

CHINA MATTERS

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Employers in Mainland China May Be Liable for Failure to "Prevent and Prohibit" Sexual Harassment

On August 28, 2005, the Standing Committee of the National People's Congress ("SCNPC") amended the Law for the Protection of Women's Rights and Interests ("Women's Protection Law") of the People's Republic of China ("Mainland China" or "PRC") to prohibit sexual harassment against women. Although the national legislation did not explicitly impose an obligation on the employer to protect women from sexual harassment, Shanghai, as well as many provinces such as Jiangxi, Hunan, Shaanxi, Xinjiang and Heilongjiang subsequently enacted local implementing rules to impose such an obligation on employers.¹ Under the local rules, an employer may be held liable if it fails to take actions to prevent and prohibit sexual harassment in the workplace.

History of China's Anti-Sexual Harassment Laws and Enforcement

Unlike many western countries that outlawed sexual harassment starting in the 1980s, PRC law did not explicitly prohibit sexual harassment until 2005. Before the new law's enactment, the victims of sexual harassment could only make a claim against the alleged wrongdoers based on the General Principals of the Civil Code, which vaguely state that no one should infringe upon another's reputation or personal dignity by insulting or labeling them.² In cases of injury to an individual's body or personal dignity, a plaintiff could claim damages for emotional distress.³

Prior to the 2005 amendment of the Women's Protection Law, there reportedly were only about ten sexual harassment lawsuits brought against the alleged wrongdoers. Only one victim prevailed, and the court awarded her about US\$210 in emotional

distress damages against the harasser.⁴ Indeed, as of early 2007, there are no reported lawsuits in Mainland China against employers for failure to take action against sexual harassment.

Obligation of the Employer

Some of the local implementing rules place affirmative obligations on the employer to "prevent and prohibit" sexual harassment. For example, the Shanghai Implementing Rules on the Women's Protection Law place an affirmative obligation on employers to "prevent and prohibit any sexual harassment of women in the form of language, words, images, electronic information or bodily actions."⁵ The Shaanxi Implementing Measures state that the employer shall take measures to prevent sexual harassment in the workplace.⁶ The Hunan Implementing Measures provide that the employer shall take measures to "prevent and prohibit" sexual harassment in the workplace.⁷

Other locations have similar wording. The Shanghai Implementing Measures provide that the employer shall take "necessary measures" to prevent and prohibit sexual harassment.⁸ The Jiangxi Implementing Measures provide that the employer shall take "effective measures" to prevent and prohibit sexual harassment.⁹ Shanxi Implementing Measures (draft) require the employer to "establish a system to prevent sexual harassment," and to take "effective measures" to handle properly the sexual harassment cases that have already taken place.¹⁰ None of the implementing measures, however, define or provide guidance as to what constitutes "necessary" or "effective" measures.

Remedies and Damages

Under the amended Women's Protection Law, and the Shanghai, Shaanxi, Xinjiang and Heilongjiang Implementing Measures, victims may file a complaint with the employer or relevant authorities.¹¹ If the victim files a complaint with the employer, the Xinjiang Implementing Measures provide that the employer "shall handle" the complaint.¹² The Heilongjiang Implementing Measures require the employer to "immediately handle" the complaint.¹³ Although the measures do not identify what constitutes "handling" a complaint, it presumably means that the employer should investigate the allegations and take appropriate measures to remedy the situation, consistent with its duty to prevent and prohibit such harassment.

Under the PRC Labor Law¹⁴ and Women's Protection Law, if the employer fails to take effective measures to prevent or prohibit sexual harassment, the relevant labor or other department may impose a fine or demand that the employer correct the situation. If the case is serious, the department may submit an application to the government at or above the county level for an order to suspend the employee's operations until the matter is rectified. If any property loss or any other damage occurs, the employer shall be civilly liable. If the employer's actions or omissions constitute a crime, criminal penalties also may apply.¹⁵ Sichuan's draft implementing rules would impose direct liability on the employer for any "damage" caused to a woman resulting from sexual harassment in the workplace.¹⁶

Clarification of Sexual Harassment

While the Women's Protection Law prohibits sexual harassment in general, it neglects to clarify what constitutes "sexual harassment." Consequently, some provinces have amended their local implementing rules to clarify what constitutes sexual harassment.

