



NATIONAL EDUCATION ASSOCIATION



HARASSMENT AND



DISCRIMINATION
T O O L K I T



HARASSMENT AND DISCRIMINATION TOOLKIT

1. Introduction
2. Protected Characteristics
3. Discrimination
4. Harassment
5. Employer Liability
6. Combating Harassment and Discrimination
7. Retaliation
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1 INTRODUCTION

The National Education Association's ("NEA") 2021 Representative Assembly requested that NEA update its 2014 Harassment and Discrimination toolkit resource which was aimed at helping members identify and respond to discrimination and harassment in the workplace. In recognizing that discrimination and harassment can have a negative effect on teachers, education support professionals, administrators and students, NEA believes that educating its members on how to assert their rights when faced with potentially unlawful employment actions is an important service. This updated toolkit includes the most recent legal developments relating to gender identity, gender expression, and sexual orientation.

A number of laws prohibit employers from treating a person differently or badly with respect to employment decisions because of a characteristic that is beyond the person's control. Several classes of people are protected from discrimination by law, especially in the areas of employment and housing. In addition to federal laws, most states and some municipalities have enacted their own statutes dealing with discrimination and harassment.

Under federal employment law, protected characteristics include race, color, national origin, religion, sex (including gender identity, gender expression, and sexual orientation), disability, age (if the employee is at least 40 years old), and citizenship status. In employment law, a protected characteristic is a trait that may not be used as the basis of employment decisions. Simply, an employer may not consider a protected characteristic when making decisions that affect a term or condition of employment such as:

- * Hiring;
- * Firing;
- * Job advertisements and recruitment;
- * Compensation and Pay;
- * Job Assignments;
- * Promotions;
- * Layoff;
- * Training; and
- * Fringe Benefits.

While the law does not prohibit simple teasing, offhand comments, or isolated incidents, harassment is prohibited when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in a change to the terms and conditions of employment (such as termination or demotion). Using this resource, members will be better equipped to recognize, confront, and remedy unlawful employment actions. It is important to note that nothing in the toolkit is intended as legal advice.

Members should use this resource as a guide to recognizing potential employment issues. When facing discrimination or harassment, members are encouraged to contact an attorney in their area who can guide the member based on his or her individual circumstances in conjunction with the laws and regulations specific to his or her state and federal laws. Your state association may be able to assist you through the NEA Unified Legal Services Program ("ULSP"). The overall purpose of this resource is to help guide members when considering whether he or she has been a target of harassment or discrimination. This toolkit will give members a guide to:

- * Who is protected by various equal employment laws;
- * Who can perpetrate harassment or discrimination;
- * What actions can constitute discrimination or harassment;
- * When your employer may be liable;
- * What to do if you suspect that you are being targeted by harassment or discrimination;
- * How to assert your rights;
- * When to file a complaint and assert your rights; and
- * Where to find help.

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2 PROTECTED CHARACTERISTICS

Under federal law and the laws of most states, certain groups of employees are protected from discrimination. These groups are typically referred to as “protected classes.” A protected class is a group of people who share common characteristics and are protected from discrimination and harassment based on those characteristics. Included below is a general description of the most common characteristics protected by federal law. Please note that state and local laws may be more protective.

2.1 Age

Age discrimination involves treating someone (an applicant or employee) less favorably because of his or her age. The Age Discrimination in Employment Act¹ (“ADEA”), 29 U.S.C. § 621 et. seq., only forbids discrimination or harassment against people who are age 40 or older. It does not protect workers under the age of 40.² It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older. The ADEA protects workers from age discrimination in every phase of the employment relationship, including job advertisements, interviewing, hiring, compensation, promotion, discipline, job evaluations, demotion, training, job assignments, and termination. Under the ADEA, employers may not:

- ✱ Set age limits for benefits, conditions of employment, job opportunities, or training programs;
- ✱ Mention age or say that a certain age is preferred in job ads and/or recruiting materials; or
- ✱ Force an employee to retire at a certain age (except for a few narrow exceptions).

To prevail on a claim for discrimination under the ADEA, an employee must show that age discrimination was the “but-for” cause for the employment action taken. What that means, is that the employee must show that age discrimination was the motivating factor. This standard is incredibly high. For example, if members believe that school reform efforts that result in the layoff of mostly teachers over 40 years of age is merely a cover for age

discrimination, the employees must prove that the age of the employees—not an attempt to improve schools—was the reason for the layoff.

Additional Protections Under the Law. In addition to protecting employees over 40 from discrimination and/or harassment, the Older Workers Benefit Protection Act³ (“OWBPA”), 29 U.S.C. § 623, amended the ADEA to make it illegal for employers to use an employee’s age as a basis for discrimination in benefits and retirement. Like the rest of the ADEA, the OWBPA only protects people who are at least 40 years old.

