SQUIRE PATTON BOGGS

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

May 2024

Why doesn't someone tell us what we need to do?

It should be a principle of good law, you would think, that you know what you have to do to comply with it. So why, when asked to provide that clarity in advance of the positive duty on employers to take reasonable steps to prevent sexual harassment coming into force in October, has the government refused to do so?

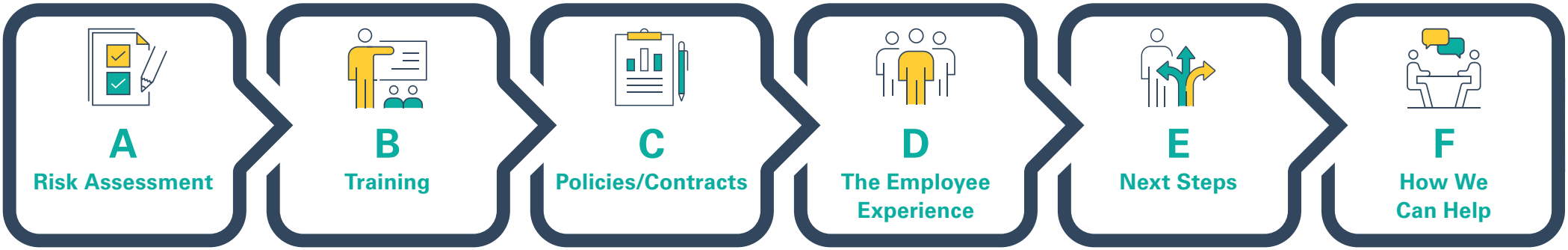
When pressed on the question, the government has so far said that the trouble with telling employers what to do to prevent harassment is that they would probably just do it, and that is not the point at all. Underneath that seemingly wilfully contrarian approach, however, lies a more sensible proposition – that no such list of "reasonable steps" can take into account the varying circumstances and risks of every workplace. As a result, there could well be things on a list which some employers simply could not do, and things not on the list which some employers really ought to do. Issuing in effect a series of boxes to tick would remove from employers the obligation to think about the issue of harassment in the context of their own business- its people, its geographies, its clients, its workplaces and so on.

The Equality and Human Rights Commission has issued guidance which is quite a good read in places. Although the original intention had been for the government to issue supporting notes to the legislation (between us, these were are probably unlikely to add anything terribly useful), the plan is now that the EHRC will instead issue updated versions of its code and guidance to reflect the statutory changes. Although the stated aim is that these will be released and subject to a six-week consultation period over the Summer, with the announcement of an early General Election being called and all the other distractions facing the government at present, the probability of the final versions being issued long enough in advance of the October implementation date to allow employers to act on them is pretty limited.

When the law changes, the obligation will be immediate. There is no transition or preparation time. So come 26 October, you have either taken the reasonable steps required or you haven't, and if you haven't, you are immediately exposed. Acting now, or as a minimum, being seen to think now about whether you need to act, is a likely pre-requisite of compliance with this new duty.

We can no more provide an exhaustive list of things to do than can the government. However, keep in mind that the requirement here is to take reasonable steps to prevent harassment, not all reasonable steps. Even if you miss one or two possible minor measures at the margins, therefore, that will not necessarily put you in breach.

So here is an entirely non-statutory, non-official, non-approved set of anti-harassment things to be seen to have thought about by October.



