

EEOC Issues Final Enforcement Guidance on Harassment in the Workplace

By: Katie A. Conklin and John A. Vering^[1]

On April 29, 2024, the Equal Employment Opportunity Commission (EEOC) published a long-anticipated update to its enforcement guidance on harassment in the workplace. The EEOC's previous guidance had not been updated since 1999. The updated guidance reflects the legal and social changes of the past two decades and includes over 70 hypothetical examples of unlawful workplace harassment based on race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, age, and genetic information.

The EEOC's guidance is structured based on the three components of a harassment claim, each of which must be satisfied for harassment to be unlawful under federal law: (1) whether the harassment was based on a legally protected characteristic; (2) whether the harassment constituted or resulted in discrimination with respect to a term, condition, or privilege of employment; and (3) whether there is a basis for holding the employer liable for the conduct.

Covered Bases and Causation

For harassment to qualify under the EEOC guidance, it must occur because of an employee's legally protected characteristic. The EEOC guidance identifies the legally protected characteristics covered by federal law, and provides specific examples of harassing conduct for each:

- Race-based harassment includes harassment based on traits or characteristics linked to an individual's race, such as an individual's name, cultural dress, accent or manner of speech, and physical characteristics, including appearance standards (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups).
- Color-based harassment due to an individual's pigmentation, complexion, or skin shade, while sometimes related to race-based harassment, is independently covered by Title VII.
- National origin harassment includes ethnic epithets, derogatory comments about individuals of a particular nationality, the use of stereotypes about an individual's national origin, or harassment regarding traits or characteristics linked to an individual's national origin (e.g., attire or diet).
- Religious harassment includes the use of religious epithets or offensive comments based on an individual's religion (including atheism), or religious stereotypes, and harassment based on an individual's request for or use of a religious accommodation.
- Sexual harassment includes pregnancy, childbirth, reproductive health, and related medical conditions; sexual orientation; and gender identity. Examples of sex-based harassment may include comments regarding an individual's choices regarding vasectomies, contraceptives, or abortions as well as comments related to pregnancy or pregnancy-related conditions such as lactation. Harassment based on an individual's sexual orientation and gender identity includes the intentional and frequent usage of pronouns other than the individual's preferred pronouns (called "misgendering"); denial of access to a bathroom corresponding with an individual's gender identity; and harassment based on manners stereotypically associated with one's sex.
- Age-based harassment includes harassment based on stereotypes about other workers, even if not motivated by animus, such as pressuring an older employee to transfer to a job that is less technology-focused because of the perception that older workers are not well-suited to such work.

- Age-based harassment may also include encouraging an older employee to retire.
- Disability-based harassment includes comments based on an individual's physical or mental disability, and harassment based on traits or characteristics linked to an individual's disability, such as how an individual speaks, looks, or moves.
 - Harassment based on genetic information includes harassment based on an individual's, or an individual's family member's, genetic test or based on an individual's family medical history.

The EEOC notes that harassment may occur within protected classes when both the harasser and the claimant belong to the same class (called "intra-class harassment"). Additionally, harassment may occur based on multiple facets of a claimant's identity. For example, harassment may occur based on age and sex.

To establish causation, the evidence must show that an individual was subject to harassment because of their protective characteristic. If an employee experiences harassment, but the evidence does not link the harassment to a protected characteristic, the individual's harassment claim will fail.

Discrimination With Respect to a Term, Condition, or Privilege

For workplace harassment to be unlawful, it must not only be based on a protected characteristic, but also affect a "term, condition, or privilege" of employment. The EEOC notes that harassment becomes unlawful when (1) enduring offensive conduct becomes a term or condition of continued employment (often referred to as "quid pro quo" harassment); or (2) conduct that is severe or pervasive enough to create a hostile work environment that constructively changes the terms or conditions of employment.

According to the EEOC guidance, while no single factor is required to establish a hostile work environment claim, relevant factors may include the frequency and severity of the conduct, the degree to which it was physically threatening or humiliating, the degree to which it interfered with the employee's work performance, the degree to which it caused psychological harm, and whether and to what extent there is a power disparity between the harasser and claimant.

The EEOC also notes that hostile work environment claims may be based on conduct that occurs in a work-related context outside of the regular place of work. For example, harassment may occur on technology platforms used for work-related communications (e.g., e-mail, instant message, or video conferencing platforms), including jokes and photos sent in work group chats, racist imagery in the background of a video meeting in one's workspace, or sexual comments made during a video meeting.

