



# INTERNATIONAL LAWYERS NETWORK



SEXUAL HARASSMENT IN THE WORKPLACE

This guide offers an overview of legal aspects of sexual harassment in the workplace in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this paper in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.

## SEXUAL HARASSMENT IN THE WORKPLACE: WHAT FRENCH COMPANIES NEED TO KNOW



### What constitutes sexual harassment?

Sexual harassment is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Using any form of pressure, which could be one-off, for sexual favors for the harasser or for a third party is deemed to constitute sexual harassment.

### What body of law governs sexual harassment in your jurisdiction?

Both the Criminal Code and the Labor Code are relevant to the issue of sexual harassment. The provisions prohibiting sexual harassment were created by the law n°92-1179 of November 2nd, 1992 relating to sexual abuses in employment. Those provisions were modified by the law n° 2012-954 of August 6th, 2012 relating to sexual harassment and by the law 2014-873 of August 4th, 2014.

The definition and the sanctions relating to sexual harassment are defined by law in the Labor Code (articles L. 1153-1 and following) and in the Criminal Code (art. 222-33).

The law n°2018-771 of September 5th, 2018 and its ordinance n°2019-15 of January 8th, 2019 sets out new obligations for employers regarding sexual harassment.

Since January 1st, 2019:

- Employers with at least 250 employees must appoint a resource person to guide, inform and support employees in combating sexual harassment and sexist conduct (art. L. 1153-5-1 of the Labor Code). In practice, this could be the Human Resources Director or a member of this department or an employee responsible for the prevention of psychosocial risks in the company.
- In all companies, regardless of their workforce, a sexual harassment adviser must be appointed within the Works Council (“Comité Social et Economique” – art. L. 2314-1 of the Labor Code). The Works Council must appoint an adviser among its members tasked with combating sexual harassment and sexist conduct. The adviser is appointed in the form of a resolution adopted by a majority of the members present, for a period that will end with the expiry of the mandate of the elected members of the Works Council.

The address and telephone number of these contact persons must be provided by any means, to employees, in the workplace as well as on the premises or at the door of the premises where the recruitment is made.

### What actions constitute sexual harassment?

Case law gives examples of the type of behaviors which could be deemed sexual harassment.

Sexual harassment is defined by taking into account:

- The facts committed;
- Their frequency;
- Their effect on the victim;
- The objective of the harasser.

Examples of unwanted conduct of a sexual nature:

- Suggestive comments about appearance or clothes or asking an employee to wear a dress to show her legs<sup>1</sup>;
- Repeated requests for a date with someone who is not interested (gifts, calls, texts...)<sup>2</sup>;
- Standing or sitting too close to someone, following an employee or blocking his or her way<sup>3</sup>;
- Sexual, suggestive, insulting or obscene comments even if the victim asked the harasser to stop<sup>4</sup>;
- Pressure to obtain sexual favors<sup>5</sup> ;
- A proposal of an employer to an employee who is suffering from sunburn to sleep in his room as he could “relieve her”<sup>6</sup>;
- Sexual blackmail during an interview or for the assignment of a promotion.

Sexual harassment at work is not only between an employee and a line manager. It could be between colleagues (not necessarily with a hierarchical link) or between an employee and a client for example (*see the question below about supervisors versus co-workers*).

### Can sexual harassment occur between two members of the same sex?

Yes.

### Are employers required to provide sexual harassment training for their employees?

The employer has a general obligation to protect the physical and mental health of the employees (art. L. 4121-1 of the Labor Code).

---

<sup>1</sup> Court of Appeal of Reims, Employment Chamber, 19 December 2008, n°06/0186

<sup>2</sup> French Supreme Court, Employment Chamber, 28 January 2014, n°12-20.497 or French Supreme Court, Employment Chamber, 3 March 2009, n°08-02.976

<sup>3</sup> French Supreme Court, Employment Chamber, 14 September 2016, n°15-14.630

<sup>4</sup> French Supreme Court, Employment Chamber, 7 August 2012, n°2012-15

<sup>5</sup> French Supreme Court, Employment Chamber, 18 February 2014, n°12-20.497

<sup>6</sup> French Supreme Court, Employment Chamber, 17 May 2017, n°15-19.300

The employer has an obligation to prevent sexual harassment and to combat its development within the workplace. This obligation is one of strict liability. The employer has to take all the necessary measures to forestall, avoid and punish any situation of sexual harassment (Article L. 1153-5 of the Labor Code). For this reason, the internal regulations of the company ("*règlement intérieur*") have to mention the provisions relating to sexual and moral harassments.

