

Workplace Sexual Harassment in Vietnam: A Review of Current Legislation

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ABSTRACT

The issue of sexual harassment in the workplace has long been a concern in the Vietnamese society. However, it is only in recent years that this issue has been acknowledged and addressed through Vietnamese laws and regulations. This article critically examines Vietnamese legislative approaches to the problem of sexual harassment in the workplace. It first analyzes existing domestic laws and regulations pertaining to sexual harassment in the workplace in Vietnam, taking into account their characteristics, advantages, and limitations. It then proposes potential changes that could strengthen the prevention of and combat against sexual harassment in the Vietnamese workplace. The paper employs doctrinal legal research methodology to analyze the content of law while utilizing a law-in-context approach to explore the social and cultural aspects at play. In Vietnam, legislation regarding sexual harassment in the workplace has developed gradually, with increasing complexity and coverage. This development encompasses various aspects, including definitions, procedures, liability, remedies, and sanctions. The government and relevant authorities are committed to revising and strengthening these laws to address the evolving nature and magnitude of sexual harassment. Key changes include the introduction of new provisions in the Labour Code 2019 to rectify previous shortcomings, as well as the issuance of Decree No. 145/2020/ND-CP and Decree No. 12/2022/ND-CP to clarify responsibilities, prevent harassment, and impose sanctions. Despite these improvements, there remain challenges in achieving a safe and harassment-free workplace.

Keywords: Sexual harassment in the workplace; Vietnam; Labour Code; employee; employer

INTRODUCTION

In Vietnam, the prohibition of sexual harassment in the workplace was first introduced in the Labour Code 2012 which provides that sexual harassment is strictly prohibited in the workplace and the harassed employee may unilaterally terminate employment contract without giving prior notice.¹ In 2015, a Code of Conduct on Sexual Harassment in the Workplace was developed by Vietnam Ministry of Labour, Invalids and Social Affairs, Vietnam General Confederation of Labour, and Vietnam Chamber of Commerce and Industry with the support of the International Labour Organization (ILO). The Code of Conduct 2015 defines different forms of sexual harassment, including physical, non-physical, and verbal harassment and recommends company policies on sexual harassment in the workplace.² While not a legally binding, the Code serves as a recommendation for businesses to incorporate it into their internal regulations and policies to create a safe working environment. Taking into account the content of the Code of Conduct 2015, Article 3(9) of the Labour Code 2019 defines sexual harassment in the workplace as any non-consensual sexual act perpetrated by an individual against another within the workplace.³ The Labour Code

2019 also requires employers to adopt measures to prevent sexual harassment and procedures for handling sexual harassment cases in the workplace.⁴ In 2022, the Government issued Decree No. 12/2022/ND-CP on Penalties for Administrative Violations against Regulations on Labour, Social Insurance, and Vietnamese Posted Workers, which imposes monetary penalties on perpetrators of sexual harassment.⁵ Despite the legislative progress made, there are various constraints that hinder these developments from effectively promoting safe working environment and deterring sexual harassment in the workplace. Sexual harassment remains a prevalent concern in Vietnam. According to a report carried out by the Vietnam Ministry of Labour, Invalids and Social Affairs with support of the ILO in 2012, the majority of those impacted by sexual harassment within Vietnam are women, accounting for approximately 78.2% of the total, while male victims constituting the remaining 21.8%.⁶

This article critically examines Vietnamese legislative approaches to the issue of sexual harassment in the workplace. By doing so, it seeks to promote greater awareness and understanding of this issue. The article first analyzes existing domestic laws and regulations pertaining to sexual harassment in

the workplace in Vietnam, taking into account their characteristics, advantages, and limitations. It then proposes potential changes that have the potential to strengthen the prevention and mitigation of sexual harassment within the Vietnamese workplace.

The article employs doctrinal legal research methodology as ‘the research process used to identify, analyse and synthesize the content of law.’⁷ The content of law is drawn from relevant national codes, laws, decrees, and resolutions. Additionally, scholarly and expert opinions serve as indispensable resources for analyzing current legislation, particularly in cases where there have been relatively few published judgments pertaining to sexual harassment. To comprehensively address the research topic, it is essential to take into account the social and cultural contexts in which the legislation operates. Therefore, a law-in-context approach should be utilized to explore the social and cultural aspects at play.

LEGISLATION ADDRESSING SEXUAL HARASSMENT IN THE WORKPLACE

DEFINITION OF SEXUAL HARASSMENT

Sexual harassment remained unregulated until the Labor Code 2012 was passed on 18 June 2012. This marks the first inclusion of sexual harassment within the lists of prohibited behaviors in Vietnam’s workplaces.⁸ Sexual harassment would entitle an employee to unilaterally terminate the employment contract without prior notice.⁹ However, the Labour Code 2012 neither defined what constitutes sexual harassment in the workplace nor provided specific measures and sanctions which could respond to sexual harassment in the workplace.

In the absence of a clear definition and established consequences for instances of sexual harassment, the authorities turned to Decree No. 167/2013/ND-CP on Regulations on Sanction of Administrative Violation in Social Security, Order and Safety, Prevention and Fighting of Social Evils, Fire and Domestic Violence.¹⁰ Many forms of sexual harassment were categorized under broad descriptors such as gestures and language which are lewd, suggestive, teasing or that demean the honor and dignity of others. These conducts were only subject to a minimal fine between VND 100,000 and VND 300,000 (approximately USD 4 to USD 12), which failed to reflect the severity of sexual

harassment and did not effectively discourage future occurrences.¹¹

On 20 November 2019, the Labor Code 2019 was adopted, replacing the Labour Code 2012. With the intention of addressing and countering sexual harassment in work environments¹², Article 3(9) of the Code introduces the first definition of sexual harassment:

“‘Sexual harassment’ in the workplace refers to any sexual act perpetrated by one individual against another in the workplace, which is unwelcomed, undesirable or unacceptable to the recipient. The term “workplace” pertains to the location where an employee carries out his/her work as defined by agreement with or as assigned by the employer.”¹³

The term ‘a person’ signifies that both those who commit and those who experience sexual harassment can be anyone, including supervisors, coworkers as well as non-employers and non-employees such as interns, contractors, clients and customers. ‘Unwelcomeness’ is established as a necessary factor in identifying sexual harassment. A common concern in this context pertains to how the recipient must expressly indicate the unwelcomeness of the conduct.

