



LEVEL

YOUR GUIDE TO THE EMPLOYMENT RIGHTS ACT 2025



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OUR TEAM

**Jonathan Rennie:
Employment Lawyer**



Jonathan has over 20 years' experience as an employment lawyer with a particular expertise in contentious employment tribunal and court matters. He is dual qualified in both Scotland and England and Wales and is recognised as an accredited specialist in employment law by the Law Society of Scotland.

Jonathan has significant corporate experience having qualified as a Chartered Company Secretary and worked in house for FTSE 100 companies. He is immersed in organisational governance and regulatory frameworks and works with Board level decision makers in resolving complex employment law disputes. He also assists clients with strategic advice on mitigating reputation and litigation risks.

**Elizabeth Johnson:
Employment Lawyer**



Elizabeth is an employment and dispute resolution law specialist. Previously the Head of Employment in a West End law firm, she is an experienced litigator in the High Court, County Court and Employment Tribunals. Her Dispute Resolution practice encompasses a wide range of general and commercial matters.

Elizabeth provides a fast and efficient service and is readily available to give on the spot advice and practical guidance. She is recommended by her clients for providing a first class level of service and for her fast, insightful and pragmatic advice.

IMPLEMENTING THE EMPLOYMENT RIGHTS ACT



The Employment Rights Act marks a step-change in UK workplace law, with wide-ranging reforms set to roll out over the next two years. For employers, the challenge lies not only in compliance but in navigating the uncertainty around how these changes will take shape in practice.

Employment specialists [Jonathan Rennie](#) and [Elizabeth Johnson](#) set out what the next phase looks like and key changes to consider for employers.

The overwhelming number of employment law changes introduced by the Employment Rights Act can feel daunting and leave HR teams questioning how to prioritise and manage the important changes.

It is helpful then to see the UK government Road map for delivering change document which sets out the phased approach to implementation including the adoption of consultations that will provide some breathing space for employers. That staggered approach to implementation should provide a greater chance for HR teams to build knowledge as matters evolve rather than all these changes landing at once.

[UK Government roadmap: Implementing the Employment Rights Act](#)

The recent cabinet re-shuffle does mean that the key sponsors of the Act are no longer directly involved in its implementation and it is conceivable that when future policy decisions are needed after consultations that there could be some further interesting and unexpected developments. *It is possible that the timetable could slip or be subject to moderation.*

The measures that are immediately implemented upon Royal Assent in December 2025 are primarily concerned with simplifying trade union processes and so will not be quite as wide-ranging as those changes that follow in April 2026.

Many employers will keep a close eye out for consultations issued in Autumn 2025 which will shape the runway into the April 2026 changes.

December 2025 – Royal Assent and Early Changes

Immediately or soon after Royal Assent, the following changes will come into effect:

- Repeal of the Strikes (Minimum Service Levels) Act 2023.
- Repeal of most provisions of the Trade Union Act 2016.
- Simplified rules for industrial action notices and ballots.
- Enhanced dismissal protections for participants in industrial action.



April 2026 – First Major Phase

- Day one rights to paternity leave and unpaid parental leave.
- Statutory Sick Pay (SSP): Removal of the lower earnings limit and waiting period, making SSP available from the first day of absence.
- Doubling of collective redundancy protective awards (from 90 to 180 days' pay).
- New whistleblowing protections with sexual harassment reports to be recognised as protected disclosures.
- Establishment of a new Fair Work Agency, to consolidate employment enforcement functions.

October 2026 – Second Wave of Reforms

Employers will face new responsibilities:

- Strict regulation of "fire and rehire" practices—only permitted under limited circumstances.
- Requirement to take "all reasonable steps" to prevent sexual harassment—including third-party harassment.
- New rights and protections for trade union representatives; workers must be informed of their right to join trade unions; unions will get better access to workplaces.
- Employment tribunal time limits extended from 3 to 6 months.
- New protection against detriment for participating in industrial action.

2027 – Final Phase of the Reforms

Impactful changes scheduled for rollout:

- Six-month qualifying period for protection from unfair dismissal
- Guaranteed hours for zero hours and low hours workers.
- Collective redundancy consultation thresholds adjusted.
- Gender pay gap and menopause action plans for employers with 250+ staff, voluntary from April 2026 but mandated in 2027.
- Expanded protections for pregnant workers.
- Legal power to define "reasonable" preventive steps against harassment.
- New statutory bereavement leave.
- Measures to counteract blacklisting.

The impact of all of these changes, both individually and collectively will take some time to comprehend but there is clearly a greater entrenchment of employment rights for workers which will create additional compliance burdens for employers and of course the potential for there to be a greater volume of disputes. ACAS and other statutory bodies are estimating an uplift of 20% in additional employment tribunal claims per annum.