Employment Liability

According to the EEOC, when an individual establishes that an employer made an explicit change to a term, condition, or privilege of employment linked to harassment based on a protected characteristic ("quid pro quo" harassment), the employer will be liable with no defense. However, for hostile work environment claims, the liability standard depends on whether the harasser is a proxy or alter ego of the employer, supervisor, or non-supervisory employee, co-worker, or non-employee.

If the harasser is an alter ego or proxy of the employer, the employer will be automatically liable for the unlawful harassment. An individual is considered an alter ego or proxy of the employer if the individual possesses such high rank or authority that his or her actions can be said to speak for the employer. Individuals who might be considered proxies include sole proprietors and other owners; partners; corporate officers; and high-level managers whose authority or influence within the organization is such that their actions could be said to "speak for" the employer. By contrast, a supervisor does not qualify as the employer's alter ego merely because the supervisor exercises significant control over the complaining employee.

If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim (a significant change in employment status or perhaps even merely some harm with respect to an identifiable term or condition of employment), the employee will be vicariously liable for the hostile work environment created by that supervisor and there is no defense. If the harasser is a supervisor (but not a proxy or alter ego) and the hostile work environment does not include a tangible employment action, the employer is vicariously liable for the action of the harasser, but the employer can limit its liability or damages if can carry the burden of proving if it exercised reasonable care to prevent and correct harassment and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

On the other hand, if a non-supervisory employee or third party created the hostile work environment, courts will apply the negligence standard to determine whether the employer unreasonably failed to prevent the harassment or failed to take reasonable corrective action in response to the harassment of which it knew or should have known.

Legal Challenge to Portions of Guidance

The attorney generals of 18 states, including Missouri and Kansas, have filed a lawsuit challenging the EEOC's guidance on harassment based on gender identity, including the EEOC's guidance regarding issues such as requiring the use of the employee's preferred pronoun and prohibiting denial of access to a bathroom or other sex-segregated facility consistent with an employee's gender identity.

What This Means for Employers

Although the EEOC's guidance is not binding on courts, employers can expect the EEOC to apply the standards and interpretations set forth in the guidance to charges filed with the agency. To ensure compliance with the guidance, employers should seek a legal review of all anti-harassment policies and reporting procedures to determine if updates are needed. At a minimum, an employer's anti-harassment policy should include the definition of prohibited conduct, a requirement for supervisors to report any harassment of which they become aware, multiple avenues for reporting, accessible points for contact for such reports, and an explanation for the complaint process, including anti-retaliation and confidentiality protections. Employers should also seek legal counsel to determine if their current practices for harassment training should be modified. There continue to be numerous gray areas regarding whether certain conduct amounts to unlawful harassment and how to best deal with harassment complaints in order to minimize legal liability.

If you have any questions concerning the EEOC's enforcement guidance on harassment in the workplace or harassment issues generally, please do not hesitate to contact the Seigfreid Bingham Employment Law Team. We will continue to monitor the latest developments on any forthcoming regulations and challenges to this guidance.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the authors, [John Vering \(jvering@sb-kc.com\)](mailto:jvering@sb-kc.com) 816.265.4109 and [Katie Conklin \(kconklin@sb-kc.com\)](mailto:kconklin@sb-kc.com) 816.265.4114, or other shareholders in Seigfreid Bingham's Employment Law Group, including [John Neyens \(johnn@sb-kc.com\)](mailto:johnn@sb-kc.com) 816.265.4152, [Mark Opara \(mopara@sb-kc.com\)](mailto:mopara@sb-kc.com) 816.265.4140, [Shannon Johnson \(sjohnson@sb-kc.com\)](mailto:sjohnson@sb-kc.com) 816.265.4139, [Brenda Hamilton \(bhamilton@sb-kc.com\)](mailto:bhamilton@sb-kc.com) 816.265.4103, [Julie Parisi \(jparisi@sb-kc.com\)](mailto:jparisi@sb-kc.com) 816.265.4159, [Christopher Tillery \(ctillery@sb-kc.com\)](mailto:ctillery@sb-kc.com) 816.265.4157, or your regular contact at Seigfreid Bingham at 816.421.4460.

[1]The authors would like to acknowledge and thank Amaris G. Garber, our Summer Associate, for her assistance in preparing this client alert.