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Challenging Harassment in the Workplace: A Key Priority at the EEOC

PRIMER FOR EMPLOYERS ON PREVENTION STRATEGIES AND APPLICABLE LEGAL STANDARDS

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to handling and/or resolving harassment claims or related litigation. Nonetheless, employers involved in such matters may find the information useful in understanding the issues raised and their legal context. This Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise based on any harassment claim or related employment dispute.

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I. INTRODUCTION

I. Introduction

As part of an employer's EEO compliance efforts, minimizing the risk of harassment claims should be a top priority. Recent statistics issued by the Equal Employment Opportunity Commission (EEOC) indicate that the number of harassment charges has continued to spike upward over the past several years, including the monetary recovery for such claims.

On May 15, 2024, the EEOC issued its annual statistics on charge activity, which indicated the following:[1]

- Total harassment charges climbed from 21,270 in FY 2021 to 24,430 in FY 2022 to 31,354 in FY 2023, thus increasing over 47% in the past three years. Monetary recoveries also dramatically increased during this period. The monetary recovery went from $142.2 million in FY 2021 to $144.1 million in FY 2022 to $202.2 million in FY 2023.[2]
- Sexual harassment charges increased from 5,581 in FY 2021 to 6,201 in FY 2022 to 7,732 in FY 2023. Monetary recovery remained relatively constant, going from $61.6 million to $59 million to $60.6 million during these three fiscal years.
- Race harassment charges grew from 7,755 in FY 2021 to 8,524 in FY 2022 to 11,720 in FY 2023. Monetary recovery increased most dramatically in this area, going from $38.8 million to $34.1 million to $75.4 million during these three fiscal years.[3]

On April 29, 2024, the EEOC also released the long-anticipated update to its enforcement guidance on harassment in the workplace. The guidance provides a legal analysis of the standards for harassment and employer liability involving harassment based on the EEO statutes enforced by the EEOC. The 2024 guidance replaces five prior guidance documents on workplace harassment issued by the agency between 1987 and 1999. In its rollout of the guidance, the EEOC highlighted that since that time, a number of notable changes in the law have occurred, including the U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision, in which the Supreme Court held that Title VII's prohibition on discrimination "because of sex" extended to discrimination on the basis of sexual orientation and gender identity. The agency also noted that the emergence of new issues, such as online harassment, justified its update.

The recent guidance on harassment was issued on the heels of two important EEOC publications: (1) the EEOC's Strategic Enforcement Plan for 2024-2028, which identified "Preventing and Remedying Systemic Harassment" as one of the agency's six priorities;[4] and (2) the EEOC's 2023 Annual Performance Report, which reported on the EEOC's charge activities and litigation during FY 2023.[5]

In its Strategic Enforcement Plan (SEP) issued on September 23, 2023, the EEOC stated that "Preventing and Remedying Systemic Harassment" is one of the EEOC's six priorities and underscored that the agency would continue to focus on combatting systemic harassment in all forms and on all bases, explaining:[6]

> Harassment, both in-person and online, remains a serious issue in our nation's workplaces. Over 34 percent of the charges of employment discrimination the EEOC received between FY 2018 and FY 2022 included an allegation of harassment, and harassment charges increased in FY 2022. In the federal sector, 47 percent of appeals received between FY 2018 and FY 2022 included an allegation of harassment, and the total number of harassment charges increased in FY 2022. The EEOC will continue to focus on combatting systemic harassment in all forms and on all bases—including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, childbirth, or related medical conditions, gender identity, and sexual orientation) or a combination or intersection of any of these. With respect to charges and litigation, a claim by an individual or small group may fall within this priority if it is related to a widespread pattern or practice of harassment.

1 *See* Enforcement and Litigation Statistics | U.S. Equal Employment Opportunity Commission (eeoc.gov)
2 *See* Appendix A for a review of recent harassment settlements.
3 The statistics involving monetary recovery were based solely on pre-litigation resolutions.
4 *See* Strategic Enforcement Plan Fiscal Years 2024 - 2028 | U.S. Equal Employment Opportunity Commission (eeoc.gov) ("SEP").
5 *See* 2023 Annual Performance Report | U.S. Equal Employment Opportunity Commission (eeoc.gov) ("2023 EEOC Performance Report")
6 *Id.; see also* EEOC Releases Strategic Enforcement Plan | U.S. Equal Employment Opportunity Commission.

To combat this persistent problem, the EEOC will continue to focus on strong enforcement with appropriate monetary relief and targeted equitable relief to prevent future harassment. The EEOC will also focus on promoting comprehensive anti-harassment programs and practices, including training tailored to the employer's workplace and workforce, using all available agency tools, including outreach, education, technical assistance, and policy guidance.[7]

In the EEOC's 2023 Performance Report, issued on February 23, 2024, the EEOC reviewed its various efforts to address harassment in the workplace:[8]

> Combatting all forms of workplace harassment remains an important priority of the agency. In fiscal year 2023, the EEOC filed 50 lawsuits challenging workplace harassment: 29 cases raised claims of hostile work environment based on sex, 16 based on race, 5 based on national origin, 1 based on disability, 1 based on religion, and 6 based on retaliation. Twenty-two harassment suits were individual cases, 25 were class cases, and 3 were systemic cases. In total, just over 35% of all lawsuits filed by the agency included an allegation of harassment.[9] The EEOC successfully resolved 35 harassment suits in fiscal year 2023. Five of these resolutions involved allegations of systemic harassment. The EEOC recovered nearly $9.8 million for 184 individuals subjected to harassment through its litigation program, including three systemic cases.

While the EEOC has been focusing on the risks and liability posed by harassment claims, the EEOC's 2024 harassment guidance also highlights key resources to assist employers in developing harassment prevention strategies, including the EEOC's 2017 "Promising Practices for Preventing Harassment" technical assistance document[10] and the 2016 Report of the Co-Chair of the Select Task Force on Harassment in the Workplace.[11]

In short, harassment prevention should be a primary focus in limiting the risks posed by harassment claims. With that in mind, this Littler Report initially focuses on harassment prevention strategies, relying on guidance provided by the EEOC's Task Force Report on Harassment. The discussion of harassment prevention will be followed by a detailed review of the EEOC's recently issued guidance in discussing the potential scope of actionable harassment claims and employer liability standards that the EEOC will rely on when an employer is faced with a harassment claim. The final section is devoted to a discussion of harassment investigations and related systemic harassment litigation by the EEOC.

This employer primer also includes appendices reviewing: (1) Noteworthy harassment settlements with the EEOC ("Appendix A"); (2) Recently filed lawsuits by the EEOC involving sexual harassment and harassment claims based on other grounds ("Appendix B" and "Appendix C"); (3) Harassment prevention strategies discussing "promising practices" tied to: (a) leadership and accountability; (b) developing a comprehensive and effective harassment policy; (c) ensuring that an employer has an effective and accessible harassment complaint procedure; and (d) implementing effective harassment training ("Appendix D");[12] and (4) Harassment prevention strategies that focus on the construction industry, which the EEOC issued on June 18, 2024 ("Appendix E").[13]

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7 *See* SEP at 12.
8 *See* 2023 EEOC Performance Report, Related Program Results and Activities, Section F, "*Challenging Discrimination in Federal Court.*"
9 *See* "Appendix B ," attached to this Littler Report, for a review of recent harassment litigation involving both sexual harassment and other sex-based claims, and "Appendix C" to this Littler Report regarding other types of harassment litigation filed by the EEOC.
10 *See* *Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
11 *See* *Select Task Force on the Study of Harassment in the Workplace | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
12 *See* Appendix D to this Littler Report.
13 *See* Appendix E to this Littler Report.

II. A Guide to Harassment Prevention – EEOC Task Force on the Study of Harassment in the Workplace

II. A Guide to Harassment Prevention – EEOC Task Force on the Study of Harassment in the Workplace

On June 6, 2016, the EEOC issued the above-referenced Report by the Select Task Force on the Study of Harassment in the Workplace, an 88-page Report[14] based on the results of the "Select Task Force on the Study of Harassment in the Workplace." Discussed below are various highlights of the Task Force Report.

A. EXECUTIVE SUMMARY

The goal of the EEOC's Task Force Report on Harassment ("TF Report") was to "reboot workplace harassment prevention," and for that reason the Task Force reviewed "conduct and behaviors which might not be 'legally actionable,' but left unchecked, may set the stage for unlawful harassment."[15] The key findings of the TF Report were as follows:[16]

- Workplace harassment remains a persistent problem, as illustrated by the fact that in the fiscal year prior to issuance of the TF Report, approximately one-third of all discrimination charges involve an allegation of workplace harassment
- There is a "compelling business case" to stop and prevent harassment, based on both "direct costs," such as the millions paid in settlement of claims, and indirect costs, based on the negative impact on the workplace resulting in "decreased productivity, increased turnover, and reputational harm."
- 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 ensuring that those who harass "are held responsible in a meaningful, appropriate and proportional manner," and those "whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so)," and anti-harassment efforts must be given "the necessary time and resources to be effective."
- Training programs need to go beyond merely "avoiding legal liability," and training should be "part of a holistic culture of non-harassment," recognizing that such training should be tailored to the specific workforce, and middle managers and supervisors "can be an employer's most valuable resource" in harassment prevention. The Report underscores that employers need to consider different approaches to training such as "bystander intervention training" so co-workers have the tools to intervene when witnessing harassing behavior, and "civility training" that promotes respect and civility in the workplace.
- The TF Report concludes that it is up to everyone – "it's on us" to "be part of the fight to stop workplace harassment," and employers "cannot be complacent bystanders and expect our workplace cultures to change themselves."

B. WHAT WE KNOW ABOUT HARASSMENT IN THE WORKPLACE

In reviewing various studies on harassment in the workplace, the TF Report concluded that "sex-based harassment" has three subtypes: (1) unwanted sexual attention; (2) sexual coercion, and (3) gender harassment. According to the TF Report, research findings indicate that "gender harassment" is the most common form of harassment."[17] Gender harassment includes "sexually crude terminology" or displays (such as using the derogatory "c" word toward a female co-worker or posting pornography) or making sexist comments, including anti-female jokes.[18] The prevalence of other forms of harassment because of race, ethnicity, religion, age, disability, gender identify or sexual orientation is less known, other than reported harassment charges based on such status.[19]

14 The EEOC's Task Force Report was prepared by the Co-Chairs of the Task Force, former EEOC Commissioners Chai R. Feldblum & Victoria Lipnic, while they were serving as Commissioners at the EEOC.
15 *See* TF Report, Executive Summary at iv.
16 *Id.* at iv – vi.
17 *Id.* at 9 and accompanying footnote 22.
18 *Id.* at 9 and accompanying footnote 20.
19 *Id.* at 9.

The Report states, "the extent of non-reporting is striking."[20] The TF Report cites certain studies, which attribute victims' non-reporting to fear of several reactions: (1) disbelief of their claim; (2) inaction on their claim; (3) receipt of blame for causing the offending actions; (4) social retaliation (including humiliation and ostracism); and (5) professional retaliation, such as damage to their career or reputation.[21] According to the TF Report, based on only 6% to 13% of individuals experiencing harassment filing a claim, "anywhere from 87% to 94% of individuals did not file a formal complaint."[22]

At the time of the TF Report, approximately 31% of all discrimination charges alleged some form of harassment.[23] which is comparable to the statistics discussed at the outset of this Littler Report.

The TF Report also reviews in some detail the "indirect costs" tied to harassment, particularly sexual harassment. In citing various studies and testimony before the Commission, the TF Report references the negative impact on employees, including employees suffering from depression and other psychological disorders and adverse physical effects, such as headaches, sleep problems and weight loss or gain, to name a few.[24] The TF Report also discusses the adverse effect on team and group relationships, employee turnover, and potential reputational damage to the employer.[25]

As a precursor to various news headlines, the TF Report also addresses the competing economic considerations when the alleged harasser is a workplace "superstar," and cautions that "superstar status can be a breeding ground for harassment."[26] The TF Report refers to various considerations, including special privileges accorded such workers based on "higher income, better accommodations and different expectations," which could "lead to a self-view that they are above the rules."[27] Reference was made to a Harvard Business School study, which suggested that avoiding such "toxic workers" actually "can save a company more than twice as much as the increased output by such workers," and "[n]o matter who the harasser is, the negative effects of harassment can cause serious damage to a business."[28]

This section of the TF Report concludes by focusing on certain workplace settings in which employees reportedly are more prone to harass, and includes specific strategies to reduce the risk of harassment.[29]

C. PREVENTING HARASSMENT IN THE WORKPLACE

In the crucial section of the TF Report, the Co-Chairs address preventive strategies to reduce the risks of harassment in the workplace. Discussed below are the key points.

1. Leadership and Accountability.

A central theme of the TF Report is creating a workplace culture with the greatest impact in preventing harassment. The TF Report highlights the paramount importance of "leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable."[30] However, as important is "accountability" to ensure that those who harass are held responsible in a "meaningful, appropriate and proportional manner," and those who are tasked with preventing or responding to harassment, directly or indirectly, "are rewarded for doing that job well, or penalized for failing to do so."[31] Leadership and accountability are described as "two sides of the coin."[32] As significantly, the TF Report stresses that commitment to a harassment-free workplace "must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy."[33] Critical to meeting this objective is creating an environment in which there is mutual respect, regardless of an employee's gender, race or any other protected status.

The TF Report emphasizes that effective leadership requires the following actions:

20 *Id.* at 15.
21 *Id.* at 16.
22 *Id.*
23 *Id.* at 18.
24 TF Report at 20-21.
25 *Id.* at 22-23.
26 *Id* at 24.
27 *Id.*
28 *Id.*
29 *Id.* at 25-30; *see also* Appendix C to TF Report at 83-88.
30 *Id.* at 31.
31 *Id.*
32 *Id.*
33 *Id.*

- First, an employer must establish a "sense of urgency" about preventing harassment, which can be done by (i) evaluating whether the workplace setting is one in which workers are more prone to harass, and if so, taking proactive steps to address the concerns;[34] and/or (ii) conducting climate surveys to determine whether employees feel that harassment exists in the workplace and is tolerated.[35]
- Second, an employer must have *effective* policies and procedures and *effective* training to ensure that employees understand the employer's policy and ways to report concerns, which may require periodic testing to ensure that the system is working.[36]
- Third, the employer needs to ensure that "money and time" are invested in this initiative, which includes having harassment prevention included as part of an employer's budget.[37]
- Fourth, those tasked with addressing harassment prevention need to be "vested with enough power and authority to make such change happen."[38]

The TF Report also addresses the importance of "accountability," as demonstrated to employees, so they have confidence that harassment complaints will be taken seriously and that "proportionate corrective actions" will be taken, which will cause employees to report harassment they *experience or observe*, thus creating a "positive cycle" that reduces harassment in the workplace.

Critical to an effective harassment prevention program is accountability by those who harass, and sanctions that are appropriate for "bad behavior." In other words, the wrong message is sent if highly valued or senior employees engaging in bad behavior are not dealt with severely if they engage in harassment.[39] The TF Report also stresses the importance of mid-level or front-line managers being held responsible for promptly following up on a harassment complaint and/or protecting from retaliation those who report harassment.[40] The TF Report highlights that a "rewards system" that incentivizes and rewards responsiveness "speaks volumes."[41] The TF Report states that "counter-intuitively, rewards initially could be given to reward manager when there is an increase in complaints in their area of responsibility."[42] The TF Report stresses that a "holistic approach" is needed in which each aspect of an effective harassment is addressed, rather than merely focusing on a particular issue, such as having a metric for a manager's performance in responding to a harassment complaint or having a harassment policy mentioned consistently at employee meetings, but not protecting those who complain about harassment.[43]

The TF Report also includes an appendix with various checklists for compliance, including "Checklist One: Leadership and Accountability."[44] Since issuance of the TF Report, the EEOC has also developed and posted "Promising Practices for Preventing Harassment," which includes a checklist on "Leadership and Accountability."[45] These "Promising Practices" are included as "Appendix D" to this Littler Report.

2. Policies and Procedures

The Task Force next addresses policies, reporting procedures, investigations and corrective actions as part of an employer's "holistic effort" to prevent harassment.

Anti-Harassment Policies. The TF Report recommends that employers adopt a "robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy."[46] The TF Report recommends that an anti-harassment policy should include the following:[47]

34 *See* Appendix C to TF Report at 83-88.
35 TF Report at 32-33.
36 *Id.* at 33.
37 *Id.* at 34.
38 *Id.* at 34.
39 *Id.*
40 *Id* at 35.
41 *Id.*
42 *Id.* at 36.
43 *Id.* at 36-37.
44 *Id.*, Appendix B, at 79.
45 *See* EEOC, EEOC-NVTA-2017-2, *Promising Practices for Preventing Harassment* (Nov. 21, 2017).
46 TF Report at 38.
47 *Id.*

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior that may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

The TF Report emphasizes the importance of the policy being in easy-to-understand language, in all languages used in the workplace, be communicated regularly to employees, including information on how to file a complaint, and that employers take a "critical look" at the current policy and determine whether a "reboot" should be considered.

Here, too, the Appendix to the TF Report includes a checklist for compliance, called "Checklist Two: An Anti-Harassment Policy."[48] The EEOC's subsequently developed "Promising Practices for Preventing Harassment," also includes a section entitled, "Comprehensive and Effective Harassment Policy," which elaborates on "Checklist Two" that discusses "An Anti-Harassment Policy."[49]

Social Media. Based on the extensive use of social media today, the TF Report also addresses the positives and negatives of social media. From a positive perspective, social media provides the opportunity for "less formal and more frequent interactions." On the other hand, from a negative perspective, it can "foster toxic interactions." For that reason, the TF Report emphasizes that harassment "should be in employers' minds as they draft social media policies," and "social media issues should be in employers' minds as they draft anti-harassment policies."[50]

"Zero Tolerance" Policies. One of the most significant recommendations of the TF Report worth close review involves its "caution" against use of the phrase "zero tolerance" as part of an anti-harassment policy. In the view of Task Force Co-Chairs Victoria Lipnic and Chai Feldblum, a zero-tolerance policy may inappropriately convey the view that "one size fits all." This could cause under-reporting of harassment complaints, particularly involving minor harassing behavior, because a co-worker does not want the offending employee to lose their job over the conduct.[51]

Reporting Systems for Harassment. Based on the TF Report, an effective anti-harassment policy needs to serve the needs of those who have *experienced* or *observed* harassment to come forward and report harassment. For the system to have credibility, if an employee has a bad experience, this may negatively affect others relying on the system. As important are those accused of harassment being treated fairly under the system.[52] The TF Report highlights the importance in a unionized environment of the union taking the system seriously and supporting complainants and witnesses, but also considering that unions have obligations to all employees they represent, including union members who may be accused of harassment.[53]

Under any harassment program, however, the TF Report stresses the importance of the reporting system being multi-faceted and robust so employees have various options in reporting harassment concerns, which may include human resources personnel, company managers, complaint hotlines and web-based complaint procedures. The response may also need to vary depending on the nature of the conduct, and it may merely require a manager talking to an employee sometimes or a full-blown investigation in other situations.[54]

The EEOC also recognized that requirements to keep an investigation confidential under anti-discrimination laws might conflict with certain decisions under the National Labor Relations Act (NLRA).

48 *Id.*, Appendix G, at 80.
49 *See* *Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)* and TF Report, Appendix B, at 80.
50 TF Report at 39.
51 *Id.* at 40.
52 *Id.*
53 *Id.* at 40-41.
54 *Id.*

The TF Report underscores the importance of the EEOC working with the National Labor Relations Board (NLRB) "to harmonize the interplay of federal EEO laws and the NLRA."[55]

Finally, the TF Report discusses key elements of a successful reporting system, including addressing how investigations should be conducted. The TF Report identifies the following as key elements in a successful reporting system:[56]

- Employers who receive harassment complaints must take the complaints seriously.
- The reporting system must provide timely responses and investigations.
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution.
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and the need to conduct a thorough, effective investigation.
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all parties.