UNFAIR DISMISSAL RIGHTS AT 6 MONTHS



Change to Qualifying Period for Unfair Dismissal – now a 6-month period! Now compensation for unfair dismissal is also uncapped!!

Perhaps the most commented upon change proposed by the Employment Rights Act was the abolition of the 2-year qualifying period for unfair dismissal and the introduction of Day 1 rights to unfair dismissal.

The proposed change was very onerous for employers and was one of the points that the House of Lords objected to which has led to the delay in the Act being implemented. The proposal was such a significant change that it was effectively holding up the remainder of the Act passing into law and so a compromise position has been adopted and now the qualifying period for unfair dismissal rights will change to a 6-month qualification period. This change in direction was announced on 27 November 2025 and at a very late stage in the proceedings.

It is important to note that the implementation roadmap has this as a 2027 change and so there is plenty of time to adjust to this and to get involved in the consultations and developments that follow. It is possible that the implementation timeline for this change may be accelerated now that some of the complications of the original proposal have been removed, such as the idea of the “light touch” probationary review, which is no longer part of the legislative changes.

There will be consultations that shape the overall impact assessment here but some of the obvious issues for employers from this change are as follows:

Increased Legal Risk and Tribunal Exposure

The government’s own impact assessment suggests a rise in tribunal claims and associated costs. The employment tribunal service is already creaking under the weight of the existing backlog of claims so this is not welcomed.

There is an interesting remedy point that arises if a “short service” employee raises an unfair dismissal claim close to their start date. An employer may legitimately argue that the individual had no reasonable expectation of long service and that the forward-looking tribunal compensation award should be minimised.

The practical reality may be that employers will presumably be helped by “short service” employees mitigating their loss and finding new employment after only recently securing employment. Contrast that with a person who has worked in the same business for 20 years who might more reasonably explain the difficulties in career transitioning as against a short server who has recently been job hunting.

The point here is that these short service claims may not be high value but of course they can still be cumbersome for employers to deal with.



Higher Compliance and Administrative Costs

Employers will need to tighten up dismissal procedures, even during probation, to ensure they are “fair” from an earlier start date. That will involve more robust documentation of performance, conduct, warnings, reviews, and investigations so there is an audit trail.

As line managers will be critical to handling probationary issues fairly, more training and oversight will likely be needed together with revising HR policies: existing probation, dismissal, and performance-management frameworks may need to be overhauled.

Stronger Need for Probation

Obviously, qualifying for unfair dismissal rights at 6 months’ service creates an obligation on the employer to better manage staff issues as they develop and almost immediately upon employment commencing.

Financial Costs

According to HR professionals, this reform could impose a substantial financial burden: the government’s own business-impact assessment estimates up to £5 billion a year in costs across companies. These costs largely come from increased administration, more litigation risk, and more rigorous HR processes. That figure was based on Day 1 rights but we can still expect significant additional costs even with this moderated position of 6 months’ qualifying service.

Mitigation Strategies Employers Can Use

Remembering this is a proposed 2027 change then the main action employers should take now is to monitor the consultation timeline and be prepared to adjust internal policies and strategy in a timely manner.

Given the risks, employers will likely need to take a number of proactive steps:

- Revise HR Policies & Contracts: Update employment contracts, probation clauses, and dismissal policies to reflect the new legal reality.
- Implement Structured Probation: Use formal milestones (e.g., 1 month, 3 months, 6 months) with documented performance reviews.
- Train Managers: Equip managers with skills to handle performance/conduct issues fairly and document appropriately.
- Improve Record-Keeping: Keep thorough records of all performance discussions, warnings, investigations, and outcomes.

Conclusion

The move to a six months’ qualifying period for unfair dismissal rights is a major shift: it fundamentally changes the risk calculus for employers around hiring and dismissals. It is a relatively easy concept for employers to understand and to adjust to and thankfully does not have the complications of the original proposed Day 1 Rights which may very well have tied up employers in more compliance and monitoring obligations and created heightened litigation risks.

THE ABOLITION OF “FIRE AND RE-HIRE”



The Employment Rights Act's provisions on fire and rehire mark a significant tightening of regulation of contract variation by dismissal and re-engagement. The shift towards describing this approach as “fire and rehire” captures public concerns about employers dismissing employees and immediately rehiring them on worse terms. The media and trade unions adopted the phrase to emphasise the perceived unfairness. The nuanced shift to defining this practice as “fire and rehire” suggests that it is implicitly bad and exploitative to change terms and conditions and the Government certainly wants to make it harder for employers to do so.

It might be nearly 20 years ago, but it is worth remembering that during the financial crisis of 2008, the ability to dismiss and re-engage staff was a powerful tool in the employer armoury, enabling varying contract terms and delaying redundancies and job losses. The practice allowed employers with sound business reasons to fairly introduce contract changes and provided an additional option in managing staffing terms and conditions. For example, in times of economic turmoil, an employer might use this option to reach agreement on temporary salary reductions across groups of staff rather than immediately implementing a more far-reaching redundancy cost-saving project.

