

# Legal News

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Dear clients and business friends

For cases of sexual harassment at the work-place, the employer can be held jointly responsible under certain circumstances. The affected employee can not only turn against the person responsible for the harassment but against the employer too. Even though the compensation to which employers are condemned in practice is usually not very high, conflicts associated with sexual harassment can become «expensive» for companies. In fact, their effects can be significant, particularly due to absences from work, decreased productivity, a deterioration of the quality of work, the working climate and demotivation of the staff. To make matters worse, the image of the company can also be damaged. However, the Equality Act (GIG) of 24 March 1995, which took effect on 1 July 1996, foresees a possibility for the employer to release itself from culpability if it can prove that all reasonable measures have been undertaken to prevent cases of sexual harassment or to put an end to them. Companies should therefore have an interest in issuing internal regulations, coaching their managers and initiating a mediation process which regulates the handling of any conflicts that might arise. The GIG is unequivocal: Companies which have undertaken suitable measures are released from the obligation to pay compensation to members of staff who are victims of sexual harassment.

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## Sexual harassment: Companies can be held culpable too

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### 1. The expression «sexual harassment»

In very general terms, the employer has a duty to protect the physical and psychological integrity of the employees (Art. 328 OR (Code of Obligations) and Art. 28 ZGB (Civil Code)). However, only Art. 4 GIG has explicitly introduced the expression «sexual harassment». Sexual harassment means a pestering behaviour of a sexual nature which infringes the dignity of employees at their place of work. This includes, in particular, threats, the promise of benefits, the use of force or the application of pressure to achieve favours of a sexual nature. Although those examples only relate to misuses of authority, the definition also covers other acts which infringe dignity and negatively influence the working climate, such as rude comments or improper jokes.

In the practice of the courts, it has been decided that the fact of an affected employee using rough expressions herself does not justify the toleration of sexist, rough or other rude comments, particularly on the part of a manager whose behaviour can rub off on those who work for him.

### 2. Obligation of the employer to intervene

The employer is not only obliged to refrain from any direct infringements of personal rights but also has the *additional obligation to do everything necessary in order to ensure that the employees are not subjected to any infringements of their personal sphere*. If the employer becomes aware of a case of sexual

harassment, he or she *must intervene in order to put a stop to such violations*. If this is not done, the employee can demand from the court that particularly the discrimination is removed or that its existence be determined if the harassment does not stop. In addition, the relevant employee can demand payment of compensation.

### 3. Responsibility of the employer

The GIG only regulates *the responsibility of the employer* but not that of the person who is guilty of harassment. The latter can be obliged to compensate the victim for the unjustness as per Art. 41 et seq. OR. Art. 5 Para. 3 GIG additionally allows the judge to oblige the employer to pay compensation to the relevant employee, regardless of the damage that is done.

The compensation is determined after taking into consideration all the circumstances and is calculated on the basis of the Swiss average salary (Art. 5, Para. 3 GIG). The compensation may not exceed the total of six monthly salaries (Art. 5, Para. 4 GIG). To the extent that the GIG is a special law in relationship to the stipulations of the Code of Obligations, and to the extent that compensation is foreseen by both laws, the relevant employee can only claim one single compensation for the same harassment.

The employer can however have itself released by proving that all measures have been introduced to prevent or put an end to sexual harassment that are regarded as necessary and appropriate according to experi-

ence and which could reasonably be expected of the employer. This therefore anchors in law a reversal of the burden of proof. In order for this responsibility to be given, it must be possible to accuse the employer of having to have known the situation, whereby this knowledge can arise from the circumstances. All the same, the affected employee must make the employer aware of the situation which is being complained about if the person believes that the employer is ignoring it. If the employer proves that he or she has fulfilled the obligation of due care, he or she cannot be condemned to pay any compensation (Art. 5, Para. 3 GIG).

Legal practice has determined that for the purposes of fulfilling the requirements made of the employer, it is insufficient to mention the subject as a half-hearted comment at a management meeting without making the other employees aware of the result of the discussion as well as the civil and criminal legal consequences of such acts.

As soon as the employer becomes aware of a case of sexual harassment, he or she must undertake appropriate measures to put an end to it. Measures which have been particularly regarded as inappropriate include:

(i) the announcement that an investigation has been delegated to the directors, even though the directors themselves are being accused;

(ii) a discussion between the human resources manager and the accused party, even though the human resources manager had already received complaints from three other employees about the same person in the course of two years.

#### 4. Revenge dismissal

The dismissal of an employee filing a complaint is relatively frequent because companies prefer to solve the problem in this way. This applies all the more because the affected employees are often lower in the hierarchy than the person against whom the complaint is aimed. The GIG therefore foresees *protection against revenge dis-*

*missals* throughout the period of a company-internal complaint process, an adjudication or court process and for six months thereafter (Art. 10 GIG).

#### 5. Mobbing

Based on Art. 328 OR, companies can also be held culpable in cases of mobbing. Mobbing is defined as systematic and hostile acts by one or more persons which continue for an extended period of time and are aimed at a third person. Here again, the company can release itself from responsibility if it proves that suitable measures have been introduced. If this is not the case, the same sanctions exist as in cases of sexual harassment.

#### 6. Conclusion

The handling of cases of sexual harassment within a company is usually very complex. The GIG is unequivocal in this regard: *Companies which have introduced appropriate measures do not have to pay any compensation to the affected employees.* In our experience, and with the aim of acting proactively, we recommend: (i) the issuance of a set of internal regulations; (ii) the training of members of management in the handling of cases of sexual harassment and (iii) provision for a preferably external mediation process (for reasons of confidentiality and independence). Employees – particularly members of management – are usually very positive about initiatives of this kind. In addition, they serve to strengthen and positively influence the image of the company on the employment market. ■

**Note:**

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