unethical Use of NDAs

The Government agreed that NDAs require better regulation and clearer explanation of rights which cannot be abrogated by signing an NDA. However, the Government rejected the proposal to make it a criminal offence to propose an NDA that is unenforceable, stating that this would be too difficult to enforce. Instead, it vowed to consider and consult on other enforcement approaches.

The Government highlighted that the legal profession in England, Wales and Scotland is independent of the Government. It noted the work done by UK legal regulators to ensure ethical use of NDAs. For example, the SRA (an English body which regulates solicitors) published a Risk Outlook in July 2018. Amongst other things, this contained a warning that the SRA will take action against any firm that uses NDAs to conceal criminal activity or serious professional misconduct.

In March 2019, the UK Government issued a follow-up consultation paper seeking views on the introduction new measures to prevent the misuse of non-disclosure agreements in situations of workplace harassment or discrimination. However, as already noted, the UK Government's proposals are largely weak in substance and seek to shift the focus of debate away from the Committee's recommendations.

Committee Recommendation #13: Amend Whistleblowing Legislation

Amend the definition of protected disclosures and prescribed persons to include disclosures of sexual harassment to the police and all regulators and to any court or tribunal.

Government Response #13: Amend Whistleblowing Legislation

Prescribed Persons: The Government stated that it regularly considers adding more bodies to the list of 'prescribed persons' in the context of whistleblowing. The Government was not persuaded that it would be beneficial to prescribe every court or tribunal. However, it vowed to consider the wider implications of adding police to the prescribed persons list but agreed that there were potential advantages. It also agreed to add EHRC to the list in due course.

Protected Disclosures: The Governments position is that protected disclosures can already cover disclosure of workplace sexual harassment. E.g. Section 43B Employment Rights Act 1996 – covers disclosures showing that a person has failed to comply with any legal obligation; including employers' legal responsibilities under the Equality Act 2010.

Committee Recommendation #14: Data Gathering and Periodic Survey

Tribunals must collect robust and comparable data on the number of tribunal claims submitted containing allegations of sexual harassment and the outcome of those claims. In addition, the Government should conduct large-scale surveys, at least every three years, to gather information on the nature and extent of sexual harassment in the workplace.

Government Response #14: Data Gathering and Periodic Survey

The Government vowed to commence planning on a periodic survey, which will run at least every three years. It aims to launch a set of survey questions in 2019.

The Government also noted that a design team are currently building and testing a replacement IT system for ETs and will take into account the Committee's recommendations and consider how the new system can better capture data. However, it noted that the process for capturing data on sexual harassment allegations is complicated. For example, manual collation would require ET staff, who are not legally qualified, to make an assessment as to whether a case involves sexual harassment, when inputting it on the system. The Government will consider potential solutions to this problem.

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2018 Edition: Sexual Harassment in the Workplace: What Scottish Companies Need to Know

What constitutes sexual harassment?

In the UK, sexual harassment occurs when a person engages in unwanted conduct of a sexual nature. The conduct has the purpose or effect of violating the dignity of another person, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. As the Equality and Human Rights Commission (EHRC) Employment: Statutory Code of Practice points out, the conduct in this context can be any unwanted verbal, non-verbal or physical conduct of a sexual nature.

An employee does not have to have previously objected to a person's conduct for it to be considered unwanted (*Reed v Stedman [1999] IRLR 299 EAT*) and the fact that an employee may have tolerated being harassed over a significant period of time or initiated sexual 'banter' as a coping strategy (*Munchkins Restaurant Ltd and another v Karmazyn & others UKEAT/0359/09*) does not mean that the conduct cannot be unwanted. Furthermore, unwanted conduct does not need to be directed at the person making the complaint, it can be witnessed or overheard, and unwanted conduct can still be considered harassment even if the alleged harasser did not mean for it to be.

What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is unlawful and is a form of discrimination under Section 26 of the Equality Act 2010. The Equality Act 2010 prohibits an employer and individuals from harassing an extensive category of people including:

- Employees, as defined in the Employment Rights Act 1996;
- Job Applicants;

- Agency Workers;
- Workers who are personally carrying out services for their employer;
- Former Employees, if the harassment arises out of or is closely connected to the employment relationship and if the harassment had occurred during the employment relationship it would have been unlawful;

What actions constitute sexual harassment?

Unwanted behaviour/conduct of a sexual nature includes:

- unwelcome sexual advances, propositions and demands for sexual favours;
- unwanted or derogatory comments about clothing or appearance;
- leering, staring and suggestive gestures or looks;
- sexual remarks or jokes;
- sexual gestures;
- displaying sexually explicit material, such as pornographic pictures, including those in electronic forms such as computer screen savers or by circulating such material in emails or via social media;
- intrusive questions about a person's private or sex life, and discussing own sex life;
- unwelcome touching, hugging, massaging or kissing;
- sending sexually explicit emails or text messages;
- spreading sexual rumours about a person;
- criminal behavior including sexual assault, stalking, indecent exposure and offensive communications.

Can sexual harassment occur between two members of the same sex?

Yes.

Are employers required to provide sexual harassment training for their employees?

On 4th December 2017, the EHRC published guidance for employers on dealing with sexual harassment in the workplace. Employers have a duty of care to protect workers and will be legally liable for sexual harassment in the workplace if they have failed to take reasonable steps to prevent it from happening. There are no minimum requirements employers can depend on to demonstrate that they have taken reasonable steps to protect workers, but all employers are expected to have an anti-harassment policy in place which is monitored and reviewed and an effective procedure for reporting harassment. Effective implementation of an anti-harassment policy includes anti-harassment training for all staff. Furthermore, the EHRC guidance recommends that individuals dealing with complaints of sexual harassment should receive specialist training.

What are the liabilities and damages for sexual harassment and where do they fall?

A successful claim for sexual harassment in the workplace can expose an employer, and an alleged harasser who has been joined into any proceedings, to an award of unlimited compensation. This would include:

- Compensation for any financial loss, including loss of earnings, suffered as a result of the harassment. The aim is to award a sum of money that will put the claimant into the position he or she would have been in had the wrong not taken place; and
- An award for injury to feelings in line with the guidelines established by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2) (2002) EWCA Civ 1871* which sets out three bands of potential awards:
    - The lower band: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence
    - The middle band: serious cases, which do not merit an award in the highest band
    - The top band: the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award for injury to feelings exceed the top of this band.

The tribunal may also make recommendations aimed at reducing the adverse effect of the harassment on the claimant. The tribunal can also make a declaration as to the rights of the claimant and the employer in relation to the matters to which the proceedings relate.

Regarding compensation, employees remain under a duty to mitigate their losses, usually by looking for a new job if the harassment has resulted in their being out of work, and by limiting their out-of-pocket expenses to those which are reasonably incurred. However, the burden remains on the employer to prove that the employees have failed to mitigate their losses. Where proceedings are brought against an employer and an alleged harasser in respect of the same allegation of harassment and the claimant is successful, the liability for any compensation awarded will be joint and several and accordingly the successful claimant can recover the full amount of any compensation against either of the respondents without the requirement for apportionment.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

As already stated, sexual harassment occurs when A engages in unwanted conduct of a sexual nature. It has the purpose or effect of violating the dignity of B, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Sexual harassment also occurs when A engages in unwanted conduct of a sexual nature. The conduct has the purpose or effect of violating the dignity of B, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them and because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

If the unwanted conduct has the **purpose** of either violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, nothing more is required, and this will amount to harassment. It does not matter whether the conduct had the effect referred to above.

In deciding whether unwanted conduct has the **effect** referred to above (albeit this was not the alleged harasser's purpose), each of the following must be taken into account:

- B's perception.
- The other circumstances of the case.
- Whether it is reasonable for the conduct to have that effect.

In order to bring a successful sexual harassment claim on the basis of unwanted conduct of a sexual nature, the victim must reasonably feel or perceive that their dignity has been violated or an intimidating, hostile, degrading, humiliating or offensive environment has been created. A tribunal will assess whether that individual genuinely held that feeling or belief. Considering reasonableness avoids liability arising where the individual is 'hypersensitive'. If the claimant is prone to taking offence, then even if they did genuinely feel their dignity had been violated there would be no harassment. The concept of the 'hypersensitive' claimant was considered by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal [2009] IRLR 336.* The EAT emphasised that it was important not to encourage the imposition of legal liability in every unfortunate phrase and that violating is a strong word which should not be used lightly.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

An Employer is vicariously liable for any acts of harassment committed by its employees against other employees which occur in the course of employment as per S190(1) of the Equality Act 2010. Additionally, employees have a personal liability in respect of any harassment that they commit. An employer may avoid liability if it can successfully show that it had taken all reasonable steps to prevent the harassment from occurring, as per S109(4) of the Equality Act 2010. It is common practice for claims for sexual harassment to be brought against the employer and the alleged harasser. By doing this the claimant can potentially obtain an additional award but it is also a tactic to put pressure on the employer to settle the claim.

What are the potential defenses employers have against sexual harassment claims?

To avoid liability for an act of harassment, an employer must show that it had in place all reasonable steps to prevent the harassment before the harassment occurred as per s109(4) of the Equality Act 2010. Acting quickly and reasonably to any allegations of discrimination will not be enough to successfully utilise this defence. In practice, the reasonable steps defence is difficult to establish successfully as the threshold is high.

Who qualifies as a supervisor?

Supervisor is not a defined term under the Equality Act 2010.

How can employers protect themselves from sexual harassment claims?

Employers can protect themselves by:

- Having in place appropriate policies which are reviewed regularly to ensure that they are compliant with changes in the law;
- Training employees on the policies, the implications of any breach and ensuring that employees properly understand the information provided to them;
- Training line management on equality and diversity and on how to effectively deal with any complaints that they receive;
- Having effective procedures in place to deal with complaints of harassment;
- A detailed record of who attended training and what the content consisted of;
- Training should be provided to staff regularly.

Does sexual harassment cover harassment because of pregnancy?

No. Under the general definition of harassment within Section 26 of the Equality Act 2010, A harasses B if A engages in unwanted conduct related to a relevant protected characteristic (rather than of a sexual nature) which has the purpose or effective of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The relevant protected characteristics are age, gender, race, sex, sexual orientation, gender reassignment, religion or belief and disability. For the purposes of harassment, pregnancy and maternity and marriage and civil partnership are not relevant protected characteristics. However, unwanted conduct related to pregnancy and maternity or marriage and civil partnership could amount to sex or sexual orientation harassment. Alternatively, such conduct could amount to pregnancy and maternity discrimination under Section 18 of the Equality Act 2010.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes, The Equality Act 2010 protects individuals from being harassed due to their sexual orientation and gender reassignment.

What is prohibited retaliation?

Prohibited retaliation is not a defined term in the Equality Act 2010. However, Employers should not take any action against an employee who raises a sexual harassment complaint. Their allegations should be taken seriously and dealt with quickly.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

An employee may succeed in a claim for sexual harassment when a consensual relationship ends, and the other party's conduct becomes unwanted. For example, in *A v Chief Constable of West Midlands*

Police UKEAT/0313/14 the EAT upheld a tribunal's decision that an employee had been sexually harassed for two days after an 18-month relationship with her work colleague ended.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

The legal position in the UK in relation to harassment by third parties (such as customers or contractors) is complex, as the original provisions relating to third-party harassment as set out in S40 of the Equality Act 2010 were repealed on 1st October 2013. Where an employer fails to act on any complaint of third-party harassment, an employee could argue that this amounts to an unlawful act under s13(1) of the 2010 Act, as the employer's inaction is unwanted conduct which has created an intimidating environment for them. If this argument is unsuccessful in establishing an employer's liability for third party harassment, an employee could claim constructive dismissal on the basis that the failure by their employer to deal with legitimate concerns regarding third party harassment amounts to a fundamental breach of the implied term of trust and confidence between employer and employee found within the employment contract.

