

What To Expect From EEOC's New Harassment Guidance

By **Kristin Klein Wheaton** (February 26, 2018, 11:21 AM EST)

Last year, the U.S. Equal Employment Opportunity Commission published a 75-page document of draft enforcement guidance on unlawful harassment and solicited public input. As a result of the public comments, the EEOC revised the guidance and it is currently in the Office of Management and Budget awaiting approval before its release. At a public appearance in early February, Acting EEOC Chair Victoria Lipnic stated that the commission will release the new guidance “soon.”



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What the final guidance will look like is anyone’s guess, but the EEOC intends it to replace several previously issued documents, and it appears to be a fairly comprehensive summary of the current state of the law. The final guidance will supersede several previously issued EEOC documents: Section 615: Harassment, EEOC Compliance Manual, Volume II; Policy Guidance on Employer Liability for Sexual Favoritism (1990); Enforcement Guidance on *Harris v. Forklift Sys. Inc.* (1994); and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

Final Guidance: What To Expect

The draft guidance defines harassment and provides recommendations for preventing harassment in the workplace. While the guidance does not have the effect of law, it is generally a good idea to follow most EEOC instructions and recommendations to be in the best position to defend potential discrimination and/or harassment lawsuits from employees. If an employer is following what the EEOC recommends, it is likely to garner a dismissal from the agency in the event it faces a discrimination charge.

The guidance also provides a fairly thorough review of the covered bases of discrimination, the definition of “severe and pervasive,” the scope of hostile work environment claims, an indication of when an employer will be liable for unlawful conduct, descriptions of systemic harassment, and “promising practices” that outline how employers can reduce their potential liability. Guidance definitions contain citations to case law as well as examples of behaviors that constitute and do not constitute harassment.

Protected Classifications: Clarifications and Open Questions

The guidance also outlines protected classifications. These include gender identity, sexual orientation

and association with individuals within the protected classifications. The inclusion of these categories has drawn some criticism. Some commenters have noted that the EEOC should clarify that the courts have not uniformly upheld that sexual orientation or gender identity is protected by Title VII. So while the EEOC takes the position that sexual orientation and gender identity are protected classifications, the final decision on that issue may rest with the courts or Congress. There is speculation over whether the EEOC will amend any portion with respect to protected classifications before issuing the final guidance.

Causation, Conduct, Context: Defining “Severe and Pervasive” and Other Terms and Conditions

The guidance then examines the requirements for establishing causation, and makes clear that the complaining party must be subjected to harassment creating a hostile work environment because of his or her protected classification. In doing so, the guidance outlines that investigators must examine whether the conduct is “facially discriminatory” or discriminatory based upon the “context” under which the conduct occurs. As an example, the guidance states that certain code words or phrases — such as “you people” — reveal an intent to discriminate against a protected group regardless of the context.

The guidance notes that while conduct must be severe or pervasive to be actionable, a single serious incident of harassment can result in a hostile work environment. Examples of this conduct include sexual assault, sexual touching of an intimate body part, physical violence or the threat of physical violence, use of symbols of violence or hatred toward individuals sharing the same protected characteristic (e.g. swastika or noose), the use of the “n-word” by a supervisor, the use of animal imagery (such as comparing the complainant to a monkey, an ape or other animal), and threats to deny job benefits for rejecting sexual advances. Epithets spoken by a supervisor are noted to be serious incidents.

In determining where harassment is “pervasive” the guidance notes that there is no “magic number” of harassing incidents that automatically gives rise to liability; rather, relevant considerations include frequency of the conduct and whether the actions occurred close together in time. In a seeming departure from the analysis of conduct in many court decisions, the guidance notes that it “disagrees with Courts that have analyzed ‘unwelcomeness’ as an element in the plaintiff’s prima facie harassment case separate from the ‘subjectively and objectively hostile work environment’ analysis.”

Accordingly, the guidance notes that “in the Commission’s view, conduct that is subjectively and objectively hostile is also necessarily unwelcome.” This comment has drawn criticism that the legal standard will be muddled if the guidance stands. For example, if a supervisor makes a habit of asking a subordinate whether she had a good weekend, and the subordinate finds the question intended to pry into her sexual life and therefore offensive, does the subordinate’s subjective offense at a repeated question turn that question into objectively offensive conduct?

“Promising Practices” and Other Pointers

The final part of the guidance outlines “promising practices” that employers can adopt to shield them from claims. The four core principles of the Promising Practices are: leadership and accountability, comprehensive and effective harassment policy, effective and accessible harassment complaint system, and effective harassment training. While these concepts are not necessarily new to human resources professionals, the EEOC has outlined specific recommendations under each category and clarified its expectations from employers.

For example, the guidance recommends live training about harassment and discrimination (unless not feasible), and makes specific reference to the concept that a business must allocate sufficient resources

and staff to address harassment issues in the workplace. The guidance recommends that leaders conduct anonymous employee surveys on a regular basis to assess whether harassment is occurring or if employees perceive management and the workplace culture, generally, to tolerate it.

The guidance further emphasizes the need for regularly updated and revised harassment trainings customized to the workplace. With respect to investigations, the guidance outlines how to document each type of complaint and indicates that management should cap each investigation with a written report of the findings, any disciplinary action imposed, and any corrective and preventative action taken. The guidance also discusses in depth supervisory liability and nonsupervisory liability, and offers detailed instructions on how to establish the Faragher-Ellerth defense.

While the guidance was issued well before the #MeToo movement, it appears that it is timely and it is expected to gain momentum when the EEOC releases the final version. The EEOC has posted checklists for the areas of promising practices, which are helpful to employers. It will be interesting to see what the final guidance brings and what, if any, substantive changes the commission will make.

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