

Employment Equality Law Update

Equality Commission

FOR NORTHERN IRELAND



Keeping you up-to-date with
developments in employment
and equality law

Welcome to the April 2016 edition of the joint Equality Commission and Labour Relations Agency newsletter. In this edition we will cover some of the key issues that are likely to affect or be of interest to you, our readers, in relation to what is happening in the field of equality and employment law from a local Northern Ireland perspective.

In particular, we will be looking at some of the queries that are received through the Commission's Employer Enquiry Line from employers and service providers. One of the most frequent queries relates to what an employer could or should be doing to ensure that they are an equal opportunities employer. We examine some key actions employers can take.

Another common query relates to the reasonable adjustment duty of the Disability Discrimination Act 1995 and how this duty should be managed. We examine the duty and provide employers with general guidance on how they should approach it.

In relation to employment law developments, we focus on the provisions of the Employment Bill (Northern Ireland) 2015 which

completed the NI Assembly's legislative process on 01 March and which, at the time of going to print, was awaiting Royal Assent. We will also look at key case decisions and developments regarding the national living wage, overtime and the calculation of holiday pay, the right to request flexible working and pre-claim conciliation.

The newsletter also contains details of forthcoming training events and seminars which may be of interest to you.

Finally, we are very interested to receive feedback on our newsletter and welcome your comments, both positive and negative as these help us to refine the newsletter to better meet the needs of employers. Our contact details are on the back page. ●

Inside this Edition


How to Become an Equal Opportunities Employer

- 12 EASY STEPS

It is important to remember that being an *equal opportunities employer* is a process, not a one-off event, and it needs continuous commitment and work if it is to succeed.

The 12-steps are listed below-

1. Declare that you are an *equal opportunities employer* and adopt employment policies which show your commitment to that principle (see next section for help with this);
2. Introduce an anti harassment and bullying policy and seek to promote a *good and harmonious working environment*;
3. Recognise that some people have disabilities and that they may be disadvantaged by your policies, practices and procedures or by the physical features of your premises and commit to making reasonable adjustments to remove or minimise those disadvantages;
4. Ensure that your recruitment and selection procedures are fair and are founded on the principle of objectively selecting the best person for the job;
5. Ensure that employment policies, practices and procedures reflect your commitment to equality. For example, working patterns should allow flexibility for those who have caring responsibilities and those with disabilities;
6. Deal promptly and seriously with any complaints of discrimination and harassment or bullying that you may receive;
7. Lead by good example. Show that you take the commitments outlined in your equal opportunity policies seriously by consistently applying them yourself. This should be done not merely by yourself and your senior managers but by all your line managers;
8. Seek the support of your workforce and their trade union representatives, in your efforts to promote equal opportunities. This can make it easier to implement your policies in practice;
9. Get your message across. Inform your managers and employees about how you expect them to behave and about the importance of complying with your employment policies. Be proactive: speak to your employees too and check that they know what you expect of them;
10. Provide training in equal opportunities that is appropriate to each employee's role. This is another aspect of getting the message across. It is important that all employees, but especially those with supervisory responsibility and those who make recruitment and selection decisions, are familiar with equal opportunities principles and with your policies and procedures;
11. Monitor how you provide equal opportunities and how your policies are operating by collecting data about the profile of your workforce, applicants and appointees in terms of characteristics such as community background, sex and disability and, review and analyse the data periodically;
12. Take positive or affirmative action, where appropriate; e.g. where your analysis of monitoring data reveals that certain groups are under-represented in your workforce or are experiencing disadvantages compared to other groups. By doing so, you may be able to correct those problems, increase the diversity of your workforce and better promote equality of opportunity in your employment.

 [Contact the Equality Commission for more advice on becoming an Equal Opportunities Employer.](#)