Preventative measures may include training or information concerning sexual harassment (which can be possibly organized with the participation of the labor inspectorate, the occupational physician or the employee representatives). Such training may address the following issues:

- what constitutes sexual harassment;
- what can be the consequences on people: psychological trauma, impossibility to come back to work...;
- what can be the disciplinary measures: the harasser can be dismissed for gross misconduct without any severance payment;
- the means available to the employee representatives to combat sexual harassment: for example, the "alert procedure": the employee representative can trigger the alert procedure in case of sexual harassment to alert the employer. The employer has to proceed immediately to an investigation and to take all the measures to stop the sexual harassment. If the employee representatives and the employer do not agree, the matter is referred to the labor inspectorate;
- how victims can denounce the facts: talk to the occupational physician or to the employee representatives, exercise the alert procedure or the right of withdrawal (if the employee considers that he/she is in danger, he/she can use the right of withdrawal and stop working while the employer takes the necessary measures to stop the conduct);
- role of the occupational physician: listen to the employees and propose measures to the employer, such as the transfer of the victim to another department for example;
- role of the labor inspectorate: the labor inspector can conduct an investigation in the company to check if a situation of sexual harassment exists by collecting statements from the employees. If the labor inspector witnesses a situation of sexual harassment, he/she can oblige the employer to take any measures to stop this situation.

#### **What are the liabilities and damages for sexual harassment and where do they fall?**

The employer must sanction the employee who has committed harassment (Article L1153-6 of the French Labor Code). The exact sanction applied depends on the severity of the harassment, but the sanction could extend to a disciplinary dismissal for gross misconduct with immediate effect.

Employees who are victims of sexual harassment may sue their employer before the Labor Court (civil jurisdiction) and / or before the Criminal Court (criminal jurisdiction).

**As regards civil courts**, pursuant to Article L. 1154-1 of the Labor Code, legal action may be brought by a person who considers himself/herself to be a victim of sexual harassment or discrimination for having suffered or refused to suffer such harassment or for having testified or reported such facts. This person may be an employee, a candidate for employment, an internship or a training period within the company.

Pursuant to Article L. 1154-2 of the Labor Code, the representative trade unions in the company may also take legal action with the consent of the victim employee.

Before the civil court, the employee may claim damages in compensation for his/her losses from the perpetrator, the employer or both. The employee can also take the initiative to terminate his/her employment contract at the fault of the employer.

**In the case of criminal courts**, the action may be brought by any employee or candidate for employment who is the victim of sexual harassment or discrimination related to such acts. Furthermore, any association which has been regularly declared for at least five years at the time of the events and which proposes by its statutes to fight discrimination based on sex, moral or sexual orientation, may exercise the rights recognized to the victim with regard to discrimination committed as a result of sexual harassment. The association is only admissible in its action if it can justify having received the written agreement of the person concerned.

Article L. 222-33 of the Criminal Code punishes sexual harassment with imprisonment of 2 years and a fine of 30,000 euros (this is a maximum).

Those penalties may be increased when harassment is committed:

- By a person who abuses the authority conferred on him/her by his/her functions (employer or hierarchical superior for example);
- On a minor under 15 years old;
- On a person of a particular vulnerability due to age, illness, infirmity or physical or mental disability, pregnancy, apparent or best known by the perpetrator;
- By several persons acting in the quality of author or accomplice.

In those cases, the penalty is increased to 3 years' imprisonment and a fine of 45,000 euros.

### **What does an employee who believes they've been sexually harassed have to prove for a successful claim?**

The burden of proof is not the same before the civil and criminal courts.

**Before the civil court**, the employee, the candidate for a job, an internship or professional training in the company must present some factual elements suggesting and not necessarily evidencing sexual harassment (some behavior has to be repeated, some other one-off is sufficient). It is then the employer's responsibility to prove that no sexual harassment has been committed.

