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Labor & Employment Alert

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EEOC Guidance on harassment in the workplace

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The updated Guidance gives employers a blueprint for how to address workplace harassment in light of timely issues like gender identity, pregnancy, and online harassment.



What's the impact?

- The Guidance is a resource to assist employers in preventing workplace harassment by updating their policies, procedures, and trainings. The Guidance also provides information to help employers improve workplace investigations.
- Although the Guidance itself “[does] not have the force of effect of law,” the Guidance can be persuasive to courts and may lay the foundation for employees to claim workplace harassment within the larger social context of issues such as abortion, sexual orientation, and gender identity.
- The Guidance is likely to be challenged by those who object to its broadened interpretation of Title VII, particularly with regard to reproductive rights and the accommodation of religious beliefs.

On April 29, 2024, the US Equal Employment Opportunity Commission (EEOC) published its long-awaited updated “Guidance on Harassment in the Workplace” ([Guidance](#)) to provide direction regarding a number of timely issues, such as harassment related to sexual orientation, gender identity, and pregnancy, as well as virtual or online harassment and harassment based on more than one protected status.

The updated Guidance is effective immediately and supersedes guidance previously published by the EEOC in the 1980s and 1990s.

Key takeaways:

SEXUAL ORIENTATION AND GENDER IDENTITY HARASSMENT

The Guidance incorporates the US Supreme Court’s 2020 decision in *Bostock v. Clayton County*, in which the Court held that Title VII’s prohibition on discrimination “because of sex” includes discrimination on the basis of sexual orientation and gender identity. The Guidance implements this decision by clarifying the types of conduct that may rise to the level of discrimination on the basis of gender identity or sexual orientation. Examples include:

- / asking intrusive questions about an employee or applicant’s sexual orientation, gender identity, gender transition, or intimate body parts;
- / repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity; and
- / denying access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.

Example: Harassment Based on Gender Identity. Chloe, a purchase order coordinator at a retail store warehouse, is approached by her supervisor, Alton, who asks whether she was “born a man” because he had heard a rumor that “there was a transvestite in the department.” Chloe disclosed to Alton that she is transgender and asked him to keep this information confidential. After this conversation, Alton instructed Chloe to wear pants to work because a dress would be “inappropriate,” despite other purchase order coordinators being permitted to wear dresses and skirts. Alton also asks inappropriate questions about Chloe’s anatomy and sexual relationships. Further, whenever Alton is frustrated with Chloe, he misgenders her by using, with emphasis, “he/him” pronouns, sometimes in front of Chloe’s coworkers. Based on these facts, Alton’s harassing conduct toward Chloe is based on her gender identity.

VIRTUAL HARASSMENT

The Guidance recognizes that harassment may occur “virtually” through work-related communication systems, accounts, devices, or platforms, such as an employer’s email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, official social media accounts, or other equivalent services or technologies. The Guidance includes numerous specific examples of unlawful harassment, explaining that harassment occurs when racist, sexist, or ableist comments are typed in a work group chat or made during a video conference, or when offensive items (such as swastikas, unequal signs, confederate flags, or offensive images) are clearly visible in an employee’s home environment during a video meeting.

Example: Conduct on Employer’s Email System Was Within the Work Environment.

Ted and Perry are coworkers in an architectural firm. Ted is White, and Perry is Black. Every Monday morning, Ted sends jokes from his work computer and work email account to colleagues, including Perry. Many of the jokes involve racial stereotypes, including stereotypes about Black individuals. Perry complains to Ted and their mutual supervisor after several weeks of Ted’s emails, but Ted is not instructed to stop and continues to send such emails. Based on these facts, the racial jokes sent by Ted occurred within Perry’s work environment because, among other reasons, they were sent using Ted’s work computer and work email account and were sent to Perry and other colleagues in the workplace.

PREGNANCY-RELATED HARASSMENT

The Guidance clarifies that harassment “because of sex” includes harassment on the basis of pregnancy, childbirth, or related medical conditions, with examples including harassment related to lactation; using, or not using, contraception; or deciding to have, or not to have, an abortion. [See EEOC’s Guidance on Pregnancy Discrimination and Related Issues.](#)

Example: Harassment Based on Pregnancy-Related Medical Condition (Lactation).

