

“Employer’s Duty to Implement Measures to Prevent Workplace Power Harassment”

While workstyles have been changing in Japan due to COVID-19, the Labor Policy Comprehensive Promotion Act (Act No.132 of 1966 amended by Act No. 24 of 2019) (the “**Act**”) became effective on June 1, 2020, and the Act requires companies to implement measures to prevent workplace power harassment. Although the Act only applies to large companies at this juncture, it will apply to small-to-mid-sized enterprises¹ from April 1, 2022, and therefore, SMEs will also be expected to implement these measures as soon as practically possible.

Under the current circumstances affected by COVID-19, many companies have implemented a “remote work” or “work-at-home” system. While some may think that not working at the office would result in less harassment cases, unfortunately, harassment continues and has just taken a different form. The term “Remote Harassment” has been increasingly used in the media, and this type of harassment is divided into two types: 1) sexual harassment – where a boss asks his subordinate to show him her room; or 2) power harassment – where a boss conducts excessive micromanagement or requests excessive online meetings.

In this newsletter, we would like to focus on the regulations with respect to workplace power harassment.

1. What is “Workplace Power Harassment”?

Article 30-2.1 of the Act requires employers to take necessary measures for employment management, such as the development of systems to respond to a request for consultation from an employee and to deal with such consultation in an appropriate manner to ensure that the working environment of the employee is not harmed.

On January 15, 2020, the Ministry of Health, Labour and Welfare published the “Guidelines Concerning Measures to be Taken by Employers in terms of Employment Management with Regard to Problems

¹ SMEs mean business operators other than the national government, local governments, and administrative agencies with capital or contributions of not more than JPY 300 million (JPY 50 million for business operators whose main business is retailing or service, and JPY 100 million for business operators whose main business is wholesale), and employing not more than 300 employees on a full-time basis (50 for employers whose principal business is retail or service, and 100 for employers whose principal business is wholesale) (see Article 4 of the supplementary provision of the Act).

Caused by Taking Advantage of Their Superior Position in the Workplace” (“Guidelines”) based on Article 30-2.3 of the Act.

According to the Act and Guidelines, workplace power harassment means words or acts which satisfy the following three requirements:

1. Which are said or done by taking advantage of the superior relationship in the workplace;
2. Which go beyond the necessary and reasonable scope of work; and
3. Which harms the working environment of the employee.

With regard to the first requirement, in general, workplace power harassment is conducted by a superior against his/her subordinate, but it can be done between colleagues or a subordinate against his/her superior if such colleague or subordinate has the necessary business knowledge or experience and it is practically difficult to work smoothly without his/her cooperation.

For the second requirement, as mentioned, workplace power harassment requires words or behavior which must go beyond the necessary and reasonable scope of the work. Also, business instructions or training in an appropriate manner which is within the scope of necessary and reasonable work would not constitute workplace power harassment. In determining the reasonableness of the conduct, various factors are comprehensively taken into consideration, including the purpose of the speech or conduct, the circumstances in which the speech or conduct was said or done, including the existence, content and degree of problematic behavior of the employee, frequency and continuity of the speech or conduct, the relationship between the employee and the harasser, and the degree of physical or mental distress suffered by the employee as a result of the speech or conduct.

The third requirement of an act which “harms the working environment of the employee” requires that the employee’s working environment becomes so unpleasant that the harassing speech or conduct causes the employee physical or mental distress that has a serious and adverse effect on his/her work performance. This requirement will be determined based on a reasonable employee’s perception of an act of harassment.

2. Types of Workplace Power Harassment

The Guidelines states the following six (6) types of speech or conduct as a typical act of workplace power harassment.

- a. Physical assault,
- b. Mental assault,
- c. Isolation,
- d. Excessive demands – i.e., to order unnecessary or impossible work,
- e. Requesting menial tasks – i.e., ordering an employee to perform menial tasks which are far below the employee’s ability or experience, and
- f. Breach of privacy – i.e., excessively inquiring into the private affairs of the employee.

The Guidelines also specifically identified that disclosing an employee’s sexual orientation or gender identity without his/her consent) is an example of a breach of privacy which would constitute workplace power harassment. In order to protect employee’s personal information, an employer

must take measures to notify their employees that they should not reveal their colleagues' sensitive personal information.

3. Employer's Measures to Prevent Workplace Power Harassment

The Act requires large company employers to implement the following measures. As mentioned above, from April 1, 2022, SMEs will also be required to implement these measures.