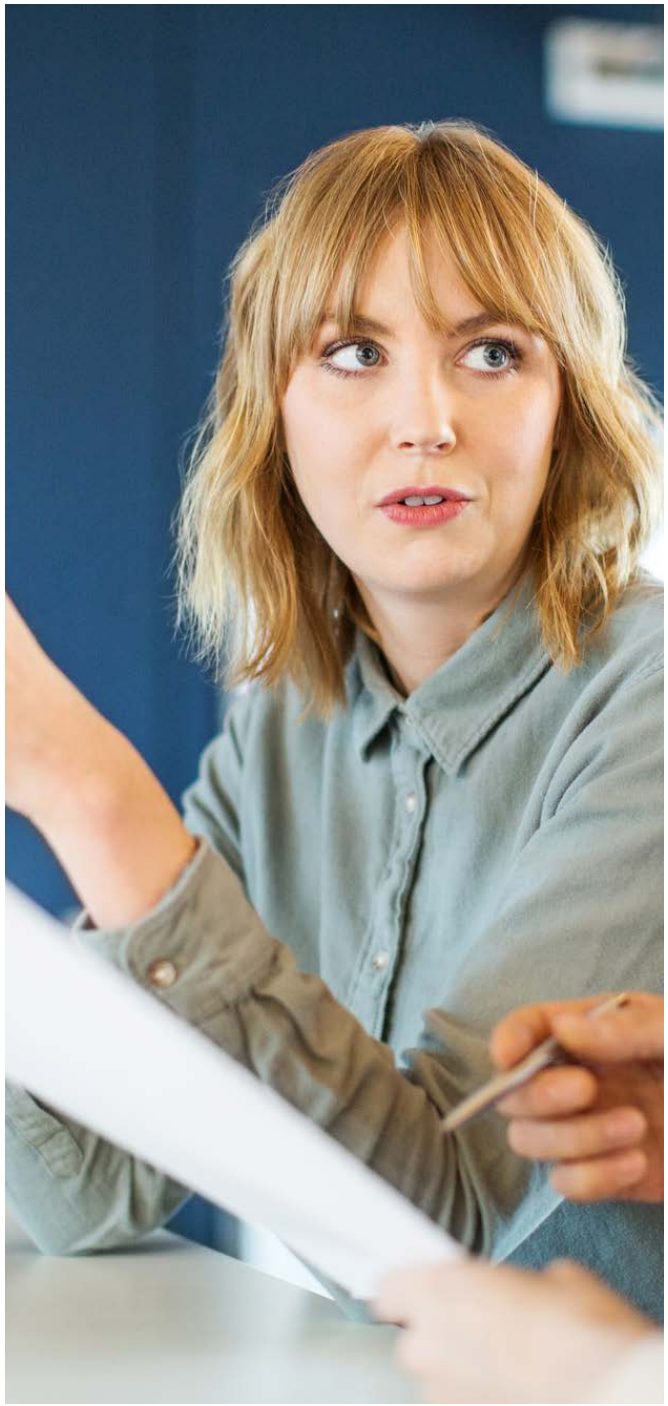
A. Risk Assessment

You cannot know what constitutes reasonable steps to head off a risk unless you know its source and extent. Any attempt to determine the steps your business should take under this new law must therefore realistically begin with an assessment of where you start from in that respect. Completed in sufficient detail, this will form the cornerstone of your later efforts, and so go a long way towards justifying the reasonableness of the steps you choose to take and not to take.

Resisting the temptation to conclude resignedly that all you require to run a risk of sexual harassment these days is two employees (actually, not even that if you have particularly frisky clients and contractors), sources for inputs to your risk assessment could include:-

1. **The composition of your workforce – are there particular gender imbalances in some teams?** Either way, actually, since assuming that all sexual harassment is man-on-woman is of itself an overly simplistic approach to the question and potentially discriminatory.
2. **Do your employees have access to alcohol in the course of their employment?**
3. **What level of direct physical management oversight applies?**
4. **Do the last, say, 12 months' exit interviews have any story to tell about this?** What about Glassdoor or internal opinion surveys?
5. **What is your corporate history of such conduct?**
6. **How have prior allegations of sexual harassment been (seen to be) handled?** What lessons will have been taken from that by the other employees?
7. **What training have you done?** How long ago? Was it any good?
8. **When was the last time your sexual harassment or equal opportunities policy saw the light of day?**
9. **Does this sort of conduct feature in your on-boarding or induction processes for new hires?**
10. **When did the Board last pay any express attention to this question other than under duress?** Is it seen to be interested in promoting the right behaviours or merely those which don't inconvenience the business?
11. **What is the physical distribution of your workforce?** Are some of them sited in dark corners, where uninvited attention may be harder to spot, or do they work alone and without potential witnesses?
12. **Have there been any material number of complaints or grievances about bullying or other unattractive behaviours that could very easily be or have been gender-related?**
13. **Do you have a route for raising allegations about harassment** which is (a) known to employees; (b) seen as safe, i.e. doesn't lead to retaliation or victim-blaming, and (c) confidential? Alternatively, do you see grounds to conclude that conduct of this sort may go or have gone unreported, whether out of fear, ignorance or concern that the company may under/over-react to those allegations?

Obviously this assessment is not mechanical and doesn't generate a numerical score above or below a particular risk threshold. It may lead you to conclude that your risk is relatively low, but NB no Employment Tribunal will ever accept an argument that there was no risk at all. Therefore, as a minimum for the sake of appearances, you will always need to do **something**. The obvious next question is what that should be. At the very least, surely, the creation of a reasonable risk assessment document. Again, have a look at the EHRC guidance, but we recommend something like steps B to E, below.



