

Protection from Sexual, Disability and Racial Harassment in Common Workplaces

The Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 came into effect on 19 June 2020. The Ordinance amended the Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO) and Race Discrimination Ordinance (RDO) to provide protection from sexual, disability and race harassment in common workplaces, even when there is no employment or other similar work relationships.

What the Law Says:

Under Section 23A of the SDO, it is unlawful for a person who is a workplace participant to sexually harass another person who is also a workplace participant at a workplace of them both.

Under Section 22A of the DDO, it is unlawful for a person who is a workplace participant to harass a person with a disability who is also a workplace participant at a workplace of them both.

Under Section 24A of the RDO, it is unlawful for a person who is a workplace participant to harass another person on the ground of that other person's race, who is also a workplace participant of them both.

What is a workplace?

A "workplace" is defined as a place:

- At which the person works as a workplace participant; or
- That the person attends as a workplace participant.

Examples of possible common workplace:

- The office of an organisation where persons do internships;
- A barrister's chamber where persons do a pupillage;
- Exhibition booths or stands at an exhibition venue sharing work facilities;
- Co-working spaces with workers from different organisations sharing work facilities;
- Promotional stands or counters in supermarkets with employees of the product promotion companies working in the supermarkets;
- Counters in department stores with consignment workers selling products on consignment; and
- Service centres of charitable or non-governmental organisations (NGOs) where persons do volunteer work.

What is a workplace participant?

Under the amended SDO, DDO and RDO, it is unlawful for a workplace participant to sexually harass, or harass on the ground of the disability or race of another workplace participant at the workplace of both persons. Workplace participant is defined under the Ordinances as:

- An employer;
- An employee;
- A contract worker;
- The principal of a contract worker;
- A commission agent;
- The principal of a commission agent;
- A partner in a firm;
- An intern; or
- A volunteer.

A volunteer – a person who performs volunteer work other than in the capacity of an employer or employee.

An intern – a person who is engaged by another person for an internship but is not an employee of that other person.

An “internship” is defined as a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or any other period of work that is usually described as an internship.

What is sexual harassment?

There are two forms of sexual harassment.

(1) Unwelcome conduct towards a person

When a person –

- Makes an unwelcome sexual advance, or unwelcome request for sexual favours, to another person; or
- Engages in other unwelcome conduct of a sexual nature to another person, which a reasonable person, having regard to all the circumstances, would anticipate that the other person would be offended, humiliated or intimidated.

(2) Create a sexually hostile environment

A person, alone or with others, engages in conduct of a sexual nature, which creates a hostile or intimidating environment for another person. Such conduct could, for example, be in the form of making sexual jokes or displaying indecent pictures.

Sexual harassment is unlawful whether it is a woman or man who is sexually harassed, and irrespective of the sex of the person doing the sexual harassment.

Example: sexual harassment of a consignment worker

Daisy works as a promoter of electronic products on consignment at a large retail shop. She is an employee of the promoter company rather than the retail shop. Henry is an employee of the retail shop and works in the same section as Daisy works. On several occasions Henry made sexual advances on Daisy, which humiliated and intimidated Daisy. This is likely to be unlawful sexual harassment by Henry of Daisy in a common workplace.

What is disability or racial harassment?

Disability harassment is any unwelcome conduct on the ground of a person's disability where a reasonable person would have anticipated that the person would be offended, humiliated or intimidated by that conduct. For example, this could include insulting remarks or offensive jokes about a person's disability.

Racial harassment is unlawful in two situations:

- (1) Unwelcome conduct towards a person

Where a person, on the ground of another person's race, engages in unwelcome conduct which a reasonable person would have anticipated that that other person would be offended, humiliated or intimidated by the conduct.

- (2) Create a racially hostile environment

Where on the ground of a person's race, a person or persons engage in conduct that creates a hostile or intimidating environment for another person.

