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Sexual harassment prevention

In light of new legislation, when does banter become sexual harassment, how do you protect employees, and how do you investigate allegations that took place outside the workplace?

Lucy Lewis

lucy.lewis@lewissilkin.com



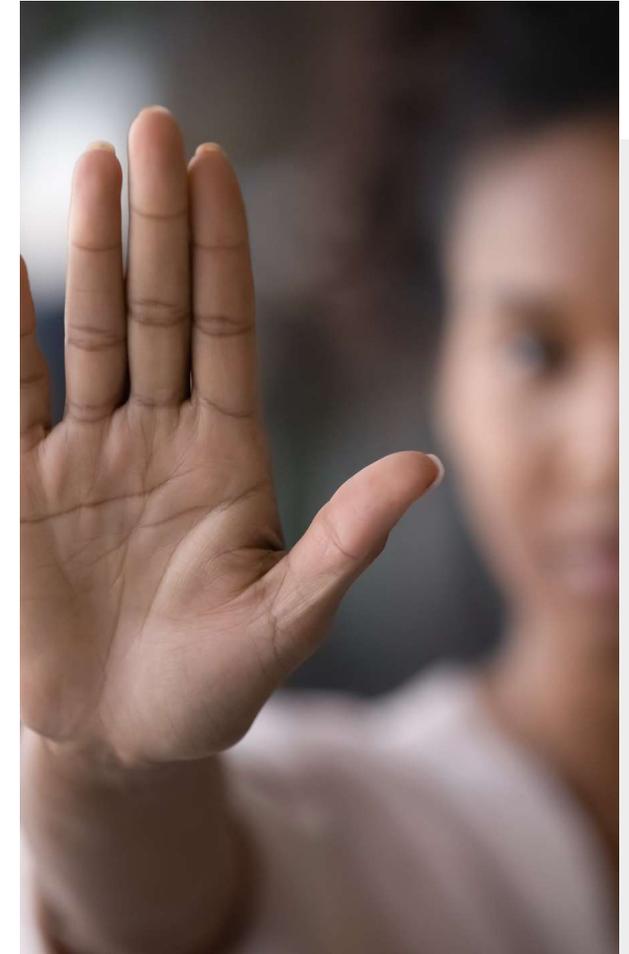
Agenda

- What is harassment
- What is sexual harassment
- The new duty to prevent sexual harassment (and Labour's proposed changes)
- Third party harassment (and Labour's proposed changes)
- Handling complaints



What is harassment?

- ▶ Unwanted conduct...
 - Related to a protected characteristic...
 - Which violates dignity or creates inappropriate environment
- ▶ Doesn't have to be your characteristic
- ▶ Includes perceptions and association with others
- ▶ A one-off comment is enough
- ▶ Intention does not matter



Sexual harassment

Where **unwanted** conduct is of a **sexual nature**

Purpose or effect of creating hostile, degrading, offensive, inappropriate environment



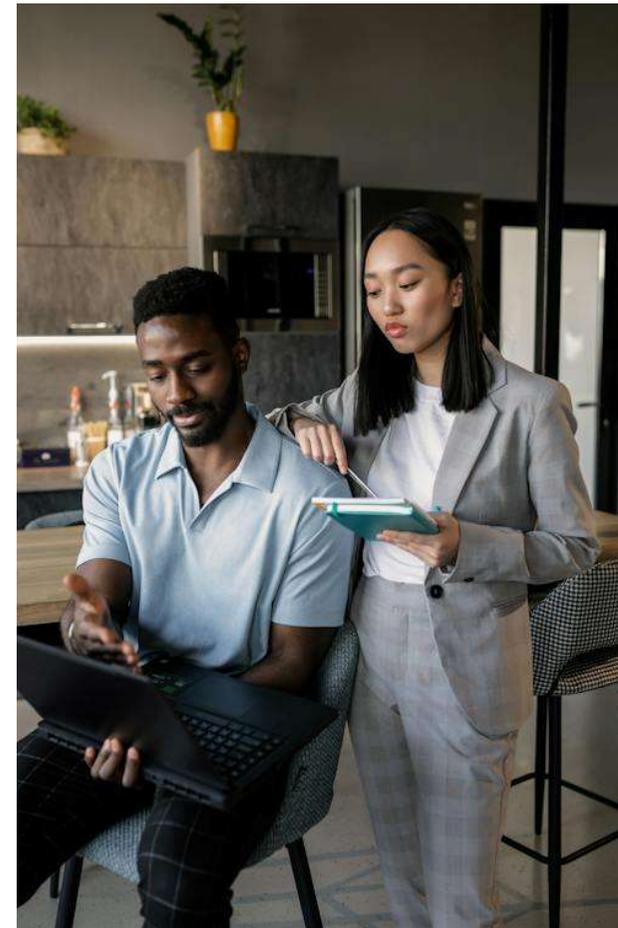
The employer who is vicariously liable for the acts of employees in the course of employment