What is the #MeToo movement?

On 5th October 2017, the New York Times published an article in which substantial allegations of sexual harassment were made against Hollywood producer, Harvey Weinstein. In response to this revelation, actress, Alyssa Milano, suggested that all women who had been sexually assaulted or harassed post #MeToo as a social media status as it would give the world 'a sense of the magnitude of the problem'. The hashtag spread virally and was used 850,000 in the first 48 hours and by November 2017 had been tweeted 2.3 million times in 85 different countries. The aim of the campaign was to raise aware of sexual harassment both within and outwith the workplace and to address power imbalances.

How is the #MeToo movement impacting the law in your jurisdiction?

On 27th March 2018 the EHRC published a report entitled 'Turning the Tables: Ending Sexual Harassment at Work.' The report makes recommendations to the UK government for legislation to be improved as the current statutory framework does not provide enough protection for victims of harassment.

These recommendations include, but are not limited to, the following:

- A mandatory duty on employers to take reasonable steps to protect workers from harassment in the workplace. A breach of this mandatory duty would constitute an unlawful act for the purposes of the Equality Act, enabling the EHRC to take enforcement action against employers which breach the duty.
- A new statutory code of practice on sexual harassment in the workplace which specifies the steps employers should take to prevent and respond to allegations of sexual harassment.
- Employment tribunals should be given power to apply an uplift of up to 25% to compensation in a successful claim for harassment where there has been a breach of mandatory elements of the code.

- ACAS should develop specific sexual harassment training for managers, workers and sexual harassment 'champions'.
- The Government should develop an online tool which facilitates the reporting of sexual harassment.
- The limitation period for bringing a claim to the tribunal for harassment should be increased from 3 months to 6 months.
- Employers should be required to publish their anti-harassment policy on their external website.

It is not yet clear which of these recommendations the UK government will take forward.

For more information, contact Marie Macdonald (mem@mshblegal.com) and Laura MacSporran (lms@mshlegal.com) at ILN member, Miller Samuel Hill Brown.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT SLOVAKIAN COMPANIES NEED TO KNOW

2019 Update: In 2018, PETERKA & PARTNERS drafted the following chapter on what Slovakian companies need to know about sexual harassment in the workplace. In 2019, the ILN asked firms to consider the response following #MeToo in various jurisdictions. For Slovakia, the update is the following:

Slovakia adopted its Antidiscrimination Act back in 2004 and from 2009, the act also clearly defines between harassment, sexual harassment, victimisation and other forms of discrimination and provides legal remedies in such cases. Slovak law also prohibits discrimination in other specific laws (Labour Code, Act on State Services, etc.).

Therefore, currently the Slovak government is not under pressure for a change in legislation.

On the other hand, #MeToo movement has frequently been mentioned in official and social media in the last year.

We include the 2018 chapter in its entirety for reference.

What constitutes sexual harassment?

According to the Slovak law, sexual harassment can be considered as a subtype of harassment as a general term. Both harassment and sexual harassment are considered as discriminatory action and thus constitute the breach of principle of equal treatment.

Slovak Act No. 365/2004 Coll., on Equal Treatment in Certain Areas and on Protection Against Discrimination (the Anti-Discrimination Act) defines sexual harassment as any verbal, non-verbal or physical conduct of sexual nature, the purpose or effect of which is or could be violating the dignity of a person and of creating a hostile, degrading or offensive environment.

What body of law governs sexual harassment in your jurisdiction?

In general, the sexual harassment is considered as the subject of Slovak civil law.

The general legal framework is governed by the Anti-Discrimination Act. Issues related to labour law and employment are further regulated by Act No. 311/2001 Coll., the Labour Code and Act. 5/2004 Coll., on Employment Services.

What actions constitute sexual harassment?

In accordance with the Anti-Discrimination Act sexual harassment can take any forms, including any verbal, non-verbal or physical conduct of sexual nature:

- of which purpose is or could be the violation of the dignity of a person and of creation of a hostile, degrading or offensive environment,

- of which effect is or could be the violation of the dignity of a person and of creation of a hostile, degrading or offensive environment.

Examples of such conduct could include:

- Repeated long-term aggressive, sexually themed remarks that are obviously unwanted by one person;
- Various non-verbal acts (such as pictures of nude women on walls in a predominantly male environment which may create a threatening atmosphere to colleagues in the same workplace);
- Repeated sending of jokes and images with a sexual subtext over the internet against the addressee's will;
- Unpleasant verbal sexual expression, offers, allusions;
- Physical contact (excessive hair stroking, attacks, etc.);
- Enforcing sexual contact, sexual extortion, in extreme cases even rape.

Can sexual harassment occur between two members of the same sex?

Yes.

Are employers required to provide sexual harassment training for their employees?

No, there is no specific obligation to provide sexual harassment training for employees. Pursuant to the Slovak Labour Code, employers are just obliged to inform newly hired employees about the general provisions of principle of equal treatment.

Each employer is obliged to ensure equal treatment at the workplace (which includes protection before sexual harassment). However, there is no obligation or general rule on how to proceed in this area.

What are the liabilities and damages for sexual harassment and where do they fall?

Under the Slovak Labour Code, employers are obliged to ensure the observance of the principle of equal treatment and non-discrimination. If the employer fails to ensure such conditions, it may be fined by Slovak Labour Inspectorate up to EUR 100,000.

Also, the person affected by sexual harassment has the right to claim before the courts that the discrimination (sexual harassment) be stopped, that the consequences of the discriminatory act be remedied and that he/she be provided with adequate satisfaction. In case such satisfaction is not sufficient, the victim also has the right to monetary compensation for non-pecuniary damage.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe that he/she has been sexually harassed must show that he or she was subject to unwelcome sexual harassment. If the court deduces the discriminatory behaviour of the defendant, the court will transfer the burden of proof to the defendant.

This means that the defendant (employer) will be required to prove that there has been no discriminatory conduct (sexual harassment) on its part.

If the sexual harassment has a more serious form, it can be considered a criminal offence committed by the harassing person and shall be investigated by the police.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Slovak labour law does not expressly distinguish between sexual harassment from a supervisor or a co-worker.

What are the potential defences employers have against sexual harassment claims?

As discussed, the employers have the obligation to ensure protection against sexual harassment. Thus, if the employer proves that it took all the measures necessary to avoid sexual harassment, it could potentially be freed from sexual harassment claim or its responsibility could be at least limited.

Who qualifies as a supervisor?

The Slovak Labour Code defines a supervisor (or managing employees) as those employees who are authorized, at the individual management levels, to determine and impose working tasks on subordinate employees, organize, direct and control their work and give them binding instructions to this end.

As discussed, Slovak labour law does not expressly distinguish between sexual harassment from a supervisor or a co-worker.

How can employers protect themselves from sexual harassment claims?

An employer needs to have internal measures to avoid sexual harassment and should inform its employees about such measures and ensure they are followed.

Does sexual harassment cover harassment because of pregnancy?

Harassment because of pregnancy is not specifically considered as sexual harassment, but can still be considered as discriminatory under Slovak Anti-Discrimination Act, e.g. as harassment (general), direct discrimination, etc.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes, both Slovak Anti-Discrimination Act and Labour Code specifically mention the protection based on sexual orientation.

What is prohibited retaliation?

Anti-Discrimination Act does not allow any any action or omission which has adverse consequences for a person and is directly connected with:

- seeking legal protection against discrimination for oneself or on behalf of another person, or
- testimony, providing an explanation or relates to other involvement of a person in a matter concerning the violation of the principle of equal treatment or,

- complaint/report of the breach of principle of equal treatment.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

A consensual relationship between a supervisor and subordinate is not prohibited by Slovak law.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

In general, no. However, the employer is always obliged to ensure measures to avoid sexual harassment. Thus, we cannot exclude that an employer would be held liable or co-liable for actions of third parties who are in business contact with its employees if it has not taken necessary and reasonable measures to avoid sexual harassment.

To date, we are not aware about such case law in Slovakia.

What is the #MeToo movement?

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms.

How is the #MeToo movement impacting the law in your jurisdiction?

We are not aware about any direct legal impact of the #MeToo movement on Slovak law. However, we cannot exclude any future impact following to the spread and development of the #MeToo movement.

For more information, contact Jan Makara (makara@peterkapartners.sk) and Pavol Kundrik (kundrik@peterkapartners.sk) at ILN member, PETERKA & PARTNERS.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT THAI COMPANIES NEED TO KNOW

What constitutes sexual harassment?

There are two categories of sexual harassment as specified by the Department of Women's Affairs and Family Development together with Mahidol University, as follows:

1. Quid quo pro; and
2. Hostile work environment

Quid pro quo is one of the most obvious forms of sexual assault by using an exchange of benefits or use of authority to punish the victim in order to get sexual pleasure, such as incest, body contact or any other sexual activities. It is the act by the authority against the lower employee. Even if the victim agrees, it is still considered sexual harassment.

Hostile work environment occurs by creating sexual nuisance in the workplace or creating an antagonistic and undesirable atmosphere. For instance, use of verbal languages such as face and body criticisms, jokes, pornography including sexual orientation, licking, kissing, whistling, holding hands or displaying a pornographic picture/message.

What body of law governs sexual harassment in your jurisdiction?

In Thailand, the laws which govern sexual harassment are as follows:

- Labor Protection Act B.E. 2541 – Section 16 and 147
    - Section 16 An employer, a person in charge, a supervisor, or a work inspector is forbidden from committing sexual abuse, harassment, or nuisance against an employee.
    - Section 147 Any person who violates Section 16 shall be punished with a fine not exceeding twenty thousand baht.
- Supreme Court Judgment No. 1372/2545: The Plaintiff had the authorization to determine the probation of employment. The Plaintiff persuaded a woman employee who worked under him to enjoy nightlife with him. If such employee did not go, he would reject their passing probation. The Plaintiff intended to commit sexual abuse against such employee under section 16 of the Labor Protection Act. It is a serious charge. The Defendant can terminate the employment of the Plaintiff without paying severance pay to the Plaintiff under section 119(4) of the Labor Protection Act B.E. 2541.
- The Criminal Code – Section 276 to 287/2 regarding sex offense and Section 397

- Section 397: Whoever, to do any act to other person, to annoy, bully, menace, or by any means whatever to be shameful or nuisance, shall be punished with a fine not exceeding five thousand baht.

  If the offence under the first paragraph is committed in public or through any act of sexual deception, it shall be punished with imprisonment not exceeding one month or a fine not exceeding ten thousand baht or both.

- Related law
  - Civil Service Act B.E. 2551 – This Act is applied to government officials.
  - Section 83(8) A civil servant is forbidden from committing sexual abuse or sexual harassment as specified in the Office of the Civil Service Commission rules.
- The Announcement of Labor Relations Commission Re: Minimum standards of employment conditions in state enterprises.
  - Article 10 An employer, a person in charge, a supervisor, or a work inspector is forbidden from committing sexual abuse, harassment, or nuisance against an employee.

What actions constitute sexual harassment?

According to the Office of the National Economic and Social Development Board, the actions that constitute sexual harassment are as follows:

1. Eye harassment
   a. Stare at the body by sexual means, look under the skirt, stare at the breast, or make the victim feel embarrassed or uncomfortable or the surrounding people feel the same way.
2. Verbal harassment
   a. Criticize shape and body sexually
   b. Force the victim to the private place without her consent and talk/joke about sex
   c. Flirt the victim and talk about porn
3. Physical harassment
   a. Touch the body of the victim, pull her to sit on the lap, kiss and hug the victim without consent, lip licking
4. Other harassment
   a. Display sexual images, objects, and messages including open pornographic images in the workplace, text sex messages, sex images, sex symbols via Line and Facebook
5. Quid pro quo

a. Promise to provide benefits for sex in return such as job title, scholarship, increase of salary, renew a contract by asking for a relationship or asking to do something else sexually

Can sexual harassment occur between two members of the same sex?

