



HARASSMENT AND DISCRIMINATION IN THE RETINA PRACTICE



An overview of the current legal landscape and how the COVID-19 pandemic has affected issues that employers face.

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Everyone is familiar with the terms *harassment* and *discrimination*, although they are often used to describe varying degrees of behavior. While not all seemingly discriminatory conduct rises to the level of illegality, there are numerous legal, business, and ethical considerations to keep in mind when evaluating whether your practice is taking adequate steps to prevent such conduct in the workplace.

THE LEGAL LANDSCAPE Discrimination

Federal regulations lay the foundation for antidiscrimination laws in the United States. Generally, these laws make it illegal to discriminate against someone based on their inclusion in certain categories of identity, called protected classes. These laws have been interpreted and amended by court cases and legislative action, often expanding the scope of the protected classes (Table).

To better understand how these laws apply, consider the following example: Under Title VII, it is unlawful for an employer to make adverse decisions related to hiring and firing, compensation and benefits, promotions, and other employment-related decisions based on an applicant's or employee's race.

Employee discrimination can also occur through other job-related actions, including unfair treatment, denial of a reasonable workplace change, improper questioning or disclosure of

TABLE. SUMMARY OF FEDERAL LAWS AND THEIR
RESPECTIVE PROTECTED CLASSES

Law	Protected Classes
Title VII of the Civil Rights Act of 1964	Race, color, religion, national origin, or sex (including pregnancy, sexual orientation, and gender identity)
Americans with Disabilities Act (ADA)	Individuals with disabilities
Age Discrimination in Employment Act (ADEA)	Employees 40 years of age or older
Equal Pay Act of 1963	Sex-based wage discrimination
Genetic Information Nondiscrimination Act (GINA)	Genetic information in health coverage and employment

medical information, sexual harassment, or failing to provide a reasonable accommodation to employees with disabilities.

Patients may also assert claims against a practice if they are denied medical treatment, receive substandard care, or are harassed by staff or other patients based on their inclusion in a protected class.

Harassment

Harassment is a specific type of discrimination regulated under the same federal law referenced in Table 1 (except for

the Equal Pay Act of 1963). Harassment is defined as unwelcome conduct that is based on the recipient's status as a member of a protected class. Harassment becomes unlawful when (1) enduring the offensive conduct becomes a condition of continued employment or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Such offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets, name calling, physical assaults, threats, intimidation, ridicule or mockery, insults or put-downs, disseminating offensive images, and interference with work performance. By contrast, petty slights, annoyances, and isolated incidents (unless extremely serious) do not typically rise to the level of unlawful harassment.

Check Your State Laws

Many states have supplemented existing federal protections with their own laws, which often further expand the protected classes, broaden the scope of employers covered, and/or lower the standard by which such behaviors are deemed illegal. While state laws may provide additional protections above and beyond those afforded under federal law, state laws cannot provide any less protection than federal laws.

WHY FOCUS ON PREVENTING HARASSMENT AND DISCRIMINATION?

Retina specialists, like all physicians, have a duty to uphold the American Medical Association's Principles of Medical Ethics. These principles include dedication to providing competent medical care with compassion and respect for human dignity and rights, as well as supporting access to medical care for all people. While moral and ethical obligations alone may be motivation enough, there are also numerous legal and business considerations that may inspire your practice to take additional steps to prevent harassment and discrimination.

Avoid Legal Trouble

When evaluating which prophylactic and remedial measures may be worth implementing, it is important to consider the legal risks involved. Under the legal theory of vicarious liability, an employer can be held liable for the wrongful acts of its employees if those acts are carried out during the course of employment. This theory extends to claims of harassment and discrimination. As such, in a case where an employee of your practice commits a discriminatory act while employed by you that leads to a lawsuit, if the facts support a finding of vicarious liability, the court may impose liability directly on the practice—as though the practice committed the discriminatory act itself. This can happen even if the practice owners weren't aware of the discriminatory conduct.

To best prevent and/or defend any such claims of vicarious liability (because, unfortunately, prevention of any wrongful acts from ever happening is not always attainable),

DOCUMENTATION IS KEY

The most important thing to remember when addressing a complaint is to document everything. The practice's representative should document the date, time, and manner in which the individual filed the complaint, details of the interactive process that took place, the plan of action that was agreed upon, if any, and the resolution of the complaint.

In addition to all conversations with the complainant, the representative should document all correspondence with other parties related to the complaint. All information disclosed throughout the interactive process should remain confidential between the complainant and the individuals involved in the interactive process. If the designated practice representative is the individual about whom the complaint is being made, the practice must provide the complainant with an alternate contact to whom the complaint may be submitted.

your practice must be able to show that preventative measures were taken against such conduct, as well as remedial measures to address any alleged incidents that may have already occurred. The upfront expenses associated with such preventative and remedial measures may not be appealing, but the cost of responding to a lawsuit, however frivolous, soars in comparison.