The practical implications of the new legislation are very clear for employers: they cannot assume that they can simply dismiss an employee and re-offer them contracts under changed terms (or replace them with someone else) if the variation involves one of the restricted terms—unless they satisfy the narrow financial-difficulty exemption and can demonstrate a fair and proper process was followed. Instead, the emphasis must be on consultation, negotiation and exploring less intrusive means of achieving change.

From a workforce planning perspective, this may prompt revision of how employers build flexibility into staffing arrangements, how roles are structured and how change is negotiated with employees and unions.

Put more bluntly, what is an employer supposed to do if they want to change terms and conditions? The answers after the Employment Rights Act comes into force are not that easy.

Key Provisions on “Fire and Rehire”

The Act introduces new restrictions on employers who seek to dismiss employees in order to re-engage them (or hire others) on changed terms. In particular:

1. The Act defines the scenario where an employer dismisses an employee because they will not agree to proposed contractual changes (or dismisses with a view to replacing the employee on less favourable terms) and then either re-engages the same person or engages someone else to perform essentially the same role under new terms.



2. As currently drafted, such dismissals will be treated as automatically unfair if they are undertaken for the reason that the employee refused to agree to a “restricted variation” in their contract.
3. The “restricted variations” are specific defined categories of terms, including reductions in pay, changes to the number of hours, shift timing or duration, reductions in time-off entitlement, changes to pensions and variation clauses that would allow the employer to change those terms unilaterally.
4. The Act provides for a narrow exemption: if the employer can show that they were facing severe financial difficulties and the variation was necessary, then the automatic unfair dismissal rule may not apply.
5. The Act is clear that dismissals for changes to other contractual terms (i.e., not listed as “restricted”) will continue to be dealt with under the ordinary unfair dismissal regime (rather than being automatically unfair).
6. The Act will not come into full force immediately for these provisions: the Government has signalled that the fire-and-rehire restrictions will commence from around October 2026.

The Act marks a major shift by turning certain contract-change processes (via dismissal and re-engagement) into automatically unfair dismissals unless exceptional circumstances apply.

What Employers Now Need to Do When Seeking Contract Changes

Given the new framework, employers who wish to change employees’ contractual terms must be much more careful. Key steps and practical implications include:

Negotiation and consultation

Employers should first seek to consult thoroughly with employees (and where relevant union representatives). Changes should be proposed, discussed, explained and alternatives explored. If employees do not agree, the employer must consider whether there is any less-drastic way of achieving the change than dismissing and re-engaging.

Avoid reliance on unilateral “fire and rehire” for restricted terms

If the proposed change is one of the restricted variations (pay, hours, shift-time, pension, holidays), the employer cannot simply proceed with dismissal and re-engagement on worse terms without risking an automatic unfair dismissal claim. Employers must therefore avoid treating dismissal and offering a new contract as the default route for such changes.



Consider structuring changes as “unrestricted” variations

For changes that are not restricted (for example, relocation, change in duties, job title etc), the employer still has more flexibility—but must act fairly (consult, consider alternatives) because ordinary unfair dismissal rules will still apply.

Document the business reason and alternatives

Where the employer invokes the financial-difficulty exemption (to justify a restricted variation via dismissal), they must be ready to show evidence of severe financial difficulties, that the variation was necessary to mitigate that difficulty and that reasonable alternatives were considered. Documentation of the decision-making process will become critical.

Timing and implementation

Since the change in law will not come into force until October 2026, employers have a transitional window. Employers should update internal guidance, train managers and review contract variation procedures to ensure compliance.

Strategic workforce planning

Because imposing changes via dismissal and replacement will become significantly riskier, employers must build in contingencies earlier: exploring voluntary change programmes, incentive schemes or restructuring via redundancy where appropriate.

Why This Change May Create Challenges for UK Workforce Models

Many UK businesses have relied on the ability to vary contractual terms in response to changing economic conditions (e.g., shifts in demand, cost pressures, new ways of working). The new rules reduce the “back-door” option of dismissal and re-engagement, particularly for key terms such as pay and hours. This means employers may face less flexibility in managing workforce costs.

The automatic unfair dismissal regime means that the cost of getting a variation wrong is higher: tribunals may award automatic unfair dismissal compensation, increased protective awards for consultation failures (which the Act also increases) and reputational/industrial relations risks are greater. Employers may need to invest significantly in planning, consultation, legal advice and alternative structuring—raising cost and complexity.

The new regime encourages greater negotiation and consultation and may rebalance power between employers and employees/unions. Employers may need to engage more with unions or worker representatives, adapt bargaining frameworks and adjust how contract variations are pursued.



What Employers Should Do Next

Employers should check whether they have an existing variation clause in contracts and consider whether that already gives them sufficient flexibility to amend contract terms.

