

## EEOC ISSUES PROPOSED HARASSMENT GUIDANCE

November 20, 2023

On September 29, 2023, the U.S. Equal Employment Opportunity Commission (“EEOC”) [posted](#) for public inspection its proposed “Enforcement Guidance on Harassment in the Workplace.” The proposed guidance was [published](#) on October 2, 2023. This long-awaited guidance is the [first voted document](#) the EEOC has issued on harassment since its “Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors” in 1999 and “reflects [notable changes in law](#), including the Supreme Court’s decision in *Bostock v. Clayton County*, the #MeToo movement, and emerging issues, such as virtual or online harassment.”

### BACKGROUND

The EEOC is a [bipartisan Commission](#) comprised of five members appointed by the President – the Chair, Vice Chair, and three Commissioners. Following the swearing in of [Kalpana Kotagal](#) as a Commissioner on July 14, 2023, the EEOC is composed of three Democratic appointees and two Republican appointees.

The EEOC is responsible for issuing enforcement guidance regarding workplace harassment. However, the EEOC has not issued by vote such guidance since June 18, 1999, when the Commission issued [guidance](#) addressing the standards of liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

The EEOC released proposed guidance on workplace harassment for public comment in 2017 during the Trump administration, but this proposed guidance was not finalized.

The current guidance was approved by a 3-2 vote of the commissioners on August 22, 2023. The EEOC Chair Charlotte A. Burrows stated in the EEOC’s [press release](#), “[p]reventing and addressing harassment in America’s workplaces has long been a key priority for the EEOC, and this guidance will provide clarity on new developments in the law and build on the Commission’s previous work.”

### THE PROPOSED GUIDANCE

The proposed guidance reflects several important changes in law and emerging issues, including the following:

### *Sexual Orientation and Gender Identity*

Following the Supreme Court's decision in [\*Bostock v. Clayton Cty.\*, 140 S. Ct. 1731 \(2020\)](#), which held that sex-based discrimination includes discrimination based on sexual orientation and gender identity, the proposed guidance concludes that "sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including how that identity is expressed." According to the EEOC, examples of such harassment include "epithets regarding sexual orientation or gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."

### *Pregnancy, Childbirth, or Related Medical Conditions*

The EEOC has also confirmed that sex-based harassment includes not only harassment based on pregnancy, but also childbirth or related medical conditions, including lactation. Sex-based harassment further includes "harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion."

### *Virtual Harassment*

The EEOC's proposed guidance notes that conduct "occurs within the work environment if it is conveyed using work-related communications systems, accounts, or platforms, such as an employer's email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, or official social media accounts." Conduct within a virtual work environment also may contribute to a hostile work environment, for instance, "sexist comments made during a video meeting, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image."

### *Religious Expression*

According to the proposed guidance, Title VII requires employers to "accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship," while also protecting workers against religiously motivated harassment. Thus, "[e]mployers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment," and employers should take corrective action before conduct becomes sufficiently severe or pervasive to create a hostile work environment.

## CONCLUSION

While EEOC guidance is not governing law, such guidance provides employers with helpful information regarding existing requirements under the law and the stance the EEOC will take on investigations and litigation. We recommend that employers review, and to the extent feasible, incorporate the EEOC's proposed harassment guidance into their practices and policies. The guidance provides a good opportunity for review and updating of workplace harassment policies as well as training to ensure that they comply with current law and EEOC policies.

The EEOC's proposed guidance includes harassment resources, which can be found here: [https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#\\_Toc133663602](https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#_Toc133663602).

If you have any questions or need further guidance regarding workplace harassment policies or procedures, please contact a member of Hancock Daniel's [Labor & Employment](#) team.

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