B. Training

Without some visible training of your staff there is next to no chance of your being found to have complied with the new statutory duties. But what training, to whom, when, how, etc? Things to think about when reviewing what has been done and what needs to be done in this respect might include:-

1. **When did you last do it?** There is no hard-and-fast rule here, but the implication from decided case law is that anything much less than annually is taking you into some pretty choppy waters.
2. **Relatedly, what has been your staff turnover or growth over that time?** In other words, has a material proportion of your workforce not actually done the training at all?
3. **What form did it take – a rushed half-hour on top of other duties or a dedicated slot of an hour or so without avoidable interruption?** That sort of time is enough to convey all the legal, practical and behavioural principles required, and much more than that risks becoming counter-productive. We saw a piece in the New York Times some years ago which suggested that equal opportunities training is most effective if it lasts for 4 hours or more, but we do not recommend that – there will be no positive and empowering message left after that, and potentially no survivors at all.
4. **How can you make sure that senior management is seen to attend the training, and not duck out for "urgent calls" and "client meetings"?** In fact, the emphasis should not just be on their attending, but being on their seen to actively drive and support these principles.
5. **Is your training comprehensive?** A full rehearsal of the law and practice around harassment is the stuff of a 3-day residential course, and there is absolutely no requirement for that. However, you do at least need to cover the basics – the components of harassment, what will constitute victimisation, the potential for personal liability, why it doesn't matter that you didn't mean to offend, your view of what should be upsetting not being relevant, why "bantz" is neither an excuse nor a word, and maybe a little on just how grim it is to be publicly grilled on the stand in the Employment Tribunal by a professional assassin.
6. **Is your training accurate?** Up to the date with law and good practice, and not misleading as to any requirement of intention or sexual intent? Does it wrongly blur the line between harassment and bullying, or suggest the need for some continuing course of conduct or for the victim to have made his/her disquiet obvious first?
7. **Who did your training?** Both in terms of whether no-shows were hunted down and made to attend a session, and whether the person doing the training had the knowledge, presentation skills and gravitas to deliver the necessary messages effectively. Getting in someone external at a cost is a visible sign of your company's willingness to invest in getting this right. Such a person may hold audience attention for longer than someone internal who necessarily comes to that session with their own perceived history or agenda and may be less persuasive as a result. Invest wisely here – a poor external presenter will blight not just their particular hour but also the wider message. You can always find a cheaper speaker, but in this arena you very much get what you pay for.
8. **What evidence have you got of all this? Is there a register, a slide-pack, a hand-out, etc?**
9. **Did it work?** Have there been new allegations of sexual harassment since the training? Do they indicate a collective failure to take the necessary messages on board, or only that one or two specific individuals have proven totally impervious to these new ideas?
10. **Should you have training tailored to different groups within your work force to address the different risks which they pose?** For example, some training for lower-level staff, some for managers who may receive complaints and some for more senior staff who may be required to deal with and rule upon them, and to decide on appropriate consequences?
11. **Should any of the training adopt a more holistic approach and look also (not instead) at related skills which could reduce workplace disputes and hence the scope for employees to feel bullied or harassed – conflict management, "difficult conversations" or formal mediation skills, for example?**
12. **Does your training give some guidance on what to do and where to go if you are not a victim of harassment, but believe yourself to be a witness or bystander to it?**

C. Policies/Contracts

Another fundamental plank of compliance here will be written rules, the evidence that your staff knew or should have known the appropriate behavioural boundaries. Substance is very definitely more important than form here, so it is not madly important whether these appear in contracts or non-contractual guidance or policies. When the glare of the Employment Tribunal's scrutiny falls on your anti-harassment paperwork, is it going to shine? Consider:

1. **When was it last reviewed?** Even if the review concludes that no update to your policy is necessary, being able to show that you look at it at least once a year will be a positive step. Maybe, if not the case already, you could expressly make review of the policy an internal audit item?
2. **Where has your policy been since then?** Front and centre on the notice board or intranet, or just turning slowly to peat in the drawer in HR where Policies Go To Die? If a member of your staff wanted to see it, how readily could they find it (and in particular, the piece around reporting harassment allegations)?
3. **Like the training, is your policy around harassment legally accurate and practically workable?** What commitments does it make to either accuser or accused around process or sanction? Are these realistic, or is some additional expectation-management wording required? Given that sexual harassment can be entirely inadvertent, even positively well-intended, you need to be careful about waving around superficially impressive references to zero tolerance and summary dismissal of harassers. They will create expectations among victims which there may be good reasons not to satisfy in particular cases. Keep in mind that if you depart from a harassment policy in any respect, the burden will be on the business to explain why and how that is not instantly a further instance of less favourable treatment or retaliation, or not taking the allegation as seriously as you said you would. It is not being disrespectful of harassment victims or the message of this new law to indicate that the appropriate response to complaints of this sort must depend on the facts of each case.
4. **Is reference to your anti-harassment policy included in your employee induction materials and do you expressly impose similar standards on external suppliers, agency temps and other contractors?** Even on clients, who may regard themselves as above all this by reason of the business they bring to your company – could you put something clear but non-provocative in your terms of business, for example? After all, the principle of not harassing your supplier's staff should hopefully be fairly uncontroversial and both clients and suppliers are increasingly used to the contractual pull-through of terms of this sort because of existing law around tax evasion and modern slavery measures.
5. **What does it say in your contract of employment?** Don't harass, obviously, but what happens if you do? This should include express mention of dismissal as a possible sanction for deliberate sexual harassment or victimisation, but should not say that even deliberate harassers will necessarily or automatically be dismissed, since that would be pre-determination and so would largely scupper your ability to defend any subsequent unfair dismissal claim.

