

EEOC Updates Anti-Harassment Guidance for First Time in 25 Years

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On April 29, 2024, the U.S. Equal Employment Opportunity Commission (the “EEOC” or the “Commission”) published its “Enforcement Guidance on Harassment in the Workplace” (the “Guidance”), which outlines the legal standards for harassment and employer liability under the equal employment opportunity laws enforced by the Commission. (See [here](#).) The Guidance replaces the five prior harassment guidance documents from the EEOC, issued between 1987 and 1999, and serves as a single resource for workplace harassment law. The Guidance addresses several timely topics, including, but not limited to, protections for LGBTQ+ workers, harassment in the remote workplace, and the interplay between religious freedom and unlawful harassment. The Guidance also includes over 70 illustrative examples of permissible and impermissible conduct.

Importantly, building on the U.S. Supreme Court’s decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), which held that discrimination on the basis of sexual orientation or gender identity is a form of prohibited sex discrimination, the Guidance affirms that harassment on the basis of those characteristics is also prohibited. The Guidance provides several examples of harassing conduct based on sexual orientation or gender identity, including, but not limited to, “outing,” meaning disclosure of an individual’s sexual orientation or gender identity without permission, “misgendering,” meaning the repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity, and refusal to allow an individual access to a bathroom that is consistent with that individual’s gender identity. A coalition of State Attorneys General recently filed suit to block the Guidance, claiming that the EEOC exceeded its rulemaking authority and impermissibly broadened the scope of the law’s gender identity-based protections. That lawsuit remains pending.

The Guidance also reiterates that prohibited harassment can occur both inside and outside of the physical workplace, including in the remote work environment, at an annual holiday party in a private restaurant, during non-working hours at the employee’s residence and through posts on private social media accounts. The Guidance further confirms that prohibited harassment includes both “intraclass” harassment, e.g. harassment based on a protected characteristic that the harasser and the victim share, as well as “intersectional” harassment, meaning harassment based on the intersection of two or more protected characteristics (for example, harassment based on an employee’s status as a Black woman or an older man).

Additionally, the Guidance addresses employers’ dual obligation to protect workers from unlawful harassment while, at the same time, accommodating employees’ sincerely held religious beliefs and practices. These concepts may come into conflict when, due to an employee’s sincerely held religious beliefs, the employee refuses to refer to a transgender coworker using the coworker’s preferred pronouns or the employee makes disparaging comments about a coworker’s decision to have, or not to have, an abortion. The Guidance maintains that employers should accommodate employees’ sincerely held religious beliefs and practices, unless doing so would create, or reasonably threatens to create, a hostile work environment. Thus, while there may be situations where an employer must provide a religious accommodation that disrupts complete harmony in the workplace, the employer should take corrective action to address religious expression that creates, or threatens to create, a hostile work environment.

Finally, the Guidance outlines several steps employers should take to help prevent harassment in the workplace, including (i) maintaining a clear, easy-to-understand anti-harassment policy; (ii) implementing safe and effective procedures that

employees can use to report harassment; (iii) providing reoccurring training to all employees and managers concerning (i) and (ii); and (iv) taking steps to ensure that the employer's policies, processes and trainings are working and effective. The EEOC strongly encourages all employers to take these steps and to consider workplace barriers to comprehension, including a limited ability to speak English, when creating, revising or assessing the effectiveness of anti-harassment policies, procedures and trainings.

If you have any questions regarding the topics discussed in this article, please contact **Michelle T. Olson** at molson@vedderprice.com, **Fernanda Contreras** at fcontreras@vedderprice.com or any Vedder Price attorney with whom you have worked.

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