- (a) Establish a corporate policy to prevent workplace power harassment and to internally announce such policy and train employees on power harassment prevention.

An employer is required to establish a corporate policy regarding the types of speech and behavior that would constitute workplace power harassment and announce such policy to their employees. An employer must also state the contents of the power harassment in its company work rules or other internal rules and have their employees understand the background and cause of workplace power harassment. An employer is also expected to conduct training or seminars for its employees to prevent power harassment.

Further, an employer needs to establish a policy on the disciplinary actions against an employee who has conducted power harassment and make it available to employees.

There are also whistleblowing type regulations which prohibit an employer from dealing with an employee who requested a consultation for potential power harassment in a disadvantageous manner (e.g., dismissal), and is required to provide such regulations in work rules or other internal rules and make it available to employees.

- (b) Establish a governance system to handle power harassment cases.

An employer is required to establish a consultation hotline or point of contact and announce it to employees and respond appropriately and flexibly to any consultations. In addition, to ensure that the person in charge of the hotline handles consultations from employees in an appropriate manner, the employer needs to establish a system that can allow the person in charge to smoothly cooperate with the HR department, create a manual for consultation, or to provide the person in charge with training.

- (c) Deal with consultation in an immediate and appropriate manner, and to implement reoccurrence prevention measures.

If an employee seeks a consultation regarding power harassment, it is necessary for the employer to investigate the facts in an immediate and appropriate manner. In doing so, it is necessary to conduct an interview with the alleged harasser as well as the employee who asked for consultation. The employer should be aware of the fact that the employee's consultation with the company could lead to further power harassment against such employee, and therefore, the employer is required to respond flexibly, such as interviewing the alleged harasser after interviewing witnesses.

A key condition to conducting a fair fact-finding investigation is that the employer must not conduct a biased interview. For example, if an employee who has work performance issues seeks a consultation regarding harassment, if the employer gives such employee a business instruction which goes beyond the necessary and reasonable scope of work, such act would constitute workplace power harassment.

Further, an employer should be aware that power harassment is often conducted in a closed room, and as a result, an employee who seeks consultation often has no objective evidence, such as audio data. Also, the employee who has been harassed is often compliant with the harasser, and thus, although email communications may indicate a friendly relationship between the harasser and the employee, the employer should be careful in determining whether there was a workplace power harassment by collecting other non-biased information and conducting interviews with colleagues.

If an employer finds workplace power harassment, it is required to take measures for the employee who has been harassed – for example, job rotation of either the employee or harasser, apology by the harasser, or consultation for mental and emotional distress. Further, the employer should take disciplinary action against the harasser, or have the actor apologize to the harassed employee in accordance with the company’s internal rules.

Also, to prevent a reoccurrence of power harassment, an employer is required to internally announce the company’s policy to prevent power harassment and educate employees to make them more deeply understand the various types of power harassment and the measures the company has in place to resolve and prevent any power harassment issues.

4. Guidelines - Preferable Measures

The Guidelines provide that companies are highly expected to take the following measures:

- a. Establish a governance system that is able to provide consultation for power harassment as well as other types of harassment such as sexual harassment or maternity harassment,
- b. Implement measures to eliminate the causes and environment which would cause power harassment in the workplace, and
- c. Put forth efforts to monitor the preventive measures for power harassment and to consider necessary update through conducting questionnaires or discussions with employees.

In addition, an employer is expected to provide an internal policy for their employees to not conduct any harassment acts against other third parties, such as their suppliers’ employees, job seekers, freelancers, and internship students. An employer should also endeavor to encourage self-awareness of their employees to not conduct harassment. Further, an employer is also expected to establish a system to properly deal with harassment acts by their customers.

5. Going Forward

The term “harassment” has continued to become a household word in the media, especially with the recent cases of “Remote Harassment”. With the increased awareness of harassment in the workplace, we believe there will likely be an increased number of employee consultations. For each employee consultation, the initial response is very important. Considering that a company could be liable for



monetary damages if workplace power harassment is found, it must be careful in its initial determination of whether there was workplace power harassment. In addition, even if the company does not find any act of power harassment, it often becomes practically difficult for the employee to continue employment with the company and appropriate measures must be implemented to ensure that such employee is not put in a disadvantageous position as a result of his/her consultation. We believe it is critical to involve an attorney in the early stages before a harassment situation can become unmanageable. Our firm can not only advise you on an initial employee consultation, but also draft internal policies and function as an outside point of contact to employees to help prevent and resolve any acts of harassment in the workplace.

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