



EEOC Issues Proposed Harassment Guidance Broadening Employers' Obligations Under Federal EEO Law

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On October 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its notice of proposed guidance on "Enforcement Guidance of Harassment in the Workplace."

The guidance incorporates updates reflecting current case law governing workplace harassment and addresses the proliferation of digital technology and how social media postings and other off-work conduct could contribute to a hostile work environment. The guidance further illustrates a wide range of scenarios showcasing actionable harassment.

A summary of the key focuses of the proposed guidance includes:

1. Covered Basis and Causation: The guidance aligns itself with current case law and further illustrates the agency's broad interpretation of the types of harassment prohibited by federal EEO law.

Covered Basis

The guidance makes clear that federal EEO statutes only protect against harassment if it is based on an employee's legally protected characteristics, such as race, color, national origin, religion, sex, age, physical and mental disability, and genetic information. Building in part on case law over the past 25 years and in part on positions taken by the commission, it goes on to provide that "sex-based" discrimination includes harassment based on

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pregnancy, childbirth, and other related medical conditions such as a worker's "reproductive decisions," "contraception or abortion" and that "sex-based" discrimination incorporates protections for LGBTQ+ workers against harassment based on sexual orientation and gender identity. The guidance further provides protections for "sex-based" stereotyping.

Notably, under the proposed guidance, the EEOC would recognize claims for perceptual-based harassment where harassment is based on the perception that an individual has a particular protected characteristic, even if that perception turns out to be incorrect. Moreover, the EEOC would recognize claims under federal EEO law for "association harassment" where a complainant associates with someone in a different protected class or suffers harassment because the complainant associates with someone in the same protected class.

Causation

The guidance reaffirms that a causation determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances. The guidance provides numerous examples that reflect a wide range of scenarios wherein causation may or may not be established. These scenarios reflect findings where the conduct involved alleges facially discriminatory conduct, stereotyping, situational context evaluations, close timing, and comparator evidence.

2. Broadening of What Constitutes a Hostile Work Environment. The guidance illustrates the agency's broad interpretation of what constitutes a "hostile work environment" under federal EEO law.

Narrowing the Objective Standard

To establish a hostile work environment, a plaintiff must show that there is conduct that is both subjectively and objectively hostile. Notably, the guidance states that whether conduct is objectively hostile "should be made from the perspective of a reasonable person of the complainant's protected class." The traditional "reasonable person" standard was not so limited. In the EEOC's view, "personal or situational characteristics," like age differential or undocumented worker status, also impact both the objective and subjective reasonableness assessment – a position that is not shared by all the courts.

Conduct Not Directed at the Complainant Can Create a Hostile Work Environment

The guidance provides that an individual who has not personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging that they have been harmed by unlawful harassment of a third party. For example, an employee who is forced to engage in unlawful harassment of another employee may have their own claim under the law, even though they were not personally subjected to unlawful harassment.

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Conduct Outside the Workplace Creates Hostile Work Environment for

The guidance broadly considers conduct occurring in a non-work-related context as part of a hostile work environment. The EEOC provides several examples where an employer may have an obligation to take action against conduct that occurs in a non-work-related context. In the EEOC's view, an employer may be liable for harassment if the conduct simply "impacts the workplace." In two examples, the EEOC notes that an employer could be subject to harassment claims if:

- "a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment."
- "an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly, or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment."

This guidance significantly stretches current case law, which typically only considers outside-of-work conduct when it is carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between coworkers who constantly work with and see each other inside the workplace. The guidance notes that the EEOC's broadened stance is in light of the proliferation of digital technology, such as electronic communications using private phones, computers, or social media accounts, that often bleeds into the workplace.

3. Employer Liability: The guidance illustrates the agency's long-held position that liability depends on the role of the harasser and mechanisms the employer has in place to prevent the harassment. In some cases, the perception by the complainant of the harasser's role may be a determining factor in liability assessments.

Framework of Liability

Consistent with governing case law, the guidance sets forth several frameworks under which claims of harassment will be analyzed. Which framework is applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Once the status of the harasser is determined, the appropriate standard will be applied to assess employer liability for a hostile work environment.

- **Automatic Liability:** An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.
- **Vicarious Liability:** If harassment by a supervisor creates a hostile work environment that did not include a tangible employment action, the employer can raise an affirmative defense to liability or damages.

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- **Negligence:** If harassment by a non-supervisory employee or non-employee, the negligence standard is principally applied.

Expansion of the Liability Standards that Apply in Harassment Cases

The guidance also expands on the circumstances in which an employer may be subject to automatic liability. Since the Supreme Court's Faragher/Ellerth rulings, the "supervisor" designation often becomes a key issue in determining an employer's liability. In the EEOC's view, a coworker is a supervisor if the complainant reasonably believed the coworker had the power to recommend or influence tangible employment actions (e.g., hiring, firing, and demotions) against the complainant. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had no power to take or influence tangible employment actions against a complainant. This guidance appears to contradict the Supreme Court's instruction to limit the supervisor's inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the complainant.

Employer's Reporting Mechanism Not Required

An employer has an affirmative defense to hostile work environment harassment where it can show both that it took reasonable steps to prevent and correct harassment and the employee unreasonably failed to take advantage of those opportunities or take other steps to avoid the harassment. The guidance provides that, even if the employee did not use the employer's reporting mechanism to complain of harassment, other actions, such as filing a grievance with a union, may mean that the employer has been notified of the concern, and the affirmative defense cannot be used.

The public is invited to submit comments and view the document via the federal e-regulation website **until November 1**.

Notably, EEOC guidance does not have the force of law, but it provides insight into how the EEOC will interpret and seek to enforce the federal EEO laws. Regardless of changes, management and human resource executives will need to continue anti-harassment efforts that have been put into place over the last 25 years: maintain clear and robust anti-harassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. Burr and Forman attorneys are well-versed in anti-harassment efforts and are available to assist in this important area.