SQUIRE PATTON BOGGS

New Duty on Employers To Take Reasonable Steps To Prevent Sexual Harassment at Work (UK)

A Relatively Informal Guide

November 2024

Importantly, the new duty on employers to take reasonable steps to prevent sexual harassment in the workplace is now in force (as of 26 October). Remember, the new duty applies to all employers, regardless of size. There is no transition period and there are no exemptions.

There have been various changes since we prepared the previous version of this Relatively Informal Guide. In particular, the eagerly anticipated final version of the Equality and Human Rights Commission's (EHRC) Sexual harassment and harassment at work: technical guidance (the EHRC guidance) has been released following a brief consultation over the summer months. We say "eagerly anticipated" as, without the guidance, employers had been left almost entirely in the dark as to what they would actually need to do to ensure compliance with the new duty.

Not that the guidance exactly turns the lights on full, if that doesn't stretch the metaphor too far. Any employers hoping for an easy checklist for compliance will be disappointed. The new paragraphs that have been inserted to update the 2021 version of the guidance do not include a list (comprehensive or otherwise) of steps that employers must take to comply with the new duty. In one sense, this seems to go against a fairly fundamental principle of good law – that those to whom it applies ought to know what they have to do to comply with it.

When pressed on the question, the government's position has been 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 that some employers simply could not do, and things not on the list that 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 (as is picked up in the updated guidance).

However, it does appear that the EHRC has taken into consideration some of the feedback received as part of the consultation and has included a more detailed section in the final version, much of which echoes the principles we had suggested employers ought to follow in the previous version of this guide. As such, the guidance is definitely worth a read and, to reflect it, we have updated our suggested steps for employers to take at the end of this guide. As well as the updated technical guidance, the EHRC has also published an 8-step guide for employers on sexual harassment in the workplace (8-step guide). Again, although this is light on detail, it is helpful in terms of showing what the EHRC will be looking for from employers.

In further news, the government has also released the Employment Rights Bill, which includes measures that will shake up the position on harassment still further. For more information on these, please see our alert, Labour's Employment Rights Bill – Key Changes. Any employers hoping that they can ignore the new duty in the hope it will go away would be well-advised to reconsider that decision. In short, the direction of travel at the moment is towards strengthening the obligations on employers in relation to harassment rather than unwinding these. That being said, the Bill's more onerous obligations in this respect are not likely to come into force before 2026.

Here are our key takeaways from the changes to the EHRC guidance:

- **A risk assessment is likely to be essential for compliance** – New paragraph 3.31 makes clear that "an employer is unlikely to be able to comply with the new preventative duty unless they carry out a risk assessment." This was not included in the version of the guidance issued as part of the consultation. This new paragraph then cross-refers to a new section in 4.10-4.15 that provides more detail about what a risk assessment should entail and the factors to be considered. Our intel suggests that the EHRC received various requests for a pro forma risk assessment template as part of the consultation process, but this has not been provided.

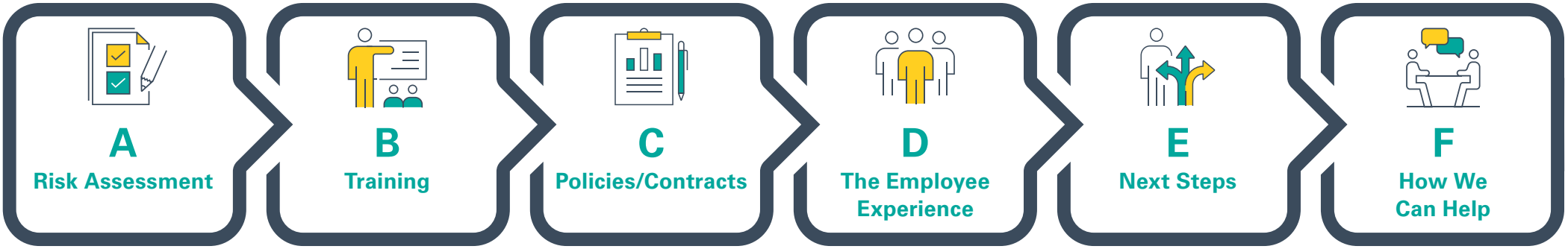
- **The preventative duty is both anticipatory and ongoing** – The EHRC guidance makes clear that "employers should not wait until an incident of sexual harassment has taken place before they take any action". Given that the new duty is now in force, you have either taken the reasonable steps required or you have not, and if you have not, you are immediately exposed. There is no transition or preparation time. So, if you have not already taken steps, we recommend you act now, or, as a minimum, be seen to think now about whether you need to act.

  Equally, the guidance also emphasises that "if sexual harassment has taken place, the preventative duty means that an employer should take steps to prevent sexual harassment from happening again." Employers must not rest on their laurels, as the duty is ongoing. An incident of harassment on your watch does not necessarily mean that you have not taken reasonable steps to prevent it, but it should certainly be a trigger to your looking again at whether there is something else you might do that could maybe stop it happening again.

