

# An employer's guide to the new duty to prevent sexual harassment at work







# An employer's guide to the new duty to prevent sexual harassment at work

On 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 ('the Worker Protection Act') comes into force in the UK (excluding N Ireland), introducing a new duty on employers to take "reasonable steps" to prevent sexual harassment at work.

## In this guide, we'll take you through:

- What is harassment?
- What are your current obligations as an employer?
- What is the new preventative duty?
- How will it be enforced?
- What about acts by third parties?
- What would be considered "reasonable steps"?
- 10 measures you should have in place to help prevent sexual harassment in your business.



## Harassment at work – employers' current obligations

### The Equality Act prohibits three types of harassment:

- 1** The first type applies to the protected characteristics of age, gender reassignment, disability, race, religion or belief, sex and sexual orientation. It's described as unwanted conduct, which is related to one of those characteristics and 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.
- 2** The second type is sexual harassment, which is defined as unwanted conduct of a sexual nature that has the purpose or effect of violating an individual's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim ('hostile environment').
- 3** The third type is treating someone less favourably, because they have either submitted to, or rejected, sexual harassment or harassment related to sex or gender reassignment (where this harassing behaviour has again violated their dignity or created a hostile environment).



Employers will be vicariously liable for acts of harassment carried out by their employees, **even if they were unaware of them and wouldn't have approved of them**, unless they can show that they took "all reasonable steps" to prevent the harassment happening.

## The new duty

Under the new rules, employers have a new, proactive duty to take "reasonable" steps to prevent sexual harassment occurring. This puts more focus on having measures in place to reduce the risk of sexual harassment happening, rather than just reacting after the fact.

## How will a breach of the duty be enforced?

There are two ways action can be taken if you breach your duty:

- Employment tribunal proceedings and
- Enforcement by the Equality and Human Rights Commission (EHRC)

### Employment tribunal proceedings

Workers can't bring a **stand-alone tribunal claim** for breach of this new duty, but if they bring a successful claim that involves sexual harassment to any extent, the tribunal has to consider whether the employer failed to take 'reasonable steps' to prevent the sexual harassment occurring.

If so, the tribunal can **increase the compensation awarded by up to 25%**. For example, if an employee is awarded £50,000 in compensation for sexual harassment they suffered at work and the tribunal felt that the employer hadn't taken reasonable steps to prevent it, they could increase the award by 25%, bringing the total compensation awarded to £62,500. The size of the uplift will depend on how big the breach is in the eyes of the tribunal.

### Enforcement by the EHRC

The EHRC is Britain's independent equality and human rights regulator. The Equality Act gives the EHRC enforcement powers such as:

- The power to conduct investigations. They can issue an unlawful act notice if an investigation finds an employer to be in breach of their obligations. The employer would then need to prepare an action plan setting out how they'll remedy the breach and stop it happening again



- The power to make action plans or enter into legally binding agreements with the employer to prevent future breaches.
- The power to apply for injunctions against a person in breach of their duties.

Unlike employment tribunals, the EHRC can take stand-alone action for a breach of the new duty – so even if no acts of sexual harassment have happened, they could take action against you for not taking reasonable steps to prevent it.

## Does the new obligation cover acts by third parties?

You can be liable for acts of harassment committed by your employees or other workers acting on your behalf, but can you be liable for the actions of third parties?

In short, yes.

At the moment, there are a few ways you can be made liable for harassment carried out by third parties. For example:

- Failing to tackle it could be seen as a breach of your duty to ensure the health, safety and welfare of your employees.
- Failing to deal with harassment by a third party could amount to direct or indirect sex discrimination. For example, if a male employee complains that he's being sexually harassed by a customer, but the manager doesn't take it seriously and doesn't follow the process they would have followed if the complaint came from a female employee.
- Failing to respond effectively to the employee's concerns could destroy trust and confidence in the employment relationship, which could lead to a potential constructive unfair dismissal claim.

The Equality Act originally included provisions making employers liable in certain circumstances for acts of harassment by third parties, but these were repealed in 2013.

