

EMPLOYMENT

Update: Prevention and Elimination of Harassment in the Workplace

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The Harassment Code

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Introduction

On 18 March 2022, the Minister of Employment and Labour ("**Minister**") published the 'Code of Good Practice on the Prevention of Elimination of Harassment in the Workplace' ("**Harassment Code**"). The Harassment Code is effective from 18 March 2022. The Minister has, simultaneously, repealed the 'Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace'.

The Purpose of the Harassment Code

The Harassment Code has been introduced to, among others, ensure that South Africa complies with international obligations while addressing the "prevention, elimination and management of all forms of harassment in the workplace."

To this end, the Harassment Code provides *"guidelines (a) to employers and employees on the prevention and elimination of all forms of harassment as a form of unfair discrimination in the workplace and (b) on [the development of] human resources policies, procedures and practices related to harassment and appropriate procedures to deal with harassment and prevent its recurrence."*

The Application of the Harassment Code

The Harassment Code applies to all employers and employees as well as 'applicants for employment'. It recognises that perpetrators and victims of harassment may be persons other than employers, employees and applicants for employment, such as owners, clients, customers, suppliers, contractors, volunteers, persons in training including interns, apprentices and persons on learnership. Others having dealings with the employer's business are also included.

The Harassment Code also applies to any situation in which the employee is working, or which is related to their work.

The Harassment Code regulates various 'substantive' and 'procedural' aspects. Substantively, clarity is provided on what constitutes 'harassment'. In this regard, 'harassment' is *"generally understood to be [a] unwanted conduct, which impairs dignity, [b] which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences and [c] is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the"* Employment Equity Act 55 of 1998 ("**EEA**").

The Harassment Code gives specific consideration to 'sexual harassment' and 'racial, ethnic or social harassment.'

It lists types of conduct that would amount to harassment which includes:

1. physical

- 2. psychological or
- 3. verbal harassment

Examples of such conduct include intimidation and workplace bullying.

Procedurally, it is made clear that employers are under an obligation, in terms of the EEA, to “*take proactive and remedial steps to prevent all forms of harassment in the workplace*”. The risk is that in failing to do so employers may be held vicariously liable for any harassment perpetrated, in terms of section 60 of the EEA.

The procedural steps highlighted include the adoption, by employers, of harassment policies, the communication of such policies to employees and the development/adoption of clear procedures to deal with harassment in the workplace. These procedures would include how harassment is to be reported, what the employer’s obligations are on becoming aware of allegations of harassment, the advice and assistance to be provided to complainants and the ‘formal’ and ‘informal’ procedures in place to deal with the harassment, etc.

An emphasis is placed on confidentiality and how and when this is to be maintained.

Where an employee’s sick leave has been exhausted, consideration should be given to providing the employee additional paid sick leave in appropriate circumstances. Where the employee has been ill for a period in excess of two weeks, the employee may be entitled to claim an illness benefit in terms of section 20 of the Unemployment Insurance Act, 2001.

The issue of harassment should be included in orientation, education and training programmes. This should be done in a manner that is accessible.

Importance of the new Code

The introduction of the Harassment Code should be an impetus for employers to assess their current policies and procedures in place to address harassment in the workplace (if any) and ensure they meet with the guidelines set out in the Harassment Code. A failure to take adequate heed of the requisite obligations may result in liability for employers.

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