Under the Labor Protection Act B.E. 2541, sexual harassment cannot occur between two members of the same sex. The victims who are protected by the Labor Protection Act B.E. 2541 are only the persons as follows:

1. All women employees; and
2. Young employees (female employees or male employees who are at the age between 15 and not exceeding 18)

In contrast, the law regarding sex offenses (section 276 to 287/2) under the Criminal Code in the division of sex offense, sexual harassment can occur between two members of the same sex. Thus, male employees are also protected under criminal law.

Are employers required to provide sexual harassment training for their employees?

The requirement to provide sexual harassment training is not specified under the law**.** However, some authorities have provided online sexual harassment training such as the Office of the Civil Service Commission **(**OCSC**).**

What are the liabilities and damages for sexual harassment and where do they fall?

The liabilities and damages for sexual harassment are in Section 147 of the Labor Protection Act B.E. 2541 which states that any person who violates Section 16 shall be punished with the fine not exceeding twenty thousand baht. Such liabilities and damages fall upon the perpetrators of sexual harassment that are employers or persons in charge or supervisors or work inspectors.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Under the Labor Protection Act B.E. 2541, the female employees have to prove for a successful claim as follows:

1. The perpetrator of sexual harassment is either an employer or a person in charge or a supervisor or a work inspector of her; and
2. Such perpetrator has committed sexual abuse or sexual harassment, or nuisance against her.

According to the Royal Institute Dictionary of Thailand,

- "**Abuse**" means excessive acts to others by molesting which violates custom or ethics.
- "**Harassment**" means showing power by using actions or words in order to frighten the victim.
- "**Nuisance**" means boredom, causing trouble.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Under Labor Protection Act B.E. 2541, it is different. A co-worker who is the perpetrator of the sexual harassment will not be punished by law and he commits no fault under section 16 of Labor Protection Act B.E. 2541. The intention of the law is to punish only the employer, the person in charge, the supervisor and the work inspector who are the perpetrators of the sexual harassment.

Nevertheless, under the Criminal Code, both a supervisor and a co-worker who are the perpetrators of the sexual harassment will be punished.

What are the potential defenses employers have against sexual harassment claims?

The employers may defend that their actions are not recognized as sexual abuse, harassment, or nuisance against employees in accordance with the definitions of “abuse,” “harassment,” “nuisance” specified in the response above, or claim that the female employees mutually agreed to engage in sexual activities with them. Besides, the employer may request the evidence and witness of claiming sexual harassment from the employee.

Who qualifies as a supervisor?

Under the Labor Protection Act B.E. 2541, there are four categories of the perpetrator of sexual harassment as follows:

1. “**Employers**” means all persons who are "employers" as defined in Section 5[28] of the Labor Protection Act which are Employer, a representative of the employer, an authorized employer and an entrepreneur employer under Section 11/1[29];
2. “**Person in charge**” means a chief of all levels including a person in charge;
3. “**Supervisor**” means those who have control over the work done by the employee whether regular or temporary, and no matter what level; and
4. “**Work inspector**” means a person responsible for inspecting the work performed by the employee whether regular or temporary, and no matter what level.

[28] "Employer" means a person who agrees to employ the employee to work and pay wages therefor and shall also include: (1) A person designated to do work for the employer; (2) Where the employer is a juristic entity, the term shall include a person authorised to act on behalf of that juristic entity, and a person designated to act on behalf of the person who is authorised to act on behalf of that juristic entity.

[29] Section 11/1 Where an entrepreneur has authorised an individual to recruit workers, which is not a business of job placement service, and such work is a part of manufacturing process or business operation under the entrepreneur's responsibility, and regardless of whether such individual is the supervisor or takes the responsibility for paying wages to those who perform work, the entrepreneur shall be deemed an employer of such workers. The entrepreneur shall provide labour-contracting employees, who perform the same nature of work as employees under the employment contract, with fair benefits and welfare without discrimination.

How can employers protect themselves from sexual harassment claims?

Employers can protect themselves by only being involved with the female employees during working hours, keeping some space between the employer and female employees, and not becoming involved with their private matters.

Does sexual harassment cover harassment because of pregnancy?

Nothing is directly specified about harassment because of pregnancy**.** However, all female employees are protected from sexual harassment in accordance with section 16 of Labor Protection Act B.E. 2541. Thus, a pregnant woman is also protected from sexual harassment.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Under Labor Protection Act B.E. 2541, sexual harassment does not protect gay, lesbian, bi-sexual, and transgender persons as described in the answer about same sex harassment. However, under Criminal Code, it does. Under Section 276 to 287/2 and Section 397 of the Criminal Code, it used the word "whoever" which intends to protect all genders regarding illegal sexual action.

What is prohibited retaliation?

Female employees shall file a complaint to Department of Women's Affairs and Family Development to begin an action, such as disciplinary punishment, to the employer who is the perpetrator of the sexual harassment. Moreover, the woman shall report to the police regarding the sexual behaviors of the employers or file a plaint to the Criminal Court.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

Yes, it is a type of quid pro quo which specified in the answer to the first question.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

No, it cannot. The employer is only liable for the action of himself.

What is the #MeToo movement?

The #MeToo movement is an international movement against sexual harassment and assault, which is meant from the phrase "you are not alone" by using the word "MeToo" after a hashtag (#) and posted widely on social networks such as Facebook, Twitter, or Instagram. The purpose of the movement is to help demonstrate the widespread prevalence of sexual harassment and assault, particularly in the workplace. The campaign of #MeToo has being used widespread on social media, including many sites, and the phrase was popularized by Alyssa Milano who encouraged women to tweet about it, especially women who were victims of sexual harassment. As result of the campaign, it was reported by *The New York Time*s, that Harvey Weinstein, who is an American Hollywood producer, was accused by a dozen of women about sexual misconduct. Thus, the #MeToo movement is now the widespread campaign to use as tool against sexual harassment.

How is the #MeToo movement impacting the law in your jurisdiction?

In Thailand, the #MeToo movement or other campaigns on sexual harassment are not impacted by the law directly because the provisions regarding sexual harassment in the workplace have been already prescribed in the Labor Protection Act B.E. 2541, including other applicable laws such as the Criminal Code, etc. However, the #MeToo movement is widespread on the many social media areas around the world, including Thailand. There are some groups of Thai people who support this campaign by posting the status followed by the "#MeToo" through the social media, not only to stop the sexual harassment and assaults in Thailand, but also to stop sexual harassment and assaults around the world.

For more information, contact Punjaporn Kosolkitiwong at ILN member, Dej-Udom & Associates (punjaporn@dejudom.com).

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: DELAWARE COMPANIES NEED TO KNOW

Delaware has responded to the #MeToo movement through legislation. Sexual harassment has long been a legally cognizable form of sex discrimination under the Delaware Discrimination in Employment Act. However, as of January 1, 2019, sexual harassment is separate from discrimination – including sex discrimination. Both men and women are protected by Delaware's sexual harassment law.

NEW NOTICE IS REQUIRED

Under this new law, for every employee hired after January 1, 2019, employers must distribute, physically or electronically, a copy of a sexual harassment information sheet created by the Delaware Department of Labor ("DDOL"). The State-specific posters that often are published and sold by vendors likely do not have the DDOL's information sheet included. Even if they do, it is likely insufficient merely to post the information sheet as often is sufficient for other employment laws.

For any employee of an employer who was employed on or before January 1, 2019, the employer has until July 1, 2019, to distribute the information sheet.

NEW TRAINING IS REQUIRED

For those who have fifty or more employees, new training requirements must be met. In counting the employees for purposes of the training requirement, employers do not count applicants or independent contractors. Nor must employers provide the required training to applicants, independent contractors, or employees employed less than six months continuously. Moreover, employment agencies are the only employers required to count and provide training to employees placed by employment agency.

Employers must take care in determining who is an "independent contractor." The often flexible and fact intensive standards for determining employment status for other purposes do not apply to Delaware's new sexual harassment law, which defines "independent contractor" as an individual who fulfills each of three requirements:

- performs the work free from the employer's control and direction over the performance of the employee's services;
- is customarily engaged in an independently established trade, occupation, profession or business; and
- performs work which is outside of the usual course of business of the employer for whom the work is performed. Thus, it is likely that some who are properly classified as independent contractors for other purposes must be counted as "employees" for purposes of calculating the fifty-employee threshold.

When training is required, an employer must provide training that is interactive. The term "interactive" is not defined. Such employers must also provide its employees with education regarding the prevention of sexual harassment. For employees hired after January 1, 2019, the training must be provided within 1 year of the commencement of employment and thereafter every 2 years. For employees employed on or before January 1, 2019, the training must be provided by January 1, 2020, and thereafter every 2 years. The training must include:

- the illegality of sexual harassment;
- the definition of sexual harassment using examples;
- the legal remedies and complaint process available to the employee;
- directions on how to contact the DDOL; and
- the legal prohibition against retaliation.

When training is required, an employer must provide additional training for supervisors, which means an individual that is empowered by the employer to take an action to change the employment status of an employee or who directs an employee's daily work activities. For those who are "new supervisors" after January 1, 2019, the training must be provided within 1 year of the commencement of employment as a supervisor, and thereafter every 2 years. For those who are supervisors on or before January 1, 2019, the training must be provided by January 1, 2020, and thereafter every 2 years. The supervisor training should include the same things required of non-supervisors plus "the specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment." The new law does not detail what is meant by "the specific responsibilities."

For employers who provided training to employees or supervisors prior to January 1, 2019, that would satisfy the requirements under the new law, no additional training is required until January 1, 2020 – though presumably that applies only to those employees or supervisors who received the training.

DEFINITION OF SEXUAL HARASSMENT AND EXAMPLES

As stated above, training must include "the definition of sexual harassment using examples." Delaware's new law describes sexual harassment as when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment;
- submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

Delaware's new sexual harassment law does not list any examples of sexual harassment outside what is stated as part of the meaning of sexual harassment. While not expressly required as part of the training, the DDOL information sheet lists the following as "some examples of sexual harassment":

- unwelcome or inappropriate touching;
- threatening or engaging in adverse action after someone refuses a sexual advance;
- making lewd or sexual comments about an individual's appearance, body, or style of dress;
- conditioning promotions or other opportunities on sexual favors;
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.;
- making sexist remarks or derogatory comments based on gender.

WHEN THE EMPLOYER IS RESPONSIBLE

Delaware's new law states that when sexual harassment exists, an employer is responsible when:

- a supervisor's sexual harassment results in a negative employment action of an employee;
- a negative employment action is taken against an employee in retaliation for the employee filing a discrimination charge, participating in an investigation of sexual harassment, or testifying in any proceeding or lawsuit about the sexual harassment of an employee; or
- the employer knew or should have known of the non-supervisory employee's sexual harassment of an employee and failed to take appropriate corrective measures.

For this final area of potential responsibility, it is an affirmative defense if the employer proves that: (a) the employer exercised reasonable care to prevent and correct any harassment promptly; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Compliance with the information sheet distribution requirement described above does not insulate the employer from liability for sexual harassment of any current or former employee or applicant. Nor is failure to distribute the information sheet in and of itself something that can result in liability of any employer to any present or former employee in any action alleging sexual harassment. However, it is expected to prove difficult for an employer to prevail on the affirmative defense if the employer does not distribute the information sheet as required.

