

HR COMPLIANCE BULLETIN

Overview of the EEOC's Workplace Guidance to Prevent Harassment

On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) published its [final guidance](#) on harassment in the workplace, which went into effect immediately upon issuance. The guidance explains how the EEOC may enforce equal employment opportunity (EEO) laws against an employer when workplace harassment is alleged or suspected.

The EEO laws are a collection of federal laws that prohibit covered employers from discriminating against or harassing individuals based on certain characteristics. These characteristics, also known as protected traits, include race, color, religion, national origin, sex (including sexual orientation, gender identity and pregnancy, childbirth, or related medical conditions), disability, age (40 and older) and genetic information (including family medical history).

The final guidance supersedes and consolidates earlier documents issued by the EEOC to guide agency staff members who investigate claims of harassment. The guidance clarifies the EEOC's positions on the application of EEO laws and includes updates to reflect legal developments in key areas such as protections regarding pregnancy, sexual orientation and gender identity, as well as online harassment considerations in an increasingly remote environment.

Action Steps

Employers subject to EEO laws should familiarize themselves with the final guidance. They may also consider reviewing and revising their policies and procedures to ensure compliance with the final guidance. This Compliance Bulletin provides an overview of the key provisions from the EEOC's final guidance to prevent harassment.

Provided to you by **Sullivan Benefits**

Highlights

On **April 29, 2024**, the EEOC published final guidance on harassment in the workplace. The new guidance clarifies the EEOC's positions on the application of EEO laws and includes updates to:

- Reflect legal developments with respect to protections on the basis of pregnancy status, sexual orientation and gender identity; and
- Address online harassment considerations in increasingly remote work environment.

Additional Resources

- [EEOC Harassment Home Page](#)
- [EEOC Sexual Harassment Home Page](#)
- [Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace](#)
- [Questions and Answers for Employees: Harassment at Work](#)





Background

Overview of EEO Laws

EEO laws prohibit employers from harassing employees or applicants on the basis of a legally protected trait. Each EEO law below prohibits unlawful harassment on the basis of certain protected traits:

EEO Law	Covered Employers	Protected Trait(s)
Title VII of the Civil Rights Act of 1964 (Title VII)	Private-sector employers with 15 or more employees for at least 20 weeks in the same calendar year as or in the calendar year prior to when the alleged discrimination occurred	<ul style="list-style-type: none">• Race;• Color;• Religion;• National origin; and• Sex (including pregnancy, childbirth or related medical conditions)
Age Discrimination in Employment Act (ADEA)	Private-sector employers with 20 or more employees for at least 20 weeks in the current or preceding calendar year	<ul style="list-style-type: none">• Physical or mental disability
Americans with Disabilities Act (ADA)	Private-sector employers with 15 or more employees for at least 20 weeks in the same calendar year as or in the calendar year prior to when the alleged discrimination occurred	<ul style="list-style-type: none">• Age (40 or older)
Genetic Information Nondiscrimination Act (GINA)	Private-sector employers with 15 or more employees for at least 20 weeks in the same calendar year as or in the calendar year prior to when the alleged discrimination occurred	<ul style="list-style-type: none">• Genetic information (e.g., family medical history, genetic tests of an individual or an individual's family members, information about any disease, disorder or condition)

Workplace Guidance to Prevent Harassment

Between 1987 and 1999, the EEOC issued several documents designed to guide agency staff members who investigate claims of harassment under EEO laws. The agency issued proposed enforcement guidance on Oct. 2, 2023. The final guidance consolidates and supersedes the earlier documents. Although the EEOC guidance is not legally binding, it offers important insights into how the EEOC will investigate claims of harassment and measures employers may take to reduce the risk of liability.

