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EEOC's New Guidance on Workplace Harassment Being Challenged

In its first update since 1999, the Equal Employment Opportunity Commission (EEOC) recently published updated enforcement [guidance](#) on workplace harassment. The 189-page guidance, which consolidates and replaces five previous guidance documents issued from 1987 through 1999, clarifies the EEOC's position on various types of harassment, incorporates new developments in the law, most notably those relating to LGBTQ+ employee rights, and addresses circumstances in modern society such as electronic communications, social media and remote work. The guidance also includes numerous hypothetical examples illustrating harassment against individuals in each protected classification under federal discrimination laws. The guidance was published on April 29. By May 13, a lawsuit challenging the guidance was filed.

Below are some highlights of the EEOC's guidance and the current legal challenge to it.

LGBTQ+ Rights

One of the most noteworthy changes in the EEOC's guidance relates to LGBTQ+ employee rights. This change was a result of the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that discriminating against an employee based on gender identity or sexual orientation is unlawful sex discrimination under Title VII. The EEOC's guidance defines sex-based discrimination under Title VII to include "repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering) or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." The EEOC noted that *Bostock's* reasoning about the nature of discrimination based on sex "logically extends to claims of harassment." Examples of harassment based on sexual orientation or gender identity include epithets, physical assault, disclosing an individual's sexual orientation or gender identity without permission, and harassing conduct because an individual presents themselves in a way that is different than the stereotype associated with that person's sex.

Pregnancy, Childbirth and Related Conditions

The EEOC's guidance makes clear that conduct based on an individual's pregnancy, childbirth or related medical conditions, such as using or not using contraception, or choices regarding abortions, falls under the umbrella of sex-based discrimination and harassment. Examples include negative comments about an employee's ability to work due to morning sickness or inappropriate conduct toward a lactating employee.

Color

The EEOC's guidance separated out color harassment from that relating to race and national origin, clarifying that "[a]lthough sometimes related to harassment based on race or national origin, color-based harassment due to an individual's pigmentation, complexion, or skin shade or tone is independently covered by Title VII." Harassment based on color could include specific comments made about the color of one's skin, as well as harassment of groups of employees of the same race based on their complexion when others of the same race who have a different complexion are not harassed.

Intraclass and Intersectional Harassment

The guidance illustrates different types of harassment. "Intraclass" harassment occurs when both the harasser and the individual being harassed are in the same protected category. For example, someone in their 50s could harass someone in their 60s by making ageist comments even though both are older than 40 and age protected.

"Intersectional" harassment occurs when an individual is harassed because that person is a member of more than one protected category. For example, the harassment of a Black woman based on stereotypes about Black women would constitute both race and sex harassment.

Recognizing Current Circumstances

The EEOC's guidance recognizes some differences in society since the last guidance was issued more than 25 years ago. It makes clear that even if certain conduct (such as "electronic communications using private phones, computers or social media accounts") does not occur in a work-related context, it can nonetheless impact the workplace and affect terms and conditions of employment. Given the growth of technology, the guidance emphasizes that "it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images, such as through social media, messaging applications, or other electronic means, can contribute to a hostile work environment, if it impacts the workplace." Further, since its guidance is the first update since the COVID-19 pandemic, the EEOC explained that the guidance applies to remote work locations as well.

The Legal Challenge

Despite the EEOC's efforts to address the approximately 38,000 comments received during the comment period before it issued the final rule on May 13, 18 states filed a lawsuit in Tennessee federal court, claiming the guidance unlawfully expands transgender rights under Title VII beyond the Supreme Court's decision in *Bostock*, including on such issues as pronouns and bathroom use. That same court vacated the EEOC's June 2021 guidance relating to sexual orientation and gender identity.

Given the legal challenge, the status of the EEOC's guidance is unclear at this point. Employers should remember, however, that state and local law may provide even greater protections to employees than those under Title VII or the EEOC's guidance. Further, employers are encouraged to ensure that their policies effectively address issues in the modern workplace, including harassment in the contexts of the remote workplace and social media. Employers are also encouraged to confer with employment counsel to ensure that they comply with the law applicable to their workplaces.

Authors



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201
New York, NY | (212) 297-5800
rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168
tkelly@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416
Stamford, CT | (973) 966-8416
jleva@daypitney.com



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536
New York, NY | (212) 297-5800
dlschwartz@daypitney.com



Alexis Abuhadba
Associate

Parsippany, NJ | (973) 966-8113
aabuhadba@daypitney.com