It is possible that a pre-existing variation clause may enable changes to be implemented without the need to consider whether the terms are restricted or not. Any such variation clause needs to be in place before the legislative provisions come into force so this is an essential check for employers before October 2026.

Variation clauses have been debated in case law over the years, including in *Bateman and Others v ASDA*, which looked at how those clauses might be interpreted. Any contractual right to vary must be exercised reasonably and it follows that making anything other than minor changes without express employee agreement could breach the implied term of mutual trust and confidence. Care therefore needs to be taken in balancing these risks.



THE DIMINISHING POWER OF NDAS IN EMPLOYMENT AGREEMENTS



A Non-Disclosure Agreement (NDA) is a widely used legal term and in the press the concept is often characterised as a “gagging clause” where a complainant is silenced in return for a payment from their employer. The precise drafting of these clauses can set limits on what a signatory can say and to whom about specific issues and can be very wide in scope.

The ethics of NDAs have been widely debated following the #Metoo movement and campaigners have argued that they silence victims and enable discriminatory work behaviours and abuses to be hidden. It is argued that the imbalance of power in the employment relationship can foster a culture of silence and prevent employees speaking out.

There are, of course, legitimate uses of NDAs around protecting intellectual property, commercially sensitive and confidential information, but it is especially important for employers to be aware of the new Section 24 in the upcoming Employment Rights Act which will void NDAs in employment agreements in certain scenarios.

Described as a “world leading amendment” in the House of Lords, the important amendment to the Employment Rights Act on NDAs was proposed on 7 July and voids as unenforceable any obligation of silence imposed on an employee or worker who has an Equality Act complaint of harassment or discrimination. The restriction applies also to any witness or colleague of the impacted party.

Many settlement agreements already include exclusions to confidentiality provisions to permit reporting offences to the police and other organisations, but this new obligation significantly broadens the circumstances where NDAs are unenforceable.

Any provision in an agreement between an employer and employee that precludes the individual from making an allegation of harassment or discrimination together with any allegation relating to the employer’s response will be void and unenforceable. There are nine protected characteristics under the Equality Act and many jurisdictional components and therefore a considerable number of potential claims. This is a very wide-ranging carve-out from the enforceability of NDAs. It also appears that any allegation or disclosure may be caught, whether proven or not proven and whether made in good faith or not.

Before this legislative change is implemented (and with the timings of that still to be established), many employers will have used NDA terminology in settlement agreements with employees around Equality Act complaints. Whilst those historic provisions are not yet retrospectively cancelled or voided, it is highly questionable (and very unlikely) that employers will now choose to enforce historic obligations on NDAs, as that could be reputationally damaging whilst the new laws are awaited.



Excepted agreements

The amendment text to the Employment Rights Act indicates that the Secretary of State may make Regulations to provide for “Excepted Agreements” where the general rule on the prohibition of this type of NDA does not apply. It is not envisaged that this will apply to settlement agreements as that would defeat the whole object of the legislative intention here. Leading commentators suggest that there may be cases where an employee wants an NDA and so it is expected that there will be further Regulations that better specify that moderation.

The general direction of NDAs is that they are becoming less enforceable in the employment context and it is expected that there will be further expansion of this general principle and that the proposed ban may be extended to interns and other categories of worker to follow.

It is already the case that NDAs cannot be used to prevent individuals from reporting criminal offences to the police. This principle is set out in the Victims and Prisoners Act 2024, which takes effect from 1 October 2025. From that date, employers must ensure that any NDA entered does not seek to restrict disclosures relating to criminal conduct.

Next steps for employers in a post-NDA world?

1. Employers should review existing historic NDA obligations within signed employment waiver documents and consider the extent to which there is any desire to enforce them in light of the impending changes and significant shift in the legal landscape.
2. For future settlement agreements after the new law is implemented, employers will have to amend the language around confidentiality to ensure compliance with Section 24 when it is introduced.
3. With NDAs losing their enforceability in Equality Act scenarios, employers may need to revise settlement strategies. That may be easier said than done and employers may invest more in defensive strategies such as bolstering policies and procedures and investigations to be able to show all reasonable steps have been taken to limit claims potential.
4. Organisations need to be aware of greater risk potential that discrimination and harassment claims may be made public. That involves HR teams appraising management of the changing legal landscape in this area.

Presently, individuals have the benefit of independent legal advice under the auspices of a settlement agreement and therefore have guidance on the financial value of these types of drafting restrictions. That does provide a level of protection for individuals but clearly the legislative intention goes further and limits the scope of NDAs quite significantly.

Baroness Jones of Whitchurch referred to the pioneering work of Zelda Perkins in lobbying Government to introduce this element of legislative reform and further information on her campaigning can be read at [Can't Buy My Silence UK](#).

