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EEOC Releases Final Guidance on Harassment in the Workplace

Law and the Workplace on **May 6, 2024**

On April 29, 2024 the U.S. Equal Employment Opportunity Commission ("EEOC") published its final guidance on harassment in the workplace.

As Proskauer previously covered, this final guidance follows proposed guidance, which the EEOC published on October 2, 2023. According to a press release issued by the EEOC, the final guidance "updates, consolidates, and replaces the agency's [previous] documents issued between 1987 and 1999, and serves as a single, unified agency resource on EEOC-enforced workplace harassment law."

Some key highlights from the final guidance are as follows:

- The clarification of broad protection for LGBTQ+ workers, based on the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). The guidance notes that harassing conduct based on sexual orientation or gender identity includes "outing (disclosure of an individual's sexual orientation or gender identity without permission); … 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 explanation of how conduct within a "virtual" work environment (like sexist comments or racist background imagery in a work video meeting) can contribute to a hostile work environment. However, the final guidance also clarifies that posts on social media generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees.
- The confirmation that a single incident of harassment can amount to a hostile work environment if sufficiently severe.
- The emphasis that sex-based harassment under Title VII encompasses harassment based on pregnancy, childbirth, or related medical conditions (including the decision to have, or not have, an abortion).
- The description of key elements necessary to establish that the employer exercised reasonable care to prevent and correct harassment. These elements are: a broadly disseminated policy against harassment, a process for addressing harassment

complaints, training to ensure employees understand their rights and responsibilities, and monitoring of the workplace to ensure adherence to the employer's policy.

- The guidance details the components of an effective anti-harassment policy, which, among other items, should cover supervisor reporting responsibilities, "clearly identif[y] accessible points of contact" and include their "contact information."
- The guidance also sets forth the features of an effective complaint process, which, among other things, should provide for prompt and effective investigations and corrective action, and adequate confidentiality and anti-retaliation protections.
- For training to be effective, the guidance instructs that it, among other things, should be provided to all employees on a regular basis. It should also provide supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment.
- Notably, according to the EEOC, having a comprehensive anti-harassment policy and complaint procedure is not enough to establish reasonable care if the employer fails to properly implement these policies and procedures or to appropriately train employees.

Alongside the final guidance, the EEOC has also issued several educational resources concerning the new guidance, including a "Summary of Key Provisions" document, a document summarizing the final guidance for employees, and a fact sheet for small businesses.

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