

## HR Law Hotline

April 30, 2013

### INDIA'S NEW LABOUR LAW - PREVENTION OF SEXUAL HARASSMENT AT THE WORKPLACE

India finally enacted its law on prevention of sexual harassment against female employees at the workplace. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**Sexual Harassment Act**") has been made effective on April 23, 2013 by way of publication in the Gazette of India.

The statute has been enacted almost 16 years after the Supreme Court of India, in its landmark judgment in Vishaka and others v. State of Rajasthan ("**Vishaka Judgement**")<sup>1</sup>, laid down guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women ("**Guidelines**"). Codification of the requirements is a much-awaited development and is a significant step towards creating awareness on the issue of workplace sexual harassment and ensuring women a safe and healthy work environment.

#### BACKGROUND

The Supreme Court of India, in 1997, in the Vishaka Judgment, for the first time, acknowledged sexual harassment at the workplace as a human rights violation. The Supreme Court relied on the Convention on the Elimination of All Forms Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified. In its judgment, the Supreme Court outlined the Guidelines making it mandatory for employers to provide for sympathetic and non-retributive mechanisms to enforce the right to gender equality of working women. As per the Vishaka Judgment, the Guidelines, until such time a legislative frame work on the subject is drawn-up and enacted, have the effect of law and the Guidelines are to be mandatorily followed by organizations, both in the private and government sector. While there were several attempts made to enact a law on this subject previously, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was eventually passed by the Lower House of the Parliament (Lok Sabha) on September 3, 2012, then passed by the Upper House of the Parliament (Rajya Sabha) on February 26, 2013 and received the President's assent on April 22, 2013.

#### SEXUAL HARASSMENT - OBJECTIVE OF THE LAW, MEANING AND PROHIBITION

The Sexual Harassment Act has been enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. Sexual harassment is considered as a violation of the fundamental right of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India ("**Constitution**") and her right to life and to live with dignity as per Article 21 of the Constitution. It has also been considered as a violation of a right to practice or to carry out any occupation, trade or business under Article 19(1)(g) of the Constitution, which includes a right to a safe environment free from harassment.

The definition of sexual harassment in the Sexual Harassment Act is in line with the Supreme Court's definition in the Vishaka Judgment and includes any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The Sexual Harassment Act stipulates that a woman shall not be subjected to sexual harassment at any workplace. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.

#### SALIENT FEATURES OF THE SEXUAL HARASSMENT ACT

■ **Scope** : The ambit of the Sexual Harassment Act is very wide and is applicable to the organized sector as well as the unorganized sector. In view of the wide definition of 'workplace', the statute, inter alia, applies to government bodies, private and public sector organisations, non-governmental organisations, organisations carrying on commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals. As per the Sexual Harassment Act, a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment - including transportation provided by the employer for the purpose of commuting to and from the place of employment<sup>2</sup>.

The definition of 'employee' under the Sexual Harassment Act is fairly wide and covers regular, temporary, ad hoc employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.

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■ **Internal Complaints Committee and Local Complaints Committee** : The Sexual Harassment Act requires an employer to set up an 'Internal Complaints Committee' ("ICC") at each office or branch, of an organization employing at least 10 employees. The government is in turn required to set up a 'Local Complaints Committees' ("LCC") at the district level to investigate complaints regarding sexual harassment from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer. The Sexual Harassment Act also sets out the constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

■ **Interim Reliefs** : The Sexual Harassment Act empowers the ICC and the LCC to recommend to the employer, at the request of the aggrieved employee, interim measures such as (i) transfer of the aggrieved woman or the respondent to any other workplace; or (ii) granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement.

■ **Process for Complaint and Inquiry** : Please refer to the following flowchart which provides, in brief, the process to be followed by the aggrieved employee to make the complaint and by the employer to inquire into the complaint. The law allows female employees to request for conciliation in order to settle the matter although a monetary settlement should not be made as a basis of conciliation.

■ **Action against Frivolous Complaints** : So as to ensure that the protections contemplated under the Sexual Harassment Act do not get misused, provisions for action against "false or malicious" complainants have been made.