The Appendix to the TF Report also includes "Checklist Three: A Harassment Reporting System and Investigations."[57] The EEOC's subsequently developed "Promising Practices for Preventing Harassment" also includes discussion of an "Effective and Accessible Harassment Complaint System," included herein as part of Appendix D to this Littler Report, which incorporates and expands upon various items in "Checklist Three" in the TF Report.[58]

3. Anti-Harassment Compliance Training

The TF Report highlights several reasons employers have developed anti-harassment training programs: (1) early initiation of such training following the EEOC's 1980 guidelines that suggested training to prevent harassment; (2) the impact of the U.S. Supreme Court's 1998 decisions in *Burlington Industries, Inc. v. Ellerth*[59] and *Faragher v. City of Boca Raton*,[60] in which anti-harassment training has been part of an employer's affirmative defense to harassment lawsuits involving supervisors; (3) EEOC conciliation agreements and consent decrees requiring such training; and (4) anti-harassment training mandated as of the date of the TF Report based on state laws in California, Connecticut and Maine.[61]

The TF Report points to various studies regarding the effectiveness of anti-harassment training and provides certain takeaways: (1) training can increase the ability of employees to understand the nature of the conduct that constitutes "harassment," which is unacceptable in the workplace; (2) to be effective, training must be coupled with other efforts to prevent harassment; and (3) although there was no evidence that training reduced the frequency of harassment, complaints to HR increased based on such training.[62]

The TF Report next provides insights regarding the key contents of anti-harassment training for both non-management and management employees, particularly focusing on "compliance training."[63]

Training for All Employees. According to the TF Report, compliance training focuses on helping employers comply with legal requirements, but such training should not be limited to actionable harassment. Rather, training should include "conduct, [that] if left unchecked, might rise to the level of illegal harassment."[64] The TF Report recommends that compliance training: (1) address the needs of the particular workplace, rather than using a "one size fits all" approach; (2) focus on "unacceptable behaviors," rather than trying to

55 *Id.* at 42.
56 *Id.*
57 *Id.*, Appendix B, at 81.
58 *See* Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)
59 524 U.S. 742 (1998).
60 524 U.S. 775 (1998).
61 TF Report at 44. Since issuance of the report, other jurisdictions have adopted laws requiring anti-harassment training, including Delaware, District of Columbia, Illinois (plus the City of Chicago), New York (plus New York City), and Washington (for hotel, motel, retail, security guard entities or property services contractor employee with 1 or more employees).
62 *Id.* at 47-48.
63 *Id.* at 49-51.
64 *Id.* at 50.

teach participants the legal standards that will make such conduct illegal;[65] (3) educate employees regarding their rights and responsibilities, including having "multiple avenues" to report unwelcome conduct; (4) describe how employees who witness harassment report such conduct; and (5) explain how the complaint procedure will proceed.[66] As significant, the TF Report highlights the importance of clarifying what conduct is ***not*** harassment,[67] explaining:

> Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

Training for Middle Managers and First-Line Supervisors. As discussed earlier in the TF Report, management and supervisory personnel must receive "clear messages of accountability" regarding their responsibilities in dealing with harassment, including: (1) practical advice on how to respond to different levels and types of offensive behavior; (2) instructions on how to report such conduct "up the chain of command"; and (3) the responsibilities of supervisors to address harassing behavior, even absent a complaint.[68]

The TF Report also focuses on key principles regarding the "structure" of successful compliance training:

- Training should be supported at the highest levels;
- Training should be conducted and reinforced regularly for all employees;
- Training should be conducted by qualified, live, and interactive trainers; and
- Training should be routinely evaluated.[69]

The Appendix to the TF Report also includes "Checklist Four: Compliance Training."[70] The EEOC's "Promising Practices for Preventing Harassment," included in this Littler Report as Appendix D, includes a discussion of "Effective Harassment Training," which incorporates and expands upon various provisions in the TF Report.[71]

4. Workplace Civility and Bystander Intervention Training

In discussing training options, the TF Report addresses training that may help shape the "organizational structure" and help prevent harassment in the workplace. The TF Report specifically addresses two types of training programs "showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander training."[72]

Workplace Civility Training. Contrary to the typical compliance training that focuses on eliminating unwelcome behavior, the TF Report explains that workplace civility training involves "promoting respect and civility in the workplace generally."[73] Such training stresses the "positive" – "what employees and managers should do, rather than on what they should not do."[74] While the authors of the TF Report comment that the civility training "has not been rigorously evaluated," they submit that such training "could provide an important complement" to compliance training.[75] The authors acknowledge that "civility codes" have been challenged under the NLRA, and they recommend that the NLRB and EEOC confer "to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes."

65 *Id.*
66 *Id.* at 50-51.
67 *Id.* at 50.
68 *Id.* at 51.
69 *Id.* at 52-53.
70 *Id.*, Appendix B, at 82.
71 *See* Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)
72 TF Report at 54-60.
73 *Id.* at 54.
74 *Id.* at 55.
75 *Id.* at 56.

Bystander Intervention Training. According to the TF Report, bystander training frequently has been utilized to prevent sexual assault at high schools and colleges, and such training is used to "empower students to intervene with peers to prevent such assaults from occurring."[76] In the view of the Co-Chairs of the TF Report, such training might be effective in the workplace, explaining:[77]

> Such training could help employees identify unwelcome and offensive behavior that is based on a co-worker's protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

D. FINAL COMMENTS ON TASK FORCE REPORT

The TF Report concluded by discussing the importance of education and outreach. This includes outreach efforts by the EEOC and non-profit organizations that provide information for workers, and other types of resources for employers, such as working with employment counsel and getting support from membership organizations like the Society for Human Resources Management. According to the TF Report, more focused outreach on youth is needed, but the Co-Chairs commended the EEOC for its Youth@Work outreach and education campaign.[78]

The TF Report also referred to the Commission's plan to update Enforcement Guidance on Harassment to be used as a resource by employers and employees,[79] but the guidance was never finalized and issued until recently, as further discussed below.

The TF Report included the observation that although the ideas provided in the TF Report may be helpful, sitting back as "complacent bystanders" will have no impact on workplace cultures needing change. The TF Report referred to the "audacious goal to launch an 'It's On Us' campaign to address anti-harassment efforts in the workplace."[80]

76 *Id.* at 57.
77 *Id.*
78 *Id.* at 62.
79 *Id.* at 61-62.
80 *Id.* at 64-65.

III. Review of EEOC's Current View on Potential Scope of Harassment Claims and Applicable Liability Standards

III. Review of EEOC's Current View on Potential Scope of Harassment Claims and Applicable Liability Standards

A. INTRODUCTION

On April 29, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) released a long-anticipated update to its enforcement guidance on harassment in the workplace.[81] The update comes almost 25 years after EEOC last published guidance on this topic. In addition to the guidance itself, the agency simultaneously issued a summary of its key provisions,[82] FAQs on workplace harassment for employees,[83] and a fact sheet for small businesses.[84]

The guidance focuses on a legal analysis of harassment and the standards for imposing employer liability for harassment based on the statutes enforced by the EEOC. Thus, the guidance is intended to "protect covered employees from 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." The agency takes pains to remind employers they are responsible to prevent harassment of their employees not only by supervisors and coworkers, but also by customers, clients, vendors, and the like.

As discussed at the outset of this Littler Report, the 2024 guidance replaces five prior guidance documents on workplace harassment issued by the EEOC between 1987 and 1999. In rolling out the guidance, the EEOC highlighted a number of notable changes in the law since then, including the 2020 *Bostock v. Clayton County* decision, in which the U.S. Supreme Court held that Title VII's prohibition on discrimination "because of sex" includes discrimination on the basis of sexual orientation and gender identity. The EEOC also noted that the emergence of new issues, such as online harassment, called for such an update.

The precursor to the 2024 guidance was proposed harassment guidance, issued in 2017 during the Trump administration, but the prior draft guidance was never finalized. In October 2023, the EEOC reissued a draft of the current guidance, prompting roughly 38,000 comments prior to the final issuance of the guidance on April 29, 2024.

81 EEOC, EEOC-CVG-2024-1, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024); *see also* *EEOC, Press Release, EEOC Releases Workplace Guidance to Prevent Harassment* (Apr. 29, 2024).
82 *Summary of Key Provisions: EEOC Enforcement Guidance on Harassment in the Workplace | U.S. Equal Employment Opportunity Commission*
83 *Questions and Answers for Employees: Harassment at Work | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
84 *Small Business Fact Sheet: Harassment in the Workplace | U.S. Equal Employment Opportunity Commission (eeoc.gov)*

The EEOC explains the structure of the guidance as follows:[85]

Structure of this Guidance

In explaining how to evaluate whether harassment violates federal EEO law, this enforcement guidance focuses on the three components of a harassment claim. Each of these must be satisfied for harassment to be unlawful under federal EEO laws.

- *Covered Bases and Causation:* Was the harassing conduct based on the individual's **legally protected characteristic** under the federal EEO statutes?
- *Discrimination with Respect to a Term, Condition, or Privilege of Employment:* Did the harassing conduct constitute or result in **discrimination with respect to a term, condition, or privilege of employment?**
- *Liability:* Is there a basis for holding the employer liable for the conduct?

This guidance also addresses systemic harassment and provides links to other EEOC harassment-related resources.[86]

The guidance includes approximately 90 pages of text and an additional 80 pages of annotations that includes 387 footnotes, citing various court decisions with brief explanations of the cases and other supporting authority for the guidance. The EEOC states that its Harassment Guidance "serves as a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues." Even so, the EEOC cautions, "Nothing in this document should be understood to prejudge the outcome of a specific set of facts presented in a charge filed with the EEOC."

With respect to the substantive guidance, the agency highlights a wide range of conduct that may, if sufficiently severe and pervasive, rise to the level of actionable harassment, including:[87]

- Saying or writing an ethnic, racial, or sex-based slur;
- Forwarding an offensive or derogatory "joke" email;
- Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
- Threatening or intimidating a person because of the person's religious beliefs or lack of religious beliefs;
- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person's disability;
- Mocking a person's accent;
- Making fun of a person's religious garments, jewelry, or displays;
- Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts;
- Groping, touching, or otherwise physically assaulting a person;

85 The full text of the guidance is available on the EEOC's website at *Enforcement Guidance on Harassment in the Workplace | U.S. Equal Employment Opportunity Commission (eeoc.gov)*. It should be noted that the current available printed version of the guidance is not paginated. For that reason, where further review of the actual text to the guidance may be helpful, this Littler Report makes reference to the applicable footnote in the Guidance and the corresponding text in the Guidance.

86 The 2024 harassment guidance also includes an "Addendum" which addresses various issues that were the source of many comments to the draft guidance, and specifically: (1) Harassment based on Sexual Orientation or Gender *Id*entify; (2) Free Speech and Religious Views; (3) Interplay between Religious Accommodations Under Title VII and Obligation to Prevent Unlawful Harassment; and (4) Interplay Between Protected Concerted Activity under the NLRA and Unlawful Harassment.

87 *See Questions and Answers for Employees: Harassment at Work | U.S. Equal Employment Opportunity Commission (eeoc.gov), Question #2.*

- Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim; and
- Threatening a person's job or offering preferential treatment in exchange for sexual favors.

With respect to the limits of legal liability for harassment, the EEOC cautions that "If an employee experiences harassment in the workplace but the evidence does not show that the harassment was based on a protected characteristic, the EEO statutes do not apply."

The guidance includes 77 "Examples" to provide practical advice on most of the topics covered in the guidance.

The guidance also adds an "Addendum," which addresses various issues that were the source of many comments to the draft guidance, including: (1) Harassment based on Sexual Orientation or Gender Identify; (2) Free Speech and Religious Views: (3) Interplay between Religious Accommodations Under Title VII and Obligation to Prevent Unlawful Harassment; and (4) Interplay Between Protected Concerted Activity under the NLRA and Unlawful Harassment.

Finally, recognizing an ongoing tension between issues of religious accommodation and unlawful harassment, the introduction to the guidance added the following statement not included in the initial draft "In some cases, the application of the EEO statutes enforced by the EEOC may implicate other rights or requirements including those under the United States Constitution; other federal laws, such as the Religious Freedom Restoration Act (RFRA) … The EEOC will consider the implication of such rights and requirements on a case-by-case basis."

Discussed below is a detailed review of the three major sections of the EEOC's April 29 guidance and other key highlights that should be carefully reviewed to assist employers in minimizing the risks posed by harassment claims.

B. INDIVIDUALS PROTECTED FROM HARASSMENT

The first section of the guidance underscores that harassment is covered by the federal EEO laws only if it is based on one or more of an individual's "characteristics" protected by federal EEO laws, specifically referring to race, color, national origin, religion, sex, age, disability, genetic information, or retaliation against an individual based on opposing an employer's unlawful discrimination and/or for participating in any investigation, hearing or proceeding under the EEO laws. It is noteworthy that, rather than referring using a term such an individual's "protected status" to identify the areas of coverage, the EEOC refers to "characteristics" that are protected by federal EEO law.[88]

1. Race

Examples of harassing conduct based on race include: (1) racial epithets or offensive comments about members of a particular race; (2) stereotypes based on a person's race; or (3) harassing conduct based on traits or characteristics, including appearance standards (*e.g.*, hair texture or hairstyles tied to a person's race).

2. Color

The guidance refers to the potential overlap between race or national origin discrimination and harassment based on "color" due to an individual's pigmentation, complexion or skin shade tone. This could include harassment that involves treating Black employees with darker complexions differently from Black employees with lighter skin tones.

3. National Origin

Harassment tied to national origin includes: (1) ethnic epithets or derogatory comments about individuals of a particular nationality; (2) use of stereotypes based on a person's national origin; (3) harassing conduct tied to physical characteristics, ancestry, ethnic or cultural characteristics (*e.g.*, attire or diet); or (4) linguistic characteristics (*e.g.*, non-English language accent or lack of fluency in English).

88 The first section discussing the individuals covered by the federal EEO statutes, referred to as "Covered Bases and Causation, Section II," is discussed in the text of the Guidance accompanying footnotes 9-118. The "Covered Bases" are discussed in the text accompanying footnotes 9-82; the discussion of "Causation" is discussed in the text accompanying footnotes 10-82.

4. Religion

Harassment based on religion may involve: (1) use of religious epithets or offensive comments based on religion including atheism or lack or religious belief; (2) attacks based on religious practices or religious dress; (3) actions directed at individuals based on a request for or receipt of a religious accommodation; or (4) explicitly or implicitly coercing employees to engage in religious practices at work.

5. Sex

Harassment based on sex is described as involving three separate categories, including: (1) conduct of a sexualized nature or otherwise based on sex; (2) conduct based on pregnancy, childbirth or related medical conditions; or (3) conduct based on sexual orientation and gender identity.

In further explaining harassing conduct based on sex, the guidance explains that it may include: (a) conduct of a sexualized nature, such as unwanted conduct tied to sexual attraction or sexual activity, sexual attention or coercion (*e.g.*, demands for sexual favors, rape, sexual assault or discussing or displaying visual depictions of sexual acts or sexual remarks); or (b) non-sexual conduct base on sex such as epithets, sexist comments or facially sex-neutral offensive conduct motivated by sex (*e.g.*, bullying directed at employees of one sex).[89]

Harassment based on pregnancy, childbirth or related medical conditions may involve targeting individuals in a negative manner based on actions such as lactation, using or not using contraception, or deciding to have or not have an abortion.[90]

Harassing conduct based on sexual orientation or gender identify includes: (a) epithets tied to sexual orientation or gender identity; (b) physical assault due to sexual orientation or sexual identity; (c) outing (disclosure of sexual orientation or gender identity without permission); (d) sexual stereotyping because an individual does not present in a manner associated with that person's gender; (e) repeated use of an individual's of a name or pronoun inconsistent with the individual's known gender identity; or (f) denial of access to a bathroom or other sex-segregated facility consistent with that individual's gender identity.[91]

6. Age

Age-based harassment may include negative perceptions about older workers or stereotypes about older workers, such as pressuring on older worker to transfer to a job that is less technology-focused because of the perception that older workers are not well suited for such work or encouraging an older employee to retire.[92]

7. Disability

Harassment based on a physical or mental disability includes: (1) stereotypes about individuals with disabilities in general or regarding a particular disability; (2) actions based on traits or characteristics linked to a person with a disability, such as how a person looks, speaks or moves; or (3) actions directed at an individual based on requests for or receipt of a reasonable accommodation.[93] The guidance includes reference to similar actions because someone is "regarded" as having an impairment, because someone has a record of a disability or actions taken based on the disability of an individual with whom they are associated.

8. Genetic Information

The Genetic Information Nondiscrimination Act (GINA) is frequently less understood than other EEO statutes, but harassing conduct could involve harassment based on an individual or family member's genetic test or family history.[94] The example provided in the guidance refers to an employee telling co-workers that a cousin had recently taken a DNA ancestry test which revealed that they had inherited a gene mutation putting them at a higher risk of developing Hypertrichosis, a condition known as "Werewolf Syndrome."

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89 *See* text accompanying footnotes 25-28 in the guidance.(As discussed above, all footnote references are included to assisted in reviewing the applicable text in the EEOC's harassment guidance

90 *See* text accompanying footnotes 29-35.

91 *See* text accompanying footnotes 36-45.

92 *See* text accompanying footnotes 46-50.

93 *See* text accompanying footnotes 50-58.

94 *See* footnotes 59-62.

Soon thereafter, coworkers began referring to the employee as "the werewoman" or making howling noises as she walked by.

9. Retaliation

The guidance includes reference to retaliation, explaining that retaliatory conduct is sometimes characterized as "retaliatory harassment," and can apply to adverse action taken against an individual for opposing unlawful conduct and/or based on participating in an investigation, hearing or proceeding under the EEOC statutes.[95] The guidance further underscores that a different legal standard applies when reviewing retaliation claims and the "severe and pervasive" standard does not apply. Rather, all that is relevant is "whether the actions, taken in the aggregate, are materially adverse and would dissuade a reasonable employee from making a complaint of discrimination."[96]

10. Cross-Bases Issues

In a final wrap-up of this section, the guidance highlights the following issues that apply to all protected characteristics: (1) harassment based on the "perception" that an individual has a protected characteristic, even if mistaken, using the example of harassment of a Hispanic person based on the mistaken belief they are Pakistani; (2) harassment against an individual based on a close relationship to someone in a protected status, called "associational discrimination"; (3) harassment by an individual who is a member of the same protected class; and (4) harassment based on two or more protected classes, which includes harassment based on social or cultural stereotypes about family responsibilities, suitability for leadership or gender roles.[97]

Among these various categories, the Guidance includes reference to the U.S. Supreme Court's decisions in *Oncale v. Sundowner Offshore Servs, Inc*,[98] which involved male employees sexually harassing a male co-worker, and *Price Waterhouse v. Hopkins*,[99] which focused on unlawful conduct tied to sex stereotyping, explaining that "an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be, has acted on the basis of gender."

C. CAUSATION AND HOSTILE ENVIRONMENT CLAIMS

After setting the stage regarding the protected characteristics that may be protected from harassment, the guidance next focuses on "causation" regarding potential liability for harassment claims, explaining that "causation is established if the evidence shows that the complainant was subjected to harassment because of the complainant's protected characteristic, whether or not the harasser explicitly refers to that characteristic or targets a particular employee."[100]

In relying on U.S. Supreme Court precedent in *Meritor Savings Bank FSB v. Vinson*,[101] the guidance explains that that the determination whether harassment is based on a protected characteristic will depend on the "totality of the circumstances."

The guidance further explains that the following principles generally will apply in determining causation:

- Conduct that explicitly insults or threatens an individual based on a protected characteristic, such as racial or sexual epithets or graffiti, offensive comments about a person's disability or targeted physical assaults based on a protected characteristic; such conduct does not have to be directed at a particular worker;
- Stereotyping regarding how persons of a particular protected group may act or appear, and it does not need to be motivated by animus or hostility toward that group (*e.g.*, comments that an older

95 *See* text accompanying footnotes 63-65.
96 *See* footnote 65 on this issue, including the citation to *Chambers v. Dist. of Columbia*, 335 4th 870, 876 (D.C. Cir. 2022), which discusses the different standard between the antidiscrimination and antiretaliation provisions.
97 *See* text accompanying footnotes 66-82.
98 523 U.S. 75 77-79 (1988), as referenced in footnote 72.
99 490 U.S.228, 250 (1989), as referenced in footnote 78.
100 The issue of "causation" is discussed in the text covered by footnotes 83-117. The EEOC further explains therein that "(t)he causation principles discussed in this enforcement guidance focus on hostile environment claims," as distinguished from unlawful harassment tied to "an explicit change to a term, condition or privilege of employment, such as denial of a promotion for rejecting sexual advances," which typically are referred to as "quid pro quo" claims.
101 477 U.S. 57, 69(1986), as cited in footnote 87.

worker should enjoy the "golden years" or female workers with young children should switch to part-time work);

- Conduct must be evaluated in the context in which it arises (*e.g.*, use of the term "boy" to refer to a Black man may reflect racial animus depending on such factors as "context, infection, tone of voice, local custom and historical usage");[102]
- Facially neutral conduct may need to be considered in tandem with other conduct that is facially discriminatory, and a court may view the entire course of conduct in determining whether there was a hostile work environment;
- Timing of any harassing conduct needs to be reviewed, determining whether the harassing conduct began or escalated shortly after the harasser learned of the individual's protected status; and
- Comparative evidence is important in showing qualitative and/or quantitative differences in conduct directed against individuals in different groups, such as differences in the harassment suffered by female and male employees.

Here, too, the Guidance cites the U.S. Supreme Court's decision in *Oncale*[103] in dealing specifically with sex-based harassment, explaining that three non-exclusive factors should be considered in causation: (1) explicit or implicit proposal of sexual activity; (2) general hostility toward members of complainant's sex; and (3) comparative evidence showing differences in treatment between those who shared the same sex as the complainant compared to those who did not.

D. DISCRIMINATION TIED TO A TERM OR CONDITION OF EMPLOYMENT[104]

While the guidance focuses on "hostile environment" claims, this next section of the guidance relies on the U.S. Supreme Court's decision in *Meritor Savings Bank*,[105] explaining, "[T]he Supreme Court discussed two examples of unlawful harassment: (1) an explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic, *e.g.* firing an employee because the employee rejected sexual advances; and (2) conduct that constructively changes the terms or conditions of employment through creation of a hostile work environment."[106]

The guidance explains that the "first type of claim" initially was described as "quid pro quo" harassment in the context of sexual harassment cases, but in relying on the subsequent U.S. Supreme Court decision in *Burlington Industries, Inc. v. Ellerth*[107] and subsequent court decisions relying on that case, the guidance explains, "The underlying issue in a quid pro quo allegation is the same as in any claim of disparate treatment (*i.e.* intentional discrimination): whether the claimant has satisfied the statutory requirement of establishing 'discriminat[ion] …because of…sex' affecting 'the terms [or] conditions of employment.'" The guidance then uses the example of denying a promotion or other job benefit for rejecting sexual advances as an "explicit change to the terms of conditions of employment," and as an example of the first type of claim.