Overview of the EEOC's Harassment Guidance

The purpose of the final guidance is to provide a legal analysis of standards for harassment and employer liability applicable to claims of harassment under agency-enforced EEO laws and to communicate the EEOC's position on important legal issues. The guidance serves as a resource for employers, employees and practitioners, as well as agency staff members investigating, adjudicating or litigating harassment claims and courts deciding harassment issues. The final



guidance focuses on three main components of a harassment claim, each of which must be satisfied for harassment to be deemed unlawful under federal EEO laws, including:

1. **Protected traits and causation** (the conduct must be based on the individual's legally protected trait);
2. **Discrimination with respect to a term, condition, or privilege of employment** (the conduct must result in either an explicit change to the terms or conditions of employment or a hostile work environment); and
3. **Employer liability** (there must be a legal basis for holding the employer liable for the harassing conduct).

Important Updates

In addition to the three components noted above and described in more detail below, the EEOC guidance includes a number of notable updates from the previous guidance, including:

- **Definition of “sexual harassment” broadened to include protections for LGBTQI+ workers**—The definition of “sexual harassment” is expanded to include harassment on the basis of sexual orientation and gender identity/transgender status. In its updated guidance, the EEOC highlights examples of unlawful harassment under this expanded definition, including the denial of access to a bathroom consistent with an employee's gender identity, the intentional and repeated misgendering of an individual, and the disclosure of an individual's sexual orientation or gender identity without permission (outing).
- **Expanded protections for pregnancy-related conditions**—The definition of sexual harassment is also expanded to include pregnancy, childbirth and other “related medical conditions.” The EEOC explains that such conditions include lactation, the use of contraceptives, and the decision to have or not have an abortion.
- **Online harassment and other remote work considerations**—The EEOC guidance clarifies that illegal harassment can occur in a virtual work environment, in the same way as a physical environment, through online communication platforms and systems, including an employer's email system, instant messaging system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, social media accounts, or other equivalent services or technologies. The final guidance provides examples of such harassing conduct, including sexist comments made during a video meeting, ageist or ableist comments typed in a group chat, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image.
- **Clarification regarding religious expression protections**—The final guidance provides some clarity in balancing religious accommodations and expanded protections for pregnancy-related conditions and LGBTQI+ workers. Specifically, although employers have an obligation to accommodate an employee's sincerely held religious beliefs in the workplace, the guidance states that employers are not required to accommodate religious expression if such accommodation creates or reasonably could create a hostile work environment.

Protected Traits and Causation

Protected Traits

Harassment on the basis of any trait protected under the EEO laws (including race, color, national origin, religion, sex, age, disability and genetic information) can constitute illegal harassment under the EEO laws. Harassment can also be based on a combination of two or more protected traits, known as intersectional harassment.

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Causation

To establish causation, the evidence must show that the employee was subject to harassment **because of their protected trait**. Harassment can occur whether or not the harasser explicitly refers to the characteristic or targets a particular employee, when the harasser is wrong about the victim’s protected trait or when the harasser shares the same protected trait as the victim. Whether harassment is based on a protected trait will depend on the totality of the circumstances and must be evaluated based on the specific facts in a case. Nevertheless, certain principles may generally apply in hostile workplace harassment investigations. Here are a few listed in the EEOC’s guidance:

- Causation may be established in sexual harassment claims through explicit or implicit proposals of sexual activity, general hostility toward members of an individual’s sex, and comparative evidence showing how the harasser treated persons who shared an individual’s sex compared to the harasser’s treatment of others;
- Facially discriminatory conduct (such as actions that explicitly insult or threaten an individual based on a protected trait) is unlawful regardless of intent;
- Stereotyping need not be motivated by animus or hostility toward the stereotyped group; and
- Additional considerations may include the following:
 - The context in which the conduct takes place or within a larger social context;
 - Any link between facially neutral and facially discriminatory conduct;
 - The timing between harassment and when the harasser learned of an individual’s protected status (such as pregnancy, sexual orientation, gender identity, religion or disability); and
 - Evidence that shows differences in the conduct directed against individuals in different groups.

