

Equal Employment Opportunity Commission Proposes Updated Guidance on Workplace Harassment, 10-26-2023

The United States Equal Employment Opportunity Commission (EEOC) recently released its long-awaited draft enforcement guidance on harassment in the workplace. If finalized, it would represent the agency's first update on harassment in more than two decades.

According to the EEOC, harassment in the workplace remains a serious problem. Between the beginning of FY 2018 and end of FY 2022, more than one-third of the charges of employment discrimination received by the agency included an allegation of harassment based on race, disability, or another protected characteristic. Subsequently, this proposed guidance presents a "legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity ("EEO") statutes enforced by the Commission," according to the EEOC. Harassment is covered by EEO laws if it is based on an employee's legally protected characteristics such as race and religion.

If finalized, the guidance would supersede earlier EEOC guidance including the last guidance issued and voted on by the EEOC on harassment, "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors," in 1999. In 2017, the EEOC released proposed updated guidance on workplace harassment for public comment, but it was never finalized. This recently released 144-page draft reflects notable changes in law, including the Supreme Court's decision in *Bostock v. Clayton County*, where the court held that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964; the #MeToo movement; and emerging issues, such as virtual or online harassment. Specifically, it "provides numerous updated examples to reflect a wide range of scenarios, incorporates updates throughout on current case law on workplace harassment, and addresses the proliferation of digital technology and how social media postings and other online content can contribute to a hostile work environment," the agency says. The public has until November 1 to submit comments on the guidance.

Some Key Takeaways

- The proposed guidance makes clear that sex-based harassment includes harassment based on sexual orientation and gender identity. Examples include harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity; or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.
- As with conduct within a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. That can include sexist comments made during a video meeting; racist imagery visible in an employee's workspace while the employee participates in a video meeting; or sexual comments made during a video meeting about a bed being near the employee in the video image.
- Conduct that does not occur in a work-related context can affect the terms and conditions of employment if it impacts the workplace. This includes electronic communications using private phones, computers, or social media accounts. For instance, if derogatory remarks about an employee's ethnicity are posted on a coworker's personal social media page and the subject of those remarks learns about it directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment.
- In some circumstances, an employee may be able to file an EEOC charge and a lawsuit based on harassing conduct that is not specifically directed at them if it contributes to a hostile work environment.
- The proposed guidance provides an overview of the liability standards that apply in harassment cases with the applicable standard of liability depending upon the level and kind of authority that the employer afforded the harasser to act on its behalf.
- The guidance also lists features an anti-harassment policy should have at a minimum to be effective including defining what conduct is prohibited; being comprehensible to workers including those the employer has reason to believe might have barriers to comprehension; and offering multiple avenues for reporting harassment.
- It also outlines the features a complaint process should have at a minimum to be effective including a process that provides for prompt and effective investigations and corrective action and one that provides adequate confidentiality and anti-retaliation protections.
- Additionally, it lists features for training to be effective including explaining the employer's anti-harassment policy and complaint process; describing and providing examples of prohibited harassment, as well as conduct that, if left unchecked, might rise to the

level of prohibited harassment; and providing information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited.

If finalized, the guidance would not be legally binding, but rather is intended "to provide clarity to the public regarding existing requirements under the law or Commission policies," according to the EEOC. However, it does shed light on how the EEOC will be analyzing charges in the future and seeking to enforce what it believes are Title VII violations. Therefore, employers would be wise to familiarize themselves with the guidance and EEOC's stance on anti-harassment and be prepared to review and update their anti-harassment policies, as well as their complaint process and training protocol.

Kaufman Dolowich Can Help

If you have questions about the recent guidance or need assistance reviewing and updating your anti-harassment policies and procedures, Kaufman Dolowich's team of labor and employment attorneys can assist.