



Navigating Harassment & Discrimination Issues

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Has the Legal Landscape Changed?

- Executive Orders
- Agency changes
- Shift in enforcement priorities

Do federal employment laws still fully apply?

DEI Executive Orders

- EO 14173 (issued on January 21, 2025) in vague terms:
 - › Declares public and private employers' policies and practices that “use dangerous, demeaning and immoral race- and sex-based preferences under the guise of so-called [DEI]” to be illegal
 - › Commands federal contractors to (a) end affirmative action plans (AAPs) and related practices and (b) certify in new federal contracts compliance with EO (triggers potential False Claim Act (FCA) concerns)
 - › Directs federal officials to submit recommendations to end illegal DEI practices (targets private employers for compliance investigations)
 - › Carves out veteran and disability preferences from so-called “illegal DEI”

What Is “Illegal DEI”?

On March 19, 2025, the EEOC and DOJ issued guidance and a Q&A document that provide additional details regarding what constitutes “DEI-Related Discrimination at Work”:

- Confirms Title VII remains the law of the land – “prohibits discrimination based on protected characteristics such as race and sex”
- Underscores that Title VII applies to “*all members*” of a protected class – not just minorities
- Clarifies that the EEOC does not recognize “reverse discrimination” claims and does “not require a higher showing of proof for so-called ‘reverse’ discrimination claims.”

What is “Illegal DEI”? (*cont.*)

- Examples of what the EEOC and DOJ view as illegal DEI:
 - › Disparate treatment of workers in access to or exclusion from (1) “training (including training characterized as leadership development programs),” (2) “mentoring, sponsorship, or workplace networking/networks,” and/or (3) “[i]nternships (including internships labeled as ‘fellowships’ or ‘summer associate programs’)”
 - › Employer-sponsored (broadly defined) activities that segregate, limit, or classify workers based on a protected class “such as employee clubs or groups . . . Employee Resource Groups (ERG), Business Resource Groups (BRG), or other employee affinity groups”
 - › Separation of workers into groups based on their “protected characteristic[s] when administering DEI or any trainings, workplace programming . . . even if the separate groups receive the same programming content or amount of employer resources.”
 - › Making employment decisions related to employees’ protected characteristics based on the preferences of clients, customers, or coworkers.

What Is “Illegal DEI”? (*cont.*)

- It’s evolving . . . as of April 23, 2025, “**disparate impact**” discrimination claims exemplify “illegal DEI” (EO re: “Restoring Quality of Opportunity and Meritocracy”)
- Asserts that disparate impact liability theory—used by courts for over five decades—violates the U.S. Constitution, “by requiring race-oriented policies and practices to rebalance outcomes along racial lines”
- Disparate Impact EO Orders:
 - › Federal agencies to “deprioritize enforcement of all statutes and regulations” that “impose” disparate impact liability (notably including by its terms “other laws or decisions, including at the State level, that impose disparate impact liability”).
 - › U.S. Attorney General must (a) repeal or amend Title VI regulations that contemplate disparate impact liability, (b) review all pending investigations and suits under federal civil rights law that rely on a theory of disparate impact liability, and (c) formulate and issue guidance to employers regarding ways to promote equal access to employment.

DEI Executive Order: Gender Ideology

- EO 14168
 - › Redefines federal policy regarding sex and gender, stating government will recognize only biological sex, not gender identity
 - › Directs agencies to eliminate any policies, guidance, or documents that refer to gender identity (going forward references to “gender” will be changed to “sex” in all federal policies and documents)
 - › Mandates that government-issued identification documents, such as visas, reflect biological sex at birth.
 - › Directs EEOC and USDOL to prioritize enforcement of rights as defined by the order
 - › Requires single sex spaces be designated by biological sex

Bostock v. Clayton County

- While many states expressly recognize sexual orientation and gender identity as protected characteristics, these terms do not appear in Title VII.
- In 2020, SCOTUS held that Title VII protected employees from discrimination on basis of sexual orientation and gender identity.
 - › Bostock was fired after expressing interest in a gay softball league at work.
- In a 6-3 decision (written by Justice Gorsuch), Court found that if Bostock was fired for this reason, the reason was “because of sex” insofar as the employer treats, e.g., a man who is attracted to a man differently than a woman who is attracted to a man.

EO-Related Guidance Construes Bostock Narrowly

- DOJ's guidance, issued 2/12/25, says that *Bostock* does not require gender-identity based access to single sex spaces or programs / activities
 - › Restrooms, locker rooms
 - › Prisons
 - › Shelters
 - › Athletics
- **Takeaway:** Administration's position is that allowing transgender women to be in spaces or to participate in programs designated for women constitutes sex discrimination or harassment under Title VII.

How should lawyers/employers be thinking about employment law now?

