

Insights

EHRC DRAFT TECHNICAL GUIDANCE – CLEAR MESSAGING ON SEXUAL HARASSMENT

UK HR - TWO MINUTE WEEKLY

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SUMMARY

Welcome to the new Two Minute Weekly.

Following requests from readers, we are changing the format of our employment law newsletter. It will now be weekly and will feature as it did before news items and new cases.

This week we cover the Equality and Human Rights Commission's (EHRC) new draft technical guidance on sexual harassment, published last week.

We have covered previously the new sexual harassment legislation, the *Worker Protection Act 2023*, coming into force on 26 October. The Act introduces a positive/proactive duty on the part of employers to take reasonable steps to prevent sexual harassment in the workplace. The Act is to be supported by updated Technical Guidance (Guidance), a draft of which was published for consultation on 9 July. Separately, an updated code of practice is to be published "in due course."

The draft Guidance is the first document which gives an idea about what the new legislation will mean for employers. What does it tell us?

THIRD PARTY HARASSMENT

The guidance makes clear that the positive duty covers sexual harassment by third parties, which would include clients, customers, contractors etc. Employers will need to take third party harassment into account when taking "reasonable steps" to prevent harassment. This means that policies, procedures, training and other means of compliance should consider third party harassment. This might come as a surprise to some, as third party harassment was apparently removed from the Act by the House of Lords and as a result an individual employee cannot bring a claim for sexual harassment by a third party. However, it appears that the positive duty is wider in

scope and **does** cover steps to prevent harassment by third parties. In any event, Labour has pledged to re-introduce liability for third party harassment in the near future.

WHAT ARE “REASONABLE STEPS” TO COMPLY WITH THE POSITIVE DUTY

The draft Guidance provides a number of hypothetical examples of what might be expected:

- a sexual harassment impact assessment including an analysis of what steps are required (this is not expressly stated in the draft Guidance but implied);
- updates to policies and procedures to clarify the law, and to set out expected behaviours and complaints mechanisms;
- training with managers and staff to raise awareness of sexual harassment rights and of the employer’s policies and procedures;
- specific training for managers to support them in dealing with complaints;
- a process for reviewing the effectiveness of policies and training;
- a timetable for refresher training for management and staff;
- encouraging staff to complain when they experience or witness sexual harassment;
- full consideration of the risks of third party harassment, including the types of third parties staff may come into contact with and the likelihood of staff coming into contact with third parties at all; and
- notifying any self-employed consultants on site or with access to staff of the employer’s policies.

In short the draft Guidance sets a high bar - it includes provisions for a timetable for regular review and updating of policies and training, as well as the express inclusion of third party harassment.

EHRC PENALTIES FOR NON-COMPLIANCE

These are free-standing penalties and action which can be taken by the EHRC. Penalties include:

- Investigation of an employer;
- Issuing an unlawful act notice following an investigation, confirming the employer has breached the Equality Act 2010 and requiring the employer to prepare an action plan setting out how matters will be resolved;

- Entering into a legally binding agreement with the employer to prevent future unlawful acts; and
- Asking the courts for an injunction to prevent an employer from committing an unlawful act

25% UPLIFT TO COMPENSATION

In terms of application and extent, this is similar to the ACAS uplift for failure to comply with the ACAS code of practice on disciplinary/grievance procedures. An uplift can only be applied to compensation awarded where an individual succeeds in a sexual harassment claim. The amount of uplift is based on the extent of non-compliance with the positive duty, again very similar to the ACAS uplift. The higher the level of non-compliance, the higher the percentage uplift.

The key takeaways from the draft Guidance seem to be the emphasis on third party harassment and the setting of a high bar for compliance.

The consultation period is due to end on 6 August.

RELATED PRACTICE AREAS

- Employment & Labor

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