On 14 December 2020, Decree No. 145/2020/ND-CP on Elaboration of some Articles of the Labor Code on Working Conditions and Labor Relations was promulgated by the Government. Article 84(1) of the Decree expands on the definition of sexual harassment stipulated in Article 3(9) of the Labor Code 2019.

The definition of sexual harassment in the workplace in Vietnamese legislation draws the distinction between *quid pro quo* harassment and hostile working environment. *Quid pro quo* harassment can manifest as request, demand, suggestion, threat or use of force to compel engagement in sexual acts in exchange for any work-related benefits.¹⁴ On the other hand, hostile working environment harassment pertains to the occurrence of non-transactional sexual acts that create an unsafe and distressing work environment. Such acts affect the mental health, physical well-being, performance, and life of the individual being harassed.¹⁵ This category encompasses various forms of conducts that do not involve explicit demands in exchange for sexual acts that undermine the employee’s morale and enthusiasm for work.

The conducts characterized as sexual harassment in the workplace are categorized as below:

1. Physical conducts: These involve actions, gestures, or any form of physical contact that is of a sexual or suggestive nature;
2. Verbal conducts: These pertain to sexual or suggestive comments or discussions whether in person, over the phone, or through digital communication channels;
3. Non-verbal conducts: These include body language and the depiction or description of sexual contents or sexual acts, whether conveyed directly or through digital communication channels.¹⁶

The workplace mentioned in Article 3(9) of the Labour Code 2019 encompasses any location where the employee carries out their duties as agreed or assigned by the employer. This entails the locations or spaces directly tied to work or work-related activities, including social functions, conferences, training sessions, business trips, meal breaks, phone conversations, electronic communications, transportation provided by the employer to and from the workplace, accommodation provided by the employer and any other locations specified by the employer.¹⁷ The legislation thus provides a broad interpretation of the term ‘workplace’ that extends beyond the physical confines of the place where work is performed. It encompasses instances that arise from, occur during, or are connected to—this includes activities like commuting to and from work.

It is observed that the definition of ‘sexual harassment in the workplace’ in Vietnamese legislation has been influenced by the experience of jurisdictions that have dealt with sexual harassment in the workplace, such as the United States and Japan¹⁸ Additionally, international frameworks like the ILO Violence and Harassment Convention (No. 190) and recommendations from the Committee of Experts on the Application of Conventions have also played a role in shaping this definition.¹⁹

SEXUAL HARASSMENT CONDUCTS THAT CONSTITUTE CRIMINAL OFFENCES

Sexual harassment conducts may constitute criminal offences that range from one of the most egregious including rape, to forcible sexual intercourse and defamation.²⁰

Rape is defined in Article 141(1) of Criminal Code 2015 as ‘engaging in non-consensual sexual

intercourse or other sexual acts with the victim by using violence or threat of violence or taking advantage of the victim’s defenselessness or other means.’²¹ Thus, in cases where sexual harassment escalates to the level of rape, it can occur through violence, threat of violence or specific actions aimed at incapacitating the victim. These actions include methods such as poisoning the victim; administering sleep-inducing drugs, anesthetics, alcohol or other agents that cause the victim to that result in the victim losing awareness or control over their actions, leading to their engagement in sexual acts.²² Rape also occurs when sexual intercourse is carried out with a person who is defenseless due to circumstances such as accidents, unconsciousness, being restrained, having a disability, and so on. Furthermore, rape occurs in situations where sexual acts take place with an individual who has experienced partial or complete loss of awareness or control over their actions. These situations can transpire when the person is influenced by alcohol, sleeping pills, anesthetics, narcotics, tranquilizers, stimulants, or suffering from mental impairment or another illness that results in their partial or total loss of consciousness or command over their actions.²³ Most of all, rape is of a non-consensual nature. This important aspect signifies that the victim withholds consent or lacks the capacity to provide consent to the intentional sexual acts initiated by the perpetrator, or has given up on resisting, protesting, or fighting against such acts.²⁴

The second class of offence, forcible sexual intercourse is described in Article 143(1) of Criminal Code 2015 as ‘the use of trickery to compel the perpetrator’s care-dependent or a person in a state of extreme need to reluctantly engage in sexual intercourse or other sexual acts.’²⁵ The term ‘care-dependent’ refers to an individual who is economically reliant on the perpetrator or dependent on the perpetrator in terms of mental, professional, educational, or religious aspects.²⁶ Thus, an employee is considered a care-dependent of his/her employer or supervisor and can be victim of forcible sexual intercourse offence. For example, a female employee is coerced into having sexual intercourse with the company’s executive against her will due to the executive’s threat of firing her. Meanwhile, the phrase ‘person in a state of extreme need’ indicates a person who finds themselves in an immensely challenging or pressing situation that necessitates external aid.²⁷ The person who succumbs to this state is no longer able to make rational choices

or behave normally like others would in ordinary circumstances. For instance, an employer promises advance payment to his female employee who lacks the financial means to afford life-saving treatment for her child in exchange for sex, and in the face of such dire situation, after much contemplation, she had to reluctantly allow the employer to have sexual intercourse with her. It is important to highlight that the victim may have alternative approaches to address their difficulties, but declining the perpetrator's demands for sexual acts could potentially place them at a significant disadvantage. While the victim might have reservations, their decision to engage in sexual acts is made willingly. The perpetrators often resort to various manipulative tactics to compel the victim to participate in sexual acts such as monetary incentives, threats of job transfer, dismissal, termination of employment contract or promise of promotion, pay rise, etc. Additionally, in the case of forcible sexual intercourse, the act of engaging in sexual intercourse or other sexual acts with the victim is a compulsory element of the crime. Therefore, *quid pro quo* harassment conducts also constitute forcible sexual intercourse offence if the sexual acts has occurred.

It must be noted that the notions of 'sexual intercourse' and 'other sexual acts' specified in Criminal Code 2015 cover the penetration of a male reproductive organ, other body parts or a sex aid into a female reproductive organ or the mouth or anus of an individual. The extent of penetration is not a determining factor within these definitions.²⁸

Finally, the Criminal Code 2015 prohibits acts that severely offend the dignity and honor of a person.²⁹ Defamation can materialize through conducts of a sexual or suggestive nature that gravely insult the human dignity and honor of others including:

1. Verbal conducts: Such as use of indecent and obscene language, offensive and derogatory remarks, conversations or rumors concerning the victim's private life, sexual life and personality regarding sexuality whether in person, through phone or via electronic media, ect;
2. Physical conducts: Such as groping and fondling the victim, etc;
3. Non-verbal conducts: Such as display and dissemination of sexually explicit videos and photographs involving the victim directly or through electronic media, etc.