Examples

The EEOC guidance provides examples of harassing conduct that is based on legally protected traits, including:

Protected Trait	Unlawful Conduct Examples
Race and color	<ul style="list-style-type: none">• Racial epithets or offensive comments about members of a particular race• Harassment based on stereotypes about or traits or characteristics linked to an individual’s race (such as name, cultural dress, accent or manner of speech, and physical characteristics, including hair textures and hairstyles commonly associated with specific racial groups)
National origin	<ul style="list-style-type: none">• Ethnic epithets, derogatory comments about individuals of a particular nationality• Harassment based on an individual’s place of origin (or that of the individual’s ancestors), stereotypes about an individual’s national origin or traits linked to an individual’s national origin (such as physical, cultural or linguistic characteristics)
Religion	<ul style="list-style-type: none">• Use of religious epithets or offensive comments based on an individual’s religion or lack of religious beliefs, religious practices or dress• Harassment based on religious stereotypes or because of a religious accommodation or request for accommodation• Coercing employees to engage in religious practices at work
Sex	<ul style="list-style-type: none">• Unwanted sexual attention or sexual coercion (such as demands or pressure for sexual favors, sexual assault or sexual remarks)



	<ul style="list-style-type: none"> • Nonsexual conduct based on sex (such as sex-based epithets, sexist comments or facially sex-neutral offensive conduct motivated by sex) • Epithets regarding sexual orientation or gender identity • Intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering) • Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity • Disclosure of an individual's sexual orientation or gender identity without permission (outing) • Harassment based on pregnancy, childbirth or related medical conditions (including lactation); a woman's reproductive decisions (such as decisions about contraception or abortion); sexual orientation or gender identity (including how that identity is expressed); or the fact that an individual does not present in a manner that would stereotypically be associated with that person's gender
Age (40 and older)	<ul style="list-style-type: none"> • Harassment based on negative perceptions or stereotypes about older workers (even if they are not motivated by animus)
Disability	<ul style="list-style-type: none"> • Harassment based on an individual's physical or mental disability; stereotypes about individuals with disabilities in general; traits or characteristics linked to an individual's disability (such as how an individual speaks, looks or moves); an individual's request for or receipt of reasonable accommodation; an individual having a record of or being regarded as having an impairment (even if the individual does not have an actual or record of disability); or disability of an associated individual
Genetic information	<ul style="list-style-type: none"> • Harassment based on an individual's genetic test or family medical history

Discrimination With Respect to a Term, Condition or Privilege of Employment

In addition to being based on a protected trait, workplace harassment must affect a term, condition or privilege of employment in order to violate the law. Specifically, unlawful harassment can occur either when:

- There is an **explicit change to the terms, conditions or privileges of employment** that is linked to harassment based on a protected trait; or
- Conduct constructively changes the terms or conditions of employment through the creation of a **hostile work environment**.

Explicit Change to Terms, Conditions or Privileges of Employment

Unlawful harassment occurs when an employee experiences a change to their employment (e.g., is fired, demoted, denied a promotion or transfer, reassigned, or receives reduced hours or pay) because of harassment based on the employee's protected trait. For example, an employee is denied a promotion after rejecting a manager's sexual advances.

Hostile Work Environment

Unlawful harassment can occur even when there is no explicit change to a term, condition or privilege of employment if the employee can show that harassing conduct caused a hostile work environment. A hostile work environment exists when harassment is so severe or frequent that a reasonable person in the employee's position would find the situation to



be abusive. In determining whether a hostile work environment exists, the EEOC will consider each claim on a case-by-case basis and take into consideration all of the circumstances. The EEOC identified a number of factors it considers:

- A victim only needs to show that the harassment was severe **or** pervasive, not both;
- A single instance of very serious misconduct may be severe enough to create a hostile work environment;
- The harasser's status at the employing organization can be relevant (for example, harassment by a supervisor may be more severe than similar behavior by a co-worker); and
- The victim does not need to show that the harassment actually caused a change in employment or caused the victim to perform worse.

Employer Liability

Lastly, the EEOC addresses how it determines whether an employer is liable for workplace harassment. The EEOC applies a different analysis depending on whether the claim relates to a **hostile work environment** or an **explicit change in an employee's terms or conditions of employment**.

Explicit Change in the Terms or Conditions of Employment

If an employee can establish that the employer made an explicit change to a term, condition or privilege of employment (e.g., termination, demotion, failure to promote, failure to transfer, reassignment, reduction in hours or rate or pay, or another similar negative change) because of the employee's protected trait, the employer is liable for harassment. There is no defense to liability in this instance.