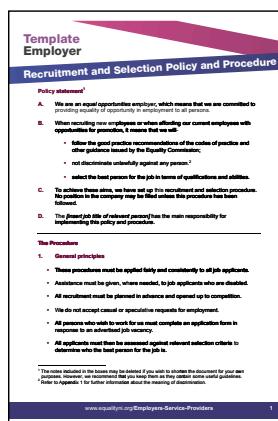
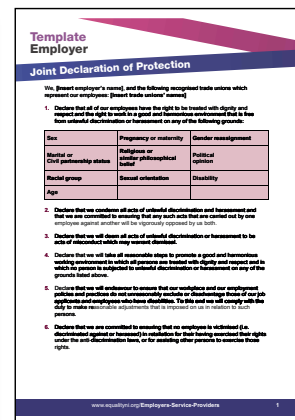
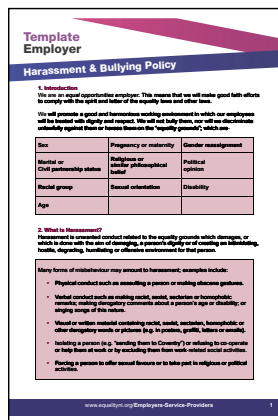
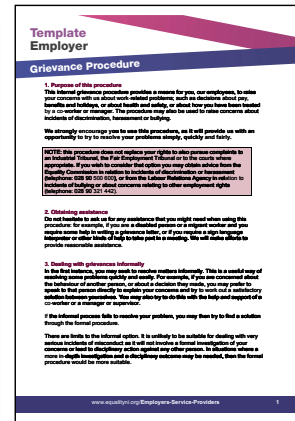
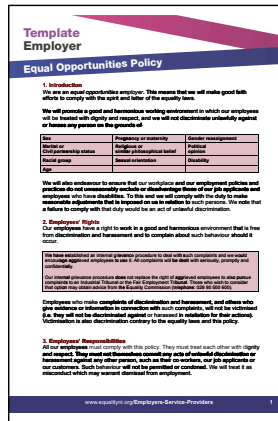
Getting Started - Policies

To become an equal opportunities employer, a good starting point is to develop a number of key employment policies and procedures that will help to show your commitment to the principle and which will provide clear guidance to your managers and employees as to how you wish and expect them to behave.

To help you to get started, the Commission has drafted some examples of key policies that we hope you find useful in reviewing and adopting to suit your own circumstances. These are our “model” policies and procedures and they outline the main statements of principle and procedures that we believe such documents should contain. They are as follows-

- Equal Opportunities Policy;
- Harassment & Bullying Policy;
- Joint Declaration of Protection;
- Grievance Procedure;
- Recruitment & Selection Policy and Procedure

These are available to download from our website, free-of-charge. ●



Frequently Asked Question

Q. IS IT OBLIGATORY TO HAVE POLICIES AND PROCEDURES LIKE OUR EXAMPLE ONES?

The short answer is “no”: there is no statutory legal obligation on you to have these policies and procedures. However, we strongly recommend that you have policies and procedures that cover each of the areas as indicated in the examples below. The ECNI Models provide a framework to assist you.

Example 1: in the event that a job applicant or one of your employees brings a discrimination complaint against you in an industrial tribunal, if you try to defend yourself on the basis that you are an *equal opportunities employer*, you may find it difficult to persuade the tribunal to accept your claim if you have not adopted any of the key employment policies and procedures.

Example 2: when applying for tenders to provide goods and services to public authorities, you are likely to be asked whether you are an *equal opportunities employer*. One of the main ways of putting yourself in the position to be able to answer “yes” to that question is to show that you have adopted the key employment policies and procedures. In some tendering exercises you may be asked to submit a copy of your *Equal Opportunities Policy* with your application.

Example 3: a common characteristic of *equal opportunities employers* is that they are likely to help their employees to develop their full potential, fully utilising their talents and resources to maximise the efficiency of their businesses. Being an “*equal opportunities employer*” also helps to attract the best talent available when recruiting staff.

Further information about the principles and actions outlined here can be found in our most comprehensive good practice guide for employers: *A Unified Guide to Promoting Equal Opportunities in Employment* and in a number of other publications, all of which are available to download from our website. ●

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The Reasonable Adjustment Duty and The Disability Discrimination Act

In responding to employers' queries, we stress the need for the employer to talk initially to the disabled person about the adjustments they require, after all, it is the disabled person who is managing their disability and may have been doing so for some time.

