

EEOC's Proposed Guidance on Harassment in the Workplace

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The Equal Employment Opportunity Commission (EEOC) released its revised “[Proposed Enforcement Guidance on Harassment in the Workplace](#)” on Sept. 29, 2023. If issued in final, the guidance would be the EEOC’s first update on harassment since its “Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors” in 1999. A 2017 proposed guidance on workplace harassment stalled under the Trump Administration.

The proposed guidance is consistent with the EEOC’s enforcement priorities: preventing and remedying systemic harassment and protecting vulnerable workers, as set forth in the Commission’s [Strategic Enforcement Plan Fiscal Years 2024-2028](#).

The new proposal reflects changes in the law, including the U.S. Supreme Court’s decision in *Bostock v. Clayton County*. The decision held Title VII of the Civil Rights Act’s prohibition on sex discrimination includes discrimination based on gender orientation and sexual identity. The guidance also addresses issues arising from the #MeToo movement and changes in technology that have affected the workplace, such as virtual and online harassment.

In releasing the proposed guidance, the EEOC notes that harassment remains a serious workplace problem, with harassment claims appearing in more than one-third of the charges filed with the EEOC between fiscal years 2016 and 2022.

Public comment to the proposal will be open through November 1, 2023.

Purpose

The proposed enforcement guidance provides a Commission-approved legal analysis of standards for determining when conduct constitutes harassment based on a protected characteristic and employer liability for claims of harassment arising under the statutes enforced by the EEOC. The document is intended as a resource for EEOC staff and potentially other agencies charged with investigating, adjudicating, or litigating harassment claims.

The guidance states nothing in it is intended to prejudge the outcome of a specific charge filed with the EEOC. The guidance consolidates and supersedes several earlier EEOC guidance documents dealing with harassment issued during the 1990s.

Key Provisions

Following are some key provisions in the proposed guidance:

- An express recognition that sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including the expression of one’s gender identity. The EEOC notes that harassment can be based on an

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individual's gender presentation that is not stereotypically associated with that person's gender assigned at birth. The EEOC states that harassment can include the intentional and repeated use of a name or pronoun inconsistent with an individual's gender identity (*i.e.*, misgendering) or the denial of access to sex-segregated facilities such as bathrooms and locker rooms that are consistent with an individual's gender identity.

- Allegedly harassing conduct must be evaluated in the context in which it arises. In certain instances, conduct that is not discriminatory on its face may in fact be discriminatory based on the specific context in which it occurs or within a larger social context. As an example, the EEOC notes the U.S. Supreme Court has found the term "boy" in reference to a Black man may reflect racial animus, depending on factors such as context, inflection, tone of voice, local custom, and historical usage.
- The statutes enforced by the EEOC are not limited to discriminatory conduct that has tangible or economic effects and instead are intended to address "the entire spectrum of disparate treatment." Echoing established case law, however, the EEOC notes these statutes do not impose a general civility code that covers "run-of-the-mill boorish, juvenile, or annoying behavior" not based on a legally protected characteristic. Rather, the EEOC requires conduct to be more than merely offensive but does not require that the conduct cause psychological harm to be actionable.
- An individual may establish harassment based on conduct that is not specifically directed at them.
- Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment.
- Harassment need not result in a decline in an individual's work performance or any apparent psychological injury, as long as the nature of the conduct and the individual's reactions to the conduct are sufficient to establish that the ongoing conduct creates a hostile work environment. An individual may establish harassment by showing that the conduct would make it more difficult for a reasonable person in the individual's situation to do their job.
- While an individual alleging harassment must establish that the harassment was unwelcome, in the EEOC's view, conduct that is subjectively and objectively hostile is necessarily unwelcome. According to the EEOC, establishing unwelcomeness is logically part of demonstrating subjective hostility and, in some instances, may also be relevant to a showing of objective hostility. Further, while the U.S. Supreme Court has not expressly eliminated unwelcomeness as the gravamen of a harassment claim, the EEOC considers this requirement effectively subsumed by the Court's requirement that an individual demonstrate the conduct was both subjectively and objectively hostile.
- Although allegedly harassing conduct must be evaluated in the context of the specific work environment in which it arose, there is no "crude environment"

exception if the harassment otherwise meets the standard of severe or pervasive harassing conduct. While the conduct must be evaluated in the context of the particular work environment, prevailing workplace culture does not excuse harassing conduct.

