



# Updated Government Guidelines Cover Confidentiality and Ensuring Prompt, Thorough and Impartial Workplace Investigations

By Kirsten Scheurer Branigan, Carole Lynn Nowicki and Beth P. Zoller

**T**here are three key pillars underlying effective investigations. Investigations must be (1) prompt, (2) thorough, and (3) conducted impartially. Organizations should ensure that their investigators are well-trained regarding proper investigation standards. Failure to implement consistent and compliant investigation protocols increases the likelihood of exposure.

If an investigation lacks any of the key pillars, challenges will undoubtedly result, leading to additional claims of liability, damages (including punitive damages), and the loss of affirmative “safe haven” defenses. The organization will then need to defend its possible failure to properly investigate and remediate the matter in addition to the underlying alleged harassment, discrimination, retaliation, or other misconduct. Aside from the legal risks, the employer is often left with a fractured and divisive

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work environment with diminished productivity.

There are several developments about which organizations and investigators should be aware to update their policies, procedures, and/or practices. On Sept. 29, the Equal Employment Opportunity Commission (EEOC) issued its long-awaited Proposed Enforcement Guidance on Harassment in the Workplace (Proposed EEOC Guidance).<sup>1</sup> On Aug. 2, the National Labor Relations Board (NLRB and/or the Board) issued a major decision, *Stericycle*, which impacts investigation confidentiality rules and instructions.<sup>2</sup> In 2020, the New Jersey Division on Civil Rights (DCR) issued New Jersey's first-ever written investigation "Best Practices" in its report entitled "Preventing and Eliminating Sexual Harassment in New Jersey" (DCR Harassment Report).<sup>3</sup>

The EEOC Proposed Guidance, and its technical assistance documents, mandate that organizations act to protect confidentiality and maintain privacy in the complaint process and resulting investigation. Conversely, through its *Stericycle* decision, the NLRB restricts employers' ability to enforce confidentiality in connection with investigations. Organizations must navigate these conflicting agency positions and endeavor to both protect employees' confidentiality while simultaneously not chilling their rights.

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### 2023 Proposed EEOC Guidance

The Proposed EEOC Guidance was published in the Federal Register on Oct. 2, and allowed for public comment until Nov. 1. If finalized, the Proposed EEOC Guidance will replace the previous EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors that was released in 1999 (1999 EEOC Guidance).<sup>4</sup>

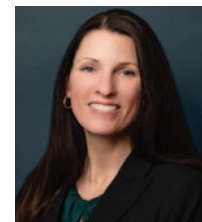
The EEOC previously attempted to update the 1999 EEOC Guidance in 2016. Following a Task Force Report, the EEOC released a draft of its Proposed Enforcement Guidance (2016 Proposed EEOC Guidance).<sup>5</sup> Although the 2016 Proposed EEOC Guidance was never finalized, the EEOC issued a technical assistance document in 2017 entitled "Promising Practices for Preventing Harassment" (Promising Practices) and four "Checklists for Employers" on the following topics: Leadership and Accountability; An Anti-Harassment Policy; A Harassment Reporting System and Investigations; and Compliance Training (EEOC Checklists).<sup>6</sup>

The recently issued Proposed EEOC Guidance is consistent with the EEOC's Enforcement Priorities in the EEOC's Strategic Enforcement Plan Fiscal Years 2024–2028, which includes preventing and remedying systemic harassment and protecting vulnerable workers and individuals from underserved communities from harassment.<sup>7</sup>

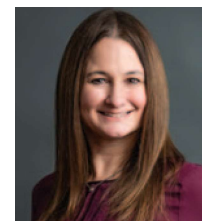
The Proposed EEOC Guidance requires



**KIRSTEN SCHEURER BRANIGAN** is managing partner at *KS Branigan Law*, a woman-owned law firm that focuses on employment law compliance, alternative dispute resolution, and diversity, equity, and inclusion. Kirsten has testified as an expert witness on the efficacy of investigations and provided testimony before the New Jersey Division on Civil Rights, resulting in the first-ever written investigation "Best Practices" in New Jersey.



**CAROLE LYNN NOWICKI** is a partner at *KS Branigan Law*. She conducts investigations and training on how to conduct investigations and frequently speaks and writes on the topic.



