

POSH – COMPLIANCES

Introduction

The Government of India enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act ("**POSH**") in 2013 for protection, prevention, and redressal of sexual harassment against women at workplace. POSH mandates employers to take positive steps for grafting zero-tolerance towards sexual harassment and any failure is penalized with fine and may also lead to cancellation of business licenses. However, after 7 years of implementation, there is no reliable statistics for analysing the extent to which employers comply with POSH and the number of complaints raised and redressed.

This detail aims to provide an overview of the employer's compliances under POSH, the practical issues encountered by them, and approach of the judiciary towards non-compliance. It also attempts to illustrate certain "extra" steps taken by employers, moving beyond the realm of statutory compliances, in order to create an environment free from sexual harassment.

1. Compliance and the concerns

POSH brings home the overarching mandate that no woman employee is meted with workplace sexual harassment, and the primary obligation to curb such prescribed conduct is on the employer. "Employer" is defined widely to include heads and officers of government departments and units, and any person responsible for management, supervision and control of a workplace in private entities. POSH also provides an expansive meaning to "management" where the ambit includes any person, board of directors or its committee, or any internal office which is responsible for formulation and administration of internal policies. The key compliances for employers and the practical concerns shrouding implementation of some of them are provided succinctly in the following paragraphs.

1.1 Constitution of Internal Committee: Every employer irrespective of the headcount must constitute an Internal Complaints Committee ("**ICC**"). In the event that the employer has multiple administrative units or offices at different locations, POSH mandates constitution of separate ICC for each such unit or office. Composition of ICC should be such that at least half of its members are women at all times, and it must have

- A senior level woman employee as the Presiding Officer.
- Minimum 2 employees within the organization, who are committed to the cause of women, or have experience in social work, or have legal knowledge: and
- A member from a non-governmental organization or association committed to women's cause or familiar with issues of sexual harassment.

POSH is silent on the way forward in situations where the employer does not have a senior level woman employee in any of its units to act as the Presiding Officer. Similarly, while POSH rules elucidate the criteria for "*person familiar with issues relating to sexual harassment*" in the context of Local Complaints Committee ("**Local Committee**"), wherein such person must have expertise on the said issues, and may be a social worker with at least 5 years' experience in women empowerment or a person familiar with labour, service, civil or criminal law, there is

no parallel interpretation provided for independent NGO member's qualification to act as ICC member. In absence of a strict mandate, entities have subjectively interpreted the composition of ICC resulting in slack implementation of POSH's most important mandate. Several entities have constituted ICCs derogating from the criteria set out for Presiding Officer, or have appointed independent members from NGOs who may not have adequate experience and expertise in matters of sexual harassment, with the ultimate effect being a half-hearted compliance with POSH.

1.2 Implementing ICC's recommendations: Once a complaint is referred to the ICC, the employer is duty bound to comply with ICC's recommendations after completion of inquiry into a harassment complaint that has resulted in conclusive finding of accused's guilty conduct. Within 10 days of inquiry completion, ICC is required to provide its report along with recommended actions to the employer. Depending on the nature of harassment proved, recommended actions can be in the nature of written apology, warning, reprimand, withholding promotion or pay increment, disciplinary action for misconduct, termination and deduction of compensation from respondent's salary. The employer must act upon the recommendations within 60 days of its receipt. If the ICC concludes that the allegations raised are without merit or forged evidence has been presented, it recommends the employer to take suitable disciplinary action against the complainant and any person acting in concert with her, in accordance with terms and conditions of employment. Further, the employer is also mandated to perform any interim measure that ICC may recommend, such as transfer of aggrieved woman or accused to another workplace, restraining accused to report on complainant's work performance or supervision, and grant of leave for a period up to 3 months. In such cases as well, the employer is required to send a report on implementation to ICC.

On several occasions, implementing ICC's recommendations have led to a rather peculiar situation, where the respondent employee approaches the labour court alleging illegal and unfair termination and raises a false industrial dispute. In such situations, it is often alleged that the due process for taking disciplinary action, mostly in cases of termination, was not followed. While such claims are often frivolous and ought to be dismissed at the outset, labour forums are bound by the procedural canons and disposal of such complaints can take months. Thus, it is extremely crucial that employers always maintain all documents and proof submitted during ICC's inquiry and the report thereof for defending any future labour disputes.

Further, employers must exercise diligence and great caution while drafting employment termination clauses, scope of misconduct and its varying degrees, consequences that ensue, the process that will be followed, and all related HR policies. Clarity and transparency in the documents will go a long way in defending potential litigation in such matters.

1.3 Annual Report: Every employer company is mandated to disclose details of harassment complaints filed and their status in the annual report prepared for every financial year. For other organizations where preparing annual report is not required, number of cases must be intimated to the concerned Local Committee. This obligation has an intricate interplay with a company's board of directors' obligation under Companies Act, 2013 ("**Companies Act**"). The annual report is approved by the board and shareholders in their general meeting, followed by filing with the Registrar of Companies ("**ROC**"). Alongside the annual report, the Companies Act

mandates the board to prepare a "Directors' Responsibility Statement", wherein the directors are required to affirm and declare that necessary steps are taken to ensure compliance with applicable law. False declaration in the aforesaid statement is punishable with fine for the company between INR 50,000 (*about USD 781*) to INR 25,000,000 (*about USD 390,625*) and personal liability on the officer who is in default for imprisonment term up to 3 years and fine between INR 50,000 (*about USD 781*) to INR 500,000 (*about USD 7,812*).