- Individuals who have not been subjected to harassing conduct based on their protected characteristics may file harassment claims if they have been harmed by the unlawful harassment of a third party. For example, if a supervisor directs an employee to engage in harassing conduct against a coworker, both the harassed coworker and the employee directed to participate in the harassment as part of their job duties have standing to file a claim, provided the employee who was directed to participate in the harassment suffered harm as a result.
- In light of new and emerging technology, conduct that occurs outside of the workplace can still affect the terms and conditions of employment. Employees' use of electronic communications, including their private phones, computers, or social media accounts, can still have a potential impact on other employees in the workplace. For example, if an employee posts harassing or discriminatory comments regarding a coworker on social media and the coworker learns of the posts or other employees discuss the posts at work, the posts can contribute to a hostile work environment.
- Harassment can occur in the virtual workplace just as it can in the physical workplace. For example, an employee's comments during virtual meetings or inappropriate imagery or home office decorations visible during videoconferences can contribute to a hostile work environment.
- Temporary employment agencies are responsible for taking reasonable corrective action within their control to address complaints of harassment. In these situations, corrective action may include ensuring that the client is aware of the alleged harassing conduct; insisting the client investigate the alleged conduct and take appropriate corrective measures; working jointly with the client to conduct an investigation and identify corrective measures; monitoring the worksite to ensure the corrective measures have been taken; and providing the temporary employee the option of taking another assignment at the same pay rate, if feasible.

EEOC Offers Proactive Guidance for Employers

The guidance examines the different standards for employer liability in harassment cases based on whether the alleged harasser is the proxy or alter ego of the employer, a supervisor, or a non-supervisory employee, coworker, or non-employee.

The EEOC also provides guidance to assist employers in developing anti-harassment policies and procedures by describing the general features of effective anti-harassment policies, processes, training, and implementation. (These measures are essential for an employer to demonstrate it took reasonable care to prevent harassment under the *Faragher-Ellerth* defense.) The guidance also provides examples of an employer's actions that would weigh against a finding of an effective anti-harassment program, including where an employer created obstacles to filing

complaints or established ineffective complaint mechanisms and where there is evidence of retaliation against those who complained.

Conducting Internal Investigations

With respect to internal investigations, the EEOC notes that an employer's investigation will generally be considered adequate if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." Under this standard, the investigation does not need to utilize a "trial-type" investigation, but it should be conducted by an impartial party free from the influence of the alleged harasser and seek information about the conduct from all parties involved. Once the employer completes its investigation, the guidance states the employer should inform the complainant and alleged harasser of its findings and any corrective action that it will be taking, subject to applicable privacy laws. According to the guidance, the EEOC will assess an employer's corrective actions based on how the employer utilized the "arsenal of incentives and sanctions" available to address the complained-of harassment. The guidance further states that an employer is not required to impose discipline against an alleged harasser if, after investigation, the employer concludes the alleged harassment did not occur or the results of the investigation are inconclusive. However, if the employer is unable to determine whether the alleged harassment occurred, the employer may elect to implement preventive measures such as counseling, training, monitoring, or issuing reminders to the entire workforce about the employer's anti-harassment policy.

Issues Relating to Systemic Harassment

To help combat systemic harassment, the guidance recommends that employers retain records of all harassment complaints and investigations. Employers should use these records to help identify patterns of harassment that can be useful for improving the employer's harassment prevention measures, including employee training. The EEOC views these records as relevant to employer credibility assessments and disciplinary measures.

The guidance provides that an employer must adopt a systemic remedy to address the pattern and practice, rather than only address the individual harassment. Further, if an employer receives frequent individual complaints of harassment, the employer must take steps to determine whether the complained-of conduct reflects a wider problem requiring a systemic response, such as developing comprehensive company-wide anti-harassment procedures.

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