BCLP. Client Intelligent

Insights

EMPLOYERS WILL HAVE POSITIVE DUTY TO PREVENT SEXUAL HARASSMENT

Nov 21, 2023

The Worker Protection (Amendment of Equality Act 2010) Bill (the Act) recently received Royal Assent and will come into force in October 2024.

Although there is no clue in the title, the Act is concerned exclusively with sexual harassment. This is already unlawful under the Equality Act 2010 (EqA), so what effect will the new Act have?

WHAT IS SEXUAL HARASSMENT?

As defined by the EqA, sexual harassment occurs when a person engages in unwanted behaviour of a sexual nature, whether verbal, non-verbal or physical, that (i) violates an individual's dignity, or (ii) creates an intimidating, hostile, degrading, humiliating or offensive working environment.

Common examples include sexual jokes, texts/emails containing sexual material, unwanted sexual advances, touching, and displaying explicit videos or photographs. The conduct does not need to be directed at the individual, and the "workplace" can include external venues for Christmas parties or corporate events, as long as there is some connection between the event and work, which there usually is.

WHAT ARE THE KEY ASPECTS OF THE ACT?

- For the first time, employers will be under a positive obligation to take reasonable steps to prevent employees experiencing workplace sexual harassment. The duty is proactive;
- There is likely to be an updated statutory Code of Practice drawn up by the Equality and Human Rights Commission (EHRC), which will give guidance on the new positive duty and other matters under the Act. The existing EHRC technical guidance on sexual harassment and harassment at work published in January 2020 can still be used as a reference point (see below);
- If the employer breaches the new positive duty, employment tribunals will have the power to increase any compensation by up to 25% and the uplift will apply to all compensation

awarded. This is quite an incentive for compliance - the average sex discrimination award in 2022 was £37,607, and the maximum uplift would increase that to circa £47,000; and

- A claim for breach of the positive duty can only be made if it is part of a claim for sexual harassment. A claim for a standalone breach of the positive duty is possible but must be raised with the EHRC. Given the possible reputational damage that can result from EHRC investigations, this is again an incentive to comply.

The new positive duty only applies to sexual harassment. It does not apply to harassment based on other protected characteristics such as age, disability, race or religion or belief. It also does not apply to harassment based on sex.

The Act was watered down from its original form. The Bill initially provided that an employer had to take "all" reasonable steps to prevent sexual harassment of employees (as opposed to just "reasonable steps") and it also included measures to protect employees against sexual harassment by third parties, such as customers, clients, contractors or suppliers. These were both dropped in August 2023.

WHAT DOES TAKING "REASONABLE STEPS" MEAN?

The Act does not offer any guidance on what "reasonable steps" means, although the updated EHRC guidance is likely to. The removal of the word "all" at the Bill stage puts the positive obligation at a slightly lower level than the employer's defence to discrimination claims under the EqA, which requires the employer "to take all reasonable steps". What an employment tribunal considers "reasonable" will likely depend on the facts of the case as well as the employer's size and resources. The incentives to comply set out above might discourage employers from testing the difference.

The scope of the existing "all reasonable steps" defence was recently considered by the tribunal in *Fischer v London United Busways Limited*, which we reported on in our September 2023 Two Minute Monthly. Although this was a gender reassignment discrimination case, the tribunal's list of additional "reasonable steps" that the respondent could and should have taken provides useful practical guidance for employers as to the types of steps it can sensibly take both to comply with the new positive duty, and overall to reduce the risk of sexual harassment claims and defend any that arise.

HOW CAN EMPLOYERS PREPARE FOR THE ACT?

A date has not been set for when the updated EHRC code of practice will be published, but employers can start preparing now by taking measures to help prevent incidents of harassment in the workplace. Some key steps might include:

- a clear and comprehensive anti-sexual harassment policy which is actively and regularly implemented/updated;
- meaningful and situational training on the prevention of sexual harassment at work being regularly delivered to **all** employees;
- a complaint system to address and resolve any complaints of sexual harassment reported by employees;
- any such complaints mechanism to have safeguards so that employees feel safe and protected in making complaints, and can do so anonymously and in strictest confidence if they wish; and
- an accurate and detailed record of any efforts taken to prevent sexual harassment in the workplace being maintained.

CONCLUSION

This will be the first time that prevention of sexual harassment becomes a positive legal duty for employers. The 25% statutory uplift and possibility of an EHRC investigation are also strong incentives for compliance.

In practical terms, it is hoped that the updated EHRC guidance is published in good time before the Act comes into force, particularly as the guidance will be used to determine whether any statutory uplift will be applied to compensation. As with uplifts under the ACAS Code, only serious breaches of the guidance/Act will warrant the maximum 25% uplift, but employers would be well-advised to review policies and procedures once the guidance is published.

This article was written with Trainee Solicitor Rhea Ava Patel.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Katherine Pope

London

katherine.pope@bclplaw.com
+44 (0) 20 3400 3533

David von Hagen

London

david.vonhagen@bclplaw.com
+44 (0) 20 3400 3576
