

New Proposed Anti-Harassment Guidance Addresses Many Issues

The Equal Employment Opportunity Commission has issued Proposed Enforcement Guidance on Unlawful Harassment. The EEOC's Guidance sets out to achieve the following: defining what constitutes harassment, examining when a basis for employer liability exists if harassment is proven, and finally, offering suggestions for preventive practices.

EEOC Guidance does not have the force of law. However, it is important because it serves as a reference for EEOC investigators and other federal agencies that address harassment through enforcement investigations, litigation, or outreach. While the Proposed Guidance will be updating the 1990 EEOC Guidance, which addressed only sexual harassment, the Proposed Guidance deals with all categories of harassment: sex (including LGBT discrimination), religion, age, national origin, disability, and genetic information.

Types of Harassment

According to the Proposed Guidance, the EEOC will find harassing conduct to be unlawful if the conduct is based on the following:

- An individual's race, color, or national origin.
- An individual's religion.
- An individual's age.
- An individual's disability.

- An individual or family member's genetic test or family medical history.

With respect to sex-based harassment, the Proposed Guidance recites the familiar definition that sex-based harassment is based on a complainant's sex or gender. The Commission specifies the following as sex-based harassment:

- Harassment based on an individual's non-conformance with social or cultural expectations of how men and women usually act, including gender-stereotyped assumptions about family responsibilities.
- Harassment based on pregnancy, childbirth, or related medical condition, including lactation.
- Harassment based on gender identity, including transgender or transitioning status and includes using a name or pronoun with the individual's gender identity in a persistent or offensive manner.
- Harassment because an individual is lesbian, gay, bisexual, or heterosexual.

Fundamental Framework

The Proposed Guidance sets forth the circumstances by which an employer will be liable for unlawful harassment:

- Alleged conduct must be based on a complainant's legally protected status.
- Where the harassment results in an explicit change to the terms or conditions of employment,

discrimination and liability are clear. For example, terminating an employee because he or she rejected sexual advances.

- Where there is no explicit change in employment status, the employee must prove a hostile work environment: conduct that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive or hostile work environment.
- To establish a hostile work environment, the employee must show that: (1) the conduct would be viewed objectively (by a reasonable person) to be hostile or abusive; *and* (2) the employee subjectively perceives the environment to be hostile or abusive.
- For hostile work environment claims where there is no explicit change in employment, there must be a basis for employer liability, and this depends on the status of the alleged harasser.
- Assuming no tangible employment action is taken for a hostile work environment created by supervisors, an employer may assert a two-part affirmative defense. The employer may avoid liability by showing: (1) it exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment.

- For harassment by non-supervisors and non-employees, an employer is liable where it is negligent. The EEOC will find negligence if an employer either failed to act reasonably to prevent harassment or failed to take reasonable corrective action in response to harassment about which it knew or should have known.

Positions Potentially Helpful to Employers

On certain issues, the Proposed Guidance takes positions that reflect the Commission understands the challenges of maintaining a harassment-free workplace. These EEOC positions may be useful authority to cite when an employer is defending a claim of harassment:

- If many employees in different protected classes are harassed, that may be evidence the harassment was not based on a protected characteristic, but was offensive and bullying conduct instead. In these types of situations, the Commission nonetheless would find the conduct unlawful if it involves explicitly denigrating an employee based on his or her protected status or if one protected group receives a bigger dose of mistreatment than other protected groups.
- Preferential treatment based on consensual sexual relationships does not amount to discrimination against disfavored employees based on their sex (such as a female boss who repeatedly promotes her boyfriend) because such a preference disadvantages men and women alike. However, broad sexual favoritism to

one sex (for example, a male supervisor who promotes only women who provide him with sexual favors) can constitute harassment for members of that sex.

- Complaints that a coworker's conduct were "rude" or "aggravating" are not enough to put an employer on notice of harassment.
- Whether harassment stops after an employer's investigation or corrective action is a key factor in determining whether the corrective action was appropriate. However, if an employer takes corrective action that is proportionate to the conduct, the employer will be found to have taken appropriate corrective action even if the harassment occurs again.
- Although an individual complaining of harassment ideally should face no adverse consequences, the employer may place some burdens on the complaining employee as part of the corrective action it imposes on the harasser, as long as it makes every reasonable effort to minimize those burdens.
- The Proposed Guidance acknowledges that employers may have fewer options for influencing the conduct of non-employees (for example, a non-employee assigned to work in an employer's workplace) and conduct that occurs outside the workplace.
- Where an employer conducts a thorough investigation but is unable to

determine with sufficient confidence that the alleged harassment.

- While employers should not ban all religious communication from the workplace, employers are not required to accommodate religious expression that creates or threatens to create a hostile work environment.
- In its updated Retaliation Guidance issued in 2016, the EEOC took the position that employers may not take adverse action based on an employee's complaints of discrimination that are made through the company's own equal employment opportunity complaint process, regardless of whether a complaint was made in bad faith. The Proposed Unlawful Harassment Guidance permits employers to promise non-retaliation only for complaints made in "good faith," implicitly permitting adverse action against employees who make bad faith complaints.

Prevention and Avoidance

At the end of the Proposed Guidance, the EEOC sets forth Promising Practices. This section emphasizes the need for senior leaders to create and maintain a culture of respect in which harassment is not tolerated, including:

- allocating sufficient resources for effective harassment prevention strategies,
- assessing harassment risk factors, and
- taking steps to minimize or eliminate those risks.

Most employers have been keenly aware of the need to prevent and correct unlawful conduct and accordingly have devoted significant resources into anti-harassment efforts. The breadth and depth of the Proposed Guidance shows this area of the law is exceedingly challenging.

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