BOOSTING FAMILY-FRIENDLY RIGHTS AND PROTECTIONS



The Employment Rights Act aims to make workplaces more family-friendly and also protect those with caring responsibilities.

The maternity changes are 2027 changes according to the implementation roadmap but there is the opportunity for employers to get ahead of the game on this and be leaders in this area. As with much of the new legislation there will be consultations on the exact mechanics of these provisions.

1. Stronger protection for pregnant women and new parents against dismissal

At the moment, if a woman is on maternity leave and there's a redundancy, she has a right to be offered a suitable alternative vacancy (if one exists) ahead of others. But outside of redundancy, or after returning, her protection is mostly just that the employer must not discriminate because of pregnancy/maternity.

The Employment Rights Act empowers the government to ban employers from dismissing a woman who is pregnant, on maternity leave, or recently returned to work (within 6 months), except in specific circumstances which, as yet, are not known. This protection is likely to also cover those on other forms of family leave (adoption leave, shared parental leave, neonatal care leave), although that will come in via separate legislation. Essentially, it's likely to become automatically unfair to dismiss employees in these protected periods.

We need regulations to spell out the 'specific circumstances' in which dismissal is allowed: possibly gross misconduct or genuine redundancy. But the message is clear: greater job security for new and expectant parents.

2. Day-one rights to parental leave and pay

There are two main changes here and current timeline is for April 2026 implementation.

First, statutory Paternity Leave (the 1 or 2 weeks fathers/partners can take around birth) will no longer require 26 weeks' service – it will be a right from day one of employment . It's the same for Parental Leave (the up to 18 weeks unpaid leave you can take before a child turns 18); currently you need 1 year's service; the Act removes that, making it a day-one right .

So, any new hire who becomes a parent will be eligible to take these leaves without having to 'earn' it through tenure.

Second, there is a new general right to Bereavement Leave. Right now, there's a statutory right to two weeks' paid time off for the death of a child under 18. But there's no legal right to leave for other close bereavements (like a spouse, parent, or adult child).



The Employment Rights Act introduces a day-one right to at least one week of bereavement leave for employees who lose a close family member. The specific relationships covered will be defined in Regulations, but it's expected to include spouse/partner, parent, sibling. It might be unpaid or paid; the Employment Rights Act just says 'leave', and that point of detail will be clarified in due course.

Third, miscarriage leave. The government is supporting an amendment, raised during the Act's passage, to include a right to leave for those who experience a miscarriage before 24 weeks. If you have a stillbirth after 24 weeks, you currently qualify for two weeks Parental Bereavement Leave and Pay.

Fourth, neonatal care leave. Although it's not in the Employment Rights Act (it was done through a separate Act in 2023), it's worth mentioning that from April 2025, employees are entitled to up to 12 weeks' of Neonatal Care Leave (and pay) if their baby is in neonatal care.

HR impact – what to do now:

Employers need to update and review their maternity, paternity, parental leave, and bereavement leave policies so remove service requirements where the law is removing them. For example, if your handbook says 'Employees must have 26 weeks' service to qualify for paternity leave,' update that to 'This leave is a day-one right in line with statutory provisions.' Similarly for parental leave.

Add new entitlements: Add Neonatal Leave and the upcoming Bereavement Leave for other relatives. For pregnancy loss, decide how you'll handle it – even before the law mandates it, consider offering leave for miscarriage. Some employers have already led on this, and it's a compassionate policy that will likely be law by 2027.

Tighten dismissal protocols around protected periods: Until regulations clarify the position, assume that dismissing a pregnant employee or one on recent return will be extremely high-risk and may be unlawful except in extreme cases.

Communicate to expectant employees as well. For example, when someone notifies you they're pregnant, you can inform them: 'under new provisions, you'll have additional protections from dismissal during pregnancy and up to 6 months after return. We will of course support you throughout.' That reassurance can be huge for retention and trust.

Plan for cover and transitions: More people may take up these leaves now that barriers are lower. For instance, previously some fathers in short-term jobs might not take paternity leave because they didn't qualify; now they will. Also, bereavement leave being a right means you need a plan for sudden absences when an employee loses someone.

SICK PAY CHANGES



Changes to Statutory Sick Pay – do contracts need to be amended?

One of the big changes to affect employers will be the day one right for employees to be paid statutory sick pay (SSP) from the first day of sickness absence.

This important change which is anticipated to come into force in April 2026 will have significant ramifications and may shape employee behaviours.

In addition to the removal of the three-day waiting period to qualify for SSP, there is the removal of the Lower Earnings Limited which currently requires employees to earn at least £125 per week to qualify for SSP.

If an employer provides enhanced sick pay which works in line with the provisions of SSP it will need to be reviewed to avoid employees becoming entitled to receive full pay from day one.