This offence often takes place openly, directly, and in front of many people. It can be carried out in the presence of the victim or in his/her absence, but the perpetrator intends to let the victim know about the humiliation due to personal motives. Another important element of this offence is that the behavior must cause a certain degree of adverse impact on the dignity and honor of the victim in order for criminal liability to be pursued. The assessment of the severity of the act must be based on the attitude and awareness of the offender, the intensity and duration of the act, the surrounding environment, status, role, reputation and prestige of the victim within the family, organization and society, as well as the social perception of the act of insult.

It is worth noting that molestation of a person under 16 is criminalized under Article 146(1) of the Criminal Code 2015.³⁰ Molestation involves an individual engaging in direct or indirect physical contact, through clothing, with someone's reproductive organ, private part, or other body parts. This contact is of a sexual nature, although not done with the intention of having sexual intercourse.³¹

However, only a person under 16 years old can be the victim of molestation. If the conducts of molestation be done as sexual harassment in the workplace against a person over 16, such act would not constitute criminal offence under the Criminal Code but administrative offence under Decree No. 12/2022/ND-CP on Penalties for Administrative Violations against Regulations on Labour, Social Insurance, and Vietnamese Posted Workers.³²

RESPONSIBILITIES OF THE EMPLOYERS IN PREVENTING AND ADDRESSING SEXUAL HARASSMENT

The Labour Code 2019 and Decree No. 145/2020/ND-CP place an affirmative duty on employers to prevent and address sexual harassment within the workplace. Accordingly, the responsibilities of the employers include the followings:

Firstly, employers are required to implement and oversee the implementation of laws and regulations on preventing and addressing instances of sexual harassment in the work environment as well as promote awareness of these laws and regulations and relevant companies' policies among the employees.³³

Secondly, the employers are obligated to promptly address and respond to any complaints or reports of sexual harassment, ensuring action is

taken to safeguard the privacy, dignity, honor, and safety of all individuals involved.³⁴

Thirdly, irrespective of their size, all companies must formulate and incorporate policies on preventing and addressing sexual harassment as well as procedures for actions against such incidents into the internal labour regulations.³⁵ These policies must ensure that the privacy, dignity, honor and safety of the involved parties are protected and that responses are prompt and timely.³⁶ The internal labour regulation shall serve as basis for taking disciplinary actions, including dismissal of employees who commit sexual harassment.³⁷

However, companies that have fewer than ten employees are exempted from providing written internal labour regulations or registering the documents with the labour authority.³⁸ As a result, there is no enforcement mechanism compelling these companies to develop policies aimed at preventing and addressing instances of sexual harassment within the workplace.

Meanwhile, companies which have ten or more employees are required to make the internal labour regulations in writing and register them at the labour authority under the Provincial People's Committee where their business is registered.³⁹ The labour authority shall inform and guide the employers to amend the internal labour regulations that are found to be in violation of the law, such as where policies regarding preventing and addressing sexual harassment in the workplace, as well as procedures for handling such cases are absent or insufficient.⁴⁰

Pursuant to Decree No. 145/2020/ND-CP, the sexual harassment policies should cover the following main points:

- “a) Sexual harassment in the workplace is strictly prohibited;
- b) Precise and detailed descriptions of conducts that qualify as sexual harassment in the workplace, aligning with the characteristics of the particular job roles and the work environment.;
- c) Responsibilities, deadlines, steps and procedures for addressing cases of sexual harassment in the workplace. This includes guidelines for initiating and resolving formal grievances and allegations, as well as policies governing the process;
- d) Disciplinary measures taken against individuals responsible for sexual harassment and unfounded allegations, taking into account the gravity and nature of the offence;
- dd) Compensation for victims and remedial measures.”⁴¹

There is no detailed guidance on the content of each of these points. Therefore, an employer shall have ample discretion on the formulation of their sexual harassment policies. The accommodating stance of the Labour Code 2019 and Decree No. 145/2020/ND-CP aligns well with the specific production and business characteristics of each company. However, this lenient approach may overlook the fact that the lack of regulatory standards and guidance accompanied by limited public awareness regarding sexual harassment in the workplace will result in reduced external pressure in directing how employers describe sexual harassment, introduce, and implement preventive measures, and respond to sexual harassment. In addition, requiring employers to draw up a list of behaviors that can be classified as sexual harassment may lead to inadequate coverage, potentially impacting victims' ability to file complaints and obtain remedies as well as employers' authority to apply disciplinary measures through internal labour regulations.

A series of recommendations on the content of sexual harassment policies in the workplace, including commitment against sexual harassment, definition of sexual harassment, complaints/grievance procedures, penalties and compensation, and other measures was jointly developed by Vietnam Ministry of Labour, Invalids and Social Affairs, Vietnam General Confederation of Labour and Vietnam Chamber of Commerce and Industry, in consultation with the ILO. These recommendations were incorporated into the Code of Conduct 2015. The Code is not legally binding. However, the Ministry has recommended that all companies, regardless of their industry or sector, whether public and private, regardless of their size, adopt recommendations in this Code of Conduct when formulating their sexual harassment policies.

Nevertheless, there is a lack of sanctions or any other enforcement measures to motivate companies towards effectively adhering to their duty to prevent and address sexual harassment as stipulated by the Labour Code 2019 and Decree No. 145/2020/ND-CP, instructions by the labour authorities or any guidance or recommendations given by the Ministry. The sole sanction found in Decree No. 12/2022/ND-CP on Penalties for Administrative Violations against Regulations on Labour, Social Insurance, and Vietnamese Posted Workers is Article 19. This provision empowers Chairpersons of People's Committees and labor inspectors to impose monetary fines on employers who fail to make

internal labor regulations readily accessible to their workforce, display key contents of these regulations at essential locations within the workplace⁴², formulate written internal labor regulations when employing a minimum of 10 workers, adhere to the stipulated processes for registering internal labor regulations, or consult the internal trade union (if present) prior to the issuance or revision of internal labor regulations.⁴³