In the event any provision of POSH is not complied with, an affirmation cannot be given by the board, unless properly qualified.

Thus, it is more than likely that POSH non-compliances such as non-establishment of ICC, large number of pending complaints, failure to implement ICC's recommendation will get reflected in the annual report and Directors' Responsibility Statement.

This may lead to potential red flags during an audit process. In fact, in 2014, the Ministry of Women & Child Development strongly urged for cooperation from ROCs for ensuring effective implementation of POSH and therefore, ROCs may seek clarifications on qualified or false statements and take suitable action under Companies Act. Hence, boards must be mindful and include appropriate qualifiers if need be, with accurate explanation for any lapses which may have occurred.

1.4 Other Duties: S. 19 of POSH imposes several other obligations on the employer to build a healthy, non-discriminatory, and safe workplace. These include:

- providing safe environment for employees from external persons at the workplace
- displaying penal consequences of sexual harassment, and constitution and composition of ICC at conspicuous place
- organizing workshops and awareness programmes regularly for sensitization, awareness and orientation of employees and ICC members
- facilitating ICC or the Local Committee for conducting inquiry
- assisting in securing attendance of respondent and witnesses in an inquiry
- providing information required by ICC for inquiry
- assisting the aggrieved woman to initiate criminal case under Indian Penal Code
- including sexual harassment as misconduct in service conditions
- monitoring timely submission of reports by ICC

2. Judicial approach towards non-compliance

S. 26 of POSH states that non-compliance is punishable with fine of INR 50,000 (*about USD 781*) in the first instance and repeated offence is punishable with twice the fine and cancellation, withdrawal or non-renewal of business licenses. Many employer organizations believe that the cost involved in ensuring compliance is significant as opposed to the fine payable for non-compliance, since there is no impending threat to business activities until second default.

However, this approach is fallacious, and the judiciary has awarded exemplary damages in cases of non-compliance and lackadaisical approach of employers to instil a culture free from harassment at workplace.

For instance, in ***Gayatri Balaswamy vs. ISG Novasoft Technologies Limited***, the aggrieved employee lodged a criminal complaint under the Indian Penal Code for harassment and the respondent employer filed counters alleging defamation and extortion under the garb of sexual harassment. The adversaries were also engaged in parallel employment termination cases, which eventually reached the Supreme Court. At that stage, the Supreme Court required them to arbitrate the dispute in accordance with the employment agreement. 12 claims including claim for damages due to mental and emotional harassment caused by the employer's failure to constitute ICC were adjudicated by the tribunal. While the tribunal awarded payment of severance compensation of INR 20,000,000 to the petitioner, it rejected the claim for damages on grounds of mental trauma caused due to non-constitution of ICC.

The petitioner appealed to the High Court, which partially reversed the arbitral award, and ordered payment of an additional INR 16,800,000 (*about USD 262,500*) as exemplary damages for employer's failure to constitute ICC. The High Court observed that the mental and emotional distress caused to an aggrieved woman in absence of ICC cannot be measured through any set formulae and such failure deserves punitive damages. It was observed that presence of a grievance committee or a designated officer is not the same as ICC, which is a specialized committee with external expertise. The presence of ICC would have (i) ensured internal redressal for women employee, (ii) sent a zero-tolerance message within the organization, and (iii) prevented a series of litigation that may be initiated. Further, the court also observed that any delay caused by the aggrieved person in filing police complaint or exercising other rights cannot be a roadblock in imposing such penalty.

Similarly, there are several other cases where employers have been issued instructions, fined in excess of INR 50,000 (*about USD 781*) and aggrieved employees have been restored back to services with damages. Thus, employer organizations must proactively act to not only comply with the letter of POSH but also achieve its main objective.

3. Employers must be proactive to deals with POSH compliances

While some employers approach POSH and its compliances as pegs in organization risk and cost analysis, many have gone beyond the mere scope of compliances and enabled POSH to be a true success within their organizations. They have acted proactively to implement innovative steps for compliance with the true spirit of POSH and create a healthier work environment. Some have voluntarily recognized sexual harassment as an act against employees irrespective of their sex and orientation and adopted gender neutral anti-sexual harassment policies protecting all employees as opposed to women employees only. Despite the fact that anonymous complaints are not recognized, some organizations have vouched to investigate into anonymous complaints as far as possible, thereby acknowledging the sentiment that it more often than not could be embarrassing for any aggrieved employee to disclose identity while complaining. Similarly, while POSH mandates complaints in writing, certain organizations have opted for inquiring oral complaints with an obligation on ICC to reduce it in writing,

resulting in less burdensome procedure for raising complaints under POSH. It is also noteworthy that while POSH is silent on course of action where aggrieved woman wishes to withdraw complaint at a later stage, one entity's policy provides that such withdrawal shall be enabled only after fair ascertainment that the same is not a result of coercion. These commendable efforts mirror the story of organizations that recognize sexual harassment at workplace as gross misconduct and are committed to create good governance and a non-discriminatory work culture.

Conclusion

An act of sexual harassment is an infringement of one's universal human right to equality, dignity, and personal liberty. In recognition of India's international obligation to protect human rights, POSH provides the minimum legal standard of protection that every employee rightfully deserves. However, it will not be fanciful to state that much more needs to be done for making its objective a reality. Employer organizations have the key responsibility of eradicating sexual harassment in all forms within their workplace and this calls for a humane outlook and a firm commitment to curb the evil, and a myopic view of the POSH provisions for compliance is bound to defeat the lofty ideals that it beholds.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.