The notes to the Worker Protection Act make it clear that the new rules don't give workers the right to bring a tribunal claim for sexual harassment by third parties. But on 26 September, the EHRC updated their guidance to employers on preventing sexual harassment and made it clear that they'd consider a failure to take reasonable steps to prevent sexual harassment by third parties to be a breach of the new duty, meaning they could take enforcement action.

**So, you should absolutely make sure that actions by third parties are covered in your policies and procedures.**



## How should employers approach preventing sexual harassment in the workplace?

The EHRC guidance sets out what you should consider when planning how you can prevent sexual harassment occurring in your workplace.

To comply with the new duty to take “reasonable steps” to prevent sexual harassment, you need to anticipate scenarios where your workers could be subject to sexual harassment and take action to prevent it.

Carrying out a risk assessment will be key to proving that you've complied with this new duty. Your risk assessment should:

1. Assess the risk of workers being exposed to sexual harassment (including by third parties) and
2. Outline what steps you can take to minimise those risks

The EHRC also recommends that employers consult with employee representatives about the measures they plan to put in place.

## What will be considered “reasonable steps”?

This will be determined by each tribunal on a case-by-case basis. The explanatory notes in the Act say that what is “reasonable” will depend on the specific circumstances of the employer.

**The EHRC guidance sets out the following list of some (but not all) of the factors which could be relevant here:**

- the size and resources of the employer
- the nature of the working environment
- the sector the employer operates in
- the risks present in that workplace
- the nature of any contact with third parties, for example, the type of third party, frequency, environment
- the likely effect of taking a particular step and whether an alternative step could be more effective
- whether concerns have been raised that sexual harassment has taken place (it would be reasonable for the employer to take steps to investigate and ensure it doesn't happen again)
- compliance with any relevant regulatory standards
- whether the steps already taken appear to have been effective or ineffective - for example, if a further incident of sexual harassment occurs after steps have been taken, this may indicate that additional and/or alternative action is necessary

When deciding whether a step is reasonable, you can weigh up how effective that step might be against factors such as cost, time and disruption. For example, a step that causes significant cost and disruption to a business may not be reasonable if it's only likely to have minimal impact.

Let's look in detail at some of the key measures you should consider putting in place to prevent sexual harassment occurring in your business.



# 10 steps to help prevent sexual harassment in your business

## 1 Carry out a risk assessment

Assessing the risk of sexual harassment happening in your business (including the risk of sexual harassment by third parties) is essential – in fact, the EHRC guidance warns that you're unlikely to be able to show you've complied with the preventative duty without it.

### The EHRC suggest considering possible factors like:

- 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
- the workforce demographic.

### The guidance also sets out some factors that could increase the risk of sexual harassment, including:

- 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 are male)
- workplaces that allow alcohol consumption
- an expectation that workers 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
- night working
- an insecure/casual workforce
- a failure to respond appropriately to previous reports of sexual harassment
- no policies or procedures to prevent or respond to sexual harassment
- workers that have more than one protected characteristic, for example, disabled people, ethnic minorities and people from the LGBTQ+ 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, but these should still be considered and addressed.

We have a risk assessment template available for our HR & Employment Law clients. If you'd like to benefit from access to this and other essential HR & Employment Law documentation as and when the law changes, call **0345 844 1111**.

## 2

### Have the right policies in place

It's important that every employer has the right policies in place to make it clear what's acceptable behaviour at work. The EHRC advises that you shouldn't confuse different forms of harassment and so should either have different policies covering sexual harassment and harassment related to protected characteristics, or have one policy which explains the different types of harassment.

You should also review other policies and procedures to check they align with your anti-harassment policies. For example:

- Do the examples of gross misconduct in your disciplinary policy reflect the anti-harassment policy?
- Do any IT, communications and social media policies include warnings against online harassment and encourage workers to report incidents even when they take place on personal devices?

HR & Employment Law clients have access to our bullying and harassment policy which we've updated in line with the latest guidance.

If you'd like to access this policy, just call us on **0345 844 1111**.





