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POSH

Prevention Of Sexual Harrasment

Live

A quarterly insight to the POSH Law!

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POSH LIVE brings to you updates and information relating to matters of sexual harassment irrespective of the gender and age. This is an effort to create awareness about laws relating to sexual harassment and any form of discrimination.

LAW ON TRANSGENDERS AND CORPORATE COMPLIANCE

Section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019 defines Transgender as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta. "Person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.

Due to widely rampant discriminative practices in society and ostracism for centuries transgender's usually end up as beggars or even prostitutes and live a life full of fear. Non-recognition of the identity of transgender persons has denied them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault and further results in them facing extreme discrimination in the field of employment, education, healthcare and in access to public spaces like restaurants, cinemas, shops and malls. The landscape is now changing as India now gears up to include and recognise transgenders as the third gender due to several landmark judgments by the Supreme Court.

A. National Legal Services Authority vs. Union of India AIR 2014 SC 1863

The Honourable Supreme Court of India declared transgender individuals distinct from binary genders, as the 'Third Gender' under the Indian constitution and for the purposes of laws enacted by the parliament and state legislatures. The Court put emphasis on the psychological sex rather than the biological sex i.e., gender recognition based not on biological way but by psychological tests. The Court declared transgender's have a right to self-identification and self-determination either as a male, female or third gender and are recognised as such by the Centre, State governments and in the eyes of law.

GOOD TO KNOW!

How to file a cyber harassment complaint online?

Log in to <https://cybercrime.gov.in>
→Report a crime/complaint
→File and track/File anonymous complaint

Cybercrime.gov.in - This portal is an initiative by government of India to facilitate victims/complainants to report to cyber-crime/ cyber harassment complaints against women and children. One can even report the women/child related crime anonymously. Complaints reported on this portal are dealt by respective police authorities of states/UT's based on the information in the complaints provided by the complainants.

Once you log on the website, by clicking on the menu, you will get 2 options, one is that of reporting women/child related crime and the other is of reporting other cyber-crime which includes, loss of money, online stalking, harassment etc. You should select the appropriate option in order to submit the complaint.



These rights include:

1. **Article 14** - is a right enjoyed by “any person” it applies equally to men, women and transgenders. They have equal right in employment, health care, education and civil rights.
2. **Article 15** - transgender’s have not been able to enjoy the provisions under Article 15(4) for the advancement of the socially and educationally backward.
3. **Article 19** - transgender’s have a right to show or express gender identity through words, dress, action or behaviour (right to freedom of expression), right to privacy, self-identity, autonomy, and personal integrity.
4. **Article 21** - transgender’s have a right to live a dignified life and enjoy personal liberty.

B. Anamika vs Union of India & Others. 2018 WP (CRL) 2537/2018

High Court heard a petition by a transgender student from Delhi University who wanted to lodge a complaint against male students who allegedly sexually harassed her, but was not entertained by the police. As Section 354A of the IPC deals with sexual harassment and punishment for sexual harassment under which complaints can only be made by women, excluding transgenders. The Delhi High Court in this judgment ruled that section 354A of the Indian Penal Code can now also be used by transgender persons to register complaints of sexual harassment. The police then registered the complaint under IPC section 354A and the petition was dismissed.

C. Navtej Singh Johar vs. Union of India WP (Crl.) No. 76 of 2016 D. No. 14961/2016

It was held that Section 377 of the IPC violated the constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination. The Court reasoned that sexual orientation forms an inherent part of self-identity and denying the same would be violative of the right to life, and that fundamental rights cannot be denied on the ground that they only affect a minuscule section of the population. It decriminalised homosexuality.

In the wake of the NALSA Judgment, the Indian parliament recently enacted the Transgender Persons (Protection of Rights) Act, 2019 that laid out the rights and protections for the marginalised community.

Salient features of Transgender Persons (Protection of Rights) Act,2019

1. Protection from discrimination

No person or establishment shall discriminate against a transgender person, including denial of service or unfair treatment in relation to:

Education, Employment or occupation, Healthcare, Access to, or enjoyment of goods and services, facilities, or opportunity which is made available to the general public, Right to movement, Right to reside, rent, or otherwise occupy the property, Opportunity to stand for or hold public or private office, Access to a government or private establishment in whose care or custody a transgender person is.

2. Protection from sexual harassment Section 18(d) of the Act which provides that whoever harms or endangers the life or well-being, whether mental or physical, of a transgender person or does acts such as causing physical, sexual, verbal, emotional or economic abuse shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

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3. Obligations on Establishments

- Establishments shall not discriminate against transgenders in matters relating to employment including recruitment or promotion.
- Every establishment shall have a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.

Inclusion of Transgender's in workplace

Organisations should recognise transgender's as human beings first and not put a gender label on them or judge their sexual preference. Not just the government but Corporates have also started adapting diversity and inclusion in their workforce, building a cohesive work culture. There are organisations like Fujitsu, Thought Works which have special policies for transgenders to enable them a happy workplace. Small actions like having a trans person in advertisement, assigning them important roles will benefit them. Companies under Corporate Social Responsibility should focus on awareness campaigns towards inclusion of transgenders in their families, society and should work in creating education and employment opportunities for them.

Companies can undertake some steps to create a more equitable and inclusive environment such as:

1. Awareness

Educate workforces around gender inclusivity, awareness about them and greater acceptance of transgender individuals in the corporate environment.

