

August 11, 2020

Labor and Employment Law Update

Workplace Harassment

On August 7, 2020 Puerto Rico enacted Act No. 90-2020 to prohibit workplace harassment. Act 90-2020 addresses situations where harassing conduct is not tied to acts already prohibited by anti-discrimination and anti-retaliation statutes, and situations that fall short of a constructive discharge under Act No. 80-1976. Its objective is to protect the employee's constitutional rights (1) to privacy and (2) to protection against workplace risks to health and safety.

The law applies to all employers and employees in Puerto Rico and requires the latter term to be broadly interpreted. Where employees of different employers interact in a common workplace, all employers are responsible for investigating harassment allegations regardless of whether they actually employ the complainant.

Workplace harassment is defined as conduct that meets the following criteria:

- reiterated conduct by the employer, its agents, supervisors or employees, that is
- malicious, unwelcome, repetitive, abusive, arbitrary, unreasonable and/or capricious, and alien to the legitimate interests of the business
- whether verbal, written or physical,
 - that threatens a person's constitutional rights such as
 - dignity, honor, reputation and privacy (Art. II Sec. 1 of our Constitution)
 - protection against workplace risks to health and safety (Art. II Sec. 16 of our Constitution)
- and creates an intimidating, humiliating, hostile or offensive work environment inadequate for the person to normally execute his or her duties.

The examples of what is workplace harassment are particularly telling:

- Defamatory or damaging expressions using foul language
- The following comments, when made before peers or publicly
 - Hostile and humiliating comments questioning the employee's professional qualifications
 - Unjustified threats of termination
 - Jokes about personal appearance
 - Comments in relation to personal and family matters of the affected employee
- Frivolous disciplinary complaints as revealed by the results of the disciplinary process
- Assigning duties patently extraneous to the employee's obligations



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- Disproportionate demands for compliance with an obligation
- Abrupt changes in work location or in the work contracted, without objective justification
- Failure of the employer or other employees to provide materials or information relevant and indispensable for performing the duties

On the other hand, the law excludes the following from the definition of workplace harassment:

- Exercising discipline
- Demanding confidentiality and loyalty
- Developing operational and performance procedures or memoranda
- Terminating an employment contract for just cause or expiration of its term
- Enforcing procedures or employment agreements
- Enforcing the law

The employer must adopt workplace policies to prevent, investigate and impose sanctions on workplace harassment.

An employer is liable for the conduct of supervisors, employees if it knew or should have known of the conduct, unless it took prompt and effective remedial action and the employee failed to avail himself or herself of the employer's preventive or corrective procedures. This defense does not apply where the offender is the employer.

An employer who takes prompt and effective remedial action could be immune from suit. The immunity does not extend to the wrongdoer in his or her personal capacity.

The law incorporates the anti-retaliation protections of Act No. 115-1991, adding as a form of retaliation the failure to take necessary measures to offer adequate protection to the employee.

Questions abound in connection with the implementation of Act No. 90-2020 ranging from coverage to independent contractors and/or their employees to employer responsibilities of common employers. Further, the scope of available employer immunity is unclear. Though Act No. 90-2020 is effective on immediately, relevant agencies have 180 to issue regulations. In turn, employers have 180 days to implement and communicate compliance protocols, counted from the date of the implementing regulations.

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