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SEXUAL HARASSMENT IN THE WORKPLACE

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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 5¹ of the Labor Protection Act which are Employer, a representative of the employer, an authorized employer and an entrepreneur employer under Section 11/1²;
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.

¹ "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.

² 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 Times*, 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.

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