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Employment Spotlight: China's New Civil Code and its Impact on Sexual Harassment in the Workplace

Background on #MeToo in China

The issue of sexual harassment and the #MeToo movement in mainland China has burst into the spotlight again recently. Demonstrators defied restrictions on public protests and mass gatherings to collect outside a Beijing court in December in support of Zhou Xiaoxuan ("Zhou"), a young woman bringing a claim of sexual misconduct against Zhu Jun ("Zhu"), a well-known television presenter. Such cases are relatively rare and the high-profile nature of the man accused has resulted in significant attention within China and beyond. The timing coincides with the new PRC Civil Code taking effect on 1 January 2021. Article 1010 of the Civil Code establishes important new principles on what constitutes sexual harassment, expands the scope of recipients to include men, and introduces specific obligations and potential liability for employers in this area.

Zhou Xiaoxuan's Case

Zhou filed her claim in 2018 in relation to an incident in 2014 while she was working for Zhu as an intern at CCTV, the State broadcaster. She also described and made public the incident in a series of social media posts which subsequently were widely shared and re-posted. She accused Zhu of groping her, trying to place his hands inside her dress and pulling her onto him, before forcibly kissing her. Zhou is seeking a public apology and damages of RMB 50,000 (approximately USD 7,700). Zhu denies the allegations and has filed a counterclaim against Zhou claiming RMB 650,000 (USD 100,000) for damage to reputation. Despite the nature of the alleged incident, Zhou's claim was filed as a "personality rights" dispute, a category which includes rights relating to one's body and wellbeing, on the basis that the existing regime on sexual harassment did not provide sufficient clarity or source of redress.

Prior to the hearing, Zhou made it clear that her rationale and determination for bringing her own claim was driven in part by the need to make legislative changes and improve the legal process generally so that rights are

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respected, and victims can seek redress against perpetrators with more confidence. Zhou feels that while the #MeToo movement has had a clear impact in China, much more needs to be done to protect victims of sexual harassment. Zhu, the accused, did not attend the hearing and the court adjourned after nearly 10 hours without giving a verdict. Zhou said afterwards that she had asked for the three judges to be replaced before the next hearing. It is not clear at present when this will take place.

Need for a Unified Law on Sexual Harassment in China

Zhou Xiaoxuan's case highlights the fact that to date China has not had a unified or detailed body of law on sexual harassment. The primary legislation was the PRC Law on Protection of Women's Rights and Interests (2005) which prohibits sexual harassment against women and provides a right for victims to file complaints to their employer or with law enforcement authorities. However, there was no clear definition of what constitutes harassment. A 2012 State Council regulation added that employers should prevent and stop sexual harassment against female employees in the workplace. Despite the issuance of local regulations with slightly more detail on what might be considered harassment and regarding employer obligations to implement complaint procedures (such as in Jiangsu Province in 2018), many observers still felt that the legal framework lacked substance. While surveys showed that many women said that they had experienced sexual harassment, in practice very few legal claims were brought. This reticence to make formal complaints seemed to stem from women's fears that this would affect their career development or reputation, as well as an underlying belief that in reality there was no chance of adequate resolution or legal redress.

The New PRC Civil Code

Against this background, the new Civil Code suggests progress. Article 1010 provides that an individual can bring a civil claim against a person who engages in sexual harassment towards them "in the form of verbal remarks, written language, images, physical behaviour or otherwise, against their will". It goes on to say that enterprises, schools, agencies and similar organisations must adopt reasonable measures to prevent sexual harassment, and implement a system for receiving, investigating and handling complaints. It is significant that:

- The concept of "sexual harassment" is defined for the first time;
- The scope of victims is now wider and no longer restricted to just women; and
- Employers have specific and clear (albeit still quite general) obligations to be proactive in preventing sexual harassment, implement procedures for handling complaints, and take disciplinary action where appropriate.

It remains to be seen exactly how these requirements will be interpreted and enforced. In particular, it is not crystal clear whether or how employers can be held liable for failing to meet their obligations under Article 1010. Commentators have already suggested that it may be necessary to show that a company's failure to implement or enforce procedures caused the specific harassment; or that the harassment was committed by a superior against a subordinate or more junior colleague. Similarly, critics have raised the possibility that sexual harassment outside of the physical work environment, such as at work functions or in social situations after normal work hours, might not be deemed sexual harassment in the course of employment. Nevertheless, the new law provides some basis for claims against employers and a fuller framework to work with than previously.

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The Power of Social Media and Reputational Damage

Aside from legal claims, individuals such as Zhou Xiaoxuan increasingly are making their voices heard through other means. Social media appears to have become the preferred route to make allegations.

In 2019, a university professor in Jilin was fired following an internal investigation after a female employee accused him online of sexual harassment. Weibo users flooded the university's page with comments, asking about repercussions and suggesting that the university had not done enough. The power of social media means that there is a risk of severe reputational damage for employers, which may well prove more debilitating than any legal liability. Foreign companies operating in mainland China may be especially vulnerable to this. Criticism tends to be swift and harsh for multinationals who appear not to have complied with the law or, regardless of that, not to have met their own stated corporate values and global ethical or business standards.

Our Recommendations for Employers

We recommend that foreign companies review existing policies applicable to their staff in mainland China from both a local law and wider ethical and business perspective. It is important to implement specific and robust rules, with clear procedures for making complaints, investigating and handling claims, and details of disciplinary repercussions for breach. Any changes to policies must go through the required consultation process in order to be effective. Companies should also consider providing regular employee education and training on sexual harassment as part of this process and to help develop an environment which prevents sexual harassment.

Position in Hong Kong

In comparison to mainland China, the legal position in Hong Kong regarding sexual harassment is more developed. In Hong Kong, sexual harassment is prohibited by the Sex Discrimination Ordinance ("SDO") and the definition of what constitutes sexual harassment is wider:

- Where a person makes any unwelcome sexual advance or request for sexual favours or engages in unwelcome conduct of sexual nature in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated; or
- Engages alone or together with other persons in conduct of a sexual nature that creates a hostile and intimidating environment.

Sexual harassment does not need to take place between a man and a woman, and "same sex" harassment is also prohibited.

Employers may be held vicariously liable for the acts of employees during their employment unless they have taken "reasonably practicable" steps to prevent employees from engaging in acts prohibited by the SDO. In this regard, it is advisable for employers in Hong Kong to adopt the 'Code of Practice on Employment' under the SDO issued by the Equal Opportunities Commission ("EOC"). In Hong Kong it is also more likely that sexual harassment which occurs in a social situation or outside of the workplace may be considered as being in the course of employment.

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In Hong Kong complaints relating to sexual harassment are filed to the EOC. The EOC is proactive in spreading awareness, devising policies and investigating complaints under the SDO. Nevertheless, making allegations on social media also happens in Hong Kong. In a recently reported case, more than 100 women came forward with allegations of harassment against a prominent local athlete and coach, prompting a wave of comments on social media. The individual ultimately issued an apology on Facebook. Given the power of social media and the risk of both legal liability and reputational damage for employers, the recommendations outlined above for mainland China also apply broadly to Hong Kong.

Final Thought

Back in Beijing, Zhou Xiaoxuan remains upbeat about the outcome of her legal claim but also focused on the bigger picture. “No matter what the result is, we feel that doing this has meaning” Zhou is quoted as saying. Her vocal and active supporters seem to agree. Employers are advised to take note and ensure that they are proactive in this area in both mainland China and Hong Kong.

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