

9 September 2021

THAILAND Newsletter

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Sexual Harassment in the Workplace – Can This be Ignored?

Introduction

Despite few reported cases, sexual harassment in the workplace has become an issue of increasing concern in all business sectors especially for businesses that require employees to work together out of the office. Many employers remain unclear about their legal obligations regarding sexual harassment in the workplace, and how to deal with cases of alleged sexual harassment. This briefing provides an overview of sexual harassment regulations in Thailand, and steps employers should consider taking in cases of alleged sexual harassment in the workplace.

What is sexual harassment in the workplace?

Most people are aware of the word “*sexual harassment*”. However, laws and regulations differ somewhat from most people’s understanding, especially in cases of sexual harassment that occur in the workplace. What constitutes sexual harassment can vary depending on the situation.

The Labor Protection Act

The main provision of the Labor Protection Act B.E. 2541 (“**LPA**”) that prohibits sexual harassment activities in the workplace is Section 16. This Section provides protection from harassment in vertical relationships where employers, chiefs of staff, supervisors, or inspectors are prohibited from sexually abusing, harassing or disturbing their employees. Due to the lack of definition of sexual abuse, harassment or disturbance, the court has broad discretion to determine whether or not particular conduct qualifies as sexual abuse, harassment or disturbance, on a case-by-case basis. As such, any form of conduct in whatsoever manner, whether physical, verbal, through body language or even sign language has the potential to fall under this Section 16 based on a court’s determination of the facts surrounding the claim. However, this Section 16 seems to create a loophole that may allow sexual abuse, harassment or disturbance among fellow employees. As such, it is advisable for the employers to ensure that their work regulations include measures to deter workplace

sexual harassment at all levels. Deterrence of workplace sexual harassment early on would help prevent it from escalating into sex crimes under the Penal Code.

The Office of the National Economic and Social Board Guidelines

In 2020, the Office of the National Economic and Social Board (ONESB) issued guidelines on preventive and corrective measures for sexual violence and sexual harassment in the workplace to raise awareness of such problems in Thailand. The guidelines provide clarity as to what are considered acts of sexual harassment from the authorities' perspective. The examples are as follows:

- **Visual harassment:** Staring at the body in a sexual manner, looking under a skirt, staring at breasts, or making a victim feel embarrassed or uncomfortable, or the surrounding people feel the same way.
- **Verbal harassment:** Criticizing shape and body sexually, forcing a victim to a private place without their consent and talking/joking about sex, or flirting with a victim and talking about sexual intercourse.
- **Physical harassment:** Touching the body of a victim, forcing a victim to sit on a lap, blowing a kiss, kissing and hugging a victim without consent, lip licking.
- **Other harassment:** Displaying sexual images, objects, or messages, including pornographic images in the workplace, texting sexual messages, sex images, and/or sex symbols via online platforms.
- **Quid pro quo:** Promises to provide benefits in exchange for sexual favours, for example, job promotions, scholarships, an increase of salary, renewal of contracts.

What needs to be done?

Given the ONESB's guidelines and expectations of employees, employers have a social responsibility to deter sexual harassment in the workplace. Such deterrence could be achieved through establishing policies in the form of enforceable work regulations, entailing that any form of sex discrimination is not permitted. Since 'prevention is better than cure', employers should take preventive measures as well as adopt the view that a victim does not have to actually be harassed but a victim could be anyone affected by the offensive conduct. Any such conduct must be unwelcome. When an incident of sexual harassment occurs, or is alleged to have occurred, it is advisable for the employer to take the following steps:

- **Initiate prompt investigations (Hear a rumor? Feel a hunch? Act immediately).** In most cases, sexual harassment would cause grief to the victim. Thus, the employer must ensure that their work regulations include grievance procedures specifically for sexual harassment cases. Timing is of the essence to initiate an effective investigation process to ensure that all relevant evidence is gathered without distortion, and feelings of a victim are protected. An investigation that begins at the very early stages of an alleged incident of sexual harassment can help the employer to identify and stop unwanted activities or behaviors. Prompt actions by the management will also send a message that the company takes such matters seriously and does not condone such misconduct.

- **Handle interviews with care.** The interview process can be done in-house or done by an outside firm with expertise in interviewing witnesses and evaluating the creditability of pieces of evidence. Most importantly, any interview and information gathered during such interview must be kept confidential, with limited individuals involved in the process. Investigations and investigators need to be aware of the sensitivity of not only the allegation itself, but those of victims or witnesses, and possess requisite experience in dealing with such matters. Following the principle of "both sides must be heard", the employer should also arrange for an interview session with the accused to see if they can justify their actions.
- **Suspension of the employment.** To ensure that a suspected harasser will not be able to interfere with the witnesses and evidence, the employer may need to keep the person away from the workplace. In order to be able to do so without violating the LPA, the employer must ensure that the work regulations clearly empower the employer to order a suspension of the employment of a particular employee pending an investigation, as provided for under Sections 116 and 117 of the LPA. With this empowerment, the employer may order a suspension of the person's employment for a period of not exceeding 7 days by giving the affected employee an advance notice thereof in writing.
- **Make a decision.** After conducting investigations and interviews, the management should determine any necessary disciplinary actions based on the findings. The LPA does not provide specific disciplinary actions for sexual harassment. Therefore, it is advisable for employers to clearly state in their work regulations a definition of sex discrimination or sexual harassment which shall be regarded as serious misconduct. Precedents set by certain judgments of the Supreme Court have determined that sexual harassment committed by superiors of an employee is viewed as a reasonable ground for terminating the employment contract with cause (without any severance pay). Management, in cases where findings of investigations uncover incidents of sexual harassment, should determine disciplinary actions that will consider all the parties involved, and enable normalcy to return to their respective workplaces.

What are the employers' liabilities?

An act of sexually abusing, harassing or disturbing their employees sexual harassment committed by employers, chiefs of staff, supervisors, or inspectors shall be punishable under the LPA with a fine not exceeding THB 20,000. If such act is also considered punishable under the Penal Code as a sexual offence, the punishment include fines, imprisonment or both. The LPA defines the term "employer" to include not only an individual or juristic person for whom an employee has agreed to work, but also any person assigned to act on behalf of the employer. This would include the authorized directors of a juristic employee, as well as any person appointed by the authorized directors to act on their behalf. This means, for example,

if an employee agreeing to work for a company is sexually harassed by his/her supervisor, the company as the employer may be subject to a fine of up to THB 20,000 while the harasser may be subject to disciplinary action as well as a punishment under the Penal Code if the harassment is considered a sexual assault.

Conclusion

Given the current movement of eliminating sex discrimination in the workplace throughout the world, it is expected that Thailand would soon promulgate more laws recognizing sexual harassment as discrimination based on 'sex'. In order to comply with the LPA and promote a workplace free of discrimination, employers, particularly their directors should take proactive actions in designing and implementing work regulations to address this very issue effectually. Without a workplace free of harassment and discrimination employers risk reputational damage as well as higher employee turnover.

If you would like to discuss any of the legal implication of the matters discussed above, please contact the authors listed in left-hand column.

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