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Mexico Develops Steps to Take Seriously Sexual Harassment in the Workplace

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On September 6, 2012, the Mexican Federal Supreme Court promulgated internal rules that explicitly prohibit harassment in the workplace and establish guidelines for investigating and punishing such conduct. On another front, and in what represents a significant step towards reform in this area, on September 1, 2012, President Felipe Calderon proposed an amendment to Articles 47 and 51 of the Mexican Federal Labor Law (FLL) to include sexual harassment as grounds for termination with cause. Although the Supreme Court rules are only applicable to its employees, they are considered a guidepost to employers on how to prevent and eliminate sexual harassment and bullying in the workplace, and signal a shift in how the legislature will likely reform the FLL to regulate these behaviors in the workplace in Mexico.

Supreme Court's Definition of Harassment in the Workplace

The Supreme Court rules, published in Administrative Notice III/2012 on the Mexican Daily Official Gazette on July 3, 2012, define workplace harassment as conduct or behavior occurring on one or several instances in the workplace, regardless of the hierarchical relationship between the parties involved, that affect an employee's self-esteem, health, integrity, freedom or safety. The Supreme Court rules prohibit workplace harassment and sexual harassment, providing that such conduct violates the duties of public servants under the Federal Administrative Responsibilities of Public Servers Act because it implies the abuse or improper use of a person's position, rank or authority. Further, the rules provide that such conduct represents a lack of respect and integrity, violates several legal provisions, regulations and administrative norms, and
in no way follow the principles of legality, honor, loyalty, impartiality and efficiency that govern public servants.

The rules define workplace harassment as conduct that includes evident, subtle or discreet provocation, pressure, intimidation, exclusion, isolation, mocking, or verbal or physical attacks that cause humiliation, frustration, offense, fear, discomfort or stress to the person being harassed or witnessing harassment of others, which interferes with work performance or causes a negative workplace environment. Further, sexual harassment is defined as conduct or behavior of a sexual nature occurring on one or several instances that affect an individual's self-esteem, health, integrity, freedom and safety, and includes unwanted physical contact, sexual insinuations or observations, unwanted exhibition of pornography or verbal or tangible sexual demands.

**Supreme Court's Internal Mandate for Investigating and Eliminating Harassment in the Workplace**

Among the Supreme Court's mandates and guidelines for investigating and eliminating workplace harassment and sexual harassment in the workplace, the Court's Human Rights Administration (Administration) must elaborate a best practices manual within 60 days of the publication of the rules, setting forth how to investigate and punish prohibited conduct once a complaint or grievance has been filed. Further, the Supreme Court charges the Comptroller of the Mexican Federal Supreme Court with the responsibility of receiving declarations of the victim, witnesses, and alleged harasser.

The first step in the investigation is to determine whether the complained-of conduct is workplace harassment or sexual harassment. Investigators will examine where the conduct occurred and whether it was consensual. When evaluating complaints the Administration will apply the "reasonable person standard" to determine whether the victim was subjected to conduct that caused intimidation, exclusion, offense, pressure, humiliation, fear or sexual insecurity. Further, the Administration will determine whether a reasonable person would consider such conduct to be sufficiently abusive or dominant to alter the conditions of his or her employment and create an oppressive workplace environment. Other factors for consideration will be the alleged harasser's true intentions, and the formal or informal relationship of power between the parties.

During the investigation, the parties may seek to clarify the allegations or conciliate the dispute to reach a healthy coexistence, as long as the alleged victim has consented to this alternative method of resolution and the alleged conduct is not severe. Once the investigation has concluded, the Administration will evaluate whether the complained-of conduct can be classified as severe and whether the corresponding corrective action is consistent with the magnitude of
the conduct and its effects. Notably, protective measures in favor of the victim may be taken during the investigation, such as a transfer, schedule changes or other employment actions that would guarantee the victim's continued integrity and well-being.

President Calderon's Proposed Bill on Sexual Harassment in the Workplace

Unlike the Supreme Court's rules, President Calderon's proposed bill would apply to all private employers. Specifically, the bill proposes a "preferential" amendment to the FLL to make sexual harassment in the workplace a valid reason to terminate an employee (Article 47). Moreover, the amendment provides that an employee will have a claim for constructive discharge if an employer, its representatives, or relatives subjected the individual to sexual harassment or engaged in conduct that undermined or attacked the employee's dignity (Article 51).

The proposed bill is currently pending before the House of Representatives and may be signed into law within 30 days.

Considerations for Employers with Business Activities in Mexico

The proposed bill would be the first substantial amendment to Mexico's Federal Labor Law since 1970. Given the imperative need to address the contemporaneous necessities of the workplace, the Supreme Court's internal rules regulating bullying and harassment in the workplace and the President's proposed bill appear to indicate that Mexico's government is gearing up to reform laws governing the employer-employee relationship.

In light of this trend, employers should assess their existing policies, procedures and forms used for internal investigations to determine whether they provide appropriate tools for preventing harassment and/or bullying in the workplace and handling corresponding grievances. They should also consider training employees charged with conducting internal investigations on maintaining confidentiality of investigations, e.g., not disclosing witness statements, and what remedial measures to take when such conduct has occurred. Implementing such measures will not only promote a healthy workplace environment and increase the company's productivity, but also might shield the business from potential risks and liabilities.

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