

EEOC Guidance Provides Employers with a Roadmap for Effective Workplace Anti-Harassment Policies and Training

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Labor and Employment Alert

5.7.24

Last week, the Equal Employment Opportunity Commission (EEOC) published its updated guidance on harassment in the workplace (the "Guidance") which provides a comprehensive resource on federal workplace harassment law. The Guidance was issued on April 29, 2024 and took effect immediately. It is the first update since 1999 and incorporates several new developments in the law. Importantly, the Guidance also specifies what should be contained in effective anti-harassment policies and what effective training should minimally contain. That said, employers should remember that additional obligations may exist under state and local laws and regulations.

Guidance Summary

The Guidance outlines the standards governing workplace harassment claims and defenses under the federal equal employment opportunity ("EEO") statutes, *i.e.*, Title VII of the Civil Rights Act of 1964, Equal Pay Act of 1963, Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1973, and the Civil Rights Act of 1991. These statutes prohibit work-related harassment based on race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, genetic information (including family medical history) and age (40 or over).

The Guidance also details the EEOC's position on what qualifies as a protected characteristic and provides key examples of workplace behaviors that the EEOC believes rise to the level of harassment. Because the EEOC and other agencies rely on the enforcement guidance when investigating or litigating harassment claims, this Guidance is an important tool for employers seeking to implement and enforce effective anti-harassment policies.

Key Provisions

The Guidance contains new provisions incorporating recent cultural and legal developments such as the widespread rise in virtual or remote work environments, as well as new legal protections based on sexual orientation and gender identity. Several of these new provisions are discussed below, with examples of each, as set forth in the EEOC's Enforcement Guidance on Harassment in the Workplace.

Virtual Harassment. The Guidance provides that virtual harassment may occur through work-related communication systems, accounts, devices or platforms such as Microsoft Teams, Slack, or Zoom.

***Example:** Ted and Perry are coworkers in an architectural firm. Ted is White, and Perry is Black. Every Monday morning, Ted sends jokes from his work computer and work email account to colleagues, including Perry. Many of the jokes involve racial stereotypes, including stereotypes about Black individuals. Perry complains to Ted and their mutual supervisor after several weeks of Ted's emails, but Ted is not instructed to stop and continues to send such emails. Based on these facts, the racial jokes sent by Ted occurred within Perry's work environment because, among other reasons, they were sent using Ted's work computer and work email account and were sent to Perry and other colleagues in the workplace.*

Color-Based Harassment. The Guidance incorporates harassment based on race or national origin and color-based harassment due to an individual's pigmentation, complexion, or skin shade or tone. For example, if a supervisor harasses Black employees with darker complexions but does not harass Black employees with lighter skin tones, this may be evidence that harassment was due to color.

Example: Shawn, an inspector at a medical equipment manufacturing facility, is a Pakistani-American with brown skin. Two of Shawn's supervisors make comments to him that suggest his skin is the color of human feces. Based on these facts, the supervisors' harassing conduct toward Shawn is based on his color.

Sexual-Orientation / Gender Identity Harassment. The Guidance incorporates principles set forth by the Supreme Court of the United States' 2020 decision in *Bostock v. Clayton County, Georgia*, in which the Court held that sex discrimination, which is prohibited by Title VII of the Civil Rights Act of 1964, includes discrimination on the basis of sexual orientation and gender identity. The updated Guidance notes several instances of potential harassment based on sexual orientation and gender identity, including outing an individual or repeated and intentional misgendering (the use of a pronoun or name to refer to a worker that does not comport with the impacted worker's gender identity).

Example: Chloe, a purchase order coordinator at a retail store warehouse, is approached by her supervisor, Alton, who asks whether she was "born a man" because he had heard a rumor that "there was a transvestite in the department." Chloe disclosed to Alton that she is transgender and asked him to keep this information confidential. After this conversation, Alton instructed Chloe to wear pants to work because a dress would be "inappropriate," despite other purchase order coordinators being permitted to wear dresses and skirts. Alton also asks inappropriate questions about Chloe's anatomy and sexual relationships. Further, whenever Alton is frustrated with Chloe, he misgenders her by using, with emphasis, "he/him" pronouns, sometimes in front of Chloe's coworkers. Based on these facts, Alton's harassing conduct toward Chloe is based on her gender identity.

Harassment by Non-Traditional Actors. The Guidance advises that harassment by any person, including coworkers, customers, and clients, can violate federal law – not just harassment by owners, managers, and supervisors. For example, an employer may have a duty to protect a receptionist who routinely receives inappropriate comments from a mail carrier while they deliver mail.

Genetic Information Harassment. The Guidance clarifies that harassment may occur on the basis of genetic information which includes harassment based on an individual's, or an individual's family member's, genetic test or on the basis of an individual's family medical history.