The guidance then turns to conduct "absent such an explicit change to the terms or conditions of employment," which involves changing the terms or conditions of employment by creating "a hostile work environment."

Prior to providing to a detailed discussion of the key factors to consider in any hostile environment claim, the guidance focuses on the basic standards applicable to such claims, as discussed in the U.S. Supreme Court's decision in *Harris v. Forklift Systems, Inc.*,[108] explaining that to establish a hostile work environment, the "offensive conduct must be both subjectively hostile and objectively hostile." Notwithstanding, "these statutes do not impose a general civility code that covers "run-of-the-mill boorish, juvenile, or annoying behavior."

102 *See Aman v. Cort. Furniture Rental Corp*, 85 F. 3d 1074, 1082-83 (3rd Cir. 1996), cited at footnote 107.
103 523 U.S. 75, 80-81 (1988), as referenced in footnote 115 in the EEOCs harassment guidance.
104 The above discussion focuses on the next major section of the guidance, "Harassment Resulting in Discrimination with Respect to a Term, Condition or Privilege of Employment," Section III, footnotes 118-227, and begins with Section III.A. and accompanying footnotes 118-130.
105 477 U.S.477 (1986), as referenced in footnote 120.
106 The introductory section explaining the distinction between explicit changes to the terms and conditions of employment to hostile environment claims and the two types of unlawful harassment are discussed in detail in the text that accompanies footnotes 119-130.
107 524 U.S. 742, as cited in footnote 119.
108 510 U.S. 17, 21-22 (1977), as referenced in footnote 126.

1. Hostile Work Environment Claims

The guidance highlights the key issues to be addressed in determining whether there is a hostile work environment:[109]

These are key questions that typically arise in evaluating a hostile work environment claim and whether it amounts to unlawful harassment:

- **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?

A more detailed discussion is then provided regarding the primary factors that need to be considered, focusing on three factors: (1) unwelcomeness; (2) whether there is a subjectively hostile work environment; and (3) whether there is an objectively hostile work environment.

a. Unwelcomeness[110]

The guidance views "unwelcomeness" as a starting point, citing the Supreme Court's 1986 decision in *Meritor Savings Bank*,[111] in which the Court determined that: (1) "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome;'" and (2) the concept of unwelcomeness must be distinguished from the concept of voluntariness, "noting that the complainant's participation in the challenged conduct did not necessarily mean that she found it welcome."

The guidance highlights that the *Meritor* decision needs to be read in tandem with the subsequent 1993 U.S. Supreme Court decision in *Harris*,[112] which determined that a hostile environment claim required a showing that the conduct was both subjectively and objectively hostile. While the courts have differed in their views whether these are separate elements, in reviewing the relationship between these two standards, the EEOC guidance states that the Commission's view is that unwelcomeness is part of determining subjective hostility "because conduct that is subjectively hostile will also, necessarily be unwelcome."

b. Subjectively Hostile Work Environment

In determining whether conduct meets the standard of a subjectively hostile work environment, the guidance highlights three factors:[113] (1) the complainant's own statement that they perceived the conduct as hostile; (2) evidence that an individual made a complaint about the conduct; or (3) there is evidence that the individual complained to family, friends or co-workers about the conduct. On the other hand, if there is evidence that the complainant did not find the conduct to be subjectively hostile (*e.g.*, a statement that they did not feel harassed), then the subsequent alleged subjective hostility may be subject to challenge.

As importantly, the guidance states that subjective hostility can change over time. An individual who did not initially perceive conduct as unwelcome could subsequently see the conduct as unwelcome, such as after the end of a romantic relationship. Similarly, conduct initially tolerated, such as a poor attempt at humor, may become unwelcome when such conduct persists or is coupled with other unwelcome conduct. So, too, conduct that may be welcome by one employee may be viewed as unwelcome by another.[114]

109 *See generally* Section II.B., which focuses on a "Hostile Work Environment," and the text accompanying footnote 131.
110 *See* text accompanying footnotes 133-138.
111 477 U.S.57, 68 (1986).
112 510 U.S.17 (1993). *See* discussion accompanying footnotes 133-136.
113 *See* text accompanying footnotes 139-147.
114 *Id.*

c. *Objectively Hostile Work Environment*

The guidance includes an extensive discussion and numerous examples for evaluating whether the conduct at issue creates an objectively hostile work environment, and reviews: (a) general factors; (b) severity; (c) pervasiveness; and (d) "context," which needs to be considered in review of any claim.[115]

i. In General

The guidance first reviews "general" considerations that need to be considered, such as the following:[116]

- The conduct must be sufficiently severe or pervasive to create an objectively hostile work environment. It does not need to be both severe and pervasive to create a hostile work environment. There is no "magic number" of harassing incidents that automatically establishes a hostile work environment, and it depends on the specific facts of each case, viewed in light of the totality of the circumstances.
- The conduct should be viewed from the perspective of a reasonable person and no single factor is determinative. According to the EEOC, "Some relevant factors are the frequency and severity of the conduct; the decree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee's work performance; and the degree to which it causes an employee psychological harm. Another relevant factor is whether there is a power disparity – and its extent – between the harasser and the person harassed. These factors are not exhaustive, and 'no single factor is required' to establish an objectively hostile work environment."[117]
- Harassing acts based on multiple protected characteristics (*e.g.*, race and sex) can be considered together regarding their combined effect, even if, standing alone the factors may not be sufficient to establish an objectively severe or pervasive hostile work environment.
- A complainant does not need to show that the conduct harmed the complainant's work performance to establish an objectively severe or pervasive hostile work environment.

ii. Severity

Various factors may impact severity,[118] including: (1) whether the individual engaging in the conduct has authority over the complainant typically has more impact on a complainant's work environment; (2) conduct that occurs in the presence of the complainant, rather than learning about it secondhand, is more probative of a hostile work environment; (3) some conduct may be more severe if it occurs in the presence of others, such as coequals, subordinates or clients; and (4) conduct may be viewed as more severe if the complainant has reason to believe that the harasser is insulated from corrective action (*e.g.*, is a highly valued employee) or the employer previously failed to take appropriate corrective action in similar circumstances.

In certain circumstances a single incident may be sufficiently severe to establish a hostile work environment. The EEOC included a "non-exhaustive list of examples" in the guidance and listed the following:

- Sexual assault;
- Sexual touching of an intimate body part;
- Physical violence or the threat of physical violence;
- The display of symbols of violence or hatred, such as a swastika, an image of a Klansman's hood, or a noose;
- The use of denigrating animal imagery, such as comparing the employee to a monkey, ape, or other animal;
- A threat to deny job benefits for rejecting sexual advances; and
- The use of the "n-word" by a supervisor in the presence of a Black subordinate.[119]

115 *See* text accompanying footnotes 148-205.
116 *See* text accompanying footnotes 148-162.
117 *See* text accompanying footnotes 152-155.
118 *See* text accompanying footnotes 163-177.
119 *See* text accompanying footnotes 170-176.

iii. Pervasiveness

As explained in the guidance, more frequent but less serious incidents can create a hostile work environment, and most hostile environment claims involve a series of acts.[120] Whether a series of events is sufficiently severe or pervasive to create a hostile work environment depends on the specific acts of each case. Relevant considerations may include the frequency of the conduct and the relationship between the number of incidents and the time period over which they occurred.

iv. Context

The final consideration in determining whether the harassment creates an objectively hostile work environment is evaluating the context of "surrounding circumstances, expectations, and relationships."[121] Factors to consider include: (1) the perspective of a reasonable person of the complainant's protected class; (2) other personal or situational characteristics may affect whether the complainant reasonably perceives certain conduct as creating a hostile work environment (*e.g.*, a teenager being harassed by a substantially older individual, an undocumented worker targeted by harassment in the context of heightened risk of deportation); (3) the context of the specific work environment must be considered (*e.g.*, complainant works in remote location alone with harasser), recognizing that there is not a "crude environment" exception to Title VII; or (4) whether the alleged harasser was put on notice by the complainant that the conduct was unwelcome, but continued such conduct.

The guidance also highlights that the same issues can arise when dealing with harassment based on other legally protected characteristics. As an example, in dealing with religious expression, if an employee attempts to persuade another employee of the correctness of their beliefs, such conduct is not necessarily objectively hostile. This is to be contrasted with the situation in which the employee objects to such proselytizing, but the employee nonetheless continues such conduct, a reasonable person may find such conduct to be hostile.[122]

2. The Scope of Hostile Work Environment Claims

Hostile environment claims can combine a series of separate incidents into a single unlawful employment practice as long as at least one incident that contributed to the hostile environment claim is timely.[123] The guidance outlines the following factors that need to be taken into account: (1) the earlier conduct must be sufficiently related to the later conduct to be "part of the same actionable hostile work environment practice" claim;[124] (2) a hostile work environment claim may include conduct that may be independently actionable as unlawful discrimination; (3) harassing conduct directed at others in the same protected class may contribute to a hostile environment as long as the complainant becomes aware of the conduct during the complainant's employment; (4) conduct that occurs outside the employee's regular workplace if directed at the employee (*e.g.*, offsite employer-required training); (5) conduct within a virtual work environment can contribute to a hostile work environment (*e.g.*, sexist or ageist comments made in video meeting or group chat); (6) conduct in a non-work-related context may create liability (*e.g.*, Black employee subjected to racist slurs or assaulted by white co-workers outside work in circumstances where same employees are co-workers in the Black employee's workspace), which includes electronic communications using private phones, computers or social media accounts in circumstances where the employee learns about it directly or other coworkers see the comment and discuss it at work.

The guidance expressly addresses technology and its impact on potential harassment claims, explaining, "Given the proliferation of technology, it is increasingly likely that non-consensual distribution of real or computer-generated images, such as through social media, message applications, or other electronic means, can contribute to a hostile work environment, if it impacts the workplace." The guidance states, however, that "postings on a social media account generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees."[125]

120 *See* text accompanying footnotes 178-184.
121 *See* text accompanying footnotes 185-205.
122 *See* text accompanying footnotes 204-205.
123 *See* Section III.C., "The Scope of Harassment Claims," and accompanying footnotes 206-227.
124 The Guidance relies on the U.S. Supreme Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-118 (2002)
125 *See* text accompanying footnotes 224-226.

The final comment of this section underscores the important role of supervisors, and any conduct by a supervisor, even if it occurs outside the workplace "is more likely to contribute to a hostile work environment than similar conduct by coworkers, given a supervisor's ability to affect a subordinate's employment status."[126]

E. LIABILITY

1. Overview of Liability Standards in Harassment Cases

The guidance devotes an entire section to the topic of employer liability and the basic standards to be applied.[127] This section begins with an overview of the liability standards as follows:[128]

> When a complainant establishes that the employer made an explicit change to a term, condition, or privilege of employment linked to harassment based on a protected characteristic (sometimes described as "quid pro quo" ...), the employer is liable and there is no defense.
>
> In cases alleging a hostile work environment, one or more standards of liability will apply. Which standards apply to any given situation depends on the relationship of the harasser to the employer and the nature of the hostile work environment... To summarize:
>
> - If the harasser is a proxy or alter ego of the employer, the employer is automatically liable for the hostile work environment created by the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no defense to liability.
> - If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim [*i.e., a "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer*], the employer is vicariously liable for the harasser's conduct and there is no defense to liability. This is true even if the supervisor is not a proxy or alter ego.
> - If the harasser is a supervisor (but not a proxy or alter ego) and the hostile work environment does *not* include a tangible employment action, the employer is vicariously liable for the actions of the harasser, but the employer may limit its liability or damages if it can prove the *Faragher-Ellerth* affirmative defense . . .
> - If the harasser is any person other than a proxy, alter ego, or supervisor, the employer is only liable for the hostile work environment created by the harasser's conduct 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 the harassment when the employer was aware, or should have been aware, of it.
>
> Negligence provides a minimum standard for employer liability, regardless of the status of the harasser. Other theories of employer liability—automatic liability (for proxies and alter egos) and vicarious liability (for supervisors)—are additional bases for employer liability that supplement and do not replace the negligence standard.
>
> If the complainant challenges harassment by one or more supervisors and one or more coworkers or non-employees and the harassment is part of the same hostile work environment claim, separate analyses of employer liability should be conducted in accordance with each harasser's classification.

126 *See* text accompanying footnote 227, including reference to case cite therein.
127 *See* Section IV, Liability, and accompanying footnotes 228-377.
128 *See* Section IV.A., Overview of Liability Standards in Harassment Cases, and text accompanying footnotes 228-234.

2. Liability Standard for a Hostile Work Environment Depends on the Role of the Harasser

The guidance describes/defines the three categories of "harassers" in applying the above-referenced liability standards as follows: (1) Proxy or alter ego of the employer; (2) Supervisor; or (3) Non-supervisory employee, co-worker, or non-employee.[129]

a. Proxy or Alter Ego of the Employer

The guidance describes this first category as including sole proprietors and other owners, partners, corporate officers, and high-level managers whose authority or influence within the organization is such that their actions could be said to "speak for" the employer, citing the U.S. Supreme Court's decision in *Faragher v. City of Boca Raton*.[130] The guidance cautions that a "supervisor" does not qualify as an "alter ego" merely because the supervisor exercises significant control over the complaining employee.

b. Supervisor

The guidance describes a "supervisor" for purposes of applying the above-referenced liability standard as an individual "empowered by the employer to take tangible employment actions against the victim," relying on the U.S. Supreme Court's decision in *Vance v. Ball State University*,[131] and states that an employee may have more than one supervisor based on this standard.

Based on the above-referenced application of a strict liability standard for harassment by a supervisor that includes a "tangible employment action," the guidance further defines that standard as "a significant change in employment status" that requires an "official act" of the employer, citing the Supreme Court's decision in *Ellerth*.[132] The guidance includes examples of tangible employment actions and expressly refers to "hiring and firing, failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decisions causing a significant change in benefits." The guidance also cites selected case law to state that it will apply the "supervisor" standard even if the individual is not a final decision maker but has the "power to *recommend* or otherwise substantially influence tangible employment actions," or "the harassed employee reasonably believes that the harasser has such power."[133]

c. Non-Supervisory Employees, Coworkers, and Non-Employees

The guidance clarifies that the negligence standard for liability for hostile work environment claims applies to coworkers and non-employees, such as independent contractors and customers, including hotel guests, airline passengers, shoppers, students, hospital patients, nursing home residents, and clients of an employer.

3. Applying the Appropriate Standard of Liability in a Hostile Work Environment Case

The most significant portion of the guidance focuses on the applicable liability standards, and 27 pages are devoted to this section of the guidance.[134]

a. Alter Ego or Proxy- Automatic Liability[135]

This is the shortest subsection and simply reiterates that "a finding that the harasser is an alter ego is the end of the liability analysis. This is true whether or not the harassment includes a tangible employment action."

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129 *See* Section IV.B. and accompanying footnotes 235-251.

130 524 U.S. 775,789-90 (1998) (citing circuit court decisions recognizing appropriateness of proxy liability for harassment by individuals occupying such positions. *See* text and accompanying footnote 236, citing the *Faragher* decision.

131 570 U.S. 421, 424 (2013). *See* text and accompanying footnote 238, citing the *Vance* case.

132 524 U.S. 742, 761-62 (1998).

133 In addressing the "reasonable belief" standard, the EEOC cites the U.S. Supreme Court's decision in *Ellerth, supra*, 524 U.S. at 759 ("If, in the unusual case it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one"). *See* footnote 243 and accompanying text.

134 Section IV.C, Applying the Appropriate Standard of Liability in a Hostile Work Environment Case, and text accompanying footnotes 252-377.

135 *See* Section IV.C.1 and text accompanying footnote 252.

b. *Supervisor – Vicarious Liability*[136]

The guidance reviews the basic standards regarding: (1) automatic liability in circumstances where a supervisor takes a "tangible employment action" as part of a hostile environment in which an employer is automatically liable; and (2) circumstances in which a tangible action is *not taken* and liability focuses on the supervisor allegedly creating a hostile work environment for the employee in which the employer can raise the *Faragher-Ellerth* affirmative defense to vicarious liability.

i. Hostile Work Environment that includes Tangible Employment Action

The guidance makes clear that any time supervisor harassment is tied to a tangible employment action, there is automatic liability and there are no available defenses. The tangible employment action can take place anytime during the employment cycle.[137]

A tangible employment action can occur in two ways: (1) fulfilling a threat (*e.g.*, denying a promotion) because a complainant rejects sexual demands; or (2) fulfilling a promise (*e.g.*, granting a promotion) because the complainant submits to sexual demand. On the other hand, an "unfulfilled threat" does not in itself constitute a tangible employment action, but it may contribute to a hostile work environment.

ii. Hostile Work Environment Without a Tangible Employment Action

Based on the guidance, the EEOC relies on the U.S. Supreme Court's *Faragher and Ellerth* decisions in reviewing the affirmative defense available to employers when dealing with harassment by a supervisor who creates a hostile work environment that did not include a tangible employment action.[138] Therein, the Court explained that the defense requires the employer to prove that:

- The employer exercised reasonable care to prevent and correct promptly any harassment; and
- 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.

The First Prong of the Affirmative Defense[139]

The first prong of the affirmative defense requires an employer to show that it exercised reasonable care both to prevent harassment and to correct harassment. Based on the guidance, "(A)n employer must show both that it took reasonable steps to prevent harassment in general…and that it took reasonable steps to prevent and to correct the specific harassment raised by a particular complainant."

The guidance acknowledges that federal EEO law does not specify particular steps an employer must take to establish that it exercises reasonable care to prevent and correct harassment. According to the EEOC, the employer will satisfy its obligations if it demonstrates that its efforts are "reasonable." According to the guidance, in assessing whether the employer had taken adequate steps, the inquiry typically involves identifying the policies and practices an employer has instituted to prevent and to respond to complaints of harassment, which usually consist of: (1) promulgating a policy against harassment; (2) establishing a process for addressing harassment complaints; (3) providing training to ensure employees understand their rights and responsibilities; and (4) monitoring the workplace to ensure adherence to the employer's policy.

In the guidance, the EEOC sets forth best practices regarding development of an anti-harassment policy, developing an effective complaint procedure, and effective training in dealing with harassment:[140]

136 *See* Section IV.C.2 and accompanying footnotes 253-308.
137 *See* text accompanying footnotes 254-262.
138 *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), as cited in footnotes, 263-265.
139 *See* text accompanying footnotes 268-289.
140 *See* text accompanying footnotes 270-281.

For an anti-harassment *policy* to be effective, it should generally have the following features:

- the policy defines what conduct is prohibited;
- the policy is widely disseminated;
- the policy is comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;
- the policy requires that supervisors report harassment when they are aware of it;
- the policy offers multiple avenues for reporting harassment, thereby allowing employees to contact someone other than their harassers;
- the policy clearly identifies accessible points of contact to whom reports of harassment should be made and includes contact information; and
- the policy explains the employer's complaint process, including the process's anti-retaliation and confidentiality protections.

For a complaint *process* to be effective, it should generally have the following features:

- the process provides for prompt and effective investigations and corrective action;
- the process provides adequate confidentiality protections; and
- the process provides adequate anti-retaliation protections.

For training to be effective, it should generally have the following features:

- it explains the employer's anti-harassment policy and complaint process, including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
- it describes and provides examples of prohibited conduct under the policy;
- it provides information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
- it 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;
- it is tailored to the workplace and workforce;
- it is provided on a regular basis to all employees; and
- it is 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. As importantly, an employer must exercise reasonable care to correct harassing behavior of which it knew or should have known, and an employer also will be unable to rely on the first prong of the affirmative defense if it fails to do so.

The Second Prong of the Affirmative Defense[141]

The second prong of the affirmative defense requires the employer to show that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," as referenced in the U.S. Supreme Court's opinions in *Faragher/Ellerth*.

The guidance refers to various factors that support the second prong of the affirmative defense, including: (1) failing to use the employer's complaint procedure; (2) the employee unreasonably delayed complaining and an earlier complaint could have avoided or limited the extent of the harm; or (3) the employee unreasonably failed to cooperate in the investigation.

141 *See* text accompanying footnotes 287-308.

Notwithstanding, the guidance provides that a reasonable explanation for delaying or failing to complain may prevent reliance on the second prong. Similarly, an employee's use of a mechanism other than the official complaint procedure may demonstrate that the employee took reasonable steps to avoid harm. The reasonableness of an employee's decision not to use the established complaint procedures will be based on "particular circumstances and information available to the employee *at that time*."[142] As an example, an employee may not be required to complain after the first or second incident of "relatively minor harassment." The employee also may tell the harasser to stop the harassment and wait to see if it stops before utilizing the complaint procedure.

