

EEOC PROPOSES UPDATES TO WORKPLACE HARASSMENT GUIDANCE: TOP 5 TAKEAWAYS AND NEXT STEPS FOR EMPLOYERS

Insights
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The EEOC recently published its long-awaited proposal to update the agency's Enforcement Guidance on Harassment in the Workplace, the first update to this crucial document in over 30 years. The proposed guidance, released on September 29, is intended to provide clarity regarding existing legal requirements in light of the recent increase in sexual and racial harassment cases identified over the past few years, and to adapt existing standards to the modern workplace. While this proposed guidance would not be governing law if it becomes official, it would still be frequently referenced by EEOC staff, employment attorneys, and courts – and thus would be an extremely useful guidance for employers as well. What are the five biggest takeaways for employers, and what next steps should you consider?

Quick Background

In 1986, the U.S. Supreme Court issued [a landmark decision](#) which held that workplace harassment can constitute unlawful discrimination under Title VII of the 1964 Civil Rights Act. Since then, and particularly over the past few years, claims of harassment in the workplace have become a serious matter for employers.

The EEOC first released proposed guidance on workplace harassment in 2017 amidst the #MeToo movement, but the proposal was never finalized. [This new proposed guidance](#) would be the first guidance on harassment in over 30 years if adopted.

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In a [press release](#) accompanying publication, EEOC Chair Charlotte Burrows stated, “preventing and addressing harassment in America’s workplaces has long been a key priority for the EEOC, and this guidance will provide clarity on new developments in the law and build on the Commission’s previous work.”

Top 5 Takeaways for Employers

- 1. Broad Protections for LGBTQ+ Workers:** The new guidance includes provisions against harassment of LGBTQ+ workers, applying the Supreme Court’s 2020 decision in [Bostock v. Clayton County](#) to claims of harassment based on sexual orientation or gender identity. According to the 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.
- 2. Anti-Bias Laws Cover Employees’ Pregnancy-Related Decisions:** The definition of sexual harassment has been broadened to include pregnancy, childbirth, and other “related medical conditions.” Employees would now be protected against discrimination surrounding decisions related to pregnancy, including lactation, contraceptive choices, and the decision to have an abortion, among others.
- 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. According to the EEOC, employers are not required to accommodate religious expression that creates or “reasonably threatens to create” a hostile work environment.
- 4. Harassment Can Occur Virtually:** In the aftermath of COVID-19 and the related increase in remote work, the guidance notes that harassment can occur virtually. If conduct occurs during the virtual work environment and communicated by email, instant message, videoconference, or other online technology, it can still violate Title VII. The proposed guidance confirms that sexist, racist, or otherwise discriminatory speech

communicated via these platforms is 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 their anti-harassment policies, complaint processes, and trainings to improve efficacy.

What's Next?

The proposed guidance will be open for [public review and comment](#) until November 1. Unless it is derailed or delayed by litigation or other unforeseen challenges, you can expect to see it take final form and be adopted by the first quarter of 2024.

What Should Employers Do?

Given this proposed guidance, employers should consider the following steps to stay on the right side of the law and to protect your interests.

- Review the [Proposed Enforcement Guidance on Harassment in the Workplace](#). You can [submit](#) comments and feedback to the EEOC before the November 1 deadline.
- Make sure your policies are compliant with modern standards. Even though this proposed EEOC guidance is currently just a proposal, there are certain policies and practices recommended therein that stand as best practices. 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 should encourage 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. This proposed guidance is a reminder to make sure your supervisory employees are trained properly so that they know how to prevent any harassment claims, and how to address them should any arise. 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, regardless of what their state may or may not require.

Conclusion

These can be challenging times for employers, but this is also a great opportunity to propel your organization further. Using this proposal as a wake-up call 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 proposed guidance or need assistance in developing comments to submit to the EEOC before the November 1 deadline, 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 employee benefits and other 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.