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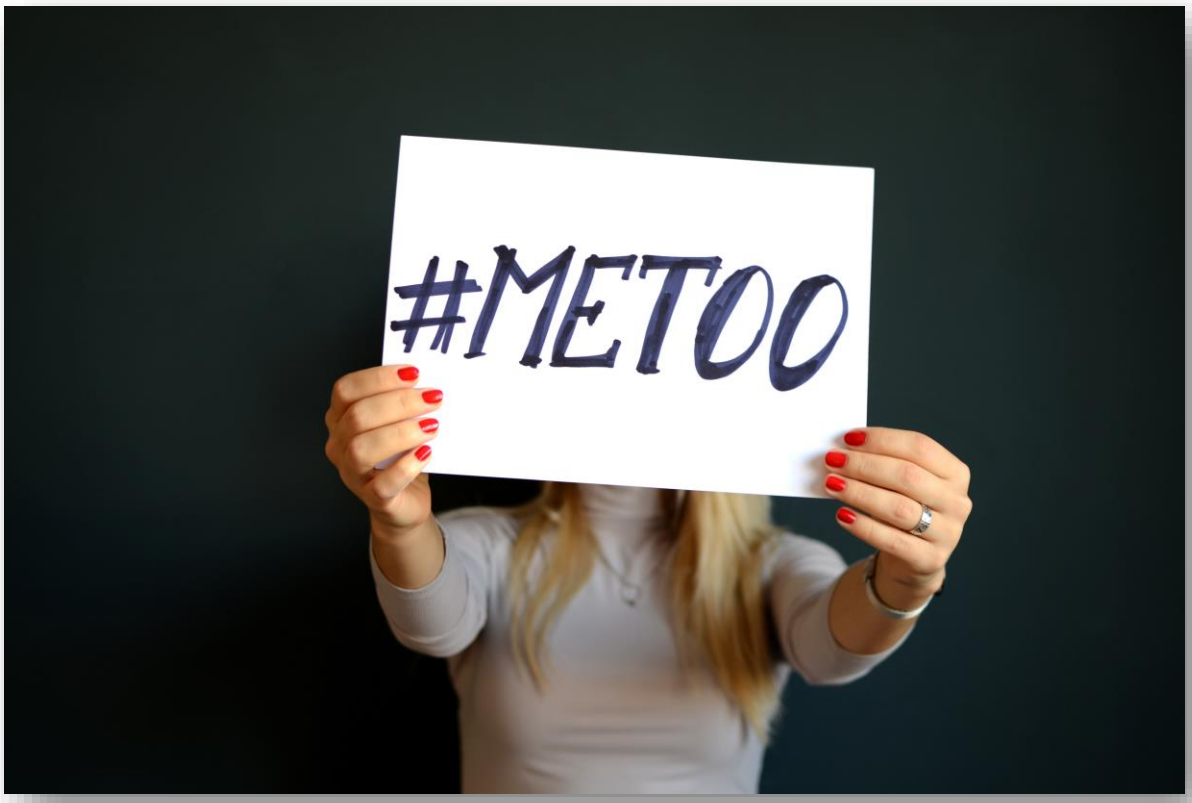

SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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The information in this guide may be considered legal advertising.

SEXUAL HARASSMENT IN THE WORKPLACE: WHAT ENGLISH COMPANIES NEED TO KNOW

We include the 2018 chapter in its entirety for reference following the 2019 update.

UK update 2019

The #MeToo movement continues to encourage women to speak out about unacceptable behaviours that they encounter at work here in the UK.

A number of high-profile UK individuals have been accused of sexual harassment and their employers alleged to have allowed such behaviour to take place or created a culture in which it is tolerated. Big name businesses have suffered considerable reputational damage as a result.

The UK Government is now responding and has announced a range of measures to address the issue. A clear emphasis has been placed on requiring employers to take responsibility for and tackle sexual harassment when it arises. The message is loud and clear - turning a blind eye to harassment is no longer acceptable.