If the employee has a contractual right to enhanced sick pay, and you need to change it because it will mean a day one right to the enhanced payment if it runs in line with SSP, then employers need to exercise care in making that change and should potentially consult with staff.

What should you do?

In anticipation of the changes, employers should:

- update sickness absence policies
- consider updating any enhanced sick pay schemes before the legislation comes into effect
- Ensure return-to-work processes are fit for purpose and understood as short term absence now becomes more costly.
- Make line managers aware of the change

These changes are part of the Government's broader efforts to enhance workers rights and provide better financial stability for employees who fall ill.

EXPANSION OF THIRD-PARTY HARASSMENT – LAW DEVELOPING EVEN FURTHER



The developments in the field of harassment require careful attention as this is evidently a very real focus for the Government who have expressly put on record:

“This Government is committed to tackling all forms of harassment in the workplace. That is why we will amend the Equality Act 2010 through this Bill to introduce an obligation on employers not to permit the harassment of their employees by third parties.”

Up until the implementation date of the Act there has been no specific employer liability for harassment of staff by third parties, like customers or clients.

There were new rules in relation to sexual harassment introduced last year (**see article at number 8 below**) and they have now been expanded upon under the Act. Until this point failing to take “reasonable steps” to prevent sexual harassment by third parties could only lead to an employer potentially facing enforcement action by the EHRC but employees were not able bring a free-standing claim in the tribunal against their employer for third-party sexual harassment.

The position is set to change **from October 2026** under the Employment Rights Act

Employers will be liable for harassment perpetrated by third parties where:

- 1.The third party harasses one of their employees in the course of their employment; and
- 2.The employer has failed to take “all reasonable steps” to prevent the third party from doing so

Crucially, this will enable employees to bring tribunal claims covering all protected characteristics where they have been subject to harassment (e.g. race, disability and age harassment, as well as sexual harassment) by a third-party at work.

Under the Employment Rights Act 2025, employers will be liable for third party harassment unless they can demonstrate they took all reasonable steps to prevent it.

This wording of **“All reasonable steps”** will be the subject of much commentary and speculation and it will likely only be through the development of case law that we get precise clarity on that.



Whilst the language echoes the current statutory defence in the Equality Act, the fact this applies to third parties does not exactly mirror the existing application of the test. An employer's steps to prevent third parties from harassing an employee will necessarily be more limited than the controls employers can place on their own staff to manage these risks.

Employers should consider undertaking a risk assessment similar to that required in respect of the duty to prevent sexual harassment. This exercise should entail considering the particular risks that the organisation faces, pinpointing when and where employees might be exposed to third-party harassment and developing an action plan of steps to address those particular risks. It would seem equality risk assessments may well become more prevalent under the new legislative framework.

In the situation where an employee claims they have been subject to third party sexual harassment then they will have claims for 1) the newly introduced duty on the employer to take all reasonable steps to prevent sexual harassment by third parties and 2) potential failure to meet the preventative steps requirements under previous legislation which can result in an uplift of compensation of up to 25%. It follows that this particular type of third-party harassment is a heightened risk area under the new Act and recent legislative upgrades on worker protections.



POSITIVE PREVENTION OF SEXUAL HARASSMENT



The Worker Protection (Amendment of Equality Act 2010) Act 2023 comes into force on 26th October 2024 and represents a seismic shift in employers' duties to proactively prevent sexual harassment of workers.

The legislation requires employers of all sizes to fundamentally enhance their approach to preventing sexual harassment at work. The Equality and Human Rights Commission (EHRC) has published technical guidance on the positive legal duty to take reasonable steps to prevent sexual harassment (the preventative duty).

<https://www.equalityhumanrights.com/guidance/sexual-harassment-and-harassment-work-technical-guidance>

The preventative duty is described as an anticipatory duty. Employers need to get ahead on this and reflect on their organisational blind spots and risks and put in place strategies to prevent harm to workers. The technical guidance is easy to read, and the tone is very strong and a clear call to action for employers.

As stated in the guidance, the intention is to transform workplace cultures by requiring employers to take positive "reasonable steps" to prevent sexual harassment of their workers. Employers should not wait until a complaint of sexual harassment has been raised before they take any action.

The duty requires that employers should anticipate scenarios when workers may be subject to sexual harassment in the course of employment and take action to prevent such harassment taking place. If sexual harassment has taken place, the preventative duty means an employer should take action to stop sexual harassment from happening again. If an employer fails to take reasonable steps to comply with the preventative duty there are consequences including EHRC enforcement action and employment tribunal compensation uplifts.

Basic Framework of Equality Act 2010 Protections

Under the Equality Act 2010, sexual harassment occurs when a worker is subjected to unwanted conduct which is of a sexual nature and has the purpose or effect of violating the worker's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that worker. A worker can be harassed even if the effect was not intended.

It is fair to say that unwanted conduct can cover an infinite array of human behaviours including spoken words, written words, banter, physical gestures or facial expressions and realistically speaking the limitations of unwanted conduct are without boundary.