3

### Ensure your policies are available to all workers

Having the right policies in place won't make a difference if workers don't know what they are, so you need to make sure your policies are easily accessible to everyone and communicated clearly.

The EHRC guidance has several suggestions for this:

- **Publish your policy on an external-facing website** – This way, not only will workers be able to access it even if they're off sick (for example, with stress because of harassment), but it'll also make sure those who don't have access to internal systems can see it.
- **Or find other ways to make it accessible** - If you're not able to publish your policy on an external website, you should find other ways to make it accessible to everyone.
- **Inductions** - Verbally communicate the policy to all workers during their induction, and make sure they have a copy or have been told where to access it.
- **Make it inclusive** - Consider translating your policy if you have a linguistically diverse workforce and make sure it's in an accessible format for workers with disabilities.
- **Communicating amendments** - If the policy is amended, everyone should be told about it and given the revised version.
- **Reminders** - Regularly remind workers of the policy, whether that's through newsletters, physical or digital noticeboards or staff meetings.
- **Around events** – It's helpful to send a reminder to staff before events which could be higher-risk for harassment, like office parties.
- **Share with external parties** - Share your policy with external organisations that supply workers or services to make sure they also understand what acceptable behaviour is and how to report concerns.

**NOTE:** The EHRC guidance warns it wouldn't be appropriate to tell workers to get a copy of the policy from their manager (they may be the harasser) or to leave copies in a staff room (people may be uncomfortable looking at it in front of others).







## 4

### Train all workers

Putting in place the right policies and making them accessible won't work if your workers don't know and understand them. That's why training is so important.

#### Your training should explain:

- the different kinds of harassment
- what is and isn't acceptable behaviour
- the serious consequences of unacceptable behaviour
- how to raise concerns if someone experiences or witnesses inappropriate behaviour, including acts involving third parties.

How long training remains effective will depend on the circumstances of each case, including things like the type of training and who carries it out.

An online course on '**Bullying and Harassment in the workplace**' is available in the 'Manage Training' area of Atlas, and more comprehensive, interactive training is available from our HR On-Demand team. Find out more by contacting us on **0345 844 4848** or emailing us at **onsitehrbookings@citation.co.uk**.

If you're a Health & Safety client and you'd like to find out more about our HR training, call **0345 844 1111**.

#### Why regular training matters

In 2021, the question of adequate training came before the Employment Appeal Tribunal (EAT) in a case involving complaints of racial harassment.

An employee raised a complaint about racist remarks in August 2017. The employer argued that they shouldn't be made liable for this as they'd taken all reasonable steps to prevent harassment happening in the workplace.

They pointed out that they had anti-bullying and harassment policies in place and had carried out equality and diversity training in January 2015 and bullying and harassment training in February 2015.

However, the tribunal found, and the EAT upheld, that this training was 'stale' and as there was more they could have done to prevent harassment occurring (by carrying out more recent training), they had not taken all reasonable steps and were therefore liable to pay compensation.

It's very important to keep records of the training your workers have completed.



## 5 Train managers

Having the right policies in place and training all your workers on how they should be behaving is a great start, but ultimately the effectiveness of these depends on your managers tackling situations the right way when they happen.

**So, make sure your managers receive additional training on:**

- how to tackle unacceptable behaviour appropriately and consistently
- how to handle a formal and informal complaint
- the support available to help them manage these situations
- the support the business can offer workers when they raise complaints
- how to spot the warning signs that harassment may be taking place, like increased sickness absence or unexplained changes in behaviour or performance.

**The EHRC recommends that managers' performance objectives should include reference to appropriately handling complaints and/or incidents of harassment.**

An online course on **'Bullying and Harassment'** for managers is available in the 'Manage Training' area of Atlas and more comprehensive, interactive training for managers is available from our HR On-Demand team, giving them the tools they need to recognise and deal effectively with any harassment issues in your business- find out more by contacting us on **0345 844 4848** or emailing us at **onsitehrbookings@citation.co.uk**.

## 6 Have clear reporting channels for formal and informal complaints

Your policy should set out how complaints of harassment can be raised, which should be as flexible as possible. They shouldn't involve completing a specific form and should reassure the complainant you won't tolerate any victimisation towards them following on from their complaint.

