

HR COMPLIANCE BULLETIN

EEOC's Proposed Guidance on Workplace Harassment

On Sept. 29, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance explaining how it may enforce fair employment laws against an employer when workplace harassment has been claimed or is suspected.

The proposed guidance includes updates on certain legal developments since the EEOC last issued similar guidance in the 1990s. These developments include the U.S. Supreme Court's 2020 holding that Title VII of the Civil Rights Act (Title VII) prohibits discrimination based on sexual orientation and gender identity and the 2023 Pregnant Workers Fairness Act.

Once finalized, the proposed guidance will serve as a resource for EEOC enforcement staff investigating harassment claims and provide informal guidelines for employer compliance with existing legal requirements.

This Compliance Bulletin provides an abbreviated and summarized version of the EEOC's proposed guidance.

Action Items

Employers with 15 or more employees should become familiar with the new proposed guidance and monitor the EEOC's website for the final version, which is expected to be released in substantially the same form as the proposed guidance near the end of 2023 or early in 2024.

Meanwhile, employers should also review and revise their policies and procedures as necessary to ensure compliance with the proposed guidance.

Provided to you by **Robertson Ryan Insurance**

Highlights

New EEOC Proposal

The EEOC has proposed new guidelines for enforcement of federal prohibitions against workplace harassment.

Fair Employment Laws

Laws enforced by the EEOC include Title VII, the Americans with Disabilities Act and others. Most federal equal employment opportunity (EEO) laws apply to employers with 15 or more employees.

Employer Impact

The new guidance does not create any new legal obligations but instead aims to clarify existing laws and policies.

Important Dates

Nov. 1, 2023

The EEOC is accepting comments on the proposed guidance until this date.

Jan. 1, 2024

A final version of the new guidance is expected to be issued after this date.





EEOC's Proposed Enforcement Guidance on Workplace Harassment Prevention

OVERVIEW

In explaining how to evaluate whether harassment violates federal EEO law, the EEOC's enforcement guidance focuses on the following three components of a harassment claim:

1. Whether the conduct is based on the individual's legally protected trait under the federal EEO laws;
2. Whether the harassing conduct results in discrimination with respect to a term, condition or privilege of employment; and
3. Whether a basis for holding the employer liable exists.

The guidance also addresses systemic harassment and includes links to additional EEOC resources on workplace harassment.

PROTECTED TRAITS AND CAUSATION

Harassment is covered by the EEO laws only if it is based on an employee's legally protected characteristics, which are also known as protected traits. The table on the following page provides a list of the traits protected under federal EEO laws, along with additional information about each trait.

Causation is established if the evidence shows that an individual was subjected to harassment **because of** the individual's protected trait, regardless of whether the harasser explicitly refers to that trait.

Whether hostile workplace harassment is based on a protected trait will depend on the totality of the circumstances and must be evaluated based on the specific facts in a case. Nevertheless, certain principles may generally apply in hostile workplace harassment investigations. A few listed in the EEOC's guidance are:

- Causation may be established in sexual harassment claims through explicit or implicit proposals of sexual activity, general hostility toward members of an individual's sex, and comparative evidence showing how the harasser treated persons who shared an individual's sex compared to the harasser's treatment of others;
- Facially discriminatory conduct (such as actions that explicitly insult or threaten an individual based on a protected trait) is unlawful regardless of intent;
- Stereotyping need not be motivated by animus or hostility toward the stereotyped group;
- Additional considerations may include the following (and others):
 - The context in which the conduct takes place or within a larger social context;
 - Any link between facially neutral and facially discriminatory conduct;
 - The timing between harassment and when the harasser learned of an individual's protected status (such as pregnancy, sexual orientation, gender identity, religion or disability); and
 - Evidence that shows differences in the conduct directed against individuals in different groups.

All retaliation claims, even if they potentially involve [unlawful retaliatory harassment](#), are evaluated under the legal standard for retaliation. This is different from the legal standard for unlawful harassment based on a protected class.