- Stick to employment law fundamentals
- Remember state laws play a critical role
- Stay apprised of any legal changes

Essential Steps

- Know what employment laws apply to your organization and its employees and how they operate
- Have appropriate employment policies
- Train employees on policies
- Conduct investigations

Key Federal Laws

- Title VII of the Civil Rights Act of 1964 (Title VII) – applies to employers with 15 or more employees
- Americans with Disabilities Act (ADA) – 15 or more employees
- Age Discrimination in Employment Act (ADEA) – 20 or more employee
- National Labor Relations Act (NLRA) – virtually all employers
- Equal Pay Act

Key State Laws

- Maine Human Rights Act – all employers
- MGL c. 151B (Massachusetts) – 6 or more employees
- New Hampshire Law Against Discrimination – 6 or more employees
- NH and ME statutes prohibiting retaliation by private employers against whistleblowers –all employers.

Legally Protected Characteristics (Discrimination)

Race, color, ethnicity,
national origin,
ancestry

Disability

Age
(40 and above,
except in ME and NH,
which protect all
ages)

Religion, religious
creed

Sex

Pregnancy or
condition related to
pregnancy

Need to express
breast milk for
nursing child

Sexual orientation,
gender identity and
expression

Veteran status /
active military
personnel /
application for
military personnel

Marital status (in
NH), familial status
(in ME)

Genetic information

Legally Protected Conduct (Retaliation)

Report of potential
workplace safety
issue

Request to be paid
for hours worked

Request for
reasonable
accommodation

Complaint of
discrimination or
harassment

Participating in an
investigation

Report of violation
of law

Workers'
compensation claim
(including with prior
employer)

Request for FMLA
or other legally
protected leave

Forms of Discrimination / Retaliation

Disparate
Impact

- Facially neutral policy disproportionately and adversely impacts members of a protected class

Disparate
Treatment

- Termination
- Failure to hire or promote
- Other tangible adverse employment action

Harassment /
Hostile Work
Environment

- Work environment is offensive, abusive, and hostile to members of protected class
- Requires proof of severe or pervasive conduct

Failure to
Accommodate

- Failing to make reasonable changes to accommodate individual's religious beliefs or disability

Adverse Employment Action

- Change to the terms and conditions of employment
- Historically, some jurisdictions required that change to be material or cause “significant harm” (*i.e.* failure to promote, termination, pay cut)
- SCOTUS has clarified that a lateral transfer, with “some harm” or “some injury” constitutes an adverse employment action
 - › Fact that employee’s pay and rank didn’t change not dispositive where employee was “worse off” insofar as she was performing less prestigious and more administrative work

Sexual Harassment

- Two types: (1) Quid Pro Quo; (2) Hostile Work Environment.
- Quid Pro Quo means a benefit or privilege of employment is conditioned upon submission to unwelcome and sexually offensive conduct.
- Hostile Work Environment concept is not limited to sexual harassment.
- ME requires most employers to provide sexual harassment training to new hires, and customized harassment training to managers. Recommended for all.

Hostile Work Environment

- Severe or pervasive conduct relating to a protected characteristic / conduct or directed to an individual because of their membership in a protected class / protected conduct
 - › Frequency, severity, whether physically threatening or humiliating, whether it unreasonably interferes with employee's work performance.
 - › Something more than "mere offensive utterances."
- Reasonable person would consider the conduct intimidating, hostile or abusive; and claimant subjectively experienced it as such
- HWE is not the same thing as bullying – HWE is discriminatory behavior

Microaggressions:

Everyday, subtle, intentional or unintentional interactions or behaviors that communicate some sort of bias toward historically marginalized groups.

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Image from The Kids Mental Health Foundation Resource [How to Teach Kids About Microaggressions](#)

Examples - Verbal

"Your English is strong."

"I have Black / gay / etc. friends"

"As a woman, I know what you go through as a person of color."

"Can I touch your hair?"

"Ok, but where are you really from?"

"When I look at people, I don't see color."

Do you have a boyfriend?

Examples - Behavioral

Giving someone a nickname without permission because uncomfortable saying full name

Scheduling meetings or events that conflict with religious observances

Excluding someone from an afterwork event based on assumptions about childcare responsibilities

Assuming an older person isn't able to use or learn technology

Refusing to use someone's pronouns because it's "too confusing" or "ungrammatical"

Gendered uniforms / dress codes

Harassment – Things to Remember

- Harassers can be anyone, including customer / patients / clients
- Intention of the speaker largely irrelevant, except perhaps in regard to what is appropriate corrective action
- Harassment that occurs entirely outside the workplace can nonetheless have effects in the workplace and must be addressed
- While bullying (equal opportunity harassment) is not yet unlawful, disputes about motive are at the heart of most employment claims.

