

EEOC Rolls Out New Guidance on Harassment in the Workplace

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On September 29, the Equal Employment Opportunity Commission (EEOC) released its draft enforcement guidance on harassment in the workplace. This proposed guidance comes after a previous attempt to update in 2017. The last published guidance released by the EEOC was in 1999, titled “Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors.” Approximately two decades later, the agency has keyed in on today’s current issues of sexual harassment to update its guidance. The desire to implement changes to the guidance has stemmed from events such as the #MeToo movement and the COVID-19 pandemic as well as the rise in online harassment.

According to the EEOC, its new guidance aims to “provide clarity on new developments in the law and build on the commission’s previous work.” It is important to note that the contents of the guidance do not have the force and effect of law and do not bind the public in any way. However, employers will want to take note of how the EEOC views harassment, as well as its legal analysis of harassment. Outlined below are a few key aspects included in the EEOC’s new guidance.

Sex-Based Harassment

Under the new guidance, sex-based harassment includes harassment based on pregnancy, childbirth, or other related medical conditions. It also includes harassment based on sexual orientation and gender identity. Examples of sex-based harassment include epithets regarding sexual orientation and gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person’s gender; and intentional or repeated

use of a name or pronoun inconsistent with the individual's gender identity. The focus on this type of harassment comes after the US Supreme Court's 2020 decision in *Bostock v. Clayton County*, in which the Court ruled that sex discrimination includes bias on the basis of gender orientation and sexual identity.

Associational Discrimination

The new guidance also covers associational discrimination, which is when harassment is based on someone's association with another person in the same or a different protected class, including close familial relationships such as marriage or maintaining a close friendship with another individual belonging to a protected class. Here, the EEOC makes employers aware that harassment does not always have to be based on an individual's own characteristics but can also be because of their association with another individual in a protected class.

Unwelcomeness

Many courts have addressed unwelcomeness in their analysis of determining subjective hostility. Subjective hostility is analyzed when determining whether there is a hostile work environment. According to the EEOC, analyzing whether the conduct was welcomed by the employee is part of demonstrating subjective hostility, and adding unwelcomeness as an additional element may cause confusion in the legal analysis of harassment. The EEOC further reasons that this additional analysis is unnecessary because conduct that is subjectively hostile will in turn be unwelcome. Therefore, employers should not focus on whether they believe the conduct was welcomed by the employee, but rather on whether the employee finds it personally offensive.

Conduct Not Directed at Complainant

Harassment can affect an employee's work environment even if it is not directed at that specific employee. In some instances, employees may be able to file a charge against their employer based on unlawful harassment of a third party. This expands the scope of liability, as an employer may be found liable for having a hostile work environment for multiple individuals despite there having been one "targeted" individual.

Conduct Outside of the Workplace

Generally, employers are not liable for conduct that occurs outside the workplace. However, employers may be liable for conduct that has consequences in the workplace and, therefore, contributes to a hostile work environment. For example, if an

employee posts racial slurs on a social media platform and the post is discussed at work, the social media posting can contribute to a racially hostile work environment.

Systemic Harassment

If multiple individuals are subjected to similar forms of discrimination, systemic harassment may be occurring in the workplace. When the harassment is systemic, the harassing conduct could subject all the employees of a protected group to the same circumstances. If there is evidence of widespread race-based harassment, the evidence could be used to show that each individual employee from a protected class was subjected to an objectively hostile work environment.

The Takeaway

The EEOC's new guidance comes after several events over many years as well as promises to redefine the agency's focus and objectives when it comes to sexual harassment. While the guidance does not have the force and effect of law, it provides insight as to how the EEOC plans to approach its investigation and enforcement efforts in response to workplace harassment claims.

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National Law Review, Volumess XIII, Number 312

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