## EMPLOYER'S OBLIGATIONS

In addition to ensuring compliance with the other provisions stipulated, the Sexual Harassment Act casts certain obligations upon the employer to, inter alia,

1. provide a safe working environment
2. display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the Internal Complaints Committee
3. organise workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the Internal Complaints Committee
4. treat sexual harassment as a misconduct under the service rules and initiate action for misconduct.

The employer is also required to monitor the timely submission of reports by the ICC.

If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty of up to INR 50,000 (approx. US\$1,000). A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

## AMENDMENTS TO THE INDIAN PENAL CODE

As a result of the growing importance of the issues relating to sexual harassment and protection of female employees in India, a new section<sup>3</sup> was added to the Indian Penal Code, 1100% through the Criminal Law (Amendment) Act, 2013<sup>4</sup>, which enlists the acts which constitute the offence of sexual harassment and further envisages penalty / punishment for such acts. A man committing an offence under this section is punishable with imprisonment, the term of which may range between 1 - 3 years or with fine or both. Since the amendment criminalizes all acts of sexual harassment, employers shall be required to report any offences of sexual harassment to the appropriate authorities.

## OUR ANALYSIS

The Sexual Harassment Act is a much awaited development and a significant step towards ensuring women a safe and healthy work environment. We however list below some issues in relation to this new legislation.

1. The Sexual Harassment Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law.
2. The definition of 'aggrieved woman' does not make a reference to victimization (on the part of the employer) of the employee who has made the complaint of harassment, which would be fairly common in such situations. This was in fact an important recommendation of the Standing Committee. The definition of the 'sexual harassment', the words 'verbal, textual, physical, graphic or electronic actions' should have been added in order for the purposes of clarity, as it would cover some of the technological developments.
3. It may become a challenge for employers to constitute an ICC at "all administrative units or offices". It may also become necessary for the employer to spend more time and efforts in training members of the ICC who are to be replaced every 3 years. There is also a lack of clarity as to who shall be a chairperson of the ICC in absence of a senior level female employee. Also, in such cases, the composition of the committee members should ideally have been an odd number in order for the committee to arrive at a decision based on majority.
4. The ICC also needs to involve a member from "amongst non-governmental organisations or associations committed to the cause of women or who have had experience in social work or have legal knowledge." Employers may not be comfortable with such an external representation, considering the sensitivities surrounding this issue and the need to maintain strict confidentiality.
5. The law casts an obligation upon the employer to address the grievances in respect of sexual harassment at workplace in a time bound manner, which in several cases may not be practically possible as the employees or witnesses involved may not easily or readily co-operate.
6. The law allows the employer to initiate action against the complainant in case of a false or malicious complaint. This provision, although meant to protect the employer's interests, is likely to deter victims from reporting such incidents and filing complaints, which may in turn defeat the purpose for which the law was enacted.

7. In case the allegation has been proved, the Sexual Harassment Act allows the ICC to recommend to the employer to deduct from the respondent's salary such sums it may consider appropriate to be paid to the aggrieved woman. However, there may need to be made certain corresponding changes to the Payment of Wages Act, 1936 of India, which restricts the nature of deductions that may be made from an employee's salary.
8. The Sexual Harassment Act does not stipulate any monetary liability on the employer in case of harassment on the part of an employee against another female employee. Infact, in developed countries like the US, although there is no codified law on sexual harassment or workplace harassment, based on case law that prohibit workplace discrimination, there is vicarious liability cast upon the employer in certain cases.
9. Considering that India has a diverse set of religions, cultures, castes, languages, etc. the government also needs to start focusing on providing protection for some of the other forms of harassment, which is fairly common in several of the developed countries.

We hope that unlike some of the other laws, the Sexual Harassment Act is implemented well, which in itself would go a long way in protecting the employees' interests and well-being in India.

- Veena Gopalakrishnan, Ajay Singh Solanki and Vikram Shroff

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<sup>1</sup> AIR 1997 SC 3011

<sup>2</sup> Section 2(o), Sexual Harassment Act, 2013

<sup>3</sup> Section 354A, Indian Penal Code, 1100%

<sup>4</sup> Published in the Official Gazette on April 2, 2013

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