D. The Employee Experience

How employees feel about their employer generally is not a reliable indicator of the risk of sexual harassment – there may be all sorts of other personal agendas and resentments also at play. However, if they have reason to doubt your good faith and commitment to the very worthy objectives of this specific change in the law, you will wish to address this. This is in part to comply, but also to give them no reason to allege that you haven't.

By definition, steps to prevent harassment are only effective until they are not, so almost any assessment of whether the steps you have taken were reasonable will be conducted with the benefit of hindsight and in the context of an allegation that they didn't work. All employers will therefore effectively go into that particular debate a goal down already, so you won't want to undermine all your company's good work on this by careless management treatment of such allegations as do arise. In particular:

1. **Have you acted in broad accordance with any relevant policy/contract?** You can threaten all the hellfire and brimstone you want, but if in reality, harassers are known to have been given no more than a gentle ribbing in the bar, the document has already been emasculated and will need a re-launch.
2. **What happens to those who make allegations?** Similarly, any number of references in your policy to good faith allegations of harassment being protected against retaliation will look pretty hollow if all those who complain seem to leave shortly thereafter. That is not to say that in individual cases, a parting may not be the best solution for both employer and employee, but you will wish to reassure yourself that the arrangement was genuinely voluntary on the part of the employee and that even then, it was not their reasonable fear of further unlawful conduct by other employees which led to that decision.
3. **Do your relevant line managers know to greet a sexual harassment allegation with empathy, concern, urgency and confidentiality?** Is there a risk that they will (even with good intent) try to make light of an issue, dismiss it as "just the way it is" or seek to persuade the complainant, for notionally the best possible reasons, not to make anything of it? Worse, will they try to fix it themselves?

E. Next Steps

None of this is very difficult. None of it requires particularly granular or forensic examination or the production of detailed statistics or empirical research into the psychology of harassment, etc. Equally, none of it requires a new brutalist approach to preventing harassment which will inevitably alienate 99% of your workforce for the notional purpose of having some positive impact on the 1%. None of it entails either any different interpretation of when harassment takes place or any new approach to how grievances about it are investigated or what sanctions may be appropriate.

What this change in law does require is recorded dedication of time, thought and ideally money between now and October to the question of whether there are things here you could relatively easily start doing, or do again, or do better, which may reduce the risk of harassment in your workplace. The key word here is "may" – there is no requirement that a reasonable step can only be one which is guaranteed to make a difference, or that it would make a difference if certain of your staff weren't such utter clowns. So that means:

1. Having reviewed the questions above and the EHRC guidance, think about generating an action plan which puts the big visible easy stuff first (training in particular).
2. Get some quotations from reputable external advisors for any external input you may require, in particular around training and revamping policies or conducting staff surveys.
3. Make a case for action to the relevant Exco or Board, coupled with an explanation of the change in law and appropriately tactful reminders that a corporate failure in this respect can cause harm not just to the business but also to them as individuals. You can particularly highlight this point if you operate in the financial services sector and are staring down the barrel of the new FCA guidance on non-financial misconduct.
4. Even if you can't do all of this by October, try to do something of it which will be a visible sign to your staff and other stakeholders that you have the new duty very much in mind.

F. How We Can Help

We are currently working with many of our clients to help them prepare for the new duty, including by helping them work through the risk assessment process, reviewing policies/procedures and designing and running training programmes, all essential elements of complying with the new duty. If you would be interested in talking to us about ways in which we might be able to support you and your business with your preparation or if you have any questions about anything in this note, please get in touch with your usual contact.

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If you would like to discuss how we can provide DEI training solutions to your business, please contact Bryn Doyle.

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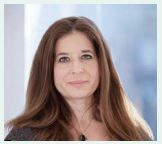

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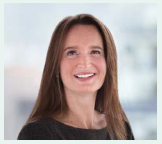

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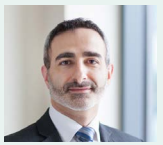

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