

A LITTLER PRESENTATION

Effectively Addressing Sexual Harassment in the Workplace

August 15, 2024

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Presented By



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Agenda

- EEOC Guidance and Related Publications
- Highlights of EEOC Task Force on Harassment
 - Leadership and Accountability
 - Harassment Policies, Procedures, and Related Investigations
 - Conducting Fair Investigations - Some Practical Guidelines
 - Training Guidelines
- Employer Takeaways



Key Resources - EEOC Guidance & Related Publications

EEOC Harassment Guidance – Published April 29, 2024

Key Points of Guidance:

- Focuses on legal analysis of harassment and the standards for imposing employer liability for harassment
- Addresses prohibited harassment “based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older) or genetic information.”
- Now serves as the single resource on EEOC-enforced workplace harassment law and “updates, consolidates and replaces the EEOC’s five guidance documents issued between 1987-1999.”
- Highlights a number of notable changes in the law since then, including the 2020 *Bostock v. Clayton County* decision (SCOTUS holds Title VII’s prohibition on discrimination “because of sex” includes discrimination on the basis of sexual orientation and gender identity).
- Notes that emergence of new issues, such as online harassment, called for such an update.

Key Companion Documents for Updated Guidance on Harassment

- ***Summary of Key Provisions*** – Includes 25 “Q’s and A’s” on the guidance
- ***Questions and Answers for Employees: Harassment at Work*** – Document for employees includes 8 “Q’s and A’s” on key issues of concern
- ***Fact Sheet for Small Businesses*** – Includes similar Q’s and A’s to assist small employers with their compliance obligations
- ***Promising Practices for Preventing Harassment*** – Reviews recommended employer practices issued on November 21, 2017
- ***Report of the Co-Chairs of the Select Task Force on Harassment in the Workplace*** – issued in June 2016, which included the findings and recommendations about harassment prevention strategies

Guidance – How Do You Determine Whether There Was a “Hostile Work Environment”

The key questions:

- Was the conduct both objectively and subjectively hostile?
 - Objective hostility: was the conduct sufficiently severe or pervasive to create a hostile work environment from the perspective of a reasonable person?
 - Subjective hostility: did the complainant actually find the conduct hostile?
- What conduct is part of the hostile work environment claim?
 - Can conduct that occurred outside the workplace be considered?
- Can conduct that was not specifically directed at the complainant be considered?

Guidance - General Liability Standards for Harassment

- If the harasser is a **proxy or alter ego** of the employer, the employer is automatically liable.
- If the harasser is a **supervisor and** the hostile work environment includes a **tangible employment action** (i.e., significant change in employment status) the employer is vicariously liable and there is no defense to liability.
- If the harasser is a **supervisor but does not include a tangible employment action**, the employer is vicariously liable, but the **employer may limit its liability or damages if it can prove the *Faragher-Ellerth* affirmative defense:**
 - (1) the employer exercised reasonable care to prevent and correct promptly 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. An employer must establish both prongs in order to rely on the affirmative defense.
- If the harasser is a **non-supervisory employee or third party**, the negligence standard applies: if the employer was negligent in that it failed to act reasonably to prevent the harassment or to take reasonable corrective action in response to harassment when the employer was aware, or should have been aware, of it.



**Highlights of
EEOC Task Force
on Harassment
(& Related
Comments from
Harassment
Guidance)**

Harassment Task Force

Two Basics Themes:

- Harassment prevention should be a primary focus in limiting the risks posed by harassment claims
- Key Recommendation to Employers: “Reboot workplace harassment prevention”

Harassment Task Force - Five Key Takeaways

1. Workplace harassment **remains a persistent problem** as shown by the level of charge activity and related litigation.
2. There is a **compelling business case based on both direct costs**, such as millions paid in settlement costs **and indirect costs** based on negative impact on the workplace resulting in decreased productivity, increased turnover, and reputational harm.
3. Effective harassment prevention includes not only the **importance of senior leadership** taking the view that harassment will not be tolerated, **but also accountability**, both in terms of **those who harass** are held accountable “in a meaningful, appropriate and proportionate manner,” **and those “whose job is to prevent or respond to harassment** should be reported for doing the job well (or penalized for failing to do so).”
4. **Training needs to be beyond merely “avoiding legal liability.”** Training should be “part of a holistic culture of non-harassment, recognizing that (a) training should be tailored to the specific workplace; (b) supervisors can be an employer’s most valuable resource; and (c) the type of training needs to be revisited including “civility training” and “bystander training.”
5. **It’s on all of us!!!!**

Harassment Task Force – “What We Know About” Harassment – Per the Report

- Three subtypes of “Sex-based harassment”
 - 1) Unwanted sexual attention;
 - 2) Sexual coercion, and
 - 3) Gender harassment, which includes “sexually crude terminology” or displays or making sexist comments, including anti-female jokes
- According to the Report, research findings indicate that **“gender harassment” is the most common form of harassment.**
- According to the Report, based on various studies **“the extent of non-reporting is striking.”**

