

EEOC Enforcement Guidance on Workplace Harassment: Covered Bases and Causation

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May 15, 2024

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The Equal Employment Opportunity Commission (EEOC) issued its first updated [enforcement guidance on workplace harassment](#) in 25 years on April 29, 2024. The guidance reflects a number of new developments concerning workplace discrimination and harassment and reflects U.S. Supreme Court precedent extending anti-discrimination protections to LGBTQ workers.

The EEOC had released the draft version of its guidance in September 2023 after an earlier effort to update existing guidance failed to gain traction during the Trump Administration.

The guidance does not constitute legally binding precedent, but it provides “legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity (EEO) statutes enforced by the Commission.” The new guidance supersedes several earlier EEOC guidance documents on harassment.

The EEOC noted that since the Supreme Court held in 1986 that workplace harassment could constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964, harassing conduct remains a serious problem in the workplace, representing more than one-third of the charges received by the EEOC over the last five years.

The enforcement guidance is broken down into the three components of a harassment claim: (1) the covered bases and causation; (2) discrimination respecting a term, condition, or privilege of employment; and (3) liability. We will discuss each component in separate articles.

Covered Bases and Causation

The first section of the guidance examines the covered bases for a claim of workplace harassment and the factors to be considered in determining whether particular conduct rises to the level of actionable workplace harassment. It also examines the characteristics protected by federal EEO laws and provides insight into the scope of protection provided for these characteristics.

Among the highlights in the new guidance:

- Race harassment includes harassment based on traits or characteristics linked to a person’s race, such as a person’s name, cultural dress and accent or speech pattern. Protection based on race extends to a person’s physical characteristics, including their appearance standards, hair texture, and hair style.
- National origin harassment includes harassment based on traits such as

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“physical characteristics, ancestry, or ethnic or cultural characteristics (e.g., attire or diet), and linguistic characteristics (e.g., non-English language accent or a lack of fluency in English).”

- The prohibition on religious harassment extends to religious stereotypes and requests for or receipt of religious accommodations in the workplace. Atheists and those without any religious beliefs are also protected from religious harassment. Religious harassment also includes explicit or implicit coercion by employees to have their coworkers engage in religious practices at work.
- Title VII of the Civil Rights Act’s prohibition on sex-based harassment also includes harassment based on pregnancy, childbirth, and related medical conditions such as lactation, morning sickness, use or non-use of contraception, and decisions related to abortions.
- Sex-based harassment under Title VII includes conduct based on an individual’s sexual orientation or gender identity, including how that identity is expressed. This includes “outing” a person’s sexual orientation or gender identity, repeated or intentional misgendering (using a pronoun inconsistent with a person’s gender identity) and “dead naming” (using a name used by a person prior to their transition), and denying a person access to a bathroom or other sex-segregated facility consistent with the person’s gender identity. Sexual orientation or gender identity harassment also includes conduct directed toward a person because the person presents themselves in a manner that is different from that which would be stereotypically associated with that person’s sex.
- Harassment prohibited by the Age Discrimination in Employment Act includes encouraging an older employee to retire or pressuring an older employee to accept a transfer to a position that uses less technology based on a stereotype that older workers are technologically illiterate.
- Disability harassment under Title I of the Americans With Disabilities Act includes conduct based on the person’s disability-related traits or characteristics such as how the person speaks, looks, or moves. Harassment based on an individual’s request for or receipt of an accommodation for their disability, the incorrect perception that a person has a disability, a person’s past disability, or a person’s association with a disabled person is also prohibited.
- The prohibition on retaliation under EEO statutes extends to what the guidance describes as “retaliatory harassment,” or harassment suffered by the employee due to their protected activity. Under the guidance, the threshold for establishing retaliatory harassment is different than the standard for establishing a hostile work environment. The guidance noted that an employer can be found liable for retaliatory harassment that is not sufficiently severe or pervasive to support a hostile work environment claim because the Supreme Court has held the EEO statutes’ anti-retaliation provisions protect against a broader range of behaviors by prohibiting any conduct that might deter a reasonable person from engaging in protected activity.

- The guidance provides that an individual can be found to have engaged in prohibited harassment against another individual even if both are in the same protected class, referred to as intraclass harassment.
- Harassment can also be based on more than one protected characteristic or be actionable under more than one EEO statute, which is referred to as intersectional harassment.

In order for harassment to be actionable under federal EEO statutes, the individual must establish the conduct occurred because of a statutorily protected characteristic. This is based on an examination of the totality of the circumstances. The guidance outlines a number of principles that are used to determine whether harassing conduct is based on protected characteristics. In doing so, however, the guidance notes that not all principles will apply in every instance.

The guidance identifies a number of factors that can be used to establish causation:

- At one end of the causation spectrum lies conduct that explicitly insults or threatens an employee based on a protected characteristic. The intentions of the alleged harasser are irrelevant in determining whether explicitly particular conduct is facially discriminatory and the conduct does not need to be directed at a particular individual to be actionable.
- Conduct based on stereotypes (whether positive, negative, or neutral) is prohibited. The new guidance highlights examples of gender-based assumptions about family roles, leadership abilities, gender roles, weight and body type, expression of sexual orientation or gender identity, and being a survivor of gender-based violence.
- Stereotypes do not need to be motivated by hostility toward a particular group. Even well-intentioned use of stereotypes such as suggesting to an older employee that they should retire to enjoy their “golden years” constitutes prohibited conduct.
- Harassing conduct must be examined in the context of where it takes place or in the larger social context, such as using the term “boy” when referring to an African American male. The harassing nature of this comment is dependent on the “context, inflection, tone of voice, local custom, and historical usage” of the term.
- Facially neutral conduct can also be related to facially discriminatory conduct and therefore should not be discounted in evaluating a harassment claim if the two sets of conduct are sufficiently related.
- Timing can be used to determine if harassing conduct is related to a protected characteristic if the conduct begins or worsens after the alleged harasser learns of an individual’s protected characteristic.
- Sex-based harassment also has its own factors to help determine whether

certain conduct is unlawful. These factors include explicit or implicit proposals for sexual activity, hostility toward members of an individual's sex, and comparative evidence showing how the harasser treated individuals of one sex versus another.

On May 13, 2024, attorneys general from 18 Republican states filed a lawsuit in the U.S. District Court for the Eastern District of Tennessee against the EEOC, seeking to block enforcement of the EEOC's new harassment guidance as it pertains to transgender employees. The states allege the EEOC lacked the power to declare existing federal laws provide the rights to transgender employees set forth in the new harassment guidance.

In their lawsuit, the states allege the scope of Title VII is much narrower than described in the new guidance. They contend that while Title VII's protection against sex-based discrimination may prevent employers from terminating transgender employees on that basis, it does not require employers to accommodate transgender employees in the workplace. Of particular concern to the states is the guidance regarding use of bathrooms and other gender-segregated facilities and the use of preferred pronouns. The states allege the EEOC's harassment guidance violates the Constitutional separation of powers.

The states named as plaintiffs in the lawsuit are, Alabama Alaska, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Utah, Virginia, and West Virginia.

Related:

- [EEOC Enforcement Guidance on Workplace Harassment: Impact on a Term, Condition, or Privilege of Employment](#)
- [EEOC Enforcement Guidance on Workplace Harassment: Liability](#)

Employers should review their harassment policies in light of the new guidance. Please contact a Jackson Lewis attorney with any questions.

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