The Disability Discrimination Act (DDA) requires that employers introduce reasonable adjustments in respect of applicants and employees who are disabled. This is with a view to ensuring that disabled people are not disadvantaged and enjoy equality of opportunity in employment. There are a number of factors that employers should consider when determining what is a *reasonable* adjustment. These include-

- **The effectiveness of the step in preventing disadvantage**

Will it work? Will it enable an absent employee to return to work? It is unlikely to be reasonable to make an adjustment that would have little or no benefit in overcoming the disadvantage;

- **The practicality of the step**

Steps that are easy to implement are likely to be more reasonable to take than ones that are difficult to implement – but this does not mean that it can never be reasonable to take difficult steps;

- **The financial/other costs required, and the extent of any disruption it may cause**

Although cost can be a factor in determining the reasonableness of an adjustment, potential adjustments should not be dismissed out of hand before being fully costed;

- **The extent of the employer's financial and other resources**

The general principle being that employers with larger financial resources are expected to consider potentially more expensive adjustments;

- **The availability of financial or other help**

E.g. Access to Work Scheme / permitting the person to use their own adapted equipment (e.g. an adapted car) / seeking information and advice from knowledgeable sources;

- **The nature of the employer's activities, the size of his/her undertaking and the effect on other employees**

E.g. If employees work in a small confined factory area and a disabled person requires a high level of permanent heat this could impact negatively on other employees;

- **Adjustments made for other disabled staff**

E.g. If a number of disabled staff need the same relatively expensive adjustment (e.g. wider doorways) this may reinforce the reasonableness of the adjustment;

- **The extent to which the disabled person is willing to co-operate**

To be effective, adjustments will generally require the co-operation of the disabled person.

Assessing and balancing these factors will call for the employer to exercise his or her judgment. It will not necessarily be easy, but it may be made easier by taking these steps-

- Consult the disabled person about his or her needs;
- Obtain expert advice, where appropriate;
- Refer to the guidance given in the DDA Code of Practice issued by the Equality Commission;
- Use trial periods to test the effectiveness of potential solutions;
- Keep an open mind to possible solutions;
- Review adjustments periodically.

If further guidance is required in relation to applying these principles in practice, please contact our Employer Enquiry line **028 90 890 888.** ●



The Disability Discrimination Act (DDA) requires that employers introduce reasonable adjustments in respect of applicants and employees who are disabled.

Employment law – hot topics



Depending on your perspective, developments in employment law can be seen as either an issue of rights or an issue of responsibilities, but either way ignorance is not bliss when it comes to major case decisions or forthcoming changes in legislation.

The long awaited Employment Bill (Northern Ireland) 2015 completed the NI Assembly's legislative process on 01 March and was, at the time of going to print, awaiting Royal Assent before becoming law. When that occurs, which should not be long, it will be named the Employment Act (Northern Ireland) 2016. In summary the Bill addresses the following-

- Provides that, in most cases, a prospective claimant must first have submitted the details of their claim to the Labour Relations Agency for an attempt at early conciliation before they can lodge the claim at an industrial tribunal or the Fair Employment Tribunal;
- Extends confidentiality provisions to ensure that the full range of LRA dispute resolution services is appropriately protected;
- Contains enabling provisions that allow for a neutral assessment service to be operated by the LRA;
- Converts the Department's power to amend the qualifying period, for the right to claim unfair dismissal, from confirmatory to draft affirmative procedure;
- Provides for more accurate rounding when annual changes, in line with inflation, are applied to the maximum amount of an unfair dismissal award and other employment rights related payments. Empowers the Department to modify these sums if a draft order is approved by the Assembly;
- Alters the effect of the good faith test; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability;
- Introduces a test to close the loophole in public interest disclosure legislation;
- Introduces a power to allow the Department to make regulations requiring regulators and other bodies prescribed for the purposes of Article 67F of ERO 1996 (as recipients of whistle-blowing disclosures) to report annually on disclosures of information made by workers;
- Includes public interest disclosure protections for student nurses and student midwives;
- Introduces a power to amend, by subordinate legislation, the definition of worker in public interest disclosure legislation;
- Legislates for employers to be vicariously liable if an employee who makes a protected disclosure subsequently experiences detriment from colleagues;

- Amends enabling powers to allow for procedural changes to be made to regulations concerning ITs and the FET;
- Permits the Department to deal with the provision of careers guidance by way of regulations;
- Empowers the Department, by regulations, to deal with the provision of apprenticeships;
- Empowers the Department to issue regulations to prevent abuses of zero hours contracts;
- Imposes a duty on the Department to issue regulations by no later than 30 June 2017 that will in turn oblige certain, as yet unspecified, employers to publish information about gender pay differences within their workforces and, where relevant, to publish action plans to eliminate those differences.