The guidance refers to "reasonable explanations for an employee's delay in complaining or failure to utilize the complaint process,"[143] and provides the following examples: (1) employer created obstacles to filing complaints (*e.g.*, undue expense by the employee, inaccessible points of contact to complain or intimidating or burdensome requirements); (2) ineffective complaint mechanism (*e.g.*, reasonable belief that the complaint process was ineffective, such as the persons designated to received complaints is close friends with the harasser or the complainant is aware of prior instances in which the employer failed to take appropriate corrective action); (3) risk of retaliation (*e.g.*, harasser threatened employee with reprisal for complaining, or employee or another employee had previously been subjected to retaliation for complaining), but failing to complain "based merely on concerns about ordinary discomfort or embarrassment will not suffice; or (4) the delay can be linked to psychological trauma resulting from the underlying harassment.[144]

Finally, an employer may not be able to rely on the second prong of the affirmative defense if the employee took other reasonable steps to avoid harm from the harassment, such as promptly filing a grievance, or if a temporary worker reported the harassment to the employment agency, reasonably expecting that the entity they notified would act to correct the problem.[145]

c. *Non-Supervisory Employee (e.g., Coworkers) and Non-Employees - Negligence Standard*[146]

The guidance also includes a detailed discussion of employer liability based on actions by non-supervisory employees or non-employees where the employer was negligent because: (1) the employer failed to prevent the harassment; or (2) the employer failed to take reasonable corrective action in response to harassment it knew or should have known about.

i. Unreasonable Failure to Prevent Harassment[147]

Vance v. Ball State University,[148] is cited for the principle that a complainant could "prevail simply by showing that the employer was negligent in permitting…harassment to occur." According to the guidance, although efforts to prevent harassment may vary from case to case, the guidance notes the following issues will be examined by the EEOC in determining whether an employer took steps to prevent harassment:

- Adequacy of the employer's anti-harassment policy, complaint procedure and training program to ensure that employees understand their rights and responsibilities pursuant to the policy.[149]
- Adequacy of the employer's efforts to monitor the workplace, such as by training supervisors and other appropriate officials to recognize potential harassment and by requiring them to report or address harassment they either are aware of or reasonably should have known about.
- Adequacy of employer's steps to minimize known or obvious risks of harassment, such as workspaces that are "isolated, decentralized, lack a diverse workforce, or rely on customer service or client satisfaction, and against employees who are vulnerable, young, do not conform to workplace norms based on societal stereotypes, or who are assigned to complete monotonous or low-intensity tasks;" or

142 *See* text accompanying footnote 292.
143 *See* text accompanying footnote 295.
144 *See* text accompanying footnotes 296-306.
145 *See* text accompanying footnotes 307-308.
146 *See* text accompanying footnotes 309-377.
147 *See* text accompanying footnotes 311-318.
148 570 U.S. 421, 424 (2013), as cited in footnote 311 and subsequent related footnotes.
149 These are the same considerations discussed in the Guidance regarding the first prong of the affirmative defense for supervisor harassment.

- Nature and degree of authority, if any, that the alleged harasser has over the complainant (*i.e.*, the harasser does not even have to be a supervisor, but be "armed with authority").

ii. Unreasonable Failure to Correct Harm of Which the Employer Had Notice[150]

Even if the employer takes appropriate steps to prevent harassment, the guidance states that an employer still may be liable for harassment if it was negligent because it did not act reasonably to correct harassment about which it knows or should have known.

The focal point is "notice," and the guidance reviews the factors that could trigger notice. The guidance points to the obvious – an individual having responsibility for reporting it or for taking corrective action has notice of the conduct. Notice also can arise for individuals who do not supervise the harasser or the target of the harassment, but have responsibility for enforcement of the anti-harassment policy and become aware of the harassment or witness it. It also would apply to an owner or high-ranking officer of the employer, who has knowledge of the harassment. Notice from a third party also may suffice.

The guidance is fairly far-reaching it its broad view of employer responsibilities.

- The guidance states that the duty to take corrective action may be triggered by notice of harassing conduct that has not yet reached the level of being actionable, but may lead to a hostile work environment if not addressed.
- Similarly, notice of harassing conduct directed at one employee may serve as notice of the harasser's potential for further harassment of others.
- As significantly, the guidance states that an employer may be viewed as having "constructive notice" if it did not have in place reasonable procedures for reporting harassment.

Prompt and Adequate Investigation[151]

The guidance states that once an employer has notice, there is an obligation to take reasonable corrective action to prevent the conduct from continuing. This obligation has two parts: (1) conducting a prompt investigation, and (2) taking appropriate action based on the investigation.

Reference is made to conducting a "prompt" investigation – conducting the investigation "reasonably soon after the employee complains or the employer otherwise has notice of possible harassment." According to the EEOC, what is "reasonably soon" is fact-sensitive and depends on such considerations as: (a) the nature and severity of the alleged harassment, and (b) the reasons for delay. The guidance provides as an example an employer who is faced with allegations involving physical touching but delays an investigation for two weeks, without explanation. In this instance, the employer has not acted promptly.

The guidance also refers to a requirement of an "adequate" investigation, referring to whether the investigation is sufficiently thorough to "arrive at a reasonably fair estimate of the truth." The guidance provides expected parameters regarding an investigation of harassment complaints or concerns:

- The investigation should be conducted by an impartial party;
- The investigation should seek information about the conduct from all parties involved;
- The alleged harasser should not have supervisory authority over the individual who conducts the investigation or have any direct or indirect control over the investigation;
- Whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility;
- Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws;[152]

150 *See* text accompanying footnotes 319-334.
151 *See* text accompanying footnotes 335-348.
152 Note: The Guidance does not provide any case support for its view that an employer should inform the complainant of any corrective action that it will be taking, and merely refers to potential Privacy Act concerns in the Federal Sector, but many private employers will inform a complainant only that

- Employers should retain records of all harassment complaints and investigations, which can help employers identify patterns of harassment, which be useful for preventive measures including training, and can be relevant to credibility assessment and disciplinary measures.
- In some cases, it may be necessary to take intermediate steps to address the situation while it investigates the complaint and provides examples, including scheduling changes to avoid contact between the parties, temporarily transferring the alleged harasser, or placing the harasser on non-disciplinary leave with pay pending the conclusion of the investigation.
- An employer should make every reasonable effort to minimize the burden of negative consequences to an employee who complains of harassment, both during and after the employer's investigation.
- An employer should take measures to ensure that retaliation does not occur based on a harassment complaint involving the complainant and any witnesses during and after the investigation. The guidance expressly refers to nonretaliation as part of the investigation process, explaining, "when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation."

Credibility Assessments. The guidance expressly addresses the issue of credibility, explaining: "If there are conflicting versions of relevant events, it may be necessary for the investigation to make credibility assessments to determine whether the alleged harassment in fact occurred."[153]

the matter has been addressed with the alleged harasser and/or state that corrective action was taken without providing any details regarding the specifics based on the view that privacy should be maintained regarding personnel decisions regarding other employees.

153 *See* text accompanying footnote 341. The EEOC includes only one case citation in addressing this issue, citing *Hathaway v. Runyon*, 132 F. 3d 1214, 1224 (8th Cir. 1997) (It is not a remedy for the employer to do nothing simply because the coworker denies that the harassment occurred, and an employer may take remedial action even where the complaint is uncorroborated).

Confidentiality of Investigations

It should be noted that the harassment guidance does not make any reference to advising employees to maintain the confidentiality of the investigation.

The EEOC's 2016 Task Force Report on Harassment included the following comments:

> We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality – specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential – has been limited in some instances by decisions of the [NLRB] relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act . . . In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.[154]

Since that time the state of the law has remained unclear on this issue, and there has continued to be a shifting standard on this issue. In a 2023 NLRB decision, Stericycle Inc.,[155] the NLRB shifted back to an earlier standard focusing on the right of employees to engage in concerted activity and overruled a prior NLRB decision,[156] which previously held that investigative-confidentiality rules limited to the duration of the investigation were presumptively lawful to maintain. Based on Stericycle, the Board may now revert to an earlier Board rule based on Banner Estrella Medical Center,[157] which had required employers to prove, on a case-by-case basis, that the integrity of an investigation would be compromised without confidentiality.

Appropriate Corrective Action[158]

The guidance underscores that to avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment under the applicable circumstances at the time." The EEOC further underscores, "Corrective action should be designed to stop the harassment and prevent it from continuing," and the "reasonableness" of the employer's corrective action "depends on the particular facts and circumstances at the time the action is taken."

The guidance reviews the following factors as being relevant in evaluating the reasonableness of an employer's corrective action:[159]

- ***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.
- ***Authority granted the harasser*** – The nature and degree of the harasser's authority "should be considered in evaluating the adequacy of the corrective action."
- ***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.
- ***Effect 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

154 *See* Task Force Report on Harassment, Part Three, Section B, Policies and Procedures, at *Select Task Force on the Study of Harassment in the Workplace | U.S. Equal Employment Opportunity Commission (eeoc.gov)*, page 42.
155 372 NLRB NO. 113 (2023).
156 The Board's *Stericycle* decision overruled 368 NLRB No. 144 (2019).
157 362 NLRB 1108 (2015), *enf. denied on other grounds*, 851 F. 3d 25 (D.C. Cir. 2017).
158 *See* text accompanying footnotes 348-371.
159 *See* text accompanying footnotes 351-366.

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.[160]

- ***Options available to employer*** – The guidance refers to employers having an "arsenal of incentives and sanctions" available to address harassment, but cautions that an employer's options for corrective action may vary depending on who engages in the conduct and where it occurs, among other considerations.
- ***The extent to which the harassment was substantiated*** – When an employer conducts a thorough investigation but 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:

> An employer is not required to impose discipline if after a thorough investigation if it concludes that the alleged harassment did not occur, or if it has inconclusive findings.[161] 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.

- ***Special considerations to be considered when balancing anti-harassment and accommodation obligations with respect to religious expression*** – Employers may have dual obligations to accommodate and employee's religious beliefs as well as protecting workers against unlawful harassment. In balancing these respective obligations, the guidance addresses the limits of potential accommodations for religious beliefs, explaining, "while an employer may need to provide a religious accommodation that disrupts '[c]omplete harmony in the workplace,' the employer should take corrective action to address religious expression that creates, or threatens to create, a hostile work environment, or otherwise would result in an undue hardship."[162]

The guidance includes two final comments on taking appropriate corrective action:

- ***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."[163]
- ***Dealing with requests to keep report of harassment confidential and take no action*** –While many employers typically advise employees that after an employee reports harassment and requests that no action be taken, that such request cannot be honored, the guidance provides additional commentary that employers should consider:[164]

> 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. One mechanism to help minimize

160 *See* text and accompanying footnote 358 citing footnote 346 and related case citations, but note that the cited cases do note address the EEOC comment that "the employer may place some burdens on the complaining employee" and appear to focus solely on not placing any burden on the complaining employee and making the employee "worse off" based on the corrective action. Thus, care needs to be taken in this area.

161 *See* footnote 361 and accompanying cite, *Swenson v. Potter*, 271 F. 3d 11594, 1196 (9th Cir. 2001)("As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment…Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred.").

162 *See* text accommodating footnotes 364-366.

163 *See* text accompanying footnote 367, and the supporting case citation.

164 *See* text accompanying footnotes 368-371, and the supporting case citations.

such conflicts could be for the employer to set up an informational phone line or website that allows employees to ask questions or share concerns about harassment anonymously. In such circumstances, the employer also may be required to take general corrective action to reduce the likelihood of harassment in the future, such as recirculating its anti-harassment policy.

d. Assessing the Liability of Joint Employers

The guidance also addresses the dual responsibilities when harassment charges are filed by individuals assigned to work for a client, explaining that both the agency and client "may jointly employ the individual during the period when the individual works for the client."[165]

The guidance provides that if jointly employed by two or more employers, each of the employers has the same responsibilities to deal with harassment complaints. As an example, if the worker complains to both entities, both are responsible to prevent and correct the harassment. The guidance states that the entities are not required to take duplicative corrective action. Each entity has an obligation to respond to potential harassment, either independently or in cooperation.

The guidance expressly addresses the responsibilities of employment agency regardless of whether the client is a joint employer. Corrective action may include, but is not limited to:

- Ensuring that the client is aware of the alleged harassment;
- Insisting that the client conduct an investigation and take appropriate corrective action measures on its own;
- Working with the client to jointly conduct an investigation and/or identify corrective measures;
- Following up and monitoring to ensure that corrective measures have been taken; and
- Providing the workers with the opportunity to take another job assignment at the same pay rate, if such assignment is available and the workers choose to do so.

F. SYSTEMIC HARASSMENT[166]

The enforcement guidance also briefly addresses systemic harassment involving an alleged "pattern or practice" of discrimination, "meaning that the employer's 'standard operating procedure' was to tolerate harassment creating a hostile work environment," in which the guidance relies on the U.S. Supreme Court's decision in *International Brotherhood of Teamsters v. United States*.[167] While the *Teamsters* decision dealt with alleged race discrimination, the basic standards set forth in *Teamsters* has been relied on in pattern-or-practice claims of discrimination. The enforcement guidance describes the applicable standard regarding systemic harassment claims as follows:[168]

> An allegation of a pattern or practice of harassment focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"—in other words, whether the work environment, as a whole, was hostile. For instance, in one case, the court concluded that evidence of widespread abuse, including physical assault, threats of deportation, denial of medical care, and limiting contact with the "outside world," was sufficient to establish that it was the employer's standard operating procedure to subject Thai nationals employed on the defendant's farms were subjected to a hostile work environment.

Per the guidance, an employer's efforts to correct and fully address the harassment must be adequate "to fully address the nature and scope of the harassment the employer knows (or reasonably should know) was or is occurring." For example, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive company-wide procedures.[169]

165 *See* text accompanying footnotes 372-377.
166 *See* text accompanying footnotes 381-386.
167 431 U.S. 324 (1977). *See* text accompanying footnote 381 and applicable citation in footnote.
168 *See* text accompanying footnotes 382-384, and reference to *Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 2074; *EEOC v. Int'l Profit Assocs., Inc.*, 2007 WL 3120069, at *17 (N.D. IL Oct. 23, 2007) and *EEOC v. Glob. Horizons, Inc.*, 7 F. supp. 3d 1053 (1-058-63) (D. Hawaii 2014).
169 *Id.* at 67.

G. SELECTED EEOC HARASSMENT RESOURCES

The guidance concludes by listing various resources to address harassment:

- EEOC Harassment Home Page;[170]
- EEOC Sexual Harassment Home Page;[171]
- EEOC Select Task Force on the Study of Harassment in the Workplace;[172]
- Report of Co-Chair, Select Task for on the Study of Harassment in the Workplace;[173]
- Promising Practices for Preventing Harassment;[174]
- Promising Practices for Preventing Harassment in the Federal Sector;[175]
- EEOC Retaliation Home Page;[176] and
- Enforcement Guidance on Retaliation and Related Issues.[177]

H. ADDENDUM TO GUIDANCE

Finally, the guidance includes a section called "Addendum Pursuant to 29 C.F.R Sec. 1695.6(c) on EEOC Responses to Major Comments Received on the Proposed Enforcement Guidance on Harassment in the Workplace" and addresses several topics, including: (1) the scope of harassing conduct involving sexual orientation and gender identify; (2) free speech and religious views; (3) the interplay between religious accommodations under Title VII and unlawful harassment; and (4) the interplay between protected concerted activity under the NLRA and unlawful harassment.

1. Harassment Based on Sexual Orientation or Gender Identify

While some commenters to the proposed guidance had asserted that the U.S. Supreme Court's decision in *Bostock v. Clayton County*,[178] which held that Title VII protects against discrimination because of sexual orientation or gender identity, was limited in scope and did not address, among other things, sex-segregated bathrooms, the final guidance took a broad-based approach regarding sex-based harassment involving sexual orientation and gender identity, explaining:

> Sex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity. Accordingly, sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed. Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.[179]

2. Free Speech and Religious Views

The topic of free speech and religious views on topics such as abortion or requiring use of pronouns based on another individual's identity also is addressed briefly in the Addendum:

170 *Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
171 *Sexual Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
172 *EEOC Select Task Force on the Study of Harassment in the Workplace | U.S. Equal Employment Opportunity Commission*
173 *June 2016 Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
174 *Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
175 *Promising Practices for Preventing Harassment in the Federal Sector | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
176 *Retaliation | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
177 *Enforcement Guidance on Retaliation and Related Issues | U.S. Equal Employment Opportunity Commission (eeoc.gov)*
178 59 U.S. 644 (2020).
179 In determining that Title VII's prohibition on sex discrimination requires employers to provide transgender employees access to sex segregated facilities consistent with their gender identity, the EEOC relied on a federal sector administrative appeal and Commission decision in EEOC Appeal No. 0120133395, 2015 WL 1697756 (Apr. 1, 2015). Therein, the Commission also decided that the repeated and intentional use of pronouns inconsistent with the employee's gender identity could contribute to a hostile work environment claim.

> The Commission fully recognizes the importance of protecting free speech and has added to the guidance specific language about the potential interaction between statutory harassment prohibitions and other legal doctrines, including the U.S. Constitution … The interplay between free speech protections and statutory harassment prohibitions in particular matters can be highly fact-specific, and the Commission will carefully consider these issues as presented on a case-by-case basis. A detailed discussion of free speech principles, however, is beyond the scope of this final guidance.
>
> Some commenters also expressed concern that, as they understood the guidance, any workplace discussion of religious perspectives on certain issues, such as abortion or gender identity, would be unlawful harassment. That interpretation is not correct and is not the Commission's intent. As discussed in the final guidance, whether conduct constitutes unlawful harassment depends on all the circumstances and is only unlawful under federal EEO law if it creates a hostile work environment.

3. Interplay between Religious Accommodations Under Title VII and Obligation to Prevent Unlawful Harassment

The interplay between reasonable accommodations for an employee's sincerely held religious beliefs, practices and observances and its obligation to prevent and correct unlawful harassment in the workplace also was addressed, recognizing the differing views on the topic.

The Commission acknowledged that the application of the EEO statutes may implicate other rights, including the Religious Freedom Restoration Act. The EEOC concluded, "When 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 the exercise of religion."

As an example, religious accommodation requests related to pronoun and first name use when dealing with gender identity issues was left for further review and consideration, citing the Seventh Circuit decision in *Kluge v. Brownsburg Community School Corp*,[180] in which the Seventh Circuit vacated the decision in view of the Supreme Court's decision in *Groff v. DeJoy*,[181] which eliminated the "de minimus" standard for undue hardship, instead requiring an employer to demonstrate "substantial increased costs" to reject a religious accommodation request.

4. Interplay Between Protected Concerted Activity Under NLRA and Unlawful Harassment

While potential conflicts can arise between potential harassment concerns and protected concerted activity under the NLRA, and various commentators requested the Commission to provide further clarification, the Commission elected not to address this issue, simply stating, "The EEOC consults with the NLRB's Office of General Counsel as needed to help ensure workable application of the statutory protections for both workers' civil right and the NLRA."

In the final section of the enforcement guidance, the EEOC essentially incorporates key recommendations of the EEOC's TF Report to prevent harassment in the workplace.

180 64 F. 4th 861 (7th Cir 2023).
181 600 U.S. 447 (2023)

IV. Systemic Harassment and Related Concerns

IV. SYSTEMIC HARASSMENT AND RELATED CONCERNS

A. PRELIMINARY OBSERVATIONS

While the EEOC's recent enforcement guidance devoted less than three pages to the issue of "Systemic Harassment," this certainly should not be interpreted to downplay the importance of employers needing to be mindful of the EEOC's continued emphasis on its systemic initiative in which systemic harassment remains one of the EEOC's key priorities.[182]

EEOC and related litigation also have created significant risks for the employer community. Illustrative of the potential exposure is an $18 million settlement entered into in March 2022 between the EEOC and a California employer, in which the parties entered into a consent decree based on a lawsuit that focused on allegations involving sexual harassment, but also included claims of pregnancy discrimination and retaliation.[183] While the consent decree was coupled with a non-admission clause, the scope of the required injunctive relief demonstrates the potential broad impact of such litigation. Based on the decree, which covered operations in six states, the injunctive relief required:

- Appointment of a neutral, third-party equal employment opportunity (EEO) consultant, overseen by the EEOC;
- Audits on pending and current complaints to determine the effectiveness of the handling of the complaints;
- Submitting to unannounced audits of current employees to assess whether sexual harassment, pregnancy discrimination and related retaliation issues are properly being addressed.
- Providing semi-annual reports to the EEOC for review for the duration of the decree;
- Providing that the EEO consultant would oversee and review the policies and procedures for handling complaints, and the policies were extended to cover interns and temps;
- Providing that climate surveys would be implemented as determined by the EEO consultant;
- Providing anti-harassment and anti-discrimination training that included bystander intervention and civility training, with the contents and effectiveness of the training being reviewed by the outside consultant;
- Providing that human resources personnel will attend training designed for HR investigations;
- Evaluating the disciplinary framework and protocols to ensure that the actions taken lead to effective corrective and preventative measures;
- Implementing a performance review system for managers, supervisors, and human resources personnel that includes an EEO component;
- Expand mental health counseling services available to its employees who have experienced sexual harassment at any time;
- Developing a centralized tracking system for complaints of discrimination and harassment;
- Setting up a toll-free hotline for employees and staffing agency workers to report complaints, even anonymously, that shall be monitored 24/7;
- Creating an internal EEO coordinator position to work with the EEO consultant to ensure compliance with the decree; and
- Developing and maintaining comprehensive record-keeping and reporting mechanisms.