For example, the Jiangxi Implementing Measures provide that "there should be no harassment against women in any manner of language, words, pictures, electronic information or body action."¹⁷ The Heilongjiang Implementing Measures and Shanghai Implementing Measures contain a similar provision.¹⁸

The Hunan Implementing Measures add the concept of "pornographic content" as a form of sexual harassment: "There should be no harassment against

women in any manner of actions, language, words, pictures, or electronic information containing pornographic content in violation of law and ethics."¹⁹ Although the implementing measures do not define what constitutes "pornographic content," some commentators have suggested that sending obscene messages by email or cell phone, or uttering indecent jokes may constitute sexual harassment.

The Anhui Implementing Measures (draft) further add the concept of "unwelcome conduct" in the definition of sexual harassment. The draft measures state that "there should be no intentional harassment that constitutes unwelcome conduct against women in any manner of actions, language, words, pictures, or electronic information that contains sexual content."²⁰

Recommendations

With the introduction of the new national law and the trend for provinces and municipalities to implement more specific regulations on the topic, the number of complaints and claims of sexual harassment may increase. To reduce the chance of being subject to sexual harassment lawsuits, employers should take effective measures to prevent and prohibit sexual harassment in the workplace. Employers should, for example, (a) review and update their policies and procedures to prohibit sexual harassment explicitly and to provide for termination of an offending employee;²¹ (b) identify a single point of contact for employees to bring a complaint or concern about improper activities in the workplace; (c) create a reporting mechanism so that complaints can be handled promptly, and to the extent possible, confidentially; (d) provide training to management staff as to what does and does not constitute unacceptable behavior; and (e) publicize to the workforce the company's rules against sexual harassment, the procedures for bringing forward any concerns, and the person to whom to bring those concerns.

PRC law does not clearly define what constitutes "measures," "necessary measures," or "effective measures," and none of the laws or local rules in effect to date provide for specific penalties against an employer that fails to take measures to prevent sexual harassment against women in the workplace. Nonetheless, taking affirmative actions to prevent and prohibit sexual harassment from occurring in the workplace should reduce the risk of such conduct and any ensuing liability for the employer.

Notes:

1 Shanxi, Anhui and Sichuan have prepared draft implementing rules.

2 See General Principles of the Civil Code of the People's Republic of China, effective Jan. 1, 1987, art. 101.

3 See Supreme People's Court, Judicial Interpretations on Several Issues: the Determination of Compensation Liabilities for Emotional Distress, Feb. 26, 2001.

4 See Victim Won First Trial of "Sexual Harassment" case in Wuhan, China Woman News, June 11, 2003, available at <http://www.china-woman.com>.

5 Shanghai Implementing Measures, effective May 11, 2007, art. 32.

6 See Shaanxi Implementing Measures, effective Jan. 1, 2007, art. 33.

7 See Hunan Implementing Measures, effective Oct. 1, 2006, art. 30.

8 See Shanghai Implementing Measures, art. 31.

9 See Jiangxi Implementing Measures, effective Dec. 1, 2006, art. 36.

10 See Major Influences of the Shanxi Legislation Regarding Women's Protection on the Definition of Sexual Harassment, Shanxi News, Sept. 27, 2006, available at <http://www.sx.chinanews.com.cn/2006-09-27/1/37249.html>.

11 See Women's Protection Law, art. 40; Shanghai Implementing Measures, art. 46; Shaanxi Implementing Measures, art. 33; Xinjiang Implementing Measures, effective July 1, 2006, art. 30; Heilongjiang Implementing Measures, effective Jan. 1, 2007, art. 32.

12 See Xinjiang Implementing Measures, art. 30.

13 See Heilongjiang Implementing Measures, art. 32.

14 Labor Law of the People's Republic of China, effective Jan. 1, 1995 ("PRC Labor Law").

15 See PRC Labor Law, art. 92; Women's Protection Law, art. 56.

16 See Sichuan Implementing Measures (draft), art. 46.

17 See Jiangxi Implementing Measures, art. 36.

18 See Heilongjiang Implementing Measures, art. 32; Shanghai Implementing Measures, art. 31.

19 See Hunan Implementing Measures, art. 30.

20 See Application for Approval of Anhui Implementing Measures, Dec. 27, 2006, available at http://www.fengyang.gov.cn/xwzx/news_view.php?id=2906&ty=2.

21 Under the PRC Labor Law, an employee can be summarily dismissed for acting in serious breach of the company's policies and procedures if those policies and procedures are clearly communicated to the employees in writing.

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