SANCTIONS AGAINST SEXUAL HARASSMENT

Under Vietnamese legislation, only the harasser can be held liable. Committing sexual harassment in the workplace has been included in Article 125(2) of the Labour Code 2019 as a new ground for dismissal. As the most severe disciplinary measure implemented by employers, dismissal leads to the termination of the employment relationship and disruption of income for individuals found guilty of sexual harassment. As a result, it acts as an effective deterrent to potential harassers while prevents repetition of the behaviors. However, the ability of employers to dismiss harassers is limited to the provisions outlined in their internal labour regulations. This prevents companies without internal labour regulations or those that do not explicitly classify sexual harassment as misconduct or a violation subject to dismissal from implementing this disciplinary action against offenders.⁴⁴ Depending on the severity of the sexual harassment case, disciplinary actions may also be reprimand, extension of the period for wage increase to no more than six months, and demotion. These actions can only be taken if sexual harassment is explicitly listed as a form of misconduct or violation subject to such disciplinary measures in the company's internal labour regulations, employment contracts, or mandated by law. Currently, there are no specific provisions in the legislation regarding the application of these disciplinary measures in cases of sexual harassment. Consequently, companies may face obstacles in implementing these disciplinary actions if they have not explicitly included sexual harassment as a ground for such measures in their internal labour regulations or employment contracts concluded with their employees.

Additionally, pursuant to Article 11(3) of the Decree No. 12/2022/ND-CP on Penalties for Administrative Violations against Regulations on Labour, Social Insurance, and Vietnamese Posted Workers, a person committing acts of sexual harassment in the workplace which is not subject

to criminal prosecution shall be subjected to a fine ranging from VND 15,000,000 to VND 30,000,000 (about USD 630 to USD 1,260).⁴⁵

Harassers judged guilty of the aforementioned sexual offences can face up to 20-year imprisonment or life imprisonment.⁴⁶ Those that are convicted of defamation under Article 155 may be subjected to a fine of maximum VND 30,000,000 (approximately USD 1,260) or sentenced to either 3 years of community service or imprisonment for up to 5 years.⁴⁷ Perpetrators of these offences may also be barred from holding certain jobs or positions.⁴⁸

REMEDIES FOR VICTIMS OF SEXUAL HARASSMENT

Employees have the right to unilaterally terminate employment contracts without giving prior notice if they are sexually harassed in the workplace.⁴⁹ In such cases, the employees can also pursue compensation by lodging a complaint following the procedures outlined in the company's sexual harassment policy.⁵⁰ Unless the sexual harassment policy is specified in the company's internal labour regulation (if any), the company has the discretion to investigate the sexual harassment allegation as well as to decide specific sanctions, penalties, and remedies. In such case, the victim might feel that the possibility for compensation is too uncertain to justify the time spent pursuing these procedures.

Simultaneously, victims of sexual harassment in the workplace may file criminal law and civil law cases following the standard procedures set in the Civil Procedure Code⁵¹ and Criminal Procedure Code.⁵² The procedures ensure confidentiality throughout the processes of reporting incidents, filing of claims, investigation and proceedings. Most notably, the Courts allow private hearings hearing to protect personal privacy of the parties involved upon reasonable requests.⁵³

Where victims of sexual harassment in the workplace pursue criminal charges, a person found guilty of a sexual offence can be ordered to provide compensation to the victim, an amount aligning with the damages obtainable in a civil litigation. On the other hand, in situations where damage claims in a criminal lawsuit lack sufficient evidence and have little influence over the resolution of the said case, the civil matters can be independently addressed via the civil procedure.⁵⁴

Under the Civil Code 2015, victims are entitled to initiate lawsuits for harm inflicted upon their honor, dignity or reputation.⁵⁵ In response, the

Court may decide to issue orders for the cessation of harassment, as well as the potential award of monetary reparations to the victim. Moreover, the perpetrator might be obligated to perform remedial actions beyond compensation, such as a public apology or reasonable acts to redress or mitigate the damage arising from their conducts.⁵⁶

The Civil Code 2015 and Resolution No 02/2022/NQ-HDTP on Guidelines for Application of some Provisions of the Civil Code on Tort Liability⁵⁷ comprehensively outline the principles of damage compensation. Accordingly, liability to compensate arises only when physical and/or spiritual damage occurs.⁵⁸

Physical damage refers to the identifiable actual physical loss suffered by the victim due to the infringement upon his/her honor, dignity and reputation, including reasonable costs to mitigate or remedy the damage and actual income that is lost or reduced. Spiritual damage is understood as losses caused by infringement upon honor, dignity or reputation of the victim or his or her relatives, such as pain, sorrow, emotional distress, diminished or lost reputation, trust, and confidence, etc.⁵⁹ In principle, spiritual damage is irreparable and unquantifiable in terms of monetary value. Nevertheless, in order to provide the victim consolation and deter future instances of harassment by others, the harasser is obligated to provide financial compensation to the victim as a means of mitigating the incurred spiritual damage.

The parties may reach a compensation agreement, provided that the agreement complies with the law and social ethics. In cases where mutual agreement cannot be reached, the Courts shall take into account the following principles when determining the appropriate compensation.⁶⁰

Reasonable expenses to mitigate or remedy the damage encompass essential costs for the retrieval and removal of articles, publications, and data that contain offensive content which affects the victim's honor, dignity, and reputation. They also include expenses relating to the gathering of relevant documents and evidence that substantiate the infringement on honor, dignity, and reputation. Additionally, they cover transportation fees, rental charges for accommodations at the average local rates that were paid by the victim when approaching competent authorities to investigate and correct the facts through mass media. The expenses also involve organizing public apologies and corrections at the place where the victim resides or carries out his/her

work, as well as any other actual and necessary costs incurred in mitigating and remedying the damage.⁶¹

If performing these tasks leads to a loss or reduction in the victim's actual income, they will be duly compensated for such loss or reduction.⁶² If the victim has a stable wage or salary, the actual amount of income lost or reduced will be determined based on their earnings during the period when the income was affected. However, if the victim's wage or salary is unstable, the actual amount of income lost or reduced will be calculated using the average wage or salary over the preceding three-month period prior to the occurrence of income loss. If it is not possible to determine the average wage or salary for that period, the actual amount of income lost or reduced will be based on the average income of employees of the same type in the local area during the time when the income was affected. In situations where it is not feasible to ascertain such average income, the daily amount of income lost or reduced will be calculated as the daily regional minimum wage of the place where the victim resides. The daily regional minimum wage is calculated by government-established monthly regional minimum wage by 26.⁶³ Currently, the highest monthly statutory minimum wage, based on regional distinctions, is VND 4.680.000 (around USD 197) per employee.⁶⁴

Meanwhile, the amount of compensation for spiritual damage shall not exceed ten months' statutory pay rate prescribed by the State.⁶⁵ From July 01, 2023, the statutory pay rate shall be VND 1.800.000 per month.⁶⁶ Thus, in the case of sexual harassment, the maximum amount of spiritual damages awarded is VND 10.800.000, approximately USD 454.

