IoD response to consultation document "Equality Act 2010 – employer liability for harassment of employees by third parties"

The Institute of Directors (IoD) welcomes this opportunity to comment in response to the consultation document "Equality Act 2010 – employer liability for harassment of employees by third parties" issued by the Government Equalities Office (GEO).

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 45,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises, ranging from long-established businesses to start-up companies. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

1. Policy relating to employment law is of the highest interest to the IoD and its members. Our surveys of members regularly show that excessive and burdensome employment regulations are one of their greatest concerns, and the area most in need of reform. Annual surveys of IoD members show that the regulatory burden is a top three issue for them (alongside tax and skills shortages) with employment regulation the area cited by the highest proportion of members (70%).

2. The IoD fully supports the principles behind non-discrimination and equality legislation. Employees or workers should be protected against unlawful discrimination by their employer. However, the way in which the principle of non-discrimination has been applied through UK legislation and by courts and tribunals has meant that discrimination law has become one of the most problematic and burdensome areas of law for employers, creating great uncertainty and risk for them in recruiting, employing or dismissing someone. For small businesses it contributes significantly to the risk associated with employing someone for the first time, or expanding the number of employees, and therefore serves to discourage employment growth. We therefore support the Government in its aim of abolishing unnecessary and burdensome provisions of the Equality Act.

Specific comments

3. The GEO is consulting on abolishing the third party harassment provisions in the Equality Act. These provide that an employer can be held liable for harassment of an employee by a third party such as a customer, supplier or contractor, if the employer knew about harassment and failed to take reasonable steps to prevent it.

Question 4: ***Do you agree or disagree that the third party harassment provision should be repealed? Please explain your answer.***

4. We agree with and strongly support the Government's proposal to abolish these provisions. They create uncertainty and risk for employers or potential employers, and can be very difficult to comply with in practice. They are not required by any EU directives, and so are an example of gold-plating of EU law which the Government has said it will not do.

5. The third party harassment provisions create uncertainty and risk in a number of respects:

   - It is unclear what constitutes "harassment". It is essentially a subjective matter from the perspective of the purported victim. One person may regard comments or actions by another person as innocent banter or joking, while another might regard the same comments or actions as harassment.

   - It is unclear what degree of evidence would be required from the complainant for the employer to be under a duty to take steps to prevent it. Or is the complaint itself sufficient?

   - When can an employer be said to "know" about the acts of harassment complained of?

   - What constitutes three separate occasions?

   - When is it safe to ignore complaints that an employer believes to be spurious?

   - What are "reasonable steps" that an employer must take?

6. The uncertainty and risk is compounded by the reverse burden of proof that applies to contraventions of the Equality Act.

7. One of the main arguments for abolition contained in the consultation document is that there are, in any event, alternative legal routes for employees to complain of harassment. The document refers *inter alia* to the employer's common law duty of care to its employees, and the Health & Safety at Work Act. We have real concerns about this. In particular, we consider it a novel and unwarranted interpretation of health and safety law to suggest that it could be used by an employee against their employer over alleged harassment by a third party. It is not at all clear how such harassment could be said to affect someone's health or safety, and it is very unhelpful of the Government to suggest in the consultation document that this could be the case. It highlights the great problem with what the Prime Minister has rightly called the "health and safety monster". We wonder what the Health & Safety Executive's "Myth Busters Challenge Panel" would make of the statement in the consultation document. We hope it will not be repeated in any future guidance on third party harassment.

Question 5: ***If this provision were removed, is there any other action that the Government should take to address third party harassment at work? Please explain your answer.***

8. Any action taken by the Government to help tackle third party harassment at work should be through good practice guidance. There is already plenty of guidance available, such as that produced by ACAS, the CIPD guidance and the EHRC. BusinessLink, or its successor, should include links through to such guidance.

9. The consultation document states that the repeals will be made through primary legislation. We would like to see the repeals made as quickly as possible as a way of showing that the Government is serious about wishing to deregulate. The Enterprise & Regulatory Reform Bill currently before Parliament offers a perfect opportunity.

We hope you find these comments helpful. For further details please do not hesitate to contact me.

Regards,

Philip Sack
Senior Adviser, Employment Policy
Institute of Directors
Philip.sack@iod.com