Q&A

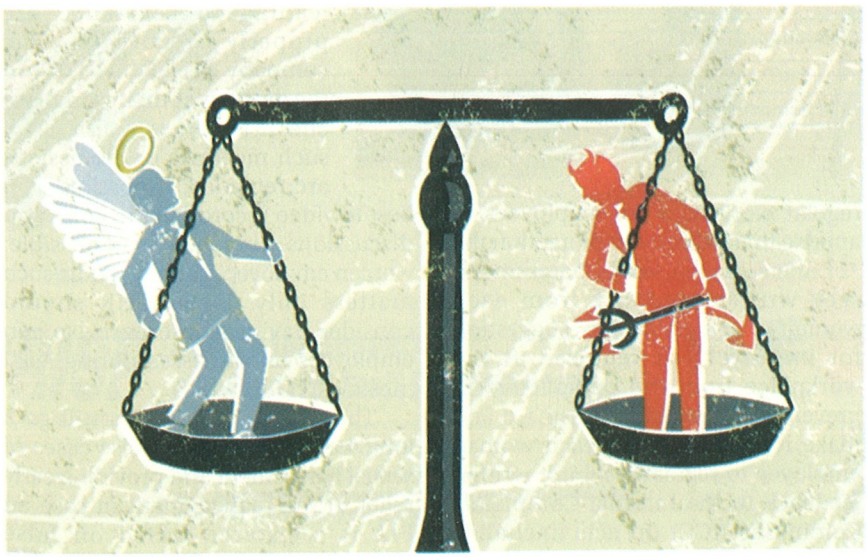
- BY K V SINGH

We are a commercial establishment registered in Mumbai. One of our employees started work on March 14, 2016 and left service on July 31, 2016. Can you please guide me on the steps for calculation of pro-rated earned leave of the said employee?

We are of the view that if the employee has worked from March 14, 2016 to July 31, 2016, i.e., for 140 days, he is entitled to a maximum of 10 leaves. In this regard, Section 35(1)(a) of the Bombay Shops & Establishments Act ("Act") provides that every employee who has been employed for not less than 3 months in any year, shall for every 60 days, on which he has worked during the year be allowed leave, consecutive or otherwise, for a period of not more than 5 days. Since 140 days means two periods of 60 days, the employee can avail of a maximum of 10 days leave. He is not entitled to any leave for the remaining 20 days (140-120) since the entitlement is linked to completion of 60 working days.

We are launching an online recognition programme in our company where the supervisors can recognize employees as well as contract workers and the employees/ contract workers get performance points on the basis of the same. My question here is that from a legal standpoint do you see any risk in including the contract workers in our recognition programme?

Please note that if you have employed contract workers and your company is involved in their performance appraisal/recognition by way of the proposed online programme, there is a risk that your agreements with the contractors may be held as 'sham' or an agreement entered into with a view to 'camouflage' the existence of direct employer-employee relationship. This is because such performance appraisal would show that you exercise direct control over such contract workers. The effect of an agreement for provision of contract workers, which essentially is a contract for services being held as sham and camouflage, is that the contract workers may claim that they are in effect your regular employees. In view of the above, it is advisable not to include the contract workers in the recognition programme. HC



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The Sexual Harassment Act: Boon or Bane?

While the Parliament enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("Act") to protect women from sexual harassment at their workplace, it has been observed that the Act is often misused by women employees. In the last three years, allegations of sexual harassment have surfaced repeatedly after the termination of employment of a woman employee. Similarly, such allegations have also surfaced where actual termination of employment has not taken place, but it has become clear to the employee that the employer is not satisfied with her performance.

According to the Act, "Sexual harassment" inter-alia includes unwelcome physical, verbal or non-verbal conduct of sexual nature (whether directly or by implication). Given the wide ambit of the definition and difficulty in ascertaining the truthfulness or otherwise of such allegations without proper enquiry, it leaves a huge scope for misuse of the Act. In addition to the Act, sexual harassment is also an offence under section 354A of the IPC, and depending on the allegations, various other provisions of IPC may also get attracted. Given that police is required to register an FIR upon receipt of complaints concerning crime against women, the management is often dragged into police investigations, and at times even criminal trials. A complaint of such nature can consume considerable time, energy and resources of an employer, which can result in substantial loss of business, besides reputational loss in the marketplace.

Although the necessity of the Act as well as the relevant provisions of IPC dealing with crimes against women cannot be denied, there is a growing consensus that appropriate means have to be devised to stem the misuse of the law. While organizations cannot completely eliminate the risk of being a target of false allegations levelled by an exiting employee, the same can be mitigated to a great extent by adopting a couple of measures.

Firstly, regardless of whether the workplace and work culture poses any risk of sexual harassment, the human resources department of every company needs to now consider prevention of sexual harassment as one of the main items requiring their attention. It should focus on organizing regular workshops for employees to apprise them about the protection the Act offers against sexual harassment, seek written feedback from each woman employee on any suggestion for improvement required at the workplace from the perspective of prevention of sexual harassment and make it mandatory for each woman employee to regularly submit written feedback to the Internal Complaints Committee (ICC) on acts (including perceived acts) of sexual harassment. In order to achieve the above, the ICC would also have to play an active role throughout the year in the affairs of the employees. The feedback received by the HR department on suggestions for improvements required at the workplace (even if such forms do not provide any suggestion) should be filed in the records of each employee and the ICC should also maintain a record of feedback from each woman employee on whether or not she has come across or faced any perceived or direct act of sexual harassment. Such records will make it difficult for an employee to suddenly make wild allegations of sexual harassment at the time of termination of her employment and provide defence to the company in case such false allegations are made.

Secondly, HR departments of every company need to understand that the termination of employment of a woman employee presents a potential risk and it is necessary to not only deal with the severance in a calm and composed manner, but also ensure that such discussions leading to severance are properly recorded. The company has a right to record the dealings at their workplace and it is perfectly all right if such meetings or discussions are recorded. If possible, it is best to video record the meetings and discussions. In so far it is possible; women employees should handle such matters only. If not, HR should consider having one or two women employees as witnesses during such meetings.

The aforesaid measures will go a long way in preventing false cases of sexual harassment and providing early relief to the management in case an FIR is registered based on false allegations of sexual harassment. HC