Harassment Task Force – Three Primary Areas of Focus for Harassment Prevention (Plus Related Comments from Recent EEOC Harassment Guidance)

1. Leadership and Accountability

- Impact of “Rainmakers”
- Accountability of those engaging in harassment
- Importance of Supervisors Being Accountable to prevent harassment

2. Policies and Procedures

- Anti-Harassment Policies
- View Toward “Zero Tolerance” Policies
- Reporting Systems for Harassment, including Company Investigations

3. Anti-Harassment Compliance Training



Leadership and Accountability

The “Rainmaker”

- Workplace culture starts at the top.
- Employees at all levels must be held accountable for inappropriate conduct.
- Conduct that is tolerated by leadership is tacitly approved.
- Risk of Serious Consequence to Organization in Litigation
 - Strict liability for supervisor conduct
 - Juries “punish” companies that allow leaders to engage in poor behavior
 - *See e.g., Weeks v. Baker & McKenzie* and lessons learned....

Accountability & Critical Role of Supervisor - Illustrations

- Scenario #1: “Taking Care of Our Own” – Supervisors/local management not reporting a potential problem
- Scenario #2: “Asleep at the Switch” – Not maintaining proper work environment
- Scenario #3: “A Day Late and a Dollar Short” – Repeated conduct not addressed until alleged serious incident occurred
- Scenario #4: “What Were You Thinking?” – Poor judgement in treatment of employees
- Scenario #5 – “What were you thinking?” – Poor judgment in getting involved with subordinate



Harassment Policies, Procedures, & Related Investigations

Harassment Policy Considerations

- A **clear explanation** of prohibited conduct, including examples
- Clear assurances of **non-retaliation** for: (a) complainants; and (b) those who provide information or participate in investigation
- Clearly described **complaint procedure**
- **Assure confidentiality /privacy** of both the accuser and the accused to the greatest extent possible
- Conduct a **prompt, thorough, and impartial investigation**
- Ensure **investigators are well-trained, objective, and neutral** – particularly internal investigators
- Take **immediate and proportionate corrective action**
- Investigators should **document all steps taken** from first point of contact through completion of investigation

Evolving Harassment Policy Issues

- Be mindful of workforce and **consider translations** where appropriate
- Don't overlook **risks faced by use of social media** and integrate with social media policy – (e.g., the dual concern of improper comments/statements on social media and related concern of improper computer-generated images)
- **Avoid use of “zero tolerance”** – because “one size does NOT fit all”
- For credibility of policy - be mindful of ***impact on both accuser and accused*** being treated fairly (i.e., ***risk of accused becoming “damaged goods”***) – ***Risk of suits by both victim and the accused!!***
- **Union settings** – duty of fair rep may include need to also protect interests of accused
- Confidentiality issues for investigation process – **telling employees investigation is completely confidential** – Evolving issue under NLRA and state law

Harassment Investigations - Some Input Based on EEOC Harassment Guidance

- **Dealing with Requests by Purported “Victim” to Take No Action** “In some circumstances, an employee may report harassment but ***ask that the employer keep the matter confidential*** and take no action. Although it may be reasonable in some circumstances to honor the employee’s request when the conduct is relatively mild, it may not be reasonable to do so in all circumstances, including, for instance, if it appears likely that the harassment was severe or if employees other than the complainant are vulnerable”
- **Avoid a Presumption that Male Employee Engaged in Harassment** The guidance underscores that employers need to follow the same investigative process, regardless of the protected status of the alleged harasser or harassee, explaining, “[I]t would violate Title VII if an employer assumed that a male employee accused of sexual harassment by a female coworker had engaged in the illegal conduct, based on stereotypes about the ‘propensity of men to harass sexually their female colleagues’ and therefore fired him.”
- **The Extent to Which the Harassment was Substantiated** – When an employer conducts a thorough investigation, ***if the findings are inconclusive***, the employer is not required to impose discipline. The guidance directly addresses an employer’s options when there are inconclusive findings based on a harassment investigation. “Nonetheless, if the employer is unable to determine whether the alleged harassment occurred, the employer may wish to consider preventive measures, such as counseling, training, monitoring, or issuing general workforce reminders about the employer’s anti-harassment policy.”

