

EEOC Proposes New Enforcement Guidance on Harassment in the Workplace

On September 29, 2023, the Equal Employment Opportunity Commission (“EEOC”) published [new proposed enforcement guidance](#) (“the Proposed Guidance”) on harassment in the workplace. This is the first proposed EEOC guidance on workplace harassment since the turn of the century. Among other things, the Proposed Guidance responds to changes in working conditions since the COVID-19 pandemic and incorporates recent legal updates, such as the Supreme Court’s majority decision in [Bostock v. Clayton County, Georgia](#) (clarifying that Title VII’s prohibition on sex discrimination covers sexual orientation and gender identity discrimination) and the enactment of the federal [Pregnant Workers Fairness Act](#). If adopted, the Proposed Guidance would consolidate and supersede five guidance documents issued from 1987 through 1999.

The EEOC also recently published [a new Strategic Enforcement Plan](#) (“SEP”) on September 21, 2023, with the following substantive priorities: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers from employment discrimination; (3) addressing emerging and developing issues, such as technology-related employment discrimination; (4) advancing equal pay; (5) preserving access to the legal system; and (6) preventing and remedying systemic harassment. These priorities closely align with updates included in the Proposed Guidance. Therefore, employers should be aware that the EEOC is likely to closely monitor adherence to the Proposed Guidance upon adoption.

Employers should consider how the Proposed Guidance will affect updates to their anti-harassment policies, practices, and trainings. The Proposed Guidance is subject to a 30-day public comment period, ending on November 1, 2023, after which the EEOC will likely issue final enforcement guidance that may or may not resemble the current version.

Overview of the Proposed Guidance

The Proposed Guidance is intended as a resource for staff of the EEOC and other agencies, organizations, and individuals that investigate, adjudicate, or litigate harassment claims, or that conduct outreach related to workplace harassment. It further aims to provide clarity to the public about existing requirements under the law and EEOC policies. However, the EEOC cautions that the document should not be understood to “prejudge the outcome of a specific charge filed with the EEOC.”

The Proposed Guidance discusses the three components of harassment claims with updated examples based on case law. These components are (1) covered bases and causation; (2) discrimination with respect to a term, condition, or privilege of employment; and (3) liability. Notably, the Proposed Guidance includes a revised definition of sex-based harassment that includes discriminatory conduct based on sexual orientation, gender identity, and pregnancy, childbirth, or related conditions, as well as an increased focus on harassment using digital technology and in virtual workplaces. The Proposed Guidance also covers systemic harassment.

Updated Definition of Sex-Based Harassment

The Proposed Guidance expands the definition of sex-based harassment to reflect the 2020 Supreme Court’s majority decision in *Bostock* and the 2023 enactment of the federal Pregnant Workers Fairness Act. Under the new definition, sex-based harassment includes harassment based on sexual orientation and gender identity, including how an individual expresses their gender identity. The

Proposed Guidance lists examples such as harassment because an individual does not present in a manner stereotypically associated with that person's gender, intentional misgendering of an employee, or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity. Per the Proposed Guidance, sex-based harassment also covers harassing conduct based on pregnancy, childbirth, or related conditions. This type of harassment includes discriminatory conduct based on an individual's reproductive decisions, such as the choice to use or not use contraception or have an abortion. Other examples of this kind of sex-based harassment include taking adverse action against an employee for expressing breast milk or pressuring an employee to transition from full-time to part-time work because of pregnancy.

Remote and Hybrid Workplaces

Employers are generally responsible for work-related conduct occurring in the regular workplace. Nonetheless, the Proposed Guidance clarifies that employers can still be liable for employee conduct if it occurs in a work-related context outside of the regular place of work, such as in a virtual work environment. Employers can also be liable for employee conduct even if it occurs in a non-work-related context, so long as that conduct impacts the work environment. This rule encompasses electronic communications on private phones, computers, or social media accounts that may contribute to a hostile work environment. Given the proliferation of digital technology and the continued use of remote and hybrid work formats since the COVID-19 pandemic, it is increasingly likely that employers will encounter liability for digital employee activity that contributes to a hostile work environment. Moreover, the Proposed Guidance notes that harassment by a supervisor occurring outside the workplace is more likely to contribute to a hostile work environment than similar conduct by coworkers due to a supervisor's ability to affect an employee's employment status.

