



May 02, 2024

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EEOC Releases Updated Workplace Harassment Guidance

On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) released its final Enforcement Guidance on Harassment (the “Guidance”) aimed at preventing harassment in the workplace. In releasing the Guidance, the EEOC noted that from fiscal year 2016 to 2023, more than one-third of charges received by the agency contained allegations of harassment based on race, sex, disability, or another protected characteristic. The Guidance will need to be reviewed and approved by the Office of Management and Budget prior to publication.

The recently released Guidance combines, revises, and supersedes the agency’s five previous guidance documents issued between 1987 and 1999. It serves as a comprehensive and unified resource and incorporates recent legal developments, including the U.S. Supreme Court’s decision in *Bostock v. Clayton County*, which extended Title VII protections to sexual orientation and gender identity. It also addresses current topics/issues including the #MeToo movement, social media, and remote work. However, the Guidance does not have the force and effect of statutory law and does not limit the EEOC’s enforcement discretion in considering the facts of each case and applicable legal principles.

What Conduct Does Not Trigger Statutory Protections

It is important to note that not all workplace conflict or friction triggers statutory Equal Employment Opportunity (EEO) protections. The Guidance states that EEO laws apply only when harassment is based on someone’s protected characteristic. Engaging in rude behavior, teasing, or mistreatment due to a personality clash, without any association with a protected characteristic, is simply not violative of the laws enforced by the EEOC. Whether harassment is based on a protected characteristic will depend on the totality of the circumstances. Further, to violate

the law, harassment must either involve a change in the individual's employment or create a hostile work environment.

Examples of Harassment Under the Guidance

Title VII protects covered employees from harassment based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older), or genetic information. A person can be subjected to unlawful harassment based on more than one protected characteristic, even when the harasser shares the same protected characteristic as the targeted individual and/or when the harasser is wrong about the target's protected characteristic. Harassment can result from behavior that is intended to embarrass, intimidate, or belittle a person because of a protected category.

The Guidance includes over 70 examples of what the EEOC considers to be unlawful harassment by coworkers, supervisors, customers, contractors, and other third parties. They involve a broad range of circumstances. Harassment, if sufficiently severe or pervasive, may include:

- Saying or writing an ethnic, racial, or sex-based slur;
- Forwarding an offensive or derogatory "joke" email;
- Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
- Threatening or intimidating a person because of the person's religious beliefs or lack of religious beliefs;
- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person's disability or a person's accent;
- Making fun of a person's religious garments, jewelry, or displays;

- Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts;
- Groping, touching, or otherwise physically assaulting a person;
- Making sexualized gestures or comments, even when this behavior is *not* motivated by a desire to have sex with the victim; and
- Threatening someone's job or offering special treatment in exchange for sexual favors.

Hostile Work Environment Under the Guidance

The EEOC will consider claims under the totality of the circumstances and on a case-by-case basis to determine whether a hostile work environment (HWE) exists when harassment based on a protected characteristic occurs. Courts evaluate whether the alleged harassment was severe or pervasive (the Guidance uses the word "frequent") enough to create an intimidating, hostile, or offensive environment sufficient to change the terms and conditions of the employee's employment. Whether the conduct is severe or pervasive enough to create a HWE is subject to both an objective (a reasonable person in the employee's position) and a subjective (the employee's perspective) test. When evaluating HWE claims, the EEOC noted the following:

- Some factors to consider include frequency and severity of the harassing conduct, how physically threatening or humiliating it was, if it caused psychological harm, and whether/how much it interfered with the employee's work.
- Conduct not directed at the complainant can contribute to a HWE, particularly when overheard, overseen, or learned about later by the complainant.
- Just one instance of very serious misconduct may be severe enough, such as intimate groping, violence, or "a supervisor using the n-word."
- The accused harasser's rank within the organization and/or any power disparity between the target and the harasser (company's owner vs. coworker or third party) may carry

weight with the EEOC.

- The complainant is not required to show that the harassment worsened their performance or that it led to a change in employment, such as a demotion or a reduction of hours.
- Harassment during off-site employer-hosted events is considered to be within the work environment.
- Conduct within a virtual work environment or even during off-duty social media use can contribute to a HWE when employment is affected, particularly when using work-related communications systems, accounts, devices, platforms, and/or other technologies.

Addressing Harassment Under the Guidance

Employers are responsible for preventing workplace harassment and quickly ending harassing behavior once they learn about it, even if the harassment has not yet risen to the level to be pervasive enough to create a HWE. In responding to a harassment complaint, employers should (1) timely and impartially conduct an investigation; (2) take appropriate corrective action if warranted; and (3) ensure the complainant is not subject to retaliation. The specific steps an employer should undertake in an investigation will depend on the facts and circumstances at hand. However, at all times investigations should be prompt, thorough, discreet, and well-documented. In deciding the appropriate level of corrective action, the EEOC opines that “the goals are to *stop* the harassment and *prevent* future harassment.”

Additionally, to invoke the affirmative defense that an employer met their duty to exercise reasonable care, an employer must show both that it took reasonable steps to prevent harassment *in general* and that it took reasonable steps to prevent and correct the *specific* harassment raised by a particular complainant.

Preventing Harassment Under the Guidance

To prevent harassment, employers are strongly *encouraged* by the EEOC to:

- Have a clear, easy-to-understand anti-harassment policy, and consider whether any employees have barriers to understanding the policy;
- Have a safe and effective procedure that employees can use to report harassment, including more than one option for reporting;
- Provide recurring training to all employees, including supervisors and managers, about the company's anti-harassment policy and complaint process; and
- Take steps to make sure the anti-harassment policy is being followed and the complaint process is working.

Employers should review and, if appropriate, revise their policies, training, and/or reporting procedures to prevent and address harassment under Title VII. Although this newly released Enforcement Guidance on Workplace Harassment is not law, it provides helpful insight into the EEOC's enforcement priorities and guidance on how to mitigate risk relating to workplace harassment. The Guidance is not exhaustive and not intended to illustrate every possible factual situation that might involve unlawful harassment.

If you have questions about the EEOC's Enforcement Guidance, please contact the authors or any attorney with Frost Brown Todd's [Labor and Employment](#) practice group.

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