

New law on the protection against moral harassment : what employers need to know

A new law has been passed on 9 March 2023, introducing a chapter in the Labour Code related to the fight against moral harassment in the context of the work relationship. Articles L. 246-1 to L. 246-7 of the Labour Code add another layer to the protection of employees against moral harassment, on top of the interprofessional convention dated 25 June 2009 related to moral harassment and violence at work (the "Convention"), and more specifically:

- An extended scope of application
- Increased obligations for employers on prevention and protection of employees
- An enhanced role for the staff delegation, or for the employees themselves
- A specific procedure in front of the Labour and Mines Inspectorate (ITM)
- Remedies for the victim of moral harassment
- Criminal sanctions (fines) in case of non-compliance with the legal obligations.

❖ Extended scope of application

Moral harassment is defined broadly as any behaviour which, through its repetition, or its systematization, affects a person's dignity or his/her psychological or physical integrity. Such behaviours are those taking place on the occasion of the work relationship, which includes business trips, professional training and any communications related or due to work, by any means and at any time, even outside normal working hours.

The prohibition of moral harassment is extended to clients and suppliers of the company.

❖ Increased obligations in relation with the prevention and protection against moral harassment

At first, the new law expressly obliges the employer to put an immediate end to any situation of moral harassment that has been brought to its attention.

Whereas the Convention already requires companies to implement preventive measures with a view to protect employees against moral harassment, the types of measures were rather indicative. The new law now provides for a minimum set of measures, to be adapted depending on the nature of the activities and the size of the company. Such mandatory measures include mainly:

- The definition of the means available for the victims, including welcome, help and support, measures for the return to work, assistance of the staff delegation, etc.
- Awareness-raising initiatives for employees and managers about the definition of moral harassment, the management of claims within the company and the sanctions against the perpetrators
- Information of the staff delegation on the employer's prevention obligations
- Information and training of employees
- The quick and impartial investigation of facts.

On the latter point, the Convention already requires companies to implement an internal procedure to deal with harassment claims. It is however even more crucial now to have a robust process in place to manage and investigate claims, considering the new powers of ITM in this matter (see below).

The employer will also have to assess the effectiveness of the preventive measures after a case occurred.

❖ Enhanced role for the staff delegation, or for the employees themselves

The staff delegation shall be actively involved, through prior consultation, in the design of the prevention policy. For the first time, the law provides that where no staff delegation is in place, the employees themselves shall be consulted (and not merely informed, as is normally the case).

The staff delegation is further entrusted with a specific role to look after the protection of employees against harassment and may in this respect propose any preventive action if deemed necessary. Staff delegates are entitled to assist and advise employees who consider themselves victims of harassment. However, they must respect confidentiality, unless the employee agrees to the disclosure.

❖ Specific procedure in front of the Labour and Mines Inspectorate (ITM)

Pursuant to the new law, employees who consider that moral harassment persists after the implementation of the protection measures, or that the employer has not taken adequate measures to protect them, may seize the ITM. This right also belongs to the staff delegation, with the agreement of the employee concerned.

ITM shall enquire the facts by analysing the file and hearing the various stakeholders. It shall then draw up a report with recommendations and proposed measures, and shall communicate it to the employer at the latest 45 days after its seizure. Should ITM conclude that moral harassment exists, it shall enjoin the employer to take the necessary measures to ensure that harassment ceases immediately. Non-compliance with the injunction allows ITM to impose an administrative fine amounting to between EUR 25 and EUR 25,000.

❖ Remedies for the victim

In the absence of any other legal remedies so far, labour courts had determined that employees who were victim of moral harassment and were facing inaction of their employer to protect them could terminate their employment contract for gross misconduct and claim for damages. Alternatively, they could file a claim based on the general civil liability rules, also allowing them to get damages for the compensation of their prejudice.

The new law now expressly provides for remedies, which are aligned with those available in case of sexual harassment, i.e.:

- A clear non-retaliation principle, and the right to claim for the nullity of any decision, which would have been taken as retaliation for having opposed to or witnessed acts of moral harassment;
- The right to terminate the employment contract for gross misconduct and to be awarded damages.
- The right to claim for unfair dismissal, with specific damages being awarded for the prejudice suffered as a result of moral harassment (on top of the damages for unfair dismissal).

The law has however not relieved the (alleged) victim from the burden of proof, as it remains their responsibility to provide evidence of the acts of moral harassment.

❖ Criminal sanctions in case of non-compliance with the legal obligations

Beside the administrative fine which may be imposed by the ITM for failure to comply with its injunction, the employer who would not be compliant with the legal obligations related to the protection against moral harassment may be sentenced to criminal fines, from EUR 251 to EUR 2,500 (or up to EUR 5,000 in case of repeated offence).

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To ensure compliance with the new law, companies should consider the following actions:

- Revise their prevention and protection programme to assess whether it embeds the minimum set of measures required by the law.
- Revise their current policy on harassment at the workplace to ensure it complies with the new legal requirements (definition, scope of application, non-retaliation principle, available remedies, ...). Special attention should be given to the process in place to receive and investigate the claims and the related internal governance. Companies should ensure that such process is adequate and complete, preserving the impartiality and confidentiality of the investigation, carried out by persons having the right competences to assess the fact, and providing for a timely response.
- Consider implementing information and (refresh) training sessions to raise awareness on moral harassment (and how to differentiate it from other situations), explain the internal process, inform remedies and possible sanctions for harassers, etc.

We are at your disposal for any information and assistance in this respect.