WHO MUST COMPLY?

As has been the case since before this new law became effective, sexual harassment claims can exist under Delaware law even when as few as four employees are employed. The threshold under federal law is fifteen employees. Nonetheless, the number of "employees" must still be calculated when determining whether the law applies.

Delaware's new sexual harassment law provides new definitions of both "employer" and "employee," which apply only to the new sexual harassment provisions of Delaware law. Specifically, for purposes of sexual harassment but not for purposes of sex discrimination (or other forms of discrimination, including harassment), employees include:

- any individual employed in agriculture or in the domestic service of any person;

- any individual who, as a part of that individual's employment, resides in the personal residence of the employer; (3) any individual employed by said individual's parents, spouse or child; and
- any individual elected to public office in the State or political subdivision by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Because the term "employee" is broader for sexual harassment than for sex discrimination, the somewhat odd situation exists where an employer might prevail on a sex discrimination claim but not prevail on a claim for sexual harassment based only on the different meanings of the word "employee."

On the other hand, within the government/public employment context, the term "employer" arguably is narrower for sexual harassment than for sex discrimination. Specifically, the definition of "employer" in the new sexual harassment law incorporates the definition of "state agency" from another law, which is narrower than the broad categories included in the definition of "employer" for purposes of sex discrimination (and other forms of harassment). That means that some in government/public employment who had protection relating to sexual harassment before January 1, 2019, may not have protection now. Furthermore, some of the new provisions concerning sexual harassment – including those discussed below – may not apply to those who are government/public "employers" under the sex discrimination law. However, that nuance is unlikely to impact any employer outside the government/public employer context; and many believe that such application of the plain language of the law is an unintended consequence even for such employers.

ENFORCEMENT MECHANISM

The same enforcement provisions, powers of the DDOL, and administrative process applies to sexual harassment claims as that which applies to sex discrimination claims, as does the same right of private action, judicial remedies, and civil penalties. In general, like under federal law, exhaustion of administrative remedies is required culminating in receipt of a right to sue notice.

For more information, contact Timothy Holly at ILN member, Connolly Gallagher tholly@connollygallagher.com.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MASSACHUSETTS COMPANIES NEED TO KNOW

In 2017, following public allegations against notable figures such as Hollywood producer Harvey Weinstein, the #MeToo movement took on national prominence. A movement of empowerment, #MeToo aims to strengthen sexual harassment laws and policies by bringing acts of sexual harassment to light and holding perpetrators of sexual harassment accountable. Though the movement has held the spotlight for less than two years, it has influenced public perceptions of the prevalence and severity of sexual harassment in the workplace and elsewhere.

This article will examine the quantifiable impact of the #MeToo movement in the Commonwealth of Massachusetts, provide an overview of the Commonwealth's legal framework related to workplace sexual harassment, summarize the legislative response to the #MeToo movement, and conclude by contemplating the future of workplace sexual harassment law in Massachusetts.

Data Demonstrating the Impact of the #MeToo Movement in Massachusetts.

An increase in both the number of sexual harassment complaints filed with the Massachusetts Commission Against Discrimination and the amounts awarded by the Commission demonstrate the influence of the #MeToo movement in the Commonwealth. During the period from 2015 to 2017, reports show an average of 271 sexual harassment claims per year. In 2018, that number jumped to 320. In January and February of 2018, the Commission reported a 400% increase in sexual harassment complaints compared to those same months in 2017. These claims of sexual harassment were overwhelmingly attributed to employment situations.

In addition, Commission data shows an increase in the average emotional distress award from $38,000 in 2016 to $71,250 in 2018. At the same time, jury awards of punitive damages in sexual harassment cases have increased dramatically.

Current Workplace Sexual Harassment Law: An Overview

Massachusetts has an extensive legal framework for addressing sexual harassment in the workplace. While Massachusetts General Laws chapter 214, section 1(c) provides an affirmative right to freedom from sexual harassment, the Massachusetts Fair Employment Practices Act, Massachusetts General Laws chapter 151B, prohibits discrimination on the basis of sex, including sexual harassment, in workplaces with six or more employees. While Massachusetts law incorporates federal standards under Title VII, Massachusetts goes farther with its application to smaller employers, sexual harassment policy requirements, breadth of liability, and robust enforcement.

Under Massachusetts law, employers must adopt and distribute annually a written policy against sexual harassment and complaint procedure, which states, at a minimum, that sexual harassment in the workplace is unlawful and that retaliation against an employee for filing a complaint is prohibited. It is further recommended that each policy express the employer's commitment to adequate investigation

of sexual harassment claims. The Massachusetts Commission Against Discrimination has published a model policy including additional elements such as: (i) a definition and examples of sexual harassment; (ii) a statement of the potential consequences for committing sexual harassment; and (iii) information about the state and federal agencies in which sexual harassment claims may be filed.

Under Chapter 151B, employers are vicariously liable for the sexual harassment of employees by managers and supervisors. Massachusetts courts have consistently found employers strictly liable for sexual harassment committed by their agents against employees. Employers may also be held liable for sexual harassment committed by co-workers, and even non-employees, if the employer knew or should have known about the harassment and failed to take remedial action.

Chapter 151B also provides for individual liability of supervisors, co-workers, and non-employees for engaging in sexually harassing conduct, for aiding and abetting sexual harassment and for retaliation against a complainant or other employee for participating in protected activity under the statute.

Regardless of whether an employee brings an internal complaint with their employer, they must file a claim under Chapter 151B with the Massachusetts Commission Against Discrimination before filing a lawsuit in state or federal court. Massachusetts employs a 300-day statutory period from the date of a sexual harassment incident to file a complaint, subject to expansion under the continuing violations doctrine in certain cases.

Upon a finding of probable cause by the Commission, a case may proceed to an administrative hearing. The Commission is authorized to award compensatory damages, including backpay and emotional distress damages, and mandatory attorney's fees and costs. The Commission is also empowered by statute to assess civil penalties and order reinstatement in instances of unlawful termination.

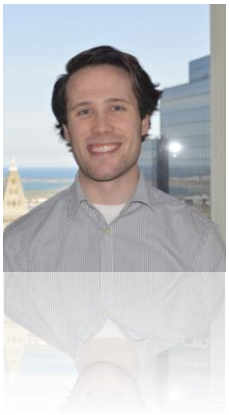
Alternatively, once a case has been pending in the Commission for at least ninety days, a claimant may withdraw their case from the Commission and pursue litigation in state or federal court subject to a three-year statute of limitations. In a sexual harassment lawsuit under Chapter 151B, the complainant may seek compensatory damages, punitive damages, and equitable relief. If the court finds in favor of the complainant, it must award reasonable attorneys' fees and costs.

The Legislative Response

Over the past few years, the legislature has proposed a number of bills on topics related to the #MeToo movement. This article will focus on the most notable examples.

In 2018, to augment the resources of the Massachusetts Commission Against Discrimination, the Senate and House considered granting the Massachusetts Attorney General pre-litigation investigative powers for sexual harassment cases similar to those the Attorney General wields in the consumer protection arena. The Senate halted the bill's progress with a study order, but both chambers have re-filed this proposed legislation.

2019 has seen a greater number of proposed bills in the sexual harassment area, both continuing prior legislative efforts and establishing new legislative priorities that would significantly impact the law relating to workplace sexual harassment.



One of the new bills requires employers to provide annual sexual harassment prevention training to their employees and to certify to the Attorney General that they have met training requirements. Each employee would receive their first training within 6 months of hire. Under the bill, training sessions must be at least two hours long and, among other things, must educate workers about employers' legal responsibilities and employees' rights of redress. A second new bill in 2019 would void sexual harassment-related non-disclosure provisions in employment contracts and settlement agreements. However, under this proposed legislation, provisions that shield the victim's identity may be included in settlement agreements at the victim's request.

What Can Massachusetts Expect in the Future?

The #MeToo movement has had a significant impact in the Commonwealth. The Massachusetts Commission Against Discrimination is seeing more sexual harassment complaints and issuing larger emotional distress damages awards, while the courts in Massachusetts are issuing higher punitive damage awards. Based on current trends, it appears that increases in complaints and award amounts will continue for the foreseeable future. At the same time, the legislature is working to impose new requirements on employers, increase protections, and expand the state's role in the investigative process. Given the multiple bills pending in this area, it is likely that Massachusetts will soon enact new legislation strengthening the current legal framework, in response to the #MeToo movement.

The growing number of complaints and larger awards, together with Chapter 151B's policy requirements, broad liability and a complainant-friendly framework provide motivation for Massachusetts employers to be vigilant about compliance. Massachusetts employers must take seriously their responsibilities to maintain and enforce anti-harassment policies, to investigate complaints, and to remedy sexual harassment when it occurs. As the effects of the #MeToo movement increase in scope and the legal framework develops further, the pressure on employers to commit resources to maintaining harassment-free workplaces will only grow.

For more information, contact Tamsin R. Kaplan (tkaplan@davismalm.com) and Taylor Lovejoy (tlovejoy@DavisMalm.com) at ILN member, Davis Malm & D'Agostine P.C.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MISSOURI COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

2019 Update

The #MeToo movement, which has grown international in scope, is a wide-ranging campaign to shed light on the occurrence of sexual assault and harassment, particularly in the workplace. The movement began in 2006, but it went viral in 2017 in response to a number of high-profile allegations of sexual assault and misconduct against a number of public figures, perhaps most notably filmmaker Harvey Weinstein. With a goal to challenge accepted norms, change the policies and laws surrounding sexual harassment, and bring the perpetrators of sexual harassment to account, the #MeToo movement has the potential to profoundly influence the practice of law in the years to come.

This article addresses three questions. First, how has the #MeToo movement affected the political landscape in Missouri, particularly regarding new legislation in the area of sex discrimination and harassment? Second, how have courts handled claims of discrimination and harassment in light of #MeToo? Third, what is the future of Missouri labor and employment law in the #MeToo era?

In short, Missouri has seen some changes in light of the #MeToo movement, but not much in the way of concrete legislation or radical new approaches to claims of sex discrimination or harassment. It remains to be seen if and how the #MeToo movement will create long-lasting changes in Missouri employment law.

What has the Missouri legislature done in the wake of #MeToo?

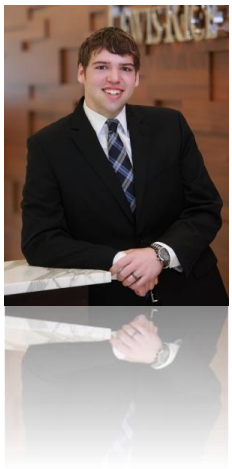
The only legislative action Missouri has seen related to the #MeToo movement concerns the use of mandatory arbitration clauses in employment contracts. As part of a larger push across the country, Missouri's legislature considered a bill in 2018 that would have strengthened the enforceability of clauses requiring any issues related to the employment relationship be resolved in arbitration proceedings. The problem with such clauses, according to the #MeToo movement, is that claims of sexual misconduct remain secret, allowing the perpetrators to continue in their positions, and possibly continue their misconduct, while the victims are kept silent. In the face of criticism from the #MeToo movement, and from politicians from both sides of the aisle, the bill died on the floor.

Similar bills have been proposed again in 2019 in both houses of the Missouri legislature. Significantly, the proposed bills contain new language that would specifically render any confidentiality or non-disclosure provisions unenforceable in cases alleging sexual harassment, sexual assault, or discrimination or harassment based on any protected status under state or federal law. Both bills remaining pending before the Missouri legislature. The bills differ from proposed legislation at the federal level, where Senators Lindsey Graham, R-South Carolina, and Kirsten Gillibrand, D-New York, have sought to prohibit

outright the use of arbitration proceedings, rather than the courts, in any claims of sexual harassment or discrimination.

