

## Preventing Sexual Harassment in the Workplace: Statutory Protections for Women in India

### Introduction

The 2001 National Census estimated that women constitute 31.6 percent of the workforce in India. As women continue to enter the workforce in greater numbers, the number of incidents of sexual harassment in the workplace may also rise. Fortunately, women in India now have a statutory right to file complaints for sexual harassment in the workplace.

Recent legislation brings into force the Supreme Court of India's 1997 decision in *Vishaka and others v. State of Rajasthan*,<sup>1</sup> requiring that women be provided a safe workplace free from sexual harassment. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the "**Act**") received the President's assent on April 22, 2013 and is effective as of April 23, 2013.<sup>2</sup> The Act requires employers to create an environment which is free from sexual harassment and provides a complaint procedure for women who have suffered sexual harassment at the workplace. While this is a long-awaited development in India there are a number of differences between the Act and U.S. employment discrimination law as discussed below.

This newsletter briefly discusses the scope of the Act, its requirements for employers, the complaint process, and considerations for U.S. companies doing business in India.

### 1. Scope of the Act

The Act applies to all **women** in all workplaces. Section 2(f) defines an employee as a woman "employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name." Section 2(o) broadly defines workplace as including various industries such as educational, commercial, and health; employment in the home; and "any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey." The inclusive and rather broad nature of these definitions makes it possible for any woman who feels as though she has been the victim of unwelcome sexual harassment in any workplace to file a complaint.

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<sup>1</sup> JT 1997(7) SC 384.

<sup>2</sup> Ministry of Law & Justice, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 Published in the Gazette of India Extraordinary.

Interestingly, the *Vishaka* decision did not apply to women lawyers working in the courts. While a trial lawyer in India may perform the majority of her work in court facilities, she is not technically an employee of the court and as a result is unable to file a complaint for sexual harassment occurring in the courts. However, earlier this year the Supreme Court of India allowed a writ petition filed by two women advocates working in the High Court, upon the revelation that an employee was peeping into the women's toilet with his mobile phone. The Court then constituted a Committee to develop recommendations and guidelines in line with the Act which were submitted in July. The Supreme Court quickly accepted the Committee's findings and recommendations which included creating a Gender Sensitization and Internal Complaints Committee to hear complaints against sexual harassment to be headed by a sitting Supreme Court Judge.

The Supreme Court case above brings even more women under the protections provided by the Act and the *Vishaka* judgment. Although there may be additional women in workplaces which are not yet legally protected, managers should work to provide a safe workplace to all women as the Act envisions.

## 2. Requirements for Employers

The Act provides a rough outline of an employer's requirements to develop a complaint mechanism. Most importantly, Section 4 of the Act requires all workplaces employing ten or more workers to establish an Internal Complaints Committee ("**ICC**"). The ICC must consist of at least four members under the Chairpersonship of a senior woman employee and must also include two members from amongst the employees preferably committed to the cause of women or with experience in social work or legal knowledge and includes a third party member, preferably affiliated with a non-governmental organization. If a workplace has fewer than ten employees, complaints may be filed at local complaints committees to be developed at the district level. The Act does not outline a deadline for the creation of ICCs; however, employers should develop an ICC in each of their workplaces as soon as possible to avoid penalties for non-compliance, discussed in more detail below.

Employers are required to organize various programs for members of the ICC. Section 19 requires employers to organize an orientation, workshops and awareness programs for sensitizing employees to the harms of sexual harassment and to provide assistance to the complainant should she choose to file a police complaint. Further, employers are required to display at the workplace details of the penal consequences of indulging in acts of sexual harassment, the composition of the ICC, and the grievance redressal mechanism available to aggrieved employees.

Annual reports and records must be maintained and provided to governmental inspectors on request. An employer found in violation of the Act during an inspection may be liable for a monetary penalty of up to INR 50,000 and repeated offenses could result in the fine being doubled, de-registration or revocation of business licenses. The violations which may trigger an offense by an employer include failing to create an ICC under Section 4; failure to take action as required by the ICC under Sections 13 (proven allegations), 14 (malicious allegations) and 22 (annual reporting); and contravention or attempted contravention of any provision of the Act. Thus, an employer does not appear to be financially liable for the actual

misconduct of his or her employees, but may suffer financial consequences if he or she does not comply with the requirements generally outlined above.

