



New EEOC Workplace Harassment Guidance on LGBTQ+ Workers and More Takes Effect Immediately: 5 Key Takeaways for Employers

Insights

4.30.24

Employers may need to update their harassment-prevention policies, procedures, and trainings now that the federal government released long-anticipated guidance on the topic. The Equal Employment Opportunity Commission's enforcement guidance on harassment in the workplace was updated yesterday for the first time in 30 years to adapt existing standards to the modern workplace. Specifically, the agency wants to provide clarity in light of evolving protections for LGBTQ+ employees and the recent uptick in sexual harassment and racial harassment cases. While not governing law, the guidance serves as a useful tool for employers and will surely be referenced by EEOC staff, employment attorneys, and courts. What are the five biggest takeaways for employers, and what next steps should you consider taking now?

How We Got Here

Workplace harassment claims have become a serious matter for employers, particularly in the last several years. The EEOC first proposed new guidance on workplace harassment in 2017 amidst the #MeToo movement, but the agency never finalized it due to political infighting. This [new guidance](#), released yesterday, is the first guidance on harassment since the 1990s.

Top 5 Takeaways for Employers

- Broad Protections for LGBTQ+ Workers:** The new guidance makes clear that harassment of LGBTQ+ workers – particularly transgender employees – can be considered a Title VII violation. The EEOC concluded that this was a natural extension of the Supreme Court's groundbreaking 2020 decision in *Bostock v. Clayton County*, holding that sexual-orientation discrimination and gender identity/transgender discrimination are forms of "sex" discrimination under Title VII. According to the EEOC's guidance, examples of harassment could include the denial of access to a bathroom consistent with the individual's gender identity, the intentional and repeated misgendering of an individual, or the harassment of an individual because they do not present in a manner stereotypically associated with their gender.
- Workplace Anti-Bias Laws Cover Pregnancy-Related Decisions:** The definition of sexual harassment has been broadened to include pregnancy, childbirth, and other "related medical conditions." According to the EEOC, employees are now also protected against discrimination

(including harassment) involving decisions related to pregnancy, such as lactation, contraceptive choices, and the decision to have, or not to have, an abortion. This broad coverage should be read in tandem with the equally broad protections the agency recently applied to pregnancy accommodations.

3. **Clarification on Protection for Religious Expression:** While employers are required to accommodate employees' sincerely held religious beliefs pursuant to Title VII, employers also have a duty to protect workers against religiously motivated harassment. Covered employers should engage in the interactive process with an employee who is requesting a religious accommodation. However, according to the EEOC, employers are not required to accommodate religious expression that creates or "reasonably threatens to create" a hostile work environment. "If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile," the guidance says. "If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile." In this case, the employer can and should take appropriate corrective action.
4. **Harassment Can Occur Virtually:** In the aftermath of COVID-19 and the related increase in remote work and online communication, the guidance notes that harassment can occur virtually. If conduct occurs in the virtual environment and is communicated by email, instant message, videoconference, or other online technology, it can still violate Title VII. The guidance confirms the EEOC's position that sexist, racist, or otherwise discriminatory speech communicated via these platforms may be considered harassment.
5. **Guidance for Employers to Update Their Harassment Policies:** The new guidance includes resources to assist employers in reviewing and updating their harassment policies to best prevent and address workplace harassment moving forward. The guidance also provides useful key points to guide employers in improving the effectiveness of their anti-harassment policies, complaint and investigation processes, and trainings.

What's Next? Legal Challenges Expected

After the EEOC initially proposed the updates back in September 2023, a coalition of 20 states said they would take legal action if the agency finalized certain aspects of the guidance. For instance, the group said the EEOC exceeded its authority by interpreting *Bostock's* employment protections based on gender-identity too broadly. In response, the EEOC said, "The proposed guidance did not attempt to – nor does the final guidance attempt to — impose new legal obligations on employers with respect to any aspect of workplace harassment law, including gender identity discrimination. Nor does the guidance exceed the scope of the Supreme Court's decision in *Bostock*."

Based on the EEOC's response and yesterday's finalized guidance, we expect the coalition to prepare a legal challenge for the courts to have the final say on the fate of this new guidance.

What Should Employers Do?

While legal challenges may impact the EEOC's enforcement guidance, the update took effect immediately. You should thus review your policies in light of the changes. Consider taking the following steps to stay compliant and promote a positive workplace culture:

- **Review** the [Enforcement Guidance on Harassment in the Workplace](#).
- **Make sure your policies are compliant with modern standards.** The EEOC's updated guidance highlights certain best practices for employers. For example, you should have a policy that clearly indicates that you have "zero tolerance" for harassment. You should also have a reporting policy that encourages employees to immediately report their concerns about potential harassment. Once policies are in place, you should ensure they are consistently enforced.
- **Train your managers to address issues and avoid common mistakes.** The guidance is a reminder to ensure your supervisors are trained properly to identify and prevent workplace harassment. While some states (such as California, Connecticut, Delaware, Illinois, Maine, New York, and Washington) require sexual harassment training to be completed by employees, it is recommended that all employers provide this type of training regularly, regardless of what their state may or may not require. It's also a good idea to review and update the training material every year.
- **Make sure all complaints are properly investigated and that appropriate corrective action is taken when improper conduct is found.** It's more important than ever for employers to follow clear processes with properly trained professionals in investigating and acting upon complaints or other concerns of potential harassment.

Conclusion

These can be challenging times for employers, but this is also a great opportunity to propel your organization further. You can take this opportunity to reexamine your organizational culture can ensure you are providing a safe and professional working environment for everyone in your service. If you have questions about the guidance, feel free to reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Government Relations Practice Group](#). We will continue to provide tips, guidance, and updates on workplace law topics, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox.

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