Lisbet, a software engineer for a video game publisher, recently returned to work after giving birth. Lisbet uses a lactation room at work as needed in order to express breastmilk. Lisbet’s coworker, Nathaniel, knocks loudly on the lactation room door while Lisbet is inside and pretends that he is going to enter. Nathaniel also refers to Lisbet’s breasts as “milk jugs,” makes suckling noises when Lisbet enters and exits the lactation room, and asks Lisbet if he can have a squirt of milk for his coffee. Nathaniel also refers to the lactation room as “Lisbet’s getaway” and asks why he is not allowed to take breaks in private rooms. Based on these facts, Nathaniel’s harassing conduct toward Lisbet is based on a pregnancy-related medical condition (lactation).

RELIGION-BASED HARASSMENT

The Guidance reiterates that Title VII includes protections against unlawful harassment based on religion. However, it acknowledges the complicated interplay between an employer's obligation to provide reasonable accommodation for employee's sincerely held religious beliefs, practices, and observances and the employer's obligation to prevent and correct unlawful harassment. These two employer obligations may come into conflict, for example, concerning issues of sexual orientation or gender identity. The law in this area is developing, which may force the EEOC to amend its Guidance.

The Guidance cites *Kluge v. Brownsburg Community School Corp.*, in which an Indiana schoolteacher was terminated for failing to use preferred names and pronouns with transgender students, citing his religious beliefs as the reason he could not do so. The teacher sued the school district under Title VII, claiming that his firing was the result of religious discrimination and retaliation. The school district defended the firing by citing its obligations to students under Title VII. The lower federal court granted summary judgment in the school district's favor, concluding that the school was unable to accommodate Kruger's religious beliefs and practices without imposing an undue hardship on the school's business.

After the Supreme Court clarified the undue hardship standard in Title VII religious accommodation cases in *Groff v. DeJoy*, the Seventh Circuit Court of Appeals vacated the opinion and judgment in *Kluge* and sent the case back to the lower court to apply the clarified legal standard. The lower court applied *Groff's* standard and still ruled in favor of the school district, holding that the teacher's proposed accommodation of using students' last names only was an "undue burden" on the school. Such an accommodation could have resulted in "substantial student harm and an unreasonable risk of liability, each sharply contradicting the school's mission to foster a supportive environment for all."

HARASSMENT BY NON-EMPLOYEES

The Guidance advises that harassment of employees by non-employees, such as independent contractors, customers, and clients of the employer, can violate Title VII. The Guidance reminds employers that their legal obligation to correct harassment as soon as they become aware of it extends to the prevention of further harassment by third parties.

CROSS-BASES HARASSMENT

The Guidance also clarifies a number of situations in which harassment is based on an erroneous belief or perception, on the basis of more than one protected status, or on the protected status(es) of others with whom an employee associates. For example:

- / Harassment may be based on the erroneous belief or perception that a person has a particular national origin, religion, or sexual orientation. As an example, a Hispanic person

who is harassed because the harasser believes he is Pakistani has a claim for national origin discrimination.

- / "Associational discrimination" includes harassment because the complainant associates with someone in a different protected class or because the complainant associates with someone in the same protected class. As an example, a cisgender employee who is harassed for having a transgender daughter has a claim for sex gender identity discrimination, or a Black employee who is harassed because she has a biracial child has a claim for race discrimination.
- / The Guidance discusses "interclass harassment," when the harasser shares the same protected characteristic as the victim, and "intersectional harassment," in which the harassment is based on more than one protected characteristic. As an example, a Black woman who is harassed based on stereotypes about Black women is experiencing harassment based on the intersection of two protected characteristics (race and sex), or a woman in her fifties who is harassed based on stereotypes about older women is experiencing harassment based on age and sex.

With the updated Guidance, the EEOC issues several resources, including a "[Summary of Key Provisions](#)," "[Questions and Answers for Employees](#)," and "[Small Business Fact Sheet](#)."

Complying with EEOC's Guidance on Harassment in the Workplace

Given the scale of these updates, employers should:

- / Review the Guidance to make sure they have a clear, easy-to-understand anti-harassment policy that complies with the new standards.
- / Ensure they have in place effective procedures that employees can use to report harassment and that their investigation practices align with the new requirements.
- / Review and enhance anti-harassment trainings to prevent workplace harassment to all employees.
- / Keep in mind that the laws of some states hold employers to a higher standard than Title VII and that these stricter laws may apply.

For more information on the Guidance, please contact the authors of this alert or another member of Nixon Peabody's [Labor and Employment practice group](#).

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