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EEOC Releases Proposed Workplace Harassment Guidelines After Six Year Delay

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On October 2, 2023, the U.S. Equal Employment Opportunity Commission ("EEOC") published long-anticipated proposed guidance related to workplace harassment. If adopted by the EEOC, the enforcement guidance would supersede four existing EEOC guidance documents issued during the 1990s, as well as a section of the EEOC Compliance Manual on harassment. Members of the public have 30 days from the date of publication to submit comments related to the proposed guidance.

As Proskauer previously covered, the EEOC attempted to publish guidance on workplace harassment over six years ago in January 2017. Now, more than six years later, the EEOC has released proposed workplace harassment guidelines. According to EEOC spokesman Victor Chen, it was approved in a narrow 3-2 vote. Chen also stated, in regards to the delay, that since the previous release of the proposed guidance, "some notable changes in society and the law have occurred, including the #MeToo movement going viral and issuance of new court decisions that required additional updates to the draft guidance."

The proposed guidance is structured as follows, focusing on the three components of a harassment claim:

Covered Bases and Causation – *was the conduct based on the individual's legally protected characteristic under the federal EEO statutes?*

- This section of the proposed guidance discusses how federal laws, like Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, establish protected characteristics, such as race and color, age (40 or older), and sex (which encompasses pregnancy, childbirth, sexual orientation, and gender identity). It further addresses how harassment based on the perception that an individual has a particular protected characteristic, for example, the belief that a person is of a particular national origin or practices a particular religion, is also covered by federal law even if the perception is incorrect. Furthermore, harassment that is based on the complainant's protected characteristic is covered, even if the

harasser is a member of the same protected class.

- One notable highlight of this section is a discussion of worker protections against harassment based on sexual orientation and gender identity. The guidance states that this kind of harassment includes conduct like physical assault, but can also include misgendering and denying access to a bathroom consistent with an individual's gender identity. The guidance elaborates that while the Supreme Court's decision in *Bostock v. Clayton County* concerned discrimination, "the Supreme Court's reasoning in the decision logically extends to claims of harassment" and that "courts have readily found post-Bostock that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII."

Harassment Resulting in Discrimination with Respect to a Term, Condition, or Privilege of Employment – *did the harassing conduct result in discrimination with respect to a term, condition, or privilege of employment?*

- This section of the proposed guidance discusses the two kinds of workplace harassment – "quid pro quo" harassment and hostile work environment. It primarily focuses on the more common hostile work environment theory, and discusses what kind of conduct rises to the level of being "severe or pervasive" enough to establish that a work environment was both objectively and subjectively hostile.
- The guidance states that to create an objectively hostile work environment under federal law, "conduct need not be both severe and pervasive: [t]he more severe the harassment, the less pervasive it must be, and vice versa, to establish a hostile work environment." In fact, the guidance advises that a single incident of harassment can result in a hostile work environment.
- The guidance makes clear that hostile work environment claims may include conduct that occurs in a work-related context outside an employee's regular workplace. Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment. Conduct that can affect the terms and conditions of employment outside of the work-related context, includes electronic communications using **private phones**, computers, or social media accounts.
- In some circumstances, an individual who has not personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging that they have been harmed by unlawful harassment of a third party. The EEOC gives an example of an employee whose manager subjects the employee's coworker to racial harassment, and forces the employee to participate in that harassment. In addition to the coworker, the employee could also

file a charge with the EEOC to seek relief for any harm she suffered as a result of having to take part in the harassment.

Liability – *is there a basis for holding the employer liable for the conduct?*

- This section of the proposed guidance illustrates the different liability standards depending on who is accused of the harassment – e.g., a proxy of the employer, a supervisor, or a non-supervisory employee.
- The proposed guidance also details the *Farragher-Ellerth* affirmative defense, which applies when harassment is by a supervisor and there is no tangible employment action. Through this affirmative defense, an employer can escape liability if the employer exercised reasonable care to prevent and promptly correct any harassment, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment. This defense is just one reason why it is so important for employers to have up-to-date policies and handbooks, as well as a proper outlet for employees to report harassment.

In addition to the three sections discussed above, the proposed guidance also includes a section on "systemic harassment", in line with the EEOC's recent focus on resolving systemic employment discrimination cases. Systemic harassment involves situations where multiple individuals of the same protected characteristic are subjected to a similar form of discrimination. In these sorts of cases where there is a "pattern or practice" of discrimination common to multiple individuals, the employer must adopt a systemic remedy, rather than only address harassment of particular individuals.

The proposed guidance includes many specific examples of conduct that, in the EEOC's view, would and would not constitute unlawful harassment under the covered laws. The proposed guidance also includes citations to decisions which interpret the covered laws and analyze how the courts applied the law to specific facts. While the EEOC recommends this guidance for employers to research how courts have previously decided harassment issues, it cautions that the document should not be understood to "prejudge the outcome of a specific charge filed with the EEOC."

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