Example: Manuella, a web developer at a university, joined in on a lively conversation between coworkers who recently used DNA ancestry testing to learn more about their extended families. Some mentioned finding unknown cousins, and others said that they had extended family from countries that surprised them. Manuella, taking part in the conversation, mentioned that although she had not taken a DNA ancestry test, a cousin recently took a genetic test that revealed that they had inherited the gene mutation that would put them at a higher risk of developing Hypertrichosis, a condition also known as Werewolf Syndrome. Soon after this discussion, coworkers began to refer to Manuella as "the werewoman," to make howling noises when they passed her office, and to leave dog treats on her desk. Based on these facts, the coworkers' harassing conduct toward Manuella is based on her genetic information.

Gender Identity / Gender Conformance Harassment. The Guidance also states that harassment may include comments or conduct aimed at an individual who does not present in a manner that would stereotypically be associated with that person's sex, as well as the denial of access to a bathroom consistent with a worker's gender identity.

***Example:** After Eric, an iron worker, made a remark that his foreman, Josh, considered “feminine,” Josh began calling Eric “Erica,” “princess,” and “gay.” Several times a week, Josh approached Eric from behind and simulated intercourse with him. More than once, Josh exposed himself to Eric. Based on these facts, Josh targeted Eric based on his perception that Eric did not conform to traditional male stereotypes and subjected Eric to harassment based on sex.*

Harassment by Someone of the Same Protected Class. The Guidance also provides that harassment may occur when the harasser shares the same protected characteristic as the victim, *i.e.*, intra-class harassment. The Guidance also addresses associational harassment – harassment because the complainant associates with someone in a different protected class. For example, harassment of a White individual because his spouse is Black.

***Example:** Dara and Sloane are lab technicians at a pharmaceutical research laboratory. On multiple occasions, one of their coworkers, Rose, makes dismissive comments to Dara, who has three children, such as, “shouldn’t mothers stay at home with their kids?” and “don’t expect to move up the career ladder with all of those children.” Rose also makes dismissive comments to Sloane, who has no children and intends to remain childfree, on a handful of occasions, such as, “women who don’t want children are frigid,” “it is sad to watch you choose a career over a family,” and “are you sure you don’t want a baby? Every woman should want a baby!” Based on these facts, Rose’s harassing conduct toward Dara and Sloane is based on their sex even though they all are women.*

Pregnancy Harassment. The Guidance also addresses harassment on the basis of pregnancy, including harassment related to breastfeeding, morning sickness, contraception and the decision to obtain – or not obtain – an abortion.

***Example:** Lisbet, a software engineer for a video game publisher, recently returned to work after giving birth. Lisbet uses a lactation room at work as needed in order to express breastmilk. Lisbet’s coworker, Nathaniel, knocks loudly on the lactation room door while Lisbet is inside and pretends that he is going to enter. Nathaniel also refers to Lisbet’s breasts as “milk jugs,” makes suckling noises when Lisbet enters and exits the lactation room and asks Lisbet if he can have a squirt of milk for his coffee. Nathaniel also refers to the lactation room as “Lisbet’s getaway” and asks why he is not allowed to take breaks in private rooms. Based on these facts, Nathaniel’s harassing conduct toward Lisbet is based on a pregnancy-related medical condition.*

Retaliatory Harassment. Finally, the Guidance covers conduct characterized as “retaliatory harassment.” The threshold for establishing retaliatory harassment is different than that for a discriminatory hostile work environment. In *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court explained that the EEO statutes’ anti-retaliation provisions complement the EEO statutes’ anti-discrimination provisions but protect against a broader range of behaviors—they forbid anything that might deter a reasonable person from engaging in protected activity. Notably, retaliatory harassing conduct can be challenged under this standard even if it is not sufficient severe or pervasive to alter the terms and conditions of employment by creating a hostile work environment.

Practical Next Steps for Employers

Barring judicial intervention, the Guidance is effective immediately and communicates the EEOC’s position regarding conduct and behaviors the agency believes constitute unlawful harassment. Given the breadth of updates, employers should promptly review their handbooks and training programs with counsel in order to ensure all necessary updates are made. Additionally, employers may have additional obligations under state and local laws and regulations and should consult with an attorney regarding potential updates in the jurisdictions in which they have employees.

For practical information on the Guidance, employers may consider reviewing the EEOC's Summary of Key Provisions, Workplace Harassment FAQs, and the Small Business Fact Sheet.

Members of the Labor and Employment Group at White and Williams LLP are available to assist employers with questions regarding the EEOC's new harassment Guidance. If you have questions, please contact Andrea Moss (mossa@whiteandwilliams.com; 212.242.6152), Joseph M. Carr (carrj@whiteandwilliams.com; 610.782.4907) or another member of the Group.

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