

Insights

SEXUAL HARASSMENT – THE PREVENTATIVE DUTY

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SUMMARY

After a slightly extended summer break, we return with a summary of the new sexual harassment rules due to come into force in just over two weeks.

BACKGROUND

The *Worker Protection (Amendment of Equality Act 2010) Act 2023* was introduced last year. Despite its generic title, the act is concerned entirely with sexual harassment, specifically the introduction of a positive duty on employers to take reasonable steps to prevent sexual harassment in the workplace. In August 2023, the act went through a couple of amendments at the House of Lords stage, where liability for third party harassment was apparently removed and “all reasonable steps” to prevent harassment was replaced with “reasonable steps”.

However, any thoughts that the preventative duty might be watered down were sent packing by the initial technical guidance published on 9 July. This was the first real introduction to the duty in practice and it became clear that:

- The bar for compliance was high;
- The preventative duty included harassment by third parties;
- There was a maximum 25% uplift for breaching the duty, based solely on non-compliance; and
- The EHRC could take independent action against employers.

On 26 September the final technical guidance was published, along with an 8-step guide. These only emphasised the points above, adding new points and two new case studies.

As a sidenote, it seems that Labour's apparent intent to amend the legislation and specifically add back in the requirement to take "all" reasonable steps are not being taken forward, certainly not yet.

THE PREVENTATIVE DUTY

The duty is to prevent sexual harassment, but what makes the preventative duty different? The biggest difference is its anticipatory, positive nature, with an emphasis on risk assessment and prevention. The duty is not so much a defence to a sexual harassment claim, it is something that should have prevented a claim in the first place. To quote the technical guidance it is "*designed to transform workplace cultures by requiring employers to take positive and proactive reasonable steps to prevent sexual harassment of their workers*".

8-STEP GUIDE

The 8-step guide is possibly the best place to start. This is brief, non-legal summary of the minimum steps all employers should take to comply with the duty. They are:

- Step 1: Develop effective anti-harassment policies and procedures;
- Step 2: Engage staff with the policies/procedures (and the duty) through 1-1 meetings, training, staff surveys and exit interviews – ensure that staff are familiar with any complaints procedure;
- Step 3: Carry out a risk assessment and take all necessary steps resulting from it. According to the EHRC, an employer is unlikely to comply with the duty without having first carried out a full risk assessment;
- Step 4: Set up a reporting system – this could be online, telephone or otherwise. All steps should be taken to respect confidentiality and, if requested/required, anonymity;
- Step 5: Train staff – all staff, including managers and senior staff, should be trained, including on what sexual harassment looks like, what to do when it happens, and how to make/deal with complaints;
- Step 6: Handle complaints – including confidentiality, anonymity and removing the alleged harasser if necessary;
- Step 7: Deal fully with third party harassment, and treat it in the same way as any other harassment; and
- Step 8: Monitor and evaluate actions – this includes reviewing effectiveness, staff surveys, reviewing complaints.

The 8-step guide provides employers with the minimum steps for compliance, emphasising the overarching importance of effective policies and procedures, and ensuring they are communicated to staff and followed through.

TECHNICAL GUIDANCE

Moving to the technical guidance, it builds on and adds to the 8-step guide and features five case studies, two of which really emphasise the issue of third party harassment.

As well as adding detail, it raises specific points:

- As mentioned already, failure to comply with the preventative duty can lead to a maximum 25% uplift to tribunal awards. The uplift can only be applied where there is a successful sexual harassment claim under the EqA, which ironically is a claim that at present cannot be brought against third parties. Despite this, when assessing the percentage uplift, the only thing a tribunal takes into account is the employer's compliance/non-compliance with the preventative duty, which **does** include third party harassment. The preventative duty is therefore wider than the employer's liability under the EqA because it includes third party harassment. This is another incentive to comply. This apparent inconsistency may be resolved if Labour restores liability for third parties under the EqA, but this does not appear to be happening any time soon;
- Although a failure to comply with the preventative duty is not a standalone claim (it can only be part of an EqA sexual harassment claim) a failure to comply alone can be directly enforced by the EHRC. Although EHRC enforcement is rare and tends to focus on very large employers, such as the equal pay investigation at the BBC, it might be reputationally damaging, and there is no way of mitigating that damage through, for example, an NDA. It is public. Enforcement can include the EHRC:
 - investigating the employer;
 - issuing an unlawful act notice if the employer is or has been the subject of an EHRC investigation. The EHRC can require an action plan to remedy the breach and prevent future breaches;
 - The EHRC can entering into a formal, legally binding agreement with the employer to prevent future unlawful acts, which include breaching the preventative duty;
 - Applying for injunction to restrain employer from committing unlawful act(s).
- If the employer is regulated, the employer should consider whether the sexual harassment in question should be reported to the regulator, including for example the FCA or GMC. The "hospital" case study in the technical guidance is specific about this; and

- When a complaint is made, immediate steps should be taken to protect the complainant and perhaps other staff from the alleged harasser. This can include suspending the alleged harasser or excluding the alleged harasser from certain kinds of work. The employer will need to have the right to do this, which may not always be the case.

The case studies are very good and set out compliance with the duty in a day-to-day setting. They are well worth a look.

SUMMARY

The duty comes into force in just over two weeks, and the supporting documents referred to above (the 8-step guide and technical guidance) provide guidance and assistance in complying with the duty. There are links below to both documents.

The main compliance issues have already been set out, but some of the wording used in the documents, such as “transformative” and “anticipatory”, indicate that the EHRC might have high expectations.

One final list we have compiled is an overall list of compliance points, taken from the documents.

Reasonable steps will always include:

- A risk assessment, including an analysis of what steps are required;
- Updating policies/procedures to clarify the law, set out expected behaviours, and set out complaints mechanisms;
- Carrying out staff training to raise awareness of rights, policies and procedures;
- Holding specific training for managers who deal with complaints;
- Having a process for reviewing the effectiveness of policies/training;
- Ensuring all complaints are acted on and keeping a record of complaints, both formal and informal;
- Carrying out staff surveys, perhaps anonymously, to test the water and compare against complaints actually made;
- Having a timetable for refresher training;
- Encouraging staff, both victims and witness to complain and including reporting to the police (if applicable);

- Taking into account full consideration of third party harassment and risks, including types of third parties, and the likelihood of staff contact with third parties. This includes clients, customers, contractors and even members of the general public;
- Notifying and warning third parties of the employer's policies/procedures; and
- Notifying regulators if applicable and appropriate.

This is not an exhaustive or complete list, but it captures the main points. It is almost certain that the preventative duty will become a feature of sexual harassment claims, employer practice and possible EHRC measures after 26 October.

FURTHER RESOURCES

ECHR: [Employer 8-step guide: Preventing sexual harassment at work](#)

ECHR: [Sexual harassment and harassment at work: technical guidance](#)

RELATED PRACTICE AREAS

- Employment & Labor

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