Example: disability harassment of a volunteer

A charitable organisation provides donated food supplies to underprivileged families. The organisation regularly engages volunteers to help with the sorting of food supplies in the office. Mr Suen, a paraplegic and wheelchair-user, has been a volunteer at the organisation for a year. There is no employment relationship between Mr Suen and the charitable organisation. While Mr Suen was working in the office, Mr Wong, an employee of the charitable organisation, made derogatory remarks about Mr Suen and his disability on several occasions. Apart from saying in a sarcastic tone that "Why are we engaging someone with a disability, he is useless", Mr Wong also said to Mr Suen: "Mr Suen, how can you have any friend when you are disabled and in a wheelchair?". Such conduct of Mr Wong is likely to be unlawful disability harassment of Mr Suen in a common workplace.

Example: racial harassment of a consignment promoter

Mrs Diego, a Filipino woman, worked as a promoter of health products in a large retail shop. She was engaged by the health products company as a promoter rather than employed by the retail shop. Mrs Cheung, a Chinese female, is an employee of the retail shop. She works as a cashier in the same health products section as Mrs Diego. Mrs Cheung frequently makes sarcastic jokes and comments about Filipino women, referring them as only good for being domestic workers, they all steal, and are likely to have affairs with other women's husbands. These comments were made by Mrs Cheung in front of Mrs Diego, and Mrs Cheung knows that Mrs Diego is Filipino. Mrs Diego felt humiliated by Mrs Cheung's comments. This is likely to be unlawful racial harassment of Mrs Diego by Mrs Cheung, by creating a hostile and intimidating environment in a common workplace.

Liability of persons engaging interns and volunteers

Under the SDO, DDO and RDO, the concept of vicarious liability applies. This means an employer or principal of an agent will be liable for an employee's or an agent's act of sexual, disability or racial harassment under the SDO, DDO and RDO, whether or not the employer or principal knew about or agreed with the act. An employer will only have a defence if they can prove that they took "reasonably practicable steps" to prevent the act in the workplace. There is no statutory defence for a principal in such circumstances.

A similar concept of liability has been enacted in relation to the person that engaged interns or volunteers. The amended SDO, DDO and RDO further provide that an act done by an intern in the course of an internship, is to be treated as an act done by the intern, and by the person who engaged the intern for the internship, whether or not the act was done with the knowledge or approval of that person.

Similarly, an act done by a volunteer in the course of performing volunteer work is treated as an act done by the volunteer, and by the person who engaged the volunteer to perform the work, whether or not the act was done with the knowledge or approval of that person.

A defence for the person engaging the intern or volunteer only exists where he/she proves that he/she has taken reasonably practicable steps to prevent the intern or volunteer from doing the act, or from doing acts of that description in the course of the internship or performing the volunteer work. Ultimately, the court will consider the circumstances of the case and decide whether the measures taken by the person who engaged the intern or volunteer are sufficient.

Good practices to prevent common workplace harassment

Preventive Measures:

- Develop or amend anti-harassment policies for the company/organisation to include situations of common workplaces where there is no employment relationships between the persons;
- Brief relevant persons, such as employees, contract workers, consignment workers, interns or volunteers, about the new laws and organisation policies before they commence work;
- Establish channels to handle complaints about harassment by persons working in the common workplace, and inform them about the complaint channels; and
- Provide regular reminders and training to all persons working in the common workplace about the changes to the laws and the updated internal anti-harassment policies.

Remedial Measures

- Handle complaints or harassment incidents properly and promptly, such as by conducting investigation;
- Make temporary adjustments to work arrangements upon the consent of the complainant to prevent further incidents of harassment from taking place;
- Take appropriate disciplinary action, such as issuing warning to the harasser or if serious, possible dismissal, where the allegation is established to be true and substantiated;
- Improve work arrangements as necessary to prevent similar harassment incidents from happening in future; and
- Review company/organisation's policy on harassment, the complaint-handling procedures and preventive measures regularly.

Example of good practice

A social service agency recruits volunteers from time to time to help provide services to the elderly, such as making home visits and performing home cleaning chores for the elderly. The agency has developed a comprehensive anti-sexual harassment policy, which applies to all full- and part-time staff members, associates and volunteers. Before the volunteers commence their volunteer work, they need to attend a briefing by the staff of the agency. In addition, each volunteer is provided with a Volunteer Handbook, highlighting the roles and responsibilities of the agency and the volunteers, as well as the anti-sexual harassment policy and complaint channel. The volunteers will be required to read through the Handbook and sign an agreement to indicate that they agree to abide by its rules and regulations.

