

EEOC Issues Long-Awaited Guidance on Harassment in the Modern Workplace

Article By:

Melanie M. Hamilton

On September 29, 2023, the [U.S. Equal Employment Opportunity Commission](#) issued long-awaited enforcement guidance on workplace harassment. The “[Proposed Enforcement Guidance on Harassment in the Workplace](#),” published in the Federal Register on October 2, 2023, advises employers on handling new workplace realities, including LGBTQ rights, online misconduct, abortion, and a number of different types of harassment.

This new guidance is the first voted document the EEOC has issued on harassment since its “Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors” in 1999.

The EEOC’s new guidance responds to the changing workplace landscape and salient issues confronting employers as a result of the #MeToo movement, the COVID-19 pandemic, the overturning of *Roe v. Wade*, and the U.S. Supreme Court’s decision in *Bostock v. Clayton County* that sex discrimination includes bias on the basis of gender identity and sexual orientation.

LGBTQ Harassment

Consistent with its long-standing position amplified by the *Bostock v. Clayton County* decision, the EEOC guidance emphasizes that sex discrimination includes sexual orientation and gender identity.

For example, the guidance discusses misgendering as a type of actionable harassment, stating that refusing to use a name or pronoun “consistent with the individual’s gender identity” may constitute harassment. According to the EEOC, another potential form of sex-based harassment is refusing to allow an employee to use a bathroom that matches their gender identity.

Further, religious accommodations for employees with sincerely held religious beliefs do not include allowing an employee with such accommodations to create a hostile work environment for an LGBTQ co-worker. In other words, the obligation to accommodate an employee’s religious beliefs does not extend to religious beliefs that infringe on another employee’s protected category.

Online Harassment

The EEOC guidance also addresses remote work, teleconferencing, and social media issues that have grown out of the way employees work coming out of the COVID-19 pandemic. The guidance emphasizes that conduct within a virtual work environment can contribute to a hostile work environment.

Going a step further, the EEOC also notes that employers may be liable for harassment occurring online, even if only over employees’ private social media accounts. If put on notice of the conduct, the employer may need to take remedial steps or disciplinary action against the offending employee for their non-workplace and non-worktime conduct.

Harassment Based on Reproductive Decision-Making

The draft guidance notes that sex-based harassment includes mistreatment based on an employee's pregnancy and reproductive decisions, such as decisions about contraception or abortion. This is consistent with the EEOC's longtime stance that terminating a pregnancy constitutes a pregnancy-related condition protected under the law.

The EEOC's proposed guidance, which remains open for public comment until November 1, 2023, covers a number of other topics. Given the comprehensive guidance and constantly changing landscape of the modern workplace, employers are strongly encouraged to seek advice of counsel to ensure compliant policies and practices. Employers' harassment policies in particular should be carefully reviewed in light of this guidance, including policies on religion, race, and national origin, in addition to sexual harassment policies.

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