In the meantime there have been some significant developments in terms of announcements and case decisions that our readers should be aware of. The top 4 issues for this edition are as follows-

- The National Living Wage;
- Where overtime fits in the calculation of holiday pay;
- The extension of the right to request flexible working;
- Pre-Claim Conciliation

The National Living Wage (NLW) – The announcement by the Chancellor in July 2015 that from April 2016 there would be a new minimum rate of pay for those aged 25 and above of £7.20 came as somewhat of a shock to many. What we know about this new legally set regime is quite limited, for example the rate is due to increase to £9.00 by 2020 and this would theoretically represent a year on year increase of 6%.

This new initiative by the Government understandably overshadowed the annual announcement in October 2015 of the increase to the levels of the National Minimum Wage (NMW) and the November 2015 increase in the confusingly similar Living Wage which is a voluntary construct not to be mixed up with the NLW.

At the time of writing questions remain about the NLW relationship with the NMW (e.g. – impact on October 2016 rate?) and issues such as enforcement, the relationship with the independent Low Pay Commission, the role of the evidence-based approach to setting the rate and so on.

Stakeholders such as the Confederation of British Industries (CBI) have voiced concerns about the entire concept of the NLW and the perceived gamble it represents, whereas other stakeholders such as the trade union movement have given the NLW a cautious and heavily caveated welcome.

One issue that has been perhaps glossed over is the actual age criteria attached to the NLW and the impact on things such as younger workers, recruitment patterns and trends, the impact in certain sectors such as healthcare and retail, impact on workforce planning (core and peripheral) and the long term impact of broader initiatives such as benefit reforms, including universal credit.

It is difficult to separate out the NLW as a purely employment law issue because it is much more than this in terms of its political and ideological base. As such it will only really come under the employment law microscope later in 2016 whereupon the impact on socially protected identities related to age and gender for example may become clearer. Whether or not, as with the NMW, the NLW will effectively be exempt from challenge or be objectively justifiable remains to be seen but either way the full social and legal impact of the change remains as yet unknown.

Overtime as part of holiday pay calculation

High profile court cases have recently brought the issue of holiday calculation to the fore and specifically whether or not overtime should be factored into the calculation of a worker's holiday pay. This has not proved to be a problem where the overtime is contractually guaranteed whereby the holiday pay calculation includes overtime, but in recent times the focus has shifted to contractual non-guaranteed overtime and indeed voluntary overtime.

At the core of cases such as the well known "Bear" and "Patterson" cases there has been the question of fact regarding what constitutes

"normal remuneration" and what is "regularly worked". At the heart of these cases is the technical definition of pay / remuneration and how it is interpreted differently under domestic and European law.

The case law situation in GB is very fluid and indeed question marks remain in relation to the consideration of other aspects of regularly achieved remuneration such as commission, shift premium, bonuses and tips.

In GB, case decisions have shown a clear direction of travel in favour of the worker getting these aspects of regular work normal remuneration factored into their holiday pay calculation. The recent (22 February) appeal

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decision in the test case named “Lock –v- British Gas”, which confirmed the principle that wages earned through results-based commission should be included in the calculation of holiday pay, has not yet settled all questions that pertain to the practicalities of that principle – the case continues. Nevertheless, the direction of the various case law decisions perhaps demonstrates that the Government in GB had seen the writing on the wall when it implemented legislation such as the Deduction From Wages (Limitation) Regulations 2015 which applied a “backstop” of going back only two years for claims by workers.

In Northern Ireland employers and workers alike are watching how this area of law develops. Regardless of whether you see the matter as one of rights enforcement or risk management, the reality is this is a live issue and could result in a worker litigating either lodging a civil action for breach of contract or a tribunal case for an on-going series of unlawful deductions from wages claim. There are also ramifications for the reconfiguration of holiday pay referencing and calculation system to take account of how payroll defines and calculates regularly worked normal remuneration.

In the meantime we may see legislative developments in this area before long in Northern Ireland.

Flexible Working (Extension of the right to all employees) The Work and Families (Northern Ireland) Act 2015 is probably best known for being the legislation that brought shared parental leave into operation in Northern Ireland from April 2015. However,

one of the lesser known aspects of the above Act was the extension of the right to request flexible working to all employees (not just those with caring responsibilities) who meet the 26 week qualifying criteria.

In some regards this change in the law may have went unnoticed but it is important to point out that this is an area where GB and Northern Ireland differ, for example, in GB the right was introduced ten months earlier and in GB the right to request is now part of a light touch ACAS guide whereas in Northern Ireland it still operates under the same statutory framework that has existed since 2002.

