

STATUTORY INSTRUMENTS

SUPPLEMENT No. 11

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STATUTORY INSTRUMENTS 2012 No. 15.

**THE EMPLOYMENT (SEXUAL HARASSMENT) REGULATIONS, 2012
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The Employment (Sexual Harassment) Regulations, 2012.

(Under sections 7 and 97(1) of the Employment Act, 2006, Act No.6 of 2006)

In exercise of the powers conferred upon the Minister responsible for labour by sections 7 and 97(1) of the Employment Act, 2006 these

Regulations are made this 28th day of April, 2011.

Part I—Preliminary.

1. Title.

These Regulations may be cited as the Employment (sexual Harassment) Regulations, 2012.

2. Interpretation.

In these Regulations, unless the context otherwise requires—

“Act” means the Employment Act, 2006 Act No. 6 of 2006;

“committee” means the sexual harassment committee established in a work place;

“currency point” is equivalent to twenty thousand shillings;

“harassment” means verbal or physical abuse or behaviour that unreasonably interferes with work or creates an intimidating, hostile, or offensive work environment including intimidation;

“intimidation” means physical or verbal abuse, or behaviour directed at isolating or humiliating an individual or a group or at preventing them from engaging in normal activities and includes—

- a. degrading public tirades by a supervisor or colleague;
- b. deliberate insults related to a person's personal or professional competence;
- c. threatening or insulting comments, whether oral or written including by e-mail; and
- d. deliberate desecration of religious or national symbols or both.

“retaliation” means any unwarranted action against an employee or employer or any other person who may be involved in a sexual harassment complaint;

“sexual harassment in employment” means—

- a. a direct or implicit request to an employee for sexual intercourse, sexual contact or any other form of sexual activity that contains—
 - i. an implied or express promise of preferential treatment in employment;
 - ii. an implied or express threat of detrimental treatment in employment;

- iii. an implied or express threat about the present or future employment status of the employee;
- b. use of language whether written or spoken of a sexual nature such as unwelcome verbal advances, sexual oriented comments, request for sexual favours, jokes of a sexual nature, offensive flirtation or obscene expressions of sexual interest that are addressed directly to the person;
- c. use of visual material of a sexual nature such as display of sexually suggestive pictures, objects or written materials or sexually suggestive gestures; and
- d. showing physical behavior of a sexual nature such as unwanted and unwelcome touching, patting, pinching or any other unsolicited physical contact;

which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

Part II—Sexual Harassment Policy.

3. Sexual harassment policy.

- 1. An employer with more than twenty five employees shall adopt a written policy against sexual harassment which shall include the following—
 - a. a notice to employees that sexual harassment at the workplace is unlawful;
 - b. a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for co-operating in an investigation of a sexual harassment complaint;
 - c. a description and examples of sexual harassment;
 - d. a statement of the consequences for employers who are found to have committed sexual harassment;
 - e. a description of the process for filing sexual harassment complaints and the addresses and telephone numbers of the person to whom complaints should be made;
 - f. education and training programmes on sexual harassment for all employees on a regular basis; and
 - g. additional training for the committee on sexual harassment, supervisory and managerial employees.
- 2. Where the union is represented at the workplace the employer shall consult the union before initiating the sexual harassment policy.
- 4. Provision of sexual harassment policy to all employees.
 - 1. An employer shall provide each employee with a copy of the sexual harassment policy.

2. An employer shall provide to each new employee a copy of the sexual harassment policy upon commencement of employment and inform the employee of his or her right to report cases of sexual harassment.
3. The policy shall be expressed in a manner and language, which the employees may reasonably be expected to understand.

5. Prohibition of the dissemination of sexual materials.

An employer shall specifically prohibit the dissemination of sexual explicit voice mail, e-mail, graphics, downloaded material or websites in the workplace and shall include these prohibitions in the workplace policy.

6. Display of sexual harassment policy.
 1. An employer shall post the sexual harassment policy in a conspicuous area at the workplace.
 2. An employer shall post the names, positions and telephone contacts of the members of the sexual harassment committee in a conspicuous area at the workplace.

