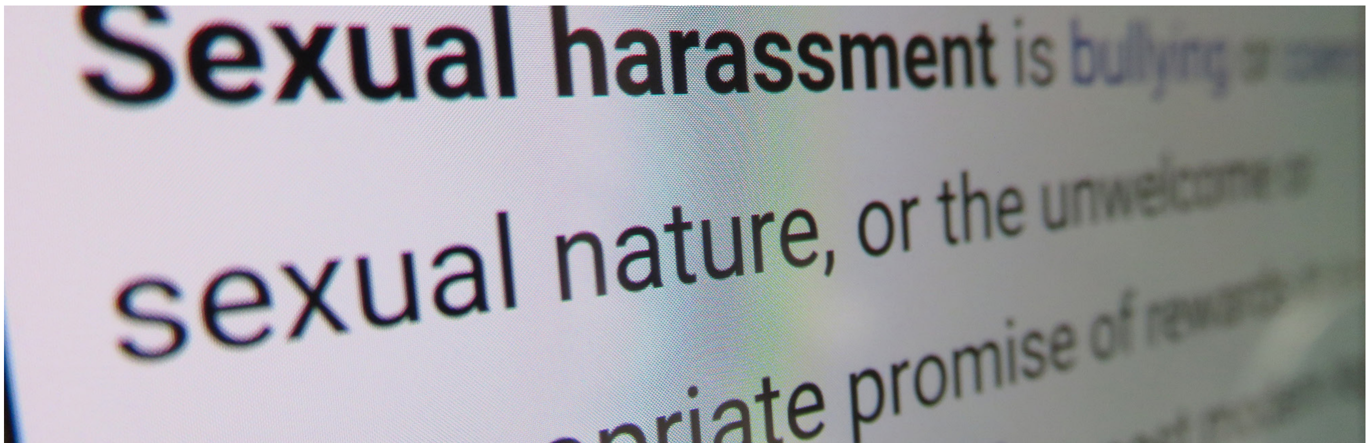
SQUIRE PATTON BOGGS

Coming Soon:

New Duty on Employers to Prevent Sexual Harassment at Work (UK)

October 2023



The Worker Protection (Amendment of Equality Act 2010) Act 2023 has received Royal Assent, which means employers now have 12 months to ensure they can show the taking of reasonable steps to prevent sexual harassment in their workplace.

In this briefing note, we set out our headline answers to the main questions employers may have about this new duty.

What will this new law do?

This new piece of legislation amends the Equality Act 2010 (EqA) and places a new pre-emptive duty on employers to take "reasonable steps" to prevent sexual harassment of employees in the course of their employment.

A couple of points to flag immediately: the definition of "employee" in the EqA is wider than that used in other pieces of employment legislation and extends to workers and some self-employed individuals, as well as your regular Schedule E employees. Furthermore, "in the course of their employment" covers activities outside the workplace, such as work drinks or off-site events. Both are points to bear in mind when considering what practical steps employers should be taking to comply with this duty (see below).

In terms of the behaviour this change is intended to address, the new provisions use the existing definition of sexual harassment in the EqA, namely unwanted conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant.

When will it come into force?

We do not have a specific date yet, but the Act states the relevant provisions will come into force one year after it becomes law, so Autumn 2024. Employers therefore have 12 months to prepare, though hopefully it should not take them anything like so long.

Why is the government making this change? Doesn't the Equality Act already prohibit sexual harassment in the workplace?

The EqA does indeed include protections against sexual harassment, which many consider already sufficient, but the government is responding to concerns that the existing legislation is not operating effectively, and that sexual harassment remains a problem within the workplace. The government therefore supported this Private Member's Bill to include a new proactive duty on employers to prevent sexual harassment – as opposed to simply giving them a defence if they can show they have taken all reasonable steps to prevent it but it happens anyway.

Can you give some examples of what those "reasonable steps" would look like, i.e. what an employer will have to do to comply with this new duty?

Ultimately, the final arbiter of what constitutes "reasonable steps" will be an employment tribunal, but the government has promised a new statutory code of practice and further guidance that will include examples of steps that employers might take. It has steadfastly refused to provide a definitive statement of what amounts to "reasonable steps" on the superficially perverse basis that if employers are told what they have to do, they will just do it. Instead, runs the argument, the employer must apply its mind to what is reasonable in the context of its own business and that could lead to the view that measures different from and/or additional to that list could or should be taken.