VICTIMS' READINESS TO COME FORWARD

Given the relatively recent implementation of legislation addressing sexual harassment in Vietnam, there is a lack of statistical data on the number of cases that have been presented before the courts.⁶⁷ Many victims may not have a clear understanding of what constitutes sexual harassment, let alone how to recognize it. Therefore, they may not fully realize that they have become victims of sexual harassment.⁶⁸ Moreover, social and cultural factors frequently discourage victims from reporting sexual harassment or initiating lawsuits.

Owing to fear of reprisal, especially the potential loss of employment, victims of sexual harassment are reluctant to speak up, especially when the

harasser holds a superior position and wields greater authority. The inclination to refrain from even filing a formal complaint is prevalent. Often, the victims only seek assistance or report sexual harassment when the situation escalates to a severe sexual assault or when they transition to a new job.⁶⁹

Flirting and sexual teasing have widely been perceived as cultural norms and integrated into everyday workplace interactions. The notion that sexual jokes exchanged between male and female colleagues can serve as a means of stress relief in the workplace is commonly held. Furthermore, a prevalent belief persists that touching, patting, staring, sexually suggestive comments or jokes, persistent proposals for dates and other sexual advances by men at workplaces are considered acceptable due to the perception that they take the lead in initiating sexual relationships, while women assumed to derive enjoyment from and welcome such advances. These gender stereotypes are also the reason why it is extremely difficult for men to speak up about their own experiences of harassment. Due to the fear of disrupting office harmony and damaging the reputation of their companies, victims of sexual harassment are frequently dissuaded from making complaints. Individuals who openly express their concerns about sexual harassment in the workplace are viewed as disruptors, troublemakers or attention seekers. Consequently, they are often pressured to resign.⁷⁰

Female victims of sexual harassment encounter a significant barrier when they are often unfairly blamed for somehow provoking the harassment. The absence of support from family, colleagues, or peers further discourages victims from seeking justice. Even when the harasser is held accountable, misguided public perception persists, suggesting that the woman herself caused the harassment or questioning her moral character. Society tends to assume that women must have invited harassment through their attire, gestures, or other inappropriate behaviors. This perpetuates the blame and stigma imposed on victims of sexual harassment throughout their lives. Shockingly, a woman's integrity is scrutinized once she becomes associated with anything related to sex, irrespective of her victimhood. Victims are often deemed to have failed in upholding their dignity and that of their families. Consequently, sexual harassment remains concealed as victims bear the burden of shame and embarrassment, while also facing immense societal pressure to uphold their honor and protect their

family's reputation. The social and emotional tolls associated with pursuing a legal case significantly overshadow the potential benefits for Vietnamese women who allege sexual harassment. Therefore, Vietnamese women typically avoid filing claims when they have experienced sexual harassment.⁷¹

While some victims are encouraged to report sexual harassment and file lawsuits, they often face uncertainty regarding the procedures involved. Particularly, many question whether they will receive appropriate redress through this process or fear that litigation will only make matters worse. The difficulties commonly faced in substantiating allegations of sexual harassment, combined with the hesitance to openly discuss distressing or embarrassing matters, can act as deterrents for victims seeking legal recourse.⁷²

Substantiating sexual harassment claims can pose a challenge, as it often occurs without witnesses, concrete proof or tangible evidence of harm.⁷³ The Criminal Procedure Code 2015 does not impose a high requirement for proof of guilt to be established 'beyond a reasonable doubt'. Instead, it emphasizes that competent procedural authorities must examine the facts of a criminal case in an impartial, comprehensive and meticulous manner, to ensure the clarification of the evidence concerning the guilt or innocence of the accused individual.⁷⁴ The Criminal Procedure Code 2015 establishes a more lenient standard of proof in civil cases, making it somewhat easier to substantiate sexual harassment claims. Notably, in criminal cases, the admission of engaging in sexual harassment by the accused should not be the sole evidence for conviction.⁷⁵ However, in civil cases, such admission is considered sufficient proof.⁷⁶ Nevertheless, Vietnam has not yet to fully acknowledge the intricacies of sexual harassment and reevaluate the kinds of evidence which can be considered to address this issue.

RECOMMENDATIONS FOR THE IMPROVEMENT OF CURRENT LEGISLATION

ON THE DEFINITION OF SEXUAL HARASSMENT

Certain types of actions are inherently unwelcomed, unwanted, or unacceptable, such as those involving physical violence or verbal aggression. However, other behaviors can vary in their impact depending on the specific circumstances such as the context, relationship between the individuals involved and their degree of tolerance influenced by their values, beliefs, cultural backgrounds, and personal

experiences. Consequently, it may not be feasible or desirable to create an exhaustive list of behaviors that constitute sexual harassment. As such, employers should not be required to specify prohibited conducts in their sexual harassment policies under Article 85(1)(b) of Decree No. 145/2020/ND-CP.

Instead, it is essential to establish a precise criterion for determining ‘unwelcomeness’, i.e., how the recipient effectively communicates their discomfort with any behavior or conduct of sexual nature. This approach will allow for consensual behaviors while prohibiting misconduct in the workplace. By adopting such a standard, employees are empowered with the freedom to establish their own personal boundaries regarding acceptable behavior while preventing potential harassers from avoiding accountability under the guise of lacking intent to inflict harm.

ON RESPONSIBILITIES OF EMPLOYERS IN PREVENTING AND ADDRESSING SEXUAL HARASSMENT

Legally binding guidelines on preventing and combating sexual harassment in the workplace should be developed by the Ministry of Labour, Invalids and Social Affairs. These guidelines should then be incorporated into Governmental Decree addressing the handling of violations of labour regulations. Aside from prescribing standard of ‘unwelcomeness’, the guidelines should provide a standardized procedure for receiving and addressing complaints and reports of sexual harassment in the workplace, measures to ensure safety and confidentiality for all parties concerned, sanctions, and compensation and remedies for victims. The guidelines will serve as legal basis for the formulation of sexual harassment policies by the employers. It is imperative to mandate that employers submit annual reports which assess the policies and actions they have undertaken to prevent and address sexual harassment.

