

EEOC Releases Proposed Workplace Harassment Guidance – 25 Years in the Making

Update

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On September 29, 2023, the Equal Employment Opportunity Commission (EEOC) released its long-awaited [proposed guidance](#) on workplace harassment. The last EEOC guidance on workplace harassment was issued in 1999. The public will have until November 1, 2023, to comment on the proposed guidance.

The proposed guidance provides a broad overview of the legal standards for harassment and employer liability under equal employment opportunity (EEO) statutes. In addition, the proposed guidance highlights and clarifies a number of workplace harassment issues, many of which were the subject of recent cases or are in response to current workplace trends.

Notably, the proposed guidance clarifies that sex-based harassment includes harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion. It also provides protections for LGBTQ+ workers, noting that sex-based harassment, like sex-based discrimination, includes harassment based on sexual orientation and gender identity. For example, the proposed guidance states that intentional or repeated use of an inconsistent pronoun with an individual's gender identity or denying an individual access to a bathroom or other sex-segregated facility consistent with the individual's gender identity qualifies as sex-based harassment.

The proposed guidance also addresses how virtual work environments can contribute to a hostile work environment. For instance, the guidance states that sexist comments made during a video meeting, racist imagery that is visible in an employee's workspace, or comments made during a video meeting about a bed being near an employee in the video image can contribute to a hostile work environment. The guidance not only addresses the virtual workplace, but also social media, noting that harassing communications or posts on or by an employee's private social media account may constitute harassment if they

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impact the workplace (e.g., the post or communication is discussed by co-workers in the workplace).

Further, the proposed guidance addresses the balance of anti-harassment and accommodation obligations by employers, specifically, accommodation of religious expression. The proposed guidance clarifies that while Title VII of the Civil Rights Act of 1964 requires employers to accommodate employees' sincerely held religious beliefs, practices and observances, in the absence of undue hardship, employers also have a duty to protect workers from religiously motivated harassment – meaning employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment.

In addition to the topics discussed above, the proposed guidance provides helpful direction on some of the more established aspects of workplace harassment and employer liability, such as an employer's affirmative defense to liability (known as the *Faragher-Ellerth* defense). In particular, the proposed guidance offers a detailed overview of the characteristics of the types of anti-harassment policies, complaint procedures, and training an employer should implement. The proposed guidance reminds employers, however, that the mere existence of an adequate anti-harassment policy, complaint procedure and/or training to prevent harassment is not enough – the employer must also exercise reasonable care to correct the harassing behavior.

Employers should closely review the proposed guidance. While the guidance will not be law even when finalized, the guidance provides an outline for how the EEOC will examine and investigate charges of harassment. Upon publication of the finalized guidance, employers should confirm their anti-harassment policies, complaint procedures and training are updated to reflect the revised standards.