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Protected Trait	Unlawful Conduct Examples
Race and color	<ul style="list-style-type: none"> • Racial epithets or offensive comments about members of a particular race • Harassment based on stereotypes about or traits or characteristics linked to an individual’s race (such as name, cultural dress, accent or manner of speech, and physical characteristics, including hair textures and hairstyles commonly associated with specific racial groups)
National origin	<ul style="list-style-type: none"> • Ethnic epithets, derogatory comments about individuals of a particular nationality • Harassment based on an individual’s place of origin (or that of the individual’s ancestors), stereotypes about an individual’s national origin or traits linked to an individual’s national origin (such as physical, cultural or linguistic characteristics)
Religion	<ul style="list-style-type: none"> • Use of religious epithets or offensive comments based on an individual’s religion (including atheism or lack of religious belief), religious practices or dress • Harassment based on religious stereotypes or because of a religious accommodation or request for one • Coercing employees to engage in religious practices at work
Sex	<ul style="list-style-type: none"> • Unwanted sexual attention or sexual coercion (such as demands or pressure for sexual favors, sexual assault or sexual remarks) • Nonsexual conduct based on sex (such as sex-based epithets, sexist comments or facially sex-neutral offensive conduct motivated by sex) • Epithets regarding sexual orientation or gender identity • Intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering) • Denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity • Harassment based on pregnancy, childbirth or related medical conditions (including lactation); a woman’s reproductive decisions (such as decisions about contraception or abortion); sexual orientation or gender identity (including how that identity is expressed); or the fact that an individual does not present in a manner that would stereotypically be associated with that person’s gender
Age (40 and older)	<ul style="list-style-type: none"> • Harassment based on negative perceptions or stereotypes about older workers (even if they are not motivated by animus)
Disability	<ul style="list-style-type: none"> • Harassment based on an individual’s physical or mental disability; stereotypes about individuals with disabilities in general; traits or characteristics linked to an individual’s disability (such as how an individual speaks, looks or moves); an individual’s request for, or receipt of, reasonable accommodation; an individual having a record of or being regarded as having an impairment (even if the individual does not have an actual or record of disability); or disability of an associated individual
Genetic information	<ul style="list-style-type: none"> • Harassment based on an individual’s genetic test or family medical history.

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AFFECTING A TERM, CONDITION OR PRIVILEGE OF EMPLOYMENT

For an employer to be liable for workplace harassment based on a protected trait, the harassment must affect a “term, condition, or privilege” of employment. Whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances and must be evaluated based on the specific facts in a case. As summarized in the table below, however, an action may meet this standard in one of two ways:

Action	Unlawful if:	Key points
Explicit Change	Linked to harassment based on a protected trait	When an individual establishes that the employer made an explicit change to a term, condition or privilege of employment linked to harassment based on a protected trait, the employer is liable, and there is no defense.
Hostile work environment	Both subjectively and objectively offensive; and	For the subjective offensiveness determination: <ul style="list-style-type: none"> • A victim’s own perception of conduct is usually enough; and • Prior evidence of the victim not finding the conduct offensive (such as a statement otherwise) may be relevant, but subjective perception can change over time.
		For the objective offensiveness determination: <ul style="list-style-type: none"> • Whether a reasonable person in the victim’s position would find the work environment hostile must be evaluated in the context of surrounding circumstances, expectations and relationships; and • Conduct can establish a hostile work environment even if some members of an individual’s protected class did not or would not find it to be hostile.
	Either severe or pervasive	Severity or pervasiveness of harassment depends on all circumstances, but relevant considerations may include: <ul style="list-style-type: none"> • The harasser’s authority level; • The victim’s belief about the harasser’s authority level or about the harasser being insulated from corrective action (such as situations involving highly valued employees or an employer’s previous failures to take corrective action in similar circumstances), even if mistaken; • Whether the exposure to harassment was direct or secondhand; • The cumulative effect of harassment rather than on individual acts; and • Frequency of the conduct and time period over which it occurred.

The guidance also notes that the following, among other things, may contribute to a hostile work environment:

- Conduct that occurs in a work-related context outside of the regular workplace (such as sexist comments made during a video meeting or racist imagery that is visible in an employee’s workspace while the employee participates in a video meeting); and
- Conduct that occurs in a nonwork-related context but impacts the workplace (such as electronic communications using private phones, computers or social media accounts, if it impacts the workplace).