All companies, regardless of size, should be obligated to create written internal labour regulations which clearly outline the companies’ sexual harassment policies and applicable disciplinary actions, and register them at the relevant labour authorities. Managerial persons in companies also need to undergo regular training on their duties in preventing sexual harassment and equip them with the necessary skills and knowledge to address such issues.

The above suggestions could act as compelling incentive for employers to effectively formulate and put into action strong sexual harassment policies. This, in turn, enables victims to develop a more realistic expectation regarding the process and potential outcomes of their complaints.

ON SANCTIONS AGAINST SEXUAL HARASSMENT

Administrative sanctions should be imposed upon employers where they fail to perform obligations to prevent and address sexual harassment. These sanctions should encompass instances such as the absence and non-implementation of written internal labour regulations and sexual harassment policies, non-compliance with instructions from labour authorities or guidance from the Ministry of Labour, Invalids and Social Affairs, failure to implement and monitor the enforcement of laws and regulations on preventing and combating sexual harassment, and inadequate promotion of awareness among employees regarding these laws, regulations, and company policies. Employers should also be held liable if they were aware of the harassment yet failed to undertake suitable measures or neglected to promptly address complaints and reports related to sexual harassment.

In addition, it is important to introduce a provision in the current legislation that enables the dismissal of harassers, irrespective of whether the application of such disciplinary action in instances of sexual harassment is specifically outlined in the company’s internal labour regulations.

It is worth noting that various types of sexual harassment behaviors that are often perceived as less serious such as caresses, staring at specific body parts of individuals of the opposite sex, sexually suggestive comments or jokes, indecent propositions for sex and sending suggestive or sexually explicit images, etc are relatively common in Vietnam. However, they are frequently overlooked if they have not caused severe consequences or harm. The absence of specific criminal offences designated for these behaviors poses challenges in ensuring adequate deterrent. It is crucial to conduct thorough research on these actions and incorporate them as a distinct offence under the criminal code, enabling criminal prosecution. In order to prevent instances of sexual harassment in the workplace, it is important to prescribe that if an individual who has previously faced administrative penalty for sexual harassment commits the wrongdoing a second time, it should

be sufficient to establish the offence of defamation without requiring further consideration of other relevant factors. The shame and the possibility of tainting one's reputation that results from being convicted of a criminal offence may be sufficient to deter sexual harassment.

ON REMEDIES FOR VICTIMS OF SEXUAL HARASSMENT

Victims of sexual harassment in the workplace should be encouraged to lodge their complaints, report their cases and bring their claims to court. In order for this to happen, both men and women need to know what the laws and regulations on sexual harassment in the workplace are to determine whether or not they have fallen victim to sexual harassment and what steps are to be taken to protect their honor, dignity and safety. Therefore, laws and regulations on sexual harassment in Vietnam should be widely publicized. Training courses or manuals on the right to protection against sexual harassment as well as the necessary skills and knowledge required to address such issues when they arise can be developed by labour authorities, companies, universities, education centers and NGOs, and offered to employees as well as non-employees.

Introducing special procedures can play a vital role in guaranteeing that the victims are treated with respect, empathy, and supported throughout the investigation and proceedings, while also addressing the challenges substantiating sexual harassment claims. The special procedures should ensure that all interactions with the complainant are conducted in a considerate manner. This includes providing a safe environment for the complainant to share their experiences, as well as assigning trained officials who are sensitive to the psychological and emotional impact of such situations. Furthermore, the procedures should explicitly address the difficulties encountered when trying to prove sexual harassment. Recognizing the power dynamics and potential imbalances often involved and along with the fact that harassment often occurs without witnesses, cameras, recordings or clear physical evidence of harm, the burden of proof should not unduly burden the victims. Moreover, these procedures should take into account the various complexities surrounding sexual harassment, such as the fear of retaliation, power disparities, or societal stigma.

CONCLUSION

Although the development of legislation on sexual harassment in the workplace in Vietnam has been slow, there has been a notable advancement in the complexity of these laws and regulations. They now encompass various aspects such as definitions, procedures, liability, remedies, and sanctions, indicating a more sophisticated framework. The Government and other competent authorities have consistently demonstrated their commitment to revising and strengthening the legislation to effectively respond to the growing recognition and awareness surrounding the nature and magnitude of sexual harassment. Particularly, several new provisions were added in the Labour Code 2019 to address the shortcomings of the Labour Code 2012 which lacked a clear definition of sexual harassment in the workplace and failed to provide specific measures and procedures to effectively address incidents of sexual harassment in the workplace. Subsequently, Decree No. 145/2020/ND-CP was introduced to provide further clarification on the articles of the Labour Code 2019 concerning the responsibilities of employers in preventing and addressing sexual harassment in the workplace as well as specific requirements for internal labour regulations pertaining to this matter. Decree No. 12/2022/ND-CP provides for the first administrative sanction for violation of the prohibition of sexual harassment in the workplace specifying a great enough fine for violators. Nevertheless, there are several constraints that impede the efficacy of these developments in fostering a safe and healthy working environment devoid of instances of sexual harassment.

NOTES

- ¹ Arts 8(2) and 37(1)(c) of the Labour Code, Vietnam National Assembly, issued 18 June 2012, effective 1 May 2013.
- ² See Vietnam Ministry of Labour, Invalids and Social Affairs, Vietnam General Confederation of Labour & Vietnam Chamber of Commerce and Industry, *Code of Conduct on Sexual Harassment in the Workplace*, 2015.
- ³ Article 3(9) of the Labour Code, Vietnam National Assembly, issued 20 November 2019, effective 1 January 2021.
- ⁴ Art 6(2)(d) and 118(2)(d) of the Labour Code, 2019.
- ⁵ Article 11(3) of Decree No. 12/2022/ND-CP on Penalties for Administrative Violations against Regulations on Labour, Social Insurance, and Vietnamese Posted Workers, Vietnam Government, issued and effective 17 January 2022.

