



# Employment Practices Liability

Harassment and Discrimination

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## Introduction

The following guide utilizes data from the Equal Employment Opportunity Commission (EEOC) to provide practical information your organization can use to better understand common employment liability exposures. While many court, state and municipal codes may vary, there are still some broad practices and information all public entities can employ to recognize and mitigate the risks of these exposures.

It is our hope that you will use this information to help identify your own exposures and to implement effective risk management practices.

## What is discrimination in the workplace?

Discrimination is unequal treatment in the workplace, usually associated with hirings, firings, promotions or daily job duties. The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of:

- Age
- Race/color
- National origin
- Disability
- Genetic information (family medical history may reveal disease or medical disorder)
- Religion
- Sex
- Retaliation

The following document will take a look at each of these discrimination types and will give some insights as to what to watch for in day-to-day operations that may lead to discrimination claims.

## Age

### WHAT IT IS

Age discrimination involves treating an applicant or employee less favorably because of his or her age.

The Age Discrimination in Employment Act (ADEA) forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40. However, some states have laws to protect younger workers. Additionally, it can still be considered age discrimination if the person being given more favorable treatment is over 40 as long as there is a significant difference in age.

### WHAT IT LOOKS LIKE

Using words, phrases or comments such as:

“Pops”, “Grandma”, “old man” or “senile.”

Manager’s comments alluding to the hope a person will retire: “He’s so old I have to look twice to see if he’s moving” and “I could get twice the work out of a younger person.”

Specifically not hiring someone due to age.  
Replacing someone who has been laid off with someone significantly younger.

**15,573**

Charges filed in 2019 with the EEOC alleging age-based discrimination.

**\$75.7 million**

Awarded in 2019 for age-based discrimination cases.

## Race/Color

### WHAT IT IS

Treating an applicant or employee unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features). Color discrimination involves treating someone unfavorably because of skin color.

### WHAT IT LOOKS LIKE

Failure to promote or hire due to race.

Failure to allow common privileges such as similar lunch breaks, typical work hours or duties due to race.

**23,976**

Charges filed in 2019 with the EEOC alleging race-based discrimination.

**\$79.8 million**

Awarded in 2019 for race-based discrimination cases.

## National Origin

### WHAT IT IS

Treating applicants or employees unfavorably because they are from a particular country or part of the world, because of ethnicity or accent or because they appear to be of a certain ethnic background (even if they are not).

National origin discrimination can also involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin.

### WHAT IT LOOKS LIKE

Discrimination of any kind based on heritage. (e.g. after Sam was promoted he let go anyone that did not share his same country of origin.)

Giving the worst work schedules to a select group.

Telling ethnic jokes.

Failure to allow common privileges due to race such as not allowing a particular group into the lunch room or requiring them to store lunch boxes or belongings in a separate area.

**7,009**

Charges filed in 2019 with the EEOC alleging national origin-based discrimination.

**\$32.3 million**

Awarded in 2019 for national origin-based discrimination cases.

## Disability

### WHAT IT IS

Treating an applicant or employee with a disability or history of disability unfavorably. Not everyone with a medical condition is protected by the law. In order to be protected, a person must be qualified for the job and have a disability as defined by the law.

In the eyes of the EEOC law, a disability is defined as someone who:

- Has a physical or mental condition that substantially limits a major life activity such as walking, talking, seeing, hearing or learning.
- Has a history of a disability such as cancer that is in remission.
- Is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he or she does not have such an impairment).

### WHAT IT LOOKS LIKE

Failure to make reasonable accommodations to facility, procedures or equipment to accommodate employees with disabilities.

Using derogatory words, phrases and comments such as “confined to a wheelchair,” “cripple” or “retard.”

Inability of disabled to access all services because:

- Physical barriers in and around the building restrict disabled patrons access to services.
- Directional signs in building are not posted in braille or high contrast colors.
- Teletypewriter (TTY) or Telecommunications Devices (TDD) services are not available.
- Sign language interpreter is not provided upon request.

## Genetic Information

### WHAT IT IS

An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work.

Title II of the Genetic Information Non-Discrimination Act of 2008 (GINA), prohibits genetic information discrimination in employment. The law forbids discrimination on the basis of genetic information including hirings, firings, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment.

Genetic testing reveals who you may be related to, your race and possible susceptibility to health issues.

### WHAT IT LOOKS LIKE

Using genetic tests to identify and screen individuals that may have:

- A different race or origin than the employer.
- A higher rate of disease, for the purpose of excluding them from health insurance or from employment.

**209**

Charges filed in 2019 with the EEOC alleging genetic-based discrimination.

**\$400,000**

Awarded in 2019 for genetic-based discrimination cases.

## Religion

### WHAT IT IS

Treating an applicant or employee unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.

Treating someone differently because that person is married to (or associated with) an individual of a particular religion.

