

FEDS FOCUS ON CONSTRUCTION INDUSTRY HARASSMENT AGAIN WITH NEW GUIDE FOR FEDERAL CONTRACTORS: 7 KEY TAKEAWAYS

Insights
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The federal contractor watchdog is hammering down on harassment in the construction industry, in a follow-up to a report from civil rights officials last year on industry-wide issues involving allegations of harassment. The latest guidance comes from the Office of Federal Contract Compliance Programs (OFCCP) and is geared toward federal construction contractors. Here, we give you a quick background and seven key takeaways from the new guide.

Quick Background

The OFCCP released a [new guide](#) on November 21 as part of the agency's continued "commitment to fighting discrimination and harassment in construction." Last year, the U.S. Equal Employment Opportunity Commission (EEOC) identified key issues in the industry and prompted us to compile these [tips for all construction employers, plus special considerations for federal contractors](#). Although changes to the policies and priorities of the OFCCP and EEOC may occur under President-elect Trump's administration, proactively addressing harassment in the workplace is in the interest of contractors.

The latest guidance, as with all OFCCP rules, applies to all federal construction contractors and subcontractors and federally assisted contractors that are subject to the agency's jurisdiction based on [certain thresholds](#). The guide was released just days before the OFCCP announced it is [reinstating a monthly compliance filing report for covered construction contractors and subcontractors](#). These

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developments are part of a series of OFCCP efforts in recent years focused on the construction contractor community.

7 Key Takeaways for Construction Contractors

1. A Refresher on the Basics

The new harassment guidance serves as a good reminder that OFCCP rules prohibit:

- **harassment**, which can be considered a form of unlawful discrimination; and
- **retaliation** against a person because they filed a complaint, participated in an investigation or compliance evaluation, opposed discrimination, or exercised a right protected under the agency's rules.

Harassment means unwelcome conduct that is **based on a protected characteristic** (such as race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran), and it becomes a form of unlawful discrimination when it is **so frequent or severe** that it creates a hostile or offensive work environment or results in an adverse employment decision (such as the victim being fired or demoted).

2. Harassment Can Take a Variety of Forms

A wide range of conduct could constitute harassment if it meets the conditions explained above. Here are just a few examples provided in the new guidance:

- Using racial slurs and nicknames.
- Making unwelcome remarks related to a protected characteristic and guising them as a joke.
- Criticizing someone's participation in a job or industry because they are deemed to not belong because of their sex.
- Labeling someone as incompetent because of pregnancy, childbirth, or related medical conditions.
- Teasing someone about their disability.
- Displaying, in writing, derogatory remarks related to a protected characteristic at a job site.



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- Failure to maintain women's restrooms to the same standards as men's restrooms as a part of creating a hostile or offensive work environment or abusive work environment for women on the job site.

3. Harassers Are Not Limited to Supervisors

Contrary to a common misconception, harassment can be unlawful regardless of whether the harasser is the victim's supervisor, a supervisor in another area, a co-worker, or a third party (such as a client, customer, vendor, subcontractor, etc.). Modeling appropriate behavior is expected from everyone in the industry to ensure a positive work environment.

4. Harassment Based on Sex Goes Far Beyond Conduct of a Sexual Nature

Sexual harassment is just one type of prohibited harassment on the basis of sex (and remember, sex is just one of the many protected characteristics). [OFCCP regulations](#) provide detailed rules against harassment based on sex, which prohibits not only sexual harassment but also harassment based on pregnancy, childbirth, or related medical conditions, as well as harassment that is not sexual in nature but is based on sex or sex-based stereotypes. Note that sexual or sex-based harassment includes harassment based on gender identity or transgender status.

5. Gender- or Sex-Based Harassment is a Workplace Safety Issue

The OFCCP guidance emphasizes that gender- or sex-based harassment remains a problem in the construction industry and creates health, safety, and economic consequences. For example, the guide states that "since construction work is sometimes dangerous and requires the work of a team, harassment can endanger the well-being of more than the direct victim of the harassment."

6. Federal Contractor and Subcontractor Obligations Related to Combatting Harassment

The agency's new guide reminds construction contractors that existing OFCCP rules require them to, at a minimum:

- make good faith efforts to meet participation goals for minorities and women;

- ensure and maintain a working environment free of harassment, intimidation, and coercion at all worksites;
- develop and implement procedures to ensure that employees are not harassed based on a disability or because of their status as a protected veteran; and
- comply with any other regulatory obligations related to harassment.

7. Best Practices for Federal Contractors and Subcontractors in the Construction Industry

The agency's new guide also recommends that construction contractors implement the following anti-harassment measures:

- communicating to all personnel, as often as possible, that harassment will not be tolerated;
- providing examples of harassment to your employees so they have a better understanding of what constitutes harassment;
- providing training to your staff and others as needed on how to identify and combat harassment;
- producing and posting equal employment opportunity (EEO) policy statements prohibiting unlawful harassment at all sites where posting is reasonably possible;
- developing formal procedures on how to handle harassment and on how to accept and investigate harassment complaints;
- taking immediate and appropriate action when an employee reports harassment;
- promoting a workplace culture of respect for everyone;
- encouraging apprenticeship programs that are available and accessible to all individuals regardless of gender or other characteristics; and
- posting and sharing information in a manner that is visible and accessible to workers and in the language(s) that workers can understand.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information. If you have any questions, please consult your Fisher Phillips attorney, the authors of this Insight, any member of our [Affirmative Action and Federal Contract Compliance Practice Group](#), or any member of our [Construction Industry Team](#).