182 *See* *Strategic Enforcement Plan Fiscal Years 2024 - 2028 | U.S. Equal Employment Opportunity Commission (eeoc.gov)*

183 *See* EEOC *Press Release* dated Mar. 30, 2022. *See* also, Case No. 2:21-cv-076820DSF-JEM, Docket 82 (C.D. CA, Filed Mar. 29, 2022). This decree was coupled with a second settlement in the amount of $54 million entered into on January 17, 2024, involving pay and promotion claims after the California Department of Fair Employment and Housing intervened and challenged the decree. *See* Case No. 21 STCV-26571, Superior Court for the State of California, County of Los Angeles (Filed: Jan. 17, 2024) ("(P)urpose of the Parties entering into this Decree" includes "to resolve the related federal proceeding" – C.D. Cal. Ca. Case No. CV 21-7682-DSF-JEM, and all related appeals thereto (9th Cir. Case Nos. 22-55060 and 22-55587). *See* California Civil Rights Department *Press Release* dated Dec. 15, 2023.

There are only a few other recent harassment settlements in the "seven figure" range during the EEOC's past two fiscal years,[184] but the EEOC has a long history of multi-million settlements dealing with systemic harassment claims.[185]

B. KEY LEGAL ISSUES INVOLVING EEOC SYSTEMIC HARASSMENT CLAIMS

1. Scope of EEOC Investigations

Based on EEOC investigations of harassment claims, it is not uncommon for the EEOC to expand individual claims into systemic investigations to determine the scope of potential harassment. Systemic investigations involving harassment claims can arise in the following circumstances: (1) an individual files a pattern-or-practice charge or the EEOC expands an individual charge into a pattern-or-practice charge; (2) the EEOC commences an investigation based on the filing of a "commissioner's charge."

In dealing with harassment charges, the EEOC frequently makes broad-based requests for information.[186] The debate in any challenge to EEOC requests for information focuses on "relevance" and "burdensomeness."

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[187] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[188] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[189] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[190]

Even assuming "relevance," the courts have stated that "burdensomeness" is a consideration that the district court must consider in determining whether to enforce EEOC requests for information, as pursued through its subpoena enforcement authority. Generally, an employer "carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad," such as by showing that "compliance would threaten the normal operation of a respondent's business." Some courts have held that the cost of compliance also is a consideration, taking into account the "personnel or financial burden... compared to the resources the employer has at its disposal." Each case has to be reviewed on an individual basis, but "conclusory allegations of burdensomeness are insufficient."[191]

Employers need to carefully evaluate EEOC requests for information, recognizing that once an employer is served with a subpoena, there is a strict time limitation to challenge a subpoena (five working days).[192] Further, even assuming that a charging party elects to settle the matter or file suit, the EEOC may elect to continue a systemic investigation when there are concerns that others may have been impacted by harassing conduct.[193]

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184 *See* Appendix A for a review of recent harassment settlements from January 1, 2023 to the present, which reviews the broad range of high-dollar harassment settlements.

185 *See* Barry Hartstein, *A Review of the EEOC's Systemic Initiative: Tracking its Progress, Current Priorities, and Key Development in FY 2016*, Littler Report, pp. 13-15; *see also* *Challenging Harassment in the Workplace, A Resource Guide for Employer*, Littler Report, at 22. When faced with a potential systemic settlement, employers should carefully review other systemic harassment settlements, including the nature of the monetary relief and required injunctive relief.

186 *See e.g., EEOC v. Michael Sinclair, MD.PA and Epilution Med Spa, LLC*, Case No. 1:23-cv-23547, Docket #1 (S.D. Fla., filed Sept. 15, 2023). A review of subpoena enforcement actions is included in Littler's Annual Report on EEO Developments. *See e.g., Annual Reports on EEOC Developments* for FY *2023*; *2022*; *2021*; *2020*. *See generally* *An Employer's Guide to EEOC Systemic Investigations and Subpoena Enforcement Actions*, Littler Report (Aug. 1, 2011).

187 *See* 42 U.S.C. § 2000e-5(b).

188 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

189 *Id.* at 59.

190 *Id.*

191 *See* Barry Hartstein, *An Employer's Guide to Systemic Investigations and Subpoena Enforcement Actions*, Littler Report (2011), at 22 and cases cited therein.

192 *See* *EEOC Annual Report on EEOC Developments for FY 2023*, Applicable Timelines for Challenging Subpoenas (Waiver Issue), at 30-31 and cases cited therein.

193 *See e.g. EEOC v. Watkins Motor Lines, Inc.* 553 F. 3d 593 (7th Cir. 2009); but see *EEOC v. Hearst Corp*, 103 F. 3d 462 (5th Cir. 1997); and *EEOC v. Federal Express Corporation*, 558 F. 3d 842 (9th Cir. 2008), *cert. denied*, 558 U.S. 1011 (2009); *EEOC v. Union Pacific R. Co*, 867 F. 3d 843 (7th Cir. 2017); see also *VF Jeanswear LP v. EEOC*, No. 17-16786 (9th Cir. 2019), *cert. denied*, No. 19-446 (U.S. Apr. 6, 2020).

2. Broad-Based Authority for EEOC to File Suit Involving Class-Type Claims

In any litigation by the EEOC, an employer also may face claims involving others beyond the charging party. More specifically, even when faced with an individual charge of sexual harassment, the EEOC can file suit on behalf of other purported victims uncovered during the course of the EEOC's investigation. As an example, in *EEOC v. Caterpillar*,[194] the charging party filed an individual charge of discrimination, alleging that she had been fired after she rejected her supervisor's sexual advances. Based on the EEOC's investigation, the EEOC issued a determination that it had "reasonable cause to believe that Caterpillar discriminated against [the charging party] and a class of female employees, based on their sex." Following conciliation, the EEOC filed suit alleging that the employer had discriminated against female employees at the facility where the charging party had been employed. The company moved for summary judgment based on the EEOC's expanding the scope of the investigation beyond the individual charge, which was rejected by the district court. On appeal, the Seventh Circuit upheld the district court and held that when the EEOC itself is the plaintiff, "any violations that the EEOC ascertains in the course of a reasonable investigation of charging party's complaint are actionable....The charge incites the investigation but if the investigation turns up additional violations the Commission can add them to its suit."

As significantly, although private plaintiffs may have challenges in bringing pattern-or-practice sexual harassment claims unless they can meet the strict requirements under Rule 23 to certify a class action,[195] such limitations do not apply to the EEOC. In 1980, The U.S. Supreme Court in *General Telephone Company v. EEOC*,[196] eased the EEOC's burden in bringing class-type claims against employers. As significantly, in *General Telephone*, which involved claims of sex discrimination on behalf of a group of female workers, the Court clarified that that the EEOC could seek relief under section 706 of Title VII on behalf of a "person or persons aggrieved."[197]

The Supreme Court's decision in *International Brotherhood of Teamsters v. United States*[198] sets forth the basic standard, consistently relied on over the years, that a pattern or practice of discrimination can be proven by "establish[ing] by a preponderance of the evidence that...discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[199] On the other hand, a pattern-or-practice claim fails by an employer's showing "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[200] These cases are typically proved based on statistical evidence, coupled with anecdotal evidence.

When the *Teamsters* framework is used, the EEOC typically has argued for bifurcation, thus initially proceeding with a liability phase, followed by a damages phase, in which the scope of individual relief is determined and a presumption of liability applies.[201] From an employer's perspective, the EEOC has an advantage in proving pattern-or-practice claims in such a manner because once the EEOC passes the threshold of demonstrating class-wide discrimination, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[202]

One of the landmark cases involving pattern-or-practice litigation involving sexual harassment, as frequently relied on by the EEOC, is *EEOC v. Mitsubishi Motor Mfg. of America, Inc*,[203] which also is relied on in the EEOC's enforcement guidance. Therein, the district court relied on the Teamsters framework for pattern-or-practice cases in determining whether the employer's "standard operating procedure" was to ignore complaints of sexual harassment. The court also addressed how such a pattern-or-practice case

194 409 F. 3d 831 (7th Cir. 2005).
195 Fed. R. Civ. P. 23(a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.
196 446 U.S. 318 (1980).
197 Fed. R. Civ. P. 23(a).
198 431 U.S. 324 (1977). The EEOC can seek relief under Section 706 or 707 of Title VII. The typical discrimination claim is brought under Section 706 of Title VII, which authorizes the EEOC to file suit for intentional acts of discrimination, and jury trials and compensatory and punitive damages are available. In contrast, Section 707 authorizes the EEOC to file suit when it has reasonable cause to believe that an employer has engaged in a "pattern or practice" of unlawful discrimination, but only permits equitable relief, such as reinstatement or hiring, back pay or any other equitable relief deemed appropriate by a court, but does not provide for compensatory or punitive damages. For a more detailed discussion on the distinction between Section 706 and 707, see "Reflections on Fifty Years of Title VII of the Civil Rights Act and Unsettled Issues Involving Systemic Claims and Class-Based Litigation by the EEOC," included in Littler's Annual Report on EEOC Developments - FY 2013.pdf (littler.com), pp. 3-10.
199 *Teamsters*, 431 U.S. at 336.
200 *Id.*
201 *Id.* at 361.
202 *Id.* at 362.
203 990 F. Supp. 1059 (C.D. Ill. 1998).

could be proven. Specifically, the court looked at two primary Supreme Court decisions, *Meritor Savings Bank v. Vinson*[204] and *Harris v. Forklift Systems, Inc.*,[205] and determined that although a hostile and abusive work environment normally would include both an "objective and subjective component," the sole focus in determining pattern-or-practice liability in harassment claims is an objective standard. In another significant pattern-or-practice lawsuit filed years later, *EEOC v. Dial Corporation*,[206] the court relied on the same reasoning applied in *Mitsubishi*.

On the other hand, the EEOC also has faced certain challenges based on systemic harassment claims against employers. Illustrative is the large-scale lawsuit filed by the agency in *EEOC v. Carrols Corporation*,[207] in which the EEOC asserted pattern-or-practice harassment claims against the employer involving 350 restaurants in 16 states, in which summary judgement was granted in favor of the employer. The *Carrols* decision demonstrates the potential challenges that can be made by employers when the EEOC asserts broad-based pattern-or-practice claims in which the EEOC relies on *Teamsters* and asserts that sexual harassment was "the standard operation procedure." The court focused on the fact that during the relevant time period, the restaurants employed 172,649 employees, of which 90,835 were women. Among the 511 purported victims, the court found 333 statements alleged facts, which if proven, could constitute sexual harassment,[208] but determined this number also represented only .367% of the women the defendant employed during the relevant time period. The court thus concluded that it did "not find that even a substantial minority of Defendant's employees experienced harassment" or "that sexual harassment was Defendant's 'standard operating procedure'—the regular rather than the unusual practice."

Despite the initial favorable ruling for the employer in *Carrols Corporation*, this case demonstrates that even winning the pattern-or-practice argument may not eliminate continued litigation by EEOC. Therein, following the adverse ruling against the EEOC, the agency nevertheless continued to pursue the claims on behalf of the original 511 purported victims under Section 706 of Title VII, relying on the Supreme Court's 1980 *General Telephone* decision, which permits the agency to pursue claims on behalf of a group of individuals. While the court granted summary judgement for the employer regarding several claims, in a ruling dated March 2, 2011,[209] the court reviewed each claim individually and permitted the EEOC to continue to pursue claims on behalf of 89 purported victims. Two years later, on January 13, 2013, after 15 years of litigation, the parties signed a consent decree in which the employer agreed to pay $2.5 million in compensatory damages and lost wages to the remaining purported victims, aside from agreeing to certain injunctive relief.[210]

Further complicating the legal landscape are that two U.S. court of appeal decisions, which have permitted the EEOC to pursue pattern-or-practice suits under Section 706 of Title VII, thus permitting compensatory and punitive damages for pattern-or-practice claims.[211] From the EEOC's perspective, "[t]he significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination."[212]

One additional issue involving systemic harassment claims involves the applicable statute of limitations regarding those who may be included in a class claim. The EEOC typically argues that no limitations period should apply based on the "continuing violation" theory. However, there have been a substantial number of court decisions that have applied a 300-day limitations period, precluding claims on behalf of individuals whose harassment claims occurred more than 300 days before the underlying charge.[213] One of the most

204 477 U.S. 57 (1986).
205 510 U.S. 17 (1993).
206 156 F. Supp. 2d 926 (N.D. Ill. 2001).
207 2005 WL 928634 (N.D.N.Y. Apr. 20, 2005).
208 The EEOC asserted claims on behalf of 511 purported victims.
209 *EEOC v. Carrols Corp.*, 5:98-CV-1772 (N.D.N.Y. Mar. 2, 2011).
210 *See* Press Release, EEOC, *Carrols Corp. To Pay $2.5 Million to Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Jan. 11, 2013), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-9-13.cfm.
211 *See EEOC v. Bass Pro Outdoor World, L.L.C.*, 2016 WL 3397696 15-20078 (5th Cir. June 17, 2016) and *Serrano & EEOC v. Cintas Corp*, 699 F.3d 884 (6th Cir. 2013). These rulings are significant because Section 707 of Title VII only authorizes injunctive relief. Compensatory and punitive damages only are permitted under Section 706.
212 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. Similar provisions exist under § 207(a) of the Genetic Information Nondiscrimination Act (GINA). The Commission also has had authority to pursue class cases under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.
213 In dealing with individual charges that are expanded into systemic investigations, some courts even have held the limitations period only goes back 300 days prior to the notice of an expanded investigation. *See e.g. EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539 (W.D. Va. 2001); *EEOC v. Freeman*,

recent decisions addressing this issue is *EEOC v. Discovering Hidden Hawaii Tours, Inc.*,[214] which included an alleged pattern or practice of sexual harassment, constructive discharge and retaliation claims against three purportedly related defendants, which initially stemmed from claims involving five former employees. The court noted that an aggrieved employee who fails to file a timely charge may be able to pursue a claim under the "piggyback or single-filing rule," in which the employee "piggyback[s] on the timely charge filed by another plaintiff for purposes of exhausting administrative remedies."[215] However, the central issues before the court, and disputed between the parties, was "whether, when the EEOC brings a Section 706 pattern-or-practice hostile environment claim on behalf of a class of aggrieved employees, it may extend liability to included employees who suffered the same type of harassment outside of the 300-day limitation period." The court concluded that the "weight of authority supports Defendants' position that the continuing violation doctrine properly applies to include only the additional, otherwise time-barred claims of aggrieved individuals, who suffered at least one unlawful employment action within 300 days of the filing of the charge, but does not permit the inclusion of employees who did not themselves suffer any unlawful employment practice within that 300-day period."[216]

While systemic harassment litigation can be extremely costly and lengthy for employers, the EEOC also faced one of its more embarrassing losses in pursuing harassment litigation in *EEOC v. CRST*.[217] The *CRST* case stemmed initially from an individual charge of discrimination and expanded into a systemic harassment lawsuit, spanning a period of over 10 years from its initial filing in 2005 and continued to move between the district and federal appellate courts until December 2019.

After the district court dismissed the EEOC's pattern-or-practice claim, the EEOC continued to pursue a class-type claim on behalf of 270 claimants. Ultimately, and after many years of litigation and various judgments for the employer, the EEOC was left with only two claimants and then dropped the claim of one claimant, and was then left solely with the claim of the initial charging party, which was settled for $50,000. Following an award of over $4 million in attorneys' fees in favor of the employer, the case was appealed to the Eighth Circuit and remanded, and most recently was before the U.S. Supreme Court, which remanded the case for further proceedings regarding the attorneys' fee award.

On September 22, 2017, the district court continued to affirm a fee award for the company and awarded fees and costs for CRST in the amount of $1,860,127.36.[218] On December 27, 2017, the fee award was increased to $3,317,289.67.[219] The EEOC appealed one last time to the Eighth Circuit, and on December 10, 2019, the appeals court issued an opinion affirming the district court's order requiring the EEOC to pay the amount previously awarded, over $3.3 million, to CRST for pursuing claims that it knew or should have known were frivolous and failing to satisfy its pre-suit obligations under Title VII.[220]

No. 09-2573, 2011 U.S. Dist. LEXIS 8718 at *2 (D. Md. Jan. 31, 2011).

214 *See EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576 (D. Haw. Sept. 21, 2017).

215 The court cited *Arizona ex rel Horne v. Geo Grp., Inc.*, 816 F. 3d 1189 (9th Cir. 2016), cert. denied, 137 S.Ct. 623 (2017).

216 The court provided a detailed review of case law supporting this view, but also included reference to case cites supporting the minority view, as supported by the EEOC, that no limitation period applies to pattern-or-practice harassment claims in relying on a "continuing violation" theory.

217 *See CRST Van Expedited, Inc. v. EEOC*, No. 14-1375, 2016 U.S. LEXIS 3350, 578 U.S. ___ (2016).

218 *See EEOC v. CRST Van Expedited Inc.*, Case No. 1:07-cv-00095-LRR, Docket 462 and subsequent entries (N.D. Iowa).

219 *Id.*, Docket 473 and 474.

220 *EEOC v. CRST Van Expedited*, No. 18-1446 (8th Cir. 2019).

V. Conclusion

V. CONCLUSION

We hope this Littler Report serves as a useful resource to assist employers in establishing a framework to better understand the complex legal landscape when confronted with potential harassment claims in the workplace, including harassment prevention. The following takeaways should be considered:

- Harassment will remain an important priority at the EEOC for the immediate future, and the EEOC has made it abundantly clear that it will not restrict its focus to sexual harassment. Rather, a charge involving alleged harassment on the basis for race, color, national origin, religion, sex *(i.e.*, conduct of a sexualized nature or otherwise based on sex, pregnancy, childbirth or related medical conditions, or sexual orientation or gender identify), age, disability, genetic information, retaliatory harassment or any cross-basis issues may lead to an expanded investigation by the EEOC beyond the individual who initially filed the charge.
- Employers should consider "rebooting" their anti-harassment programs and policies to ensure they have considered the recommendations proposed by the EEOC's Task Force Report as well as the EEOC's "Promising Practices for Preventing Harassment." This should start with an appropriate message from senior leadership, and ensure there is accountability to make certain those who harass are held responsible "in a meaningful, appropriate and proportional manner," and those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for a job well done, or penalized for failing to do to so.[221]
- In enforcing an anti-harassment policy, employers should be mindful of the recommendation of the Co-Chairs of the Harassment Task Force Report that "zero tolerance" policies may hinder, rather than improve, the work environment and "may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-workers to lose their job over relatively minor harassing behavior." Rather, "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct."[222]
- Based on the Task Force Report, the most effective approach to harassment prevention is to address actions in the work environment that have not yet risen to the level of a hostile work environment from a legal perspective (*i.e.*, "severe or pervasive" conduct to create an objectively and subjectively hostile work environment), but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.
- Employers must be mindful of the courts' view that harassment by supervisors or managers will cause strict liability if a supervisor's harassment creates a hostile work environment that includes a "tangible employment action" (*e.g.*, hiring, firing, failure to promote, demotion, etc.), and strict liability will arise for supervisory harassment even absent a tangible employment action, unless the employer can effectively raise an affirmative defense by demonstrating: (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 to prevent harm or take other steps to avoid harm from the harassment.
- Liability will also arise for actions by employees or non-employees based on actual or constructive notice of such harassment and the employer fails to promptly investigate and take appropriate corrective action or to correct the harassment of which the employer had notice.

221 TF Report at 31.
222 *Id.* at 40.

- Employers need to conduct due diligence whenever faced with a harassment complaint, including conducting a thorough investigation, and be proactive in providing a detailed submission to the EEOC to demonstrate: (1) an employer's good-faith efforts involving harassment prevention, including company policy and applicable training; (2) an employer's prompt investigation of any complaint, including taking appropriate corrective action; (3) engaging in efforts to minimize the burden of negative consequences to an employee who complains of harassment, both during and after the employer's investigation; and (4) taking measure to ensure that retaliation does not occur based on a harassment complaint involving the complainant or any witnesses during and after the investigation, and reminding employees involved in an investigation of the employer's prohibition against retaliation.
- Employers immediately should involve experienced employment counsel when faced with a potential expanded or systemic harassment investigation by the EEOC based on the significant legal and financial risks posed by such investigations.
- Employers need to continue to monitor this evolving area of the law, including issues involving gender identity, potential conflicting rights and obligations involving religious accommodation and unlawful harassment, and the tension in the law between protected activity under the NLRA and harassment based on an individual's protected status.