**BETH P. ZOLLER** is a partner at *KS Branigan Law*. She conducts investigations and training on how to conduct investigations and frequently speaks and writes on the topic.

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effective complaint processes and requires, at a minimum, prompt and effective investigations and corrective action as well as adequate confidentiality and anti-retaliation protections.<sup>8</sup> It advises that “an investigation is prompt if it is conducted reasonably soon after the complaint is filed or the employer otherwise has notice of possible harassment,” illustrating that a two-month delay in instituting an investigation is not prompt in comparison to an investigation opened one day after a complaint was filed, which is clearly prompt.<sup>9</sup> What is considered to be “reasonably soon” is fact-sensitive and depends on considerations like the nature and severity of the alleged harassment and the reasons for delay.<sup>10</sup>

The EEOC provides that adequate investigations must also be thorough enough to “arrive at a reasonably fair estimate of truth.”<sup>11</sup> While investigations do not require “a trial-type investigation,” they should be “conducted by an impartial party and seek information about the conduct from all parties involved.”<sup>12</sup> The EEOC highlights that investigators should be “well-trained in the skills required for interviewing witnesses and evaluating credibility.”<sup>13</sup> It expressly instructs that, if there are conflicting versions of relevant events, it may be necessary for the investigator to make credibility assessments so the employer can determine whether the alleged harassment in fact occurred.<sup>14</sup> The EEOC also highlights that it is not a remedy for the employer to do nothing simply because there is a denial that the harassment occurred and that an employer may take remedial action even where a complaint is uncorroborated.<sup>15</sup>

As per the EEOC, an employer may need to consider intermediate and interim steps to address the situation based on the nature and seriousness of the complaint, including “making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.”<sup>16</sup> The EEOC instructs employers to “make every reasonable effort to minimize the burden or negative consequences to an employee who complains of harassment, pending the employer’s investigation.”<sup>17</sup> Further, “corrective action that leaves the complainant worse off also could constitute unlawful retaliation if motivated by retaliatory bias.”<sup>18</sup>

The EEOC indicates that, after the investigation has been completed, the employer should inform the complainant and alleged harasser of its determination and corrective action being taken, subject to applicable privacy laws.<sup>19</sup> It stresses that recordkeeping is an important part of the investigation process and that “employers should retain records of all harassment complaints and investigations” as this may “help employers identify patterns of harassment, which can be useful for improving preventive measures, including training,” and may also “be relevant to credibility assessments and disciplinary measures.”<sup>20</sup>

Employers should implement measures to minimize the risk of retaliation, such as reminding individuals about the prohibition against retaliation and closely evaluating “employment decisions affecting the complainant and witnesses during and after the investigation to

ensure that such decisions are not based on retaliatory motives.”<sup>21</sup>

As per the EEOC Proposed Guidance, employer anti-harassment policies, training, and complaint procedures are expected to contain confidentiality protections.<sup>22</sup> While employers are expected to make clear to employees that they will protect the confidentiality of harassment allegations to the extent possible, the EEOC also acknowledges that employers cannot guarantee complete confidentiality since they cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses.<sup>23</sup> However, it also urges that information about allegations should only be shared with those who need to know and that records relating to harassment complaints be kept confidential.<sup>24</sup>

The EEOC’s Checklists and Promising Practices documents also reference employers’ confidentiality and privacy obligations in handling harassment complaints and investigations. Employment policies should include statements that the employer will keep the identities of complainants, witnesses, or those accused of harassment, and the information gathered during an investigation, confidential to the extent possible and consistent with a thorough and impartial investigation.<sup>25</sup> The EEOC provides that employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, should among other things, “understand and maintain the confidentiality associated with the complaint process.”<sup>26</sup> Further, the EEOC cites that one of the factors

underlying effective harassment complaint systems is protecting the privacy of individuals who file reports or provide information during the investigation, and the persons(s) alleged to have engaged in the harassment, to the greatest extent possible.<sup>27</sup>

