

EEOC Task Force Offers Expansive Recommendations for Updating Anti-Harassment Policies and Training

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This summer, the Equal Employment Opportunity Commission (“EEOC”) issued a 127-page document titled [“Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace”](#) (“Report”). Among other things, the Report suggests that harassment prevention policies address the potential for harassment to occur through social media and avoid the term “zero tolerance” and that anti-harassment training be frequent, live, and interactive; convey the buy-in of top-level management; and include workplace civility and bystander intervention training.

The Report, coauthored by EEOC Commissioners Chai R. Feldblum and Victoria A. Lipnic, follows 14 months of work that included testimony, research, public comment, and consultations by a 16-member task force composed of representatives from academia, the legal profession, employers, employee advocacy groups, and organized labor (“Task Force”). According to the Report, the members endeavored to learn everything they could about workplace harassment and why it persists.

The Report expresses concern that harassment is a continuing problem and questions the effectiveness of some common policies, training, and practices. However, the Report endorses prevention measures that go beyond what the law currently requires, could potentially conflict with National Labor Relations Board (“NLRB”) decisions, and demand a significant investment of time and money. The Report also includes checklists to assist employers in a “holistic harassment prevention effort.”

The Report’s Effect on Current Laws

The U.S. Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), established an affirmative defense to harassment claims under Title VII of the Civil Rights Act of 1964 (“Title VII”). Under the affirmative defense, an employer can avoid liability by proving that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise[.]”

As addressed in our [Act Now Advisory](#) that discussed the New Jersey Supreme Court's decision in *Aguas v. New Jersey*, 220 N.J. 494 (2015), employers may expect increased scrutiny of their efforts to prevent and respond to alleged harassment. The Report, which applies to all forms of harassment—not just sexual harassment—may be seen as yet another step that an employer could be required to take to establish that it exercised reasonable care to prevent and respond to harassing behavior.

Although the Report's checklists and recommendations are not exactly new, they differ somewhat from what the law currently requires. It is important to keep in mind that the Report's findings, recommendations, and checklists do not carry the weight of law—and, in fact, the Report contains several specific disclaimers to this effect. Yet, the Report serves as another reminder that the more an employer does to prevent harassment, the better its odds will be for prevailing in the event of a claim. Whether the recommendations will lead to the establishment of higher standards and burdens for employers remains to be seen, but they certainly describe concepts that employers should take under advisement.

Leadership and Culture

According to the Report, “workplace culture has the greatest impact on allowing harassment to flourish or conversely in preventing harassment.” The Report finds that an organization's culture is determined (i) by top executive leaders and (ii) by whether employees are held accountable for fostering a “diverse, inclusive and respectful workplace.” To establish a workplace where harassment is best prevented, the Report recommends that employers:

- model respectful behavior;
- ensure that harassing behavior is prohibited as a matter of policy;
- establish policies and practices that ensure that employees feel safe in reporting harassment;
- respond swiftly, effectively, and proportionately when harassment occurs;
- not tolerate demeaning conduct or remarks; and
- support anti-harassment policies with necessary resources, i.e., time and money for investigations and frequent training.

The recommendations echo, for the most part, what employers are already expected to do, but they expand the focus to behavior that may not violate the law and, as discussed more fully below, to far more training than is currently typical.

Accountability, according to the Report, requires a system that ensures that:

- those who engage in harassment 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 doing that job well, or penalized for failing to do so.

The Report also endorses conducting regular “climate surveys” to assess the extent to which harassment is perceived as a problem in the workplace. However, the Report does not address the issue of the potential discoverability of such “climate surveys,” or how they might be used in litigation against an employer.

Policies and Procedures

The Report endorses as sound the EEOC’s position that employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy. According to the Report, a policy should generally include:

- a clear explanation of prohibited conduct and include 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;
- 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; and
- a clear statement that harassment on the basis of any protected characteristic will not be tolerated.

The Report goes on to recommend that the policy be written in “clear, simple words,” and, of particular note, “*in all the languages used in the workplace*” (emphasis added). Additionally, the policy should:

- be communicated on a regular basis to employees,

- emphasize how to file a complaint or report harassment that an employee observes, and
- make clear that an employee who files a complaint, who reports harassment, or who participates in an investigation of alleged harassment will be protected from retaliation.

Social Media

The Report contains a section addressing social media and the potential for it to be used as a means of workplace harassment. Accordingly, the Report advises employers to keep social media in mind when drafting their anti-harassment policies.

In addition, the Report takes the express position that “an anti-harassment policy should make clear that mistreatment on social media carries the weight of any other workplace interaction.” The Report also cautions supervisors and others with anti-harassment responsibilities to be wary of their social media connections with employees and recommends that “procedures for investigating harassment should carefully delineate how to access an employee’s social media content when warranted.”

Non-Endorsement of “Zero Tolerance” Policies

Of interest, the Report strongly cautions against using the phrase “zero tolerance” in an anti-harassment policy, finding that it is “misleading and potentially counter-productive,” because it may result in an underreporting of harassment by conveying a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. Thus, the Report suggests that employees be allowed to decide not to make a complaint if they do not want a colleague or co-worker to lose his or her job over relatively minor harassing behavior but simply want the harassment to stop.

Reporting Systems for Harassment; Investigations; Corrective Actions

The Report emphasizes the need for an “accessible and well-running reporting system” that communicates to employees the leadership’s commitment to the organization’s anti-harassment policy. Also, the Report notes that it received strong support for keeping workplace investigations as confidential as possible, to better ensure a thorough and effective investigation. However, the Report recognizes that decisions by the NLRB have limited the extent to which an employer can require employees to maintain the confidentiality of investigations.