Since its introduction the right to request flexible working has not caused a great deal of controversy as a stand-alone concept given that it is quite procedurally driven and mechanical in terms of the application, meeting and decision process.

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However, there have over the years been issues aligned to the flexible work pattern that have caused concern, for example the potential overlap with indirect sex discrimination (e.g. - a female employee wishing to return in a part-time capacity after being off on maternity leave and being unjustifiably denied) as well as other issues relating to the fact that the flexible working pattern is a permanent variation to the contract of employment with no automatic review or revert to the previous work pattern.

Many progressive employers now offer a vast array of flexible working patterns (e.g. – part-time, term-time, compressed hours, and so on) and there may be a temptation to bring in a blanket ban on any further requests because such work patterns have reached critical mass. The difficulty with a policy, practice or provision such as this in the context of an increase in requests from male employees raises the spectre of discrimination if such requests are not given reasonable consideration in line with the legislation.

Pre-Claim Conciliation - The number and extent of individual employment rights have increased dramatically in recent times. This has led to a greater number of claims being lodged with the Industrial Tribunal where workers and employees allege that their employment rights have been breached. It makes good business sense to resolve disputes in the workplace at the earliest opportunity.

In advance of the implementation of Early Conciliation in 2016, the Labour Relations Agency is promoting its free pre-claim conciliation service. So in order to keep things

straightforward the material below explains what pre-claim conciliation is.

Where a problem or disagreement in the workplace is likely to lead to a tribunal claim the Labour Relations Agency will often be able to help employers and employees find a solution that is acceptable to both. This service is known as **Pre-Claim Conciliation**. It can save you the time, stress and expense normally associated with a tribunal claim.

Issues referred for Pre-claim Conciliation are dealt with by **Conciliation Officers** who talk through the problem, outline your options, discuss the benefits of the service and answer any questions you may have.

We do not impose outcomes or make judgements on the rights or wrongs of the matter in dispute; we simply try to help people settle their differences on their own terms.

Key features of Pre-Claim Conciliation

Conciliation officers are **impartial**.

They do not-

- Represent either the employer or the employee;
- Take sides or judge who is right or wrong;
- Give an explicit opinion on the merits of a claim or potential claim;
- Advise on tactics, or how to win at a tribunal;
- Pressurise people to settle or abandon a case.

Conciliation is **voluntary**.

- Employers and employees can opt in or out at any time;
- The conciliation officer has no power to compel anyone to take any course of action;
- There are no restrictions on what can be included in the terms of a settlement agreement (as long as it does not contain anything unlawful).

Conciliation is **confidential**.

- Nothing you say to us will be passed to other parties without your agreement;
- What you say during conciliation cannot be used as evidence against you at a tribunal hearing.

Conciliation is **independent**.

- It is entirely separate from the tribunal process and if a settlement is not reached a claim can still be pursued.

Conciliation is **free**.

- There is no charge for our service.

What are the options?

If an employee believes they could complain about their employment rights but has not yet made a claim to a tribunal, there are several ways to resolve the matter without going any further-

Use workplace procedures – Employers and employees should always try this before considering any other option. It's usually quicker, less stressful and less costly for all concerned.

Settle the matter through the **Labour Relations Agency** – We can conciliate in almost every type of potential claim about individual employment rights and most are resolved at this stage.

Settle the matter privately – you can choose to settle the matter privately in certain circumstances but a private settlement reached without the assistance of an appropriate adviser may not be legally binding. If you decide to explore this option you should take advice. If an agreed solution cannot be found the employee may still choose to lodge a claim with the tribunal. Claims must be made within a specified time of the events they concern. In most cases this is **three months**.

In limited circumstances the tribunal can accept late claims but taking part in conciliation or any of the other activities described above does not provide grounds for this. It is the employee's responsibility to find out what time limits apply and ensure they do not lose the right to make a claim if the matter cannot be resolved before then. Employers or employees who are in any doubt as to how this might affect a particular case should seek legal advice.

Why choose Pre-Claim Conciliation?

- **Saves time and money.**

Preparing or responding to a tribunal claim takes a great deal of time, and if there is a tribunal hearing both employer and employee could have representational costs.

- **Minimises stress.**

Almost everyone finds the process of pursuing or defending a case difficult and appearing in tribunal can be a stressful experience.

- **Quick Solution.**

Many cases can be dealt with in a few telephone calls or a short meeting, with agreed settlements implemented very soon afterwards.

