

THOUGHT LEADERSHIP

LEGAL UPDATES

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Service

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EEOC Finalizes Workplace Harassment Guidance

On April 29, 2024, the Equal Employment Opportunity Commission (EEOC) issued new enforcement guidance on workplace harassment, effective immediately. Guidance on this topic had not been updated since 1999. The EEOC received nearly 40,000 comments following its publication of proposed guidance on October 2, 2023 until the public comment period ended on November 1, 2023.

The final guidance clarifies recent developments in the law and includes more than 70 hypothetical examples of potential unlawful harassment reflecting the quarter century of legal and social changes since the agency's last official guidance on the topic.

According to the EEOC, "Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." Harassing conduct is only covered by federal EEO laws if it is based on an employee's legally protected characteristic(s).

Highlights from the new guidance include:

Intraclass harassment

The EEOC notes that harassment based on an employee's protected characteristic is covered even if the harasser is a member of the same protected class. This is termed "intraclass harassment." For instance, an organization could be liable for the actions of a supervisor who allegedly harasses an employee based on national origin who is of the same national origin as the supervisor.

Intersectional harassment

The EEOC calls attention to the possibility that harassment may be based on more than one protected characteristic and more than one statute may apply. Intersectional harassment is “harassment based on the intersection of two or more protected characteristics, which may, in fact, compound the harm.” For example, a woman over the age of 40 may be harassed for being a woman, being over 40, and based on stereotypes of being an older woman. In this case, both Title VII (which covers sex discrimination) and the ADEA (which covers age discrimination) could apply.

Color

The final guidance acknowledges colorism. It states that while discrimination based on color is “sometimes related to harassment based on race or national origin, color-based harassment due to an individual’s pigmentation, complexion, or skin shade or tone is independently covered by Title VII.” The guidance provides an example of colorism harassment where a supervisor harasses Black employees with “darker complexions” and not Black employees with “lighter skin tones,” even though they are all of the same race or national origin.

Pregnancy, childbirth, or related medical conditions

Reflective of the Pregnant Workers Fairness Act (PWFA), the EEOC notes that sex-based harassment claims may include harassment based on pregnancy, childbirth, or related medical conditions. For example, harassment based on a woman’s reproductive decisions may be actionable and may be demonstrated by employees making negative comments about another employee’s choice to use contraception or seek access to an abortion.

Harassment based on pregnancy related accommodations may also be actionable. The final guidance includes an example where employees make negative comments about a pregnant employee who is allowed to “telework up to three days per week and utilize flexible scheduling” as an accommodation for “pregnancy-related morning sickness.”

Sexual orientation and gender identity

The final guidance provides that “outing” (disclosing an individual’s sexual orientation or gender identity without the individual’s permission) is an example of harassment based on sexual orientation or gender identity.

Additionally, the EEOC includes the following examples of harassment related to sexual orientation and gender identity: misgendering (the intentional and repeated used of a name or pronoun inconsistent with an individual’s gender identity), harassment because an individual does not present in a manner that would stereotypically be associated with that person’s gender, and the denial of access to a bathroom or other sex-segregated facility consistent with an individual’s gender identity.

Systemic harassment

The guidance defines systemic harassment as subjecting multiple individuals to a similar form of discrimination. The EEOC has stated it will review systemic harassment as it relates to potential pattern or practice claims. The EEOC's Systemic Task Forces defines these cases as "pattern or practice, policy, and/or class cases where the discrimination has a broad impact on an industry, profession, company, or geographic location." The guidance is also calling on employers to adopt a systemic remedy to such claims, rather than addressing the conduct of a particular individual.

In addition to the new guidance, the EEOC published a "Summary of Key Provisions" document and a fact sheet for small businesses with more information for employers.

Contact us

If you have questions about the final "Enforcement Guidance on Harassment in the Workplace" or would like assistance to ensure compliance with existing employment law and rules, contact Jenna Brofsky, Delia Berrigan, or your Husch Blackwell attorney.