The OWBPA prohibits age discrimination in the provision of fringe benefits, such as life insurance, health insurance, disability benefits, pensions, and retirement benefits. Typically, this means that employers must provide equal benefits to older and younger workers. For some types of benefits, employers can meet this nondiscrimination requirement by spending the same amount on the benefit provided to each group, even if older workers receive “lesser” benefits. In some circumstances, employers are also allowed to provide lesser benefits to older workers if those workers receive additional benefits -- from the government or the employer -- to make up the difference.

Waiver of Age Discrimination Claims. An individual may agree to waive his/her age discrimination rights or claims under state and federal law. Federal law sets out specific minimum standards that must be met in order for a waiver to be valid. Among other requirements, a valid waiver:

1. Must be in writing and be understandable;
2. Must specifically refer to ADEA rights or claims;
3. Must not waive rights or claims that may arise in the future;
4. Must be in exchange for something of value (such as additional pay or benefits that an employee is not already entitled to);
5. Must advise the individual in writing to consult an attorney before signing the waiver; and
6. Must provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it.⁴

³ As part of the ADEA, the OWBPA applies to all private employers with 20 or more employees and to federal, state, and local governments.

⁴ In addition, if an employer requests a waiver of age discrimination claims in connection with an exit incentive program or other employment termination program (such as a reduction in force), the minimum requirements for a valid waiver are more extensive. Employees should always contact an attorney when they are considering signing a waiver of rights.

¹ The ADEA applies to all private employers with 20 or more employees and to federal and local governments. It also applies to state governments, although their employees cannot sue them directly for age discrimination.

² Some states have enacted laws that also protect younger workers from age discrimination.

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2.2 Sex

Title VII of the Civil Rights Act of 1964 ("Title VII"),⁴ prohibits employment discrimination based on race, color, religion, sex, or national origin. Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's gender. Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex. For example, if a man joins the National Organization of Women and then faces harassment because of his membership, that harassment could be unlawful.

On June 15, 2020, the U.S. Supreme Court announced in *Bostock v. Clayton County* that federal employment law protections apply to lesbian, gay, bisexual and transgender workers. This means that employers, including public employers like school districts and public universities, as well as private employers, are prohibited from discriminating on the basis of sexual orientation or gender identity. This means that employers cannot fire someone or refuse to hire them because of their sexual orientation or gender identity.

It is unlawful to harass 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, and 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. LGBTQ harassment is also prohibited at work. Employers cannot harass employees based on their sexual orientation or gender identity, but instead must protect employees from sexual harassment that is so frequent or severe that it creates a hostile or offensive work environment.

Both the victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Educators and students are also protected by Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et. Seq. ("Title IX"), which prohibits sex discrimination (including discrimination on the basis of sexual orientation or gender identity) in any educational institution that receives federal funding.

2.3 Race/Color

Discrimination based on race involves treating a person less favorably because he or she is a member of, or identifies as, a particular race.

While similar to race discrimination, color discrimination is not the same. Discrimination based on skin color, or colorism, is a form of prejudice or discrimination in which individuals are treated differently based on the social meanings attached to skin color. This type of discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color. For example, a person of may treat another person of unfairly because he or she is darker in color than the discriminator, even if they are of the same race or ethnic background.

Both race and color discrimination may involve treating someone unfavorably because the person is married to and/or associated with a person of a certain race or color or because of a person's connection with a race-based organization or group, or an organization or group that is generally associated with people of a certain color.

2.4 National Origin

National origin discrimination involves treating people (applicant 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).⁵ Often, national origin discrimination is based on stereotypes about what people from a certain country are like or how that person is supposed to act.

Citizenship. Title VII does not prohibit citizenship requirements for employment. A requirement that all employees be U.S. citizens may violate Title VII if it has been the purpose or effect of discriminating based on national origin. A separate federal law, the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324b, prohibits employers from discriminating on the basis of citizenship status, as long as the employee or applicant is legally authorized to work in the United States.

Accent. Because accent can be associated with an employee's national origin, employers can legitimately make job decisions based on an employee's accent **only** if the accent significantly interferes with the employee's ability to do the job.

2.5 Religion

Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law

⁵ An "English-only rule", which requires employees to speak only English on the job, is only allowed if it is needed to ensure the safe or efficient operation of the employer's business and is put in place for nondiscriminatory reasons.

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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. Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group. In addition, an employee cannot be forced to participate (or not participate) in a religious activity as a condition of employment.

Accommodation. The Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Rehab Act”) requires an employer to provide reasonable accommodation to an employee or job applicant with a disability. A reasonable accommodation is any change in the work environment (or in the way things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.⁶

2.6 Disability

Disability discrimination occurs when an applicant or employee is treated less favorably because of a disability. A person can show that he or she has a disability in one of three ways:

- ✱ A person may be disabled if he or she has a physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning);
- ✱ A person may be disabled if he or she has a history of a disability (such as cancer that is in remission); or
- ✱ A person may be disabled if he 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 has no such impairment).

