



The new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace - Part A:

INTRODUCTION, BACKGROUND AND OTHER FORMS OF HARASSMENT

(In terms of the Employment Equity Act 55 of 1998 as amended)

Greetings to all GEO members.

The last two and a half years have certainly been tumultuous. Let's hope that the wheels of the economy begin gaining the momentum the country so desperately needs.

The new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

Introduction

On the 18th of March 2022, the Department of Employment and Labour published a new Code of Good Practice ("the New Code") dealing with all forms of harassment in the workplace.

The Employment Equity Act (the Act) makes provision for the publishing, amending or repealing of codes published in terms of the Act.

The New Code replaces the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (Old Code).

As can be derived from the title of the Old Code versus the New Code, the concept of harassment in the workplace is not limited to just sexual harassment. The New Code recognizes that various forms of harassment may occur in the workplace.

The purpose of this article is to focus on these other forms of harassment.

This New Code will be discussed in three newsletters:

1. PART A – INTRODUCTION, BACKGROUND AND OTHER FORMS OF HARASSMENT
2. PART B – RACIAL, ETHNIC AND SOCIAL HARASSMENT
3. PART C – PROCEDURAL ISSUES

PART A – INTRODUCTION, BACKGROUND AND OTHER FORMS OF HARASSMENT

Foundations of the New Code

The Employment Equity Act regulates equity in the workplace. Section 6(3) of the Act states that harassment of an employee is a form of discrimination and is prohibited on any one or more of the grounds listed in Section 6(1) of the Act. The Employment Equity Act is a product of the South African Constitution and the Bill of Rights.

The New Code is a guideline which forms part of the Act. In drafting the New Code, the legislators were guided by the South African Constitution, the Bill of Rights and certain ILO conventions.

Harassment under the New Code

The New Code states that South Africa regards all types of harassment as a form of discrimination and that such constitutes a barrier to equity and equality in the workplace. It identifies several examples of harassment, i.e., sexual, gender, ethnic or social origin harassment, bullying, physical, emotional, psychological and sexual abuse.

The New Code states in the introduction that it *recognizes that harassment may occur through physical force or power, whether threatened or actual against an individual or a group or community that results in, or has the potential to cause social injustice, economic harm, injury, death, physical and psychological harm, mal-development, or deprivation.*

It states further that all forms of harassment against women, men and the LGBTQIA+ and vulnerable persons is an abuse of power.

Purpose of the New Code

The New Code provides a guideline to all employers and employees on what constitutes harassment in the workplace *and* measures, policies and procedures that employers should implement to prevent and eliminate harassment in the workplace.

Scope of applicability

To whom is it applicable?

It is important to note that the New Code applies to all South African employers, employees, job applicants and volunteers (whether employed in the formal or informal sector). It also applies to suppliers, contractors, clients and customers, trainees, interns, apprentices and those on learnerships and to any other person having dealings with a business.

Where is it applicable?

The New Code recognizes that harassment may not only occur at the workplace and provides more detailed examples of where harassment may occur. It mentions, for example, that harassment may occur:

- In private and public spaces in which people perform their work,
- where people take rest breaks or a meal, wash or change or breastfeed;
- in medical facilities;
- on work-related trips, travel, training, events, or social activities;
- in work-related communications, websites, and work-related social groups (e.g. WhatsApp);
- in employer provided accommodation (e.g. housing);
- when commuting to and from work;
- in domestic workplaces (e.g. domestic worker, health-care provider);
- in the case of employees working virtually or any place other than the employer's premises. (The *location* where they are working constitutes a workplace).

Unwanted Conduct

Unwanted conduct

The New Code follows the criterion that harassment involves unwanted conduct and distinguishes this from acceptable conduct in the workplace.

In determining whether conduct is deemed to be harassment, the New Code considers several issues.