**Before the criminal courts**, the accused is presumed innocent. The burden of proof rests on the victim/prosecution and the judge decides on the basis of his or her intimate conviction.

In any event, the victim must report elements of the offence, namely repeated sexual comments or behaviour that:

- Either violate the dignity of the victim because of its degrading or humiliating character;
- Either create an intimidating, hostile or offensive situation against him/her.

The decision rendered by the criminal court has civil *res judicata* effect. The civil judge cannot ignore what has been decided by the criminal judge. For example, if the criminal judge dismisses the complaint, the Labor court cannot reach a finding of harassment.

### Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The employer has a specific obligation to protect any worker in the workplace. He must therefore prevent possible sexual harassment, but the law does not specify the quality of persons who may be guilty of sexual harassment. The harasser may therefore be the employer, a superior, a colleague, but also a client or a customer, for example. It is not necessary to demonstrate the existence of a subordinate relationship between the victim and the perpetrator. However, abuse of authority may be regarded as an aggravating circumstance (*see the question above about liabilities and damages*).

### What are the potential defenses employers have against sexual harassment claims?

Given the strict liability obligation to which the employer is bound, its liability is often engaged since the responsibility lies on the employer to take preventive actions to combat the occurrence of acts of sexual harassment. Case law generally considers that in so far as it is bound by an obligation of strict liability, the employer is liable as soon as an employee is the victim of harassment, even if it has taken measures to put an end to it.

However, more recent decisions on moral harassment have admitted that if the employer manages to demonstrate that it has implemented measures pursuant to articles L. 4121-1 and L. 4121-2 of the Labor Code (risk prevention measures, information and staff training measures, setting up of a more appropriate organization and means, etc.) and that it had taken measures, to put an end to a situation of sexual harassment, as soon as the employer became aware of it, then its liability might not be retained (French Supreme Court, Employment Chamber, 01-06-2016, n° 14-19.702 and French Supreme Court, Employment Chamber, 5-10-2016 n° 15-20.140). Even if those decisions constitute an evolution in the Court's appreciation of the employer's liability, the fact remains that the obligation which weighs on the employer is very heavy.

According to the doctrine, those decisions could be applicable to sexual harassment, however, no such ruling has been rendered to date. In defense, the employer can provide evidence for instance that:

- it put in place all preventive measures and acted immediately as soon as he became aware of the harassment;

- the facts do not, in themselves, constitute sexual harassment;
- the facts have nothing to do with the employee's work and therefore with his employer.

### Who qualifies as a supervisor?

In France, the supervisor is someone who has the power to hire, fire, demote, promote, and discipline the employees. However (*see the question about supervisor versus co-worker above*), in France, the subordination link isn't necessary to qualify the sexual harassment. The harasser could be the employer, the supervisor or a coworker. The abuse of authority could only be an aggravating circumstance.

### How can employers protect themselves from sexual harassment claims?

The employer must implement the preventive and information measures provided for, in particular, in articles L. 4121-1 and L. 4121-2 of the Labor Code and recall the provisions on sexual and moral harassment in the internal regulations. He can also work closely with other actors such as the Labor Doctor or the Health, Safety and Working Conditions Committee or the workers representatives to implement:

- employee training;
- an appropriate and effective policy;
- information;
- communication;

to combat harassment and/or to encourage employees to speak out.

### Does sexual harassment cover harassment because of pregnancy?

Discrimination or harassment on the basis of pregnancy, childbirth or related to health problems are unlawful and sanctioned by the Labor Code and the Criminal Code.

Sexual harassment against a pregnant woman is an aggravating circumstance pursuant to Article 222-33 of the Criminal Code (*see the question above about liabilities and damages*).

### Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

The law protects all the employees whatever their gender or sexual orientation.

Discrimination based on gender or sexual orientation is prohibited and sanctioned by the Labor Code and the Criminal Code.