Disability discrimination can also involve treating someone differently because that person is married to, associated with, or responsible for caring for an individual with a disability.

Accommodation. The Americans with Disabilities Act (“ADA”)^{7,8} and

⁶ When an employee or applicant needs a dress or grooming accommodation for religious reasons, he or she should notify the employer of the need for an accommodation for religious reasons. If the employer reasonably needs more information, the employer and the employee should engage in an interactive process to discuss the request. If it would not pose an undue hardship, the employer must grant the accommodation.

⁷ The ADA applies to all private employers with 20 or more employees and to federal and local governments.

⁸ The ADA is different from the Family Medical Leave Act (“FMLA”) and state worker’s compensation laws.

Section 504 of the Rehabilitation Act (“Rehab Act”) requires an employer to provide *reasonable* accommodation⁹ to an employee or job applicant with a disability.

A reasonable accommodation is any change in the work environment (or in the way things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

An employer does not have to provide an accommodation if doing so would cause undue hardship. Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer’s size, financial resources, and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost.

Medical Exams. The law places strict limits on when an employer may ask job applicants medical questions, to take a medical exam, or to identify a disability.

For example, an employer may not ask a job applicant to answer medical questions or to take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability). An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.

After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam,¹¹ but only if all new employees in the same type of job have to answer the questions or take the exam.

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee’s request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

According to the EEOC in providing guidance related to COVID-19, during a pandemic, employers may ask employees if they are experiencing symptoms of infections with the illness-causing virus. Such symptom screening questions do not violate the ADA’s requirements on medical exams.

⁹ An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

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Employers can ask employees about COVID-19 vaccination status and can also ask to see proof of COVID-19 vaccination. Such questions do not violate the Americans with Disabilities Act (ADA) because they do not necessarily seek medical information—there are many reasons why someone may not be vaccinated which are unrelated to an underlying medical condition. However, any follow-up questions about why an employee is not vaccinated may violate the ADA as it may impermissibly seek information about a disability. Such follow up questions by the employer are only allowed if they are “job-related and consistent with business necessity.”

Employers can mandate that their employees working on the job site receive a COVID-19 vaccine as long as the employer accommodates those who have a medical condition where vaccination is not advised or a sincerely held religious belief or practice that prohibits vaccination. However, religious objections to vaccination do not need to be accommodated if the accommodations would pose more than a minimal burden to the employer.

2.7 Pregnancy

The Pregnancy Discrimination Act (“PDA”) forbids discrimination based on pregnancy or *pregnancy related* conditions. If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same manner as it treats any other temporarily disabled employee.

Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay must allow an employee who is temporarily disabled due to pregnancy to do the same. An employer may not single out pregnancy-related conditions for special procedures to determine an employee’s ability to work. However, if an employer requires its employees to submit a doctor’s statement concerning their ability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

Title IX also prohibits employment discrimination based on pregnancy or childbirth, including time off or temporary disability resulting from miscarriage or termination of pregnancy.

Nursing. Nursing mothers have the right to express milk in the workplace under the Fair Labor Standards Act (“FLSA”). Employers are required to provide a reasonable amount of break time as well as a space to express milk as frequently as needed by a nursing mother, for up to one year following the birth of her child. Other requirements for nursing include:

- * The space must be shielded from view and free from intrusion by coworkers or the public;

- * The use of a bathroom is not an acceptable space to provide to nursing mothers expressing milk; and
- * Nursing employees must have access to this space each time they need to express milk.

The frequency of breaks needed to express breast milk as well as the duration of each break depends on several factors and may vary. Employees who are exempt under the FLSA (that is, they are not entitled to overtime pay) are not covered by the Breaktime for Nursing Mothers Act, but may be covered by state or municipal laws that may provide additional protections for pregnant and postpartum people.

Impairments Resulting from Pregnancy. In addition to the requirements above, impairments resulting from pregnancy (such as gestational diabetes or preeclampsia) may also be considered disabilities under the ADA. An employer may have to provide a reasonable accommodation (such as leave or modifications that enable an employee to perform her job) for a disability related to pregnancy.

2.8 Family and Medical Leave Discrimination

The Family and Medical Leave Act (“FMLA”) provides for eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12 month period, as set by the employer, for certain specified family and medical reasons such as:

- * the birth and care of a newborn child of the employee;
- * the placement with the employee of a son or daughter for adoption or foster care;
- * to care for an immediate family member (spouse, child or parent) with a serious medical condition; or
- * when the employee is unable to work because of a serious medical condition.