It is important always to remember that it is not necessary for the individual worker to say that they object to the conduct for it to be unwanted. The classic exposition of this was outlined in *Munchkins Restaurants Ltd & Anor v Karmazyn & Ors* [2010] EWCA Civ 1163 when it was established that individual victims may have a coping mechanism for dealing with harassment at work and may participate in conversations or seemingly not outrightly object to sexual harassment and that does not automatically make conduct unwanted.

It is also worth pointing out that an individual can experience unwanted conduct from someone of the same or a different sex. Employers may fall into the trap of assuming that all sexual harassment cases will be males acting against females but evidently the preventative duty and all that entails will require a wider consideration of all workers.

Third Party Sexual Harassment

The issue of third-party harassment has been hotly debated over the years.

It is important to note that the Equality Act 2010 originally made employers liable for third party harassment of workers in the course of employment but that provision was repealed. When this new legislation was proposed, it was intended that employers once again be made expressly liable for harassment of workers by third parties. However, the new legislation has not actually gone quite that far. There is no ability for a worker to bring a stand-alone claim in an employment tribunal for third party sexual harassment.

The updated position in the new legislation is simply that if an employer does not take reasonable steps to prevent sexual harassment of workers by third parties the preventative duty will be breached. That still has consequences and potential reputational damage and of course it may be that the law further evolves in this area and that the current development paves the way for full third-party liability to follow.

The EHRC technical guidance provides an interesting example at paragraph 3.26 where it describes an employer that updates its anti-harassment policies and provide training for all staff on sexual harassment. The employer might even carry out a risk assessment of its workers being exposed to sexual harassment and provide specific training for managers together with a feedback review and refresher training.

The example states that if such employer takes all these relevant steps but fails to consider the risk that its workers could be sexually harassed by third parties such as customers attending the premises then there would be a breach of the preventative duty. The employer will have failed to consider if there are reasonable steps it can take to prevent the sexual harassment of workers by third parties.

In such circumstances then the EHRC could take enforcement action against that employer for failing to comply with their duties



EHRC Guidance – Sector Specifics

The EHRC guidance makes for compelling reading. It provides best practice guidance on reasonable steps to satisfy the preventative duty and employers are recommended to read the guidance and to consider the illustrative examples and what can be learned and applied to their business. It will be an unfortunate scenario if an employer working in the construction or theatre sector was tripped up when those industries are specifically referenced in the guidance.

Paragraph 3.32 of the EHRC guidance specifically calls out the construction industry and looks at examples of reasonable steps to take to comply with the preventative duty. A key risk factor in construction may be the male dominated workforce where senior management roles are often still held by men. The example considers other risk factors such as a culture of crude banter and potential interaction with third parties at sites and remote working. Where there is a higher risk of sexual harassment then this means more steps may be required to satisfy the duty on preventative steps.

The specific construction example refers to such action as staff consultation, setting up anonymous reporting channels, refreshing a staff survey on sexual harassment every 6 months, setting up a new management develop programme for women, identifying senior leaders to “champion” the women’s network and establishing bespoke expert training. There is a significant amount of proposed action and employers should take time to read this guidance and decide how they can best meet that preventative duty. From a risk management point of view, employers who can point to the guidance and show they have implemented the recommendations stand the best chance of avoiding liabilities and reputational fall out.

It might be pertinent for sports organisations to also have regard to the specifics outlined in paragraph 3.32 of the guidance and more generally given such recent issues as the Luis Rubiales controversy which followed the FIFA World Cup. Women in Football have published a call to arms to employers in the UK football industry to have specific regard to the new positive duty. One can expect that player organisations and representatives will be keeping a close eye on developments also:

<https://www.womeninfootball.co.uk/news/2024/10/21/new-law-means-uk-employers-must-take-`reasonable-steps'-to-prevent-sexual-harassment/>

WIF expressly state:

“The best employers are already taking measures to ensure that women are protected from abusive behaviour, and that where violations occur, they are dealt with appropriately. The rest need to catch up, because from 26 October, UK employers’ new duties to act against sexual harassment will come into effect. Anyone working in football who has been affected by these issues is welcome to contact Women in Football for support and signposting.”



Paragraph 3.34 gives an example of a theatre company and the steps they ought to take in preventing the sexual harassment of its workers. They describe a company that is very small and has limited financial resource. The guidance advises that risk assessments should be carried out to identify key areas of risk and actions it can take to tackle and prevent sexual harassment. It is suggested that within the theatre environment that individuals will be exposed to audiences, freelancers and various other third parties who might attend opening night parties and awards events. The recommendation is that such organisations should consult with workers and determine the appropriate approach and communicate that policy to staff and encourage them to report any instances of third-party harassment that might occur. That might involve displaying notices in both the public and private areas of the theatre where the company normally runs its productions.