Until such time as we have this guidance and initial decisions from employment tribunals and the higher courts, a good starting point is the Equality and Human Rights Commission's existing guidance on Preventing sexual harassment at work: A guide for employers and its more detailed technical guidance on sexual harassment and harassment at work. Neither of these documents is currently statutory (which means there is no penalty for not complying with them, but a tribunal may take them into account in relevant circumstances), but they give us a strong idea of what any new code of practice/ guidance will include.

As indicated above, what is reasonable will vary from employer to employer depending on the size and nature of the business, the resources available to it, any specific risk factors that need to be addressed within their particular sector or employer, etc. Ultimately, the bigger the employer and the more obvious the harassment risk there, the more a tribunal is likely to expect from it.

The existing EHRC technical guidance includes the following steps:

- **Develop and communicate an effective anti-harassment policy** – The guidance sets out in detail what such a policy should contain, including a definition of sexual harassment, a statement that such behaviour will not be tolerated and is unlawful and an effective procedure for receiving and responding to complaints. Policies should be actively communicated to staff, including as part of the induction process, and the effectiveness of any policies should be evaluated on a regular basis (at least annually).
- **Assess and minimise risk in your business** – This would include considering whether there are any factors that might increase the likelihood of sexual harassment taking place in your workplace (e.g. job insecurity, power or gender imbalances, a lack of diversity overall, etc.) and the steps that can be taken to minimise them.
- **Engage and train staff** – Staff should be trained on what sexual harassment in the workplace looks like, what to do if they experience it, either direct or as "bystander", and, if appropriate, how to handle complaints. The guidance recommends that employers run staff surveys and exit interviews to help them understand where any potential issues lie and whether the steps they are taking are working. Training should be tailored towards the nature of the employer, the target audience (e.g. seniority and job role) and consideration should be given to the best way of delivering training to maximise impact.
- **Have effective reporting procedures in place** – The new legal duty will be to take preventative steps and, therefore, the fact an employer has conducted a decent investigation after an incident of harassment will not be sufficient to avoid liability. However, the technical guidance points out that if an employer has taken effective steps to deal with an occurrence of this sort, this may help to prove that the anti-harassment policy is taken seriously by the employer and used effectively when breached. Furthermore, the deterrent effect of such steps could be considered in relation to any future acts of harassment.

We would also add to this list, create the right workplace culture. We all know that a business can have all the right policies and procedures in place, but these mean very little if no one feels comfortable using them (e.g. because they do not think anything will change or, even worse, they are concerned they will suffer a detriment for raising a complaint) or if there is a toxic culture in which behaviour such as sexual harassment is tolerated. This means setting the right tone at the top and ensuring this is promoted within the rest of the business.

As the issue of sexual harassment in the workplace has been topical for several years now, many businesses will have already reviewed what they currently do on this front and considered whether they should be doing more. Hopefully, that means those businesses will have very little more to do in light of these legislative changes. We would, however, recommend that even these employers take another look at their current practices in light of these changes – especially once we see the new code of practice issued by the EHRC – to ensure they are comfortable that there are no other steps that it would be reasonable for them to take. A written record of what they have done in this regard would also be advisable.

What are the consequences for employers of breaching this new duty?

An employer that breaches this new duty could face proceedings by the EHRC, as it will have new powers to enforce standalone breaches, i.e. even without sexual harassment having taken place. As per our previous blog, the expectation must be that the EHRC's intervention would not lead immediately to any financial penalty, but instead to an order or recommendation that the employer take specified steps to bring its suite of protections against harassment up to scratch and some fairly painful financial pokes in the eye if it does not comply, especially if there is then any incident of harassment.

If an employee brings a successful complaint of sexual harassment, an employer risks an uplift in compensation of up to 25% if the tribunal is satisfied that the employer has breached the new duty to take reasonable steps to prevent it. There is unlikely to be any requirement for the individual or the EHRC to show that its taking those steps would actually have made any difference.

Is there still a proposal that employers will be liable for sexual harassment carried out by third parties, e.g. clients or customers?

No. The original version of the legislation would have made employers liable for harassment of employees by third parties (such as customers and clients) in certain circumstances. The provision was, however, controversial and prompted a lot of debate, in particular about its potential impact in the hospitality sector if employees/workers brought claims when they overheard comments from customers that they found offensive. This provision was, therefore, dropped during the parliamentary process to ensure the rest of the Bill became law.

Some may recall that employer liability for third-party harassment was originally introduced in 2008 by an amendment to the Sex Discrimination Act 1975. It later became s.40 of the EqA. In 2013, the provision was repealed because the government felt it was unnecessary and confusing (and substantially unworkable in practice, as it had been warned, but nobody mentioned that).