Appendices

APPENDIX A – High-Dollar EEOC Settlements for Harassment Cases[223]

FY 2023-PRESENT (OCT. 1, 2022 – JUNE 1, 2024)

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2 million	Sex Harassment	The EEOC alleged a fast-food franchise owner allowed sexual harassing behavior to persist at various locations. Under the terms of the consent decree, the owner will pay $1,997,500 to 41 individuals, retain a third-party EEO monitor to conduct audits of the franchise practices in handling harassment and retaliation claims, create a tracking system for complaints, conduct climate surveys, update its EEO policies, and conduct training.	U.S. District Court for the District of Nevada	*1/6/2023*
$2 million	Sex Harassment Retaliation	The EEOC alleged the company subjected a class of female agricultural workers to a sexually hostile work environment and threatened retaliation for those who did not acquiesce to the harassment. Under the terms of the consent decree, the company will pay $2 million to the class, hire a third-party monitor, conduct training, update its policies and procedures, provide periodic reports to the EEOC, and institute reporting mechanisms.	U.S. District Court for the Eastern District of California	*3/12/2024*
$1.2 million	Race Harassment Retaliation	The EEOC alleged that from at least May 2018 through the fall of 2019, a contractor subjected Black employees to a racially hostile working environment and retaliated against two employees who complained. As part of the two-year consent decree, the company agreed to pay $1.2 million to 31 claimants, conduct anti-harassment training, assign an EEO liaison to each of its construction sites, and institute a strict prohibition against racist symbols, graffiti, jokes, slurs, and hate symbols into its harassment policy.	U.S. District Court for the Middle District of Tennessee	*5/4/2023*

223 This chart is limited to settlements involving monetary awards of $500,000 or more.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$865,000	Race Harassment Retaliation	EEOC alleged a company engaged in race-based harassment and retaliation. Specifically, the EEOC claimed the company allowed a class of Black employees to be harassed by residents, co-workers, and a supervisor. Under the terms of the three-year consent decree, the company agreed to retain an EEO monitor, review policies and procedures on discrimination, harassment and retaliation, create a structure for reporting incidents of harassment/ discrimination, and pay $865,000.	U.S. District Court for the Central District of California	*9/28/2023*
$730,000	Race Discrimination and Harassment	The EEOC alleged the company engaged in systemic race-based harassment. Under the terms of the conciliation agreement, the company agreed to pay $730,000 to the 16 affected workers and implement other forms of injunctive relief to combat discrimination and harassment.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 22
$650,000	Race Discrimination Retaliation	The EEOC alleged that a restaurant subjected Black employees to race-based harassment, initially restaffed the workplace with non-Black employees following a layoff, and refused to rehire several employees who complained about the harassment and discriminatory hiring practices. Under the terms of the consent decree, the employer agreed to pay $650,000 in back pay and damages to six individuals, conduct training, revise its policies, and provide regular reports to the EEOC.	U.S. District Court for the Eastern District of Louisiana	9/5/2023
$600,000	Sexual Harassment Retaliation	EEOC alleged the restaurant's line cook sexually harassed female employees, which led one employee to quit, and that the employer did not take prompt or effective remedial action. Under the terms of the three-year consent decree, the company agreed to pay $600,000 to four former employees. In addition, the company will hire a third-party EEO expert to review company policies and assist with investigations and conduct training for 12 company locations.	U.S. District Court for the Western District of Washington	*4/22/2024*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$500,000	Sex Harassment	The EEOC alleged the defendant subjected a class of monolingual Spanish-speaking female employees to sexual harassment. Under the terms of the 2.5-year consent decree, the company will pay $500,000 in monetary relief to members of the class, provide sexual harassment training, post a notice of the settlement, and hire an outside EEO monitor to ensure it adheres to the terms of the decree.	U.S. District Court for the District of Nevada	*10/13/2022*
$500,000	Race Discrimination National Origin Discrimination Retaliation	The EEOC alleged the employer subjected Black and Latino employees to race- and national origin-based harassment and retaliated against employees who complained by moving them to the night shift or terminating their employment. As part of the three-year consent decree, the employer agreed to pay $500,000 to aggrieved employees, retain an outside consultant or legal counsel to review and revise the company's policies and procedures, provide training, and establish a complaint hotline.	U.S. District Court for the District of Arizona	*12/20/2023*

APPENDIX B – EEOC Case Filings Involving Allegations of Harassment Based on Sex, Sexual Orientation, and/or Gender Identity

FY 2023-PRESENT (OCT. 1, 2022-JUNE 1, 2024)

State	Court, Date Filed, Case Number	Summary of Allegations	Nature of Harassment
NC	USDC Middle District of North Carolina Filed: 12/21/2022 No. 1:22cv1115 EEOC Press Release: 12/21/2022	EEOC alleges company violated federal law when it subjected a female employee to a sexually hostile work environment and then fired her for complaining about it. EEOC alleged the employee was subjected to vulgar sexual comments and unwelcome touching by male coworkers from August to October 2020. The employee reported the harassment to the shift supervisor and other managers on several occasions, but her complaints were never addressed, and the harassment continued. Company denied request to be transferred to a different facility. In October 2020 the employee reported that a male coworker had exposed himself to her. Management officials told her that she should take a few days off while they looked into the matter and instructed her to call the production manager before returning to work. Although the employee made several attempts to return to work, the production manager did not return her calls and effectively terminated her employment.	Sex
NY	USDC Western District of New York Filed: 3/30/2023 No. 1:23cv286 EEOC Press Release: 3/30/2023	EEOC alleges defendant violated federal law when management and employees harassed an employee because of his gender identity. The EEOC alleges that beginning in January 2021, one of defendant's owners repeatedly harassed the charging party, a transgender male, including telling him that he "wasn't a real man," asking invasive questions about his transition, and asking, "Does she have female parts?" According to the EEOC's complaint, the owners also intentionally misgendered charging party by using female pronouns (such as "she" or "her") and stood by as employees and customers did the same. EEOC also claims management and employees made numerous other anti-transgender comments, including asking questions about charging party's genitalia, telling him he wasn't a "real guy," and equating being transgender to pedophilia. Charging party complained repeatedly to management, but harassment continued, leading to constructive discharge.	Gender Identity
NM	USDC New Mexico Filed: 3/31/2023 No. 1:23cv274	EEOC alleges Defendant subjected three charging parties to unwelcome severe or pervasive hostile work environment on the basis of their sex and/or sexual orientation. Further, the continued harassment of the charging parties by the defendant's owner culminated in their collective terminations from employment on the same day because of his dislike of charging parties' sexual orientation and/ or because the charging parties did not conform to "stereotypes" of femininity or other gender norms or expectations of female employees. Additionally, EEOC submits defendant failed to maintain records in accordance with EEOC's recordkeeping and reporting requirements.	Sex Sexual Orientation

CA	USDC Central District of California Filed: 4/21/2023 No. 2:23cv3018 EEOC Press Release: 4/21/2023	EEOC alleges defendants violated federal law when they failed to prevent and correct ongoing sexual harassment and retaliation. According to the EEOC's lawsuit, since at least 2020, defendants subjected both female and male workers to ongoing verbal and physical sexual harassment. The harassment, allegedly perpetrated by their chief operating officer, included but was not limited to, frequent and offensive unwanted groping and touching of their bodies, unwelcome sexual advances and comments about their appearance, and inappropriate questions about employees' sexual preferences and sexual activities. Despite having received multiple complaints of the sexual harassment, the companies failed to take prompt and effective action, and the sexual harassment continued. The EEOC also said when employees objected to or reported the harassment, they were retaliated against with further harassment and/or by discipline, including termination. The unlawful employment practices resulted in intolerable working conditions, compelling some of the workers to quit.	Sex
AL	USDC Northern District of Alabama Filed: 5/1/2023 No. 4:23cv552	EEOC alleges defendant discriminated against three female employees because of their sex, subjected them to sexual and other sex-based harassment, and created a hostile work environment, resulting in one constructive discharge, and that the defendant retaliated against two women when they complained about the harassment, and subjected them to different terms/conditions of employment, including reduced hours, less-desirable shifts, suspension, etc.	Sex
HI	USDC Hawai'i Filed: 5/11/2023 No. 1:23cv208 EEOC Press Release: 5/12/2023	EEOC alleges a restaurant and its outsourced human resources company violated federal law by subjecting male employees to sexual harassment. The EEOC charged that since 2018, a co-owner of the restaurant sexually harassed male employees by exposing his genitals in the workplace and making repeated sexual comments related to the male employees' sexual orientation. Restaurant and its outsourced HR company failed to conduct an adequate investigation, thereby failing to address and rectify the harassment.	Sex
CA	USDC Southern District of California Filed: 5/17/2023 No. 3:23cv902 EEOC Press Release: 5/17/2023	EEOC alleges defendant violated federal law by allowing a class of female employees to be subjected to sexual harassment and retaliation. According to the EEOC's lawsuit, beginning as early as 2019, nine locations of the defendant chain allowed a class of young female employees, including some teenagers, to be subjected to sexual harassment by male supervisors and co-workers. The harassment included repeated, frequent, and offensive sex-based remarks and advances, as well as unwelcome touching. Defendant did not properly monitor the workplace, which left the employees vulnerable to ongoing harassment. Female employees who complained were retaliated against or forced to quit their jobs.	Sex
MN	USDC Minnesota Filed: 5/23/2023 No. 0:23cv1501 EEOC Press Release: 5/23/2023	EEOC alleges franchisee violated federal law when it subjected employees to a hostile work environment based on race, sex, and sexual orientation. According to the EEOC, multiple workers endured harassment. In one instance, managers and other employees singled out a gay and Black employee for racial and homophobic insults that included the n-word and f-word, discussed his sex life, and referred to him as the restaurant's "adopted African child." The company also exposed female employees, some as young as 14, to sexual harassment that included unwanted sexual touching, jokes, and propositions. Employees reported these conditions to management, but the company failed to reasonably address the harassment or discipline those responsible. The intolerable working conditions forced one employee to quit.	Sex Sexual Orientation Race

MI	USDC Western District of Michigan Filed: 6/15/2023 No. 1:23-cv-00622 EEOC Press Release: 6/15/2023	EEOC alleges a farming and produce supplier violated federal law by subjecting a female employee to a hostile work environment because of her sex. According to the EEOC's lawsuit, a female employee was harassed by a male forklift driver with whom she had a prior romantic relationship. The forklift driver made numerous remarks to the female employee that were lewd and sexual, insulting, and threatening. The female employee complained to her supervisor about the harassment. The supervisor attempted to counsel the forklift driver and moved him to a different shift. The harassment continued, and the female employee continued to complain, to no avail. Months later, when she reported an incident to the company's national human resources manager, she was told she would need a restraining order before the company could act. The next day, the employee obtained a personal protection order and submitted it to the company. Afterward, the forklift driver was fired. However, the company deemed the driver eligible for rehire.	Sex
MI	USDC Eastern District of Michigan Filed: 6/22/2023 No. 4:23cv11479 EEOC Press Release: 6/22/2023	EEOC alleges an automotive quality control company violated federal law by maintaining a sexually hostile work environment and retaliating against a female employee who complained of being sexually harassed by a male supervisor. According to the EEOC's lawsuit, shortly after the female employee was hired, her male supervisor began to make sexual advances toward her. During the months that followed, the supervisor's sexual advances were constant. The employee rejected her supervisor's advances and complained to a higher manager. No action was taken to address her complaints and the harassment continued. Because she rejected the supervisor and complained about the sexual advances, her hours were reduced, and she was eventually fired.	Sex
MS	USDC Southern District of Mississippi Filed: 7/31/2023 No. 2:23cv106 EEOC Press Release: 7/31/2023	EEOC alleges restaurant violated federal law when it subjected a female employee to a sexually hostile work environment. According to the EEOC's lawsuit, in February 2021, a female employee was subjected to inappropriate sexual comments and unwanted touching by the male head server. The female employee reported the harassment to owners and to a manager, but they gave no indication they took the complaint seriously or that they would address the situation. The lawsuit further alleges this was not the first time the head server harassed a female employee. The EEOC claims that defendant knew or should have known of the head server's propensity for sexual harassment and that it failed to take appropriate corrective action to eliminate the sexual harassment from the workplace.	Sex
AR	USDC Western District of Arkansas Filed: 8/9/2023 No. 6:23cv6090 EEOC Press Release: 8/10/2023	EEOC alleges defendant subjected a class of teens and young adults to sexual harassment and a sexually hostile work environment. According to the EEOC's lawsuit, a shift manager made inappropriate sexual comments to a young female. The young female immediately reported the comments to the general manager. While receiving notice of the sexual harassment, the company failed to address the harassment and the shift manager continued to harass other young female employees, including teenagers. Eventually, the sexual harassment forced several of the employees to resign.	Sex
NV	USDC Nevada Filed: 8/24/2023 No. 2:23cv1308 EEOC Press Release: 8/24/2023	EEOC alleges a restaurant chain violated federal law by subjecting employees to sexual harassment. According to the EEOC's lawsuit, since at least 2018, managers at sexually harassed female and male employees on a daily basis. The harassment included unwanted and repeated sexual advances, sexual comments, sexually offensive conduct, and unwelcome physical contact. Despite receiving complaints, defendants failed to take appropriate and effective action to prevent the ongoing sexual harassment. Instead, some employees who complained faced retaliation.	Sex

NV	USDC Nevada Filed: 8/24/2023 No. 2:23cv1307 EEOC Press Release: 8/24/2023	EEOC alleges defendant violated federal law when it failed to prevent and correct ongoing sexual harassment and retaliation. According to the EEOC's lawsuit, since at least 2018, defendant tolerated sexual harassment in which the harassers and victims were both men and women. The harassment included, but was not limited to, unwanted touching and groping, stalking, offering to pay for sex, and sexually offensive comments towards female employees. Even after complaints of harassment were made to human resources, defendant failed to address and correct the harassment, which forced some employees to quit to avoid the harassment.	Sex
NV	USDC Nevada Filed: 8/24/2023 No. 2:23cv1309 EEOC Press Release: 8/24/2023	EEOC alleges defendant violated federal law when its owners, managers, supervisors, co-workers, and customers subjected female workers to sexual harassment and subjected gay and lesbian workers to discrimination and harassment. According to the first lawsuit, since 2015, male managers, supervisors, co-workers, and/or customers subjected female workers at the restaurant and bar to sexual harassment. Male managers and/or supervisors required female employees to engage in sexual activities to maintain their employment and terminated employees who refused. The harassment also included sexual assaults, sexual solicitations, inappropriate touching of the buttocks and breasts, males rubbing up against the female workers, and frequent explicit sexual comments.	Sex
NV	USDC Nevada Filed: 8/24/2023 No. 2:23cv1310 EEOC Press Release: 8/24/2023	EEOC alleges defendant violated federal law when its owners, managers, supervisors, co-workers, and customers subjected female workers to sexual harassment and subjected gay and lesbian workers to discrimination and harassment. The second lawsuit alleges defendant and owners, managers, and/or supervisors discriminated against gay and lesbian workers and subjected them to harassment based on their sexual orientation, which included physical assault and offensive slurs. The two lawsuits further allege that for some workers, the working conditions were so intolerable they felt they had no choice but to quit.	Sexual Orientation
NC	USDC Eastern District of North Carolina Filed: 9/6/2023 No. 4:23cv144 EEOC Press Release: 9/6/2023	EEOC alleges defendant subjected a female truck driver to severe and pervasive sexual harassment, a hostile environment based on sex, and retaliation. The EEOC suit alleges that, for over a year, the victim was subjected to harassment by several male coworkers. When the victim reported the conduct to the foreman, he reportedly laughed. The victim also experienced hostile and abusive harassment by several male coworkers because she was female. After the victim complained to a superintendent, she was denied an opportunity for advancement she was expecting. Instead, she was transferred to an undesirable work location while the offending coworkers, and the foreman who failed to stop the abuse, were transferred to the more desirable project.	Sex
TN	USDC Western District of Tennessee Filed: 9/7/2023 No. 2:23cv2568	EEOC alleges defendant subjected two charging parties and a class of female employees to sexual harassment, and then retaliated against them for complaining about the harassment by terminating their employment.	Sex
OK	USDC Eastern District of Oklahoma Filed: 9/8/2023 No. 6:23cv299 EEOC Press Release: 9/8/2023	EEOC alleges defendant fired a female manager because she is a woman. According to the suit, prior to April 2020, a female employee was performing both finance manager and sales manager duties. She was the only woman working in the sales department. In April 2020, the dealership hired a new general manager and a new finance manager – both men – and took away the woman's finance manager duties, reducing her role to sales manager. The new male managers immediately began subjecting the female employee to sexually offensive conduct and undermining her management authority. In August 2020, the dealership abruptly informed the woman that her sales manager position was being eliminated and she was terminated. Soon after, defendant posted a message on Facebook announcing a less experienced male employee's promotion to the woman's former position.	Sex

TX	USDC Eastern District of Texas Filed: 9/13/2023 No. 4:23cv814	EEOC alleges defendant discriminated against the female employees by subjecting them to a sexually hostile work environment, intolerable conditions causing their constructive discharge, and quid pro quo sexual harassment in violation of Title VII.	Sex
TX	USDC Northern District Texas Filed: 9/14/2023 No. 3:23cv2060	EEOC alleges defendant subjected charging party to harassment because of her sex and terminated her in retaliation for opposing harassment because of sex.	Sex
OH	USDC Northern District of Ohio Filed: 9/15/2023 No. 1:23-cv-01802 EEOC Press Release: 9/20/2023	EEOC alleges defendants engaged in sex discrimination when they subjected two charging parties (gay men) to an unlawful hostile work environment and discharge or constructive discharge because of sexual orientation. Defendants also unlawfully retaliated against charging parties for engaging in protected activity.	Sexual Orientation
WV	USDC Southern District of West Virginia Filed: 9/19/2023 No. 5:23cv623 EEOC Press Release: 9/19/2023	EEOC alleges retailer violated federal law when it subjected female employees to sexual harassment and fired a female employee in retaliation for reporting the harassment. According to the EEOC's lawsuit, the manager subjected a class of female employees to egregious sexual harassment, including unwelcome and offensive sexual touching, requests for sexual acts in exchange for money or favorable treatment at work, requests that female workers expose intimate body areas, and making crude sexual innuendos. Defendant had received multiple complaints about the store manager's conduct and failed to take appropriate action to stop the harassment. After the store manager subjected a female employee to particularly egregious harassment, she reported the harassment, and the company fired her in retaliation for her actions opposing the harassment and for filing a charge of discrimination.	Sex
PA	USDC Middle District of Pennsylvania Filed: 9/25/2023 No. 1:23cv1587 EEOC Press Release: 9/25/2023	EEOC alleges defendant violated federal law when it subjected female employees to a hostile work environment because of their sex. According to the EEOC's lawsuit, two female employees were subjected to sexually charged and demeaning sex-based comments from male co-workers and supervisors. One of the women endured cat-calling and vulgar comments about female anatomy and was told that a male employee wanted to "mount" her, while another female employee was subjected to crude comments about her sexual orientation, to sexual overtures, and to inappropriate touching, the agency charged. According to the lawsuit, defendant failed to take effective action to stop the harassment, despite receiving complaints from both women.	Sex
TX	USDC Western District of Texas Filed: 9/26/2023 No. 3:23cv359 EEOC Press Release: 9/26/2023	EEOC alleges defendants violated federal law when they allowed an administrator to sexually harass a housekeeping aide, and then retaliated against her and another employee for complaining. According to the EEOC's suit, an administrator harassed the charging party by subjecting her to unwelcome sexual comments and forcible kissing. When her male supervisor elevated the sexual harassment complaint, the human resources director at the facility was dismissive and suggested that the aide may have enticed the administrator to harass her. The EEOC further alleges that no credible investigation was conducted into the complaint, and the administrator whose misconduct was reported was never disciplined. The aide was subjected to taunting and criticism by onsite management at the facility after her complaint. The supervisor who sought intervention from upper management to assist the aide was later given a written disciplinary warning for "gossiping." Ultimately, both were constructively discharged.	Sex

WI	USDC Eastern District of Wisconsin Filed: 9/28/2023 No. 1:23cv1293	EEOC alleges defendant cleaning service provider violated federal law when it subjected female employees to a hostile work environment and terminated their employment in retaliation for opposition to sexual harassment. According to the lawsuit, female employees were subjected to harassment, which included inappropriate touching and sex-based derogatory comments. For some, the conduct was so severe they were forced to quit to avoid the harassment. Employees who opposed the sexual harassment were terminated, including one who was threatened, causing her to retire early.	Sex
CO	USDC Colorado Filed: 9/28/2023 No. 1:23cv2531	EEOC alleges defendant violated federal law by subjecting female employees to sexual harassment and retaliation. According to the EEOC's lawsuit, a male farm manager entered the women's dressing room on at least three separate occasions without knocking while female employees were either undressed or undressing. Another male manager regularly subjected female employees to vulgar sexual language and sexual propositions. The EEOC alleges that defendant failed to take preventive or corrective action when female employees complained about the harassment and at least one woman who could not tolerate the harassment was forced to resign. The EEOC also alleges that at least one other woman was discharged because she complained to management and human resources about sexual harassment.	Sex
AZ	USDC Arizona Filed: 9/28/2023 No. 2:23cv2051	EEOC alleges defendant pet store violated federal civil rights laws when it discriminated against employees because of sex, failed to prevent and remedy sexual harassment in its stores, and retaliated against employees who opposed the discriminatory and harassing conduct. According to EEOC's lawsuit, a male manager and a male employee subjected female employees to constant sexual harassment, including making inappropriate sexual comments about female customers and employees, physically touching female employees without their consent, showing female employees naked photos, and sexually propositioning female employees. Female employees complained about this harassment to management on multiple occasions, only for management to ignore the complaints and fail to take corrective action. Defendant also retaliated against some female employees by terminating them after they complained about sexual harassment.	Sex
OK	USDC Eastern District of Oklahoma Filed: 9/28/2023 No. 6:23cv331	EEOC alleges defendant violated federal law when a manager sexually harassed a 17-year-old worker, and she was forced to resign. According to the suit, an adult male supervisor sexually harassed a teen girl who worked under his supervision in or around November 2021. After subjecting the teenager to sexual comments and innuendo for about a month, the male supervisor grabbed her by the waist in a dark, isolated storage shed and said he could rape her. When defendant learned about the incident and other sexual harassing conduct by the supervisor, it failed to take prompt or effective remedial action to protect the girl and other workers. Instead, the company allowed the supervisor to continue supervising the victim and other teenage girls. As a result, the teenage worker had no choice but to resign and was constructively discharged.	Sex
IA	USDC Southern District of Iowa Filed: 9/29/2023 No. 3:23cv65	EEOC alleges a restaurant violated federal law when it subjected female employees to sexual harassment and retaliation. According to the EEOC's suit, female employees endured serious and widespread sexual harassment by male supervisors and co-workers. The harassment included unwanted sexual touching and groping, sexual solicitation, threats, and offensive sexual comments towards female employees. Multiple employees reported the harassment to the restaurant's management, but the company permitted the harassment to continue, creating intolerable workplace conditions forcing several female employees to quit. Defendant also retaliated against women who reported the harassment, including one female employee who was terminated after objecting to the misconduct.	Sex

