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SEXUAL HARASSMENT IN THE WORKPLACE



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## 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."*<sup>1</sup>

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<sup>2</sup>.

### 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.

<sup>1</sup> 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](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf).

<sup>2</sup> Ibid.

- VERBAL: Comments and questions about appearance, lifestyle, sexual orientation, offensive phone calls.
- NON-VERBAL: Whistling, sexually suggestive gestures, display of sexual materials<sup>3</sup>.

#### 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.

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<sup>3</sup> 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.

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