

New EHRC guidance on sexual harassment

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New EHRC guidance on sexual harassment

Employers should take note of new [guidance from the Equalities and Human Rights Commission](#) covering sexual harassment and other forms of harassment at work. Whilst the guidance is not a statutory code of practice, it is described as the authoritative and comprehensive guide to the law and best practice. This means it can be considered by an Employment

Tribunal in relevant cases.

The legal framework

The guidance begins by examining the scale and effect of sexual harassment and other forms of harassment in the workplace (i.e. on the grounds of sexual orientation, race, religion or belief, age and disability). It goes on to remind us of the legal meanings of harassment, sexual harassment and victimisation. It also considers issues such as who is protected and who can be liable for harassment and victimisation. Helpfully, it also addresses tricky legal issues such as harassment by third parties and harassment by a colleague outside of the workplace.

Having established the legal framework, the guidance explores the practical steps employers should take to prevent and respond to harassment.

Preventing harassment

As far as preventing harassment is concerned, the most important step is to ensure that effective and well-communicated policies and practices are in place. The guidance recommends having separate policies for sexual harassment and other forms of harassment (or having one policy which is clearly delineated). It also suggests that employers prepare separate strategy documents setting out what measures they will take to tackle different forms of harassment. Helpfully, the guidance also includes a checklist of the kinds of things a good anti-harassment policy should cover (pages 56-57).

It also highlights the importance of not over-emphasising malicious complaints in the policy, since the vast majority of complaints are made in good faith. Whilst it is acceptable to explain how you will deal with a malicious complaint, this should be worded very carefully.

Other important policy issues are:

- The need for anti-harassment policies to cohere with other relevant policies such as disciplinary and social media policies.
- The need to raise awareness of anti-harassment policies amongst the workforce. Amongst other things, the guidance suggests that employers place the policy on their external-facing website and regularly communicate it to staff, for example, before events such as work parties.
- Ensuring anti-harassment policies are evaluated annually and by reference to any trends apparent from internal complaints and through the use of staff surveys.

Aside from having a good policy in place, employers also need to consider which methods to employ to detect harassment (e.g. informal one-to-ones, sickness return-to-work meetings and exit interviews). It is recommended that employers introduce an external reporting system which allows workers to make complaints anonymously if they wish.

Another important step to prevent harassment is the provision of regular training to all employees on the law and the internal procedure. Such training should be tailored to the audience, with managers, for example, needing additional guidance on how to deal with complaints they receive. As well as this, it is recommended that some workers are trained to act as “harassment guardians”, who can provide extra support to victims during the handling of the complaint.

Other preventative steps include conducting harassment risk assessments, reviewing agency worker arrangements and addressing power imbalances.

Responding to harassment

The guidance goes on to discuss how employers should respond to harassment and looks at a variety of issues. It begins by

focusing on the procedure and when to use an informal or formal approach. Much of this discussion rehearses the key principles of a fair process that employers will already be familiar with. However, there are a few interesting points worth noting:

- The guidance makes it clear that employers should always investigate historic complaints in the normal way and not assume that they will be unable to find any evidence.
- It is recommended that employers extend the right to be accompanied to allow people other than colleagues or trade union representatives to act as the companion.
- Employers should ensure that investigators have appropriate expertise to investigate the particular complaint (e.g. an investigator appointed to deal with a complaint of antisemitism should have a good understanding of what antisemitism means). Employers will need to consider this prior to appointing the investigator and this could limit the pool of potential candidates in particular cases (e.g. where the complaint is relatively unusual, such as transgender harassment). In certain cases, it may even mean the employer has to appoint an external investigator.

One very important issue the guidance looks at is how employers should deal with requests by the victim not to take any action. The advice is that employers should still take steps to ensure the matter is resolved. Amongst other things, this means the need to keep a record of the complaint, to encourage informal resolution and to keep the situation under review. It also goes on to say that there may be cases which are so serious that the employer has to take formal action despite the victim's wishes.

This section also addresses issues such as what to do if the harassment amounts to a criminal offence, how to prevent further harassment or victimisation during an investigation

and steps to take at the end of the process.

Next steps for employers

Although the new guidance does not have statutory force, at 82 pages it is certainly comprehensive. Employers should review the guidance and benchmark anti-harassment policies and procedures against the EHRC's recommendations. Where policies are updated, employers should take the opportunity to highlight them to employees. This will be help to avoid vicarious liability for harassment carried out by employees.

Employers should also monitor the Government's response to its [Consultation on Workplace Sexual Harassment](#) which closed on 2 October 2019. This consultation sought views on proposals such as introducing a mandatory duty to prevent harassment in the workplace and re-introducing protection against third party harassment. The Government's response is expected shortly and this could lead to more reforms in this area.

If you need help or would like to discuss the issues raised in this news article, please contact [Amanda Steadman](#) or your usual [BDBF contact](#).

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