

## Labor & Employment Client Service Group

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### A New Law on Sexual Harassment in France

Since the initial enactment of anti-sexual harassment legislation in France in 1992, sexual harassment was not only prohibited under the French Labor Code but was also a punishable offense under the Penal Code. However, the definitions in the Labor Code and the Penal Code were both vague and not entirely in sync and the French *Conseil Constitutionnel* (Constitutional Council) ruled them unconstitutional on May 4, 2012 (*Conseil Constitutionnel*, May 4, 2012, n°2012-240).

The decision was of course not without consequences since it struck down legislation that was being applied in a number of pending cases including some where guilty verdicts had been entered but the appeal period had not yet expired. Not surprisingly, the decision was greeted with vehemence by sexual harassment victims and victims' rights associations throughout France.

In order that sexual harassment "not go unpunished"<sup>1</sup>, the French Parliament adopted Law Number 2012-954 on August 6, 2012, giving a new definition of the crime, increasing the sanctions against it and prescribing new preventive and protective measures on the question.

#### The New Definition of Sexual Harassment

The new articles in the Labor Code and the Penal Code now both read as follows: "Harassment is the fact of imposing on a person, in a repetitive fashion, statement or behavior of a sexual connotation which violate a person's dignity by virtue of their degrading or humiliating character or create as concerns such person an intimidating, hostile or offensive situation."<sup>2</sup>

Going beyond the new definition of the crime, the new law also assimilates "sexual blackmail" to sexual harassment -- although sexual blackmail need not be repetitive. The Penal Code and the Labor Code now provide that sexual blackmail consists in "the fact of using any form of serious pressure, not even repetitive, with the real or apparent goal of obtaining a sexual act regardless of whether done for the benefit of the actor of the facts or for the benefit of a third party".

#### Increased Sanctions for Sexual Harassment

In addition to doubling the penalties to 2 years imprisonment and € 30,000 in fines, the new law also provides for certain strictly defined aggravating circumstances which are punished even more severely. With respect to sexual harassment in the workplace, the most important aggravating circumstances are: (i) the fact of a person abusing her / his authority; and (ii) the fact that several

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<sup>1</sup> Quotation of May 21, 2012 from the Minister of Rights of Women, Najat Vallaud-Belkacem, and the Minister of Justice, Christiane Taubira.

<sup>2</sup> It would appear that this new definition of sexual harassment has been inspired at least in part from the Anglo-American notion of "hostile environment". This is an innovation in French law. The French text of the new Articles 222-33 (Penal Code) and L. 1153-1 (Labor Code) read: "Le harcèlement sexuel est le fait d'imposer à une personne, de façon répétée, des propos ou comportements à connotation sexuelle qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante."

people are acting together or as accomplices. In both of these cases, the penalties can be increased to three years imprisonment and € 45,000 in fines.

It is significant to note as well that the new law applies the same increased sanctions to the crime of moral harassment<sup>3</sup> which is prohibited under Articles L. 1152-1 et seq. of the Labor Code.

### **New Protective and Preventive Measures**

Among the preventive measures in the new law, there is now an obligation to post the texts of the Penal Code concerning moral harassment and sexual harassment on official bulletin boards in the workplace. Additional protective measures have also been adopted, including:

- The creation of a new crime of “discrimination” which punishes “any distinction that is made between persons who have been subjected to or refused to subject themselves to sexual harassment or who have witnessed the same thing, even if the statements or behaviors have not been repeated.”<sup>4</sup>;
- The introduction in the Penal Code and the Labor Code of a new category of (retaliatory) discrimination based on the notion of sexual identity (transsexuals and transgender people). In this regard, it is worth noting that the legislation has protected victims of discrimination by reason of their sexual orientation for a number of years.

### **Treatment of Victims of Sexual Harassment Prior to the Entry into Force of the Law of August 6, 2012**

As noted above, the decision of the Conseil Constitutionnel did leave a number of litigious matters before the courts up in the air.

However, based on the principle of the non-retroactivity of more severe penal laws, the provisions of the law sanctioning the crime of sexual harassment provided for in the Law of August 6, 2012 could not be applied to matters which arose prior to its entry into force.

As a result, the Minister of Justice, Madame Christiane Taubira, announced in a Circular dated August 7, 2012<sup>5</sup> that, if an investigating magistrate or the courts had been seised of a matter before the decision of the *Conseil Constitutionnel* on the basis of the now abrogated text of the Penal Code, the re-characterization of the fact (if it is possible) is an obligation of the magistrate or court. One could expect however that in most cases “re-characterization” will not be possible, hence the Circular also notes that for those cases which cannot be recharacterized and a decision of non-lieu or file closure must be imposed, the plaintiffs must be informed of the possibility of demanding damages before the civil courts on the basis of Article 1382 of the Civil Code. Finally, Article 12 of the Law of August 6, 2012 provides for a special transitional phase where the criminal courts which have already been seised of a criminal case with a pendant civil action: even if the basis for the criminal prosecution has been extinguished the courts may nevertheless award damages on the civil claim in order to avoid the victim’s having to start all over again with a new case before the civil courts.

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<sup>3</sup> The crime of moral harassment now carries the same penalties provide for under the new Article 222-33 of the Penal Code. Moral harassment is defined in Article L. 1152-1 of the Labor Code as follows: “Aucun salarié ne doit subir les agissements qui ont pour objet ou pour effet une dégradation de ses conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d’altérer sa santé physique ou mentale ou de compromettre son avenir professionnel.” (“No employee may be subjected to repeated acts of moral harassment the purpose of or effect of which is a diminution of her / his working conditions susceptible to damage her / his rights or her / his dignity, to effect her / his physical or mental health or compromise her / his professional future.”)

<sup>4</sup> The crime of discrimination is punishable by three years imprisonment and € 45,000 in penalties.

<sup>5</sup> Circular CRIM 2012-15 dated August 7, 2012.

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