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EMPLOYER LIABILITY

As noted above, when an individual establishes that the employer made an explicit change to a term, condition or privilege of employment linked to harassment based on a protected characteristic, the employer is liable and has no defense.

However, in cases alleging a **hostile work environment**, one or more standards of liability may apply. This generally depends on the harasser’s relationship to the employer and the victim, as described below.

- An alleged harasser is considered a **proxy or alter ego of the employer** if the individual possesses such high rank or authority that the individual’s actions can be said to speak for the employer. Examples include sole proprietors and other owners; partners; corporate officers; and high-level managers.
- An alleged harasser is considered a **supervisor** if the individual is empowered by the employer to take “tangible employment actions” or has the actual or apparent power to recommend or otherwise substantially influence tangible employment actions against the victim.
- EEO laws also protect against harassment committed by **any person other than a proxy/alter ego or supervisor**, including other employees (such as co-workers, shift leads or other workers with limited authority over an individual) and any other person (such as independent contractors, customers, students, patients and clients of the employer).

For all employer liability purposes, the term “**tangible employment action**” means a “significant change in employment status” that requires an “official act” of the employer. Examples include hiring and firing; failure to promote; demotion; reassignment with significantly different responsibilities; compensation decisions; and decisions causing a significant change in benefits.

The table below provides an overview of how a harasser’s identity and tangible employment actions may determine employer liability.

Harasser Identity	Employer Liability		Defense available
Proxy or alter ego	Employer is automatically liable.		None
Supervisor	Employer is vicariously liable, but the extent of damages may depend on whether conduct included a tangible employment action.	If so, employer may not limit liability or damages.	None
		If not, employer may limit its liability or damages if it can show it took reasonable prevention and prompt correction steps and the employee failed to minimize harm.	“Faragher- Ellerth affirmative defense”
Anyone other than a proxy/alter ego or supervisor	Employer liability depends on whether the employer was negligent.	Employer is liable if it unreasonably fails to prevent or correct harassment but may limit damages.	Defense based on victim’s unreasonable failure to report or minimize harm.

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Establishing the *Faragher-Ellerth* Affirmative Defense to Hostile Work Environment Liability

The table below provides an overview of the elements an employer must prove to successfully defend against liability or reduce damages for harassment that was committed by a supervisor but did not include a tangible employment action.

Employer must show:	Key Points
<input checked="" type="checkbox"/> Employer exercised reasonable care to both prevent and correct harassment; and	At minimum, employers should: <ul style="list-style-type: none">• Have a written policy against harassment and process for addressing harassment complaints;• Provide training to ensure employees know their rights and responsibilities under the policy; and• Monitor employees' workplaces for compliance.
<input checked="" type="checkbox"/> Victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or avoid harm otherwise.	<p>The reasonableness of an employee's actions depends on the particular circumstances and information available to the employee <i>at the time of the actions</i>.</p> <p>Delayed complaints may reduce damages even if they would not eliminate liability altogether. However, an employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment.</p>

SYSTEMIC HARASSMENT

Harassment can be systemic, subjecting multiple individuals to a similar form of discrimination. For example, evidence might show that the Black employees working on a particular shift were subjected to, or otherwise knew about, the same racial epithets, racial imagery and other offensive race-based conduct. In such a situation, evidence of widespread race-based harassment could be used to establish that each Black employee working on that shift was individually subjected to an objectively hostile work environment.

In some systemic harassment situations, the evidence may establish that the employer engaged in a "pattern or practice" of discrimination, meaning that the employer's "standard operating procedure" was to tolerate harassment, creating a hostile work environment. To avoid liability in a pattern-or-practice case, employers must adopt a systemic remedy rather than only address the harassment of particular individuals. In addition, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive companywide procedures.

ADDITIONAL RESOURCES

The EEOC provides the following and other additional resources relating to workplace harassment:

- Home pages on [Harassment](#), [Sexual Harassment](#) and [Retaliation](#)
- [Select Task Force on the Study of Harassment in the Workplace](#)
- [Promising Practices for Preventing Harassment](#)
- [Promising Practices for Preventing Harassment in the Federal Sector](#)
- [Enforcement Guidance on Retaliation and Related Issues](#)