New duty to prevent sexual harassment at work coming into force on 26 October 2024

The Equality and Human Rights Commission (EHRC) has confirmed that the new duty for employers to take reasonable steps to prevent sexual harassment at work will come into force on 26 October 2024. The EHRC has opened a consultation on new guidance which will govern how the duty will operate in practice. In this briefing, we explain the duty in full and consider the recommendations set out in the guidance.

Do employers currently have to take steps to prevent sexual harassment?

The current position is that sexual harassment in the workplace is unlawful, and employers and individual perpetrators may be found liable in claims brought in the Employment Tribunal. However, employers can avoid being found vicariously liable for harassment committed by their workers if they can show that they took *all* reasonable steps to prevent such harassment from occurring – this is known as the "reasonable steps defence". In this context, reasonable steps include things like implementing an anti-harassment policy; providing good quality and regular training to staff; and dealing with complaints effectively.

In practice, most employers elect to take such steps, but there is no legal obligation to do so. However, from 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 (**the Act**) will introduce a mandatory duty on

all employers to prevent sexual harassment, regardless of whether they wish to be able to rely on the reasonable steps defence.

What is the new duty to prevent sexual harassment?

The new duty to prevent will require all employers to take reasonable steps to prevent sexual harassment of workers in the course of their employment. In this context, "sexual harassment" means unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Importantly, the duty does *not* extend to either:

- less favourable treatment of an individual because they had either rejected or submitted to sexual harassment; or

- harassment related to any protected characteristic, including sex-based harassment (i.e. where an individual suffers harassment related to the fact that they are a man or women, but the unwanted conduct in question is not of a sexual nature).

The new duty extends to sexual harassment occurring "in the

course of employment". Naturally, this covers sexual harassment occurring within the workplace, but it also covers harassment occurring at work-related events such as conferences, off-sites, parties or leaving drinks. Importantly, the duty requires employers to anticipate the situations when workers might be exposed to sexual harassment and take action *in advance* to prevent it from happening. Employers must not wait until an incident has occurred before taking action.

In one respect, the new duty is less stringent than the reasonable steps defence, in that it only requires employers to "take reasonable steps" rather than to "take *all* reasonable steps". When the Act was on its passage through Parliament, it was envisaged that it would require employers to take all reasonable steps. However, this was watered down due to fears that it would be too onerous for employers. Yet the new Labour Government has promised to strengthen the duty by reinstating the requirement for all reasonable steps to be taken. However, this would need an amendment to the Act, and it is not yet known when this change will be made (but it seems unlikely that it will be made before the duty comes into force).

Will the new duty cover sexual harassment committed by third parties?

Until October 2013, the Equality Act 2010 contained express provisions making employers liable for harassment of their staff by third parties (e.g. contractors, clients, delegates at a conference or members of the public), although liability only arose where the worker had been harassed on at least three occasions. These provisions were repealed by the Coalition Government on 1 October 2013, with the result that

it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party.

When the Act was on its passage through Parliament, it was envisaged that it would make employers directly liable for the sexual harassment of workers by third parties, from the first time that the harassment occurred. However, the third-party harassment provisions were dropped, again, out of a concern that they would be too onerous for employers, particularly those in the hospitality sector.

Therefore, the position regarding employer's liability for third party harassment will remain unchanged. There is no specific legal protection, however, workers who are sexually harassed by third parties may be able to bring other claims against their employer in certain circumstances. For example, individuals could argue that their employer's failure to take reasonable steps to protect them from third party sexual harassment amounts to:

- a serious breach of contract entitling them to resign and claim constructive unfair dismissal (currently, an employee would need two years' service to bring this claim); or

- direct or indirect discrimination on the grounds of a protected characteristic such as sex, sexual orientation or disability (there is evidence to show that women,

LGBT and disabled people are more likely to suffer sexual harassment at work).

