

The new duty to prevent sexual harassment in the workplace: How much is enough?

October 2024

The new duty to prevent sexual harassment in the workplace: How much is enough?

The Worker Protection (Amendment of Equality Act 2010) Act 2023 ("the Act") is effective from 26 October 2024 requiring employers to take reasonable steps to prevent sexual harassment of their employees, including harassment by third parties.

How prevalent is sexual harassment?

Does sexual harassment happen in your organisation? How do you really know? Recent statistics from the [TUC report](#) show that 3 in 5 women say they have experienced harassment at work – rising to almost 2 in 3 women aged 25 to 34. With the numbers so high the unfortunate reality is that it is likely sexual harassment is happening in your workplace.

The sound of silence in a workplace does not mean sexual harassment is not an issue. Often employees are fearful about speaking up based on concerns about not being listened to, retaliation or simply that nothing will be done. Employers with no reports of issues should challenge themselves to find actual evidence that sexual harassment is not taking place. Robust whistleblowing frameworks, speak up policies, genuine leadership buy-in, pulse surveys, one-to-ones, exit interview and employee forums all help to ensure a culture of voice is cultivated in the workplace – allowing concerns to be raised and addressed appropriately.

The legal parameters

What is sexual harassment?

Defining sexual harassment so that everyone knows what it is, and what it is not, is critical to enabling understanding the impact of the new duty on workplace conduct and behaviours. Under the Equality Act 2010 sexual harassment occurs where both A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. According to the Equality and Human Rights Commission technical guidance ("[the EHRC technical guidance](#)") conduct of a sexual nature includes a wide variety of behaviour, such as sexual comments or jokes (in person and online/via social media), suggestive looks, propositions, making promises in return for sexual favours – the list goes on. An individual can experience unwanted conduct from someone of the same or a different sex.

Employers can be vicariously liable for the acts of their employees during the course of their employment and employees themselves can be individually liable. The definition of workplace is interpreted very widely and can include events outside work, social gatherings and even the informal "party after the work party" in the hotel bar. Employers may be able to defend a claim on the basis that they took all reasonable steps to prevent the harassment (a seldom used defence).

What is the new duty?

The Act introduces a new duty on employers to take reasonable steps to prevent sexual harassment of their employees – referred to as "the preventative duty". According to the updated EHRC technical guidance the preventative duty is an anticipatory duty designed to transform workplace cultures by requiring employers to take positive and proactive steps to prevent harassment of their employees.

Compensation in claims can be increased by up to 25% when the employer is found not to have met the preventative duty. The Equality and Human Rights Commission also has the power to take enforcement action where there is evidence of organisations failing to take reasonable steps to prevent sexual harassment. The new legislation has teeth.

Research published in the Harvard Business Review in 2018 found that people's perception of a company's overall attitude and fairness towards men and women is dramatically impacted by even a single sexual harassment claim. There is no doubt that organisations who do not take the new legislation seriously could face significant reputational risk and brand impact if they end up in an employment tribunal.

It is important to note that further reform is on the horizon with the duty to prevent sexual harassment being extended to taking "all reasonable steps" and third party protection due to come in across the board (not just in relation to sexual harassment) under the Employment Rights Bill published on Thursday 10 October 2024.

The link to human rights and sustainability

It is important to see the prevention of harassment as part of the wider picture of protecting human rights. We are seeing more and more cases where employees are asserting that there has been a breach of their human rights in relation to workplace harassment issues. For example Article 8 of the European Convention on Human Rights (right to respect for private and family life) has been engaged in a number of bullying and harassment cases with courts finding that the right to respect for private life includes an individual's physical and psychological safety. By way of further example, whistleblowers may be afforded protection under Article 10 (freedom of expression) of the European Convention on Human Rights. Respecting basic human rights in the workplace helps employers attract and retain the best talent.