- **Win-Win Outcome.**

In a tribunal someone always loses and even the 'winner' will not always get what he or she wants from the process.

- **Control.**

Settlements are reached by agreement on terms that suit the parties. In the tribunal the decision is taken out of the parties' hands and there are restrictions on what the tribunal can award (e.g. they cannot order references to be given).

- **Avoids Formality.**

Although the tribunal is less 'stuffy' and legalistic than most courts it is still a judicial process with which most people are unfamiliar and uncomfortable.

- **Can restore the employment relationship**

– if that is what the employer and employee want to achieve.

What will the Conciliation Officer do?

To explore how the potential claim might be resolved the conciliation officer will talk through the issues with the employer and the employee.

Where appropriate, the conciliation officer will also-

- Explain the pre-claim conciliation process;
- Explain the way tribunals operate, and what they take into account in deciding claims in similar circumstances;
- Discuss the options;
- Ask questions to help clarify the employer and employee's positions and concerns;
- Help each person understand how the other views the case;
- Relay any proposals for a settlement between the employer and the employee.

The conciliation officer **will not-**

- Make a judgement on the case, or the likely outcome of a tribunal hearing;
- Advise either the employer or the employee whether or not to accept any proposals for settlement;

“Settle the matter through the Labour Relations Agency – We can conciliate in almost every type of potential claim about individual employment rights and most are resolved at this stage.”

- Act as a representative or take sides in any other way.

What happens if I settle the complaint through the Labour Relations Agency?

If you settle the complaint through the Labour Relations Agency, the agreement will be legally binding and no tribunal claim can then be made about the matter in question. Although agreements do not have to be in writing to be legally binding, the terms of any agreement reached will be recorded on a Labour Relations Agency form and signed by both parties as proof of the agreement.

What happens if agreement cannot be reached?

It will be up to the employee to decide whether or not they wish to submit a claim to the tribunal. If a claim is lodged, the Labour Relations Agency will continue to offer conciliation with the aim of resolving the matter without the need for a tribunal hearing.

What about representation?

If you appoint a representative to act for you we will conciliate through them and will not be able to deal with you directly. As any settlement reached through your representative would be legally binding it is important to ensure that they are fully aware of your requirements.

Where can I get more information or advice?

If you have already spoken to a Labour Relations Agency conciliation officer, you will find they can help you identify sources of advice and information appropriate to your situation. ●



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The Business of Human Rights


The importance of human rights is widely accepted but there is a genuine question about how human rights are relevant to business. The Northern Ireland Business and Human Rights Forum was established in 2015 to help answer this question. This is a forum for business where the agenda is set by the participants, with support from the Northern Ireland Human Rights Commission. The membership includes businesses (large and SMEs), the Equality Commission for Northern Ireland, NGOs, the Irish Congress of Trade Unions, the Department of Finance and Personnel and the Department of Enterprise, Trade and Investment.

Customers and shareholders are asking questions about human rights within supply chains, and among their employees. They want to know the impact operations have both at home and abroad. Human rights are important in due diligence and in corporate reporting legal requirements such as the Modern Slavery Act 2015. The UK government is developing its second National Action Plan on business and human rights to implement the UN Guiding Principles, and the Government of Ireland will soon launch its first.



Adopting human rights standards may sound like a significant burden, especially on SMEs, but that is not necessarily the case. The UN Guiding Principles Reporting Framework, designed to help businesses report on human rights, is a two page A4 document. The forum helps businesses understand what these mean and demonstrates that protecting and respecting human rights, and providing remedies is achievable for all businesses.

We are developing guidance and other practical tools to promote the value of human rights based approaches and keep forum members updated on what is happening within government and elsewhere.

 We hold quarterly forum meetings and are open to new members. Please contact daniel.morris@nihrc.org if you would like to attend the next meeting.

Training and Information

One way that the Commission and Agency seek to keep employers and service providers updated on developments in the areas of employment and equality law is through the provision of training and information sessions. In some areas such as bullying and harassment or recruitment and selection the training is provided jointly by both organisations.

The Agency provides *essential employment related information sessions which last one hour and cover a range of themes including*; Zero Hours Contracts, Employment Law – NI and GB, the differences, Alcohol and Drugs Misuse at Work, Variation of a Contract and Whistle-Blowing. You can book a place at any of these sessions online at: <https://www.lra.org.uk/seminars-workshops-briefings/>

Details of the Commission's current Employer Training Programme can be found on our website at: www.equalityni.org/training



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