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Client Alert

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Call of Duty: UK Government proposes new duty for employers to prevent sexual harassment

The UK Government has recently published its long-awaited response to its 2019 consultation on measures to combat sexual harassment in the workplace and strengthen existing legal protections.

Most significantly, the government has committed to introducing a new proactive duty on employers to prevent sexual harassment in the workplace and to reintroduce protections from third-party harassment. The government is also likely to extend the time limits for bringing claims under the Equality Act 2010 (**EqA**), but this is still being considered.

The response is very light on detail about how these legislative changes will be implemented and much remains the subject of further consideration. Set out below are the headlines of the government's response and what lies ahead for employers "as soon as parliamentary time allows".

This is a timely reminder for employers to sharply refocus on preventing sexual harassment in the workplace as we return to the office.

PROACTIVE DUTY TO PREVENT SEXUAL HARASSMENT

The government intends to introduce legislation which requires employers to take positive, proactive steps to prevent sexual harassment. Currently, employers are under no proactive duty to prevent sexual harassment in the workplace. However, if an incident has taken place and an individual makes a claim, an employer will potentially be liable unless it can show it took "all reasonable steps" to prevent the sexual harassment.

The main findings of the consultation were that many respondents were supportive of the new duty to prompt employers to take positive steps to prevent harassment. The #MeToo movement made it clear that existing laws with after-the-event liability were not enough and that more is needed to drive lasting cultural change.

The government has said it anticipates that the new duty will require employers to take all reasonable steps to prevent harassment. Under this

reformulation of existing laws, an employer would still be required to take reasonable steps (as they are now, assuming they want to be able to defend any claims) but could potentially be liable for failing to take preventative action without the need for an incident to have occurred.

The response refers to the Equality and Human Rights Commission's (**EHRC**) existing power to enter into legally binding agreements with employers who are found to be liable for breaches of the EqA and that there may be scope for "further EHRC action in this area". It could be possible that employers find themselves the subject of enforcement action by the EHRC based on lack of policies, training or other steps to prevent sexual harassment, even if no incident has occurred. It is however anticipated that an incident would still need to have taken place before an individual could make a claim.

The scope of this new duty will be clarified by a statutory code of practice, developed by the EHRC. Many respondents advocated that the steps themselves should be explicitly outlined, but the government has said this would remove the flexibility to take a proportionate approach. What taking "all reasonable steps" will involve will vary according to an employer's size and resources. The government wants to motivate employers to put in place practices and policies which respond to the needs of their specific organisation, rather than creating a checkbox exercise.

The response does not state whether the preventative duty will apply to all forms of harassment under the EqA, or whether protections against sexual harassment will be elevated over and above other forms of harassment. The original consultation paper referred to discussing options that would apply equally to all forms of harassment. Further clarity on this point is awaited.

LEGAL PROTECTIONS AGAINST THIRD-PARTY HARASSMENT

The government also intends to reintroduce protections against third-party harassment in the workplace. Historically, employers could be liable for harassment of their employees by third parties in the workplace (for example, a customer or supplier) under the "three strikes rule", if the employee had been harassed on two prior occasions. This was repealed in 2013. It remains unclear in what form this protection will be re-introduced, but the government has confirmed that alongside this employer liability, it will introduce the defence of having taken all reasonable steps in response to a claim. There is no current indication it will be a proactive duty, as above.

Again, the response is vague on whether the new duty will apply to all forms of harassment, or just to sexual harassment.

EXTENDING TIME LIMIT TO BRING CLAIMS

The UK Government has said it will "closely" look at extending the time limit to bring claims under the EqA from three months to six months. This is said to be in relation to all claims under the EqA, not just sexual harassment.

The general response to the consultation was in favour of increasing the time limit, with many respondents advocating for twelve months. The government stated that if an extension was to be introduced, a time limit of six months would be more appropriate than twelve. This is in recognition of the need to strike a balance of ensuring access to justice while minimising the potential negative impact on employers. Any extension will lead to an increase in employer liability and also start to limit the reliability with which those involved can recall events, and the availability of documents and witnesses.

It is not clear how this would intersect with other employment claims subject to a three-month time limit. For example, how easily could an employee claiming unfair dismissal amend their claim to tack on claims of discrimination? This would place an additional burden on employers to file an amended defence.

Any extension in time limit is also likely to see an increase in the number of claims filed. The government is conscious of existing tribunal delays exacerbated by the COVID-19 pandemic and the need to first return the tribunal to previous levels of service before "additional loading" is added.

VOLUNTEERS AND INTERNS

The consultation also considered whether interns were adequately protected under the EqA and whether the EqA's protections should be extended to volunteers. The government has ruled out changes in this regard on the basis that:

- Interns are already sufficiently protected by the EqA as they are likely to be considered "workers".
- Extending protections to volunteers could create a disproportionate level of liability and difficulty for organisations which outweighs the benefit of the volunteering services provided. For instance, individuals helping out at one-off school events or charities.

NEXT STEPS

The above anticipated changes need a great deal of fleshing out. Crucially, it remains to be seen whether these new protections will be extended to other forms of harassment under the EqA.

No timelines have been indicated and it is likely to be some time before any changes come into effect. We are still waiting on the legislation promised in 2019 in relation to the use of non-disclosure agreements (**NDAs**). This is another issue which the #MeToo movement shone a spotlight on.

In the meantime, employers can start to refocus on the issue of sexual harassment as employees return to the workplace. COVID-19 may have alleviated some of the #MeToo issues with the absence of in-person incidents and office events, but the new hybrid work environment may present new challenges. For example, fewer people being present in the office to witness incidents of sexual harassment.

Another potential challenge is the availability of people in the workplace to whom an employee feels comfortable to "speak up" to about any complaints. This could be a particular issue for new starters whose work relationships may be limited to a small team with whom they have interacted virtually, leaving them without a wider support network.

Some employees may be more confident or forthright in their advances by email or text messages if they do not have to see a colleague in person each day. We could see a rise of harassment complaints relating to inappropriate messages if staff can more easily hide behind their screens.

Harassment can occur in many forms and employers should ensure that training and policies are up to date and consider how harassment can occur in a remote workforce. Training and policies need to address the nuances of what may constitute harassment in the new dynamic world. Staff should be given refresher training and employers should be cautious about remote employees slipping through the cracks if training only takes place in-person.

Employers can also review the EHRC's technical guidance (published in 2020), on which the code is likely to be based. The guidance sets out the EHRC's recommendations on steps employers should consider taking to prevent harassment. It calls for employers to be more inquisitive about what is going on in the workplace and recommended actions such as conducting risk assessments, carrying out regular feedback surveys and having nominated "guardians" who are trained to support a complainant through the process of making a complaint. When entering into third-party supplier contracts, employers could consider including contractual clauses regarding compliance with anti-harassment policies or requiring third parties to have given training to relevant staff.

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