We are also seeing employers actively implementing human rights frameworks as part of their wider sustainability programmes such as the United Nations Guiding Principles on Business and Human Rights ("UNGPs"). Organisations report on human rights in a number of ways from slavery and human trafficking statements, to UK Corporate Governance Code disclosures, to voluntary Environmental, Social, Governance ("ESG") disclosures – it is crucial to see where the landmark preventative duty fits into this jigsaw and how it will play out through the supply chain. Whether through regulatory compliance requirements or simply due to a drive to do the right thing – stakeholders are paying more and more attention to the protection of human rights.

What does the EHRC technical guidance say?

The EHRC technical guidance provides a useful overview of some of the key points employers need to be considering, including risk assessments, robust policies and detailed training.

This sounds straightforward enough, however, the EHRC technical guidance recognises that what is reasonable will vary from employer to employer. The law does not list specific steps an employer must take. In truth the points set out above are the tip of the iceberg. Engaging the workforce on creating a safe environment free from poor behaviour has never been more important.

The question is not where to start but how much is enough? Every employer's answer to that question will be different.

How to prepare for the new duty on prevention of sexual harassment at work?

This is not a tick box exercise. Carrying out the measures set out in the EHRC technical guidance will of course put employers in a stronger position but the key is to engage the business in a cultural movement whereby dignity, trust and respect in the workplace are viewed as intrinsic values and supported by all. What will not be enough is to approach this as another compliance exercise. It is a fundamental human right for all of us to come to work and feel safe, free from harassment and unwanted behaviours.

Leaders play a crucial role in creating an inclusive and prosperous environment for their employees, customers, suppliers, shareholders, investors and communities – an environment where basic human rights are respected, where there is no place for sexual harassment and indeed no place for harassment of any sort. The new duty provides an opportunity for employers to recalibrate and put workplace culture front and centre of their business strategy, and reap the rewards.

Creating a psychologically safe workplace: It's good for business

The legislative changes in place act as a catalyst for culture change. However, the case for eradicating sexual harassment in the workplace is already clear. Complaints of sexual harassment can lead to:

- Costly settlements
- Expensive litigation
- Reputational damage
- High profile senior departures
- Poor employee and customer relations
- Lost productivity
- Reduced profitability
- High staff turnover

Are you ready?

- Have you commissioned independent, detailed, robust risk assessments regarding the new duty?
- Have external cultural and behaviour reviews taken place linking your sustainable business strategy to the protection of human rights in the workplace?
- What steps have been taken to address third party harassment?
- Has your workforce been educated on the new duty and what it means in practice?
- Have your policies and procedures been reviewed, implemented and set up for on-going monitoring? What regular external testing and assessments take place to assess understanding and provide confidence in effectiveness?
- Are your non-disclosure clauses and protocols in line with legal guidelines and your ethical strategy?

No matter how prepared you feel you may be, there is still more that you can do. The new duty ushers in standards of vigilance and monitoring of workplace conduct and culture that are unprecedented. There is no one size fits all. How much will be enough for your organisation?

Contacts



Tracey Groves
Head of Sustainable Business
& ESG

M 0784 232 4547
E tracey.groves@dwf.law



Joanne Frew
Global Head of Employment
and Pensions,

M 0779 617 4538
E joanne.frew@dwf.law

dwfgroup.com

© DWF, 2024. DWF is a global legal services, legal operations and professional services business operating through a number of separately constituted and distinct legal entities. The DWF Group comprises DWF Group Limited (incorporated in England and Wales, registered number 11561594, registered office at 20 Fenchurch Street, London, EC3M 3AG) and its subsidiaries and subsidiary undertakings (as defined in the UK's Companies Act 2006). For further information about these entities and the DWF Group's structure, please refer to the Legal Notices page on our website at www.dwfgroup.com. Where we provide legal services, our lawyers are subject to the rules of the regulatory body with whom they are admitted and the DWF Group entities providing such legal services are regulated in accordance with the relevant laws in the jurisdictions in which they operate. All rights reserved. This information is intended as a general discussion surrounding the topics covered and is for guidance purposes only. It does not constitute legal advice and should not be regarded as a substitute for taking legal advice. DWF is not responsible for any activity undertaken based on this information and makes no representations or warranties of any kind, express or implied, about the completeness, accuracy, reliability or suitability of the information contained herein.