So, what is the UK Government doing in practice?

Government Report

The Women and Equalities Committee (**WEC**) carried out an inquiry into sexual harassment in the workplace and published its findings in July 2018. The Government published its own report in response on 18 December 2018.

Action

The most notable consequence of the report is that the Government has asked the Equality and Human Rights Commission (**EHRC**) to create a statutory code of practice dealing with sexual harassment in the workplace. This is a formal document that UK employers will be required to consider, and those employers will be criticised if they do not follow it. Although we have yet to see the exact content and requirements of the code, it is expected to set out detailed guidance to help employers better understand their legal responsibilities, set examples of best practice and protect staff against sexual harassment.

Some other action points from the report have now been implemented. For example, a legislative amendment was introduced on 6 April 2019 increasing the maximum penalty for an "aggravated" breach of employment law from £5,000 to £20,000. Serious incidents of sexual harassment could amount to such a breach – for example if an employer fails to take necessary action despite being aware of a pattern of sexual harassment.

This is a significant increase as, generally speaking, compensation awards in employment claims rise by only a small amount year on year. A 400% increase demonstrates that this is a topic the Government is taking seriously.

Further consultation

The Government also set out a number of matters for further consultation (some of which are already in progress). These include:

- new measures to protect interns and volunteers (who have been identified as particularly vulnerable groups in the workplace);
- the possibility of extending Employment Tribunal (**ET**) time limits to bring claims under the Equality Act 2010 from three to six months, which include claims relating to sexual harassment;
- better regulations around the use and content of non-disclosure agreements (more of which below); and
- strengthening and clarifying the law on third party harassment, which has received considerable press attention in the UK recently thanks to an undercover report on the President's Club male only charity event hosted at the Dorchester Hotel. The report alleged repeated inappropriate behaviour towards female hostesses working at the hotel by male attendees. Provisions under the Equality Act 2010 which were designed to protect individuals (the hostesses, working for the hotel) against harassment by third parties (the event attendees) were actually repealed in October 2013. However, we suspect there will be a move to require that employers have strategies in place to prevent it following this and other incidents.

No further action

The Government has rejected some recommendations for change, however. For example:

- a proposal to give ETs the power to award an increase in compensation in cases where the employer failed to comply with the proposed statutory code of practice on sexual harassment will not be pursued; and
- a proposal that legal costs should automatically be recovered by a successful claimant in harassment cases has also been dropped. This would have represented a significant shift in the ET cost regime, where each party is usually responsible for their own costs, win or lose.

NDAs

Non-disclosure agreements (**NDAs**) and confidentiality clauses are routinely included in employment settlement agreements that deal with harassment allegations but have faced sharp criticism following revelations that Harvey Weinstein used them to "hush up" numerous victims, including his Personal Assistant.

The WEC launched an enquiry into the use of NDAs on 13 November 2018. The Government also commenced a consultation on this issue in March 2019 and is already proposing legislative changes.

These changes include a requirement that settlement agreements must make it clear that allegations may be disclosed to the police or other law enforcement agencies in any circumstances. Previously, most settlement agreements allowed such disclosures only where they were "required by law" which prevented many victims from raising concerns. It is alleged that this has allowed perpetrators to escape liability for their actions and even to commit repeat offences.

Solicitors in the UK have also been warned by their regulator that NDAs and confidentiality clauses must not be used improperly in settlement agreements. That is not to say that NDAs and confidentiality provisions no longer have a place in negotiated exits; they do, and they are often valued by the employee as much as the employer. However, caution must now be exercised when using such clauses. We recommend that:

- language used in confidentiality clauses should be clear and comprehensible – set out in plain English what can and what cannot be disclosed;
- specific wording is included which confirms that the employee is not prevented from making a disclosure to the police or law enforcement agencies; and
- only legally enforceable provisions are included.