Other measures introduced in the most recent term of the legislature would change how Missouri colleges handle complaints of sex discrimination under Title IX. The proposed legislation would add additional procedures to protect the rights of the accused in these proceedings. Among the changes include the use of administrative law judges to hear appeals of Title IX proceedings, the right for accused students to see evidence against them, the right to cross-examine the accuser, and the ability for the accused to sue the school (if the administrative court determines that the school failed to provide due process) or the accuser (if the administrative court determines that the accusation was false). Victims' rights advocates have criticized the legislation as re-victimizing women and creating a deterrent to the reporting of sexual assaults. The bill sponsors defend the changes as necessary to ensure the due process rights of all parties in Title IX proceedings. The legislation is currently under debate in both the House and the Senate.

How are Missouri courts handling claims of sex discrimination and harassment in the #MeToo era?



Missouri courts have increasingly been receptive to the use of "me too" evidence – testimony from employees other than the plaintiff who allege they too were subject to the same type of discrimination as the plaintiff – in cases filed under the Missouri Human Rights Act. In the leading Missouri case on "me too" evidence, the Missouri Supreme Court held that, if a plaintiff can show certain facts that suggest that he or she and the "me too" non-party employee are similarly situated, "me too" evidence should be admitted as circumstantial evidence that can support an inference of discrimination in the context of single-act employment discrimination claims. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 117-20 (Mo. banc 2015). Missouri courts still must perform their gatekeeping function to ensure only "relevant" evidence is put before the jury. *Compare Hesse v. Mo. Dep't of Corr.*, 530 S.W.3d 1, 5 (Mo. Ct. App. 2017) (upholding admission of "me too" testimony of co-worker with common experiences as plaintiff) *with Reed v. Kansas City Mo. Sch. Dist.*, 504 S.W.3d 235, 244-45 (Mo. Ct. App. 2016) (upholding exclusion of "me too" testimony when similarities are too few to make the testimony legally relevant). The analysis is fact-intensive and decided on a case-by-case basis.

Regarding broader claims of sex discrimination and harassment, the Missouri Supreme Court recently handed down a decision regarding claims of "sex" discrimination alleged by homosexual employees. Under Missouri law, sexual orientation is not an enumerated protected class. But in *Lampley v. Missouri Commission on Human Rights*, the Court adopted the rationale of *PriceWaterhouse v. Hopkins*, the 1989 U.S. Supreme Court opinion holding that evidence of sex stereotyping could support a claim of sex discrimination under federal law. In *Lampley*, the Court reasoned that the homosexual employee's sex discrimination claim could proceed, supported by evidence of sex stereotyping. By implication, the *Lampley* decision also offers heterosexual employees the ability to support their claims of sex discrimination through evidence of sex stereotyping.

A case currently pending before the Missouri Supreme Court – *Halsey v. Phillips* – asks the question whether the #MeToo movement is grounds to extend the statute of limitations for a woman's claim of sexual harassment by her supervisor. The woman filed her lawsuit in 2018 over claims of harassment that took place in 2013, outside of the applicable two-year statute of limitations. Seeking to evade the limitations period, the woman has argued to the courts that she did not appreciate the impact of her supervisor's sexual misconduct until 2017 when the #MeToo movement gained prominence. The trial court accepted her arguments and allowed her claims to proceed. The Missouri Supreme Court has taken up the appeal of that decision and heard oral arguments on February 5, 2019.

What does the future hold in Missouri?

It is difficult to predict what further impact the #MeToo movement will have in Missouri. We have seen an uptick in requests for sexual harassment training and general awareness of the complex issues related to sex discrimination and harassment. It is not clear yet whether the #MeToo movement has resulted, or will result, in an increased number of sexual harassment claims. But a rise in such claims is a distinct possibility employers should consider and preemptively address. Another consideration for employers and attorneys in the labor and employment field is that, with the increased visibility of sexual misconduct in the workplace, juries may now be more inclined to believe claims of sex discrimination and harassment.

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2018 Edition: Sexual Harassment in the Workplace: What US: Missouri Companies Need to Know

What constitutes sexual harassment?

In general, Missouri discrimination law now closely resembles Title VII jurisprudence. "There are two types of discriminatory harassment claims: *quid pro quo* and hostile work environment. The former involves the creation of a hostile work environment with threats to alter a term or condition of employment that is carried out. The latter involves the creation of a hostile work environment with threats that are not carried out, or with other severe or pervasive offensive conduct." *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731-32 (Mo. App. W.D. 2014).

What body of law governs sexual harassment in your jurisdiction?

The Missouri Human Rights Act ("MHRA"), §§ 213.010 through 213.137, R.S.Mo., prohibits employers with 6 or more employees in Missouri from discriminating on the basis of sex. Sexual harassment is considered to be sex-based discrimination under the MHRA. *See, e.g.*, *Fuchs v. Dep't of Revenue*, 447 S.W.3d 727, 731 (Mo. App. W.D. 2014).

What actions constitute sexual harassment?

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when-

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
- Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

8 C.S.R. § 60-3.040(17)(A).

> "Sexual harassment is defined as any behavior of a sexual nature that is unwelcome and creates a hostile, offensive or intimidating work environment. It includes verbal comments as well as physical touching, as well as 'dirty' pictures or lewd jokes. Situations are analyzed on a case-by-case basis. Another kind of sexual harassment is when a supervisor tries to extort sexual favors for subordinates by threatening adverse actions or promising rewards."

(https://molabor.uservoice.com/knowledgebase/articles/283102-what-is-the-legal-definition-of-sexual-harassment).

Can sexual harassment occur between two members of the same sex?

"The Missouri Human Rights Act, like Title VII, prohibits sexual harassment regardless of the sex of the claimant or the harasser. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that sex discrimination consisting of same-sex harassment is actionable under Title VII). In other words, the human rights act protects individuals against sexual harassment, a form of sex discrimination, by members of either the same sex or the opposite sex." *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009).

Are employers required to provide sexual harassment training for their employees?

Missouri law does not require employers to provide sexual harassment training for their employees. However, it is common and normally recommended that employers provide such training with the aim toward reducing the incidence of sexual harassment. Further, a court, jury, or administrative agency may look more favorably on a defendant-employer who conducts sexual harassment training for employees.

What are the liabilities and damages for sexual harassment and where do they fall?

Under Missouri law, among the damages an employee can seek for sexual harassment are back pay, front pay, compensatory and punitive damages, and attorney's fees. As recently amended by Senate Bill No. 43 ("SB 43"), effective as of August 2017, the MHRA limits compensatory and punitive damages in the following way:

> For employers with 6-100 employees, the limit is $50,000.
>
> For employers with 101-200 employees, the limit is $100,000.
>
> For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $500,000.

§ 213.111.4, R.S.Mo.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

A plaintiff must prove that:

- He was part of a protected class.
- He was subjected to unwelcome harassment.
- His gender was a motivating factor in the harassment (§§ 213.010(2) and 213.101.4, R.S.Mo.).
- The harassment affected a term, condition, or privilege of his employment.
- The employer, if the harassers are the plaintiff's co-workers:
    - knew or should have known about the harassment; and
    - did not take prompt and effective remedial action.

Hill v. Ford Motor Co., 277 S.W.3d 659, 666 & n.6 (Mo. banc 2009).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

Yes. "An employer is subject to vicarious liability to a victimized employee with respect to sexual harassment by a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command." 8 C.S.R. § 60-3.040(17)(D). "If the alleged harassers are co-workers, the plaintiff must also show that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action." *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 n.6 (Mo. banc 2009).

What are the potential defenses employers have against sexual harassment claims?

An employer may raise an affirmative defense to liability or damages if "no tangible employment action" is taken by a harassing supervisor. 8 C.S.R. § 60-3.040(17)(D)(1)-(2). A tangible employment action is a significant change in employment status, including: hiring and firing, promotion and failure to promote, demotion, making an undesirable reassignment, making a decision that causes significant changes in benefits, compensation decisions, or work assignments. 8 C.S.R. § 60-3.040(17)(D)(3)-(4).

To establish an affirmative defense, an employer must prove by a preponderance of the evidence that:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The employee unreasonably failed to take advantage of any of the employer's preventive or corrective opportunities or to avoid harm.

Reed v. McDonald's Corp., 363 S.W.3d 134, 142 (Mo. App. E.D. 2012); 8 CSR § 60-3.040(17)(D)(1).

Who qualifies as a supervisor?

An employer is subject to liability with respect to a supervisor with immediate (or successively higher) authority over an employee or other supervisor who the employee reasonably believes has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command. 8 C.S.R. § 60-3.040(17)(D). (Note: Following the recent amendments to the MHRA, there is no longer individual liability for supervisors as the definition of employer now expressly excludes an individual employed by an employer. § 213.010(8), R.S.Mo.).

How can employers protect themselves from sexual harassment claims?

Employers should develop and institute clear, straightforward complaint procedures for employees who believe they are being subjected to, or witness, sexual harassment. Further, employers should present sexual harassment policies in a company handbook or otherwise provide each employee a copy of the employer's sexual harassment policy to make sure employees know how to raise complaints if they wish to do so. Finally, employers should conduct sexual harassment trainings for employees, including supervisory employees.

Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment based on a gender-related trait, such as pregnancy, is unlawful under the MHRA. *See, e.g.*, *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984).

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Under Missouri law, discrimination or harassment on the basis of sexual orientation is not prohibited. *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 485 (Mo. App. W.D. 2015). A case is currently on appeal to the Missouri Supreme Court addressing situations when the MHRA might prohibit discrimination based on sexual orientation. *See Lampley v. Mo. Comm'n on Human Rights*, 2017 WL 4779447 (Mo. App. W.D. Oct. 24, 2017), *reh'g and/or transfer denied* (Nov. 16, 2017), *cause ordered transferred to mo. s. ct.* (Jan. 23, 2018).

What is prohibited retaliation?

The MHRA prohibits retaliation (generally defined as taking an adverse employment action against an employee) or discrimination against any individual who:

- Opposed a practice prohibited by the MHRA.
- Filed a complaint.
- Testified, assisted, or participated in an investigation, proceeding, or hearing conducted under the MHRA.

§ 213.070.1(2), R.S.Mo.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

No. By itself, a consensual relationship between a supervisor and a subordinate is not unlawful. That being said, such a relationship can lead to problematic situations, and a post hoc attempt could be made to use such a relationship as evidence of quid pro quo sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. An employer can be liable for the actions of third parties if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. *See Diaz v. Autozoners, LLC*, 484 S.W.3d 64, 76-77 (Mo. App. W.D. 2015); 8 C.S.R. 60-3.040(17)(C).

What is the #MeToo movement?

The #MeToo movement, which has grown international in scope, is a wide-ranging campaign to shed light on the prevalence of sexual assault and harassment, especially in the workplace. The movement became widely known in 2017 in response to a number of high-profile allegations of sexual assault and misconduct against a number of public figures, most notably the filmmaker Harvey Weinstein. The purpose of the hashtag is to empower women and focus attention on male supervisors who engage in sexual misconduct. The #MeToo movement seeks to challenge social norms and change policies and laws surrounding sexual harassment.

How is the #MeToo movement impacting the law in your jurisdiction?