Under the FMLA, it is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. It also prohibits provisions prohibit employers from discharging or discriminating against employees for opposing any practice made unlawful by the FMLA. For example, if a man has met the employer’s requirement for FMLA and chooses to take 12 weeks of leave to care for his newborn daughter, the FMLA prevents the employer from terminating or otherwise punishing the employee for taking leave.

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3 DISCRIMINATION

Unlawful discrimination occurs when a person is treated arbitrarily or differently because of his or her membership in a protected class. In the employment context, discrimination begins when an individual is subject to an adverse employment action, which is something an employer does that hurts an employee (for example: terminating the employee or not selecting him or her for a promotion, harassing the employee, denying the employee's request for a reasonable accommodation, etc.).

Not all types of discrimination violate federal and/or state laws that prohibit discrimination. Some types of unequal treatment are perfectly legal, and cannot form the basis for a lawsuit alleging discrimination. For example, discrimination based on weight is not prohibited by federal law (although it may be prohibited by state statutes).

Discrimination is *not*:

- * Different treatment due to personality differences or conflicts;
- * General treatment not based on a protected characteristic;
- * Different treatment or rewards based on differing levels of productivity;
- * Responses or changes to employment based on poor performance;
- * Different treatment to meet the special needs of certain individuals, such as accommodations for disabled employees;
- * Bullying;¹⁰ or
- * Different treatment based on individual merit, such as talent, skills, and other qualifications.

Not all discrimination is overt. Discrimination can take the form of seemingly innocent banter, jokes or through the use of stereotypes. It does not matter that:

- * A person did not intend to be offensive;
- * "Everyone laughed"; or
- * The comments were not directed to the person who was offended.

The only thing that matters in the context of employment laws is the impact of the behavior on the person raising the discrimination claim.

¹⁰ Although it is abhorrent, workplace bullying is not illegal unless it also constitutes discrimination and/or harassment. The bullying should be evaluated by determining whether the behavior by the perpetrator is based on a protected characteristic under state and/or federal law (i.e. age, race, national origin, etc.).

4 HARASSMENT

Generally, unlawful harassment is defined as verbal or physical conduct that denigrates or shows hostility or aversion to an individual because of protected characteristics, and which:

- * Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
- * Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- * Otherwise adversely affects an individual's employment opportunities.

The following kinds of behavior, or others with a similar harassing effect, are absolutely prohibited:

- * Abusing an employee through epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts which relate to a protected characteristic, even if the person undertaking claims that he or she is "only joking" or did not mean to be offensive and;
- * Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of a protected characteristic. Written or graphic material includes any material whether placed, displayed, stored or appearing on paper, electronically or otherwise. This can include material transmitted via Facebook, e-mail, text messages, social media or any other electronic media.

There are two types of prohibited harassment: Quid Pro Quo Harassment and Hostile Work Environment Harassment.

4.1 Quid Pro Quo Harassment

Quid Pro Quo harassment can be thought of as "something for something" or "this for that" and is harassment by a supervisor, owner or manager, or another representative of the employer who has the authority to take a tangible employment action against the victim. Such tangible employment actions include any significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

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Quid Pro Quo harassment can occur in two ways:

1. When an employer or supervisor makes submission to unwelcome sexual advances or other verbal or physical conduct an implicit or explicit term or condition of employment that affects job benefits, including employment, promotion, salary increases, shift or work assignments, performance expectations and other conditions of employment; and/or
2. When the submission to, or rejection of, a sexual advance or request for sexual favors results in a tangible employment detriment, or the loss of a job benefit of the kind described above.

4.2 Hostile Work Environment

Hostile Work Environment harassment occurs when unwelcome comments or conduct based on sex, race or other protected characteristics unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.

Anyone in the workplace can commit this type of harassment—a manager, co-worker, or non-employee, such as a contractor, vendor or guest. The victim can be anyone affected by the conduct, not just the individual at whom the offensive conduct is directed.

Hostile Work Environment harassment is conduct that is severe and pervasive and unreasonably interferes with the victim's job performance. Examples of conduct that can contribute to a hostile work environment includes jokes or remarks based on a protected characteristic, graffiti or cartoons, derogatory comments, posters, unnecessary touching, or other behavior. When determining whether conduct is sufficiently severe or pervasive so as to constitute hostile work environment harassment, courts and administrative agencies look at:

1. The frequency of the conduct;
2. Its severity;
3. Whether the conduct is physically threatening or humiliating or merely an offensive utterance; and
4. Whether the conduct unreasonably interferes with an employee's work performance.

5 EMPLOYER LIABILITY

Generally, an employer has a legal duty to take action to stop harassment and discrimination as soon as the management learns of it. In some cases, however, an employer will be held responsible for harassment committed by a manager or supervisor, even if no one else knew what was occurring.