As well as making it clear to everyone how they can report harassment, the ECHR recommends that employers should make sure workers have lots of opportunities to raise any issues, including:

- Making sure managers have regular informal one-to-one meetings with employees
- Holding return-to-work meetings to explore any underlying issues that led to the sickness absence
- Holding exit interviews (which shouldn't be held by the employee's manager)



Consider introducing a system where anonymous complaints can be made to help people feel comfortable raising issues.

## Getting informal reporting right

Although the EHRC recommends your policies should tell workers how they can raise issues informally, you should make sure you're not putting any kind of pressure on employees or worker to resolve an issue personally.

### The policy should:

- give guidance on how to raise the issue directly with the harasser, but only if it is the worker's preferred option and they feel comfortable.
- make it clear that it's entirely their choice and there's no pressure on them to go down this route - many workers will feel uncomfortable doing this. Identify who they should approach to discuss their concerns (it's helpful to offer a range of people and the worker can then choose someone they would feel comfortable speaking to about the issue - these people should receive training on how to support workers with their concerns). Even if a worker is comfortable tackling it themselves, it's helpful to ask them to tell you about the issue so you can put any necessary measures in place, like refresher training.

Of course, some situations are too serious to be managed informally, and all need careful handling. Remember, our Employment Law experts are on hand to help you navigate these situations - contact us for advice if you receive any informal or formal complaints of harassment.







## 7 Respond to complaints appropriately

Handling complaints effectively and appropriately is so important in showing you take these matters seriously.

So, this is what you should do:

### Can't find someone impartial?

When appointing the investigation officer, bear in mind that if the matter goes to a disciplinary hearing and appeal, you ideally need to appoint impartial people with escalating levels of seniority to deal with these elements of the process.

If it's impossible to find impartial people in the business, or if you're keen to show that you have carried out an independent investigation, you can appoint an external investigator who can approach the situation objectively.

**Citation's HR On-Demand team can do this for you – simply call 0345 844 4848 for more information.**

**1 When you receive a complaint:** An impartial investigation officer should be appointed to undertake a prompt, fair and thorough investigation into the allegations. This person should ideally be senior to the alleged harasser (or at the very least, on the same level of seniority if this is not possible).

**2 During the meetings:** The EHRC guidance suggests that in some cases it could be helpful to let the employee raising the complaint to be accompanied to meetings by someone who can offer emotional support, like a friend or family member. Throughout the investigation: Maintain the highest levels of confidentiality throughout the process. Remind all witnesses interviewed of this and advise that a failure to keep matters confidential would be dealt with under the disciplinary process.

## 8 Monitor trends

It's important to keep track of complaints of harassment and analyse trends to help you assess how effective your current policies are in preventing harassment and identifying areas for improvement.

This may involve collating information on:

- the date of the complaint (both formal and informal)
- the area of the business and the roles of the complainant and harasser
- the outcome (with a brief explanation).

It's really important that this information is stored and processed in a way that's compliant with UK GDPR. That means restricting access to the information, ensuring the processing of this data is proportionate, and employees are aware the data will be stored.



## 9

### Review and evaluate the effectiveness of your policies on an ongoing basis

No matter how many complaints you experience, it could be a good idea to regularly test how effective your policies are. Anonymous surveys are a good way to do this.

#### This may include questions on:

- whether those surveyed have been subjected to or witnessed harassment (and describing what this means)
- what type of harassment they experienced
- whether they reported this and if not, why not?
- if they did report it, what was the outcome?
- were they happy with the outcome and if not, why not?
- did they feel they would be able to speak up if they experienced harassment in the future?
- did they think there were other steps you could take to prevent harassment occurring?

Policies should be reviewed annually. Take into account any trends from complaints and feedback from any staff surveys.

## 10

### Communicate your strategy for prevention

The EHRC recommends that you create an action plan setting out the measures you're taking to prevent sexual harassment and communicate it to all workers.

