LEGAL MINUTE

EEOC's Proposed New Guidance on Harassment in the Workplace

The EEOC released its revised "Proposed Enforcement Guidance on Harassment in the Workplace" in September. If finalized, the guidance would be the EEOC's first update on harassment since 1999. The new proposal reflects changes in the law, including the U.S. Supreme Court's decision in *Bostock v. Clayton County*, where the decision held Title VII of the Civil Rights Act's prohibition on sex discrimination includes discrimination based on gender orientation and sexual identity. The guidance also addresses issues arising from the #MeToo movement and changes in technology that have affected the workplace, such as virtual and online harassment. The EEOC notes that harassment remains a serious workplace problem, with harassment claims appearing in more than one-third of the charges filed with the EEOC between the fiscal years of 2018 and 2022.

While the guidance does not carry the weight of statutes or regulations, it is a useful resource for employers and provides perspective on how the EEOC interprets and applies anti-harassment principles. Some key provisions from the proposed guidance include:

- The EEOC's proposed guidance addresses Title VII's prohibition of sex-based harassment and discrimination, which specifically includes harassment based on sexual orientation and gender identity, including misgendering a transgender employee through "intentional, 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 that is consistent with the individual's gender identity". Comments that may not be obviously discriminatory ("you people") may be unlawful harassment based on the context in which spoken. It also prohibits harassment based on a woman's reproductive decisions, including decisions about contraception or abortion.
- Additionally, it provides guidance on age-based harassment, which could include "stereotypes about older workers even if not motivated by animus such as pressuring an older employee to transfer to a job that is less technology-focused because of a perception that older workers are not well-suited to such work or encouraging older workers to retire". The guidance also includes in the definition of disability harassment, "harassment based on traits or characteristics linked to an individual's disability, such as how an individual speaks, looks or moves".
- With the increase in virtual and remote work in recent years, the proposed guidance provides insight into the types of virtual contact that can constitute actionable harassment under federal EEO statutes. It specifies that electronic communication using private phones, computers or social media accounts--even if it does not occur in a work-related context--can affect the terms and conditions of employment. It also provides that conduct occurring within the work environment, if conveyed using work-related communication systems, accounts or platforms, such as the employer's email system, instant message system, etc. can contribute to a hostile work environment. Such conduct can include "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".

It is unclear when the final guidance will be issued, but it does provide a roadmap for employers to begin reviewing their anti-harassment policies, complaint procedure and approach to employee training. For more information on what your anti-harassment policies should include and how your complaint process and training can be effective, reach out to your employment law attorney today.

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