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EEOC Issues New Harassment and Retaliation Guidance

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Harassment



Introduction

The Equal Employment Opportunity Commission (EEOC) recently issued proposed guidance crystallizing the agency's expectation that employers be proactive in eliminating workplace harassment. The *Proposed Enforcement Guidance on Unlawful Harassment*, which was published on January 10th, requires that employers implement programs to combat "known or obvious risks of harassment," and states that a failure to do so could result in the loss of traditional affirmative defenses to harassment claims.

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Indeed, the proposed guidance makes clear the EEOC's long-held position that employers have an affirmative duty to respond to conduct that does not constitute actionable harassment in order to prevent further escalation that could lead to a cognizable legal claim.

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The proposed guidance includes a section titled "Promising Practices," which lists "five core principles" that the EEOC states "have generally proven effective in preventing and addressing harassment":

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- Committed and engaged leadership
- Consistent and demonstrated accountability
- Strong and comprehensive harassment policies
- Trusted and accessible complaint procedures
- Regular, interactive training tailored to the audience and organization

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These practices should not be confused with affirmative defenses to harassment claims. However, here is direct interplay between implementation of these practices and an employer's reliance on the *Faragher/Ellerth* defense, which allows an employer that exercised reasonable care to prevent and promptly correct harassment to rebut a harassment claim.



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To be sure, an employer will be much better positioned to assert this defense if it can establish that:

- i. Corporate leadership prioritizes the elimination of workplace harassment (both in word and deed)
- ii. It enforces a comprehensive and clear anti-harassment policy that is regularly communicated to all employees

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- iii. It created an effective and easily understood internal complaint system with multiple avenues of complaint, and a process for investigating and resolving harassment complaints by neutral, well-trained HR professionals
- iv. It regularly conducts anti-harassment training aimed at educating all employees on rules, policies, procedures, and consequences of policy violations

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Notably, the guidance further illustrates the agency's broad interpretation of the types of harassment prohibited by Title VII — which historically has been limited to harassment based on race, color, national origin, religion, sex, age, and disability. Under the proposed guidance, harassment claims could extend to harassment actions based on sex stereotyping, sexual orientation, gender identity, genetic information, and pregnancy. Moreover, the EEOC has announced that it will entertain harassment claims:

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- Based on "perceived" membership in a protected class (even if the perception is incorrect)
- For "associational harassment," where an employee who is a member of a protected class claims harassment based on their association with individuals who do not share their protected characteristics
- Where the alleged harassment was not directed at the complainant
- In instances where the alleged harassment occurred outside of the workplace

Harassment Policies and Procedures

Among other things, the EEOC identified 12 *Recommendations Regarding Harassment Policies and Procedures*, which it opined, if followed, can go a long way in helping to prevent harassment.

Harassment Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.

Harassment Policies and Procedures

- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.

Harassment Policies and Procedures

- Employers should offer reporting procedures that are multifaceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.



Harassment Policies and Procedures

- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

Harassment Policies and Procedures

- Employers should periodically “test” their reporting system to determine how well the system is working.

Harassment Policies and Procedures

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.



Harassment Policies and Procedures

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.



Harassment Policies and Procedures

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.



Harassment Policies and Procedures

- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.

Harassment Policies and Procedures

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

Harassment Policies and Procedures

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.



Harassment Policies and Procedures

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.



Anti-Harassment Compliance Training

EEOC is not only requiring employers to train as part of their settlements; EEOC is attempting to oversee the training and requiring employers to seek approval of the trainers, syllabus and materials they use.

Demonstrating just how important it believes training to be, the EEOC also articulated seven *Recommendations Regarding Anti-Harassment Compliance Training*.



Anti-Harassment Compliance Training

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.

Anti-Harassment Compliance Training

- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.



Anti-Harassment Compliance Training

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.



Anti-Harassment Compliance Training

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components.



Anti-Harassment Compliance Training

Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or “start up” firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.



Anti-Harassment Compliance Training

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.



Anti-Harassment Compliance Training

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.



Anti-Harassment Compliance Training

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and educational programs.





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Retaliation



Retaliation Enforcement Guidance

On August 25, 2016, the EEOC issued its Final *Enforcement Guidance on Retaliation and Related Issues*. This is the first revision since the Guidelines were enacted in 1998.

Retaliation Enforcement Guidance

The Guidance addresses retaliation under each of the statutes enforced by EEOC.

Topics explained in the *Enforcement Guidance* include:

Retaliation Enforcement Guidance

- The scope of employee activity protected by the law.
- Legal analysis to be used to determine if evidence supports a claim of retaliation.
- Remedies available for retaliation.
- Rules against interference with the exercise of rights under the ADA.
- Detailed examples of employer actions that may constitute retaliation.



Retaliation Enforcement Guidance

Perhaps most helpful are the detailed examples provided by the EEOC of activity that may constitute protected activity (whether under the opposition clause or the participation clause).

Examples of protected opposition include:

Retaliation Enforcement Guidance

- Complaining or threatening to complain to anyone about alleged discrimination against oneself or others;
- Providing information in an employer's internal investigation of an EEO matter;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory;



Retaliation Enforcement Guidance

- Advising an employer on EEO compliance;
- Resisting sexual advances or intervening to protect others;
- Passive resistance (allowing others to express opposition); and
- Requesting reasonable accommodation for disability or religion.



Retaliation Enforcement Guidance

In addition to the comprehensive Guidance and very detailed examples, the Commission issued two user-friendly resource documents:

1. *Questions and Answers*, <https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>; and
2. *Small Business Fact Sheet: Retaliation and Related Issues*, <https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm> condensing the major points of the Guidance.



Retaliation Enforcement Guidance

As EEOC Chair indicated: “Retaliation is asserted in nearly 45 percent of all charges we receive and is the most frequently alleged basis of discrimination. The examples and promising practices included in the guidance are aimed at assisting all employers reduce the likelihood of retaliation.” Again, unlike past years, the Commission appears to be engaging in additional preventative activities beyond remediation activities.



Retaliation Enforcement Guidance

While EEOC has aggressively expanded those individuals it believes to be engaged in protected activity in the last few years, and while the courts have not adopted wholesale EEOC's wide expansion, the courts are following suit in many instances.

Retaliation Enforcement Guidance

In the Commission's view, all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors, regardless of their job duties or managerial status and regardless of whether they are individuals who are being harassed or discriminated against or simply spoke up for others.



Questions?

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