- ⁶ T.H.P Ha, 'Definition Clarification of Sexual Harassment at Workplace under the Labor Code', (2017) 8 *Journal of Legislative Studies*, p 21.
- ⁷ T. Hutchinson, Doctrinal Research – Researching the Jury, in Watkins, D & Burton, M (ed.), *Research Methods in Law*, Routledge, Oxon, 2013, p 9.
- ⁸ Article 8(2) of the Labour Code, 2012.
- ⁹ Article 37(1)(c) of the Labour Code, 2012.
- ¹⁰ Decree No. 167/2013/ND-CP on Regulations on Sanction of Administrative Violation in Social Security, Order and Safety, Prevention and Fighting of Social Evils, Fire and Domestic Violence, Vietnam Government, issued 12 November 2013, effective 28 December 2013.
- ¹¹ Article 5(1)(a) of Decree No. 167/2013/ND-CP. See T.D. Ngo, 'Sexual Harassment and Sexual Harassment Prevention in Universities', (2019) 33 *Journal of Transportation Science and Technology*, p 100-101.
- ¹² Article 135(1) of the Labour Code, 2019.
- ¹³ Article 3(9) of the Labour Code, 2019.
- ¹⁴ Article 84(1) of Decree No. 145/2020/ND-CP on Elaboration of some Articles of the Labor Code on Working Conditions and Labor Relations, Vietnam Government, issued 14 December 2020, effective 1 February 2021.
- ¹⁵ Ibid.
- ¹⁶ Article 84(2) of Decree No. 145/2020/ND-CP.
- ¹⁷ Article 84(3) of Decree No. 145/2020/ND-CP.
- ¹⁸ See *Williams v. Saxbe*, 413 F.Supp 654 (DDC 1976); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); R. Yamakawa. 'We've only just Begun: The Law of Sexual Harassment in Japan', (1999) 22 *Hastings International and Comparative Law Review*.
- ¹⁹ See ILO Violence and Harassment Convention, 2019 (No. 190); ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, (Articles 19, 22 and 35 of the Constitution): General Report and Observations concerning Particular Countries*, ILO, Geneva, 2003, p 463-464. See also T.H. Luu, 'Preventing Sexual Harassment in the Workplace – The Regulations of the Vietnam Labour Code and Prospects of Implementation', (2022) 6 *Journal of Human Resources and Social Protection*, p 12; T.H.P Ha, 'Definition Clarification of Sexual Harassment at Workplace under the Labor Code', (2017) 8 *Journal of Legislative Studies*, p 25.
- ²⁰ See T.H. Luu, 'Preventing Sexual Harassment in the Workplace – The Regulations of the Vietnam Labour Code and Prospects of Implementation', p 9; Vietnam Ministry of Labour, Invalids and Social Affairs et al, *Code of Conduct on Sexual Harassment in the Workplace*; T.D. Ngo, 'Sexual Harassment and Sexual Harassment Prevention in Universities', p 102; H. Tien, 'Sanctions against Sexual Harassment', *Vietnam Lawyer Journal*, 2022, <https://lsvn.vn/hanh-vi-quay-roi-tinh-duc-co-the-bi-xu-ly-nhu-the-nao1657017828.html> [30 May 2023]. See Article 141, 143 and 155 of the Criminal Code, Vietnam National Assembly, issued 27 November 2015, effective 1 July 2016, amended 20 June 2017.
- ²¹ Article 141(1) of the Criminal Code.
- ²² Article 3(8) of Resolution No. 06/2019/NQ-HDTP Guiding the Application of a number of Rules in Articles 141,142,143,144,145, 146 and 147 of the Criminal Code and Settlement of Cases concerning Sexual Exploitation and Abuse of Persons under 18, Council of Justices of the Supreme People's Court of Vietnam, issued 01 October 2019, effective 05 November 2019.
- ²³ Article 3(7) of Resolution No. 06/2019/NQ-HDTP.
- ²⁴ Article 3(9) of Resolution No. 06/2019/NQ-HDTP.
- ²⁵ Article 143(1) of the Criminal Code.
- ²⁶ Article 3(10) of Resolution No. 06/2019/NQ-HDTP.
- ²⁷ Article 3(11) of Resolution No. 06/2019/NQ-HDTP.
- ²⁸ Articles 3(1) and 3(2) of Resolution No. 06/2019/NQ-HDTP.
- ²⁹ Article 155(1) of the Criminal Code.
- ³⁰ Article 146(1) of the Criminal Code.
- ³¹ Article 3(3) of Resolution No. 06/2019/NQ-HDTP.
- ³² V.M.T. Pham, 'Some Opinions on the Handling of Sexual Harassment Conducts', (2019) 18 *Journal of Procuracy*, p 41.
- ³³ Article 86(1) of Decree No. 145/2020/ND-CP.
- ³⁴ Article 86(1) of Decree No. 145/2020/ND-CP.
- ³⁵ Articles 6(2)(d) and 118(2)(d) of the Labour Code; Article 69(2)(d) and Article 85(1) of Decree No. 145/2020/ND-CP.
- ³⁶ Article 85(2) of Decree No. 145/2020/ND-CP.
- ³⁷ Article 125(2) of the Labour Code, 2019.
- ³⁸ Articles 118(1) and 119(1) of the Labour Code, 2019.
- ³⁹ Article 69 of Decree No. 145/2020/ND-CP.
- ⁴⁰ Article 119(3) of the Labour Code, 2019.
- ⁴¹ Article 85(1) of Decree No. 145/2020/ND-CP.
- ⁴² Article 19(1) of Decree No. 12/2022/ND-CP.
- ⁴³ Articles 19(1)(a), (b) and (c) of Decree No. 12/2022/ND-CP.
- ⁴⁴ Article 125(2) of the Labour Code, 2019.
- ⁴⁵ Article 11(3) of the Decree No. 12/2022/ND-CP.
- ⁴⁶ Articles 141 and 143 of the Criminal Code.
- ⁴⁷ Article 155 of the Criminal Code.
- ⁴⁸ Articles 141(5), 143(5) and 155(4) of the Criminal Code.
- ⁴⁹ Article 35(2)(d) of the Labour Code, 2019.
- ⁵⁰ Article 85(1)(dd) of Decree No. 145/2020/ND-CP.
- ⁵¹ See Civil Procedure Code, Vietnam National Assembly, issued 25 November 2015, effective 1 July 2016.
- ⁵² See Criminal Procedure Code, Vietnam National Assembly, issued 27 November 2015, effective 1 July 2016.
- ⁵³ Article 15(2) of the Civil Procedure Code; Article 25 of the Criminal Procedure Code.
- ⁵⁴ Article 30 of the Criminal Procedure Code.
- ⁵⁵ Article 14(1) of the Civil Code, Vietnam National Assembly, issued 24 November 2015, effective 1 January 2016.
- ⁵⁶ Articles 11 and 13 of the Civil Code.
- ⁵⁷ Resolution No. 02/2022/NQ-HDTP on Guidelines for Application of some Provisions of the Civil Code on Tort Liability, Supreme People's Court of Vietnam, issued 6 September 2022, effective 1 January 2023.
- ⁵⁸ Article 2(1) of Resolution No 02/2022/NQ-HDTP.
- ⁵⁹ Article 592 of the Civil Code; Article 2(1)(b) of Resolution No 02/2022/NQ-HDTP.
- ⁶⁰ Article 585(1) of the Civil Code.
- ⁶¹ Article 9(1) of Resolution No 02/2022/NQ-HDTP.
- ⁶² Article 9(1)(a) of Resolution No 02/2022/NQ-HDTP.
- ⁶³ Article 7(2) of Resolution No 02/2022/NQ-HDTP.
- ⁶⁴ Article 3(1) of Decree No. 38/2022/ND-CP Prescribing Statutory Minimum Wages paid to Employees Working under Employment Contracts, Vietnam Government, issued 12 June 2022, effective 1 July 2022.
- ⁶⁵ Article 592(2) of the Civil Code.
- ⁶⁶ Article 3(2) of Decree No. 24/2023/ND-CP Prescribing Statutory Pay Rate for Officials, Public Employees and Armed Forces, Vietnam Government, issued 14 May 2023, effective 1 July 2023.