“In the course of employment” - wider than you might think

What is unwanted conduct of a sexual nature?

- Verbal
 - e.g. sexual comments, innuendos, jokes
 - e.g. asking about a person's sexual orientation or sex life
- Non-verbal
 - e.g. gestures, body language, looking someone up and down
- Visual
 - e.g. Sending inappropriate images, photos or video content
- Physical
 - e.g. deliberately standing too close, unwanted touching, assault

Ideas. People. Possibilities.

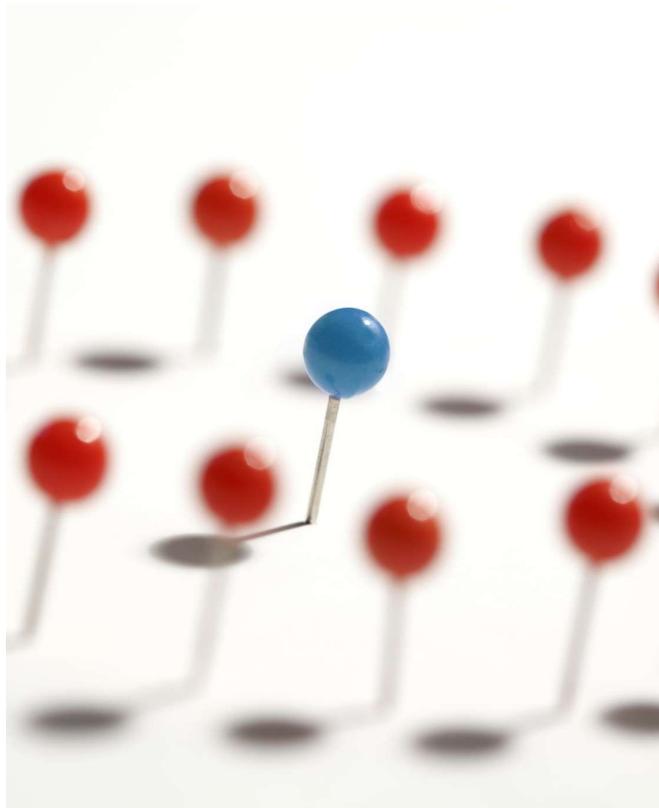


When does banter become sexual harassment?

When the “victim” determines that it is

Purpose or intention is not required

Banter is not a defence



Munchkins Restaurant Ltd and another v Karmazyn 2010

Four waitresses succeeded in their claims for sexual harassment even though they had joined in much of the banter for fear of making things worse or losing their jobs.

Their conduct was found to be a coping strategy and did not defeat the employees' argument of unwanted conduct.

