

What Employers Need to Know About the EEOC's Proposed Workplace Harassment Guidance

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The U.S. Equal Employment Opportunity Commission (EEOC) proposed new guidance for employers regarding updates to the law and modern examples of workplace harassment. The public is allowed to comment on the proposed guidance through November 1, 2023. Prior to this release, the EEOC had not updated its guidance regarding workplace harassment since 2017. Needless to say, much of its prior guidance, while still legally correct, did not relate to modern examples of the workplace (i.e. incorporating work-from-home and the #metoo movement). Employers should understand what the guidance means in the ever-changing labor and employment landscape and should be on the lookout for further EEOC guidance after the public comment period.

Highlights from the Proposed Guidance

The proposed guidance incorporates examples from the U.S. Supreme Court's landmark decision in *Bostock v. Clayton County* (June 15, 2020) which held that sexual discrimination and harassment includes discrimination and harassment against individuals based on their sexual orientation, transgender status, and gender identity. For example, the EEOC crafts an example of an employee alleging sexual harassment when her coworkers refuse to refer to her using female pronouns, ask about her sexual anatomy and whether she has had gender affirmation surgery, and refer to the individual using her previous male name. Such actions could be the basis of a harassment charge and suit and violate Title VII. The proposed guidance includes many other examples employers should

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review that may apply in their every-day operations. The proposed guidance does not address how to resolve the inherent conflict between religious and gender identity protections should someone claim that their religion prevents them from using their colleagues' preferred pronoun.

Other examples include less explicit, but still unlawful, harassment based on traits associated with race, color, and national origin. The proposed guidance discusses harassment and discrimination against individuals based on their characteristics associated with race, color, and national origin, such as an individual's name, accent, dress, and physical characteristics like hair textures and hairstyles. Such proposal should be familiar to Illinois employers as this mirrors the purpose of the Illinois CROWN Act which prohibits harassment and discrimination based on traits commonly associated with race, including hair texture and protective hairstyles such as braids, locks, and twists.

The proposed guidance also addresses harassment and discrimination based on religion, and how it easily overlaps with other protected characteristics like race and national origin. For example, harassment about an individual wearing a hijab to work, who is also Muslim and Middle Eastern may be based on both national origin and religion. As with the EEOC's guidance pertaining to traits associated with race (described above), the EEOC describes harassment that seems facially neutral, but is sufficiently related to religious bias.

The EEOC also addresses harassment in the virtual age of remote work. As with conduct within a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. This can include, for instance, sexist comments made during a video meeting or racist imagery that is visible in an employee's workspace while the employee participates in a video meeting.

Employers maintaining dated harassment policies should consider updating such policies in light of this new EEOC guidance. If you have any questions about EEOC's new proposed guidance, please contact your Laner Muchin attorney.