7. Sexual harassment to be part of the collective bargaining agreement.

Where a labour union exists in a workplace the employer and the labour union shall include sexual harassment in the collective bargaining agreement.

8. Employer to designate a person in charge of sexual harassment.
 1. An employer with more than twenty-five employees shall designate a person who is gender sensitive to be in charge of sexual harassment complaints.
 2. In this regulation, a person shall be taken to be gender sensitive if he or she is conscious of the needs of each gender.

9. Duties of the person designated for sexual harassment.
 1. A person designated to receive complaints of sexual harassment shall issue a written acknowledgment of receipt of each complaint received by him or her.
 2. An employer shall instruct the recipient of sexual harassment complaints to inform the complainant and the alleged perpetrator that the employer shall—
 - a. keep the complaint confidential to the extent practicable under the circumstances;
 - b. conduct a prompt and neutral investigation; and
 - c. not tolerate any form of retaliation against the complainant.

Part III—Sexual Harassment Committee.

10. Sexual harassment committee.

1. An employer shall establish a sexual harassment committee composed of representatives of management and employees or labour union representatives selected annually by each party.
2. The committee shall comprise four members, including the Chairperson designated by the employer.
3. Members of the committee shall be persons knowledgeable in and sensitive to gender and sexual harassment issues.
4. A member of the committee may receive a written or verbal complaint and where a verbal complaint is made the committee member receiving it, shall reduce it into writing and read to the complainant who shall sign it and the member of the committee shall countersign it.

11. Functions of the committee.

The Committee shall—

- a. receive and register complaints of sexual harassment in a form prescribed in the First schedule;
- b. initiate internal investigations into complaints;
- c. keep a record of the nature of sexual harassment offences, proceedings, documents, information and action taken;
- d. respond to complaints within fourteen days from the date of lodging the complaint with recommendations to management for appropriate action;
- e. review the provisions of the policy to convey a responsive and supportive attitude that builds faith and trust;
- f. prepare and provide reports under the complaints procedure to the labour commissioner or labour officer; and
- g. carry out any other duties as may arise for the prevention of sexual harassment.

Part IV—Sexual Harassment Complaints Procedure.

12. Lodging of sexual harassment complaints.

An employee who is sexually harassed in any way described in these Regulations, by the employer or employers' representative, shall lodge a complaint to the labour officer.

13. Procedure for handling sexual harassment complaints by

labour officer.

1. On receipt of a complaint, the labour officer shall promptly investigate a complaint by taking the following steps—
 - a. register the details of the complaint in the form prescribed in the Second Schedule;
 - b. interview the complainant to ascertain the facts of the matter;

- c. obtain from the committee the written report of their investigation and decision on the complaint;
 - d. notify the employer of the complaint and direct the employer to respond to the complaint;
 - e. investigate the complaint to ascertain the facts to the extent practicable, throughout the investigation and consult the union official where a union exists in the establishment;
 - f. in case of a labour officer not being a Labour Commissioner, dispose of the complaint or refer it to the Labour Commissioner in case of deadlock;
 - g. inform the employer and complainant of the decision in writing;
 - h. inform the employer that he or she will not engage in retaliation against the complainant or anyone else who cooperates with the investigations;
 - i. order the employer to separate the complainant and the person alleged to have harassed to avoid further harassment without adverse discrimination affecting their working conditions; and
 - (j) continuously monitor the interim measures that are being taken by the employer throughout the investigation and thereafter.
2. At any time during the investigations the person alleged to have harassed the complainant may be temporarily transferred, reassigned or sent on leave pending the completion of the investigations.

Part V—Referral to the Industrial Court.