Communication of unwanted conduct

- Whether the complainant communicated to the perpetrator that the conduct was unwanted and;
- Whether the complainant communicated this verbally or non-verbally and/or directly or indirectly.

Nature of the conduct

- If there is no communication, it is necessary to examine the conduct to determine if the conduct was of such a nature that the perpetrator should have known that the conduct amounted to harassment or is generally accepted as unacceptable.

Objective assessment

- To further determine if conduct constitutes harassment, an objective view should be taken from the perspective of the person who alleges harassment. The primary focus should be on the effect that the conduct has on the person who alleges harassment.

Repeated or serious misconduct

- Harassment may occur as a result of a pattern of persistent conduct (bullying) or a single serious incident of harassment.
- It is not necessary to establish the intention or state of mind of the perpetrator.

The following factors may be relevant to establishing whether harassment has occurred:

- The context of the harassment;
- The circumstances of the complainant;
- The impact that the harassment has had on the complainant;
- The perpetrator's position in relation to the complainant.

Hostile Work Environment

The New Code goes further to define what is regarded as a hostile work environment.

- It states that a hostile work environment is present where conduct related to a prohibited ground impacts the dignity of one or more employees and has the effect of negatively affecting their ability to work and/or their personal well-being. This could be brought about by the conduct of managers, supervisors or other employees.
- A hostile work environment may also be present where an employer fails to anticipate and take steps against harassment committed by the public, customers or clients.
- Harassment resulting in a hostile work environment may either be direct or indirect.

Types of harassment

The New Code lists the following examples of conduct that may constitute harassment:

- Physical, verbal or psychological harassment;
- Physical harassment – physical attacks, threatened violence (e.g. raising a fist, finger to the throat, throwing objects near a person);
- Verbal bullying – threats, shaming, hostile teasing, insults constant negative judgement,

- and criticism. Racist, sexist, or LGBTQIA+ phobic language.
- Psychological harassment – emotional abuse, verbal abuse, bullying, mobbing (bullying of a person by a group).

•Further examples:

- Slandering, maligning an employee or spreading malicious rumours;
- Conduct which humiliates insults or demeans an employee;
- Withholding work-related information or supplying incorrect information;
- Sabotaging or impeding the performance of work;
- Ostracising, boycotting, excluding an employee from work or work-related activities;
- Threats, creating fear and degradation;
- Intolerance of psychological, medical, disability or personal circumstances;
- Surveillance without an employee's knowledge and with harmful intent;
- Disciplining without an objective or good reason, explanation or efforts at problem-solving. Abuse or selective use of disciplinary action.
- Demotion without justification;
- Pressuring an employee to commit an illegal act or not to exercise legal rights;
- Pressuring an employee to resign.

The New Code states that harassment may be vertical (manager towards a subordinate) or horizontal (between colleagues).

My comment: Although not stated in the New Code, I am of the view that harassment may also be inversely vertical, i.e. a subordinate harassing his/her manager or supervisor. For example, an employee making false reports against his supervisor to try and get the supervisor dismissed.

SUBTLE FORMS OF PASSIVE-AGGRESSIVE HARASSMENT AS DEFINED BY THE NEW CODE

The New Code identifies examples of a subtle form of harassment defined as “passive-aggressive harassment”

Passive-aggressive harassment is considered to be a covert form of harassment and may include:

- Negative gossip;
- Joking at someone's expense;
- Sarcasm;
- Condescending eye contact, facial expression or gestures;
- Mimicking to ridicule;
- Deliberately causing embarrassment and insecurity;
- Invisible treatment, marginalization; social exclusion, professional isolation;
- Deliberately sabotaging someone's dignity, well-being, happiness, success and career performance, mobbing;
- Online harassment through information technology, mobile phones, the internet, social media platforms or email (cyber-bullying).

END OF PART A

You can access the entire New Code by selecting the link below:

[Code of good Practice on the Prevention and Elimination of Harassment in the Workplace](#)

Kind Regards

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