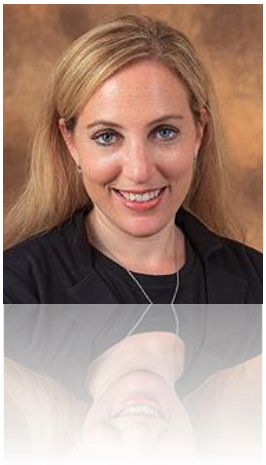
Missouri has seen a rise in cases wherein the court permits "me too" evidence – testimony from employees other than the plaintiff who allege that they too were subject to the same type of discrimination as the plaintiff – in cases filed under the MHRA. The Missouri Supreme Court has held that, if a plaintiff can show certain facts that suggest that he/she and the "me too" non-party employee are similarly situated, "me too" evidence should be admitted as circumstantial evidence that can support an inference of discrimination in the context of single-act employment discrimination claims. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 117-20 (Mo. banc 2015).

We have seen an uptick in requests for sexual harassment training and general awareness of the complex issues related to sexual discrimination and harassment. It is not clear yet whether the #MeToo movement will result in an increased number of sexual harassment claims, but a rise in such claims is a distinct possibility employers should consider and preemptively address. An apparent consequence of the #MeToo movement and the many stories of sexual harassment that have come to light is that juries may now be more inclined to believe claims of sexual harassment and, therefore, more likely to find against employers.

For more information, contact Neal Perryman (nperryman@lewisrice.com), Michael Jente (mjente@lewisrice.com), and Benjamin Farley (bfarley@lewisrice.com), at ILN member, Lewis Rice.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: MULTI-STATE COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.



2019 Update

In the wake the of the #MeToo movement, lawmakers have acted to ensure that victims of sexual harassment are not silenced. Several states have mandated employee training and policy requirements, as well as passed laws that limit or prohibit non-disclosure provisions in settlement agreements.

With respect to non-disclosure provisions, the specifics of the laws differ, as set forth below. While several similar federal bills have been introduced, none have gained much traction. However, Congress enacted, as a part of the Tax Cuts and Jobs Act, a provision that prevents employers from taking a tax deduction if they have a sexual harassment or sexual abuse allegation settlement that is subject to a non-disclosure agreement.

Outlined below, we discuss the mandated policy and training requirements in various states, along with updated guidelines on non-disclosure provisions.

California

Mandated Policy and Training Requirements

On September 30, 2018, California passed SB 1343, a bill requiring all California employers with five or more employees to provide sexual harassment prevention training to all employees – both supervisory and non-supervisory – by January 1, 2020 and biannually thereafter. The bill significantly expands existing California law, which previously only required employers with at least 50 employees to provide such training to supervisory employees every two years.

Employer Obligations

By January 1, 2020, California employers with five or more employees must provide:

- at least 2 hours of sexual harassment prevention training to all supervisory employees; and
- at least 1 hour of sexual harassment prevention training to all non-supervisory employees.

This training must also be provided within six months of the employee's assumption of a supervisory or non-supervisory position (including hiring), as applicable. Employers who provide the required training to an employee after January 1, 2019 are not required to provide training again before January 1, 2020. After January 1, 2020, covered employers must provide sexual harassment prevention training to employees once every two years.

The training may be completed by employees individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is met.

Training for Seasonal and Temporary Employees

Beginning on January 1, 2020, California employers with five or more employees also must provide sexual harassment prevention training to seasonal and temporary employees (or any other employee who is hired to work for less than six months) within 30 calendar days of the employee's hire date, or within 100 hours worked for that employer, whichever occurs first. Notably, in the case of a temporary employee engaged through a temporary staffing agency, the bill clarifies that it is the agency – rather than the entity receiving the services – that is responsible for providing the training.

Government Obligations

The bill also imposes certain requirements on the California Department of Fair Employment and Housing (DFEH). Specifically, DFEH must develop or obtain two online sexual harassment prevention training courses – a two-hour course for supervisors and a one-hour course for non-supervisors. Both courses must contain an interactive component that requires viewers to periodically answer questions in order for the course to continue to play. The courses, along with the DFEH's existing poster and information sheet on sexual harassment prevention, must be made available to employers on the DFEH website in English and a variety of other languages (including Spanish, Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a "substantial number of non-English speaking people").

The bill clarifies that an employer may direct its employees to complete the online trainings provided by DFEH on its website or it has an option to develop its own training program, as long as the content of the employer's training includes the following components (established under existing California law but reiterated in the bill):

- Information and practical guidance on federal and state laws prohibiting sexual harassment and remedies available to victims of sexual harassment;
- Practical examples aimed at training employees in the prevention of harassment, discrimination and retaliation;
- Training addressing harassment on the basis of gender identity, gender expression and sexual orientation; and
- Training addressing the prevention of abusive conduct in the workplace.

Finally, the bill requires DFEH to provide a method for employees who have completed the required trainings – whether the online program provided by DFEH or the employer's own training module – to electronically save and print a certificate of completion.

Non-Disclosure Provisions

In 2018, California enacted two laws prohibiting non-disclosure provisions – one relating to settlement agreements for sexual harassment claims and one relating to employment agreements for sexual harassment within the workplace.

The first, SB 820, prohibits a provision in a settlement agreement (such as a confidentiality or non-disclosure clause) that prevents the disclosure of factual information related to a civil or administrative

action that includes claims of sexual assault, sexual harassment, harassment or discrimination based on sex, the failure to prevent an act of workplace harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex. In accordance with the law, any provision that prevents the disclosure of "factual information related to the claim" is void as a matter of law and against public policy. The law, however, does create an exception for a provision that shields the identity of the claimant, including all facts that could lead to the discovery of his or her identity. Such non-disclosure clauses may be included but only if the claimant requests the provisions. Unlike the New York law, the California law does not require a 21-day waiting period or a revocation period. Importantly, the law does not prohibit provisions making confidential the amount paid in settlement of a claim.

The second, SB 1300, prohibits employers from requiring the employees sign a non-disparagement agreement or other document that prohibits the employee from disclosing information about unlawful acts in the workplace, including, but not limited to, sexual harassment. These agreements would include any employment contract or continuing employment agreement. However, in a negotiated settlement, an employer may include a non-disclosure and a non-disparagement clause.

New Jersey

Non-Disclosure Provisions

Among the broadest laws passed in the #MeToo era, New Jersey enacted a law on March 18, 2019 that prohibits any non-disclosure provision in a claim of discrimination, retaliation or harassment for any claim under the New Jersey Law Against Discrimination – not just sexual harassment.

The law does not contain any carve-out for including a non-disclosure provision at the complainant's preference, and further requires employers settling a claim of discrimination, retaliation or harassment to include a disclaimer. The disclaimer must be bold and prominently placed, stating:

> **Although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.**

The New Jersey law contains two specific exceptions to the non-disclosure prohibition: (i) non-competition agreements and (ii) confidentiality agreements concerning an employer's proprietary information, which includes only non-public trade secrets, business plans, and customer information.

New York

Mandated Policy and Training Requirements - New York State

On March 30, 2018, New York State passed a $168 million budget deal, which included several provisions governing workplace sexual harassment, responsive to the #MeToo movement.

Mandatory Sexual Harassment Prevention Policy and Training Program

The legislation required the New York State Department of Labor (DOL), in consultation with the Division of Human Rights (DHR), to create and publish a model sexual harassment policy, including at a minimum, the following:

i. prohibiting sexual harassment and providing examples of conduct that would constitute unlawful sexual harassment;

ii. including information concerning the federal and state statutory provisions concerning sexual harassment, the remedies available to harassment victims and a statement that there may be applicable local laws;

iii. including a standard complaint form;

iv. including a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;

v. informing employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

vi. clearly stating that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

vii. clearly stating that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

The new law also mandated that the DOL and DHR produce a model, interactive sexual harassment prevention training program, containing:

i. an explanation of sexual harassment;

ii. examples of conduct that would constitute unlawful harassment;

iii. information on state and federal laws concerning sexual harassment and remedies available to victims; and

iv. information on employees' rights and all available forums for adjudicating complaints administratively and judicially.

On August 23, 2018, New York State released guidance materials for employers, including model sexual harassment prevention documents. The materials were published in draft form and followed by a period of public comment that closed on September 12, 2018. After considering comments from companies and interest groups, New York State issued this week a final set of employer guidance materials on sexual harassment prevention. These policy and training requirements took effect on **October 9, 2018** and

impacted every company with employees in New York State. All New York State employers had to implement a new sexual harassment policy compliant with the new law by October 9, 2018, and all New York State employers have to complete State-compliant interactive sexual harassment training for all employees by October 9, 2019, and annually thereafter. The new law also dictates that employers need to train new employees as soon as possible after commencing employment.

Final New York State Sexual Harassment Prevention Documents

The final materials issued by New York State relating to employer policies included Minimum Standards for Sexual Harassment Prevention Policies, Model Sexual Harassment Prevention Policy, Model Complaint Form, and an optional Policy Notice/Poster.

The final materials relating to mandatory annual employee training included Minimum Standards for Sexual Harassment Prevention Training, Sexual Harassment Prevention Model Training (along with Training Presentation Slides and Sexual Harassment Prevention Training Case Studies).

For employers that prefer to update their own existing policies and training programs to comply with New York law, rather than adopting the state's model materials, the state has published an Employer Toolkit. This toolkit contains "minimum standards checklists" to ensure that company policies and training materials meet or exceed minimum legal requirements.

New York State also issued FAQs that provide additional guidance for implementation of policies and training.

Extension of Protections to Third Parties

Notably, in addition to the new policy and training requirements under the new law, the law also extends employers' liability for sexual harassment to *non-employees*. An employer can be held liable for sexual harassment of independent contractors, subcontractors, vendors, consultants, "or any other person providing services pursuant to a contract in the workplace" or the employees of any such person. Liability may apply when the employer, its agents or its supervisors knew or should have known that a non-employee was subjected to sexual harassment in the employer's workplace and failed to take immediate and appropriate corrective action.

Non-Disclosure Provisions

Effective July 11, 2018, non-disclosure provisions in settlements, agreements, or other resolutions of sexual harassment claims in New York State are prohibited, unless inclusion of the clause is the complainant's preference.

Prior to including a non-disclosure clause in a settlement agreement, the complainant must be provided with the non-disclosure term or condition provision in writing, and he or she will have 21 days to consider it. Then, the complainant will have seven days to revoke his or her decision. Only then can the agreed-upon provision be included in the larger settlement agreement.

This 21-day period cannot be waived, shortened, or calculated to overlap with the seven-day revocation period. Unlike the federal provisions for waiving age discrimination claims (which also include a 21-day review period and seven-day revocation period), the non-disclosure provision requires a separate agreement to be executed after the expiration of the 21-day consideration period and the seven-day revocation period before the employer is authorized to include confidentiality language in a proposed resolution.

Mandated Policy and Training Requirements - New York City

Beginning September 6, 2018, New York City employers were required to post a mandatory anti-sexual harassment rights and responsibilities poster and provide an information sheet to all new hires under the Stop Sexual Harassment in New York City Act (the "NYC Act").

The poster can be found and downloaded in English and Spanish on the website of the New York City Commission on Human Rights (the "Commission"). This poster must be conspicuously displayed "in employee breakrooms or other common areas". The poster must be sized to 8.5 x 14 inches with 12-point font at a minimum and every employer is required to display the poster in both English and Spanish.

Beginning September 6, 2018, the employee information sheet, which can be found and downloaded here, also has to be provided to all new employees at the time of hire. Alternatively, the information sheet may be included in an employee handbook given to new hires.

In addition to the posting and information sheet requirements, the NYC Act also contains mandatory employee training requirements that went into effect this month, on April 1, 2019.

Under the NYC Act, all private employers with fifteen (15) or more employees in New York City must provide anti-sexual harassment training to employees on an annual basis. This training requirement covers all employees, including interns, who work at least 80 hours in a calendar year. New employees must also be trained after 90 days of initial hire. However, employees who received training within the required training cycle at a prior employer are not required to receive additional training at their new employer until the next training cycle.