Grow Your Business

In addition to ethical, legal, and financial considerations, there are several business considerations to keep in mind. Providing a safe workspace boosts employee morale and can cut down on employee burnout, which retina practices are experiencing across the country. Happy employees are more likely to stay long-term, which reduces the turnover costs associated with hiring and training new staff. Also, patients are more likely to continue returning to your practice if they feel safe and are attended to by happy staff members. It goes without saying that patient retention is essential for growing a healthy business.

Protect Your Reputation

Finally, your practice's reputation, which is highly influenced by patient and staff experience, directly affects your referral relationships. The more positive the experience of each patient sent your way, the stronger your referral relationships become. Keeping employees, patients, and referral sources happy is an essential component of building and maintaining a successful retina practice.

STEPS YOU CAN TAKE

To minimize the occurrence of harassment and discrimination in your practice, implement measures to both prevent harassment and discrimination and respond

to alleged incidents in a productive and compliant manner. Consulting with an attorney to ensure compliance with relevant federal and state laws is always a good idea. Other steps you can take include the following:

1. Outline procedures and policies for handling workplace issues in an employee handbook. The handbook should provide details regarding how the practice expects employees to treat each other and patients, what conduct will not be tolerated, and the disciplinary action associated with failure to comply. The handbook should also provide a detailed procedure that employees can use to report and escalate complaints of harassment and discrimination, as well as the dispute resolution process that follows.

2. Hold annual harassment and discrimination training to educate staff about their rights and responsibilities in the workplace. Even the most well-intentioned employees can sometimes unknowingly act in a manner that could subject both the employee and the practice to liability for discrimination. Often, these instances of discrimination occur because of rapidly changing social norms and expectations. Due to generational and cultural differences, employees and patients from different backgrounds may have differing expectations of what is appropriate in the workplace. Offering annual training can help to reconcile these differences and educate your employees about what conduct is and is not acceptable.

3. If a complaint does arise, engage in an interactive process with the complainant through a practice representative. During this interactive process, the representative should gather as many details from the complainant as they are comfortable disclosing. The representative should work with the complainant to find an agreeable resolution, within reason, and formulate a plan of action. It is essential to keep a thorough record of the entire process (see *Documentation Is Key*).

While all instances of discrimination cannot be prevented, you must demonstrate that your practice has taken reasonable steps toward prevention and remediation. Diligent efforts can go a long way, both in avoiding issues in the workplace and supporting the defense of any alleged claims that may arise in the future.

UNIQUE ISSUES PRESENTED BY COVID-19

The COVID-19 pandemic brought new legal issues related to harassment and discrimination to the forefront. These issues will persist as employers deal with the lasting effects on the workplace, especially in the health care setting. Employers should find comfort in knowing that the measures described above remain good practice in dealing with the unique issues presented by the pandemic.

While the nationwide mask mandate was lifted in 2022,

several states continue to require masks in health care settings. Similarly, many practices ask that their employees be vaccinated for COVID-19. While your practice may feel it is best to require masks and/or vaccines in the office, there have been cases where patients and employees do not agree with such requirements for different reasons. When the individual's reason for refusal to comply relates to their status as a member of a protected class, claims of discrimination may surface. In any such instance involving an employee, the practice should engage in the interactive process detailed above to determine whether a reasonable accommodation may exist that permits the employee to continue working, while preserving the integrity of the employee's reason for refusing to comply.

Regarding patients, the practice need not always engage in an interactive process. However, it may be in the practice's best interest to work with the patient to find an accommodation that allows the patient to be seen, while accommodating their refusal to comply, within reason.

It's important to note that COVID-19 has not changed the legal obligations of employers to prevent and address harassment and discrimination in the workplace. Rather, it has brought about a new wave of issues that have increased discrimination claims in the health care setting. Many of these new issues are due to controversial political views, which do not fall under a protected class, but they can still lead to complaints. That is, even if the initial complaint may appear to be based on something unprotected (such as political views), it could still be a sign of an underlying issue involving the individual's inclusion in a protected class. Therefore, it is paramount that each complaint is thoroughly investigated and addressed.

GET AHEAD OF THE ISSUE

To avoid claims of harassment and discrimination in your practice, you must maintain current policies and procedures, offer annual employee training and, when necessary, consult an attorney to remain apprised of applicable laws and measures available to create a safe workplace for employees and patients alike. ■

1. American Medical Association. AMA principles of medical ethics. Revised June 2001. Accessed April 21, 2023. [code-medical-ethics.ama-assn.org/principles](https://www.code-medical-ethics.ama-assn.org/principles)

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