

Welcome to the 21st Century: EEOC Issues New Guidance on Workplace Harassment

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On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) published its first final guidance on workplace harassment since 1999, [Enforcement Guidance on Harassment in the Workplace](#) (the Guidance). Informed by the significant changes to the workplace over the last quarter-century, the Guidance incorporates twenty-five years of judicial interpretation of the laws that the EEOC enforces. The Guidance does not change the general structure of the applicable law, but rather includes dozens of new illustrative examples of challenges in the modern workplace that could help employers like CAAs better understand harassment. The Guidance also includes practical tips on workplace policies that CAAs can implement.

The Guidance is currently in effect. However, on May 13, 2024, eighteen states filed suit in federal court to enjoin the EEOC from implementing portions of the Guidance related to gender identity discrimination. The outcome of this lawsuit is uncertain at this time, and the [U.S. Supreme Court's recent decision](#) recent decision overturning judicial deference for agency actions does not directly address non-binding guidance such as this.

Legal Background

Although the Guidance is non-binding, it provides insight into the EEOC's interpretation of legal issues relevant to employers in the Community Action network. The EEOC enforces federal employment discrimination laws that protect 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 over), or genetic information. These laws include Title VII of the Civil Rights Act of 1964 (Title VII), Title I of the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA), each of which apply to employers with 15 or more employees, and the Age Discrimination in Employment Act (ADEA), which applies to employers with 20 or more employees.

For workplace harassment to violate federal employment discrimination law, the conduct must (1) be based on the individual's legally protected characteristic and (2) constitute or result in discrimination with respect to a term, condition, or privilege of employment. The Supreme Court has identified two forms of workplace harassment. The first is intentional discrimination¹, which is an explicit change to the terms or conditions of employment that is linked to harassment, such as firing an employee for rejecting sexual advances. The second is conduct that creates a hostile work environment. This type of harassment requires the existence of sufficiently severe or pervasive conduct that creates an objectively hostile or abusive work environment from the perspective of a reasonable person. Conduct that can contribute to a hostile work environment includes physical or sexual assaults or threats; offensive jokes, slurs, epithets, or name calling; intimidation, bullying, ridicule, or mockery; insults or put-downs; ostracism; offensive objects



or pictures; and interference with work performance. Even a single action, if severe enough, can create a hostile work environment. Employers can be held liable for the harassing conduct of their employees (including supervisors and co-workers) as well as non-employees such as independent contractors and clients.²

Key Topics

The Guidance does not change the main framework created by statute and the courts for analyzing workplace harassment claims. Rather, it provides a structured overview of the legal standards for workplace harassment and employer liability under the laws the EEOC enforces, and includes significant explanations and analysis of fact patterns that could give rise to a claim.³ The EEOC included nearly 80 examples in the Guidance, based on numerous federal court cases interpreting anti-discrimination laws, including on the following key issues⁴:

Sex. Harassment on the basis of sex includes pregnancy, childbirth, or related medical conditions as well as sexual orientation and gender identity. The Guidance clarifies that sex-based harassment can include harassment based on lactation, using or not using contraception, and deciding to have or not have an abortion. The Guidance also notes that sex-based workplace harassment includes conduct based on how gender identity is expressed, outing, misgendering, and the denial of access to a bathroom or other sex-segregated facility consistent with an individual's gender identity.⁵

Color. Federal law continues to prohibit harassment based on a person's race, color, or national origin. The Guidance clarifies that color-based harassment due to an individual's pigmentation, complexion, or skin shade or tone is its own protected class and is thus covered independently from the protected characteristics of race and national origin. The Guidance includes an example of a supervisor harassing Black employees with darker complexions, but not Black employees with lighter complexions.⁶

New Terminology. The Guidance includes new terms for known, existing concepts. "Intraclass harassment" describes harassment where the harasser is a member of the same protected class as the complainant (e.g., both are the same sex). "Intersectional harassment" describes harassment based on the combination of two or more protected characteristics (e.g., race and age), including harassment based on a protected class that may overlap with another protected class due to an actual or perceived close association between them (e.g., religion and national origin). Federal law continues to prohibit both intraclass harassment and intersectional harassment.⁷

