

An Employer's Guide To EEOC Draft Harassment Guidance

By **Rudy Gomez and Steven Reardon** (October 10, 2023)

On Oct. 2, the U.S. Equal Employment Opportunity Commission released its proposed "Enforcement Guidance on Harassment in the Workplace" for public comment. The proposed guidance is an update to the EEOC's existing workplace harassment guidance.

The public comment period ends on Nov. 1, at which point the EEOC will take the public's comments under consideration and issue the finalized guidance. Once published, the guidance will supersede all previous EEOC guidance.

This will be the first update of the EEOC's workplace harassment guidance since 1999. Indeed, there have been many notable changes in employment law over the past 24 years. With its updated guidance, the EEOC seeks to address recent and emerging legal developments, such as the #MeToo movement, the U.S. Supreme Court's landmark 2020 decision in *Bostock v. Clayton County*, and online harassment.

This article discusses the most notable aspects of the proposed guidance, how it fits into the context of recent EEOC enforcement trends, and the important compliance measures that employers may want to proactively consider.



Rudy Gomez



Steven Reardon

Expansion of Protected Characteristics

Notably, the updated guidance expands the scope of characteristics entitled to protection from harassment.

In *Bostock v. Clayton County*, the Supreme Court held that sex-based discrimination protected under Title VII of the Civil Rights Act extended to discrimination based on an individual's sexual orientation and gender identity. The EEOC incorporates the Supreme Court's decision by expanding sex-based harassment to include harassment based on sexual orientation and gender identity.

Examples of such harassment may include:

- "[T]he use of epithets regarding sexual orientation or gender identity";
- "[I]ntentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)"; and
- "[T]he denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."

The guidance also notes that sex-based harassment includes harassment based on pregnancy, childbirth, related medical conditions and a woman's reproductive decisions. The

EEOC identifies lactation and a woman's decisions about contraception and abortion as protected under federal anti-harassment laws.

Finally, the proposed guidance expands the protections afforded under federal anti-harassment laws to individuals who are harassed based upon stereotypes pertaining to their race, color, national origin, religion, sex, age or disability. Importantly, harassment can be based on negative or positive stereotyping, and it does not need to be motivated by animus toward a protected group.

The guidance provides several examples of such harassment, including harassment based on an individual's hairstyle, cultural or linguistic characteristics, dress, appearance, or ability to use technology.

Conduct Occurring Outside the Office

During and following the COVID-19 pandemic, many businesses adopted remote working arrangements for employees, which remain in place today. The EEOC's updated guidance addresses harassment occurring in the virtual work environment.

Notably, hostile work environment claims may include conduct that occurs in a work-related context outside an employee's regular workplace. While these scenarios previously consisted of off-site employee trainings and holiday parties, now they may include harassment taking place in the virtual work environment. Specifically, the EEOC warns of harassment occurring over work emails or during videoconferences.

The EEOC has also taken note of the increased use of social media and text messaging as a form of communication between employees. While employers generally are not responsible for conduct occurring outside the work context, they may be liable when the conduct has consequences in the workplace and contributes to a hostile work environment.

The proposed guidance explains that harassment can result from an employee's harassing social media post, or even private message, if it is subsequently repeated or commented upon in the workplace. Such scenarios may become even more prevalent through the nonconsensual distribution of real or computer-generated intimate images using social media.

EEOC Enforcement Trends

The EEOC's updated guidance comes at a time when the commission has increased its enforcement efforts across the board.

During its 2023 fiscal year, the EEOC filed 143 new employment discrimination lawsuits — a more than 50% increase compared to the previous fiscal year. That number will likely continue to rise based on the broad nature of the EEOC's strategic enforcement plan for fiscal years 2024-2028, as well as the new parameters laid out in the proposed anti-harassment guidance.

According to the strategic enforcement plan, the EEOC will prioritize "vulnerable and underserved" workers, which include people with intellectual and developmental disabilities, workers facing disabilities related to mental health, individuals with arrest or conviction records, LGBTQI+ individuals, temporary workers, older workers, low-wage workers, and persons with limited literacy or English proficiency. The EEOC will also seek to protect workers affected by pregnancy, childbirth or related medical conditions.

Takeaways for Employers

While the EEOC's proposed guidance is neither finalized nor legally binding at this time, it provides insight into how the commission, which is currently comprised of a 3-2 Democratic majority, will address workplace harassment claims going forward. It is unsurprising that the EEOC's strategic enforcement plan prioritizes enforcing many of the expanded protections contemplated under its proposed harassment guidance.

Employers can prevent workplace harassment and avoid liability by showing that they exercised reasonable care to both prevent harassment and promptly correct any harassment once notified. An employer's first line of defense is its anti-harassment policy.

The EEOC's proposed guidance provides tips for an effective anti-harassment policy. The policy should clearly define what conduct is prohibited, be disseminated to all employees and be available in the languages spoken by employees.

The policy should also contain a complaint process that offers multiple avenues for reporting harassment, identifies points of contact for making complaints, and provides adequate confidentiality and anti-retaliation protections for reporting employees. Finally, the policy should require that those individuals designated to receive complaints of harassment ensure that information is relayed to the designated investigator(s).

Employers must also ensure that their workforce is regularly trained on their anti-harassment policy. The training should cover examples of prohibited harassment, the complaint procedure, and employees' confidentiality and anti-retaliation protections. It is imperative that supervisors and managers receive training on identifying, reporting and correcting harassment.

Ultimately, the employer will need to show that they have not only developed an anti-harassment policy and conducted training, but that the policy is being effectively implemented. Employers can conduct employee surveys to determine whether workers believe that harassment exists in the workplace and if it is tolerated. By conducting these surveys on a regular basis, employers can address any shortcomings in the implementation of their anti-harassment policy.

In light of the expansive definition of protected characteristics in the proposed guidance, employers should review their current policies to ensure they address the expanded definitions and scenarios included in the EEOC guidance.

Rudy Gomez is a partner and Steven Reardon is a senior associate at FordHarrison LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.