

Tackling sexual harassment risks in the workplace: Part one

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This three-part series will focus on sexual harassment in the corporate setting and discuss the importance of corporate policies and measures against sexual harassment from a governance perspective. Part one of this series covers the legal framework and highlights lessons learned from recent cases. Parts two and three will discuss how to conduct effective corporate investigations and provide guidance on managing risks of workplace sexual harassment.

Read our series on workplace sexual harassment

Part one: Key legal elements and recent cases

Part two: [How to conduct effective investigations](#)

Part three: [Critical harassment prevention measures](#)

Following the evolution of #MeToo into a global movement, there has been a surge in accusations of sexual harassment in the workplace in recent years.

In Asia-Pacific too, #MeToo has gained greater prominence, with more complaints being made, a small number of high-profile public cases and non-governmental organizations emerging to focus on this issue and encourage better governance and protection of, and rights for, victims. Some jurisdictions already have significant law and regulation on harassment. Some governments, though, have recently been exploring whether it is appropriate to develop anti-harassment law further, not just limiting their review to sexual harassment but encompassing wider forms of harassment and discrimination.

In contrast, perhaps most notably to the U.S. in particular, to date, whether complaints of sexual harassment are resolved formally or informally, they tend to be dealt with privately and not in the public domain. A private resolution of a sexual harassment claim may be in the interests of both the complainant and the employer. However, these privately resolved cases do not trigger regulatory or judicial guidance to corporations regarding the expectations and liability standards on employers.

Part one of this series will provide an overview of what conduct potentially constitutes sexual harassment, the legal and regulatory landscape in Asia-Pacific, and the risks and potential consequences faced by employers and individuals where sexual harassment takes place in the workplace.

What is sexual harassment

First, we explain the relevant terminology, recognizing that there may be differences in scope in law and regulations between jurisdictions:

- **Sexual harassment** includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and transgender status.
- **Workplace sexual harassment** refers to unwelcome conduct that is either of a sexual nature or which is directed at an individual on account of that individual's sex, which has the purpose of, among other things, creating an intimidating, hostile or offensive work environment (even if the reporting individual is not the intended target of the sexual harassment). As elaborated further below, workplace sexual harassment can take place outside the physical workplace.

There are two main types of workplace sexual harassment:

- **Hostile environment sexual harassment** which may present itself in different ways but always creates an environment of intimidation and fear. It may feature hostile physical acts of a sexual nature (which may or may not be inappropriately intended), as well as sexually-oriented, non-physical conduct, such as bullying, yelling, name-calling, jokes, and comments about a person's sexuality or sexual experience. Conduct that is not directed at a specific individual, such as sexual or discriminatory displays or publications in the workplace, may also constitute hostile environment sexual harassment.
- **Quid pro quo sexual harassment** which occurs when a person in authority or who otherwise has the ability to grant or withhold job benefits, trades, or tries to trade, job benefits for sexual favors. This kind of harassment can include offering or granting better working conditions or opportunities in exchange for a sexual relationship, threatening adverse working conditions or denial of opportunities if a sexual relationship is refused, and using pressure, threats, or physical acts to force a sexual relationship.

Under what circumstances can workplace sexual harassment occur?

Sexual harassment can occur between individuals of the opposite sex or the same sex, as well as between employees and non-employees (such as contractors, vendors, unpaid interns, applicants for employment, clients, customers, visitors, and any third party in the workplace).

Despite its name, workplace sexual harassment is not limited to the physical workplace itself, but can occur whenever and wherever employees are fulfilling their work responsibilities. Examples include (but are not limited to):

- business travel;
- employer-sponsored events or parties; and
- phone calls, text messages, emails, or social media messages/posts, even if away from workplace premises, on personal devices, and/or during non-work hours.