The theatre company should further consider what other measures they might take and whether the cost of the training is a disproportionate amount of its limited budget. This is simply an example within the technical guidance but obviously bears consideration by organisations who might choose to tailor their approach according to this powerful document.

It is worth noting that industry bodies such as the Musicians Union have commented on the new legislation and will be representing members in cases to follow:

<https://musiciansunion.org.uk/news/worker-protection-act-comes-into-force-to-help-tackle-sexual-harassment-in-the-workplace>

What are Reasonable Steps to take to Meet the Preventative Duty

The preventative duty is only that the employer must take reasonable steps to prevent the sexual harassment of their workers in the course of employment. As is the way with employment law the question of “reasonable steps” is an elastic one that will vary from employer to employer. The law does not list specific steps an employer must take.

In deciding what is reasonable, the factors listed in the guidance as relevant include:

- a) The size and resources of the employer.
- b) The sector they operate in.
- c) The risks present in the workplace – hence the need for a risk assessment!
- d) The nature of any third-party contact – frequency and environment.
- e) Time, cost and disruption of taking a particular step.
- f) Whether concerns have been previously raised about sexual harassment.
- g) Whether previous steps taken have been effective or not?



As this is a step change in sexual harassment law then employers will be significantly tested on their considerations and decision making in this area. It is very clear and specifically set out at paragraph 3.31 of the EHRC code that an employer is unlikely to be able to comply with the duty unless they carry out a risk assessment.

Employers may be very familiar with risk assessments having done so for health and safety reasons during COVID. It is very clear that the first precautionary and preventative step will be for employers of all sizes to produce a risk assessment on sexual harassment. Such template might consider the following:

- 1) The risk of sexual harassment occurring in the course of employment.
- 2) Steps it could take to reduce those risks and prevent sexual harassment of the workers.
- 3) Which of those steps are reasonable; and
- 4) Implement those reasonable steps.

If an employer has been on the receiving end of sexual harassment complaints, whether informally or formally, then it will be more reasonable for the employer to take steps to prevent this happening again and so such organisations may be more severely tested.

Staff Consultation = Recommended!

There will be a significant number of employment law changes over the course of the current parliament. In respect of the Worker Protection Act then an initial consideration might be what is the appropriate forum for an organisation to discuss these obligations.

Is there an existing women's network or a consultation forum? Is there a unionised environment? Many organisations adopt drop-in sessions or workshops where there can be an open exchange of information with staff to understand what they perceive the risks to be and how they can be reduced.

Depending on the culture of an organisation there may be the use of surveys or anonymous reporting to enable better diligence and understanding of the level of risk before then taking the considered preventative measures. Absent consultation and understanding the scope of the risk of sexual harassment then policies and follow-up measures may be at risk of being rather generic or a box ticking exercise or even missing the point completely.

Paragraph 3.32 of the Guide highlights that this preventative duty is not going to be static. Employers will need to review what steps they are taking to meet the duty on a regular basis.



Relationships at Work – a Heightened Risk Area?

There are plenty of statistics that detail the proportion of individuals who meet their romantic or life partners in the workplace. Evidently there is the potential for relationships to start in a consensual and wanted fashion and for them to develop into an unwanted harassment case at a point in time.

It can be difficult for employers to have insight when relationship status between colleagues may change. It is relevant to note that paragraph 1.22 of the EHRC code recognises this potential shift in relationships which does perhaps suggest that there may be greater scope for employers looking at “love contracts” or relationship at work policies requiring specific disclosure of relationships in certain situations such as direct reports, seniority status etc.

Many employers frown upon the idea of relationship disclosure contracts and indeed may perceive it as being a US type influence on UK law. Nonetheless, given the preventative duties and obligation on employers to horizon scan and identify risk areas then it appears there may be more scope for employers to weigh up the relevance of such policy making.

Employer Penalties

Perhaps employers may be more incentivised to consider proactive preventative action when they understand the enforcement measures that they may face:

- 1) EHRC has the power to take enforcement action against an employer for breach of the duty.
- 2) EHRC may enter into a formal legally binding agreement with an employer to prevent future unlawful acts.
- 3) EHRC may petition a court to provide an injunction to restrain an employer from committing an unlawful act; and
- 4) If an individual succeeds in a claim for sexual harassment and is awarded compensation, then an employment tribunal must consider whether the employer has complied with the preventative duty. If it considers the preventative duty has been breached an employment tribunal can increase compensation by up to 25 percent.

It is worth noting that a worker cannot claim before an employment tribunal for a breach of the preventative duty alone. However, they may still report an employer to EHRC.

Evidently, the EHRC will be looking for test cases in this area which will be reputationally damaging for organisations as well as costly. Employers must focus on risk assessing their workplaces as a starting point to meeting this new and demanding Equality Act obligation.

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