### WHAT IT LOOKS LIKE

Disparaging remarks regarding religions such as "Christian Infidels" or "All Muslims are terrorists."

Not accommodating time off for religious practices.

Not allowing a practice or belief that is religion-based (i.e. no beards, no headscarves, no robes).

Granting Christmas as a holiday but not Hanukah or others upon request for substitution.

**2,725**

Charges filed in 2019 with the EEOC alleging religion-based discrimination.

**\$9.9 million**

Awarded in 2019 for religious-based discrimination cases.



## Sex

### WHAT IT IS

Treating an applicant or employee unfavorably because of that person's sex.

Discrimination against an individual because of gender or pregnancy status is discrimination in violation of Title VII of the Civil Rights Act.

Some courts have agreed with the EEOC on GLBT being a protected class where as other courts have not and will be ultimately decided by the United States Supreme Court.

### WHAT IT LOOKS LIKE

Harassing a person because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, it can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

- Both the victim and the harasser can be either a woman or a man, and the victim and harasser can be of the same sex.
- Basing raise/promotion on sexual favors or repeated requests for dates.
- Making disparaging or insensitive jokes with a person's sex as the main topic.

**23,532**

Charges filed in 2019 with the EEOC alleging sex-based discrimination.

**\$170.7 million**

Awarded in 2019 for sex-based discrimination cases.

## Harassment

### WHAT IT IS

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

### WHAT IT LOOKS LIKE

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where:

- Enduring the offensive conduct becomes a condition of continued employment; or,
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people. Some specific areas we see activity are sexual harassment and workplace harassment. Hostile work environment is a unique subset of workplace harassment.

**26,221**

Charges filed in 2019 with the EEOC alleging harassment-based discrimination.

**\$139.6 million**

Awarded in 2019 for harassment-based discrimination cases.



## Hostile Work Environment

### WHAT IT IS

Workplace is polluted with foul or abusive language or inappropriate behavior and it is unwelcome.

Termination or demotion if employee becomes pregnant.

Sexual favors for continued employment or advancement.

Being inflexible to non-Christians who may have different holiday schedules.

Focusing supervisory scrutiny more on one individual or group than others.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.

### WHAT IT LOOKS LIKE

The EEOC looks at the totality of the circumstances to determine if the work environment would be considered intimidating, hostile or abusive by a reasonable person. Additional questions:

- Was the conduct verbal, physical or both?
- How frequent was it?
- Was it hostile or patently offensive?
- Was the alleged harasser a co-worker or supervisor?
- Did others join in the harassment?
- Was the harassment directed at one or more individuals?
- What happened when senior management became aware of the situation?

## Retaliation

### WHAT IT IS

EEOC laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment.

Employers are free to discipline or terminate workers if motivated by non-retaliatory and non-discriminatory reasons.

It is unlawful to retaliate against applicants or employees for:

- Filing or being a witness in an EEOC charge, complaint, investigation or lawsuit.
- Communicating with a supervisor or manager about employment discrimination, including harassment. This also applies to safety issues.
- Answering questions during an employer investigation of alleged harassment.
- Refusing to follow orders that would result in discrimination.
- Resisting sexual advances, or intervening to protect others.
- Requesting accommodation of a disability or for a religious practice;
  - Reasonable accommodation could be additional time off, in addition to what has been already given under FMLA.
- Asking managers or co-workers about salary information to uncover potentially discriminatory wages

### WHAT IT LOOKS LIKE

It could be retaliation if an employer acts because of the employee's EEOC activity to:

- Reprimanding the employee or giving a performance evaluation that is lower than it should be.
- Transferring or reassigning employee to less desirable position.
- Engaging in verbal or physical abuse.
- Threatening to make, or actually make reports to authorities (such as reporting immigration status or contacting the police).
- Increasing scrutiny and write-ups.
- Spreading false rumors; treating a family member negatively (for example, canceling a contract with the person's spouse).
- Making the person's work more difficult (for example, punishing an employee for an EEOC complaint by purposefully changing his work schedule to conflict with family responsibilities).
- Not talking to individual (giving the cold shoulder) once charge is made.

It doesn't matter if there was no initial discrimination; it's what action you take and the reason for it that may constitute retaliation.

