

Ireland employment update: New Code of Practice on Sexual Harassment and Harassment at Work

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Summary: the "Code"

On 9 March 2022, the Irish Human Rights and Equality Commission ("IHREC") published a new Code of Practice ("the Code") aimed at combating the incidence of sexual harassment and harassment in the workplace. The purpose of the Code is to eliminate discrimination which manifests as harassment or sexual harassment in the workplace.

Aims and application

The Code is intended to provide practical guidance to employers, organisations, trade unions and employees on:

- what is meant by employment-related sexual harassment and harassment;
- how it can be prevented; and
- what steps ensure that adequate procedures are readily available to deal with the problem and to prevent its reoccurrence.

The Code does not create legal obligations on employers in and of itself but does summarise the legal obligations on employers under the **Employment Equality Acts 1998 - 2015** (the "EEAs") relating to workplace harassment.

The Code also reminds employers of their vicarious liability. Employers' bare legal responsibility for harassment suffered by a member of staff as a result of the conduct of another member of staff unless reasonable steps are taken to prevent it, reverse its effects and ensure there is no reoccurrence.

The Code highlights that certain groups are more vulnerable to sexual harassment and harassment,

particularly those in precarious work and new workers, including immigrant workers. The Code outlines measures aimed at ensuring that work environments are free from harassment and which provide for everyone's dignity.

What is sexual harassment and harassment?

Unlike bullying, which is defined as repeated incidents of inappropriate behaviour, harassment can be one incident, but must be linked to one of the nine equality grounds under the EEAs. Sexual harassment must be specifically linked to conduct relating to gender and sexuality.

The key element in defining whether sexual harassment or harassment has occurred, is not the intent of the alleged perpetrator, but rather the effect of their behaviour.

Policy guidance

The Code advises employers to draft and implement a comprehensive, effective and accessible policy (the “**Policy**”). This is considered the best means of minimising the incidents of sexual harassment and harassment. The contents of the Policy should be drafted after consultation with employees in order to maximise compliance with its provisions. Employers are advised to implement the Code with regard for the size of the organisation. The Policy should:

- detail the employers' commitment to the Policy's stated aims;
- outline the Policy's scope at the outset;
- provide clear definitions of harassment and sexual harassment; and
- include a complaints procedure in the event of an infringement.

There may be occasions during which an employer may become aware of a case of sexual harassment or harassment without any complaint being made. In such instances, the employer has a duty to act in the absence of any such complaint.

A notable new change in the Code is the introduction of a “Champion” within the organisation. This is similar to the “Contact Person” as provided for under the updated anti-bullying code of practice.[1] The Champion should be a member of staff who is not a member of HR and can be the same individual appointed to be the Contact Person tasked to manage bullying complaints. Of course this individual must also be given complimentary training to take on this additional role. The Code recognises that a Champion may not be feasible in all organisations, for example, in a smaller company with fewer resources and headcount.

Complaints procedure

The Code outlines in detail the key elements of an effective complaints' procedure. The Code advises that the issue should be dealt with informally in the first instance before a formal

complaint is made. An investigation should then be conducted to resolve the matter. Should the individual not be satisfied with the outcome of this procedure, they are entitled to lodge a claim in the Workplace Relations Commission (the “WRC”), or, where the complaint relates to gender discrimination, the individual can bring proceedings in the Circuit Court under the EEAs.

Training and implementation of the Policy

Emphasis should be placed on the importance of training around dignity and respect in the workplace. Employers should be proactive in training procedures and seek to implement training for managers, and supervisors, as well as at staff inductions. Employees may not realise that their joke, comment or behaviour in question was perceived as harassment or bullying and instead considered it in good humour or banter.

In the event that a claim is brought to the WRC, the Labour Court or any other court, confirmation will be sought as to what steps the employer took to ensure a work environment existed that was free of bullying, harassment and/or sexual harassment, the starting point being the existence of the relevant policy, whether training was provided to staff and whether any measures were implemented to ensure regular training was in place.

Non-employees

In some instances, the alleged wrong-doer may not be employed by the company, but is a client or customer instead. The employer must still make every effort to resolve any issue that comes to its attention in this regard. This kind of situation presents practical difficulties as the alleged wrong-doer may not want to partake in any investigation process. It is, however, imperative that the employer ensures to manage the process and keep the employee up to date in this regard. Failure to do so could lead to the employee taking a constructive dismissal case in the WRC.

Key takeaways for employers

Employers should note that although the Code is not legally binding, it is admissible in evidence in proceedings before the WRC, the Labour Court, or any other Irish Court. A Policy on sexual harassment and harassment at work is an integral part of equality strategies in the workplace. It is therefore advisable for employers to review and update their current policies to reflect the best standard as outlined in the Code. It is also important that employers provide training to employees on their obligations under the Policy and/or Code and that employees know where to find a copy of same.

In the event of an external investigation taking place and a report being issued, having a well drafted policy with a clear complaints procedure could be vital for employers as an external investigator can only follow the company’s own policies and procedures. The outcome of said report would then be relied upon in the event that matter was referred to the WRC or Labour Court, which could be detrimental to the employers’ defence.

Our employment team regularly advises employers on managing and investigating harassment, sexual harassment and bullying complaints, as well as updating workplace policies. For further information, please contact Bláthnaid Evans blathnaid.evans@ogier.com or Marianne Norton (marianne.norton@ogier.com)

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