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Culture in financial services: New duty to prevent sexual harassment

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Employers in financial services will already be aware of the need to take any complaint of sexual harassment seriously. But from 26 October 2024 there will be a new proactive duty on employers to "take reasonable steps" to prevent sexual harassment of their employees. What does this mean for employers, and what should they be doing now to prepare for this?

Why do employers need to tackle sexual harassment in the workplace?

Sexual harassment in the workplace is an important ongoing issue, as demonstrated by the recent House of Commons Treasury Committee's "Sexism in the City" inquiry which highlighted areas of concern regarding the treatment of women in financial services.

Dealing with sexual harassment claims isn't just about managing the immediate issues and protecting and safeguarding employees; it is also about managing consequential issues that can impact an organisation – including negative publicity leading to reputational damage, managing difficult questions from current and prospective clients and the negative impact on recruitment and retention strategies.

Taking proactive steps to prevent these issues arising will not only help employers comply with their regulatory obligations and the new duty coming into force in October 2024, but will also help with drives to an inclusive and positive workplace culture.

In addition, heightened expectations for a positive workplace culture and a diminished tolerance for poor behaviour, mean that employers that neglect to prepare for this new duty could face an increase in harassment claims.

What is the current legal requirement in relation to sexual harassment for employers?

Legal duty

Sexual harassment is defined as unwanted conduct that is sexual in nature, where the purpose or effect of the conduct is to violate a person's dignity or create an intimidating, hostile, degrading or offensive environment.

Unwanted conduct of a sexual nature encompasses a range of actions. Examples include sexual comments or jokes, displaying sexually graphic photos, spreading sexual rumours about a person, and asking intrusive questions about a person's private or sex life.

Employers can be vicariously liable for sexual harassment committed by one of their employees against a colleague, although it is a defence for the employer to show that they have taken "all reasonable steps" to

prevent that individual from doing so. As a minimum, this means:

- providing adequate and appropriate training of staff;
- dealing effectively with and investigating complaints; and
- taking appropriate disciplinary action against harassers.

New legal proactive duty on employers from 26 October 2024

New legislation will apply to all employers and will strengthen the protection from sexual harassment of employees at work by introducing a new duty on employers, from 26 October 2024, to "take reasonable steps" to prevent sexual harassment of their employees. Whilst it was advisable to take such steps under the old regime to meet the "reasonable steps defence" to any discrimination and harassment claims, the new law makes "reasonable steps" an express requirement on employers. The intention of the legislation is to shift the focus from redress to prevention and protection, which adds to the onus on employers to take proactive steps.

EHRC draft guidance on the new duty

The Equality and Human Rights Commission (EHRC) has now published draft guidance on this new duty which emphasises that this is **an anticipatory duty.** Employers should not wait until an incident of sexual harassment occurs before taking action. Instead, they should undertake **risk assessments** to identify situations in which their workers may be subject to sexual harassment and take action to prevent such harassment taking place. In the financial services context, the new "reasonable steps" requirement is likely to promote a sharp focus on who should bear responsibility for changing the perceived culture. Dame Amanda Blanc proposed to the "Sexism in the City" inquiry that accountability should rest with the board and management of a firm to create the right culture and ensure the right processes are in place to handle allegations of misconduct, with the regulator as the backstop should that not work.

The EHRC draft guidance also makes reference to **harassment by third parties** – and whilst there is no direct legal protection for employees against third party harassment, as this was dropped from the final legislation, the guidance indicates that the new duty will require employers to take reasonable steps to prevent sexual harassment **by both their own workers and third parties**.

This highlights the need for financial services employers to be attentive to protecting staff from sexual harassment, both in the office and at work related events, including interactions with clients and customers. The recent "Sexism in the City" report highlights ongoing concerns, indicating that some of the worst instances of sexual harassment occur beyond the workplace—during conferences, social gatherings, and business trips.

Enforcing the new legal duty

Employment tribunal compensation uplift: There will be a corresponding new compensation uplift of up to 25% for breach of the new employer's duty to prevent sexual harassment. Employees won't be able to bring a claim for breach of the duty as it won't be a standalone claim. However, where an employee's claim for sexual harassment succeeds, the Employment Tribunal will then consider applying an uplift to any overall compensation awarded if it also considers there has been a breach of the new duty. If sexual harassment claims are successful, the compensation payable to employees can be substantial, even without the impending threat of an uplift. For example, in Tahir v National Grid UK Ltd [2023] an Employment Tribunal awarded over £350,000 in compensation to an employee who resigned after suffering sexual harassment.

