

LABOR RELATIONS

New Proposed EEOC Harassment Guidance

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On Oct. 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) issued its long-awaited Proposed Enforcement Guidance on Harassment in the Workplace (Proposed Guidance), which includes comprehensive guidance on different types of harassment and associated liabilities. This Proposed Guidance is the EEOC's first published proposed guidance on workplace harassment since 1999. It is open for public comment until Nov. 1, 2023.

The Proposed Guidance consolidates and, once final, will supersede all prior EEOC guidance, including Compliance Manual Section 615: Harassment (1987); Policy Guidance on Current Issues of Sexual Harassment (1990); Policy Guidance on Employer Liability under Title VII for Sexual Favoritism (1990); Enforcement Guidance on *Harris v. Forklift Systems* (1994); and Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

As with the prior guidance, the Proposed Guidance outlines the legal standards and employer liability for claims of harassment under the equal employment opportunity (EEO) statutes enforced by the EEOC, including Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.



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In addition to expanding and further clarifying existing guidance related to the EEO statutes, including by adding several additional examples of harassment, the Proposed Guidance also addresses key updates in light of recent developments, including the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the #MeToo movement and the widespread transition to remote work environments.

The Proposed Guidance is divided into three sections that track the three components of a harassment claim: (1) covered bases and causation; (2) harassment resulting in discrimination with respect to a term, condition or privilege of employment; and (3) employer liability.

The Proposed Guidance also specifically addresses systemic harassment in the workplace.

Covered Bases and Causation

Consistent with prior guidance, the Proposed Guidance makes clear that harassment is unlawful under the EEO statutes when based on an employee's legally protected characteristics. The

Proposed Guidance identifies the previously recognized legally protected characteristics (i.e., race and color, national origin, religion, sex, age, disability and genetic information) and explains that a claimant must show that the harassment occurred because of a legally protected characteristic.

The Proposed Guidance also incorporates two additional legally protected characteristics, as types of sex-based harassment, including harassment based on sexual orientation and gender identity and harassment based on pregnancy, childbirth or related medical conditions.

The EEOC addresses harassment based on sexual orientation and gender identity in light of the Supreme Court's 2020 decision in *Bostock*, in which the court held that Title VII's protections extend to discrimination based on a person's gender or sexual orientation. Specifically, the Proposed Guidance addresses LGBTQ+ employees' rights in the workplace and provides that sex discrimination can be based on sexual orientation and gender identity.

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The Proposed Guidance provides that using gender identity epithets, misgendering an employee or denying access to facilities consistent with gender identity can constitute harassment. Sex-based discrimination can also extend to harassment based on the fact that an individual does not present in a manner stereotypically associated with a particular gender, among other things.

The Proposed Guidance also incorporates examples of harassment based on an individual's LGBTQ+ status. Notably, the New York State Human Rights Law also prohibits harassment on the basis of

sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

The EEOC addressed many of these same protections for LGBTQ+ employees in a prior technical assistance guidance struck down by a federal court.

In 2021, after *Bostock* extended federal anti-discrimination laws to include sexual orientation and gender identity as protected characteristics, the EEOC issued a technical assistance document clarifying employers' legal obligations to LGBTQ+ employees. The technical assistance document was challenged in a letter to President Joe Biden from 21 state attorneys general, a federal lawsuit by 20 states in the Eastern District of Tennessee and a federal lawsuit by the state of Texas in the Northern District of Texas.

In October 2022, the federal district court in Texas vacated the document on a nationwide basis, finding that the EEOC misread the Supreme Court's opinion—which banned workplace bias due to an employee's homosexual or transgender status—by extending protection for correlated conduct, including access to facilities, dress codes and pronoun usage.

Additionally, the court found that the EEOC guidance created substantive, legislative rules that violated the Administrative Procedures Act and Title VII by not following proper rulemaking procedures.

The Proposed Guidance incorporates much of the substance of the former technical assistance document with respect to LGBTQ+ protections, and is now published as a proposed rule open for public comment in accordance with applicable rulemaking procedures. Notably, the Proposed Guidance states that "*Bostock* itself concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision logically extends to claims of harassment."

In the Proposed Guidance, the EEOC also expands the definition of sex-based harassment to include harassment based on pregnancy, childbirth or related medical conditions, such as lacta-

tion. Harassment based on reproductive decisions, including decisions about contraception or abortion, is also prohibited.

Harassment Resulting In Discrimination With Respect to a Term, Condition Or Privilege of Employment

The Proposed Guidance also outlines the legal standards governing different types of harassment, including (1) harassment that results in an explicit change to the terms, conditions or privileges of employment and (2) harassment that creates a hostile work environment. Notably, in recognition of the change in work environments due to technology, the Proposed Guidance clarifies that conduct within virtual work environments can contribute to a hostile work environment.

Out-of-work conduct that has consequences in the workplace can be actionable, including any communications through phones, computers or social media accounts. As an example, the Proposed Guidance mentions “sexist comments made during a video meeting, racist imagery that is 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 an employee in the video image.”

Employer Liability

The Proposed Guidance also includes additional information on the standards governing employer liability, which depend on whether there is an explicit change to a term, condition or privilege of employment or the claimant makes allegations of a hostile work environment. As to the latter, the standards further differ depending on the role of the harasser (i.e., proxy or alter ego of the employer, supervisor or non-supervisory employee, coworker or non-employee) and the nature of the allegations.

Because an employer’s liability in certain circumstances may depend on the employer’s efforts to prevent and correct harassment, the Proposed Guidance also addresses what makes an anti-harassment policy, complaint procedure and training effective. It also discusses standards for conducting a prompt and adequate investigation and taking appropriate action based on the findings of the investigation.

Looking Ahead

For the EEOC, preventing harassment in the workplace remains a priority. In its press release announcing the new Proposed Guidance, the EEOC emphasized the importance of this objective, noting that more than one-third of the charges received by the EEOC between fiscal years 2016 and 2022 involved harassment. Employers should expect this trend to continue.

While the Proposed Guidance—even when final—does not have the force and effect of law, it provides a resource to the EEOC and other agencies that enforce harassment claims, employers and employees addressing these issues and courts adjudicating harassment cases.

Due to the scope of the Proposed Guidance and its replacement of multiple previous EEOC sources on harassment, employers should review and be prepared to update their harassment policies, as applicable, in anticipation of the Proposed Guidance becoming final. In particular, employers should ensure that their anti-harassment policies and trainings address harassment based on sexual orientation, gender identity and pregnancy-related decisions, and the potential for harassment in virtual work environments.

Employers should also ensure that their anti-harassment policies and trainings are up-to-date with other applicable state and local law requirements.