### **NLRB's New Standard for Workplace Confidentiality Instructions and Rules**

While the EEOC prioritizes confidentiality, the NLRB cautions that too much confidentiality can chill protected conduct. Such was articulated by the NLRB in its recent *Stericycle* decision, where the Board overhauled the standard to assess the legality of various workplace rules and policies and adopted a new approach for evaluating facially neutral employer rules that do not expressly restrict employees from engaging in protected concerted activity in furtherance of “mutual aid or protection” under Section 7 of the National Labor Relations Act (NLRA).<sup>28</sup> In *Stericycle*, the NLRB specifically overruled its holding in *Apogee Retail LLC d/b/a Unique Thrift Store* (which held that, absent very few exceptions, employer rules/instructions that required confidentiality for the duration of the investigation were presumptively lawful without a case-by-case balancing of interests).<sup>29</sup>

Now, under *Stericycle*, a workplace rule or confidentiality instruction will be deemed presumptively unlawful if it can be demonstrated that a challenged rule has a “reasonable tendency to chill employees from exercising their Section 7 rights.”<sup>30</sup> It would then be incumbent upon the employer to rebut this presump-

tion by establishing that “the rule advances a legitimate and substantial business interest” that cannot be achieved by a more narrowly tailored rule.<sup>31</sup> Thus, this new standard requires a particularized analysis of the specific rule or instruction, its language, the workplace industry and context, and the employer’s interests in justifying the rule. Investigators and organizations should review and update confidentiality rules/instructions in light of *Stericycle*.

### **NJ DCR Investigation Best Practices**

In February 2020, following a series of public hearings, the DCR Harassment Report was issued.<sup>32</sup> Such specified four “Best Practices” for conducting “prompt, thorough and impartial investigations.”<sup>33</sup> These best practices, itemized below, are the first-ever written investigation standards articulated by a government agency in New Jersey.

First, employers should “allocate sufficient resources and authority to those responsible for investigating complaints” and “ensure that those conducting investigations are impartial, objective, and well-trained.”<sup>34</sup> The DCR highlighted that this could include employers engaging third parties trained in conducting “impartial, independent investigations.”<sup>35</sup>

Second, policies should set forth the stages and procedures for conducting investigations.<sup>36</sup> For example, an employer should have clear protocols for what triggers an investigation, how an investigation will be conducted (including policies on witness interviews), how an investigation will be concluded (includ-

ing the issuance of a final report and retention policies on documents, notes, and evidence), communicating the results to the impacted parties, and appropriate post-investigation monitoring mechanisms.<sup>37</sup>

Third, employers should “consistently enforce prohibitions on retaliation throughout the investigation process and maintain the confidentiality of the complainant to the fullest extent possible to prevent retaliation.”<sup>38</sup> Those conducting investigations should treat all parties involved, including complainants, witnesses, and alleged harassers, with respect and compassion.<sup>39</sup>

Fourth, employers should empower their investigators to “reach meaningful conclusions” and then follow up those conclusions with corrective action.<sup>40</sup> Guidance should be provided to those conducting investigations on how to appropriately assess credibility, weigh evidence, make findings, and reach a conclusion.<sup>41</sup>

The DCR also cited the appropriate investigation burden of proof as “more likely than not” (a preponderance of the evidence standard). Specifically, if the investigator finds that the conduct is “more likely than not” to have occurred, employers should “impose appropriate consequences, up to and including termination” of the accused wrongdoer.<sup>42</sup>

### **Credibility Assessments**

As highlighted in both the Proposed EEOC Guidance and the DCR Report’s Best Practices, credibility determinations are critical components of effective investigations. An investigator’s failure

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## Using Trauma-Informed Interviewing Techniques

In situations dealing with sensitive matters in which the complainant or witnesses may have experienced some sort of trauma, investigators should use trauma-informed interviewing techniques. Trauma-informed interviewing is a method of asking questions in a manner that minimizes harm to the interviewee while improving the reliability of the information being provided.<sup>50</sup> Critical components of trauma-informed interviews include the tone, manner of phrasing questions, and commitment to listening without interruption.<sup>51</sup>

One helpful way to achieve a trauma-informed tone is through genuine curiosity about what the interviewee has to say.<sup>52</sup> The investigator should aim to build a rapport with the interviewee by asking questions in a non-judgmental tone.<sup>53</sup> Instead of asking “why” or “what” questions, the investigator should say to the interviewee, “Help me understand...”<sup>54</sup>