TN	USDC Western District of Tennessee Filed: 9/22/2023 No. 2:23cv2604 EEOC Press Release: 9/22/2023	EEOC alleges defendant violated federal law when it subjected an employee to sexual orientation discrimination and discharged the employee in retaliation after he complained of the discrimination. According to the EEOC's lawsuit, managers of the restaurant cultivated a hostile environment when they permitted the waitstaff to target a gay employee with homophobic slurs, insults and profane, discriminatory attacks. The employee complained of the treatment, but defendant did nothing to stop it and allowed the harassment to continue for months. Defendant then fired the gay employee for allegedly not showing up to work and not notifying a supervisor. The employee, however, had reached out to management for assistance.	Sexual Orientation
PA	USDC Middle District of Pennsylvania Filed: 10/25/2023 No. 1:23cv1767 EEOC Press Release: 10/26/2023	EEOC alleges a grocery chain subjected an employee to sexual harassment and discharged her when she refused to comply with an unlawful directive to participate in the company's employee assistance program. According to the EEOC's lawsuit, defendant failed to take reasonable corrective action against the harassing supervisor after the employee reported the sexual harassment and the supervisor admitted some of his conduct. After the employee's sexual harassment complaint, the company told her that coworkers had complained about her and as a result of those complaints, she would be required to participate in its employee assistance program (EAP). The EEOC's lawsuit charged that the mandatory EAP referral would have required her to undergo a medical examination and disability-related inquiries. The referral would also require her to release medical information to the company, and a company official confirmed to her that the referral was to determine whether she would be placed on disability leave. When the female employee refused to comply with the mandatory EAP referral, defendant suspended her without pay and ultimately discharged her.	Sex
TX	USDC Western District of Texas Filed: 12/20/2023 No. 1:23cv1541 EEOC Press Release: 12/20/2023	EEOC alleges a car dealership subjected female employees to sexual harassment and retaliated against employees when they reported the harassment the EEOC. According to the EEOC's lawsuit, three managers engaged in egregious and persistent sexual harassment towards female employees. These managers regularly touched or attempted to touch female employees. They also made sexual comments about female employees, critiquing their physical appearance and referring to the employees' personal relationships. Several female employees who suffered harassment were forced to leave their jobs because of the managers' conduct. Several employees, including a male manager, reported the harassers' behavior. However, no appropriate investigation, effective corrective action, or remedial action was taken in response to the complaints. Instead, the reporting employees were transferred to other dealerships. One reporting manager was transferred, received a reduction in pay, and was subsequently terminated for standing up against harassment.	Sex
MA	USDC Massachusetts Filed: 1/1/2024 No. 1:24cv10077 EEOC Press Release: 1/10/2024	EEOC alleges the defendant subjected male and Hispanic employees — nearly all of Guatemalan descent — to sex, racial, and/or national origin harassment, and retaliated against one employee who complained about sexual harassment. According to the EEOC's lawsuit, the owner subjected employees to egregious and constant harassment. Additionally, employees were also harassed by a co-worker because of their sex, race, and national origin, and at least one employee complained to the owner about this co-worker's sexual harassment. EEOC alleges the company retaliated against this complaining employee by mocking him for being in a romantic and/or sexual relationship with the harassing co-worker, effectively condoning the illegal harassment in the workplace.	Sex Race National Origin

APPENDIX C - EEOC Case Filings Involving Allegations of Harassment Based on Race and Other Characteristics

FY 2023-PRESENT (OCT. 1, 2022-JUNE 1, 2024)

State	Court, Date Filed, Case Number	Summary of Allegations	Nature of Harassment
NY	USDC Western District of New York Filed: 2/2/2023 No. 1:23cv111 EEOC Press Release: 2/2/2023	EEOC alleges pizza franchise permitted race-based harassment of Black employees by managers and co-workers. The EEOC charges that, beginning in at least 2019, defendant subjected its Black employees to a race-based hostile work environment. The mistreatment included two managers' regular and open use of slurs. Among other incidents, one of the managers mimicked the voice of a slave owner and called one charging party "boy" while the other manager stood by and laughed. EEOC alleged they complained but were met only with further harassment and intimidation. Defendant allegedly took no disciplinary action against the harassers. On the contrary, one manager was promoted and the other received an increase in pay. Because of the harassment he had experienced, and defendant's failure to protect him from discrimination, the charging party was compelled to resign.	Race
LA	USDC Middle District of Louisiana Filed: 3/2/2023 No. 3:23cv159 EEOC Press Release: 3/2/2023	EEOC alleges defendant violated federal law when it failed to take effective measures to prevent the display of hangman's nooses. According to the EEOC's lawsuit, a Black employee found a hangman's noose at his worksite in January 2020. At the time he reported the noose, defendant was aware that three other nooses had been displayed at the complex. The EEOC alleges that defendant investigated some, but not all, of the prior incidents and failed to take measures reasonably calculated to end the harassment. After the employee reported the noose in January, a fifth noose was reported in December 2020 at the complex. Defendant's actions and omissions regarding the noose incidents created a racially hostile work environment.	Race
NC	USDC Eastern District of North Carolina Filed: 3/16/2023 No. 5:23cv129 EEOC Press Release: 3/16/2023	EEOC alleges defendant violated federal law when it subjected employees to a hostile work environment, discharged Black employees and discriminated against applicants in the hiring process because of their race and color. According to the EEOC's lawsuit, from October 2018 to August 2021, the owner of the franchises repeatedly instructed the general manager not to hire Black employees and to discharge other employees because they were Black or because they appeared to be Black. The owner also created a hostile work environment for Black employees by repeatedly making disparaging remarks and stereotyping them based on his own racial bias. When the general manager confronted the owner stating he was Black, the owner argued with him stating he was "not really Black" and had "Puerto Rican" in him. The racially offensive behavior continued until the general manager felt he could no longer work for the owner and resigned.	Race Color
NV	USDC Nevada Filed: 3/28/2023 No. 3:23cv135 EEOC Press Release: 3/29/2023	EEOC alleges defendant violated federal law by tolerating racial harassment of two Black workers and firing them in retaliation for reporting the harassment. According to EEOC's suit, two Black workers, a married couple hired in Jan. 2020, faced constant racial taunts and slurs, including the 'n-word,' from their supervisors, a brother and sister. The couple also observed the sibling supervisors routinely denigrating other Black employees due to their race. This conduct occurred openly, in front of co-workers and managers. Senior personnel, including a site manager and a vice president, failed to take adequate steps to curb the misconduct, despite being put on notice of the racial harassment. In late-May 2020, when the couple continued to report ongoing offensive treatment, they were fired via text message by one of the supervisors accused of harassment.	Race
ND	USDC North Dakota Filed: 5/4/2023 No. 3:23cv86 EEOC Press Release: 5/4/2023	EEOC alleges defendant subjected a Black employee to a racially hostile work environment and then retaliated against him for complaining. According to the EEOC's lawsuit, the Black employee was the target of sustained racial hostility from white employees and supervisors, which included racial slurs and threats of violence. EEOC claims the defendant did not address the harassment, and instead fired the employee in retaliation for his complaints.	Race

MN	USDC Minnesota Filed: 5/23/2023 No. 0:23cv1506 EEOC Press Release: 5/23/2023	EEOC alleges franchisee violated federal law when it subjected an employee, who also has a disability, to bullying and disability-related slurs, while paying him less than his co-workers without disabilities.	Disability
MN	USDC Minnesota Filed: 5/23/2023 No. 0:23cv1501 EEOC Press Release: 5/23/2023	EEOC alleges franchisee violated federal law when it subjected employees to a hostile work environment based on race, sex, and sexual orientation. According to the EEOC, multiple workers endured harassment. In one instance, managers and other employees singled out a gay, Black employee for racial and homophobic insults that included the n-word and f-word, discussed his sex life, and referred to him as the restaurant's "adopted African child." The company also exposed female employees, some as young as 14, to sexual harassment that included unwanted sexual touching, jokes, and propositions. Employees reported these conditions to management, but the company failed to reasonably address the harassment or discipline those responsible. The intolerable working conditions forced one employee to quit.	Race Sex Sexual Orientation
LA	USDC Middle District of Louisiana Filed: 6/15/2023 No. 5:23-cv-00808 EEOC Press Release: 6/16/2023	EEOC alleges defendant subjected a Black employee to a hostile work environment on the basis of her race and fired her after she complained about racially offensive workplace conduct. According to the EEOC's lawsuit, in June 2020, a Black employee complained to defendant that its dental director made racially offensive comments about racial justice protests associated with the Black Lives Matter movement. The employee alleged that the dental director proposed putting on blackface and going rioting and looting. The employee further complained that the dental director singled her out as the only Black employee in a room full of white coworkers and questioned her whether she attended the protests. After defendant's chief executive officer learned about the employee's internal complaint, she immediately placed the employee on unpaid administrative leave and terminated her employment.	Race
TX	USDC Western District of Texas Filed: 6/30/2023 No. 7:23cv100 EEOC Press Release: 6/30/2023	EEOC alleges defendant subjected three mechanics to discrimination and harassment. According to the lawsuit, a Black mechanic and two Hispanic co-workers were subjected to a hostile environment, including racial slurs. In spite of the employees' reports to supervisors, management and Human Resources about the discriminatory treatment, no effective corrective or remedial action was taken by defendant. The EEOC's suit charges that after making his report, the Black mechanic was forced by management to perform undesirable work tasks and was isolated by his peers, and ultimately resigned.	Race National Origin
LA	USDC Eastern District of Louisiana Filed: 7/28/2023 No. 2:23cv2864	EEOC alleges defendant failed to correct unlawful employment practices on the basis of race and engaged in retaliation for protected activity. EEOC also alleges defendant discriminated against two charging parties and group of other Black servers, hostesses, and bartenders who worked at defendant's restaurant between 2017 and 2020. Specifically, the EEOC claims defendant subjected employees to harassment and offensive remarks based on race, and laid off only employees who were Black. When the company recalled employees, no Black employees were recalled. The EEOC also alleges certain charging parties were not recalled due to their complaints.	Race
TX	USDC Northern District of Texas Filed: 8/24/2023 No. 4:23-cv-881 EEOC Press Release: 8/24/2023	EEOC alleges defendant violated federal law by subjecting four Black employees to race-based discrimination and harassment. The EEOC also charged the company with retaliating against a white employee for raising allegations of race-based discrimination. According to the lawsuit, the four Black employees were subjected to a hostile work environment through the open display of nooses and white supremacy symbols, along with being subjected to derogatory terms, including the n-word, by employees and managers. Further, a white employee witnessed the racial discrimination and harassment, including a noose in the workplace, and reported the derogatory treatment to management, the EEOC said. However, despite the white employee reporting his concerns to managers, supervisors, and the corporate human resources manager, the company took no effective corrective or remedial actions. The EEOC also claims that the white employee's work hours and pay were reduced following his complaints, and was forced to resign.	Race

OH	USDC Northern District of Ohio Filed: 9/8/2023 No. 1:23cv1758	EEOC alleges the defendant violated Title VII and the ADA when it discriminated against the charging party because of race and/or disability (depression, anxiety, and ADHD) and retaliated against her. The charging party was subjected to a hostile work environment because of race. After she opposed the harassment and engaged in protected activity, defendant subjected her to materially adverse action including but not limited to increasing hostility; interference with wage and tip-earning opportunities; threats and demands; false accusations of poor performance or attendance issues; scheduling and attendance-record manipulation; denied promotion or advancement opportunities; disciplinary action; suspension; disciplinary probation; termination; and failure to hire or rehire. The EEOC also alleges the charging party's disability played a role.	Disability Race
TX	USDC Western District of Texas Filed: 9/20/2023 No. 6:23cv678 EEOC Press Release: 9/20/2023	EEOC alleges defendant discriminated against the charging party, who is white, based on his close family association with individuals who are Black and biracial. Such discrimination in violation of Title VII included subjecting charging party to a hostile work environment and changing the terms and conditions of his employment by taking actions that lowered his commissions, causing his total compensation to be reduced. Finally, the EEOC claims the defendant terminated the charging party because of his association with individuals who are Black and biracial.	Race
CO	USDC Colorado Filed: 9/22/2023 No. 1:23-cv-2463 EEOC Press Release: 9/22/2023	EEOC alleges a restaurant chain violated federal law when it subjected an Iranian employee to a hostile work environment based on her national origin and retaliated against her when she made discrimination complaints. According to the EEOC's lawsuit, employees, including managers and supervisors, regularly and openly mocked an Iranian employee's accent, criticized her physical appearance, and treated her differently than non-Iranian employees in ways that negatively impacted her and her pay. After the employee raised complaints about the harassment with the restaurant's general manger and human resources department, defendant failed to stop the harassment and discharged the employee.	National Origin
FL	USDC Middle District of Florida Filed: 9/26/2023 No. 8:23cv2169 EEOC Press Release: 9/26/2023	EEOC alleges defendant violated federal law by subjecting 12 Black employees who had filed charges with the EEOC, and a class of other Black employees, to race-based discrimination and harassment. According to the EEOC's lawsuit, Black employees were subjected to a hostile work environment through the open use of racial slurs and racist comments, including use of the "n-word" by employees and managers. Black employees were also subjected to demeaning working conditions, such as being required to work without breaks while white employees watched, and being forced to relieve themselves outdoors while white employees were taken to indoor bathrooms. The complaint further alleges that defendant prevented members of a Black paving crew from finding alternative employment by contacting a future employer and requesting that they not hire them.	Race
FL	USDC Middle District of Florida Filed: 9/26/2023 No. 3:23cv1132 EEOC Press Release: 9/26/2023	EEOC alleges defendant violated federal law when it subjected Black employees to racist slurs and then retaliated against them for complaining about the behavior. According to the filing, employees regularly used the n-word in front of Black employees, including a white employee telling a Black Haitian American, "Go back to Haiti N*****," and "Y'all don't belong here," and "go back on the banana boat," and other racial slurs. After an employee complained, a stuffed monkey waiving an American flag was left in his work area and defendant retaliated against him for reporting the discrimination.	Race
OH	USDC Northern District of Ohio Filed: 9/26/2023 No. 1:23cv1874	EEOC alleges defendant violated federal law by engaging in race and/or religious discrimination and retaliation. The charging party identifies his race as Middle Eastern and as descending from Israelites and the Hebrew nation. The charging party adheres to Torah Observant Christianity. The charging party sought religious accommodation to not work on the Sabbath, and alleges he was retaliated against, and also subjected to harassment based on religion and race.	Race Religion

KS	USDC Kansas Filed: 9/27/2023 No. 2:23cv2439	EEOC alleges defendant restaurant chain violated federal law when a manager harassed a teen worker for wearing a hijab and when the company retaliated against her after she complained. The agency further alleged the teen was forced to resign because of the discriminatory treatment. According to the suit, the teen was employed as a line server. During the summer of 2021, an assistant manager began repeatedly asking her to remove her hijab, pressuring her to show him her hair. Despite the teen's rejections and complaints to management, defendant failed to act to stop the manager's harassment. The manager ultimately grabbed and forcibly removed part of the teen's hijab. After the teen reported the incident, defendant again failed to take prompt corrective action, and she was forced to submit her two weeks' notice. The EEOC further alleges that defendant retaliated against the teen by refusing to schedule her to work additional shifts unless she agreed to transfer locations, while allowing her harasser to continue working at the same location.	Religion
CA	USDC Northern District of California Filed: 9/28/2023 No. 4:23cv4984	EEOC alleges defendant violated federal law by tolerating widespread and ongoing racial harassment of its Black employees and by subjecting some of these workers to retaliation for opposing the harassment. According to the EEOC's suit, since at least 2015 to the present, Black employees have routinely endured racial abuse, pervasive stereotyping, and hostility as well as epithets. Slurs were used casually and openly in high-traffic areas and at worker hubs. Black employees regularly encountered graffiti, including variations of the n-word, swastikas, threats, and nooses, on desks and other equipment, in bathroom stalls, within elevators, and even on new vehicles rolling off the production line, the EEOC said. The EEOC's investigation also found that those who raised objections to racial hostility suffered various forms of retaliation, including terminations, changes in job duties, transfers, and other adverse employment actions.	Race
MO	USDC Western District of Missouri Filed: 9/28/2023 No. 4:23cv694	EEOC alleges defendant violated federal law by failing to prevent or correct a racially hostile work environment at one of its facilities and then retaliating against an employee who complained about it. According to the EEOC's suit, an employee at defendant's manufacturing facility was subjected to a racially hostile work environment when a coworker verbally and physically harassed him with profanity in the lunchroom, followed him into the locker room, slammed his hand into the locker next to the employee, and called him the n-word. Supervisory employees at the facility were aware of that coworker using the n-word in the workplace on multiple prior occasions but failed to take prompt and appropriate corrective action. When the employee complained about being racially harassed by his coworker, defendant retaliated by issuing him a written warning for using profanity against the harasser.	Race
OK	USDC Northern District of Oklahoma Filed: 9/29/2023 No. 4:23cv419	EEOC alleges defendant violated federal law when a supervisor harassed a charging party with racial and national origin slurs after the employee shared her DNA ancestry results. According to the EEOC's suit, in or around August 2022, the employee received results from an at-home DNA test kit showing she had ancestry from Cameroon and the Congo. When the worker's supervisor learned about her DNA results, the supervisor began calling her names such as "ape" and "Congo." The supervisor also began mocking the employee, saying she was "swinging through trees" and was an "ape princess" looking for a "king." On one occasion, the supervisor asked the employee if she wanted greens when coworkers were getting lunch. The employee repeatedly asked the supervisor to stop the harassment to no avail. When the employee complained about the harassment to a higher-level manager, he participated in the harassment and did nothing to stop it. The EEOC charges that the harassment was so intolerable the employee was forced to resign. But not even her resignation stopped the harassment – according to the suit, the supervisor obtained the employee's phone number and sent her a text calling her "Congo" following her resignation.	Race National Origin

APPENDIX D – Promising Practices for Preventing Harassment

In announcing the EEOC's Enforcement Guidance on April 29, 2024, the EEOC highlighted additional resources on workplace harassment, including the agency's 2017 Promising Practices for Preventing Harassment technical assistance document.

The guidelines expanded upon the "checklists" developed as part of the EEOC's 2016 Task Force on the Prevention of Harassment in the Workplace. The following are the key provisions discussing the "Promising Practices." [224]

Promising Practices for Preventing Harassment

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment.

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace ("Report") identified five core principles that have generally proven effective in preventing and addressing harassment:

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

The Report includes checklists based on these principles to assist employers in preventing and responding to workplace harassment. The promising practices identified in this document are based primarily on these checklists. Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts.

A. Leadership and Accountability

- The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. This commitment may be demonstrated by, among other things:
- Clearly, frequently, and unequivocally stating that harassment is prohibited;
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks; and
- Engaging organizational leadership in harassment prevention and correction efforts.

224 For a complete review of these 2017 guidelines, see *Promising Practices for Preventing Harassment | U.S. Equal Employment Opportunity Commission (eeoc.gov)*. The footnotes are omitted from the attached excerpt.

In particular, we recommend that senior leaders ensure that their organizations:

- Have a harassment policy that is comprehensive, easy to understand, and regularly communicated to all employees;
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;
- Regularly and effectively train all employees about the harassment policy and complaint system;
- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints; and
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.

In addition, we recommend that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, which may include:

- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;
- Ensuring that concerns or complaints regarding the policy, complaint system, and/or training are addressed appropriately;
- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.

To maximize effectiveness, senior leaders could seek feedback about their anti-harassment efforts. For example, senior leaders could consider:

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated; and
- Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes, for example:

- A statement that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;
- An unequivocal statement that harassment based on, at a minimum, any legally protected characteristic is prohibited;
- An easy to understand description of prohibited conduct, including examples;
- A description of any processes for employees to informally share or obtain information about harassment without filing a complaint;
- A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;
- A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;

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- A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;

- A statement that the employer will provide a prompt, impartial, and thorough investigation;
- A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation;
- A statement that employees are encouraged to respond to questions or to otherwise participate in investigations regarding alleged harassment;
- A statement that information obtained during an investigation will be kept confidential to the extent consistent with a thorough and impartial investigation and permitted by law;
- An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and
- An unequivocal statement that retaliation is prohibited, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation.

In addition, effective written harassment policies are, for example:

- Written and communicated in a clear, easy to understand style and format;
- Translated into all languages commonly used by employees;
- Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations; and
- Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;
- Provides multiple avenues of complaint, if possible, including an avenue to report complaints regarding senior leaders;
- Is responsive to complaints by employees and by other individuals on their behalf;
- May describe the information the organization requests from complainants, even if complainants cannot provide it all, including: the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
- May include voluntary alternative dispute resolution processes to facilitate communication and assist in preventing and addressing prohibited conduct, or conduct that could eventually rise to the level of prohibited conduct, early;
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;

- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate and consistent with relevant legal requirements, the preventative and corrective action taken.

