

EEOC Updates Workplace Harassment Guidelines

Alert

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By Amy Conway & Kelly Maxwell

For the first time in 25 years, the U.S. Equal Employment Opportunity Commission (EEOC) updated its [Enforcement Guidance on Harassment in the Workplace](#). Employers should review existing anti-harassment policies and trainings with counsel to determine whether any changes are appropriate in light of the new guidance.

In addition to general changes to update the guidance after 25 years of dormancy, new areas of focus include reinforcement of LGBTQ+ employee rights, discussion of sex-based harassment encompassing pregnancy- and reproductive care-related issues, emphasis on intraclass harassment and explanations of how harassment occurs in a remote work environment. The updated guidance also outlines how employers should provide adequate anti-harassment policies, trainings, and complaint procedures, as well as instructs supervisors on how to recognize and report instances of all types of harassment.

An increased area of focus in the updated guidance concerns gender identity. The EEOC outlines specific examples of harassment based on gender identity, including misgendering, which is the repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity. The guidance provides a scenario involving a transgender female employee who is regularly and intentionally misgendered by supervisors, coworkers and customers when they refer to her by her prior name, male pronouns and other male references, such as "dude." In such a situation, the guidance states that the employee has been subjected to a hostile work environment based on her gender identity that includes repeated and intentional misgendering.

Additionally, the guidance states that sex-based discrimination under Title VII includes outing an employee (disclosure of an individual's sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be

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associated with that person's sex; and denial of access to a bathroom or other sex-segregated facilities consistent with the individual's gender identity. The guidance provides an example of harassing conduct involving a transgender employee who is questioned about whether she was "born a man," informed of a rumor that "there was a transvestite," instructed to wear pants instead of skirts, asked inappropriate questions about anatomy and sexual relationships, and misgendered.

Another major development in the guidance addresses employees' reproductive health-related decisions, stating that harassment at work based on employees' decisions around contraception and abortion is covered by Title VII if it is linked to a targeted individual's sex. The guidance states that Title VII protects women from being fired for taking contraceptives, having an abortion or contemplating having an abortion. Also, it would be unlawful for a manager/employee to pressure another employee to have or not to have an abortion in order to retain a job, get better assignments, etc. Related EEOC regulations implementing the Pregnant Workers' Fairness Act were immediately challenged by 17 Republican attorneys general.

This new guidance also adds a provision on intraclass harassment, or harassment based on a protected characteristic when the harasser is a member of the same protected class. The guidance provides examples of intraclass harassment based on national origin (Chinese supervisor berating Chinese employee for not living up to the supervisor's notion of the ideal Chinese worker, stating ancestors would be ashamed and the employee would not last a day in China) and based on sex (female coworker making comments to two female coworkers about mothers staying at home with kids as well as childless women being frigid).

Finally, as the remote work setting persists and expands following the COVID-19 pandemic, the EEOC details how harassment can occur between remote workers, saying that conduct "within a virtual work environment" can contribute to an unlawful hostile work environment, such as racist or sexist comments made during a video meeting, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image. Additionally, the guidance confirms that conduct that occurs away from work, including workers' posts on their personal social media pages, can constitute illegal harassment if it affects an employee's working conditions.

Much of the guidance reinforces what has already been the state of the law since the last guidance was issued 25 years ago. The guidance does not itself have the force of law, and again, employers should work with their legal counsel to assess whether changes to their policies or trainings are appropriate in light of these developments. Regardless, the guidance is important to review and lays out a blueprint for how the EEOC will interpret and enforce the law on harassment and discrimination in the workplace.

For more information on the EEOC workplace harassment guidelines, please contact [Amy Conway](#), [Kelly Maxwell](#), [Stephanie Scheck](#), [Sara Welch](#) or the Stinson LLP contact with whom you regularly work.

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