With the COVID-19 pandemic transforming the world of work and blurring the lines between work and home, new forms of remote sexual harassment have arisen. This may include improper comments on an employee's appearance on camera; dressing inappropriately when participating in virtual conferences; the use of unprofessional virtual backgrounds and inappropriate emojis; recording video conversations without permission and posting the recordings on social media.

Overview of the anti-harassment laws and regulations in Asia

In most jurisdictions, sexual harassment could constitute a criminal offense. The #MeToo movement has also prompted legislative and enforcement responses from governments across the world. This section provides a high-level summary of the anti-harassment legal framework in Hong Kong, the People's Republic of China and Singapore.

Hong Kong

Discrimination and harassment in the workplace are governed in Hong Kong by various statutes, including the Family Status Discrimination Ordinance (Cap. 527), Race Discrimination Ordinance (Cap. 602), and Disability Discrimination Ordinance (Cap. 487).

Sexual harassment is prohibited by the Sex Discrimination Ordinance (Cap. 480) which applies to employers in Hong Kong and “workplace participants,” including interns and volunteers. The legislation covers both same-sex and opposite-sex harassment and addresses both direct harassment and indirect harassment (whereby a secondary victim who witnesses the unwelcome act is exposed to a hostile or intimidating environment). Under this Ordinance, employers can be held vicariously liable for the acts of their employees to the extent they are conducted “in the course of employment,” which includes off-hours work-related social events, unless the employer has taken reasonably practicable steps to prevent employees from engaging in acts prohibited by the Ordinance.

The Hong Kong Equal Opportunities Commission’s “Code of Practice on Employment” provides practical guidance to employers for eliminating harassment and discrimination.

PRC

In addition to the existing prohibition of sexual harassment against women in the Law on Protection of Rights and Interests of Women, as well as anti-discrimination provisions in the Labor Law and the Employment Promotion Law, Article 1010 of the new PRC Civil Code (which took effect on 1 January 2021) sets out the latest anti-harassment provisions. Points to note about Article 1010 include:

- individuals, including men, can bring a civil claim against a person who engages in sexual harassment towards her or him “in the form of verbal remarks, written language, images, physical behavior or otherwise” against her or his will;
- introduction of specific obligations on organizations to adopt reasonable measures to prevent sexual harassment and implement a system for receiving, investigating, and handling complaints; and
- while the legislation has yet to cover indirect sexual harassment, the new legislation suggests progress by defining the concept of “sexual harassment” for the first time, expanding the scope of potential victims to cover both women and men, and by imposing specific (although still quite general) obligations on employers to be proactive in preventing sexual harassment.

Earlier this year, the National People’s Congress deliberated on proposals to amend the Law on the Protection of Women’s Rights and Interests. The draft amendments seek to prohibit harassment against women involving words with sexual connotations or innuendo, inappropriate and unnecessary physical behavior, displays or dissemination of images, text, information, audio or video with obvious sexual significance, and acts implying benefits from initiating a sexual relationship. The proposals also seek to improve protection against discrimination on the basis of marriage status, pregnancy, maternity leave, and nursing.

Singapore

As with many jurisdictions, Singapore’s Constitution prohibits discrimination on the grounds of religion, race, descent or place of birth. The Constitution, however, does not specifically guarantee equality or non-discrimination based on other grounds, such as sex, family or disability status. Singapore’s criminal law penalizes rape, sexual assault, molestation, voyeurism, and indecent exposure.

The Protection from Harassment Act, which came into force in 2014, criminalizes harassment, stalking and other anti-social behavior. While the statute does not specifically define sexual harassment, it protects against the use of any threatening, abusive or insulting words or behavior, the making of similar communications, and “doxxing.” Doxxing is modern offence created in 2020 in Singapore to address the increasing trend of victims being harassed through publication of personally identifiable information, with the intent of harassing, threatening, or facilitating violence against the person.

Under the legislation, perpetrators could be subject to both criminal sanctions and civil remedies. While an employer cannot be held vicariously liable under the statute, an employer's failure to protect employees from sexual harassment or handle similar complaints may amount to a breach of express or implied contractual duties and internal policies, such as duties of mutual trust and confidence and to provide safe working conditions and protections.

