

**THOUGHT LEADERSHIP**

LEGAL UPDATES

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# EEOC Proposes New Guidance on Harassment - Open for Public Comment Until Nov. 1

The Equal Employment Opportunity Commission (EEOC) has released proposed “Enforcement Guidance on Harassment in the Workplace.” The proposed guidance presents a legal analysis of the standards for harassment and employer liability under the laws enforced by the EEOC: the Age Discrimination in Employment Act of 1967 (ADEA), Titles I and V of the Americans with Disabilities Act of 1990 (ADA), the Equal Pay Act of 1963 (EPA), Sections 501 and 505 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964 (Title VII). Public comments may be submitted to the EEOC until Nov. 1.

Current EEOC guidance on this topic was published in 1999, titled “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors.” In January 2017, under the Obama Administration, the EEOC proposed updated guidance on workplace harassment, but it was never finalized under the Trump administration. Because nearly 25 years have passed since the last guidance was published, administrative changes and landmark court decisions have necessitated new and updated definitions in EEOC guidance as well as revised standards of liability.

For instance, in 2005, the EEOC established the Systemic Task Force to address “systemic harassment.” The new proposed guidance defines systemic harassment as subjecting multiple individuals to a similar form of discrimination. The EEOC has stated it will review systemic harassment as it relates to potential pattern or practice claims. The EEOC is also calling on employers to adopt a systemic remedy to such claims, rather than addressing the conduct of a particular individual.

In 2020, the Supreme Court held that sex discrimination includes bias on the basis of gender orientation and sexual identity. The updated EEOC proposed guidance includes examples of sex-based discrimination involving sexual orientation and gender identity. Updates also include examples of harassment based on pregnancy, childbirth, or related conditions, which was absent in previous guidance.

Between the beginning of fiscal year (FY) 2018 and the end of FY 2022, 35% of the charges of employment discrimination received by the EEOC included an allegation of harassment based on race, sex, disability, or another protected characteristic.

The proposed “Enforcement Guidance on Harassment in the Workplace” document will not have the force and effect of law and is not meant to bind the public in any way unless and until it is finalized.

## **Key points**

The new proposed guidance explains how to evaluate whether alleged harassment violates federal EEO law and focuses on the three components of a harassment claim:

**Covered bases and causation:** Was the conduct based on the individual’s legally protected characteristic under the federal EEO statutes?

**Discrimination with respect to a term, condition, or privilege of employment:** Did the harassing conduct result in discrimination with respect to a term, condition, or privilege of employment?

**Liability:** Is there a basis for holding the employer liable for the conduct?

### **Covered bases and causation**

Harassment is covered by EEO laws only if it is based on an employee’s legally protected characteristic(s). While many people are familiar with the concept of harassment based on sex, harassment claims can be brought based on race and color, national origin, religion, sex (including gender identity and sexual orientation), age (over 40), disability, and/or genetic information. Harassment may be based on a single protected characteristic or overlapping protected characteristics.

Causation can be established if the evidence shows the employee was harassed because of the protected characteristic. In other words, the alleged harassment must have been motivated by the protected characteristic.

### **Discrimination with respect to a term, condition, or privilege of employment**

To support a harassment claim, an employee must show that the alleged harassment affected a term, condition, or privilege of employment. Employees may also allege what is known as a “hostile work environment” claim. A hostile work environment claim may be alleged separate from or in conjunction with job loss. A hostile work environment claim must meet a “severe-or-pervasive” standard requiring “the conduct to be more than merely offensive but does not require that the conduct cause psychological harm.”

## **Liability**

Per the EEOC’s proposed guidance, an employer’s liability will depend on the role of the harasser.

If the harasser is found to be a proxy or alter ego of the employer, the actions of the harasser may be considered the actions of the employer.

If the harasser is found to be a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer may be vicariously liable.

If the harasser is found to be a supervisor (but not a proxy or alter ego) and the hostile work environment does not include a tangible employment action, the employer may be vicariously liable. However, the employer may limit its liability or damages where (1) they exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment. (This is known as the Faragher-Ellerth affirmative defense.)

If the harasser is any other person than those listed above, the employer may be held liable for negligence in failing to reasonably act to prevent the harassment or failing to take reasonably corrective action when they were aware or should have been aware of the harassment.

## **Contact us**

If you have questions about the proposed “Enforcement Guidance on Harassment in the Workplace” or would like assistance to ensure compliance with the existing rules and to plan for the changes ahead, contact Jenna Brofsky, Delia Berrigan, or your Husch Blackwell attorney.