Hostile Work Environment

If an employee does not experience an explicit change in a term, condition or privilege of employment, they must establish that the harassment caused a hostile work environment. When an employee alleges a hostile work environment, the EEOC applies a different liability standard depending on who is alleged to have done the harassment and the nature of the hostile work environment, as outlined below:

- Proxy/alter ego of the employer—If the harasser is a proxy or alter ego of the employer (i.e., an individual who possesses such high rank or authority that their actions can be said to speak for the employer, such as owners or corporate officers), the employer is automatically liable for the hostile work environment created by the harasser's conduct, and there is **no defense to liability**;
- Supervisor—If the harasser is a supervisor, employer liability will depend on whether the hostile work environment includes a tangible employment action. A tangible employment action is a significant change in employment status that requires an official act of the employer (e.g., hiring, firing, failure to promote, demotion, reassignment with significantly different responsibilities, or a decision causing a significant change in compensation or benefits).
 - Employment action—The employer is vicariously liable for the harasser's conduct and there is **no defense to liability**;
 - No employment action—The employer is vicariously liable for the harasser's conduct, but the employer can limit its liability or damages if the employer can prove the **Faragher-Elzerth affirmative defense** (described below); and
- Any other person—If the harasser is any person other than a proxy, alter ego or supervisor, the employer is only liable for the harasser's conduct if the employer was negligent by failing to act reasonably to prevent the harassment or to take reasonable corrective action in response to harassment when the employer was aware, or should have been aware, of it.



Establishing the Faragher-Ellerth Affirmative Defense

If an employee establishes a hostile work environment claim based on harassing conduct by a supervisor that does **not** include a tangible employment action, an employer can limit or eliminate its liability or damages by proving the *Faragher-Ellerth* affirmative defense. Specifically, the employer must show:

- **The employer exercised reasonable care to prevent and correct harassment.**
 - At a minimum, the employer should (i) have a written anti-harassment policy and process for addressing harassment complaints, (ii) provide training to ensure employees know their rights and responsibilities under the policy, and (iii) monitor employees' workplaces for compliance; and
- **The victim unreasonably failed to take advantage of any corrective opportunities provided by the employer or to avoid harm otherwise.**
 - The reasonableness of an employee's actions depends on the particular circumstances and information available to the employee at the time of the actions; and
 - Delayed complaints may reduce damages even if they would not eliminate liability altogether.

Systemic Harassment

Harassment can be systemic, subjecting multiple individuals to a similar form of discrimination. For example, evidence might show that Black employees working on a particular shift were subjected to, or otherwise knew about, the same racial epithets, racial imagery and other offensive race-based conduct. In such a situation, evidence of widespread race-based harassment could be used to establish that each Black employee working on that shift was individually subjected to an objectively hostile work environment.

In some systemic harassment situations, the evidence may establish that the employer engaged in a "pattern or practice" of discrimination, meaning that the employer's "standard operating procedure" was to engage in or tolerate harassment, creating a hostile work environment. To avoid liability in a pattern-or-practice case, employers must adopt a systemic remedy rather than only address the harassment of particular individuals. In addition, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive companywide procedures.

Employer Takeaways

Although the final guidance is not legally binding, it provides insight into how the EEOC will investigate harassment claims. The EEOC also identifies a number of steps employers can take to prevent harassment, such as:

- Establishing a clear, easy-to-understand anti-harassment policy;
- Having a safe and effective procedure that employees can use to report harassment, including having more than one option for reporting;
- Providing recurring training to all employees (including supervisors and managers) about the company's anti-harassment policy and complaint process; and
- Taking steps to ensure the anti-harassment policy is being followed and the complaint process is working.

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Employers should consider reviewing and familiarizing themselves with the updated guidance. For additional information, employers may review other EEOC resources regarding workplace harassment, including:

- [EEOC Harassment Home Page](#)
- [EEOC Sexual Harassment Home Page](#)
- [Summary of Key Provisions](#): EEOC Enforcement Guidance on Harassment in the Workplace
- [Questions and Answers for Employees](#): Harassment at Work