5.1 Harassment and Discrimination by Managers or Supervisors

When a supervisor engages in harassment or discrimination that results in an adverse employment action against the victim, the employer can be held liable, even if management was unaware of the harassment. An employer is generally liable for the actions of its managers and supervisors because they are given substantial authority over subordinates and are thus considered agents of the employer. In some circumstances, an employer may be liable for the actions of a supervisor, even if that supervisor does not have direct supervisory authority over the person making the complaint.

5.2 Harassment and Discrimination by Coworkers or Other Non-Supervisory Individuals

Likewise, an employer may be liable when an individual creates a hostile work environment. An employer can limit liability, however, by showing that it took reasonable steps to prevent and promptly address the problem and that the victim unreasonably failed to take advantage of these measures. An employer may also be liable for the sexual harassment of its employees by certain non-employees, such as customers, vendors, independent contractors or other acquaintances. The primary difference between employer liability for harassment perpetrated by coworkers and harassment committed by non-employees rests on the ability of the employer to control the conduct of the non-employees. The greater the employer's ability to control the non-employee's conduct, the more likely it will be found liable for that person's unlawful harassment.

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6 COMBATING HARASSMENT AND DISCRIMINATION IN THE WORKPLACE

When dealing with harassment or discrimination at work, there are certain steps an employee should take to protect his or her rights. Each of these steps may help stop the mistreatment and improve the work environment. In addition to helping curb the offending behavior, taking these steps will help an employee prove his or her case and preserve his or her right to sue, if the employee later decides to file a harassment or discrimination lawsuit.

6.1 Talk to the Offender

One of the first steps an employee can take when attempting to stop offensive behavior is to confront the person who is being offensive. An employee is not obligated to take this step; however, this approach may be the best way to get the behavior to stop. Confronting the harasser will also help prove important legal facts if the employee decides to pursue legal action.

For example, in a harassment case, the employee complaining of harassment must prove that the behavior to which he or she was subjected was unwelcome: in other words, that the employee did not like the behavior and did not participate in it willingly. This factor is important in harassment cases, in case the offender claims that the victim laughed at his or her jokes or otherwise was not offended by the behavior. The best way an employee can prove that the behavior was unwelcome is to show that he or she told the harasser the behavior was offensive.

6.2 Document the Behavior

An employee should keep a record of what is happening that includes each incident and the time, place, and witnesses of each incident. If able, an employee should ask co-workers who witnessed the harassing or discriminatory behavior to write down what they saw. Each record should be as detailed as possible so that someone reviewing it later has a clear picture of the offensive behavior. An employee should also keep a file of any documents that he or she is given, such as written performance reviews or disciplinary notices.

In addition to keeping a record of the offending behavior, an employee should also document any meetings with the employer—including managers

and human resources personnel—concerning the behavior. An employee should take note of who attended each meeting, when and where the meeting occurred, what was said, and what conclusions were reached. If possible, a copy of the notes should be sent to all participants as a follow-up. Documentation should be kept at home or in another safe place.

6.3 Complain!

An employee who has been subjected to harassment and/or discrimination should inform the employer as soon as possible. Members should also contact their union for help with their discrimination claims. Before filing a complaint, a member should first review the employee handbook, employer's equal employment opportunity and/or harassment/discrimination policy. Those policies may describe the procedure to lodge a formal complaint in the workplace. If no procedure is described in company documents, the employee should contact human resources or a manager to find out how to lodge a complaint. Members of the human resources department are responsible for knowing and applying the harassment/discrimination policies of the employer. It is best to make a complaint in writing (keep a copy). Make sure to be as detailed as possible. The more information that you provide, the stronger the complaint is. After a complaint is filed, the employer will investigate your complaint. Make sure to cooperate with any investigation: make yourself available to meet with the investigator and provide him or her with information regarding the discrimination or retaliation.

6.4 Consider Contacting Counsel

In addition to contacting the employer about offensive behavior, the employee should consider contacting legal counsel for advice. Members should reach out to their state associations when looking for an attorney because your state association may offer legal services through the Unified Legal Services Program ("ULSP"). Many lawyers specialize in workplace discrimination, and will be able to evaluate the employee's case based on the employee's specific circumstances. An attorney will also be able to keep the employee informed of any deadlines that have to be met in order to move forward with a lawsuit.