EHRC investigations: The EHRC currently has the power to investigate breaches of the Equality Act 2010 and to take enforcement action. From 26 October 2024, the EHRC will also have power to take enforcement action where employers (including firms) breach the new duty to "take reasonable steps" to prevent sexual harassment,

whether harassment is instigated by the employer's own workers or by third parties such as customers or suppliers. So, if the EHRC were to find the employer had breached this duty, regulatory considerations would arise.

The role of the regulators – Non-financial misconduct

Since 2018, the FCA and PRA have made it clear that bullying, harassment (including sexual harassment) and discrimination are examples of non-financial misconduct, which is a regulatory issue. We are also expecting guidance on a firm's suitability to practice which will provide that a finding of discriminatory practices by a tribunal or court against a firm or a person connected to a firm will be relevant to the firm's suitability to practice under the Threshold Conditions.

So not only can acts of bullying, sexual harassment and discrimination lead to disciplinary action and potentially to dismissal, such personal misbehaviour can also amount to a breach of the Conduct Rules, and possible regulatory investigations and disciplinary action by the regulators.

A number of high-profile enforcement cases have illustrated the extent to which serious non-financial misconduct has led to regulatory action against the individuals concerned.[1]

Looking ahead, employers can expect more guidance and regulation in this area. In September 2023, the FCA and PRA published consultation papers (CP23/20 and CP18/23) containing their proposals to issue revised guidance to clarify how non-financial misconduct impacts on fitness and propriety and what type of conduct will be considered a breach of the Conduct Rules, making it clear that the Conduct Rules cover instances of bullying, harassment and similar behaviours towards fellow employees and employees of group companies and contractors.

The results of a recent FCA survey asking members how they prevent and handle misconduct and the findings and recommendations made by the "Sexism in the City" inquiry will no doubt feed into the policy statements to CP23/20 and CP18/23 which are expected in the second half of 2024. The revised rules and guidance will come into force one year after publication of the policy statements and the final regulatory requirements to give firms time to prepare.

Linking the new duty with regulatory obligations

But does the new duty impose any additional obligations on financial services firms beyond their regulatory obligations? While sexual harassment by employees raises regulatory issues, the new duty may go wider since it extends to protecting employees from third party harassment, including customers or clients. For example, if a third-party individual at a customer or client harasses an employee of your financial services organisation – you should be considering how you protect your employee and what steps you should take.

The key point perhaps, given the focus on "non-financial misconduct", is a finding by an employment tribunal that a firm has not taken "reasonable steps" to prevent an actual occurrence of sexual harassment is clearly going to be unwelcome, and could trigger regulatory considerations.

As with other employment tribunal claims, and allegations and complaints which relate to workplace culture issues, financial services firms should be considering their regulatory reporting obligations at all times.

With recent submissions to the Treasury Committee[2] making it clear that the FCA will be progressing "at pace" with their proposals in relation to non-financial misconduct, it is clear that issues around sexual harassment in the financial services sector will require careful consideration of both legal and regulatory obligations, and in practice will require input from a firm's legal, compliance and HR teams.

Action points: 4 steps for firms to take

Now that the EHRC has published its draft updated technical guidance on sexual harassment to reflect the new duty, employers should take steps to ensure compliance with their regulatory requirements and the new duty, and to foster an inclusive and positive workplace culture.

This involves firms undertaking a comprehensive review of their current policies and procedures, training and workplace culture and implementing practical measures to help adopt a proactive stance against sexual harassment and other negative workplace behaviours. Agile policies and procedures are needed to address and demonstrate compliance in this area at both an individual level (for managers) and a firm level.

Step One – Review and Understand What you are Currently Doing

- Gather all policies that you have which are relevant to preventing sexual harassment. This will include your equal opportunities policy, bullying and anti-harassment policy, whistleblowing policy, data protection and disciplinary policies.
- Gather all training that you currently do in relation to these policies, and any programmes you use for communicating them (such as posters, internal newsletters, staff meetings). This should include training in relation to the Conduct Rules, non-financial misconduct and fitness and propriety. Gather all policies and programmes that you have in relation to reporting. This will include formal reporting channels, whistleblowing mechanisms, "Speak Up" helplines, and telephone hotlines run by third parties.

