



# INTERNATIONAL LAWYERS NETWORK



## SEXUAL HARASSMENT IN THE WORKPLACE



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## 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 Constitution 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.

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