We recommend that organizations ensure that the employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, among other things:

- Are well-trained, objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes, for example:

- Descriptions of prohibited harassment, as well as conduct that if left unchecked, might rise to the level of prohibited harassment;
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct that they believe may be prohibited;

- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;
- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;
- Explanations of the range of possible consequences for engaging in prohibited conduct;
- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and
- Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.

Effective harassment training for supervisors and managers includes, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
  - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassmnt;
  - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  - Clear instructions about how to report harassment up the chain of command; and
  - Explanations of the confidentiality rules associated with harassment complaints;
- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:
  - Complaining or expressing an intent to complain about harassing conduct;
  - Resisting sexual advances or intervening to protect others from such conduct; and
  - Participating in an investigation about harassing conduct or other alleged discrimination;
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training. In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.

APPENDIX E – Promising Practices for Preventing Harassment in the Construction Industry

On June 18, 2024, the EEOC released Promising Practices for Preventing Harassment in the Construction Industry. The document identified core practices to help prevent and address harassment in the construction industry. The promising practice document follows a 2023 report issued by the EEOC, "Building For the Future: Advancing Equal Employment in the Construction Industry," that examined discrimination based on race, national origin, and sex in the industry through the lens of EEOC cases, witness testimony from a 2022 EEOC hearing, and research. Included below are excerpts from the June 18 document. The June 18 "promising practices" incorporate the "Core Principles and Promising Practices for Combatting Harassment," as discussed in the EEOC's 2016 Task Force Report on the Prevention of Harassment in the Workplace. Discussed below are the key excerpts tied specifically to the discussion of the construction industry.[255]

Promising Practices for Preventing Harassment in the Construction Industry

While workplace harassment is an issue in all sectors and industries, it is prevalent on many construction jobsites, and some of the most egregious incidents of harassment investigated by the EEOC have arisen in the construction industry. The nature of the construction industry includes a number of risk factors that may increase the likelihood of harassment, including workforces that are primarily male, workplaces where there is pressure to conform to traditional stereotypes, and decentralized workplaces. These factors may be exacerbated by the presence of multiple employers on a worksite, and the cyclical, project-based nature of construction.

Harassment imposes immediate costs on those who are subject to it, and harassment based on race, sex, and national origin is also a significant barrier to recruiting and retaining women and people of color in construction. It is also a workplace safety issue. Because construction work is potentially hazardous and often performed in teams, harassment on construction sites can endanger workers' physical safety and increase the chance of injury.

The EEOC's *Strategic Enforcement Plan (SEP) for Fiscal Years 2024-2028* prioritizes combatting systemic harassment in all forms and on all prohibited bases. The SEP also includes a focus on industries where women and workers of color are underrepresented, especially industries that benefit from substantial federal investment, like construction. The EEOC intends to address systemic harassment in construction using a variety of tools, such as encouraging commitment and coordination from every entity with a presence on a construction worksite, including all employers (contractors and subcontractors), unions, apprenticeship programs, and staffing agencies.

This document identifies promising practices for industry leaders to help prevent and address harassment in the construction industry. It recommends that general contractors take on a coordination and leadership role on the construction worksite. This document draws from and builds upon the EEOC's existing resources on workplace harassment, including the 2024 Enforcement Guidance on Harassment in the Workplace, the 2016 Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace ("the Co-Chair Task Force Report"), and subsequent companion documents on promising practices. The practices discussed in this document may assist covered entities in meeting their legal obligations to maintain harassment-free workplaces and remedy harassment if it arises, which will in turn promote safety on the job.

A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is leadership's consistent and demonstrated commitment to create and maintain a culture in which harassment is not acceptable. Worksite leaders—from the project owner to crew leads to union stewards—should clearly, frequently, and unequivocally message and demonstrate that harassment is prohibited. Approaches include:

Treating Harassment Prevention Holistically

Project owners and general contractors should consider prioritizing and emphasizing worksite-wide collaboration to prevent and correct harassment. While every onsite entity has its own legal obligations and potential liabilities, the project owners and general contractor can play an important oversight and coordination function by maintaining an overarching focus on the shared responsibility of fostering a harassment-free workplace. The EEOC recommends that:

255 *See PROMISING PRACTICES FOR PREVENTING HARASSMENT IN THE CONSTRUCTION INDUSTRY | U.S. Equal Employment Opportunity Commission (eeoc.gov)* for a complete set of these guidelines. The attached excerpt excludes certain text and omits all footnotes cited therein.

- Project leaders strive to prevent and address harassment against ALL workers on a site, whether or not those workers are covered by anti-discrimination laws.
- General contractors refer smaller subcontractors or staffing agencies that may need assistance with their legal responsibilities under federal anti-discrimination laws to the EEOC's resources for employers and small businesses, including employer checklists, harassment risk factors and responsive strategies, harassment policy tips, and contact information for the EEOC's small business liaisons.

Unions can help prevent and address harassment in construction workplaces by:

- Including and consistently abiding by a commitment to preventing and remedying harassment in their governing documents and in negotiated workplace agreements.
- Serving as a critical resource for members who may need assistance in identifying the appropriate reporting channels to utilize, such as in situations when it is unclear which entities are responsible for remedying harassment.
- Continuing to support and promote efforts to help ensure apprenticeship and pre-apprenticeship programs are fully inclusive and do not have unnecessary barriers to entry for workers from underrepresented groups.
- Supporting efforts to help ensure that apprenticeship and pre-apprenticeship programs are fostering and maintaining harassment-free worksite training environments.
- Developing guidance and promising practices for representing members subject to harassment, including offering advice for addressing allegations of harassment against a fellow union member.

Including Anti-Harassment Measures in Contract Bids

Any project owner or sponsor—including a state or local government—should consider requiring that contract bids include a plan to prevent and address workplace harassment. Similarly, general contractors can include corresponding provisions in any agreements with subcontractors and staffing agencies to ensure ongoing compliance. These bid requirements (verified at the time of award) and corresponding contract provisions could include that the bidder maintain:

- An effective and comprehensive harassment policy that accounts for anticipated potential accessibility barriers, such as limited literacy skills or language access needs;
- An accessible complaint system with multiple reporting channels that are clearly identified and provide contact information;
- Regular and effective training for all workers about the harassment policy and complaint system, including training that retaliation for reporting or reasonably opposing harassment is against the law, as well as training for designated individuals about how to prevent, recognize, and respond to objectionable conduct without retaliation; and/or
- A discipline policy that is prompt, consistent, and proportionate to the severity of the harassment or related misconduct, such as retaliation.

General Contractors Serving in a Coordinating Role

In addition to ensuring compliance with its own internal policies, the general contractor is typically well positioned to coordinate harassment prevention across a worksite and serve as a backstop for resolving difficult issues. For example, the EEOC recommends that general contractors:

- Consider providing or coordinating sitewide preventive measures, such as training.
  - General contractors may be well positioned to determine the scope and substance of training, including whether bystander training may be appropriate.
- Consider monitoring the actions of subcontractors and staffing agencies to ensure adherence to such measures and providing supportive resources as needed.
- Convene, in coordination with a union if applicable, a sitewide leadership committee that meets regularly to coordinate on preventing discrimination and harassment and to identify emerging issues and collaborate to develop solutions. Such a committee could seek to include input from civic groups that are representative of the broader community, such as tradeswomen organizations and pre-apprenticeship and apprenticeship programs, to benefit from their expertise. The committee should be led by an individual with knowledge of EEO policies and authority to implement change.

  - If a workplace safety committee already exists, consider whether it is appropriate to expand its scope to issues that may give rise to safety incidents such as workplace harassment, mental health, and substance use disorders.

- Periodically verify that their subcontractors are following through with their harassment-prevention commitments by:
  - Ensuring that subcontractors are complying with obligations set out in their contracts;
  - Monitoring the effectiveness of subcontractors' efforts to prevent and correct harassment, which could include conducting tests or spot checks of their harassment complaint procedures;
  - Reviewing training materials to determine whether they include accurate and sufficient information about harassment policies, complaint procedures, and related topics, such as retaliation; and
  - Ensuring that concerns or complaints regarding harassment policies, complaint systems, or trainings are addressed appropriately and that any necessary changes are implemented and communicated to workers.
- When subcontractors lack the experience or resources to resolve an issue, take inadequate steps to address or prevent harassment, or fail to take reasonable corrective action in response to harassment, consider facilitating and assisting subcontractors in finding solutions, especially when harassment is occurring between workers from different employers.
- When circumstances warrant, work with the subcontractor's management team to remove or bar harassers from the worksite.
- As appropriate, acknowledge and thank individuals on the worksite who take action to prevent or address workplace harassment.

Evaluating Policies and Seeking Feedback

When building in workforce accountability, general contractors are encouraged to seek feedback from workers about the worksite's collective anti-harassment efforts. For example, the general contractor or relevant committee should consider:

- Conducting anonymous worker surveys on a regular basis to assess whether harassment may be occurring. Worksite leaders may wish to explore ways to seek quick, simple feedback, including through mobile phones, to serve as an early indicator of any emerging concerns, rather than relying on lengthy surveys designed to be taken on a computer. This provides an opportunity to intervene and correct any problems at an early stage. Repeating the survey regularly could get the views of new workers at later stages of the project and evaluate progress.
- Partnering with researchers to evaluate the worksite's harassment prevention strategies.

B. Comprehensive and Clear Harassment Policies

A comprehensive, clear policy against harassment sets forth the behaviors that are unacceptable in the workplace, the procedures workers are encouraged to follow when reporting harassment, and the steps that the employer will follow when responding to complaints or reports of harassment. The policies should be developed with input from supervisors and managers who have a role in implementing them. Employers should solicit input of workers to ensure the policies are understandable to individuals at all levels, positions, and locations. Policies should be communicated regularly in an accessible format to all workers on a worksite, including employees, independent contractors, and workers placed by a staffing agency. When communicating these policies, employers should take into account the language access needs of workers, including those with limited literacy skills or limited proficiency in English, or workers with a disability. The policies should be communicated whenever workers cycle onto a project—distributing or posting the policy once at the outset of a project is likely insufficient to inform workers who join the project after it begins. In some cases, a general contractor may wish to make available its own policies or suggested model policies for subcontractors to adopt.

The EEOC recommends including the following elements in a comprehensive anti-harassment policy:

- **A clear description of who is covered by the policy**, such that people covered by the policy can understand that it prohibits certain conduct by and toward coworkers, apprentices, applicants, independent contractors, temporary workers, worksite inspectors, onsite vendors, or any other people likely to be on the worksite.
- **A clear description of prohibited conduct, with examples tailored to the work environment**, such as taunting tradeswomen when they are performing a difficult or dangerous task or vandalizing the toolboxes or personal protective equipment of Black workers. Certain conduct may be more likely to constitute unlawful harassment when it occurs in high-risk environments like construction.

- **An unequivocal statement that harassment is prohibited**. Anti-harassment policies do not have to be limited to characteristics explicitly covered by law, and employers should consider extending their policies to cover additional factors that may make a worker more vulnerable to harassment in a construction environment (e.g., apprenticeship status, undocumented status).
- **A description of complaint and reporting processes** and where to find more information about them.
- **A statement that workers are encouraged to report harassment, bullying, or other inappropriate conduct** even if they are not sure if the conduct violates the policy. Early notification enables the employer to promptly address problematic conduct before it may result in a legal violation, and limits potential harm to workers.
- **A commitment that the employer will provide a prompt, impartial, and thorough investigation**, and that the employer will keep the identity of individuals who report harassment, alleged targets, witnesses, and alleged harassers confidential to the extent possible and permitted by law, to allow the employer to conduct an effective investigation.
- **A statement that workers are encouraged to respond** to questions or to otherwise participate in investigations regarding alleged harassment.
- **An assurance that the employer will take immediate, reasonable, and proportionate corrective action** if it determines that harassment has occurred. The policy should outline the range of possible consequences for engaging in prohibited conduct and not rely on the term "zero-tolerance," which may have the unintended consequence of deterring reporting.
- **An unequivocal statement that retaliation is prohibited**, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be penalized or retaliated against for doing so.
  - In construction, such retaliation may include blackballing, transferring to a different worksite, or cutting hours worked of the target of harassment (and/or anyone who supported the target and their allegations). Retaliatory transfers and hours reductions may significantly impact workers' ability to build long-term trusted relationships with coworkers and impair career advancement.
  - For example, one way to identify and address possible retaliation would be for any entity with access to hours worked information to cross-reference retaliation complaints and hours worked and scrutinize any correlation.

The EEOC recommends that employers ensure that anti-harassment policies are accessible to all workers in the following ways:

- **Written and communicated in a clear, easy to understand style and format in all languages commonly used by workers at the site**. Because of the decentralized nature of many construction worksites, consider creative ways to make policies readily available on an ongoing basis, including through a company app, messaging app, or web portal that workers can access on their mobile phones.
- **Posted in consistent and easy-to-find places** like the location of the morning meeting, or near restrooms, breakrooms, or timeclocks. A general contractor could consider:
  - Posting its own anti-harassment policy;
  - Providing a space for other relevant entities (such as subcontractors and staffing agencies) to post their anti-harassment policies;
  - Making the anti-harassment policy continuously available on the employer's website and/or digital platforms used by applicants and employees;
  - Notifying all workers that they should have received an anti-harassment policy at the time of hire, and describing where such policies are located;
  - Offering to help workers locate any policy upon request; and
  - Identifying individuals who can answer questions about harassment policies and complaint procedures.
- **Kept up to date**. Ensure that the latest version of each entity's policy is reviewed regularly, updated as needed, and posted and distributed to all workers.

If multiple entities on site have their own policies, it may be advantageous for all policies to be reviewed for consistency by a single designated person (or relevant committee) at the worksite. Absent a workplace committee, the general contractor may be well positioned to review each policy for content and overall alignment and share feedback with the subcontractor, staffing agency, or other entity that created the policy.

C. Effective and Accessible Harassment Complaint System

In the construction context, the complexity of the multiple employer/entity environment introduces challenges to traditional reporting structures, but also presents opportunities to turn multiple channels into a "no wrong door" environment. While each onsite employer should have its own complaint system, the general contractor may also wish to coordinate supplemental channels that are available to workers regardless of their employer of record. Additionally, registered apprentices should be able to report harassment to their program sponsor.

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged targets of harassment, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

The EEOC recommends that a harassment complaint system:

- **Be fully resourced and accessible in languages commonly used by workers**, enabling the employer to respond promptly, thoroughly, and effectively to complaints.
- **Include multiple ways to complain, both formally and informally**. Reporting channels should be clearly identified, and the policy should include contact information for those who can receive complaints. Workers may be reluctant to file a formal complaint reporting harassment. While a formal complaint leading to an investigation may often be the best route, there may be circumstances in which a target of harassment primarily wants the harassment to stop and prefers an alternative option.
  - In addition to existing legal posting requirements, a strong harassment policy educates workers on available avenues to contact local, state, and federal enforcement agencies to learn more about their rights or to file a complaint.
- **Have more than one channel**. Providing multiple channels for workers to complain about harassment helps to ensure that a complainant who is harassed by their immediate supervisor can lodge a complaint with a different employer representative, which reduces the risk of retaliation.
- **Describe the information the entity may request** from complainants, including: the identity of the alleged harasser(s), alleged target(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment.
  - Given the multiple employer/entity nature of many construction worksites, a complainant may not be able to provide all requested information, such as the identity or employer of an alleged harasser. In those cases, the EEOC recommends that employers encourage complainants to provide as much information as possible, while also assuring them that the employer(s) responding to the complaint will assist the complainant with identifying an alleged harasser, if in question, and their employer, to the extent feasible.
- **Include processes to determine whether alleged targets of harassment, individuals who report harassment, witnesses, or other relevant individuals are subjected to retaliation, and impose sanctions on those responsible.**
  - The cyclical, project-based nature of construction may facilitate or mask retaliation. The EEOC recommends that a complaint system actively account for those risks, such as monitoring whether any site transfers involve individuals participating in a harassment investigation, and whether the individual consents to the transfer.
- **Ensure that the individuals who are responsible for receiving complaints are well-trained** and are granted the requisite authority to meaningfully investigate complaints.
- **Clarify that once a complaint is made and an investigation underway, relevant supervisors should remain vigilant** and use the tools at their disposal to mitigate ongoing harassment and retaliation in a way that doesn't penalize the person who filed a complaint. A complaint filing should not suggest to supervisors that they take no action of any kind.
- **Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination** and any corrective action that it will be taking, subject to applicable privacy laws.

The general contractor can play an oversight and coordinating role with regard to complaint systems across a worksite by:

- Seeking to ensure that all workers have multiple reporting channels to complain.
  - For example, confirming that every subcontractor has implemented a complaint channel, and then also providing an anonymous hotline for all workers.
- Considering use of shared, site-wide alternate complaint channels such as an ombudsperson or a hotline that accepts anonymous complaints.
- Training all workers on existing complaint channels, such as through an apprentice's registered program.
- Requiring each onsite employer to notify the general contractor of complaints it receives so that the general contractor can ensure that complaints are resolved promptly and effectively, without retaliation. The general contractor may also wish to periodically review complaints holistically and take action to address any patterns.
- Requiring each onsite employer to notify the general contractor of any complaint it may receive about the conduct of any worker, even if that worker is employed by a different entity. This enables the general contractor to facilitate re-routing the complaint to the most appropriate employer. It also provides visibility so that the general contractor can look out for and prevent any cross-entity retaliation.
- Periodically testing the complaint systems in place throughout the worksite to ensure they are working as intended and identifying and addressing any breakdowns. For example, an HR representative could call the hotline and ensure that the required next steps are followed.

D. Effective Harassment Training

Regular, interactive, and comprehensive training of all workers on a construction site can help ensure that the workforce understands applicable rules, policies, procedures, and expectations, as well as the consequences of misconduct. As with all aspects of harassment prevention, the training should be provided in a clear, easy to understand style in all languages commonly used by onsite workers.

Harassment Trainings may be most effective when they are:

- Tailored to the workforce and work environment.
- Developed and presented with input from worksite leaders and a cross-section of workers, including those in different trades, positions, and at different seniority levels. This will help ensure that the content, format, and delivery is inclusive, effectively tailored, and better received by the audience.
- Championed by senior leaders, including project owners/sponsors, general contractor leadership, crew leads/forepersons, and union representatives.
- Repeated and reinforced regularly, and, if appropriate, presented in brief segments, such as at the worksite morning meeting or through a toolbox talk. Such training can be repeated throughout a project's lifecycle to reach workers newly arrived onsite.
- In most situations, live, interactive trainings are recommended. Given the dynamic nature of construction workforces, providing training through an interactive module accessible via mobile phone, or watching a series of shorter video clips and having a follow-up guided discussion about the clips, may be more feasible than live trainers.
  - Workers should be provided adequate time during the workday to complete training, whether online or in-person, including any follow up discussions or supplemental training.
- Structured to facilitate open communication. This may be best accomplished by holding separate sessions for supervisors/managers and non-supervisory employees to better tailor the sessions to their responsibilities and to encourage more frank conversations.
- Provided to workers, temps, apprentices, and supervisors (this applies regardless of whether they are employees or independent contractors or other types of workers), at all levels, supported by union representatives, and reinforced by apprenticeship programs, which should have their own policies and procedures.

- Routinely evaluated by participants and revised as necessary.
- Multifaceted to include expectations of civil and respectful treatment of others in the workplace. Such training should be structured so as not to discourage workers from reporting or opposing harassing conduct or otherwise interfering with their statutory rights.

The EEOC recommends comprehensive harassment trainings that include:

- Descriptions of prohibited harassment, including offensive or unsafe conduct that may constitute harassment in the particular context of construction.
- Descriptions and tailored examples of conduct that could constitute retaliation, along with an explanation of the types of activities that are protected from retaliation under federal employment discrimination laws.
- Information about what workers should do if they experience, observe, or become aware of conduct that they believe may be prohibited, and encouraging people to report it.
- A clear, simple, and specific explanation of the complaint process and all available complaint options, what happens after a complaint is made (typically investigation), and previewing that the range of disciplinary consequences will be proportionate to the conduct.
- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations.

Additionally, worksites may benefit from training on how colleagues or others may choose to intervene when they witness harassment (bystander training) or are asked for help.

Additional training may be necessary for those with legal responsibilities.

Worksite leaders are encouraged to identify those with managerial or supervisory responsibility for preventing, stopping, and correcting harassment and ensure they have specific training on these legal obligations. Senior worksite leaders may also find it helpful to include additional employees who exercise authority, such as team leaders, or members of any committees focused on worker well-being.

Anti-harassment training for workers with managerial or supervisory responsibility or other worksite leadership roles might include, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
  - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;
  - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  - Clear instructions about their obligation to report harassment observed or reported to appropriate personnel; and
  - Explanations of confidentiality associated with harassment complaints.
- An unequivocal statement that retaliation is prohibited, a description and examples of conduct that could constitute retaliation and an explanation of the types of activities that are protected from retaliation under federal employment discrimination laws, such as:
  - Complaining or expressing an intent to complain about harassing conduct;
  - Resisting sexual advances or intervening to protect others from such conduct; and
  - Participating in an investigation about harassing conduct or other alleged discrimination.
- Explanations of the consequences (for example, discipline) of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.[226]

226 The EEOC's "promising practices" document for prevention of harassment in construction includes two appendices: (1) Appendix A, which discusses "Construction Industry Risk Factors for Harassment"; and (2) Appendix B, which reviews "Additional Resources."