- **Third-party harassment** – Those who have been following the passage of this legislation may recall that originally it was intended that there would be a duty for employers to take steps to prevent third-party harassment, but that this was removed from the final legislation by the House of Lords. However, the proposed updated guidance sets out that employers will in fact be required to "take reasonable steps to prevent sexual harassment of workers by third parties, such as clients and customers" (from new paragraph 3.22) – suggesting that while workers will not have a claim under the Equality Act in relation to a failure to take steps to stop third-party harassment, it could lead to enforcement action by the EHRC. As such, employers should factor into any risk assessment the types of third parties that staff might come into contact with; how that contact is made; the likelihood of any such contact; and what steps they can take to prevent sexual harassment of workers by those third parties. Labour's Employment Rights Bill includes provision for extending the duty in terms of third-party harassment such that it is put back on a statutory basis (please refer to our alert), but any such changes are unlikely to come into force before 2026.

- **What is meant by "reasonable" will vary** – New paragraph 3.28 states "the law does not list specific steps an employer must take. Different employers may prevent sexual harassment in different ways, but all employers must take action and no employer is exempt from the sexual harassment preventative duty." New paragraph 3.29 states that "whether an employer has taken reasonable steps is an objective test and will depend upon the facts and circumstances of each situation." New paragraph 3.32 lists the factors that employers should take into account when deciding whether a step is reasonable, but makes clear that "a step may be reasonable, even if it would not have prevented a particular act of sexual harassment."

We can no more provide an exhaustive list of things to do at this stage than can the government. However, we appreciate that many employers remain uncertain about what they actually need to do. So, here is our entirely non-statutory, non-official, non-approved set of anti-harassment things to think (and to be seen to have thought) about, which now incorporates our key learnings from the EHRC guidance and the 8-step guide.



A. Risk Assessment

As above, the EHRC has been pretty unequivocal about the necessity of carrying out a risk assessment in order to comply with the new duty, and as per the previous version of this Guide, that makes complete sense. 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. Interestingly, this is not the first step in the 8-step guide (it only makes an appearance at Step 3), but our view is that your risk assessment is the place to start. 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.

Paragraph 4.10 of the EHRC guidance states that "existing risk management frameworks traditionally used in the workplace health and safety context could be used for the process. Assessments should identify the risks and the control measures identified to minimise the risks." This is framework in the loosest sense – in effect, little more than an idea on formatting. Though harassment can have health consequences, it is oversimplifying the issue to suggest that it is bound or even particularly likely to do so.

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 suggested by the EHRC include (from paragraph 4.10):

- power imbalances;
- job insecurity; for example, use of zero hours contracts, agency staff or contractors;
- lone working and night working;
- out of hours working;
- the presence of alcohol;
- customer-facing duties;
- particular events that raise tensions locally or nationally;
- lack of diversity in the workforce, especially at a senior level;
- workers being placed on secondment;
- travel to different work locations;
- working from home;
- attendance at events outside of the usual working environment, for example, training, conferences or work-related social events;
- socialising outside work;
- social media contact between workers; and/or
- the workforce demographic; for example, the risk of sexual harassment may be higher in a predominantly male workforce.*

The EHRC also suggests that there are certain factors that increase the risk of sexual harassment and makes clear that employers should consider these factors when thinking about how they can comply with the preventative duty. The factors include, but are not limited to (taken from paragraph 4.11 of the EHRC guidance, with our comments added where we consider helpful):

- a male-dominated workforce;*
- a workplace culture that permits crude/sexist "banter" or other disrespectful behaviour;
- gendered power imbalances (for example, where most junior staff are female and most senior managers/leaders are male);*
- workplaces that permit alcohol consumption;

- an expectation that workers will attend social events/conferences outside of the workplace or stay away from home overnight (particularly if alcohol is being consumed);
- lone or isolated working;
- working alone with a third party [Author's comment – Given the EHRC's focus on extending the duty to prevent sexual harassment (in terms of enforcement action, at least) to interactions with third parties, this is actually given relatively little airtime in the relevant section of the EHRC guidance on risk assessments. While there are undoubtedly risks where individuals work alone with third parties (see also Step 7 in the 8-step guide), we recommend you consider this more widely – e.g. consider any risks that might arise for your employees due to interactions with third parties (e.g. customers) rather than simply when staff are alone with third parties, and how to mitigate these.]
- night working;
- an insecure/casual workforce;
- a failure to respond appropriately to previous reports of sexual harassment [Author's comment – We would add to this, how have prior allegations of sexual harassment been (seen to be) handled? What lessons will have been taken from that by the other employees? Please refer also to Step 6 of the 8-step guide.]
- not having policies or procedures to prevent or respond to sexual harassment [Author's comment – The EHRC guidance also makes clear that risk assessments should consider working practices, including policies and procedures. We would add to this, when was the last time your sexual harassment or equal opportunities policy saw the light of day? While the EHRC lists "not having policies or procedures" as a factor likely to increase the risk of sexual harassment (fairly obviously), we suggest most of our clients and contacts will have these in place. The more pertinent question is when were these were last reviewed/implemented/taken seriously?]
- workers who have more than one protected characteristic – for example, disabled people, ethnic minorities and people from the LGBT community – are more likely to experience sexual harassment than people who do not have these protected characteristics;
- there may be risks that only affect one job role or worker – these should still be considered and addressed.