You might also want to communicate it to the public - for example, by putting details on your website. They also suggest it could be useful to have separate strategy documents for tackling sexual harassment and other types of harassment.



## The guidance in practice

### Example of a risk assessment and prevention action plan

The EHRC guidance gives a couple of examples of how you can approach the risk assessment and action plan, including this one based in a construction environment.

### The risk assessment

The employer carried out a risk assessment and identified the following risk factors:

- The workforce was male dominated, with 80% of senior management roles held by men
- There was a culture of crude banter at some client sites
- There was regular interaction with third-party contractors
- Sometimes workers would attend client sites alone
- The business had carried out an anonymous survey which found that female workers didn't feel confident about raising sexual harassment concerns as they didn't think it would be taken seriously.







## The action plan

The business considered these added up to a high risk of sexual harassment, so they consulted with employee representatives. This led to them putting together an action plan to:

- ✔ Review and relaunch their anti-harassment policies and procedures
- ✔ Undertake training with managers to ensure they understand:
  - what sexual harassment is
  - what the company policies and procedures are
  - the need for all reports to be taken seriously, documented and appropriate action taken
  - where to get support if they need it.
- ✔ Identify senior leaders to speak to staff to reiterate that sexual harassment won't be tolerated and all reports would be taken seriously
- ✔ Initiate a senior development programme for women to encourage and support women to enter senior management roles
- ✔ Carry out refresher equality, diversity and inclusion training for all workers, stressing the importance of reporting any harassment they see
- ✔ Write to all clients and contractors formally setting out their stance on tackling sexual harassment and making it clear it won't be tolerated
- ✔ Instruct managers to arrange for in-person meetings with clients and contractors to discuss their zero-tolerance of harassment and make sure protocols, responsibilities and reporting channels are clear for sexual harassment involving third parties
- ✔ Instruct managers to discuss any initial site visit with a female member of staff to check if she is comfortable attending site alone or would prefer to be accompanied by a colleague
- ✔ Set up anonymous reporting channels to encourage higher rates of reporting where workers could be worried about speaking up
- ✔ Set up a hub for managers to record details of all reported incidents of sexual harassment, both informal and formal (the hub would need to meet the requirements of UK Data Protection laws)
- ✔ Commit to review the data on the hub every 6 months to identify trends and appropriate action to tackle them
- ✔ Commit to undertaking a staff survey every 6 months for the next 18 months to evaluate the effectiveness of these measures.



## Other considerations

### Agency workers

The EHRC guidance recommends that agency businesses and hirers should have clear policies on who is responsible for handling complaints of harassment. These should be confirmed in writing (usually it'll be better for the hirer to investigate any concerns).

The agency should check before supplying a worker that the hirer has procedures in place to prevent harassment and investigate complaints and the agency worker should receive an induction in both the hirer and agency's policies.

### What if a worker raises an issue but requests that no action is taken?

The EHRC guidance says that if the worker raises a complaint with you but requests that you don't take it any further, you should respect their wishes but still take steps to make sure it's resolved.

#### For example:

- keeping a record of the complaint and the worker's request not to take action
- encouraging the worker to address the issue informally, either directly themselves or with your support
- keeping the situation under review and checking with the worker to see if it's resolved
- if the situation hasn't resolved, explain to the worker that it's necessary for them to tackle the issue, both for their own wellbeing and potentially the wellbeing of others.

In some situations, the harassment is so serious that you need to take action to safeguard the health, safety and welfare of the complainant and other colleagues. In these circumstances, you should explain to the worker why you have to take action and reassure them that you'll put in place safeguards to stop anything else happening.

# We're here to help

Showing a strong commitment to preventing incidents of harassment and encouraging an inclusive working environment helps to build a happier, more positive and productive culture within your business – and what employer doesn't want that?

But we know this is a lot to get your head around.

That's why we're here to help you every step of the way - from having the right policies in place, to delivering training to your teams and guiding you through handling complaints, we're just a call away. Simply call **0345 844 4848** to speak to our friendly HR & Employment Law advisors whenever suits you. Or, if you'd like to find out more about our HR & Employment Law services, call us on **0345 844 1111**.