Harassment Investigations – Some Input Based on Harassment Guidance

- **Limit Burden on Complainant** – An employee who in good faith complains of harassment should ideally face no burden because of the corrective action the employer takes to stop or prevent the harassment from occurring. The guidance states that “the employer may place some burdens on the complaining employee as part of the corrective action it imposes on the harasser if it makes every reasonable effort to minimize those burdens or adverse consequences,” but the various case citations refer to the remedial measures **not making the victim of sexual harassment worse off following the complaint of harassment**.
- **Employer Obligation to Monitor Whether Harassment Stops** – After taking corrective action, an employer should monitor the situation to ensure that the harassment has stopped. The guidance states that continuation of the harassment does not necessarily mean that the corrective action was inadequate, particularly for first-time offenders engaged in mildly offensive conduct. Similarly, if the same employee engages in further harassment, then the employer may not be liable if it also responded appropriately to the subsequent misconduct by taking further corrective action appropriate to the pattern of harassment.
- **Proportionality of the Corrective Action** – The corrective action should be “proportionate to the seriousness of the offense.” Minor infractions with no prior offenses may warrant counseling or a warning, as contrasted to severe or pervasive conduct that warrants suspension or discharge of the harasser.

A circular inset image showing a close-up of a file folder tab. The tab is made of light brown cardboard and has a white rectangular label with the word "Investigations" printed in a black, typewriter-style font. The background of the inset is a blurred view of other file folders in a cabinet.

Investigations

Conducting Fair Investigations

Some Practical Recommendations

A “Good Faith” Investigation Defined:

- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected and secured
- Conclusion documented
- Remedial measures documented



Plan the Investigation

- **Acknowledge the Complaint**
- **Gather Documents**
 - Policies, personnel and other documents, photos, video/audio, email/IMs/texts
- **Plan Interviews**
 - Start with complainant.
 - Must give accused a chance to explain their side of the story.
 - Prepare outlines and “must ask” questions, but don’t miss important information on the fly!
- Place individual(s) on **leave and/or restrict access?**
 - At what point?

Interviews

- **Location**
 - In-person interviews are generally better
 - Zoom considerations
 - Do you bring a witness to the interview?
 - Does it need to be in a place where co-workers will not see?
- **Non-retaliation reminder**
- **Confidentiality**
 - “**Need to know** circle,” but no way to promise 100% confidentiality
 - Complainant has the right to talk with coworkers about terms and conditions of employment

Confidentiality

- Non-supervisors have the right to talk with coworkers about terms and conditions of employment per the National Labor Relations Act
- The Equal Employment Opportunity Commission has taken the position that co-workers who are complaining about discrimination, harassment, retaliation, etc., have the right to talk to each other about their complaints
- Emphasize the following to witnesses:
 - Company values the integrity of the investigation and the importance of conducting an investigation that is thorough, accurate, and fair.
 - Company expects cooperation, honesty, and candor, and that associates will not interfere with, impede, or undermine the investigation.

Training Scenario – “I don’t want to get anyone in trouble”

“I don’t want anyone to get in trouble.”

or

“I don’t want an investigation.”

What do you do?

Once we’re on notice, we need to investigate and take prompt, effective remedial action. It’s not the employee’s choice whether we investigate.

On some occasions, a “preliminary investigation” is appropriate to determine if a full investigation is needed (i.e., a simple complaint about a manager).

Interviews

- Start simple – tell me what’s going on in **chronological** order
 - General nature of complaint
 - Open-ended questions
 - Chronological; anticipate witness will get off track – bring them back!
 - Who, what, when, where, why
 - Start broad then funnel
 - Focus on facts not labels
 - Inconsistencies – ASK!
 - Motivation – why?
 - Ask each witness who else may have relevant information.

Training Scenario – Witness says “I want them fired”

You have interviewed a witness about misconduct on his team. At the end of the interview, the witness says things will never get better unless certain team members are fired, and asks if you will be firing them.

What do you do?

Clarify your role: As an investigator, your role is to find out what the facts are and discuss the facts with management.

Reassure your role allows them to provide input: Are there any other facts you want to share? Any other people whom I should interview?

Social Media

- Do not demand that employees provide passwords or provide access to their social media sites
- Do not demand that employees “friend” you so you can obtain access to their social media sites
- However, employees are free to share with you information from their social media sites



Interview of the Accused/Others

- **Critical to allow the accused to tell their side of the story**
- Avoid disclosing identity of complainant, if possible
 - Often not possible when interviewing accused.
 - Often is possible when interviewing other witnesses
- Carefully consider questions or information disclosed to witnesses

Interview of the Accused/Others

- Same process as interviewing complainant – **open ended** questions first
 - Exercise caution with excessively specific questions early in the interview
 - **Broad then funnel**
 - After you get their side of the story, then be more specific
 - **Use facts not labels.**
 - E.g., “did you put yourself into unavailable status from 9:21 am to 10:34 am?” not “were you avoiding work?” (you can ask about motivation after you get the facts).
 - E.g., “did you ask her to have sex?” not “are you harassing her?”
- Any other witnesses? Documents?
- End with “anything else” question/leave door open