### What is prohibited retaliation?

Article L. 1153-2 of the French Labor Code provides that "*No employee or candidate for recruitment, internship, professional training period in a company, may be sanctioned, dismissed or be the subject of any direct or indirect discriminatory measure, in particular with regard to remuneration, training, reclassification, assignment, qualification, classification, professional promotion, transfer or renewal of contract, for having suffered or refused to suffer sexual harassment*" and Article L. 1153-3 provides that



*"No employee may be sanctioned, dismissed or discriminated against for testifying or reporting sexual harassment".*

Any provision or act contrary to those provisions is void.

### **Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?**

No. In France, sexual harassment within the meaning of Article L. 1153-1 of French Labor Code is when the facts are suffered by the victim which means that the victim is not consenting. A consenting relationship can't be considered as sexual harassment. However, a consenting relationship can turn into one without consent: in that case, sexual harassment may be established.

### **Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?**

In the event that an employer's employee sexually harasses a third party (customer, supplier, etc.) at work, the employer has to take sanctions against the harasser. If it does not, the harassed third party could claim damages from the employer.

### **What is the #MeToo movement?**

The #MeToo movement is a movement against sexual harassment and assault. Although the hashtag #MeToo had been created some years prior, immediately following the public allegations against Harvey Weinstein in October 2017, the hashtag #MeToo was picked up by celebrities and spread virally on social networks. This powerful movement has put sexual harassment in the spotlight, and has empowered survivors of sexual misconduct, especially workplace misconduct, to step forward and take action against their perpetrators.

In France, following the #MeToo movement, the #BalanceTonPorc (meaning "Squeal on your pig") movement has been created and spread all over the social media platforms prompting victims of sexual misconduct at work or in private life to speak out against sexual harassment and to raise awareness of continued tolerance of sexual harassment. The French journalist Sandra Muller (based in New York) has created the #BalanceTonPorc movement on Twitter by denouncing sexual and inappropriate remarks. Following this movement, investigations are underway against some public figures.

### **How is the #MeToo movement impacting the law in your jurisdiction?**

The "#BalanceTonPorc" movement has had a significant impact on social networks. Opinions are divided in France on this movement which both serves to free the voice of victims but also generates excesses and consequences that can be disastrous on alleged harassers. Social networks have been transformed into Courts, forgetting the principle of the presumption of innocence.

Of course, the movement conveys a message to harassers that victims are no longer afraid to speak out and this message can cause attitudes to sexual harassment to evolve.

Nowadays, sexual harassment has to be judged by the Court. Between 2002 and 2003, the parties had the possibility to do a mediation. This possibility has been removed with the Law n°2003-6 of January 3rd, 2003 as the legislator considered that sexual harassment is too serious and imposed the Court process.

The legislation on harassment has not fundamentally changed since the movement but has been reinforced and improved. The law n°2018-703 of August 3rd, 2018 has introduced new prohibitions of sexist violence, such as cyber harassment or upskirting, and has improved prevention.

Upskirting (defined as “the fact of using any means to perceive a person’s intimate body parts which such person, due to his/her clothing or presence in a private place, is hiding from view, where this is done without such person’s knowledge or consent”) can also occur in the workplace. This offence is punishable by one year’s imprisonment and a fine of 15,000 euros (art.226-3-1 of the Criminal Code).

Street harassment and more specifically sexist insults, defined as imposing on a person any comment or behavior with a sexual or sexist connotation that either violates his/her dignity because of its degrading or humiliating nature, or creates an intimidating, hostile or offensive situation against him/her is now prohibited by law.

Sexist insults constitute an offence punishable by a fine of 750 euros (art. 621-1 of the Criminal Code). The fine shall be 1,500 euros where the offence is committed by a person who abuses the authority conferred on him/her by his/her duties or against a minor under fifteen years old or against a person whose particular vulnerability, due to his/her age, disease, infirmity, physical or psychological disability or pregnancy, is apparent or known to the perpetrator for example.

Since the law came into force, 447<sup>7</sup> fines have been imposed, but the Government considers that considerable work remains to be done to address online harassment.

---

*For more information, contact Catherine Broussot-Morin at ILN member, Reinhart Marville Torre, [cbroussot-morin@rmt.fr](mailto:cbroussot-morin@rmt.fr).*

---

<sup>7</sup> Figures provided by the Government as at 30 April 2019.