Putting aside the risk of direct claims against the employer, the EHRC makes it clear that the new duty to prevent requires employers to take steps to prevent sexual harassment committed by third parties. A failure to do so would give rise to a breach of duty, which could lead to enforcement action by the EHRC (this is discussed further below).

It should also be noted that the new Labour Government has promised to introduce direct legal protection from third party harassment. Again, this would need an amendment to the Act, and it is not yet known when this change will be made (and, again, it seems unlikely that it will be made before the duty comes into force).

What information is there for employers on how to comply with the new duty?

On 9 July 2024, the EHRC opened a consultation on changes to its Technical Guidance on Sexual Harassment and Harassment (the **Guidance**) to reflect the new duty. The consultation will run for four weeks, closing on 6 August 2024. The Guidance explains the new duty and, crucially, sets out the steps that employers are expected to take to discharge the duty.

It is important to note that the Guidance is just that – it does not have the status of a "Statutory Code". This means

that Employment Tribunals are not obliged to take it into account in relevant cases. That said, it may still be used as evidence in legal proceedings. For that reason, employers would be wise to apply the recommendations in the Guidance as far as possible. Separately, the EHRC has said it intends to update its existing Employment Statutory Code of Practice "in due course" to reflect the new duty.

When will a preventative step be "reasonable"?

The Guidance explains that employers are required to take reasonable steps and what is reasonable will vary from employer to employer and will depend on factors including, but not limited to, the following things:

- the employer's size;
- the sector it operates in;
- the working environment;
- particular risks present in the workplace; and

- the likelihood of workers coming into contact with third parties, and the types of third parties that they might come into contact with.

Taking these factors into account, an employer must consider the risks of sexual harassment arising in the course of employment and the different steps that it could take to prevent it from happening. It must then assess which of those steps would be reasonable for it to take and implement them. When making this assessment, the time, cost, potential disruption and likely effectiveness of the proposed steps are all relevant considerations. However, it is important to remember that it may still be reasonable to take a step even if might *not* be effective in preventing the harassment.

What kinds of steps should employers consider taking in order to discharge the duty?

The Guidance recommends that employers should take the following types of preventative steps:

- **Have a good suite of policies in place.** Employers should have separate policies for sexual harassment and other forms of harassment (or have one clearly delineated policy). Such policies should also cohere with other relevant policies such as disciplinary, social media and health and safety policies.

- **Raise awareness of the anti-harassment policies amongst the workforce and third parties.** This could mean requiring employers to provide copies to staff at regular intervals and before events where harassment has occurred in the past (e.g. Christmas parties). The policies should be adapted as appropriate and also shared with third parties such as clients and contractors. Third parties should be alerted to the employer's expectations around the treatment of staff and the consequences of any harassment (e.g. in any contractual terms with the third party, or by way of a sign visible in the workplace).

- **Review the anti-harassment policies on a regular basis.** Policies should have an annual health check and be updated to reflect any legal changes and trends apparent from internal complaints, staff surveys and/or exit interviews. Policies should also be reviewed after any significant incident of sexual harassment occurs.

- **Put in place methods to detect harassment (including third party harassment).** This could include informal one-to-ones, sickness return to work meetings, exit interviews and external reporting systems which allow anonymous reports. We have previously reported on how some employers are making use of apps which permit real time and anonymous reporting of sexual harassment.

- **Provide high-quality and regular harassment training to staff.** As an important EAT decision highlighted, an

employer will not have taken reasonable steps if the training it provides to staff does not pass muster. This training should cover both prohibited conduct and encourage staff to engage in respectful and safe behaviours at work. Such training should also be tailored to the sector and audience, with more comprehensive training provided to those in leadership and HR roles.

- **Assess the risk of sexual harassment.** Employers must interrogate the risk of sexual harassment in their organisation and the steps that could be taken to eliminate or minimise such risks. Common risk factors include: job insecurity, lone working, the presence of alcohol, customer-facing duties, gender imbalanced workforces and workers being placed on secondment.