21st Century Workplace. The workplace has changed significantly since the last time the EEOC updated its guidance, from more remote employees and telework to an increased use of computers and other communication technologies. The Guidance reflects this by acknowledging that conduct within a virtual work environment can constitute harassment. Specifically, the Guidance includes



examples of conduct over video meetings, such as having racist imagery visible on screen or making sexual comments about a bed being within the frame. The Guidance also discusses how conduct on platforms unrelated to work, such as xenophobic posts on [social media that are discussed at the office](#), can contribute to creating a hostile work environment if the conduct impacts the workplace.⁸

Employer Liability. The Guidance reiterates the longstanding framework that makes employers like CAAs liable for employee harassment. The legal standard for determining employer liability differs based on the role of the harasser and the type of harassment claim. In the case of intentional discrimination, if employers are found liable for the conduct of the harasser, there is no available legal defense. For hostile work environment claims, employers can be similarly liable in some cases (e.g., if the harassing employee is the executive director), but in other cases (e.g., if the harassing employee is a mid-level manager) the employer can limit their liability by showing that it acted to prevent and correct harassment. Employers can also be liable for the harassing conduct of non-employees, such as contractors or clients, if they fail to reasonably act in preventing or responding to the harassment.⁹

Action Items for CAAs

In addition to examples of fact patterns and analysis of the legal standards, the Guidance recommends that employers adopt an anti-harassment policy and monitor the workplace to ensure adherence, establish an effective reporting system for allegations of harassment, and regularly train employees on their rights and responsibilities under the law and their policies. CAAs should use the elements of effective policies, reporting systems, and training laid out in the Guidance when complying with [CSBG Organizational Standards 7.1 and 7.7](#), which require that CAAs adopt and work with an attorney to review personnel policies and a [whistleblower policy](#). CAAs should also ensure they reconcile the Guidance with the laws of their state, which may provide additional protections to employees or impose further requirements on employers.¹⁰

Anti-Harassment Policy. The Guidance provides that an effective anti-harassment policy:

- Defines what conduct is prohibited;
- Is widely disseminated;
- Is comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;
- Requires that supervisors report harassment when aware of it;
- Offers multiple avenues for reporting harassment, allowing employees to contact someone other than their harassers;
- Clearly identifies accessible points of contact to whom reports of harassment should be made and includes contact information; and
- Explains the employer's complaint process, including anti-retaliation and confidentiality protections.



Complaint Reporting Process. The Guidance states that an effective complaint process provides for:

- Prompt and effective investigations and corrective action;
- Adequate confidentiality protections; and
- Adequate anti-retaliation protections.

Training and Ongoing Monitoring. The Guidance provides that an effective training program:

- Explains the employer’s anti-harassment policy and complaint process;
- Describes and provides examples of prohibited conduct under the policy;
- Informs employees of their rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
- Explains how supervisors and managers prevent, identify, stop, report, and correct harassment, such as taking actions that minimize the risk of harassment, and provides clear instructions for addressing and reporting harassment;
- Is tailored to the workplace and workforce;
- Occurs on a regular basis for all employees; and
- Is conducted in a clear, easy-to-understand style and format.

Resources

To view the Guidance itself: [Enforcement Guidance on Harassment in the Workplace](#).

For EEOC resources that supplement the Guidance: [Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace](#); [Promising Practices for Preventing Harassment](#).



ENDNOTES

¹ Also referred to as quid pro quo harassment or disparate treatment.

² U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2024-1, Enforcement Guidance on Harassment in the Workplace (April 29, 2024), Sections I(B), III(A), III(B), III(B)(3)(b)(ii), & IV(A).

³ The Guidance acknowledges that religious freedom and free speech can intersect with harassment, but the EEOC did not provide significant detail on how employers can balance those competing interests, other than noting they would review those instances on a case-by-case basis.

⁴ Guidance, Section I(A).

⁵ Guidance, Section II(A)(5).

⁶ Guidance, Section II(A)(2).

⁷ Guidance, Section II(A)(10).

⁸ Guidance, Section III(C)(2).

⁹ Guidance, Sections IV(A) & (B).

¹⁰ Guidance, Section IV(C); U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2017-2, Promising Practices for Preventing Harassment (November 21, 2017).

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