

# CLIENT ALERTS

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## EEOC Issues Workplace Harassment Guidance & Lawsuits Follow

### Client Alert

5.17.2024

On April 29, 2024, the Equal Employment Opportunity Commission (EEOC) released newly updated Enforcement Guidance on Harassment in the Workplace. At the same time, the EEOC also released a Summary of Key Provisions related to the Enforcement Guidance. The recent Enforcement Guidance has been the first guidance from the EEOC on this topic since 1999. It contains over 70 examples that illustrate how the EEOC is interpreting Title VII's harassment protections. While the Enforcement Guidance reiterates a lot of what employers already know, it provides some important reminders and clarifications.

For one, the Enforcement Guidance lists all the legally protected characteristics that can serve as a basis for a harassment claim under federal law. That includes race, color, national origin, religion, sex (which includes sexual orientation, gender identity, pregnancy, childbirth, or related medical conditions), age, disability, and genetic information.<sup>[1]</sup> While most employers have operated under the assumption that sexual orientation and gender identity can serve as the basis of a harassment claim given the Supreme Court decision in *Bostock v. Clayton County*, the Guidance confirms that point. The Enforcement Guidance also explained that harassment related to pregnancy, childbirth, or related medical conditions would include harassment based on lactation; using or not using contraception; or deciding to have, or not to have, an abortion. The Guidance also includes discussion of "Retaliatory Harassment." The EEOC's guidance clarifies that harassment done in retaliation for engaging in protected activity will be analyzed under Title VII's retaliation standard, opposed to the much higher harassment standard.

The Enforcement Guidance also addresses the potential clash between religious expression and harassment protections of Title VII. Under Title VII, employers have an obligation to

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accommodate an employee's sincerely held religious belief, practices, and observances unless doing so would impose an undue hardship. That could include an accommodation that causes some disruption in the workplace. However, employers must also protect workers from unlawful harassment even when the harassment occurs as a result of an employee's religious expression. As such, the Enforcement Guidance specifies employers should accommodate religious expression, but employers must be prepared take corrective action to address the religious expression when it creates a hostile work environment.

The EEOC also uses the Guidance to detail its approach to harassment in the virtual workplace. This has become more and more prevalent for employers following the rise of remote work after the Covid-19 pandemic. Virtual harassment can take the form of inappropriate comments made during a video meeting, discriminatory comments typed in a group chat, and/or offensive imagery that is visible in an employee's workspace while the employee participates in a video meeting. The Guidance warns employers that they have an obligation to protect employees from harassment regardless of whether the employee is in-person or remote.

A group of states filed a lawsuit on May 14<sup>th</sup> to block the EEOC's Enforcement Guidance. Among other things, these states took issue with the portions of the Guidance that provide an employer could be liable if employees/customers refuse to use the preferred pronouns of a transgender employee and/or if employers refuse to allow employees to use the bathroom that matches their gender identity. The states argue that the EEOC's guidance goes too far with these transgender protections. The lawsuit is pending in federal court in Tennessee.

The Enforcement Guidance was published on April 29, 2024, and became effective immediately. However, the Guidance could eventually be blocked as a result of the ongoing litigation. While the EEOC battles it out in the courts, employers should review their harassment policies to determine if any changes are needed.

Butzel will continue to monitor the litigation and provide updates if/when the Guidance is blocked or upheld. Butzel's Labor and Employment team also stands ready to help you review your harassment policies and to help you address any of your other labor and employment issues.

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[1] Employers need to remember state law often prohibits harassment based on protected characteristics that are not covered by Title VII. For example, Michigan's Elliott-Larsen Civil Rights Act prohibits harassment on the basis of height and weight.