- **Take steps to address power imbalances.** Harassment often takes place and goes unreported where there are power imbalances in the workplace. For example, between senior and junior workers, where workers with particular protected characteristics are in a minority in the workplace or where workers are in insecure employment. Employers should consider what actions they can take to reduce such power imbalances.

- **Deal with harassment complaints effectively.** This includes taking appropriate and consistent disciplinary action against the perpetrators of harassment. Those who engage in unlawful conduct should not be protected,

rewarded or promoted, regardless of their importance to the organisation. Where the perpetrator is a third party, in some cases this may mean ending the relationship with them.

What other steps could employers consider taking?

There are, of course, many other steps that employers could consider taking to help discharge the new duty. Australia has had a similar duty to prevent in place since 2022 and the Australian Human Rights Commission has issued extensive guidelines on the steps needed to discharge that duty. Some of the most interesting suggestions are set out below.

- Require senior leaders to be involved in the development and oversight of a compliance plan, including regular reviews of whether the chosen steps have been effective.

- Require senior leaders to lead on workplace communications about the duty, to act as role models and to be responsible and accountable for compliance with the duty (with consequences for failure built into their employment contracts and remuneration packages).

- Consult with staff to obtain their views on where the risks lie and what measures would be effective to prevent sexual harassment.

- Encourage staff to call out both positive and unacceptable behaviour and recognise those who do so, for example, in appraisal and promotion processes.

- Make support options available for staff. This can include both internal support options (e.g. a named member of HR or a mental health champion) and external support options (e.g. an Employee Assistance Programme or free advice line).

- Have multiple reporting pathways (e.g. online, in person, anonymously, externally) and ensuring that these are communicated to staff in a variety of ways.

What are the consequences of breaching the duty?

Enforcement action by the EHRC

Where an employer fails to comply with the duty (or there is a suspicion that this is the case), the EHRC will be able to take enforcement action against them. This includes powers

to:

- investigate the employer;
- issue an “unlawful act notice” which confirms that the employer has breached the duty and requires it to prepare an action plan setting out how it will remedy the breach and prevent future breaches;
- enter into a legally binding agreement with the employer to prevent future unlawful acts; and/or
- ask the court for an injunction to restrain an unlawful act.

The EHRC’s enforcement action is in the public domain, with details of their current and past investigations held on their website. This raises an important point for employers to note when it comes to settling claims of sexual harassment. Employers are not allowed to use settlement agreements to gag workers from blowing the whistle about various forms of malpractice. The EHRC is a “prescribed body” for whistleblowing about breaches of equality law, which means

that workers are entitled to make whistleblowing disclosures to them about such breaches. Therefore, even after a settlement agreement has been signed, a worker will remain entitled to blow the whistle to the EHRC about a breach of the duty which, in turn, could lead to enforcement action attracting negative publicity.

Uplift to compensation

Where an individual brings a claim against their employer and the Employment Tribunal finds that they were subjected to sexual harassment it must consider whether, and to what extent, the employer has breached the legal duty to prevent sexual harassment. Where a Tribunal concludes that the employer has breached the duty, it may award an uplift to the compensation award. Any uplift must correlate to the extent of the employer's breach but may not exceed 25%.

Where there is no claim before an Employment Tribunal, it will not have jurisdiction to rule on whether an employer has breached the duty to prevent. In this situation, the employer's duty may only be enforced by the EHRC as discussed above.

Next steps for employers?

Employers wishing to respond to the EHRC's consultation can do so here before 6 August 2024. The final Guidance should be published in good time before the duty comes into force on 26 October 2024. In the meantime, employers should consider how to address the risk of sexual harassment of staff and assess which steps would be reasonable for it to take. A good

starting point – and one almost all employers will need to take – would be to review and update internal policies and refresh training for all staff.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

EHRC – Consultation on changes to the Technical Guidance on Sexual Harassment and Harassment at Work (9 July 2024)

EHRC – Technical Guidance on Sexual Harassment and Harassment at Work (January 2020)