Similar to New York State's recently enacted sexual harassment prevention legislation, the NYC Act requires "interactive" annual training. The law defines interactive training as participatory teaching where employees are engaged in "trainer-trainee interaction." This may include the use of audio-visuals, computer, or online training programs or other participatory forms of teaching. However, the training does not have to be live or facilitated by an in-person instructor.

The NYC Act provides that annual training must cover the following topics at a minimum:

1. An explanation of sexual harassment as a form of unlawful discrimination under New York City law;
2. A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
3. A description of what sexual harassment is, using examples;

4. Any internal complaint process available to employees through their employer to address sexual harassment claims;
5. The complaint process available through the Commission, the New York State Division of Human Rights and the U.S. Equal Employment Opportunity Commission, including contact information;
6. The prohibition of retaliation under New York City law, including examples of retaliation;
7. Information concerning bystander intervention, including resources that explain how to engage in bystander intervention;
8. The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation and measures that supervisors and managers may take to appropriately address sexual harassment complaints.

The Commission has developed a training module, which can be found here: https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page. This training module may be utilized by employers for their workforce as long as employees are informed of the employer's internal complaint process that is available to address sexual harassment claims.

Employers are required to maintain records of employee training for at least three years, including signed employee acknowledgements of attendance. These records may be maintained in electronic form.

Extended Statute of Limitations under the new NYC Law

Significantly, the NYC Act has also extended the statute of limitations for bringing gender-based harassment claims with the Commission from one year to three years. And, the New York City Human Rights Law prohibition on gender-based harassment claims also now applies to employers with fewer than four employees.

Vermont

Non-Disclosure Provisions

Effective July 1, 2018, Vermont employers have new requirements for settlement agreements relating to sexual harassment claims. Any such settlement agreement must expressly state in settlement agreements of sexual harassment claims that the agreement does not prohibit or restrict the claimant from:

- Testifying, assisting, or participating in an investigation of a sexual harassment claim conducted by any state or federal agency;
- Complying with a discovery request or testifying in a proceeding concerning a claim of sexual harassment; and
- Exercising "any right" the claimant has under State or federal labor relations laws "to engage in concerted activities with other employees for the purposes of collective bargaining or mutual aid and protection."

The statement also must make clear that the claimant "does not waive any rights or claims that may arise after the date the settlement agreement is executed."

Additionally, the law mandates that a sexual harassment settlement agreement may *not* prohibit the claimant-party from working for the employer "or any parent company, subsidiary, division, or affiliate of the employer."

Washington

Non-Disclosure Provisions

Effective June 7, 2018, Washington State prohibits employers from requiring as a condition of employment that employees sign a non-disclosure agreement preventing them from discussing workplace sexual harassment or sexual assault.

In addition to sexual offenses in the workplace, the Washington law covers such incidents that occur at work-related events "coordinated by or through the employer," or between employees, or between an employer and an employee off the employment premises. The new law also prevents employers from retaliating against employees who disclose workplace sexual harassment or sexual assault.

Notably, however, this law *does not* prohibit an employer from including confidentiality provisions in a settlement agreement with an employee regarding sexual harassment allegations. Further, the law provides exceptions for human resources, supervisory, and managerial staff who are expected to maintain confidentiality as part of their jobs. It also excludes employees who participate in an "open and ongoing" sexual harassment investigation and are requested to maintain confidentiality during that investigation.

Under the Washington law, "sexual harassment" is defined broadly to mean unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if submission to that conduct or communication is, among other things, used as a factor in decisions affecting that individual's employment or creates a hostile environment. "Sexual assault" is similarly defined as any type of sexual contact or behavior that occurs without the explicit consent of the recipient.

Other States with Mandatory and/or Encouraged Training Requirements

Pre-dating the #MeToo movement, California, Connecticut, Delaware and Maine already mandated employee anti-harassment and discrimination trainings, and Colorado, Massachusetts, Rhode Island, and Vermont strongly encouraged such trainings (though they are not mandated). Each state has specific requirements. Employers in these locations should engage with counsel to ensure compliance.

Mandatory Arbitration Prohibitions

New York and Maryland have enacted laws that explicitly prohibit employers from requiring the mandatory arbitration of sexual harassment claims, subject to certain requirements. The laws may, however, be preempted by the Federal Arbitration Act, and we await further developments in this regard.

Maryland

Effective October 1, 2018, Maryland prohibits employers from mandating arbitration of sexual harassment or related retaliation claims. This prohibition applies to employment contracts, policies, and agreements, including collective bargaining agreements. Under the act, prohibited mandatory arbitration clauses in employment contracts will be rendered null and void. How a court might interpret a contract that has such a provision, however, will depend on the other terms within the contract, including whether a "severability" clause exists.

New York

Effective July 11, 2018, New York employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses in written employment contracts requiring the resolution of allegations or claims of an unlawful discrimination practice of sexual harassment. This prohibition applies only to contracts entered into *after* the effective date of this law. A "mandatory arbitration clause" includes a term or provision requiring the parties to submit any matter thereafter arising under such contract to arbitration prior to the commencement of any legal action, which also further provides language to the effect that the facts found or determination made by the arbitrator or panel of arbitrators, in its application to a party alleging an unlawful discriminatory practice based on sexual harassment, shall be final and not subject to independent court review.

If a contract entered into after the effective date of the law contains a prohibited mandatory arbitration clause, the clause will be rendered null and void without affecting the enforceability of any other provision in the contract.

This law only addresses claims related to sexual harassment. The law also contain a carve-out for employees subject to a collective bargaining agreement.

Prohibition on a "Waiver of Rights"

Several states have passed laws that prohibit in an employment contract (or some in any agreement affecting the employment relationship, including arbitration agreements) a waiver of substantive or procedural rights. There is some debate as to whether these laws will impact only current employment agreements, or arbitration agreements, as well.

California

California's SB1300 makes it unlawful for an employer, in exchange for a raise or bonus, or as a condition of continued employment, to require an employee to sign a release of any discrimination, harassment, or retaliation claim under Fair Employment and Housing Act (FEHA), or sign a statement that the individual will not bring a claim under FEHA,

However, such release agreements are permissible as part of a negotiated settlement agreement to resolve a claim. To qualify for this exception, the settlement agreement must be voluntary, deliberate, and informed and provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney in the negotiation of the agreement.

Maryland

Maryland law prohibits employers from requiring employees to enter into an employment contract, policy, or agreement (including collective bargaining agreements) that waives substantive or procedural rights to bring claims of sexual harassment. (e.g., a jury trial waiver). Further, the law voids any provision contained in an employment contract, policy, or agreement waiving an employee's substantive or procedural rights to make a future sexual harassment or related retaliation claim. Employers may not take adverse action against an employee who fails or refuses to enter into an agreement containing an impermissible waiver. Any employer who attempts to enforce any such waiver will be liable for the employee's attorneys' fees. Unlike the other laws, employers must provide data on the number of sexual harassment settlements to the Maryland Commission on Civil Rights.

New Jersey

The New Jersey law prohibits any provision in an employment contract that waives an employee's substantive or procedural right or remedy relating to a discrimination, retaliation, or harassment claim under the Law Against Discrimination or any other statute or case law. This prohibition potentially includes prospective class action waivers and jury trial waivers.

Vermont

Vermont law prohibits employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement that waives "a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment."

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2018 Edition: Sexual Harassment in the Workplace: What US: Missouri Companies Need to Know

What constitutes sexual harassment?

Epstein Becker & Green (EBG): United States law has designated sexual harassment into two categories (1) quid quo pro and (2) hostile work environment. Quid pro quo occurs where the employer or agent of the employer grants favors or advantages or makes threats in return for sexual acts. Hostile work environment occurs when the employer or agent of the employer permits or engages in severe or pervasive sexual or sex-based conduct affecting the terms and conditions of the victims' employment.

Davis & Gilbert (D&G): Employers must also be mindful of governing laws in their local jurisdictions, such as New York City, which can have more stringent definitions than under federal law.

What body of law governs sexual harassment in your jurisdiction?

EBG: Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating on the basis of sex. In two cases, *Meritor Savings Bank v. Vinson* (1986) and *Harris v. Forklift Systems* (1993), the Supreme Court held that sexual harassment was sex-based discrimination and actionable under Title VII. Sexual harassment law is rooted in Title VII, but has developed through the common law system.

For employers with fewer than 15 employees, state anti-discrimination or harassment law will govern.

What actions constitute sexual harassment?

EBG & D&G: Sexual harassment can take many forms, including:

- Unwelcome sexual advances; requests for sexual favors; and all other verbal and physical conduct of a sexual or otherwise offensive nature, especially where:
    - Submission to such conduct is made explicitly or implicitly a term or condition of employment;
    - Submission to or rejection of such conduct is used as the basis for decisions affecting an individual's employment;
    - Such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.

Examples of such conduct include:

- Telling or otherwise sharing sexually explicit or demeaning jokes or using innuendo;
- Suggestive comments about appearance or dress;
- Suggestive, insulting or obscene comments;
- Repeated requests for a date with someone who is not interested, even in jest;
- Discussion about sexual thoughts, fantasies or activities;
- Leering or catcalls at someone or sexual gestures with hands or body;
- Love letters or phone calls;
- Unwelcome physical touching such as shoulder or arm rubbing or squeezing;
- Standing or sitting too close to someone, following an employee or blocking his or her way;
- Displaying sexually explicit magazines or cartoons, or calendars showing individuals in bathing suits or underwear; and
- Posting sexually offensive content on social media sites.

Can sexual harassment occur between two members of the same sex?

EBG: Yes. A federal court case, *Oncale v. Sundowner* (1998), held that sexual harassment can be perpetrated by members of the same sex, holding that Title VII bars harassment regardless of sexual desire if the harassment is "because of sex."

Are employers required to provide sexual harassment training for their employees?

EBG & D&G: Some states and localities require some form of sexual harassment training for private employers: California, Connecticut, Maine, New York and New York City. Most states do not require such

training, but courts of law tend to look favorably on employers who mandate sexual harassment trainings.

What are the liabilities and damages for sexual harassment and where do they fall?

EBG: Employees seeking damages for sexual harassment may be entitled to back pay, front pay, compensatory and punitive damages, and attorney's fees. Contingent on the size of the employer, compensatory and punitive damages are limited under Title VII.

For employers with 15-100 employees, the limit is $50,000.

For employers with 101-200 employees, the limit is $100,000.

For employers with 201-500 employees, the limit is $200,000.

For employers with more than 500 employees, the limit is $300,000.

Damages sought under state and local harassment laws may be significantly higher.

D&G: Managers who engage in workplace harassment may also be subject to individual liability under state and local laws. See below the question about the difference between supervisor and co-worker harassment.

What does an employee who believes they've been sexually harassed have to prove for a successful claim against the employer?

EBG & D&G: Under Title VII, employees who believe that they have been sexually harassed based on the *hostile work environment* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment; (2) the harassment was based on the individual's sex; (3) the sexual harassment was so severe or pervasive that it affected the terms or conditions of employment; and (4) that the employer knew or should have known about the harassment and failed to take prompt remedial action. Employees who believe that they have been sexually harassed based on the *quid pro quo* theory of liability must show that (1) he or she was subject to unwelcome sexual harassment and (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision(s).

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

EBG: When an employee alleges sexual harassment against a supervisor, the company is liable for his/her behavior. If the employee alleges sexual harassment against a co-worker, the employee will also have to show that the employer knew or should have known about the harassing conduct and failed to take appropriate remedial action. Certain state and local sexual harassment laws hold individuals personally liable for claims of harassment.

What are the potential defenses employers have against sexual harassment claims?