Practically, it seems unlikely that inspections will be regularly performed at workplaces. As a result, penalties for employers will probably be uncommon. However, it may be possible for women to bring complaints against employers for not fully complying with the Act which could then initiate an investigation.

### 3. The Complaint Process

Assuming an ICC has been established in a workplace, a woman alleging sexual harassment must act quickly to preserve her complaint. As detailed below, the ICC must then investigate and provide recommendations for the employer.

Section 9 requires that a complaint of sexual harassment be filed within three months of the date of the incident. This may be extended for another three months if the woman can prove that grave circumstances prevented her from filing at an earlier time although “grave” is not defined within the Act. The ICC is required to complete the inquiry within 90 days of receipt of a complaint. While the complaint investigation is ongoing, upon written request of the complainant, the woman may be transferred to another workplace or granted leave for a period of up to three months. On completion of the inquiry, a report will be sent to the employer or the District Officer (for workplaces with fewer than 10 employees) who is then obligated to take action on the report within 60 days. Employers are required to ensure timely submission of reports to the District Officer.

If a complaint has been found “proved,” the ICC can then recommend action which may include suspension, termination, mediation, or other appropriate actions as the ICC sees fit. It remains unclear from the text of the Act what will constitute sufficient proof. In the U.S., under *Meritor Savings Bank, FSB v. Vinson*,<sup>3</sup> in addition to proving the underlying offense a complainant must also provide evidence that the conduct was unwelcome. The requirement that conduct be “unwelcome” is also found in Section 2(n) of the Act, although the amount of proof or type required is undefined. While the definition of sexual harassment is quite broad the Act also considers unspecified penalties for women who are found to have filed malicious and meritless complaints which may deter women from filing legitimate complaints.

Section 15 provides various factors to be considered if compensation for the aggrieved woman is deemed appropriate by the ICC which include the level of mental trauma, pain, suffering, emotional distress, medical expenses incurred, financial status of the respondent, loss in career opportunity due to the incident, and the feasibility of such payment in lump sum or in installments. As a result, the accused person faces a potentially significant financial loss if found liable by the ICC. The Act provides that deductions may be made from the respondent’s salary or wages. This provision lacks specificity as to how much each factor will be taken into account and under what circumstances. If a complaint is not proven, the ICC can instruct the employer or appropriate District Officer that no further action is required.

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<sup>3</sup> 477 U.S. 57 (1996).

The timelines in place for this process seem rather ambitious and it will be some time before we know if they are actually reasonable. It may be particularly difficult for an ICC to provide recommendations when a parallel criminal investigation is ongoing as the criminal investigation will assumedly take precedent over the ICC's inquiry.

#### 4. Considerations for U.S. Companies

Because the Act construes sexual harassment as only affecting women U.S. companies may find that their sexual harassment policies are overly inclusive when applied to an Indian subsidiary. U.S. Supreme Court precedents allow complaints of sexual harassment to be filed by men, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,<sup>4</sup> and in the case of same-sex sexual harassment, *Oncale v. Sundowner Offshore Services, Inc.*<sup>5</sup> While the rights of all people are protected by Article 14 of the Indian Constitution, men are not currently guaranteed a workplace free from sexual harassment under the law.<sup>6</sup> Furthermore, it is unclear as to whether same-sex sexual harassment, i.e., the harassment of a woman by a woman, would be a cognizable cause of action under the Act. U.S. companies may desire to create a global policy of non-tolerance for sexual harassment which encompasses all employees regardless of gender in line with national law.

Under U.S. law, it is best to very clearly articulate a company-wide sexual harassment policy to avoid vicarious liability for employee conduct. In *Farragher v. City of Boca Raton*,<sup>7</sup> the Supreme Court found an employer vicariously liable for the actions of a supervisor where the employer failed to exercise reasonable care to prevent harassing behavior. It appears unlikely that an employer in India would be held vicariously liable for the actions of an employee except in circumstances, likely to be uncommon, in which the employer was found to be aiding the perpetrator in sexually harassing a female employee. Although the Act provides less financial risk for employers a U.S. company should maintain a clear, zero-tolerance policy for sexual harassment applicable to all employees in line with U.S. law which, although over-inclusive for purposes of complying with the laws of India, will minimize any potential liability.

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<sup>4</sup> 462 U.S. 669 (1983).

<sup>5</sup> 523 U.S. 75 (1998).

<sup>6</sup> Article 14 states: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

<sup>7</sup> 524 U.S. 775 (1998).