14. Referral to the Industrial Court.

- 1. Where the commissioner has failed to dispose of a complaint referred to him or her under regulation 13(f) he or she shall refer the matter to the Industrial Court for hearing.
- 2. A person aggrieved by the decision of a labour officer may within twenty one days give a notice of appeal to the Industrial Court in the form prescribed in the Third Schedule.
- 3. The Registrar of the Industrial Court shall within fourteen days after receipt of the notice of appeal require the labour officer to provide the Industrial Court with full information concerning the complaint, the parties involved, proceedings of the hearings and action taken.
- 4. The Industrial Court shall within fourteen days after receiving the required information from the labour officer issue summons to the parties for hearing.
- 5. The Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules, 2012 shall apply.

Part VI—Principles of the Complaints Procedure.

15. Principles of the complaints procedure.

The complaints procedure shall exhibit the following principles—

- (a) thoroughness;

- (b) impartiality;
- (c) timeliness;
- (d) gender sensitivity;
- (e) social dialogue;
- (f) discretion;
- (g) confidentiality; and
- (h) the right to privacy of the victim of harassment.

16. Confidentiality.

1. All information received when handling complaints of sexual harassment shall be confidential.
2. A recipient of confidential information shall have a duty to protect the confidentiality of the information.
3. Information received in handling sexual harassment complaints shall only be used for the purpose of determining or resolving the complaint and its disclosure shall be limited to persons involved in handling the complaint.
4. The confidentiality on information received while handling a sexual harassment complaint shall continue to exist after the employment relationship has ceased to exist.
5. A person who contravenes this regulation commits an offence.
6. At any stage of investigation arbitration or trial, the labour officer, law enforcement officers, prosecutors, judicial officers, social partners, employer's representatives, the union or workers' representatives, medical practitioners and other parties to the case shall recognise and observe the attributes of the complaints procedure.

Part VII—Protection of Persons Involved in Investigations Against Discrimination.

17. Retaliation and discrimination.

1. A person involved in a sexual harassment complaint under these Regulations shall not be retaliated against for doing the following—
 - a. consulting on, reporting or filing a complaint of sexual harassment;
 - b. testifying as a witness in a claim of sexual harassment;
 - c. cooperating during any investigation of a sexual harassment complaint;
 - d. participating in a meeting constituted to discuss sexual harassment in the workplace;
 - e. discussing the complaint of sexual harassment with the labour union representatives or the employers' organizations; and
 - f. carrying out any duties as a member of the committee on sexual harassment.

2. An employer shall not discriminate against an employee based on the employees involvement in a sexual harassment complaint.
3. Discrimination under this regulation includes—
 - a. termination;
 - b. denial of promotion;
 - c. demotion in title or duties;
 - d. transfer to a less favorable position or location;
 - e. involuntary placement on leave;
 - f. hostile or abusive treatment;
 - g. decreasing remuneration or benefits;
 - h. coercion;
 - i. threats; and (j) intimidation.
4. In determining whether an action is discriminatory, the proximity in time between the action and the protected activity shall be taken into account but the fact that an action occurred after a protected activity does not make it discriminatory.

Part VIII—Offences And Penalties.

18. False and frivolous claim.

1. An employee shall not knowingly raise a false or frivolous sexual harassment claim.
2. Where an employee raises a false or frivolous sexual harassment claim, the employer may take appropriate disciplinary action against that employee.

19. Offence and penalty.

A person who contravenes these Regulations, commits an offence and is liable on conviction to a fine not exceeding six currency points or imprisonment not exceeding three months or both.

CONFIDENTIAL

Regulation 13(1) (a)

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REGISTER FOR SEXUAL HARASSMENT COMPLAINTS

Name of complainant	Age	Occupation	Description of Sexual Harassment	Date of incident	Name of the employer	Sexual Harassment Policy	Name, Age, Sex and position of the alleged Perpetrator	Action taken by the Committee
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Regulation 14(3)

application for referral of sexual harassment complaint to the industrial court.

Case No.:.....

Name of the aggrieved:.....

Nature of Complaint:.....

Name of the alleged perpetrator:

Employer and Address:

Signature of the Aggrieved

GABRIEL OPIO,

Minister of Gender, Labour and Social Development.