

IN FOCUS

EEOC Final Guidance Provides Many Examples of Unlawful Harassment

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"Workplace harassment" is more than just sexual harassment, the U.S. Equal Employment Opportunity Commission (EEOC) reminded employers in [guidance published April 29](https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace) - (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>). The commission shared specific examples of the kinds of harassment it deems unlawful—including harassment based on race, sex, religion and other factors.

Examples of Workplace Harassment

The following is an example of race-based harassment, according to the guidance: Chelsea, a hostess at an upscale restaurant, is a Black woman who wears her hair in locs for both cultural reasons and to reflect the natural texture of her hair. Chelsea's manager, Gregor, periodically tries to touch Chelsea's hair while asking questions about it, such as "why does Black people's hair look like that?" and "what does it feel like?" Gregor says that Chelsea could go from "savage to stunning" if she relaxed her hair. On other occasions, Gregor criticizes her hair as "messy," "untamed," and "unprofessional." Based on these facts, Gregor's harassing conduct toward Chelsea is based on her race, the agency stated.

Here's an example of harassment based on religious coercion, according to the EEOC: Sandra, an exterminator for a pest control service, is a Christian. The owner of the pest control service, Fabian, is a self-described "spiritual guru" who believes he is called by the universe to help people transcend the Judeo-Christian belief system. Fabian regularly makes comments to Sandra criticizing Judeo-Christian tenets; asks Sandra probing questions about her faith; distributes tracts arguing that "traditional religion" is the cause of all ills in modern society; and states a "strong hope" that Sandra will attend his lunchtime lectures, which consistently focus on Fabian's religious beliefs. While Fabian claims he would never require employees to share his beliefs, attend his lectures or read the material he distributes, he also keeps track of which employees do and do not participate in his religious activities and tends to act with favoritism toward employees who agree with or are receptive to his religious messages. Sandra feels she must feign interest in Fabian's beliefs or else she will be subject to ostracism or possibly even termination. Based on these facts, Fabian's harassing conduct toward Sandra is based on religion.

The EEOC also provided the following example of harassment based on a pregnancy-related medical condition—morning sickness. Kristina, a graphic designer at a marketing firm, is experiencing pregnancy-related morning sickness. Kristina's employer accommodates her limitations due to morning sickness by permitting Kristina to telework up to three days per week and use flexible scheduling on the days she comes into the office. Kristina's colleagues complain that pregnant women always get special perks and privileges and accuse Kristina of getting pregnant "just so she can kick back, relax at home on the couch and collect a paycheck." During a team meeting to discuss staffing a new, high-priority portfolio, when Kristina requests to be considered, her co-workers scoff that "if Kristina is so sick that she cannot come into the office, how can she be well enough to work on such an important account?" Based on these facts, the co-workers harassed. This is an example of age-based harassment creating a "hostile work environment." Henry, age 62, is a consultant at a professional services company. Ryan, his supervisor, calls him "old man" on a periodic basis. Since Henry's 60th birthday, Ryan has repeatedly asked him when he plans to retire, saying he can't wait to bring in "young blood" and "fresh ideas." During a recent staff meeting, Ryan reminded staff to get their flu shots, then looked at Henry and said, "Although I wouldn't be heartbroken if the flu took out some of the old timers." Henry asked Ryan if he was referring to him, and Ryan replied, "Absolutely, old man." Henry reports feeling targeted by Ryan's comments. Based on these facts, Ryan has subjected Henry to an objectively hostile work environment based on age, the agency stated.

Equal employment opportunity (EEO) statutes apply only if the evidence shows the harassment was based on a protected characteristic, the EEOC noted. To show a hostile work environment, the agency said "conduct need not be both severe and pervasive" but instead "the legal standard is severe or pervasive."

To avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment" under the particular circumstances at that time, the EEOC notes. Corrective action should be designed to stop the harassment and prevent it from continuing.

Many commenters responding last year to the proposed guidance asked the EEOC to clarify the interplay between an employers' obligations to address workplace harassment under federal employment discrimination laws and to comply with the National Labor Relations Act (NLRA). The commission said a discussion of the interaction of EEO laws with the NLRA was beyond the scope of its guidance.

We've gathered articles on the news from *SHRM Online* and other outlets.

Guidance Addresses Bathrooms, Misgendering

The guidance reinforces LGBTQ employee rights like allowing the use of bathrooms that fit a worker's gender identity as well as protection from misgendering. The guidance, which takes effect immediately, is the EEOC's second attempt in recent years to establish new anti-harassment guidelines for employers, which have not been updated since 1999.

A coalition of 20 red state attorneys wrote a [comment letter](https://news.bloomberglaw.com/daily-labor-report/eeocs-proposed-lgbtq-protections-assailed-by-attorneys-general) - (<https://news.bloomberglaw.com/daily-labor-report/eeocs-proposed-lgbtq-protections-assailed-by-attorneys-general>) to the EEOC in 2023 following the draft guidance's release arguing it illegally stretches the definition of "sex-based harassment" under Title VII of the Civil Rights Act of 1964 through its coverage of bathroom usage and misgendering, in which a worker is referred to repeatedly and intentionally using pronouns that do not align with their gender identity.

In its guidance, the EEOC noted that in federal sector EEO appeals, the commission "has concluded that misgendering and denial of access to a bathroom consistent with the individual's gender identity may constitute sex discrimination in violation of Title VII."

([Bloomberg](https://news.bloomberglaw.com/daily-labor-report/do-not-publish-35) - (<https://news.bloomberglaw.com/daily-labor-report/do-not-publish-35>))

Preventing Sexual Harassment in the Workplace

Employers should have robust policies prohibiting harassment, with clear examples of the types of prohibited behaviors. Legal experts say that organizations should reinforce their anti-harassment policy, outline strategies to prevent harassment and other abusive conduct, and take additional actions to mitigate harassment at work.

(*SHRM Online* - (<https://www.shrm.org/topics-tools/news/inclusion-equity-diversity/preventing-sexual-harassment-workplace>))

When an Employee Asks an Employer Not to Investigate

Often, an employee requests that the employer not investigate concerns they have raised. Many employers respond by saying that all concerns must be investigated, with no exceptions. This response is an overstatement that may destroy workplace relationships and turn a relatively minor issue into a major issue.

The final guidance states that “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.” It likely would not be reasonable to honor the employee’s request if other employees are affected by or have witnessed the conduct at issue.

(*HR Magazine* - (<https://www.shrm.org/topics-tools/news/hr-magazine/eec-proposed-harassment-guidance>))