6.5 Filing an EEOC Complaint

If the employee plans to file a lawsuit, he or she must first file a charge with the Equal Employment Opportunity Commission ("EEOC") and/or the state fair employment agency. When investigating allegations of harassment

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or discrimination, the EEOC looks at the entire record and makes a determination on a case-by-case evaluation. Before a discrimination or harassment lawsuit can be filed under federal law, the employee **must** file an administrative charge with the EEOC or a similar state agency. This is a legal requirement: **If the employee files a lawsuit without first having filed a charge, the lawsuit will be thrown out.**

6.5.1 Who can File a Charge with the EEOC

The following individuals and organizations can bring a charge of discrimination:

Individuals or Groups Subjected to Alleged Discrimination. A typical charge alleges that an individual was subjected to prohibited discrimination because of his/her protected status. For example, a woman might file a charge alleging that her employer fired her because she was 50 years old, or a man with a hearing impairment might allege that he was not provided a reasonable accommodation for his disability. Charges may also be brought by a group of individuals with shared characteristics who believe that they were discriminated against or harassed. For example, a group of men may file a group charge that alleges that they were all sexually harassed by their female supervisor.

Individuals Who Were Personally Harmed by Discrimination Against Others. A charge may also be filed under Title VII, the ADEA, the ADA, or other laws by an individual who was not directly subjected to prohibited discrimination or harassment but was harmed by prohibited discrimination against others. For instance, individuals who are under 40 would have standing to file a charge if they were laid off because a particular plant was closed as the result of discrimination against individuals 40 or over. A charge of this type must include a description of how the charging party was harmed by the respondent's discriminatory actions.

Organizations. Under limited circumstances, an organization may file a charge as an "aggrieved person." For example, a local may be file because it lost members or financial support because its members were subjected to age discrimination.

"On Behalf of" a Victim. A charge can be filed by an individual, agency, or organization "on behalf of" a victim of discrimination. An "on behalf of" charge allows the victim to remain unnamed while the charge is being processed by the EEOC.

EEOC Commissioner. An EEOC Commissioner may file a charge with the EEOC under some of the federal equal opportunity statutes.

6.6 Determining Whether to File with the EEOC or a State Agency

Victims of discrimination and/or harassment can file a charge with either the EEOC or with a state or local human rights agency. Some state human rights agency have a worksharing agreement with the EEOC, and if the allegation is initially filed with the state human rights agency and conduct is covered by a law enforced by the EEOC, the state human rights agency will file a copy of the charge with the EEOC and continue the investigation. Similarly, If the charge is initially filed with EEOC, the EEOC will file a copy of the charge with state human rights agency. In those instances, the EEOC will generally be responsible for investigating the charge. Individuals should contact an attorney in their area when determining which agency should receive the initial charge.

6.7 Timing

An employee has either 180 or 300 days to file a charge, depending on the allegations and the state in which the offensive behavior occurs.

Victims of unlawful discrimination have 180 days to file a charge.

If the employee's state has its own equal employment opportunity laws, the limitations period is extended to 300 days after the act of discrimination occurred to file a complaint. The limitation period begins to run when the discriminatory acts occur, not when the discriminatory acts are felt. In some instances, the time frames for filing may be different for different types of allegations. For example, in South Dakota, an individual has 300 days to file a charge based on race discrimination. However, because South Dakota has no state law that addresses age discrimination, a victim of age bias in South Dakota only has 180 days to file a charge.

The safest way to proceed is to assume that 180 days is the limit in your case. The employee should be careful of statutory time frames—if the wrong dates are used, that mistake can end his or her case before it even begins.

6.8 Filling out the EEOC Questionnaire

Individuals wishing to file charges of discrimination are generally screened by an EEOC representative to determine whether the employment experiences are covered by the EEOC. Individuals will be asked to fill out an

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EEOC Questionnaire.¹¹ The Questionnaire can become the foundation for the charge. When completing the charge, the individual should review and fill out the questionnaire completely. Information gathered on the charge includes:

- * Basic information: Name, address, and telephone number;
- * The name, address and telephone number of the employer;
- * The number of employees you employer has at all locations – there are boxes with ranges of numbers on the form
- * A short description of the events they believe were discriminatory (for example, they were fired, demoted, harassed);
- * When the events took place;
- * Why the member believes s/he was discriminated against (for example, because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information); and
- * Sign and date the form.

6.9 Organizing Evidence

When filling out the questionnaire, the individual should make sure that evidence is presented to the EEOC in an organized way—without yielding to the temptation to vent or present matters outside the scope of the charge.

Because illegal discrimination rarely takes the form of one simple event, it is important to organize evidence of incidents of illegal discrimination before contacting the EEOC or the state agency.

Incidents that should be included in the questionnaire and charge include:

- * Direct, or “smoking gun” evidence, such as:
 - ⊙ disparaging remarks;
 - ⊙ slurs;
 - ⊙ admissions of bias (“women shouldn’t teach math”);
 - ⊙ jokes.
- * Indirect evidence, such as:
 - ⊙ Other cases of discrimination;
 - ⊙ Pretext (bogus reasons given for employment decisions to cover up the unlawful reason);
 - ⊙ Better treatment of people outside of the protected class who have equal or lesser qualifications.