What should an aggrieved or harassed person do?

I am a second year female law student at a university and I secured a 10-week non-paid summer internship at a law firm to enrich my experience. I am not entitled to any wages and there is no employment contract governing my internship. During the second week of the internship, a lawyer of the firm approached me in the pantry. He touched my waist and commented that I was very attractive and have a good figure. He said that we could go out for a date one night, during which he could coach me personally and share some tips on how to make clients happy. Is this sexual harassment? What should I do?

The above act by the lawyer is likely to be sexual harassment.

- ✓ The amendments to the SDO mean that sexual harassment of interns in common workplaces is unlawful, even where there is no employment relationship between the organisation engaging the intern and the intern.
- ✓ Sexual harassment comes in various different forms, such as unwelcome physical contact, staring or leering at a person or at parts of his/her body, commenting on his/her body, or making sexual advances. A reasonable third party, having considered all the circumstances, would have anticipated that the person would be offended, humiliated or intimidated.
- ✓ When encountering sexual harassment, you should say “No” to the harasser(s).
- ✓ Write down in details what happened, including the name of the harasser, the date, time, place and details of the incident, and witnesses, if any.
- ✓ Discuss with the officer supervising your internship, your tutor at the university or persons you trust.
- ✓ Lodge a complaint with the law firm. Request the firm to handle the complaint in a fair and impartial manner.
- ✓ Lodge a complaint with the EOC, or institute legal proceedings and file a claim with the District Court.

How can an aggrieved or harassed person lodge a complaint with the EOC?

Anyone who feels that he/she has been discriminated against, harassed or vilified as specified in the four anti-discrimination Ordinances may lodge a complaint **in writing** to the EOC and submit the complaint to the EOC through one of the following channels:



Letter by Mail



[Online form on the EOC website](#)



Fax



In person at the EOC office



Telephone (for enquiries only)



SMS service (For enquiries by people with hearing impairment/speech difficulties)

Enquiry related to anti-discrimination ordinances: [On-line Enquiry Form](#)
Complaint related to anti-discrimination ordinances: [On-line Complaint Form](#)
Enquiry and complaint related to EOC's services: [On-line Form](#)

How does the EOC handle a complaint?

Upon receiving an enquiry or complaint, the EOC will verify if it has met the conditions or threshold of a complaint, namely whether it is in writing, whether it is lodged by the aggrieved person or by a representative authorised by that person, and whether it contains an allegation of unlawful act under the anti-discrimination Ordinances.

Once the above conditions are fulfilled, the enquiry or complaint will be formally classified as a complaint, and a case officer would be promptly assigned to follow up on it. The EOC is committed to adopting a "victim-centric" approach, while adhering to the principles of fairness and impartiality in handling complaints. When investigating a complaint, the EOC would examine all information relevant to the case and give all involved parties adequate opportunities to respond. Where deemed appropriate, the EOC would encourage the parties in dispute to settle through conciliation, which is entirely voluntary.

If conciliation is unsuccessful, the complainant can apply to the EOC for legal assistance to institute civil action against the respondent. All applications for assistance are considered by the Legal and Complaints Committee of the EOC in accordance with the established principles.

How to contact the EOC?

Tel: (852) 2511 8211 (for general enquiries only)

Fax: (852) 2511 8142

Address: 16/F, 41 Heung Yip Road, Wong Chuk Hang, Hong Kong.

Email: eoc@eoc.org.hk (for general enquiries only)

SMS service: 6972566616538 (For enquiries by people with hearing impairment/speech difficulties)

(For enquiries and complaints about discrimination under the anti-discrimination Ordinances, please make use of the above online forms.)

Equal Opportunities Commission

August 2020

Note: This leaflet is for reference only and should not be taken as a substitute for legal advice.