This does not, of course, suggest that employers do not have to take sexual harassment by third parties seriously. A failure to do so could still result in poor staff morale, increased staff turnover and bad PR, as well as the risk of constructive unfair dismissal claims and potentially personal injury proceedings. It does, however, mean that there is reduced scope for employees to bring discrimination claims in such circumstances. In *Unite the Union v. Nailard* in 2018, the Court of Appeal indicated that such a claim would only succeed if the employee could show that their protected characteristic was the reason for the employer's failure to protect them against the harassment by a third party.

How does this new duty interact with the existing defence available to employers in discrimination cases if they can demonstrate they have taken "all reasonable steps" to prevent their employees from acting unlawfully?

These two things are different.

Under the EqA, employers may be held liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of their employment. Employers do, however, have a legal defence (often referred to as the statutory defence) if they can demonstrate they had previously taken "all reasonable steps" to prevent their employees from acting in that way.

The purpose of this defence is to exonerate the conscientious employer that has used its best endeavours to prevent discrimination occurring. This defence will continue in force and employers will still be able to defeat a claim on this basis. Historically, few employers have relied successfully on the statutory defence. This is usually because they have rarely done much more than issue a policy and possibly run a training session on harassment and because the question is being considered against the background that whatever the employer had done was clearly not effective in practice. This was illustrated recently in *Allay (UK) Limited v Gehlen* – involving an allegation of race discrimination – in which the EAT gave a very clear warning to employers that it is not enough to have done some anti-harassment training at some point in the past and then just hope for the best. The principles in this case would equally cover training that was legally wrong or incomplete, or where the last edition of your anti-harassment materials can only be found in the HR Drawer Where Policies Go To Die. The case also gives an indication of the steps an employer is likely to be expected to take under the new rules. See our blog for further details.

Another point to mention is that a failure on this front will not necessarily mean that an employer will face an uplift in compensation. As you will have spotted, the statutory defence requires an employer to show that it has taken "all reasonable steps" to prevent the behaviour in question, whereas the new duty on employers to prevent sexual harassment requires employers to take only "reasonable steps". A reference to "all" was dropped during the parliamentary process to ensure the passage of the duty into law.

Will the new duty cover other forms of harassment, e.g. racial harassment?

No. This new duty on employers only covers sexual harassment, as this has been identified as a particular problem in workplaces. Having said that, we would recommend that if an employer is rolling out training on inappropriate behaviour in the workplace to comply with this new duty, it should cover all forms of harassment at the same time, as these too remain unlawful. Doing so should also support an employer if it wishes to run the statutory defence in response to a claim of harassment on the grounds of one of the other protected characteristics.

What guidance is available for employers?

The EHRC will be producing a new statutory code of practice on workplace harassment. Presumably, this will be similar to its current technical guidance on sexual harassment and harassment at work, save that it will only cover sexual harassment and not the other forms of harassment prohibited under the EqA. The EHRC will be consulting on the new code and it should be published before the new duty comes into force.

The government has also committed to producing further guidance for employers on sexual harassment.

There is also some existing guidance from Acas on preventing sexual harassment. While this reflects the current state of the law, it is another useful source of information for any employer considering what steps it should consider taking to comply with the new duty.

What changes should employers be making to their policies and processes? In particular, should employers introduce a standalone sexual harassment policy?

We will have to wait and see if the new code of practice from the EHRC recommends a standalone policy on sexual harassment. Its current technical guidance on sexual harassment and harassment at work states that employers should either have different policies to deal with sexual harassment and harassment related to protected characteristics or have one policy that clearly distinguishes within its terms between the different forms of harassment. In our view, a standalone policy would be ideal (but not essential) in light of the specific new obligations being placed on employers in relation to sexual harassment at work.

Whatever approach an employer decides to take, any policies and procedures should be reviewed considering the new code of practice/guidance when it is issued. A good starting point would be to review your current policies/processes against the existing guidance that is available. If you do this and they are compliant, you are unlikely to be required to make significant changes further down the line.

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To help you, we have put together a menu of training solutions, which we can provide for you "off the shelf" or tailored to your organisation's specific requirements, supplemented by short introduction infocasts – our "skills pills".

Our DEI training solutions package is aimed at both local and global businesses operating in the UK. The package is aimed at all levels of audience within your organisation, including HR, recruitment and talent professionals, mid-management, in-house lawyers, general counsel, board members and other C-suite executives.

Please contact Bryn Doyle or your usual contact in the Labour & Employment team to find out more about the diversity and inclusion training we can offer.

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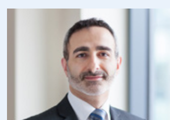

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