- ⁶⁷ T.N.L. Nguyen, 'Criminalizing Sexual Harassment', *Journal of People's Court*, 2018, <https://tapchitoaan.vn/can-bo-sung-toi-quay-roi-tinh-duc-vao-bo-luat-hinh-su> [30 May 2023]; T.T.N. Pham, 'International and Vietnamese Laws on Sexual Harassment in the Workplace – Recommendations for Improving Vietnamese Laws', (2016) 12 *Journal of State and Law*, p 48.
- ⁶⁸ M.T. Pham, 'Issues regarding Sexual Harassment and Sexual Abuse of Children in Vietnam - Current Situation and Solutions', (2019) 1 *Journal of Procuracy*, p 14; T.D. Ngo, 'Sexual Harassment and Sexual Harassment Prevention in Universities', p 102.
- ⁶⁹ Vietnam Ministry of Labour, Invalids and Social Affairs & ILO, *Research Report: Sexual Harassment at the Workplace in Viet Nam: An Overview of the Legal Framework*, 2013, p 27; T.T.N. Pham, 'International and Vietnamese Laws on Sexual Harassment in the Workplace – Recommendations for Improving Vietnamese Laws', p 53; T.H.P Ha, 'Definition Clarification of Sexual Harassment at Workplace under the Labor Code', p 21.
- ⁷⁰ Vietnam Ministry of Labour, Invalids and Social Affairs & ILO, *Research Report: Sexual Harassment at the Workplace in Viet Nam: An Overview of the Legal Framework*, p 20-21 & 25-26; T.H. Truong, 'Aspects Influencing the Awareness of Workers on Prevention and Response to Sexual Harassment in the Workplace', (2021) 16(4) *Vietnam Women's Academy Journal of Sciences*, p 39; S.H. Luu, 'The Situation of Sexual Harassment against Female Officials in Hanoi', (2019) 8(4) *Vietnam Women's Academy Journal Of Sciences* 8, p 20; T.D. Ngo, 'Sexual Harassment and Sexual Harassment Prevention in Universities', p 102; T. Quynh, 'Reporting sexual assault: The pressure of stigma and legal loopholes', 2022, <https://tiasang.com.vn/dien-dan/to-cao-xam-hai-tinh-duc-ap-luc-pham-gia-va-ke-ho-luat-phap/> [30 May 2023]; A.V. Le, 'Experiences of Sexual Harassment in Public Spaces among Male College Students in the Southeast Region', (2022) 3(276) *Journal of Psychology*, p 59; T.V. Pham & P.C. Nguyen, 'Perceptions and Attitudes of Students towards Sexual Harassment Behaviors', (2019) 3 *Vietnam Journal of Family and Gender Studies*; M.T. Pham, 'Issues regarding Sexual Harassment and Sexual Abuse of Children in Vietnam - Current Situation and Solutions', p 14.
- ⁷¹ T. Quynh, 'Reporting Sexual Assault: The Pressure of Stigma and Legal Loopholes', 2022, <https://tiasang.com.vn/dien-dan/to-cao-xam-hai-tinh-duc-ap-luc-pham-gia-va-ke-ho-luat-phap/> [30 May 2023]; T.V. Pham & P.C. Nguyen, 'Perceptions and Attitudes of Students towards Sexual Harassment Behaviors', p 76; S.H. Luu, 'The Situation of Sexual Harassment against Female Officials in Hanoi', p 10-11; Vietnam Ministry of Labour, Invalids and Social Affairs & ILO, *Research Report: Sexual Harassment at the Workplace in Viet Nam: An Overview of the Legal Framework*, p 27; T.H. Truong, 'Aspects Influencing the Awareness of Workers on Prevention and Response to Sexual Harassment in the Workplace', p 39.
- ⁷² M.T. Pham, 'Issues regarding Sexual Harassment and Sexual Abuse of Children in Vietnam - Current Situation and Solutions', p 13; T. Quynh, 'Reporting Sexual Assault: The Pressure of Stigma and Legal Loopholes', 2022, <https://tiasang.com.vn/dien-dan/to-cao-xam-hai-tinh-duc-ap-luc-pham-gia-va-ke-ho-luat-phap/> [30 May 2023].
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- ⁷⁴ Article 15 of the Criminal Procedure Code.
- ⁷⁵ Article 98(2) of the Criminal Procedure Code.
- ⁷⁶ People's Court of Tu Son Town, Bac Ninh Province, Judgment No. 01/2018/LD-ST dated 5 November 2018 on Individual Labor Dispute concerning Disciplinary Dismissal.

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