6.10 Completing the Charge

Once the questionnaire is complete, an EEOC investigator or staff lawyer will fill out an EEOC Charge of Discrimination form describing the incident and send it to the victim to review and sign. Individuals should thoroughly read the statement before signing. In addition, the individual should ask for copies of the completed charge before leaving the office. If filing by mail, be sure to retain a copy of the charge.

When working with the EEOC, the individual should ensure that the EEOC has current contact information for the member on file so that s/he can receive timely updates and notices regarding the status of the charge. The individual should check with the investigator handling the case periodically to get current status updates.

6.11 Updating and Amending the Charge

As long as the individual is still within the statute of limitations for filing a complaint (either 180 or 300 days) he or she can file a new complaint (or amend the old one) to add any charges that were forgotten or misstated. Employees should check with the EEOC or state agency as the investigation moves forward and provide any updates or changes in status.

6.12 The EEOC and/or State Agency Investigation

During the investigation, the EEOC or State Agency will contact the employer and give it an opportunity to respond to the allegations through documents and a position statement. After all of the evidence is presented, the EEOC or state agency will make a determination.

- * If “reasonable cause” is found, the EEOC will send both parties a Letter of Determination stating its finding and inviting the parties to resolve the charge informally through conciliation. Although, the EEOC has the right to file a lawsuit on the employee’s behalf, that is *not* the typical outcome. Because of limited resources, the EEOC tend only to file on behalf of employees in high profile cases that will serve to send a message to employers generally.
- * If the EEOC finds no “reasonable cause” to believe that discrimination occurred, it will dismiss the complaint and send a Dismissal and Notice of Rights letter to the charging employee and a copy to the employer. This is most common.

¹¹ The EEOC questionnaire can be completed at an EEOC office, at home or online at <https://egov.eeoc.gov/eas/>.

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The Dismissal and Notice of Rights letter explains that the employee may still file suit on his or her own in court within **90 days** from receipt of the letter. The statutory time frame is vitally important! If you do not file a lawsuit with 90 days, your case will be dismissed.

6.13 Filing a Lawsuit

If the employee wishes to file a lawsuit, he or she should contact an attorney in his or her area that specializes in workplace harassment/discrimination cases. The law surrounding discrimination and harassment is very complicated, and an attorney will be able to explain both the obligations of the employee and the employer obligations under federal and state law, while keeping the employee apprised of statutory deadlines. Your local or state affiliate may also be able to help you find an attorney and file a lawsuit.

6.14 Filing an Administrative Complaint

Under Section 504 of the Rehab Act, if you have experienced discrimination, harassment, or retaliation on the basis of your disability, you can choose whether to file a complaint with the U.S. Department of Education, Office of Civil Rights, or with the Equal Employment Opportunity Commission (EEOC). You do not have to file an administrative complaint to bring a lawsuit in federal district court under Section 504. However, it is a legal requirement to file an administrative complaint with the EEOC or similar state agency to bring a lawsuit under the Americans with Disabilities Act (ADA). As the ADA and Section 504 both prohibit disability discrimination and retaliation, it is advisable to file an EEOC charge as described above in order to protect your ability to sue on the basis of all applicable federal antidiscrimination laws.

Similarly, under Title IX, if you have experienced discrimination, harassment, or retaliation based on sex, you can choose whether to file a complaint with the U.S. Department of Education, Office of Civil Rights, or with the Equal Employment Opportunity Commission (EEOC). However, it is a legal requirement to file an administrative complaint with the EEOC or similar state agency to bring a lawsuit under Title VII. As Title VII and Title IX both prohibit sex discrimination and harassment, it is advisable to file an EEOC charge as described above in order to protect your ability to sue on the basis of all applicable federal antidiscrimination laws.

FMLA complaints may be filed with the Department of Labor's Wage and Hour Division at the appropriate local office: <https://www.dol.gov/agencies/whd/contact/local-offices>. There is no requirement to file an administrative complaint with DOL prior to filing a lawsuit under the FMLA.

7 RETALIATION

7.1 Retaliation for Asserting Rights is Also Prohibited

The law also prohibits retaliation against an individual for exercising his or her rights. Retaliation occurs when an employee is punished for engaging in legally protected activity such as reporting discrimination.

An individual may not be subject to changes to the terms and conditions of his or her employment for:

- ✱ Inquiring about legal rights under various employment laws or the employer's harassment or discrimination policy;
- ✱ Reporting or complaining about possible discrimination and/or harassment; or
- ✱ Assisting in a complaint investigation, including providing truthful information about discrimination and/or harassment.

7.2 Prohibited Retaliatory Behavior

Retaliation can include any negative job action, such as demotion, discipline, firing, salary reduction, or job or shift reassignment. For example, it is illegal for an employer to refuse to allow an employee to receive job training because he or she filed a charge of discrimination with the EEOC, even if the EEOC later determines that no discrimination occurred. Retaliation can also be subtle, such as excluding an employee from work meetings that are essential to his or her employment or changes to the work environment designed to punish an employee because he or she filed a complaint.