Conclusion

The number of sexual harassment complaints has increased noticeably in recent years and we have assisted a number of clients in dealing with allegations, often made against high profile or management figures. Investigating these sensitive issues is a difficult task; the accused typically deny any wrongdoing and it is rare that any clear written or other documented evidence exists that confirms one version of events over another.

As such, the most common outcome remains that one party exits under the terms of a settlement agreement – an often-uneasy truce usually accompanied by a financial payment of some sort.

In an effort to avoid such disputes arising, or to mitigate the damage if they do, well-advised employers have been undertaking a risk audit in relation to harassment issues. Staff handbooks, equal opportunity and bullying/harassment policies should be reviewed to ensure that they are up to date and fit for purpose in the current environment. Those organisations that do not already have such policies should be putting them in place.

Employers should also give thought to delivering training on the topic of harassment to employees – especially to management level employees who tend to have the greatest opportunity to commit such offences or to be the target of allegations that are made.

Another common step is to review workplace entertainment to consider whether they are appropriate for the modern age. Staff and business development events carried out in many industries remains

heavily focussed around alcohol – an environment that breeds the sort of actions that might lead to incidents and allegations of harassment or other inappropriate behaviour. Moving away from alcohol driven events is a sensible and increasing feature and can only help in reducing the risk of the workplace claims – harassment and otherwise. Not to mention the health and productivity benefits that may result.

Finally, employers should be ensuring that harassment policies and procedures that are in place are enforced. Action should be taken to address any concerns that are raised and "top down" commitment from influential figures is a must. Management should be encouraged to address issues proactively – taking steps if they witness any inappropriate behaviour, even if no complaint is raised.

Those looking for a silver lining in the cloud cast by the current sexual harassment commentary might find it in the fact that a business's positive approach and response to these issues could well become a marketable feature. With harassment set to remain on the news agenda in coming years, being able to demonstrate to customers, potential customers, employees, potential employees and other business contacts that proactive action has been taken could be a significantly marketable feature for many companies.

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2018 Edition: Sexual Harassment in the Workplace: What English Companies Need to Know

What constitutes sexual harassment?

In England and Wales, it is unwanted conduct of a sexual nature which has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim.

The victim also has protection from being treated less favourably because they have rejected or submitted to unwanted conduct of a sexual nature. See the answer to the question about prohibited retaliation below.

Separately there is protection for harassment related to sex (gender) and sexual orientation, gender reassignment as well as other protected characteristics. The scope of this Q&A is to consider sexual harassment as set out above.

What body of law governs sexual harassment in your jurisdiction?

The Equality Act 2010 applies to most sexual harassment which occurs in the workplace or is related to employment. The Protection From Harassment Act 1997 may also be relevant but is intended to apply where any harassment or conduct occurs generally and not specifically related to work or employment.

What actions constitute sexual harassment?

See the answer to the first question above. Sexual harassment typically is associated with unwanted conduct or behavior of a sexual nature which violates dignity or creates an intimidating or degrading environment.

A wide range of actions can therefore constitute sexual harassment, but common examples include:

- unwanted physical conduct or "horseplay", including touching, pinching, pushing and grabbing;
- continued suggestions for social activity after it has been made clear that such suggestions are unwelcome;
- sending or displaying material that is pornographic or that some people may find offensive (including e-mails, text messages, video clips and images sent by mobile phone or posted on the internet);
- unwelcome sexual advances or suggestive behaviour (which the harasser may perceive as harmless); and
- jokes of a sexual nature.

Can sexual harassment occur between two members of the same sex?

Yes. Most complaints regarding harassment involve members of the opposite sex but there is no requirement for this.

Are employers required to provide sexual harassment training for their employees?

No.

In most cases, employers are vicariously liable for the actions of their employees and so, where sexual harassment occurs at work or is related to work, usually the victim will raise a complaint or pursue a claim against the employer as well as the individual perpetrator.

Having completed sexual harassment training and/or having anti-harassment policies in place will help an employer in defending harassment claims.

What are the liabilities and damages for sexual harassment and where do they fall?