Employment Policies

- Review and update when necessary (but at least annually)
- Ensure complaint procedures are clear, accessible and that contact information is up-to-date
- Train employees on policy (with a separate training for managers on their heightened duties)

When to conduct formal investigation

Definitely investigate

- Report of harassment, being treated differently, hostile work environment, retaliation
- Report of bullying, offensive conduct, teasing
- Report of romantic relationship between manager and direct or indirect report

Follow up

- Employee mentions in exit interview that they can't stand the manager (and you have heard this before)
- Employee reports feeling uncomfortable around a co-worker
- Employee reports that a co-worker's recent promotion is not fair

No need for formal investigation

- My manager expects too much of everyone in the department
- Co-worker keeps to himself/herself and doesn't sit with us at lunch
- Employee relations issues that do not relate to any protected characteristic

Purpose(s) of investigation

Determinative Defensive



☐ To figure out whether disciplinary action is required in response to employee misconduct

☐ To correct an injustice or mistake

☐ To make the work environment safer or less hostile or offensive

☐ To correct legal compliance problems before they become liabilities



☐ To create an affirmative defense to a potential hostile work environment claim

☐ To pin down witness statements while memories are fresh and to prevent future exaggeration

☐ To be able to communicate the facts in order to obtain legal advice

☐ To figure out facts in order to devise a defense strategy in anticipated litigation

Hypotheticals

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Jason, junior counsel in the GC's office, has not come to work for over a month. Jason typically works with Laura, who is one of the busiest attorneys in the office. Since Jason has been out, Craig, also counsel but with more years of service who works with Jason and Laura, has been inundated with work that Jason would typically handle on top of his own workload. Craig hears that Jason is out on a mental health leave for depression and anxiety from one of Jason's friends at the company who shared that information with Craig in confidence.

Craig is connected with Jason on Instagram and has seen Jason posting about going to a concert at Thompson's Point, having dinner and drinks at a restaurant downtown and running with his dog on the beach while on leave. Craig questions whether Jason is out for legitimate reasons and is resentful of his increased workload. He tells others in the GC's office about Jason's social media posts, the fact that Jason is purportedly on medical leave, and his suspicions that the leave is not legitimate.

When Jason returns to work about a month later, Craig is cold to him. When Jason asks for a meeting to discuss how he can help with some existing litigation matters, Craig rolls his eyes while saying, "Well, I could use my own mental health break after the last two months." Craig gives Jason work to lighten his own load, but is unusually critical of Jason's work, nit-picking.

- *Assume that Jason was on an approved leave of absence for a mental health condition. Is Craig's suspicion justified / fair?*
- *Assume that Craig had a reasonable concern here, what should he do with / about that concern?*
- *What, if anything, should the individuals Craig complained to about Jason do with that information?*
- *Does Craig's behavior toward Jason create risk for himself and the company? How / why?*

Alice Doe (Alice), who works in the company's development department, is bright, hard-working, and receives consistently strong performance evaluations. Over time, she is charged with an increasing level of direct client contact and, in fact, one of the company's more important clients frequently calls her directly when they need advice. Alice's supervisor is John Doe (John). Over time, John notices some changes in Alice's appearance and presentation. Specifically, Alice cuts her hair quite short and increasingly wears clothing that John would describe as traditionally "men's clothing." One day, Alice comes to work wearing a three-piece suit and with a new a flat top haircut. Alice has always chosen to include her pronouns in the signature line of her email and overnight they have gone from "she / her / hers" to "they / them / theirs." Alice has also changed the name in her signature from "Alice" to "Ali."

John has the following questions and concerns:

- *Is it okay to acknowledge this change directly with Ali and to ask them what's happening?*
- *The client is conservative, and John is afraid they will not react well if surprised with this identity change. Is it okay for John to speak with the client and give them a heads up?*
- *What if the client is thereafter unwilling to work with Ali?*
- *Which bathroom will Ali use? If it's the men's room, how will the male firm members react to that? What if someone complains that it's an invasion of their privacy for Ali to use the men's restroom?*
- *Adjusting to "they / them / theirs" pronouns can be challenging, both because John's brain has been trained to refer to them as "she" and because John is a grammar purist. What if he messes up and calls Ali "Alice" or "she"?*

What does your group think about John's questions and concerns, and does it have any additional ones?

You are recruiting for a new attorney in the office and are interviewing the candidate, Jonah Doe, over Zoom. Jonah logs-in and joins the Zoom 5 minutes late. He apologizes for his late arrival and explains that he is home alone with a newborn child and was delayed because the baby was crying. You offer to reschedule at a better time for the candidate, but Jonah insists he is ready to go forward. Jonah is professionally dressed, but what you can see of the house behind him is extremely messy. There are dirty dishes piled high in the sink, food containers all over the counter, and piles of clothes on the kitchen island. Jonah performs extremely well during the interview, and his credentials and experience could not be better aligned with the department's needs, however.

Toward the end of the interview, you ask Jonah about timing – specifically, whether time is of the essence for him because of competing offers or other considerations. Jonah replies that his wife recently left him and his child and he is now a single father, so time is very much of the essence for him insofar as he is desperate for an income.

- *Given this fact pattern, there are certain things any reasonable person would want to ask Jonah but cannot and should not. Can you identify some of them?*
- *You no doubt have some concerns about whether Jonah will be a good hire. What are they, and are any of them tied or arguably tied to a protected characteristic?*
- *If you aren't sure whether some of your concerns are appropriate bases for evaluation / decision, what can / should you do?*



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