The new duty to prevent sexual harassment

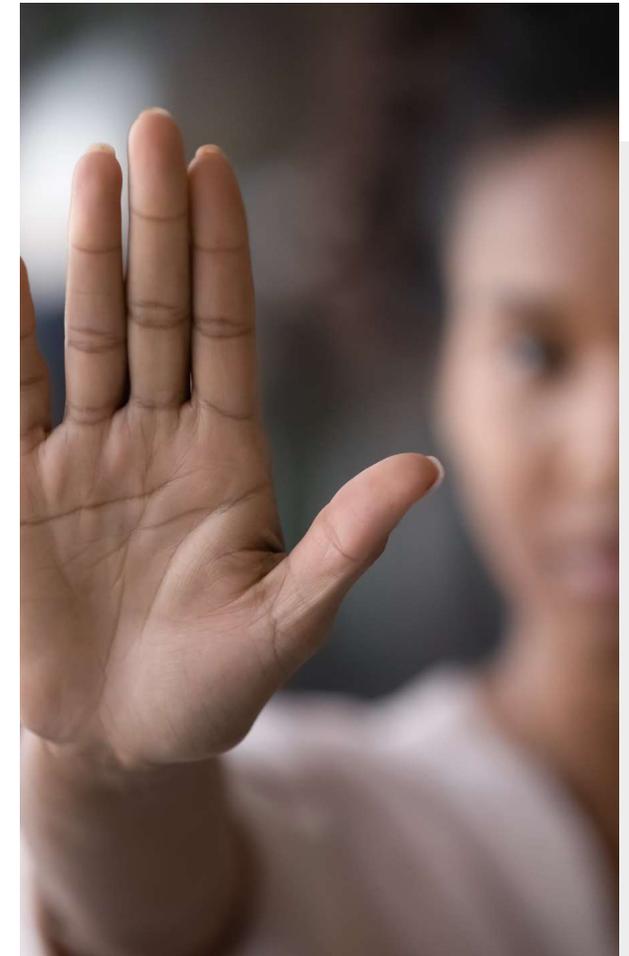
Worker Protection (Amendment of Equality Act) Act 2023

- ❑ New proactive duty to take “reasonable steps” to prevent sexual harassment, came into force on 26 October 2024
- ❑ Failure to comply gives up to 25% uplift in ET discrimination compensation
- ❑ EHRC powers to enforce

Updated EHRC guidance

- ❑ All employers must take action
- ❑ Emphasises application to harassment by third parties
- ❑ Expectation employers will conduct risk assessments
- ❑ Expectation employers will act on lessons learned
- ❑ Emphasis on policies, training and reporting

Ideas. People. Possibilities.

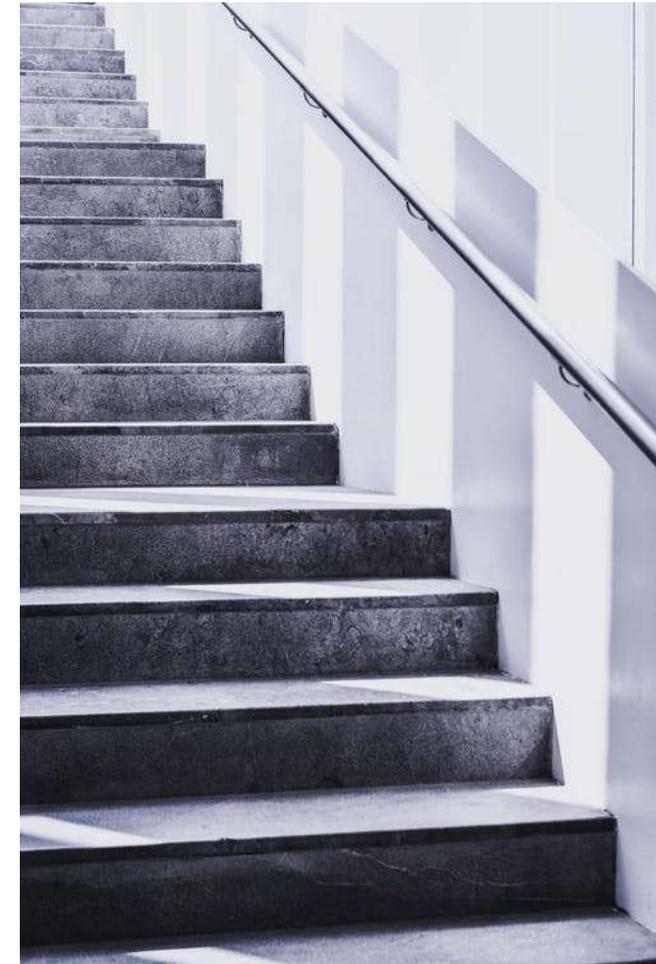


Labour plans for sexual harassment duty

Employment Rights Bill

- ❓ Extension of the duty to **"all" reasonable steps** to prevent sexual harassment
- ❓ Power to make regulations specifying steps regarded as "reasonable"
- ❓ May include specified assessments, specified plans/policies, steps on reporting, steps on complaint handling – plus a requirement to have regard to specified matters
- ❓ These steps will be the minimum - "all" depends on circumstances
- ❓ It still only applies to one form of sexual harassment - **"unwanted conduct of a sexual nature"**
- ❓ Timing – 2026 after regulations made?