7.3 Remediating Retaliation

If the individual is subject to retaliation after s/he filed an EEOC complaint, the individual should file a new EEOC complaint regarding the retaliation. The member should first notify the EEOC investigator who is handling the complaint that resulted in the retaliation.

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8 RESOURCES

8.1 Sample EEOC Questionnaire

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION INTAKE QUESTIONNAIRE

Please immediately complete the entire form and return it to the U.S. Equal Employment Opportunity Commission ("EEOC"). **REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage. **Answer all questions as completely as possible, and attach additional pages if needed to complete your response(s). If you do not know the answer to a question, answer by stating "not known." If a question is not applicable, write "n/a." Please Print.**

1. Personal Information

Last Name: _____ First Name: _____ MI: _____

Street or Mailing Address: _____ Apt Or Unit #: _____

City: _____ County: _____ State: _____ ZIP: _____

Phone Numbers: Home: (____) _____ Work: (____) _____

Cell: (____) _____ Email Address: _____

Date of Birth: _____ Sex: Male ☐ Female ☐ Do You Have a Disability? ☐ Yes ☐ No

Please answer each of the next three questions. i. Are you Hispanic or Latino? ☐ Yes ☐ No

ii. What is your Race? Please choose all that apply. ☐ American Indian or Alaska Native ☐ Asian ☐ White

☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander

iii. What is your National Origin (country of origin or ancestry)? _____

Please Provide The Name Of A Person We Can Contact If We Are Unable To Reach You:

Name: _____ Relationship: _____

Address: _____ City: _____ State: _____ Zip Code: _____

Home Phone: (____) _____ Other Phone: (____) _____

2. I believe that I was discriminated against by the following organization(s): (Check those that apply)

☐ Employer ☐ Union ☐ Employment Agency ☐ Other (Please Specify) _____

Organization Contact Information (If the organization is an employer, provide the address where you actually worked. If you work from home, check here ☐ and provide the address of the office to which you reported.) **If more than one employer is involved, attach additional sheets.**

Organization Name: _____

Address: _____ County: _____

City: _____ State: _____ Zip: _____ Phone: (____) _____

Type of Business: _____ Job Location if different from Org. Address: _____

Human Resources Director or Owner Name: _____ Phone: _____

Number of Employees in the Organization at All Locations: Please Check (✓) One

☐ Fewer Than 15 ☐ 15 - 100 ☐ 101 - 200 ☐ 201 - 500 ☐ More than 500

3. Your Employment Data (Complete as many items as you can) **Are you a Federal Employee?** ☐ Yes ☐ No

Date Hired: _____ Job Title At Hire: _____

Pay Rate When Hired: _____ Last or Current Pay Rate: _____

Job Title at Time of Alleged Discrimination: _____ Date Quit/Discharged: _____

Name and Title of Immediate Supervisor: _____

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8.2 Sample EEOC Charge Form

EEOC Form 5 (5/01)

CHARGE OF DISCRIMINATION <small>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</small>		Charge Presented to: Agency(ies) Charge No(s): <input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC	
_____ and EEOC <small>State or local Agency, if any</small>			
Name (indicate Mr. Ms. Mrs.)		Home Phone (Incl. Area Code)	
Date of Birth			
Street Address		City, State and ZIP Code	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name		No. Employees, Members	
Phone No. (Include Area Code)			
Street Address		City, State and ZIP Code	
Name		No. Employees, Members	
Phone No. (Include Area Code)			
Street Address		City, State and ZIP Code	
DISCRIMINATION BASED ON (Check appropriate box(es).) <input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> OTHER (Specify below.)		DATE(S) DISCRIMINATION TOOK PLACE Earliest _____ Latest _____ <input type="checkbox"/> CONTINUING ACTION	
THE PARTICULARS ARE (If additional paper is needed, attached extra sheet(s)):			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY – When necessary for State and Local Agency Requirements	
I declare under penalty of perjury that the above is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT	
_____ Date		_____ Charging Party Signature	
		SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)	

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8.3 EEOC Offices

A searchable database of EEOC offices, by zip code, can be found here:

<https://www.eeoc.gov/field-office>

A list of state human rights agencies can be found here:

<https://www.usccr.gov/files/pubs/crd/stateloc/all.htm>

8.4 Additional NEA Guidance

For additional information about workplace rights related to sex discrimination, pregnancy discrimination, sexual harassment, FMLA, and family responsibilities discrimination, see NEA Guidance - "Women Rising: A Guide to Your Rights at Work": <https://neadjustice.org/wp-content/uploads/2020/01/Women-Rising-Guidance-FINAL-01.08.20.pdf>