Consequences faced by employers and individuals: Recent cases of sexual harassment

Sexual harassment presents an ongoing danger for employees, as well as employers. For employers, allegations of sexual harassment could:

- adversely and seriously affect a company's public image;
- expose a company to legal costs when defending lawsuits;
- increase the risk of losing high-performing employees and an inability to attract top talent, potentially exposing the company to business disruption;
- result in potential defections of clients and customers;
- negatively impact the company's stock price; and
- expose members of senior management to personal liability for internal control failures.

The following are several recent notable cases of workplace sexual harassment, highlighting the consequences and impact of sexual harassment on corporations and individual employees. These are global cases, not all occurring in Asia-Pacific, but the principles involved appear universal:

- Executives of a U.S. Company, "Company A," were accused of fostering a "frat boy culture" that encouraged inappropriate and discriminatory behavior towards female workers. The company faced both federal and state lawsuits from the U.S. Equal Employment Opportunity Commission and the state-level fair employment authority. The federal case was settled for tens of millions of U.S. dollars and the state lawsuit is ongoing. A securities class action was also filed against Company A and several of its directors based on allegations that Company A, as a public company, knew about and failed to disclose to its investors government investigations of sexual harassment allegations of employees. While the claim against Company A in the class action was dismissed, Company A suffered a significant public relations crisis.
- A female employee of a public company, "Company B," accused her then-supervisor of molestation and rape after being pressured to drink during a business trip. After the victim published her account of the incident online, public debate around sexual harassment was triggered and Company B faced public criticism for failing to properly handle employee complaints of sexual assault and fostering a culture where female employees felt obliged to drink on the job. The controversy led to Company B's pledge to set up an anti-sexual harassment policy and the dismissal of the supervisor. Two executives who failed to act on the allegations also resigned. After the criminal charges against the male supervisor were dropped by the authorities for lack of evidence of rape, Company B fired the female employee for spreading false information and "triggering strong social concern" that negatively impacted its reputation. The news of the complainant's firing raised further questions about the culture of sexual misconduct and retaliatory action, further damaging Company B's public image.
- A former female employee sued a professional service firm, "Company C," for failing to protect her from bullying and harassment by one of the firm's male managers after she ended a romantic relationship with him. She further alleged that Company C's investigation into the partner's conduct was designed to protect his reputation rather than to find the truth. The alleged misconduct included manipulative and abusive behavior inextricably linked to the male manager's seniority and authority, such as threats of dismissal. Company C denied that it owed a duty to stop the alleged harassment, given that the majority of the conduct in question took place away from work and in the context of a personal relationship between autonomous adults. Company C also claimed that its investigation had been conducted independently and fairly by another senior manager at the firm with the involvement of a member of its board. The case is pending trial.

Lessons for employers

As demonstrated by the cases highlighted above, the effects of workplace sexual harassment and associated litigation and publicity can present a clear danger to businesses and employee-wellbeing. The power of social media poses a

heightened risk of severe reputational damage for employers, which might in practice prove more debilitating than any legal liability.

In order to ensure that they are not fostering a workplace where sexual harassment can occur, companies should proactively develop robust and specific **policies and procedures**, covering (1) provisions on unacceptable behavior at work, (2) reporting and whistleblowing, (3) investigating and handling complaints and claims, (4) ensuring business partners and advisers, including legal advisers, commit to supporting the policies, and (5) appropriate disciplinary repercussions for breaches.

It is necessary, but not sufficient, to have robust, specific policies and procedures. Companies should provide comprehensive sexual harassment prevention **training** and develop an environment that does not tolerate sexual harassment.

It is critical that boards demonstrate strong leadership in this area, ensuring both that senior management drive down to the tone from the top and that they (the boards) respond appropriately when sensitive matters, including those related to sexual misconduct, arise.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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