Another aspect of trauma-informed interviewing is focusing on the details themselves and asking interviewees open-ended questions, such as “what else happened,” rather than forcing interviewees into chronological timelines.<sup>55</sup> Using open-ended questions without interruption permits the interviewee to tell the story without the pressure to convey information in a manner in which the interviewee is not comfortable.<sup>56</sup> Trauma-informed interviewers should engage in active listening and allow interviewees to tell their own narrative, in their own way, ensuring that the interviewee feels respected and heard. After the interviewee relays the narrative, the investigator can then ask follow-up questions to ascertain more details and the sequence of events.

to appropriately make credibility determinations will be under scrutiny in litigation. Investigators should evaluate the credibility of those interviewed, including closely examining the information provided to determine believability and truthfulness. Assessing credibility can be a challenging area if the investigator is not educated on how to approach the assessment.

All too often, investigators will bypass this critical step and simply determine the allegations were “unsubstantiated” when there are conflicting versions of events. This is particularly common when there are no eyewitnesses to alleged conduct. By essentially making a non-decision, the investigator is in effect disbelieving the complainant. It is critical for investigators to understand that there are other ways to assess credibility

when there are no eyewitness accounts. Simply because another person did not see the conduct does not mean that it did not occur. In fact, both the existing EEOC Guidance and the Proposed EEOC Guidance specifically reference that credibility assessments may be necessary to determine whether conduct occurred when there are conflicting versions of relevant events.<sup>43</sup>

Both the EEOC and courts have highlighted the important premise that facts can be believed even when the conduct was not witnessed.<sup>44</sup> For example, in *Knabe v. Boury Corp.*, the court cited that it was an “incorrect premise” for the investigator to conclude that a finding of harassment could not be made absent a corroborating witness.<sup>45</sup> Even when conduct is not witnessed, investigators can corroborate the allegations through

other methods. If an investigator fails to do so and does not appropriately assess credibility, the investigation can be deemed ineffective.<sup>46</sup> As such, investigators who do not make credibility assessments should prepare to have their investigations challenged.

One example of a challenge to an investigator’s failure to assess credibility was demonstrated in *Lightbody v. Walmart Stores*, which was noted in the Proposed EEOC Guidance.<sup>47</sup> There, the plaintiff submitted a written complaint that her manager engaged in inappropriate behavior. The human resources manager interviewed the plaintiff, the manager, and two employees identified by her. The manager denied many of the accusations. One of the employees identified a number of other female employees who cited inappropriate behavior by the manager, but the human resources manager did not interview them because the plaintiff was not aware of the allegations. The plaintiff argued that the investigation was deficient because the investigator failed to interview all relevant witnesses. The court found that a reasonable jury could conclude that the employer’s investigation was deficient, and a thorough investigation would have required the employer to follow leads that bore on the manager’s credibility.<sup>48</sup>

Another example of a deficiency as to credibility assessments was in *Vandegrift v. City of Philadelphia*, in which the court found that a genuine issue of fact existed as to whether the city had properly responded to the plaintiff’s harassment allegations when, among other things, the investigator failed to judge the credibility of the plaintiff, the witnesses, and the alleged harassers.<sup>49</sup>

### Conclusion

For investigations to withstand scrutiny, they must be prompt, thorough, and conducted in an impartial manner. Both organizations and investigators should keep apprised of current investigation

resources and standards. It is critical for organizations to provide training to investigators and maintain clear investigation protocols to ensure consistent and reliable results. ■

## Endnotes

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8. Proposed EEOC Guidance (2023), *supra*, Section (IV)(C) (3)(b)(ii)(a).
9. *Id.*
10. *Id.*
11. *Id.* (citing *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007)).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (citing *Hathaway v. Runyon*, 132 F.3d 1214, 1224 (8th Cir. 1997)).
16. EEOC Proposed Guidance (2023), *supra*, Section (IV)(C) (3)(b)(ii)(a).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at Section (IV)(C)(2)(b)(i) (citing Select Task Force on the Study of Harassment in the Workplace, *supra*).
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29. Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019).
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37. *Id.*
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41. *Id.* at 35.
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