Step Two – Consider and Review your Current Culture and Risk Points

- What is your current culture?
    - Review what claims, grievances and issues you have had, perhaps over the last three years. Do you carry out leaving interviews and can you review those?
    - Do you do culture or engagement surveys? Do they ask relevant questions?
    - How are complaints recorded, investigated and resolved? Do they follow your policies? Do they adequately observe confidentiality and support individuals involved?
    - Do personal objectives, incentives and remuneration packages reward good non-financial standards as well as financial performance?
    - What can any past cases involving sexual harassment tell you about behaviours and the ability of the organisation to take any necessary action? This should include reviewing any cases involving exits via Settlement Agreements.
    - Can you identify any trends or behaviours and do these give rise to concerns?
- Do you need to know more about your current culture and any issues?
    - Can you conduct leaving interviews or add questions around this area?
    - Can you do engagement surveys or, if you already do, can you add questions relating to 'speak up' culture?
    - Can you do a culture survey that is specifically related to sexual harassment?
- What actually is your risk?
    - What are the risks of sexual harassment occurring, and where and when may it be more likely to occur?
    - Do you have any learning from issues which have arisen in relation to, for instance, relationship at work policies, alcohol consumption policies, work trip policies, social event policies?
    - What is the best way of preventing the risk of sexual harassment, as opposed to simply reacting to issues as they arise?

Step Three – Put in Place an Action Plan

- Do you need to update your policies?
  - Do they cover social media and out of work scenarios?
  - Are your reporting mechanisms (both internal and external) sufficient?
  - Should you have a standalone sexual harassment policy?
  - Do your policies appropriately describe the serious nature of behaviour that might constitute sexual harassment? Consider making reference to non-financial conduct clear and stating that it will be treated as seriously as financial misconduct and impropriety.
  - Have you introduced an events policy with a non-exhaustive list of unacceptable behaviours?
  - Are your reporting mechanisms sufficient?
- Do you need to update your training or awareness or consider a campaign on this area?
  - Has everyone within the organisation received specific training on sexual harassment? Has this been done recently?
  - Is your training sufficiently targeted at identified risk areas, the right levels of staff and tailored by role?
  - Does it include situational training and training for those who witness sexual harassment (including bystander intervention)?
  - Does it include a section on 'microaggressions' and unconscious bias?
- Do you need to improve the way you communicate your policies to drive a zero-tolerance culture regarding harassment?
  - Have you considered appointing a senior manager as a workplace champion responsible for overseeing the organisational risk of sexual harassment and wider non-financial misconduct issues? Will they consistently remind leaders of the cultural ethos they are expected to drive, and the expectation on them to cascade this to their teams? Will they also assess feedback on whether policies and training are working?
  - Have you provided training to the HR team and investigating managers on how to provide support and investigate complaints in a trauma-informed manner?
  - Have you considered appointing other (more junior) staff within the organisation as points of support for those who lodge sexual harassment complaints?
  - Have you advertised the sexual harassment policy and other linked policies sufficiently?
  - Have you notified staff of the existence of the FCA whistleblowing line and what it means in practice?

Step Four – Plan timing and a rolling review

- When will you next review your policies? Ensure policies are reviewed regularly, paying particular attention to legislative and regulatory changes (e.g., the positive duty to prevent sexual harassment, the proposed changes to COCON, the proposals under CP23/20).
- When will you next engage with staff on whether the training, policies and materials are fit for purpose?
- How will you record and report in relation to any issues of sexual harassment (in relation to your leadership teams)?
- Will you observe and regularly audit notification requirements to the regulators (including consideration of 'soft' notifications)?

Get in touch for advice

We can provide bespoke advice tailored to your firm's needs. Our approach is not just about meeting the new requirements; it's about helping you foster a zero-tolerance environment that drives positive change. Our goal is to help you create effective resolution pathways, pinpoint risk areas, and ultimately cultivate a superior workplace culture.

Click here for more information on how we can help

Contact us

[1]Lloyd's of London v Atrium; 2020 cases where three individuals who were found guilty of separate indictable non-financial criminal offences.

[2]FCA consultation on diversity and inclusion: applying the breaks on data gathering, D&I strategies a : Clyde & Co (clydeco.com)

END

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