Damages in England and Wales are typically compensatory rather than punitive. As such, an employee is entitled to recover any financial loss they have suffered as a result of sexual harassment. If the employee has remained in work, there will often be no loss and so limited compensation (see below).

If the employee resigns following an incident of sexual harassment, or the incident involves the termination of their employment, they will suffer a loss of salary. The employee is entitled to pursue compensation for this loss – which will usually be the lost net salary from the date of termination until a time when it can be expected that they will find a new role of equivalent remuneration with a new employer. There is no cap that applies to this compensation and it is not unusual for employees to seek many years' worth of lost salary where they allege sexual harassment.

In addition, employees that have suffered sexual harassment are entitled to seek compensation for "injury to feelings". The compensation to be awarded for injury to feelings falls within three bands:

- an award in the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence;

- an award in the middle band should be used for serious cases, which do not merit an award in the highest band; and
- an award in the top band would be made in the most serious cases, such as where there has been a lengthy campaign of harassment. Only in the most exceptional case should an award for injury to feelings exceed the top of this band.

The value of the bands has recently been increased as follows:

- awards in the lower band will be between £900 and £8,600;
- awards in the middle band will be between £8,600 and £25,700; and
- awards in the upper band will be between £25,700 and £42,900.

The employer and any personal defendant will be liable for any compensation awarded on a joint and several basis – meaning that the successful claimant would be entitled to recover 100% of the compensation from any of the respondents. Typically, the employer is the target in this respect as they will be more likely to be able to pay the compensation.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

Employees who believe they have been sexually harassed must show that (1) the perpetrator engaged in unwanted conduct of a sexual nature and that (2) the behaviour had either the purpose or effect of either violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The employee does not need to have made the perpetrator aware that the conduct was unwanted.

When considering what effect the behaviour had, the Employment Tribunal (the courts in England and Wales that hear complaints of sexual harassment in the workplace) will take into account the victim's subjective view. However, the Employment Tribunal will also consider whether it is reasonable for the conduct to have that effect.

A one-off incident is enough to establish sexual harassment. The employee does not need to establish a course of conduct.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

In short, no. For the purposes of the legislation in England and Wales, an employer is usually vicariously liable for the acts of an employee in the course of their employment (subject to the employer establishing a successful defence, as discussed below). The seniority of the employee is not a relevant consideration.

What are the potential defenses employers have against sexual harassment claims?

An employee who is subject to sexual harassment can bring their claim against the individual perpetrator and/or their employer. An employer will have a defence against a claim for sexual harassment if it can

show that it took "all reasonable steps" to prevent the employee from carrying out the offending behaviour or from doing anything of that description.

The employer must have taken these steps before the harassment occurred. Relying on its response to an employee's complaint of sexual harassment will not be enough to successfully defend a claim.

The Employment Tribunal will consider (1) the steps the employer took and (2) other steps it was reasonable for the employer to take, when deciding if the employer is vicariously liable for the acts of its employees.

Therefore, employers should take steps to protect themselves in this respect, which is discussed further below.

Who qualifies as a supervisor?

Not relevant in England and Wales.

How can employers protect themselves from sexual harassment claims?

Employers should proactively take steps to prevent behaviours which amount to sexual harassment. These will usually include:

1. having an equal opportunities policy and an anti-harassment and bullying policy;
2. keeping those policies under review and proactively making staff aware of them;
3. training managers in these types of issues, including how to identify them and deal with them;
4. dealing swiftly and effectively with complaints of sexual harassment, making sure the complainant is supported and that the perpetrator is subject to suitable disciplinary action.

The Employment Tribunal have made clear that simply having a policy in place will not be enough to defend claims of sexual harassment. Employers must ensure staff are informed and policies are effectively implemented.

Does sexual harassment cover harassment because of pregnancy?

No. Pregnancy and maternity are not relevant for the purposes of establishing sexual harassment.