2. Policy Review

Organisations must review and update their existing HR, administrative, recruitment and employee benefit policies. It would be beneficial to incorporate suggestions from a person from the transgender community

3. Gender neutral washrooms

Employees should have access to washrooms that are appropriate to their gender. Trans women are often subject to harassment as they are forced to use male washrooms

4. Anti-harassment policies

Similar to the POSH Act (The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013), organisations must put in place internal grievance redressal mechanisms for transgender individuals to deal with the harassment complaints, while keeping the identity of the complainant anonymous

5. Training program to increase skills and soft skills

Conclusion

We as a society are obligated to demonstrate inclusiveness and respect towards the transgenders so that they can live a life of dignity, equality and non-discrimination. Let us celebrate the differences we have and look at each other empathetically. Let us not exploit each other's shortcomings and let us thrive together.

NEWS CORNER - #METOO DEFAMATION PRIYA RAMANI CASE

#METOO – DELHI COURT ACQUITS PRIYA RAMANI IN M.J. AKBAR'S DEFAMATION CASE

“Women have the right to put their grievances at any platform of their choice and even after decades”, the court said. it was a hearing of a defamation case on journalist Priya Ramani by former union minister M.J. Akbar, on account of her tweets where she shared her story of sexual harassment in the height of #metoo movement. While setting aside the defamation charges, the court further stated that, “sexual abuse takes away dignity and self-confidence. Right of reputation can't be protected at the cost of right to dignity.”

When we say 'Workplace', we have a picture of an office in our mind. With changing times, especially when many organizations have directed employees to Work from home for longer periods, we should relook at the image of workplace/office in our minds and should also have a look at what does the Law talk about it. What is meant by workplace as per POSH Law? Is the definition under POSH law limited to office place? What does it cover and what is the interpretation that several courts have put forth? To seek answers, let us look at the definition first and then we will discuss its aspects one by one.

Definition –

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, defines workplace very specifically as -

- (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
- (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;
- (iii) hospitals or nursing homes;
- (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
- (v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;
- (vi) a dwelling place or a house;

To simply put, it includes the physical location of the entity from where the business is operated or from where any official or extracurricular activities related to business are conducted. It also includes a place visited by the employees as part of their official duty. Referring to the point 5 of the definition, we can say that the definition is not limited to the office place but includes any place the employee visits for work or while at work. It includes travel and place of accommodation as well. Having said so, the definition does not talk about "**Virtual Workplace**". While people are working from home and are connected with each other virtually, the definition fails to cover this aspect. However, the interpretations given by various courts from time to time have made an effort to protect the essence of legislation and make the definition flexible.

In *Ayesha Khatun v. The State of West Bengal & others*, Calcutta High Court held that "a logical meaning should be given to the expression – workplace, so that the purpose for which Vishakha guidelines have been framed is not made unworkable." The Court further stated that, "**Workplace should be treated in a broader and wider meaning and be applied even beyond the compound of actual workplace.**"

Extended Workplace -

The High Court of Delhi, In *Gaurav Jain vs Hindustan Latex Family Planning Promotion Trust*, W.P(C) No. 139 of 2015, upheld the recommendations of ICC in treating the **outstation travel and a hotel room as workplace**. The extended workplace, is an important part of the law as, many of the sexual harassment incidences tend to happen at such place.

Whose workplace matters?

The **workplace that of a perpetrator/respondent** matters as the ICC of respondent has the jurisdiction to take action on the complaint. The Act handles this specifically and defines aggrieved woman as a woman of any age, whether employed or not, who has been subject to sexual harassment. For example, any woman visiting a workplace for the purpose of an interview and is subject to sexual harassment can file such complaint to the Internal Complaints Committee of the Company where the alleged offender is working.

In *Jaya Kodate V Rashtrasant Tukdoji Maharaj Nagpur University Writ Petition Nos. 3449, 3450 & 3451 of 2013*, the court states that, "**This definition is inclusive and again deliberately kept wide** by the Parliament to ensure that any area where women may be subjected to Sexual Harassment is not left unattended or unprovoked for. Its Clause (v) highlighted by us above shows even an artificial extension thereof and it may include workplace of another employer. Section 2(p) defining "unorganized sector" in relation to a workplace also brings out this intention. This wide canvass brings to fore the intention to provide protection and prevention at all possible workplaces **where either Aggrieved Woman works or may be or visit in connection with her duty or the Respondent is at work.**"

Virtual Sexual Harassment

In the wake of Corona pandemic, many organizations have witnessed a shift in way of working. Work From Home has given rise to incidences of virtual sexual harassment in different forms like inappropriate dressing on virtual meetings, oddly timed meetings and calls, personal intruding questions, etc. There is ambiguity whether these incidences fall in the ambit of workplace. The definition does not talk about it. However, a judgement by Delhi High Court cited hereafter, talks about virtual harassment and helps clear the ambiguity around the blurry lines.

The Delhi High Court in its judgement for Saurabh Kumar Mallick v. The Comptroller & Auditor General of India & Another Civil Writ Petition No. 8649 of 2007, has recognized the virtual form of sexual harassment and extended the definition so as to the virtual workplace falls under the definition of workplace. The virtual workspace is to be treated as workplace, thereby including virtual space as the part of notional definition of workplace. Few of the notional extensions considered as workplaces are places of team outings, places of official dinner/partying, cyber space, virtual meetings, work from home etc.

Keeping in mind the spirit of the Law, the interpretation of definition of workplace by various courts is comprehensive and flexible.

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