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U.S. Equal Employment Opportunity Commission Updates Workplace Harassment Enforcement Guidelines

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In this article, the authors review an update released recently by the U.S. Equal Employment Opportunity Commission to its enforcement guidance on workplace harassment.

The U.S. Equal Employment Opportunity Commission (EEOC) has released an update to its enforcement guidance on workplace harassment.¹ The update comes almost 25 years after the EEOC last published guidance on this topic and replaces the prior versions. Workplace harassment claims have become a serious matter for employers, particularly in the last several years. According to EEOC statistics, between 2016 and 2023, more than a third of all discrimination charges filed with the EEOC included an allegation of harassment based on race, sex, disability, or another federally protected characteristic. In addition, approximately 35% of the 143 lawsuits the EEOC filed in 2023 included an allegation of harassment.

The EEOC's new guidance outlines the standards governing workplace harassment claims and defenses under the federal equal employment opportunity statutes, which prohibit work-related harassment based on race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, genetic information, and age (40 or over).

The EEOC designed the guidance to serve as "a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts

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deciding harassment issues.” Although the guidance does not have the force of law and is not legally binding, it is nonetheless notable because it signals how the EEOC will analyze harassment claims, which courts may turn to for guidance.

EXAMPLES OF HARASSMENT

The guidance provides nearly 70 examples of what can constitute harassment in the workplace, including:

- Saying or writing an ethnic, racial, or sex-based slur;
- Forwarding an offensive or derogatory “joke” email;
- Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
- Threatening or intimidating a person because of their religious beliefs or lack of religious beliefs;
- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person’s disability;
- Mocking a person’s accent;
- Making fun of a person’s religious garments, jewelry, or displays;
- Asking intrusive questions about a person’s sexual orientation, gender identity, gender transition, or intimate body parts;
- Groping, touching, or otherwise physically assaulting a person;
- Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim; and
- Threatening a person’s job or offering preferential treatment in exchange for sexual favors.

In addition, the guidance addresses the growth of virtual workplace environments and the increasing impact of digital technology, electronic

communications, and social media on workplace harassment issues. The EEOC stresses that employees can still be subject to harassing conduct while working from home.

KEY POINTS FOR EMPLOYERS

There are several key takeaways for employers under the new guidance:

- *Additional Protections for LGBTQ+ Workers.* The new guidance clarifies that harassment of transgender employees can be considered a Title VII violation. The EEOC maintains that the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County* (holding that sexual orientation discrimination and gender identity/transgender discrimination are forms of "sex" discrimination under Title VII) provides a basis for asserting harassment claims based on gender identity. According to the EEOC, examples of harassment could include the denial of access to a bathroom consistent with the individual's gender identity, the intentional and repeated misgendering of an individual, or the harassment of an individual because they do not present in a manner stereotypically associated with their gender.
- *Expanded Pregnancy Considerations.* The EEOC further broadens the definition of sexual harassment to include pregnancy, childbirth, and other "related medical conditions." According to the EEOC, employees are now also protected against discrimination (including harassment) involving decisions related to pregnancy, such as lactation, contraceptive choices, and the decision to have, or not have, an abortion.
- *Religious Expression Clarification.* Employers are still required to accommodate employees' sincerely held religious beliefs pursuant to Title VII, but they now also have a duty to protect workers against religiously motivated harassment. According to the EEOC, employers should engage in an interactive process with an employee who is requesting a religious accommodation, but they are not required to accommodate religious expression that creates or "reasonably threatens to create" a hostile work environment. "If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile," the guidance says. "If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile." In

such a case, the employer should take appropriate corrective action.

- *Virtual Harassment Concerns.* Given the increase in remote work and online communication, the guidance emphasizes that harassment can occur virtually. As with other forms of harassment, if conduct occurs in the virtual environment and is communicated by email, instant message, videoconference, or other online technology, it can still violate Title VII.
- *Harassment Policy Updates.* The new guidance includes resources to assist employers in reviewing and updating their harassment policies to best prevent and address workplace harassment moving forward. The guidance also provides useful key points to guide employers in improving the effectiveness of their anti-harassment policies, complaint and investigation processes, and trainings.

STEPS TO TAKE

While legal challenges may impact the new guidance, it is already in effect and employers should be prepared to quickly adapt and take steps to ensure that they are compliant with the relevant provisions of the guidance, including:

- At a minimum, review the EEOC's summary of the guidance.
- Review relevant harassment policies to ensure compliance with the new guidance and be sure to include a zero-tolerance policy.
- Provide training on the new guidance for all employees and include additional training for management on how to spot and eliminate harassment.
- Properly investigate all harassment complaints and take appropriate corrective action when it is warranted. We anticipate an increase in litigation given the further broadening of the EEOC guidance.

NOTE

1. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

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