Credibility Determination



- Sometimes investigations come down to “he said/she said” situations in which there are no other witnesses
- A lack of a third-party or “neutral” witness alone does not mean the complaint should be considered unsubstantiated
- Investigators must try to make credibility determinations
- Determinations must be objective
- Don’t make final credibility determinations until investigation is complete

Credibility Determinations

- When assessing credibility, consider the following:
 - Plausibility
 - Source of Information
 - Detail
 - Corroboration or conflicting testimony
 - Internal Contradictions
 - Demeanor
 - Omissions
 - Slow to come forward
 - Prior incidents
 - Motive

Drafting the Report

- Purpose of the report
 - Document process, facts, policies, and reasons for factual findings
 - Evidence of prompt and fair investigation
 - Allows decision makers to get up to speed and make an informed decision with confidence that you did a deep dive.
- Format of the Report
 - Attorney Client Privilege drafts?
 - Recommend NOT making recommendations regarding outcomes

Drafting the Report – Be Precise Use Facts Not Labels

- Not Precise

- Kate was often tardy.
- Lisa complained that she was sexually harassed by Harold

- Precise

- Kate was more than 30 minutes late on three occasions in March (or better – give the dates).
- Lisa complained that her supervisor asked her out on a date three times.

Drafting the Report – Be Precise Use Facts Not Labels

- Not Precise

- Margaret’s work exhibits a lack of concentration.
- Teresa does not get along with her coworkers.
- Joe used inappropriate language.

- Precise

- Margaret made 29 typing errors in one three-page document.
- Teresa yelled at Chris for rescheduling a meeting and slammed down the phone when talking with Loretta.
- Joe held up the report and said, “What is this shit?”

Closing out the Investigation

- Close out:
 - Focus on compliance with policies rather than laws
 - Complainant: Provide high-level summary of findings, ideally face-to-face
 - Accused: Is or is not substantiated?
 - Corrective action? Who owns delivery and follow up?
 - Written or verbal (or both)
 - If disciplinary action is taken, do not share the details with the complainant; Simply make clear that the company has taken appropriate action
 - Entertain questions but do not engage in a debate

Follow Up

Investigators should maintain complete files of their investigations in a centralized location.

Other follow-up below may or may not be handled by the investigator (may be business unit and/or HR).

- Follow-up with the complainant. Any recurring/new problems?
- Managers of the accused should closely monitor interactions post-complaint
- Document substantiated outcome in the accused's personnel file
- Put documentation of complaint and investigation in separate file
- Monitor, follow-up and document that all post-investigation actions have been completed



Training Guidelines

Training Guidelines

General Guidelines for Compliance Training:

- Focus on helping employees comply with legal requirements
- Training should include conduct, that if left unchecked, can lead to illegal harassment.
- Address the needs of the particular workplace (e.g., youth workplace, casino, isolated late-night work, etc.)
- Focus on “unacceptable behavior,” rather than teach legal standards.
- Educate employees regarding their rights & responsibilities, including multiple avenues to report unwelcome conduct.
- Describe how employee who witnesses harassment should report such conduct.
- Explain how complaint procedure will proceed.
- Clarify what is not harassment – e.g., telling employee that performance management is not harassment

Training Guidelines Harassment Guidance – “Best Practices”

- For **training** to be effective, it should generally have the following features:
 - Explains the employer’s anti-harassment policy and complaint process, including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
 - Describes and provides examples of prohibited conduct under the policy;
 - Provides information about employees’ rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
 - Provides supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment, such as actions that can be taken to minimize the risk of harassment, and with clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of;
 - Tailored to the workplace and workforce;
 - Provided on a regular basis to all employees; and
 - Provided in a clear, easy-to-understand style and format.
- Despite these recommended best practices for an anti-harassment policy, complaint procedure, and training, the guidance emphasizes that **an employer must implement these elements “effectively” in order to be able to rely on the affirmative defense**



Employer Takeaways

Employer Takeaways

- Ask yourself: Is your anti-harassment policy and related training on auto-pilot? Does it need to be reevaluated/refreshed? Employers should consider “rebooting” their anti-harassment policies and procedures.
- Does your supervisory and management team understand the issues tied to “accountability”? Remember the scenarios!!
- In dealing with harassment prevention, are you focusing on conduct in the work environment that has not yet risen to an actionable claim, but reasonably may be expected to do so if appropriate corrective action is not taken?
- Is discipline for harassment proportionate based on the nature of the offense vs. application of a “zero tolerance” policy?
- Is your HR team “up to speed” based on the applicable standards for actionable harassment and employer liability?
- Are those responsible for harassment investigations properly trained and has the company set up appropriate protocols for conducting effective harassment investigations?
- Are your HR and Legal teams prepared to deal with the risks of a potential expanded investigation based on a harassment Charge being filed against the employer?



Questions?

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