## EEOC Initiatives

### WHERE WILL THE EEOC FOCUS?

The EEOC has set forth its 5 year Strategic Enforcement Plan for 2017 through 2021. The previous 5 year plan made the Americans with Disabilities Act the center of focus. The new Plan has 6 points of emphasis:

1. **Eliminating Barriers in Recruitment and Hiring.** The goal of this initiative is to eliminate hiring practices that discriminate against classes of individuals. Its focus will be on algorithms and data-based methods for recruiting workers that it believes perpetuate a homogenized work force.
2. **Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.** The focus here is on disparate pay, job segregation and other discriminatory practices against those who may be unaware of their rights or reluctant to assert them.
3. **Addressing Selected Emerging Developing Issues.** Some of the issues addressed here are: accommodating pregnancy; qualification standards and inflexible leave policies that affect disabled individuals; and protecting the LGBT community, temporary workers and workers from the Arab, Middle Eastern or South Asian world.
4. **Ensuring Equal Pay Protections for All Workers.** The focus here will be on pay discrimination based on gender or other protected classes.
5. **Preserving Access to the Legal System.** The EEOC will target practices that interfere with its investigation and/or enforcement efforts addressed as overly broad waivers and releases as well as retaliatory practices. The EEOC will also ensure that rules requiring maintenance and retention of applications and employee data are in place.

6. **Preventing Systemic Harassment.** Roughly 1/3 of all charges filed with the EEOC involve allegations of harassment. The EEOC will focus on claims that raise concerns regarding customs, policies and patterns of harassment.

In conjunction with the strategic initiatives, the EEOC has multiple programs designed to help employers obtain success. These include:

### E-RACE

The E-RACE Initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination. Specifically, the EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment.

### LEAD

LEAD (Leadership for the Employment of Americans with Disabilities) is the EEOC's initiative to address the declining number of employees with targeted disabilities in the federal workforce. The goal for this initiative is to significantly increase the population of individuals with severe disabilities employed by the federal government.

### YOUTH@WORK

The Youth@Work initiative is a national education and outreach campaign to promote equal employment opportunity for America's next generation of workers.

Despite a recent dip in number of charges, the EEOC continues to enforce employment statutes.

## Litigation

Defending a case through discovery and a ruling on a motion for summary judgment can cost an employer between \$75,000 and \$125,000. If an employer loses summary judgment (which, much more often than not, is the case), the employer can expect to spend a total of \$175,000 to \$250,000 to take a case to a jury verdict at trial.

- Employee lawsuits have risen 400% in the past 20 years to the current annual level of 6.5 claims per 1,000 employees.
- In any employment case filed in federal court, there is a 16% chance the award (excluding attorney fees) will exceed \$1 million and a 67% chance that the award will exceed \$100,000.
- The average compensatory award in all federal court employment cases (excluding punitive damages or attorney fees) was more than \$490,000 and reflects a 45% increase since 2000.
- If you lose your case, you may owe:
  - Your own cost of defense
  - The verdict amount
  - The plaintiff's attorney fees and court costs

Instead of paying judgements, it is better to invest in training before there is an issue and reduce the likelihood of a claim.

## Risk Management

Risk management is all about being proactive, anticipating what may go wrong, putting plans in place to counteract the known issues and investigating when things don't go as planned so you can make adjustments and move forward. Risk Management controls for Employment Practices are developing good policies, training on the policies and enforcement of policies.

### PERSONNEL POLICIES

Update your personnel policies and procedures at least every couple of years keep pace with any changes in laws and court cases. Utilize a firm that specializes in Employment Practices for best results.

If and when an incident is reported, it is critical that you document it and then take action.

In *Faragher v. City of Boca Raton*, the U. S. Supreme Court identifies what a local government should include in their policies and procedures:

- A written policy prohibiting harassment is in place including guidelines on how to report harassment, clearly defined persons for who to report it to and thorough investigations are conducted.
- Adequate details documented showing that appropriate discipline was applied.
- Updated policy manual and job descriptions. This will help improve the effectiveness of your policies and ensure there is an effective mechanism in place to prevent harassment.

### TRAINING

**Employees:** Annually train employees on personnel policies such as harassment. Do not try to make them the expert on all the nuances of harassment. Simply talk about what harassment is, what the policy says (harassment and discrimination are illegal and don't do it) and how to report it if you see it or experience it.

**Managers:** Train managers on the policy and specifically what harassment and discrimination is, how to identify it, what to do when they identify it and how to report it. Retaliation against someone who has made a complaint not only makes the problem worse it is a separate violation in itself—even if the original complaint turns out to be unfounded. Managers should be able to recognize requests for accommodation and connect them to the correct person to assess their needs. EEOC has an outreach and education function that may be able to help provide resources and training.

### PERFORMANCE

Employee performance monitoring, supervision and feedback are critical both for a strong defense and overall employee performance. Document discussions with employees. Lack of documentation is one of the most important factors that weigh into large settlements and jury verdicts.

### EMPLOYMENT ACTIONS

The most common pitfall to defending hirings, firings and promotions is the failure to document your actions and why you took the action you did. Remember, if it is not written down, it did not happen.

### BOTTOM LINE

- Employment related claims are a large drain on your budget.
- Ensure that policies are in place that clearly define how one is to report issues and who they are to be reported to.
- Train employees and managers on your policies often.
- Front line supervisors are the key to enforcement and good documentation.