

EEOC ISSUES GUIDANCE ON WORKPLACE HARASSMENT INSIGHT

The U.S. Equal Employment Opportunity Commission (EEOC) recently published its final [Enforcement Guidance on Harassment in the Workplace](#). The EEOC also issued supplemental documents with the guidance, including a [Summary of Key Provisions](#) document, [Questions and Answers for Employees](#), and a [Small Business Fact Sheet](#).

KEY TAKEAWAYS

- Guidance replaces the existing EEOC's enforcement guidance on harassment.
- Guidance includes 70+ examples of harassment issues.
- Guidance reflects increased protections for LGBTQ+ workers, broadened definition of covered "medical conditions" in the context of pregnancy, and clarification on the expression of sincerely held religious beliefs.
- Guidance offers recommendations for employers' harassment trainings and policies; employers in states with mandated sexual harassment trainings should consider potential overlap with EEOC recommendations.

BACKGROUND

On April 29, 2024, the EEOC published its long-expected updated guidance on prohibited harassment in the workplace. As most observers expected, the EEOC's commissioners approved the guidance on a 3-2 vote along party lines.

The update is the EEOC's first refresh of its harassment guidance in over two decades. The guidance takes effect immediately. The finalized guidance comes after the EEOC's published its proposed guidance in October 2023.

While the guidance itself notes that it does not carry any binding force of law as it is not a regulation nor formal statute, the EEOC's guidance is frequently utilized by HR practitioners — and referenced by Federal courts — in evaluating harassment matters.

The EEOC enforces several federal laws that prohibit discrimination and harassment in the workplace, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Consolidating the laws, the new guidance provides an update on the EEOC's legal position on prohibited workplace harassment on the basis of employees' race, religion, sex, disability, genetic information, national origin, and age (covering employees at least 40 years old).

UPDATED LEGAL ANALYSIS FROM EEOC ON PROHIBITED HARASSMENT

Overall, the guidance represents the most up-to-date insight on the EEOC's legal positions for what constitutes prohibited harassment. Several portions of the guidance bring the EEOC's guidance in line with judicial opinions from the last twenty years, while others signal a more aggressive interpretation.

The guidance is expansive, including 77 in-depth examples. Among the examples from the EEOC's guidance:

- "Misgendering" an employee constitutes sex-based harassment and discrimination.
- "Outing" an employee (i.e., disclosing that individual's sexual orientation or gender identity without their consent) constitutes sex-based harassment and discrimination.
- Race-based harassment does not need to directly implicate skin color, and instead, can be linked to "traits or characteristics linked to an individual's race, such as the [employee's] name, cultural dress, accent or manner of speech," or appearance characteristics like hairstyle and hair texture.
- Denigrating comments about an employee's need to take lactation breaks after pregnancy can be a form of harassment based on medical condition.
- "Anonymous" harassment, such as the discovery of racist or anti-Semitic illustrations or displays in the workplace without attribution, may create an objectively hostile work environment, requiring employers to take corrective action.
- Harassment may occur in "virtual" workspaces, such as where sexist, ageist, or ableist comments are made in a group chat or video call.
- Conduct wholly outside the workplace, such as comments made on an employee's "personal social media page," can contribute to a hostile work environment if it eventually impacts the workplace.
- Repeated comments about religion, such as unwanted preaching to coworkers, may contribute to religious-based harassment.

GUIDANCE OFFERS RECOMMENDATIONS ON WORKPLACE ANTI-HARASSMENT POLICIES AND PRACTICES

The EEOC's guidance offers best practices on "effective" anti-harassment policies, complaint procedures, and investigations into harassment. Among the tips from the guidance related to policies and investigations, the EEOC advises that employers:

- Maintain robust anti-harassment policies and disseminate them to all workers;
- Maintain "multiple avenues" for reporting harassment;
- Require supervisors report harassment when they are aware of it;
- Provide prompt and effective investigations and corrective action;
- Provide confidentiality protections for individuals who report harassment

On effective anti-harassment training, the EEOC guidance notes that employers' anti-harassment trainings should:

- describe and provide examples of prohibited conduct;
- provide information about employees' rights if they experience, observe, become aware of, or report conduct they believe may be prohibited;
- provide supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment, such as actions that can be taken to minimize the risk of harassment, and with clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of;
- be tailored to the workplace and workforce;
- be provided on a regular basis to all employees; and
- be provided in a clear, easy-to-understand style and format.

INTERPLAY WITH STATE LAW REQUIREMENTS AND BEST PRACTICES FOR EMPLOYERS

In the wake of the #MeToo movement, several states — including New York, Connecticut, and Massachusetts — instituted obligations on employers for responding to sexual harassment, such as mandatory trainings and/or anti-sexual harassment policies. The EEOC's guidance is just the latest development in the now fully-formed reality that employers need to pay regular attention to anti-harassment practices on a broader scale.

Although the guidance does not mandate any particular frequency with which employers need to provide training or update policies, employers would be well-served with an annual review of their harassment and discrimination policies and trainings. And employers in states with mandated sexual harassment training requirements may consider broader trainings (beyond just sexual harassment) to better support organization-wide harassment-free policies.

Employers should review their policies and prepare for compliance with the EEOC's final Guidance. Should you have questions or need advice, please reach out to Harris Beach's New York Labor and Employment team: attorney [Daniel J. Moore](mailto:dmoore@harrisbeach.com) at (585) 419-8626 and dmoore@harrisbeach.com; attorney [Scott D. Piper](mailto:spiper@harrisbeach.com) at (585) 419-8621 and spiper@harrisbeach.com; attorney [Ibrahim Tariq](mailto:itariq@harrisbeach.com) at (585) 419-8556 and itariq@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

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