Systemic Harassment

Both the Proposed Guidance and the SEP discuss systemic harassment, defined as harassment that subjects "multiple individuals to a similar form of discrimination." If harassment is systemic rather than particularized to a single employee, the harassing conduct could subject all employees sharing a protected characteristic to the same circumstances. Evidence of widespread classification-based harassment could then be used to establish that each employee belonging to that protected class was individually subjected to an objectively hostile work environment. In these situations, the EEOC's inquiry focuses on the holistic landscape of the work environment, not the subjective experiences of each individual complainant. To avoid liability, employers whose workplace harassment investigations reveal systemic harassment must adopt a systemic remedy, such as developing comprehensive company-wide procedures. Addressing the harassment of individual employees is not enough. Further, if employers find that there have been frequent individual instances of harassment based on the same protected characteristic or characteristics, the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response.

Key Takeaways

The Proposed Guidance and the SEP suggest that employers should pay careful attention to the incorporation of new legal developments in their anti-harassment practices, policies, and trainings. The *Faragher-Ellerth* affirmative defense under federal anti-discrimination laws—which employers may invoke to defend against claims of hostile work environment harassment—remains integral to employer protection from liability for workplace harassment. This defense (statutorily unavailable under New York State and City law) may be available to an employer if, among other things, the employer establishes that it exercised reasonable care to prevent and promptly correct harassing behavior, including by maintaining effective anti-harassment policies, complaint processes, and trainings.

To ensure compliance with federal law, employers should review and begin updating (while the Guidance is finalized) anti-harassment practices, policies, and trainings to address the following principles:

- Sex-based harassment covers harassing conduct based on gender identity and sexual orientation. Such conduct includes harassment based on how individuals express their gender identities.
- Sex-based harassment also includes harassing conduct based on pregnancy, childbirth, or related medical conditions. This category encompasses harassment based on an individual's reproductive decisions, like choices on whether to use contraception or have an abortion.
- Employers can be liable for harassing conduct that occurs outside the regular place of work when the conduct contributes to a hostile work environment, even if it is not in a work-related context. Harassing conduct within employers' scope of liability includes discriminatory conduct within a virtual work environment and electronic communications made on private telephones, computers, or social media accounts that contribute to a hostile work environment.
- Systemic workplace harassment requires a systemic response. If there have been frequent individual instances of harassment based on the same protected characteristic or characteristics, employers have a responsibility to investigate whether the conduct reflects the existence of a systemic problem.
- In situations where a "pattern or practice" of tolerating systemic harassment is identified, the EEOC will focus its inquiry on the entire work environment to establish whether there was a hostile work environment, not each individual complainant's subjective experiences.

New York State and City employers may already have policies in place that cover some of these concepts, [as required](#) by State and City law. Indeed, employers can likely address many of the concerns in the Proposed Guidance, if adopted, by aligning their policies to the [New York State Sexual Harassment Model Policy](#), as there is considerable overlap between New York State law and the Proposed Guidance.

The SEP released in September provided a glimpse into the [Biden Administration's commitment](#) to supporting a diverse workforce, and the Proposed Guidance is yet another example of that dedication. The EEOC will be taking [comments on the Proposed Guidance](#) through November 1, 2023.

Patterson Belknap will monitor subsequent developments in connection with the Proposed Guidance. For additional guidance, please contact our Employment Law Group.

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Lisa E. Cleary	212.336.2159	lecleary@pbwt.com
Sara Arrow	212.336.2031	sarrow@pbwt.com
Ryan J. Kurtz	212.336.2405	rkurtz@pbwt.com
Sarah E. Brand	212.336.2207	sbrand@pbwt.com

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Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710
212.336.2000
www.pbwt.com