According to the Report, reporting systems work well if:

- employees who receive harassment complaints take the complaints seriously;
- the reporting system provides timely responses and investigations;

- the system provides a supportive environment where employees feel safe to express their views and do not experience retribution;
- the system ensures that investigators are well trained, objective, and neutral, especially where investigators are internal company employees;
- the privacy of both the accuser and the accused are protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation;
- investigators 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 relevant parties; and
- employers ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction, is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

Anti-Harassment Compliance Training

The Report acknowledges the ubiquity of anti-harassment training as a primary mechanism used to prevent harassment. Based on the information gathered by the Task Force, the Report makes several recommendations with regard to training. Of particular note, the Report recommends more frequent and varied training that is beyond the annual or biannual anti-harassment training that many employers conduct. Specifically, the Report recommends four types of training:

1. Compliance Training for All Employees

The Report suggests providing to all employees regular anti-harassment training that:

- is introduced (even if only by video) by a senior leader who, when possible, stays for the entire program;
- is conducted by qualified, live, and interactive trainers;
- educates employees about forms of conduct that are unacceptable and about which they have the right to complain, including conduct that may not be actionable but which, if left unchecked, might rise to the level of illegal harassment;
- explains the organization's avenues for reporting complaints;
- explains the consequences of engaging in unacceptable conduct, including that corrective action will be proportionate to the severity of the misbehavior;
- is tailored to the workplace and not a "canned, 'one-size-fits-all'" presentation;

- uses examples and scenarios that “realistically involve situations from the specific worksite, organization and/or industry”;
- depending on the makeup of the workforce, is given in multiple languages and provides for different learning styles and levels of education;
- provides examples of improper conduct, as well as examples of conduct that is acceptable and not harassing, such as legitimate performance criticism or occasional innocuous comments (such as, “I like your jacket”); and
- is routinely evaluated, for example, through questionnaires to participants immediately following the training.

Of note, the Report considers once-a-year training insufficient to show that an organization puts a high priority on preventing harassment. The Report urges employers “to consider training that is varied and dynamic in style, form and content.”

2. Compliance Training for Supervisors and Managers

In addition to basic compliance training, the Report recommends providing supervisors and managers with additional training to help ensure (i) compliance with anti-discrimination laws and (ii) that problematic conduct is addressed before it rises to the level of illegal harassment. The Report recommends live, interactive training that provides supervisors and managers with “easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information” and that:

- includes practical suggestions on how to respond to different levels and types of offensive behavior;
- provides clear instructions on how to report harassing behavior up the chain of command;
- stresses the affirmative duties of supervisors to respond to harassing behavior, even in the absence of a complaint; and
- is tailored to the specific worksite, organization, and/or industry.

3. Workplace Civility Training

Citing research that shows that incivility often leads to harassment by creating a climate of “general derision and disrespect” in which harassing behaviors are tolerated, the Report recommends civility training as a complement to anti-harassment training. The Report acknowledges that “Title VII is not meant and should not be read to be ‘a general civility code for the American workplace’” but suggests that “promoting civility and respect in a workplace may be a means of preventing conduct from rising to the level of unlawful harassment.” The Report also

acknowledges that while workplace “civility codes” may raise issues under the National Labor Relations Act, which is outside the jurisdiction of the EEOC, civility training may be beneficial in preventing harassment.

The Report recommends that civility training include:

- an exploration of workplace norms;
- a discussion of what constitutes appropriate and inappropriate behaviors in the workplace; and
- a heavily skills-based component, including interpersonal skills training.

4. Bystander Intervention Training

The Report also recommends that employers consider bystander intervention training to encourage employees to speak up or take action when they see harassing conduct in the workplace.

The Impact of the Report on Discovery Requests

As previously noted, the Report does not address the issue of the potential discoverability of climate surveys. Nevertheless, it is not a stretch to imagine that the Report’s many recommendations and checklists may form the basis of discovery requests to employers defending harassment claims. Employers could end up getting requests for information relating to:

- the organization’s budget for anti-harassment training,
- the organization’s training schedule,
- what such training includes,
- whether the CEO introduced the training sessions,
- whether executive management attended the training sessions,
- whether the organization conducts regular climate surveys (and, if so, to produce them), and
- what the organization has done to determine whether its training is effective.

What Employers Should Do Now

To enable employers to demonstrate an organizational commitment to preventing harassment in the workplace and efforts undertaken in support of that goal, we recommend:

- reviewing your organization’s written anti-harassment and anti-discrimination policy to ensure that it:
 - is comprehensive and clearly presents the organization’s complaint and investigation procedures and non-retaliation policy,
 - addresses the use of social media—keeping in mind the NLRB’s decisions limiting employer social media policies, and
 - considers eliminating the term “zero tolerance”;
- conducting live, interactive anti-harassment training for ***all*** employees upon hire, and regularly thereafter;
- conducting interactive management training to all employees who have supervisory responsibilities regarding their obligation to help maintain a harassment-free workplace;
- conducting civility training either as a separate training module or as part of anti-harassment and management training;
- ensuring that executives and managers model appropriate behavior, be a presence in the workplace, and promptly address inappropriate conduct immediately;
- documenting management’s response to all harassment complaints, including keeping records of any investigations performed in response to complaints;
- taking prompt, proportionate remedial action, if appropriate; and
- assessing whether your organization’s anti-harassment training is effective, and taking remedial steps if it is found to be inadequate.

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