

Preparing for EEOC's Proposed Guidance on Harassment in the Workplace

On October 2, 2023, the Equal Employment Opportunity Commission's¹ proposed guidance regarding harassment in the workplace ("Proposed Guidance") was published in the Federal Register. The EEOC is now considering the public's input.

The guidance addresses three key areas of the law: (1) expansion of protected categories under Title VII, including harassment based on pregnancy and related medical conditions, (2) virtual workplace harassment, and (3) harassment not directed at the Complainant. We discuss each of these in more detail below.

Summary of Proposed Guidance

1. Expansion of Protected Categories Entitled to

Protection from Harassment: The guidance clarifies that sex-based discrimination includes (1) harassment as it pertains to pregnancy, childbirth, and other "related medical conditions" such as lactation, decisions about contraception, abortion, or reproductive decisions, and (2) harassment based on sexual orientation and gender identity, which includes physical assault, misgendering (i.e., "intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity"), and denying access to a bathroom based on an individual's gender identity.

The Proposed Guidance also states that harassment "based on traits or characteristics linked to an individual's race," such as their "name, cultural dress, accent or manner of speech, and physical characteristics, including grooming practices [such as] harassment based on hair textures and hairstyles commonly associated with specific racial groups," would violate Title VII because it constitutes harassment based on race.

2. Virtual Workplace Harassment & Conduct Occurring Outside the Workplace:

The Proposed Guidance reaffirms that harassment based on an employee's personal activity outside of the workplace, conduct occurring off-site, in virtual work environments, or on social media, including electronic communications using private phones or computers, can contribute to a hostile work environment. Given the Proposed Guidance's emphasis on virtual harassment, anti-harassment trainings should address remote work and virtual harassment and inform employees that communications on video meetings, work chats, and text messages can constitute harassment and create a hostile work environment.

3. Harassment Not Directed at Complainant:

Under the Proposed Guidance, harassing conduct that is not directed at the specific employee who files a complaint can still constitute a hostile work environment. For example, the use of gender-based epithets "may contribute to a hostile work environment for women even if the epithets are not directed at them" but are made in their presence or they become aware of such comments.

¹ The EEOC is responsible for enforcing federal laws, including Title VII which prohibits discrimination on the basis of race, color, national origin, religion, age, disability, genetic information, and sex.

Practical Advice for Employers

While the EEOC's Proposed Guidance is not final, employers should be prepared to review and revise their harassment policies, procedures, and training materials to align with the EEOC's Proposed Guidance.

Specifically, the Proposed Guidance clarifies that an effective anti-harassment policy should: (1) define prohibited conduct; (2) be comprehensible to workers, including those who might have barriers to comprehension, such as limited English proficiency; (3) require supervisors to report harassment; (4) clearly identify "accessible points of contact" for reporting purposes; (5) offer multiple avenues for reporting harassment; and (6) explain the complaint process, including the process's anti-retaliation and confidentiality protections. The policy must also be widely disseminated.

The Proposed Guidance also states that effective training should: (1) explain the employer's anti-harassment policy and complaint process; (2) describe and provide examples of prohibited harassment and conduct that might rise to the level of prohibited harassment; (3) provide information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited; (4) provide supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment, and clear instructions for addressing and reporting harassment; (5) be tailored to the workplace and workforce; (6) be provided on a regular basis to all employees; and (7) be provided in a clear, easy-to-understand style and format.

Even though the Proposed Guidance does not have the same force and effect of law as do formal regulations or statutes, such guidance will be influential during EEOC investigations and litigation, i.e., employers can expect agency investigators to rely on the guidance. The Proposed Guidance is also useful for employers to understand how the EEOC interprets and applies anti-harassment principles.

We will continue to monitor the status of this Proposed Guidance and will keep you apprised of any subsequent developments relating to the EEOC's guidance document.

For questions relating to this client alert, please contact:



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