However, employees do benefit from other protections against discrimination on the grounds of pregnancy and maternity.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. Sexual harassment in England and Wales relates to unwanted conduct of a sexual nature and will apply regardless of the sexual orientation of the harasser or the victim.

Harassment related to sexual orientation is also prohibited.

What is prohibited retaliation?

Retaliation in England and Wales is known as "victimisation". Employers are prohibited from subjecting someone to a detriment (i.e. disadvantaging them) because they have or intend to (or are suspected of having or intending to):

1. allege sexual harassment has taken place;
2. bring proceedings in relation to sexual harassment; or
3. given evidence/information in relation to a complaint.

Protection does not apply to individuals who have made false statements in bad faith. However, those who have made false statements in good faith will be protected from victimisation.

Additionally, there is protection for victims of sexual harassment from being treated less favourably either because they have rejected or submitted to the sexual harassment. For example, if an employee rejects the sexual advances of her boss and is then turned down for a promotion because of her rejection, she will have been treated less favourably.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

For sexual harassment to be established in England and Wales, the conduct must be unwanted. It must also be established that it was reasonable for the complainant to consider the conduct to have the effect of creating an intimidating, hostile etc. environment. Whilst a complaint of sexual harassment could arise even where there is a consensual relationship, it may be more difficult to establish that the conduct was unwanted or that it was reasonable for the complainant to consider it had such effect.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Potentially, yes. Currently there is uncertainty as to when liability for harassment by third parties will arise. In circumstances where an employer was on notice of the risks of harassment (e.g. where there have been previous complaints about the actions of a client) and has failed to take appropriate action, there is a reasonable prospect that the employer will be found at fault.

In any event, employers can take steps to avoid liability (or harassment occurring in the first place) which would include: having a policy on harassment; notifying third parties that harassment is unlawful and will not be tolerated (for example by displaying a public notice); express terms in contracts with third parties requiring them to adhere to the harassment policy; encouraging employees to report incidents and taking appropriate action to deal with a complaint.

What is the #MeToo movement?

The #MeToo movement has been used by victims of sexual harassment (both male and female) to support one another and to make it clear to the wider society that such behaviour will not be suffered in silence. It has been widely used on social media and in the wider media for victims of sexual

harassment to share their experiences and lend support to others. It has highlighted the prevalence of sexual harassment, particularly in the workplace.

How is the #MeToo movement impacting the law in your jurisdiction?

Currently there has been no legislative change, however the Equality and Human Rights Commission (**EHRC**) has made a number of recommendations to the UK Government to introduce new laws.

The EHRC issued a report on 27 March 2018 which followed a call for evidence in relation to sexual harassment in the workplace. Its recommendations include mandatory duties on employers to protect employees from harassment and victimisation and uplifts on compensation to be awarded for non-compliance. The EHRC has also suggested that the time limits for bringing complaints in an Employment Tribunal should be increased from three months (from the last act of harassment or last in a series of such acts) to six months and for time to run, where appropriate, from the exhaustion of any internal complaints procedures. With the UK Government busy with Brexit negotiations, it is difficult to anticipate what steps may be implemented and in what timescale.

Also, again whilst there has no change in the law, the use of non-disclosure agreements (NDAs) has come under scrutiny in the wake of the #MeToo movement particularly as a result of concerns that alleged victims of harassment by Harvey Weinstein had been asked to sign NDAs, with the effect that allegations were suppressed, and the alleged harassment could continue undeterred. Use of NDAs in sexual harassment situations therefore now carries the risk of further adverse publicity and criticism for employers.

The Solicitors Regulation Authority (SRA) issued a warning notice on 12 March 2018 on the use of NDAs with the effect that inappropriate use of NDAs could amount to professional misconduct for lawyers. The SRA are particularly concerned that NDAs are not used in a manner that could result in suppression of complaints to law enforcement agencies. As a result, lawyers are expected to take extra care when advising on NDAs (whether standalone or in a settlement agreement) and to ensure they are not used inappropriately.

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