Ideas. People. Possibilities.





Third party harassment – the current law

There is no direct employer **liability for third-party harassment** in the course of employment

- ❓ Old law removed in 2013 – employers were liable if they failed to take reasonable steps to prevent third party harassment, but only if they knew the employee had been harassed by a third party at least twice before
- ❓ Risk of harassment, direct or indirect discrimination claims if employer ignores complaints of harassment, or knowingly puts the employee in a situation where they are likely to be harassed

Duty to prevent sexual harassment

- ❓ Clear from EHRC guidance it applies to third party harassment, and they will enforce this duty
- ❓ But 25% compensation uplift probably can't apply if there is no valid third party harassment claim

Labour plans for third party harassment

New law planned on liability for third-party harassment in the Employment Rights Bill

- ❓ Employers liable for harassment of employees by third parties ...
- ❓ ...if it happened in the "course of employment" and employer failed to take all reasonable steps to prevent it
- ❓ Covers **any** type of harassment (not just sexual harassment)
- ❓ No two strikes rule like old law – immediate liability
- ❓ Third party is anyone except employer or fellow employee

Overlap with "reasonable steps" duty – will make the 25% uplift to compensation effective for third party sexual harassment



Risk assessments

EHRC Guidance

- ❑ Compliance with duty “unlikely” without carrying out a risk assessment
- ❑ Assessments should identify the risks and the control measures identified to minimise the risks
- ❑ Employers should identify any risks that apply to the particular working environment
- ❑ An action plan should be created to detail preventative steps taken to address identified risks and how these steps will be monitored



Risk factors for harassment

Homogenous workforce

Night / late working or travel commitments

Cultural and language differences

Social discourse outside the workplace

Young workforces

Workplaces with “high value” employees

Significant power disparities

Workplaces relying on customer / client satisfaction

Monotonous tasks

Isolated workplaces

Encouragement around alcohol

Banter/jokey environment



Handling complaints

- Take it seriously
- Focus on the behaviour not the individual
- Informal v formal approach
- Reassurance about consequences of reporting
- Confidentiality - “Need to know” basis
- Ensure ongoing support



Training and engagement

- ❑ Tailored training is recommended for ALL staff - keep records
- ❑ Additional manager training – focused on responsibilities of managers to help prevent and deal with sexual harassment
- ❑ Refresher training to be given periodically
- ❑ Allyship and promoting the role of an active bystander
- ❑ Engaging with staff
 - ❑ Questionnaires
 - ❑ Employee networks



Ideas. People. Possibilities.

Speak up



Creating a culture where employees feel able to report sexual harassment

- ❓ Employees should know what their options are and who they should speak to for support.
- ❓ The active bystander – employees should be empowered to speak up and intervene when witnessing harassment
- ❓ Harassment training should help support employees to speak up
- ❓ The Employment Rights Bill includes a new specific provision on whistleblowing, expressly including sexual harassment included in subject matter list of disclosures that qualify for protection

Free bar or fun police?

- Consider your risk and review your data
 - How many incidents occur after a social event / involving alcohol?
 - Are there alternatives to evening events?
 - Should you leave everyone to the party?

“It needs to be drummed into senior members of the management team that they have a responsibility, as a representative of the employer, to intervene and address any errant behaviour before it escalates”

Top tips

- Risk assessments are crucial when looking to meet the new duty
- Engage with your staff – what are the risks that they see?
- Ensure your policies are clear, comprehensive and known
- Carry out training that will be the most effective in your organisation and keep that refreshed
- Evaluate the impact of the steps you are taking and make changes as you need to
- Remember this is not just a one-off – keep things under review