*These factors are extracted from the EHRC guidance and should be considered, but our advice is also to be wary of assuming that all sexual harassment is man-on-woman. That is, of itself, an overly simplistic approach to the question and potentially discriminatory.

To the risk factors set out by the EHRC, we would add the following:

- What level of direct physical management oversight applies?
- Do the last, say, 12 months' exit interviews have any story to tell about this? What about Glassdoor or internal opinion surveys?
- What is your corporate history of such conduct?
- What training have you done? How long ago? Was it any good?
- Does this sort of conduct feature in your onboarding or induction processes for new hires?
- 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 that do not inconvenience the business?
- 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 the deterrence of potential witnesses?
- Has 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?
- Do you have a route for raising allegations about harassment that is (a) known to employees; (b) seen as safe, i.e. does not lead to retaliation or victim blaming, and (c) confidential? The EHRC guidance makes it clear that employers should ensure that staff are aware of reporting mechanisms and that management know what to do if a staff member raises a complaint of harassment. 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-/overreact to those allegations? See also Step 4 of the 8-step guide for more information on the EHRC's expectations in this regard.

Obviously, this assessment is not mechanical and does not generate a numerical score above or below a particular risk threshold. It may lead you to conclude that your risk is relatively low, but be aware, 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. The EHRC guidance recommends that employers should produce an action plan that sets out what preventative steps they will take to address any identified risks and how that will be monitored. Employers should consider publishing their action plan to workers and the public – for example, on their website – and updating it from time to time.

Employers are also advised to consider appointing a designated lead to take responsibility for implementation of the action plan and compliance with the preventative duty.

Again, have a look at the EHRC guidance and 8-step guide, but once you have your risk assessment in place, 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.? This is covered in Step 5 of the 8-step guide. Other things we recommend thinking 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 counterproductive. We saw a piece in the New York Times some years ago that suggested that equal opportunities training is most effective if it lasts for four 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 on their being 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 three-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 does not matter that you did not 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?** Is it up to 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 their 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 handout, 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? Given that the duty is ongoing, as time passes, you will need to factor the success or otherwise of the training into your risk assessment.
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 that 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. Refer also to Step 1 of the 8-step guide for details of what the EHRC expects any such policies to include. Substance is very definitely more important than form here, so it is not madly important whether these appear in contracts or noncontractual 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 that 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 nonprovocative 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. Or, if you have premises where third parties may be present, you may wish to consider signage making it clear that you will not accept harassment of your staff.
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 predetermination 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. Step 2 of the 8-step guide focuses on employee engagement, suggesting that employers should conduct regular 1-to-1s, run staff surveys and exit interviews, and have open door policies.

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 did not work. All employers will therefore effectively go into that particular debate a goal down already, so you will not 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 relaunch.
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 that 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? Step 6 of the 8-step guide suggests further steps employers ought to take when a complaint of harassment is made, and importantly emphasises its view that employers should only use confidentiality agreements (also known as confidentiality clauses, nondisclosure agreements (NDAs) or gagging clauses) where it is lawful, necessary and appropriate to do so. Employers are directed to the EHRC's guidance on the use of confidentiality agreements in discrimination cases for further information. But keep in mind that such agreements are often at least as much in the victim's best interests as the harasser's, so consider their wishes in the matter too.

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 that 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 to the question of whether there are things here you could relatively easily start doing, or do again, or do better, that 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 that is guaranteed to make a difference, or that it would make a difference if certain of your staff were not such utter clowns. So, that means:

1. Having reviewed the questions above and the EHRC guidance, think about generating an action plan that puts the big visible easy stuff first (training in particular).
2. Get some quotations from reputable external advisers for any external input you may require, in particular around preparing the risk assessments, 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 Financial Conduct Authority (FCA) guidance on non-financial misconduct.
4. Even if you did not manage to do all of this by 26 October, try to do at least something of it sooner rather than later, which will be a visible sign to your staff and other stakeholders that you have the new duty very much in mind.
5. Remember that the duty is ongoing, so Step 8 of the 8-step guide emphasises the importance of regularly evaluating the effectiveness of the steps you put in place to prevent sexual harassment in your workplace and of implementing any changes arising from that.

F. How We Can Help

We are currently working with many of our clients on compliance with 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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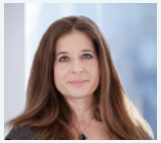

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