

## Publications

### EEOC Releases Updated Workplace Harassment Guidance

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On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) published its **final form** Enforcement Guidance on Harassment in the Workplace (Guidance). It is the EEOC's first update on its harassment guidance since 1999. The Guidance reflects the changes in the law, the findings and recommendation of the EEOC's bipartisan Select Task Force on Harassment in the Workplace, and emerging issues such as online harassment. It replaces five guidance documents issued between 1987 and 1999 and serves as unified agency resource on EEOC-enforced workplace harassment law.

The EEOC reviewed approximately 38,000 comments in developing the Guidance, many of which expressed concerns that the proposed guidance would infringe on free speech and religious rights by restricting speech regarding birth control and abortion or by requiring individuals to refer to another by their preferred pronouns. In response, the EEOC noted that "[w]hen the Commission is presented with individualized facts in an EEOC administrative harassment charge, the agency works with great care to analyze the interaction of Title VII harassment law and the rights to free speech and free exercise of religion." The EEOC also added more than 70 additional harassment examples. Notable provisions of the Guidance are summarized below.

### Expanded Definitions of Covered Bases

The covered bases are race and color, national origin, religion, sex, disability, age (40 and older), and genetic information. The Guidance expands the definitions of the covered bases, except genetic information, to protect against harassment based on stereotypes associated with these groups. For example, pressuring an older employee to transfer to a less technology-focused position based on the stereotype that older employees are less tech-savvy. The EEOC notes that harassment based on a covered base, even if not directed at the complainant, may be actionable if it contributes to a hostile work environment.

The Guidance also broadens the definition of sex-based harassment to include harassment based on pregnancy, childbirth, and other related medical conditions. This protects against harassment based on reproductive decisions, such as abortion. The Guidance further expands sex-based harassment to protect against harassment based on sexual orientation and gender identity. This includes the intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering) and the denial of access to a bathroom consistent with the individual's gender identity.

### Virtual Harassment May Create a Hostile Work Environment

The Guidance acknowledges the effect technology has had on workplace harassment, noting harassment can also occur in the “virtual work environment,” such as through an employer’s email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, or official social media accounts. Similarly, because of the nature of virtual harassment, even conduct that occurs in a non-work-related context can contribute to a hostile work environment. For example, if a coworker posts ethnic epithets about an employee on a personal social media page and the employee learns about it directly, or other coworkers discuss it at work, the post can contribute to a racially hostile work environment.

### Employer Guidance

The EEOC provides employers with substantial guidance regarding how their anti-harassment policies and procedures will be evaluated. At a minimum, the EEOC provides that an anti-harassment policy should:

- Define what conduct is prohibited and be widely disseminated;
- Be comprehensible to worker, including those who the employer has reason to believe might have barriers to comprehension, such as limited literacy skills or proficiency in English;
- Require that supervisors report harassment when they are aware of it;
- Offer multiple avenues for reporting harassment;
- Clearly identify accessible points of contact to whom reports of harassment should be made, including contact information; and
- Explain the employer’s complaint process, including the anti-retaliation and confidentiality protections.

The EEOC also clarifies that an investigation need only be sufficiently thorough to arrive at a reasonably fair estimate of truth, and does not need to entail a trial-type investigation. The investigation should, however, be conducted by an impartial party who is well-trained in the skills required for interviewing witnesses and evaluating credibility and should seek information about the conduct from all parties involved.

Employers should follow consistent processes to determine what corrective action, if any, is appropriate. In some cases, it may be necessary to take intermediate steps to address the situation, such as scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary, paid leave. However, every reasonable effort should be made to minimize the burden or negative consequences to the complainant pending the investigation.

Finally, whether an employee's corrective action will be deemed reasonable is based on the following: the proportionality of the corrective action, nature and degree of the harasser's authority, effect on the complainant, options available to the employer, extent to which the harassment was substantiated, and whether the harassment stops. Employers must also consider whether there is a pattern or practice of harassment in the workplace, as this would require a systemic remedy rather than simply addressing harassment on the individual level.

### Takeaways

The EEOC has made it clear that workplace harassment is an enforcement priority. If you have questions or require assistance updating your anti-harassment policies, procedures, or training, contact your Vorys lawyer.