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An in-house lawyers guide to the duty to prevent sexual harassment

The landscape

In October 2024, the Government amended the Equality Act 2010 (EqA 2010) to impose a duty on employers to take reasonable steps to prevent sexual harassment of employees in the course of their employment – including harassment from third parties.

Breach of the mandatory duty can be enforced directly by the EHRC and, in the event of a successful claim for sexual harassment, the Tribunal can increase the compensation awarded to a claimant by up to 25% if an employer is found to have failed to take reasonable steps to prevent it.

The Government proposes to further amend the EqA 2010 to require employers to take all reasonable steps to prevent sexual harassment when the Employment Rights Bill comes into force, together with re-introducing employer liability for third party harassment and making complaints of sexual harassment a public interest disclosure.

Rebecca Kirk, Partner, Employment and Immigration and Head of Defence, Infrastructure and National Security, takes us through what in-house legal teams need to know and the steps that employers should take in order to prevent sexual harassment.

The law

Section 26 of the Equality Act 2010 deals with harassment generally, and sexual harassment in particular, at section 26(2) and 26(4).

Section 26(2) – sexual harassment occurs where A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of either violating B's dignity or of creating an intimating, hostile, degrading, humiliating or offensive environment for B.

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Section 26(3) – sexual harassment also occurs where:

- A or another person engages in either unwanted conduct of a sexual nature or unwanted conduct that is related to gender reassignment or sex
- The conduct has the purpose or effect of either violating B's dignity or of creating an intimating, hostile, degrading, humiliating or offensive environment for B
- As a result of B's rejection or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

Section 40A (1) – an employer (A) must take reasonable steps to prevent sexual harassment - of the kind described in section 26(2) - of employees of A in the course of their employment.

"Employee" for the purposes of the EqA 2010 encompasses employees, workers, employee shareholders and wider categories of individuals, such as those who are self-employed provided that their contract requires them to do the work personally.

The liability

It's not possible for an employee to bring a stand-alone claim in the Tribunal where an employer fails to take reasonable steps to prevent sexual harassment, contrary to section 40A (1) of the EqA 2010. Direct enforcement of the S40A duty falls to the EHRC which has the power to investigate employers, issue unlawful act notices, enter into binding agreements with an employer to prevent future harassment and seek court injunctions to prevent ongoing non-compliance.

It has long been the case, under section 109(1) of the EqA 2010, that employers are prima facie liable for sexual harassment committed by their employees during the course of their employment. This is the case regardless of whether the employee's acts were done with the employer's knowledge or approval, unless the employer can show that is took all reasonable steps to prevent the employee from engaging in the sexual harassment, in accordance with Section 109(4). The section 109 defence, however, sets an extremely high bar.

Where such a claim is successfully brought, any compensation can now be increased by up to 25% where the Tribunal finds that the employer failed to take reasonable steps to prevent sexual harassment in accordance with the section 40A duty.

In addition to employment tribunal claims, employers who fail to prevent sexual harassment are likely to suffer irreparable reputational damage, leading to potential issues such as difficulties recruiting and retaining staff, adversely affected relationships with customers, clients and suppliers (who will themselves be taking steps to prevent sexual harassment), regulatory consequences for relevant businesses and increased negative press and public interest.

The reasonable steps

The duty to take preventative steps under Section 40A and the 'all reasonable steps' defence to a claim for sexual harassment under Section 109(1) are different. The section 40A duty is, for now, a lower bar although many of the same steps are likely to be relevant.

In September 2024, shortly before the introduction of the new preventive duty, the EHRC published updated technical guidance on harassment and sexual harassment at work, together with an eight-step guide to preventing sexual harassment at work.

What is reasonable is an objective test, taking into account factors such as:

- The nature of the employer's business
- The size and resources of the employer
- What sector the employer operates in
- The working environment
- What the nature of contact between employees and third parties was
- The particular risks present in the workplace
- Whether sexual harassment has been reported to the employer as having occurred previously.

The eight steps suggested by the ECHR are:

1

Developing an effective anti-harassment policy

Employers should develop and implement an effective anti-harassment policy. To be effective, the policy will need to be reviewed regularly – I would suggest annually – and brought to the attention of all staff. It should make it clear what sexual harassment is, provide examples and make it clear that the employer has a zero tolerance approach to sexual harassment in the workplace. Zero tolerance means making it clear how staff can report sexual harassment, setting out the responsibility of everyone in the workplace to prevent sexual harassment and stating that sexual harassment or victimisation is likely to be dealt with as a disciplinary matter and may result in a disciplinary sanction, up to and including dismissal.

That said, it's important to ensure that, whilst taking a zero-tolerance approach, effective sexual harassment policies don't inadvertently discourage reporting by being too prescriptive or authoritarian. As such, the methods by which employees can make a complaint of harassment should not be too prescriptive or narrow. Likewise, the policy should not dictate nor encourage a culture where every allegation of sexual harassment will be treated as a dismissal offence. Whilst the seriousness with which allegations of sexual harassment will be treated should be made clear – the policy should set out a range of options for managers dealing with allegations of harassment, from informal resolutions through to dismissal – with clear guidance being provided regarding aggravating and mitigating factors to be considered.