EBG & D&G: In two federal cases, *Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Supreme Court held that employers are always subject to vicarious liability for unlawful harassment by supervisors if the conduct culminates in a tangible employment action. If there is no

tangible employment action, the employer may avoid liability by establishing an affirmative defense (the Faragher-Ellerth defense) consisting of the following two elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In cases where the employee is subject to a tangible employment action, the employer may not raise the affirmative defense. For such cases, the employer must produce evidence of a non-discriminatory reason for the tangible employment action, and a determination must be made whether the explanation is pretext designed to hide the discriminatory motive. In some state and local jurisdictions, affirmative defenses may not be available, but the existence of actions taken by the employer to prevent harassment and discrimination, such as conducting regular trainings, can factor into the amount of damages that may be awarded.

Who qualifies as a supervisor?

EBG: In *Vance v. Ball State University* (2013), the Supreme Court held that a supervisor, in cases involving harassment claims, is someone who has the power to hire, fire, demote, promote, transfer, or discipline the individual who is being harassed. This explicitly excluded some managers who only have the authority to make or change schedules or direct an employee's daily activities.

How can employers protect themselves from sexual harassment claims?

EBG & D&G: Employers should conduct mandatory sexual harassment training. Employers should provide all employees with a copy of a sexual harassment policy and implement accessible complaint procedures for employees who believe they are being subject to or witness sexual harassment. Per the above, training is now mandated in several states and localities, including California, New York, New York City, Connecticut and Maine.

Does sexual harassment cover harassment because of pregnancy?

EBG: Discrimination or harassment on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Title VII as well as under state and local laws.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

EBG: Federal courts are divided on whether harassment on the basis of sexual orientation or gender identity are covered under Title VII's protections against sex-based harassment. Several states and cities expressly prohibit harassment on the basis of sexual orientation and/or gender identity.

What is prohibited retaliation?

EBG: Employers may not take any adverse action against an employee for reporting an incident of sexual harassment or for participating in an investigation of a sexual harassment claim. A claim for retaliation may be made even if the underlying complaint of harassment is unfounded.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

EBG: While not prohibited, a consensual relationship can be considered sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

EBG: Yes.

What is the #MeToo movement?

EBG: #MeToo was been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social media platforms. This powerful movement has put sexual harassment and abuse in the spotlight and has encouraged survivors of sexual misconduct, including workplace misconduct, to step forward and take action against their alleged harassers.

How is the #MeToo movement impacting the law in your jurisdiction?

EBG & D&G: The #MeToo movement has had a large impact on the depth of awareness of the issues of sexual harassment in the workplace. It remains unclear whether the movement will result in an increased number of sexual harassment claims, but more employers are requiring sexual harassment trainings and are looking for ways to make them more effective.

While there have been no substantive or procedural changes to federal sexual harassment law, the recently enacted tax reform, The Tax Cut and Jobs Act (2017), includes a provision that now expressly denies taxpayers the ability to deduct as a business expense (1) any settlement or payment related to sexual harassment or sexual abuse, or (2) any attorney's fees related to any settlement or payment if such settlement or payment is subject to a nondisclosure agreement. Congress has further mandated that all lawmakers, staff, interns and fellows are required to attend sexual harassment prevention trainings.

Many states and cities have reacted to the #MeToo movement. For example, both New York State and New York City have enacted legislation which requires most private employers to provide sexual harassment training to their workers on an annual basis and also prohibit employers from including confidentiality provisions in settlement agreements involving claims of sexual harassment unless the complaining employee specifically consents.

For more information, contact Bill Milani (wjmilani@ebglaw.com) and Nancy Gunzenhauser Popper (npopper@ebglaw.com) at ILN member, Epstein Becker & Green, and Jessica Golden Cortes (jcortes@dglaw.com) at ILN member, Davis & Gilbert LLP.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: WASHINGTON STATE COMPANIES NEED TO KNOW

Below are summaries of recent laws adopted in Washington State that could be interpreted as relating to the #MeToo movement. Some of them directly address sexual harassment and sexual assault; others are directed at providing a more equitable workplace. Washington's legislature is currently in session; this paper does not address any laws that may be adopted in the current session.

RCW 49.44.210 (2018) regarding nondisclosure agreements that prevent disclosure of sexual assault or sexual harassment, with an exception for settlement agreements

This new statute has three primary components:

First, it prohibits employers, as a condition of employment, from requiring an employee "to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises."

Second, it provides that "any nondisclosure agreement, waiver, or other document signed by an employee as a condition of employment that has the purpose or effect of preventing the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises is against public policy and is void and unenforceable."

Third, it states that it "is an unfair practice under chapter 49.60 RCW for an employer to discharge or otherwise retaliate against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises."

However, RCW 49.44.210 does not prohibit settlement agreements between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions. It also does not apply to human resources staff, supervisors, or managers when they are expected to maintain confidentiality as part of their assigned job duties. In addition, it does not include individuals who are notified and asked to participate in an open and ongoing investigation into alleged sexual harassment and requested to maintain confidentiality during the pendency of that investigation.

When applying RCW 49.44.210, keep in mind that federal law is unclear on confidentiality as it relates to workplace investigations of sexual harassment claims. The Equal Employment Opportunity Commission (EEOC) recommends that employers provide "[a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible."[i] However, the National Labor Relations Board (NLRB) does not allow employers to have a blanket prohibition against employees discussing sexual harassment investigations.[ii] Also, be aware that federal tax law provides a disincentive

to employers who include a confidentiality provision in a settlement or payment related to sexual harassment or sexual abuse, as such payments are not deductible as business expenses.[iii]

RCW 49.44.085 (2018) prohibiting employers from requiring employees to waive their right to publicly pursue a lawsuit or complaint with an agency

This new statute states as follows:

> **RCW 49.44.085**
>
> **Provision requiring an employee to waive right to publicly pursue cause of action is unenforceable.**
>
> A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

RCW 49.44.085 does not expressly address settlement agreements. Presumably, it was not intended to prevent an employer from entering into a settlement agreement with an employee after a claim has been made that prohibits the employee from filing suit for damages arising from existing claims. However, there is no court guidance on this issue yet.

SB 6471 (2018) regarding development of a model sexual harassment policy and best practices

This bill required the Human Rights Commission (HRC) to convene a work group to develop model sexual harassment policies and best practices and post it on the HRC website by January 1, 2019. The work group produced three documents that are posted on the HRC website:[iv] "Introduction and Best Practices," "Sexual Harassment Model Policy," and "Sexual Harassment Model Procedures." They are not mandatory, but they are available for employer use. Additionally, as noted in the Introduction, "The adoption of these Practices, Policy, and Procedures does not create an affirmative defense or safe harbor to a complaint of sexual harassment."

RCW 49.60.510 (2018) regarding disclosure of medical and psychiatric records

RCW 49.60.510 protects claimants who seek noneconomic damages arising from sexual harassment (and other forms of discrimination) from having to disclose their medical or psychiatric records unless the claimant:

> (a) Alleges a specific diagnosable physical or psychiatric injury as a proximate result of the respondents' conduct;
>
> (b) Relies on the records or testimony of a health care provider or expert witness to seek general damages; or

(c) Alleges failure to accommodate a disability or alleges discrimination on the basis of a disability.

Any such waiver is limited to health care records and communication between a claimant and his or her provider or providers:

(a) Created or occurring in the period beginning two years immediately preceding the first alleged unlawful act for which the claimant seeks damages and ending at the last date for which the claimant seeks damages, unless the court finds exceptional circumstances to order a longer period of time; and

(b) Relating specifically to the diagnosable injury, to the health care provider or providers on which the claimant relies in the action, or to the disability specifically at issue in the allegation.

HB 2661 (2018) protecting survivors of domestic violence, sexual assault, and stalking from employment discrimination

This bill amended several existing state statutes (RCW 49.76.010, 49.76.040, 49.76.060, 49.76.100, and 49.76.120) and it added a new section to chapter 49.76 RCW. The key substantive additions are in RCW 49.76.115:

49.76.115

Employer conduct—Actual or perceived victim of domestic violence, sexual assault, or stalking.

An employer may not:

(1) Refuse to hire an otherwise qualified individual because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking;

(2) Discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an individual with regard to promotion, compensation, or other terms, conditions, or privileges of employment because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking;

(3) Refuse to make a reasonable safety accommodation requested by an individual who is a victim of domestic violence, sexual assault, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer. For the purposes of this section, an "undue hardship" means an action requiring significant difficulty or expense. A reasonable safety accommodation may include, but is not limited to, a transfer, reassignment, modified schedule, changed work telephone number, changed work email address, changed workstation, installed lock, implemented safety procedure, or any other adjustment to a job structure, workplace facility, or work requirement in response to actual or threatened domestic violence, sexual assault, or stalking.

Another new section, codified in RCW 49.76.120, prohibits employers from retaliation for exercising their rights or assisting others in exercising their rights, or filing or communicating to the employer an intent to file a complaint.

SHHB 1506 (2018) regarding gender wage and advancement parity

This bill amended RCW 49.12.175, added a new chapter to Title 49 RCW, recodified RCW 49.12.175, and prescribed penalties. RCW 49.12.175 already prohibited paying women less than men who were similarly employed. SHHB 1506, which was codified as chapter 49.58 RCW, broadened prior law to apply to discrimination in compensation based on gender and defined "similarly employed." *See* RCW 49.58.020. SHHB 1506 also added a section prohibiting employers from limiting or depriving an employee of career advancement opportunities that would otherwise be available unless the differential in career advancement was based on a bona fide job-related factor or factors, which are defined in the new law. *See* RCW 49.58.030. In addition, RCW 49.58.030 prohibits employers from the following conduct:

> (1) An employer may not:
>
> > (a) Require nondisclosure by an employee of his or her wages as a condition of employment; or
> >
> > (b) Require an employee to sign a waiver or other document that prevents the employee from disclosing the amount of the employee's wages.
>
> (2) An employer may not discharge or in any other manner retaliate against an employee for:
>
> > (a) Inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee;
> >
> > (b) Asking the employer to provide a reason for the employee's wages or lack of opportunity for advancement; or
> >
> > (c) Aiding or encouraging an employee to exercise his or her rights under this section.
>
> (3) An employer may prohibit an employee who has access to compensation information of other employees or applicants as part of such employee's essential job functions from disclosing the wages of the other employees or applicants to individuals who do not otherwise have access to such information, unless the disclosure is in response to a complaint or charge, in furtherance of an investigation, or consistent with the employer's legal duty to provide the information and the disclosure is part of the employee's essential job functions. An employee described in this subsection otherwise has the protections of this section, including to disclose the employee's wages without retaliation.
>
> (4) This section does not require an employee to disclose the employee's compensation.
>
> (5) This section does not permit an employee to violate the requirements in chapter 49.17 RCW and rules adopted under that chapter.

SHHB 1506 also contains a prohibition against retaliation and includes enforcement mechanisms, which are codified in chapter 49.58 RCW.

For more information, contact Karen Sutherland (ksutherland@omwlaw.com) at ILN member, Ogden Murphy Wallace, P.L.L.C.

[i] EEOC's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 1999); *see also Report of the Co-Chairs of the Select Task Force on Harassment in the Workplace* (June 2016); and EEOC's *Proposed Guidance on Unlawful Harassment* (January 2017).

[ii] *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015); *affirmed in part and reversed in part, Banner Health System v. NLRB*, 851 F.3d 35 (2017). It may be possible under *Banner Health* to require confidentiality during an investigation if the employer makes a case-by-case determination that there is a legitimate business justification for it based on the individual features of a sensitive investigation. 851 F.3d at 44.

[iii] *See* Section 13307 of the Tax Cuts and Jobs Act of 2017 (TCJA).

[iv] https://www.hum.wa.gov/publications.