



eeoc releases guidance on harassment in the workplace addressing timely topics

Jeremy Mittman, Thea Rogers and Ricky Tai
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The U.S. Equal Employment Opportunity Commission (the "EEOC") has recently released its final workplace harassment enforcement guidance, the "Enforcement Guidance on Harassment in the Workplace" (the "Guidance"). Employers should review their workplace anti-harassment policies and training in light of the recently issued Guidance, as well as the accompanying trio of companion documents (a key provisions summary, FAQs and small business fact sheet), especially as they pertain to current and timely topics of remote work, social media, as well as gender identity.

The Guidance's provisions apply to businesses with 15 or more employees, and they pertain to harassment by co-workers, supervisors, and relevant third parties, such as customers and clients. Of course, the Guidance only addresses workplace harassment under federal law, and does not address additional state-specific obligations, where they may be applicable.

The Guidance addresses a landscape of potential workplace harassment that is constantly evolving, especially with advances in technology and continued increase use of social media. The Guidance provides specific examples of harassing conduct, and offers resources and recommendations for employers to avoid potential liability and prevent harassment in the workplace.

Key areas of the Guidance:

1. **The rise of virtual harassment.** Harassment can take place virtually in many forms: an offensive or derogatory "joke" email; sharing pornography or sexually demeaning depictions of people, including AI-generated and "deepfake" images and videos; and making comments based on stereotypes during a Zoom meeting or on Slack.

attorneys

Jeremy Mittman
Thea E. Rogers
Wei Kit (Ricky) Tai

practice areas

employment litigation & counseling
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- 2. Social media can contribute to a hostile work environment.** While employer liability may not attach to many instances of employees' conduct outside of work, employers could be liable if the employees' conduct *impacts* the workplace and contributes to a hostile work environment. For example, if an employee becomes the subject of ethnic, racial, or sex-based slurs that another coworker posts on her personal social media page, and the employee learns of that post by seeing it or hearing about it through coworkers, then the post can contribute to a hostile work environment.
- 3. Recognizing intra-class harassment.** Unlawful harassment that occurs when the harasser and the victim share the same protected characteristic (i.e. the same age, national origin, etc.) is possible, and known as "intra-class" harassment.
- 4. Highlighting different forms of pregnancy-related sexual harassment.** "Sex" is a protected class that includes pregnancy, childbirth, and related medical conditions. This includes harassment due to "lactation; using or not using contraception; or deciding to have, or not have, an abortion."
- 5. Protecting the rights of LGBT+ employees.** Referencing the U.S. Supreme Court's 2020 *Bostock* decision, the EEOC reiterated its position that sex-based harassment can include intrusive questions about an individual's sexual orientation, gender identity, gender transition, or intimate body parts. Examples discussed include misgendering, outing a co-worker, repeatedly not using a co-worker's identified pronouns, or commenting on how a co-worker should dress in accordance with heteronormative presumptions. Further, harassment can occur when an employee is denied access to a bathroom or other workplace facility consistent with the employee's gender identity.
- 6. Balancing free speech and religious-based rights.** While employers should accommodate an employees' sincerely held religious practice of engaging in religious expression in the workplace, employers are not required to provide accommodations that would create, or reasonably threaten to create, a hostile work environment.

Employees may file a charge or complaint with the EEOC (or lawsuit) when workplace harassment is not addressed. Consequently, employers could be liable for violating the law, and penalties may include compensatory, punitive damages, and equitable relief.

Employers can avoid liability by exercising reasonable care in preventing harassment and correcting harassment. The Guidance is a valuable resource that employers can use to create effective anti-harassment policies and processes to address harassment complaints, understand legal obligations in the context of new and changing technologies, provide anti-harassment training to employees, and monitor the workplace to ensure compliance with anti-harassment laws.