Staff Engagement

2

Employers should regularly engage with staff giving them every opportunity to raise issues and helping managers determine where any potential risk areas or problem areas may lie. Staff engagement can involve regular one to one meetings, running staff surveys, holding exit interviews, having open door policies, hosting town hall meetings and potentially appointing and engaging with representative groups, such as trade unions, staff representatives and workplace champions.clear guidance being provided regarding aggravating and mitigating factors to be considered.

3

Risk Assessments –

Understanding the extent of the problem and assessing the risk of sexual harassment is key. An employer is highly unlikely to be able to satisfy the preventive duty, much less make out the Section 109 defence in the event of a claim, in the absence of regular risk assessments being undertaken and acted upon. Employers need to understand where in the organisation sexual harassment might be more likely to occur and the particular risk factors relevant to its business, if it is to prevent sexual harassment.

Risk factors might include areas where power imbalances exist, where job insecurity is an issue, out of hours working, where alcohol is present, customer facing roles and duties, departments where there is a lack of diversity, roles which require staff to work remotely or in locations where there is less supervisory oversight, attendance at events outside of the workplace, business areas where there is a culture that permits or overlooks "banter" – the list goes on. Employers should undertake regular risk assessments, both periodically and where circumstances change with regard to working practices. Those assessments should be documented and coupled with a clear action plan which includes dedicated, accountable leads for implementation.

Reporting

4

Employers are encouraged to foster a culture where reporting of sexual harassment is encouraged and where employees feel safe and confident enough to report their concerns and know that they will be taken seriously, given support and protected from victimisation. Part of that will involve providing more than one reporting mechanism, including, potentially, the ability to report a concern anonymously and to someone other than the employer – for example via an external helpline such as an EAP. Likewise, employers should avoid setting a time limit in which complaints of sexual harassment must be made and instead make it clear that allegations regarding historical matters will be investigated in line with the company's usual procedures.

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5 Staff Training

Most good employers already train their managers on issues such as discrimination, bullying and harassment and how to deal with it. However, to meet the preventative duty, employers should train all staff. As a minimum, all staff should be trained about the behaviours that are expected in the workplace, how to spot sexual harassment and how to report incidents where standards fall short. Employees should be trained as part of the onboarding process with the training being repeated or updated regularly – at least every two years - with clear training records being kept. In addition, managers should receive additional training and guidance on how to deal with a report or complaint of sexual harassment, how to support staff who make a complaint and how to manage an investigation or disciplinary process.

Training, whether to managers or wider staff, should be tailored to your organisation and the risks within your business to maximise its impact and ensure effectiveness. There is little point in training on how to identify sexual harassment containing examples which might occur in an office environment, if the majority of your staff work remotely or in a public facing role such as a bar, where the biggest risk is likely to be presented by third parties, as opposed to colleagues at the Christmas party.

6 Responding –

It's crucial that, in addition to clear reporting mechanisms, employers have clear procedures in place for dealing with reports or complaints about sexual harassment – with flexibility in those procedures to allow for various types of reporting. Employers should have a range of options when it comes to responding to complaints, from informal responses to disciplinary proceedings leading to dismissal. As with reporting, employers should place the voice of the complainant at the centre of the process and ensure that they remain in control, as far as possible – not only as a matter of good practice but, also, to prevent a future claim being made. An employee who feels heard and treated fairly and empathetically having reported concerns regarding sexual harassment is less likely to resign or make a claim.

That doesn't mean the employer should allow a complainant to dictate the process – for example by insisting on the alleged perpetrator being dismissed, where that might not be appropriate. The complaint should however be spoken to about their concerns and asked what the outcome or resolution might look like to them. What is key is that the person making the complaint has their voice and choice heard when it comes to the remedies available to them and the next steps that will be taken. Whilst there will often be circumstances in which an employer has to act, regardless of the views of the complainant, in order to protect others, a lack of control is often reported by many victims of sexual harassment as being a part of the abuse and, a loss of control can act as a barrier to reporting.

7 Dealing with Third Party Harassment –

Employers should not only deal with peer-on-peer sexual harassment, but they also have a duty to prevent sexual harassment by third parties such as contractors, members of the public and service providers. That means that employers should assess the risk of third-party harassment as part of their risk assessment process and then take appropriate steps to deal with that risk. What is appropriate will depend on the nature of the business and, therefore, the nature of the risk posed by third parties. Examples include encouraging employees to report third party harassment, requiring contractors to provide evidence of their own policies and training on sexual harassment, publishing notices in public areas, making it clear that harassment of staff is unlawful and will not be tolerated and banning third parties from site, where harassment takes place or your policies on sexual harassment are disregarded.

8 Monitoring and Evaluating Actions –

The EHRC makes it clear that the preventative duty is ongoing. From a legal perspective it's clear that a one-off approach will not be sufficient to discharge the duty. In addition to regularly reviewing their policies and updating their risk assessments and training programmes, employers should also evaluate the steps they have taken to prevent sexual harassment to ensure the steps they take continue to be effective. That might include regularly reviewing complaints data to identify any trends or patterns, conducting anonymous staff surveys to obtain information on their experiences of sexual harassment, such as whether they have been subjected to it, witnessed it and have or would report it and why, and holding lessons learned/feedback sessions following the resolution of sexual harassment complaints.

For more information on how to ensure your organisation can discharge its preventative duty and prepare for the increased obligation to take all reasonable steps when the Employment Rights Bill comes into force, please contact:

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