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## **EEOC Issues Proposed Enforcement Guidance on Unlawful Harassment – A Good time to Review Your Policies and Procedures**

The Equal Employment Opportunity Commission (EEOC) is seeking public comment on its newly proposed enforcement guidance addressing unlawful workplace harassment under the federal anti-discrimination laws. The deadline for employers and other members of the public to submit input regarding the proposed guidance has been extended to March 21.

The publishing of the new proposed guidance stems from the recommendations made last June by the EEOC's Select Task Force on the study of harassment in the workplace. If put into effect, the new guidelines would supersede pre-existing agency guidelines created during the 1990s. The EEOC issued a press release, in which EEOC Commissioner Chai Feldblum was quoted as saying: "This guidance clearly sets forth the Commission's positions on harassment law, provides helpful explanatory examples, and provides promising practices based on the recommendations in the report."

In its press release accompanying the issuance of the proposed guidance, the EEOC stated that the new guidance is necessary because the number of harassment claims filed over the past several years is on the rise. According to the EEOC, between 2012 and 2015, the percentage of private sector charges that included an allegation of harassment increased from slightly more than one-quarter of all charges annually to over 30% of all charges. In 2015, the EEOC received 27,893 private sector charges that included an allegation of harassment, accounting for more than 31% of the charges filed that year.

### **Highlights from the Draft Guidance**

The majority of the 75-page guidance offers an overview of the EEOC's positions on the following topics:

- harassment based on protected characteristics (race, color, national origin, religion, sex, age, disability, and genetic information);
- establishing causation;
- harassment resulting in discrimination based on a term, condition, or privilege of employment;
- defining hostile work environment claims;
- employer liability standards; and
- systemic harassment.

In its draft guidance, the EEOC also suggests a number of "promising practices" to help employers eliminate workplace harassment including: (1) committed and engaged leadership; (2) strong and comprehensive harassment policies; (3) trusted and accessible complaint procedures; and (4) regular and interactive anti-harassment trainings. These last three

areas merit strong attention today, under established legal precedent by employers to limit liability, regardless of when the Guidance is finalized and regardless of its final content.

### **Policy Evaluation for Employers – Why Wait?**

Concerning policies and complaint procedures, employer defenses under both federal and state law can be asserted based on strong policies defining and prohibiting harassing conduct, encouraging/requiring the reporting of harassing conduct that violates the policy, and providing clear and accessible complaint procedures. Common shortcoming among employer policies include outdated listings of legally protected categories, less than clear encouragement/requirement that unlawful harassing conduct be reported, and unclear or deficient complaint procedures. A strong commitment to non-retaliation should also be a prominent component of the employer's policy.

Regarding the concept of regular and interactive trainings, some employers are reluctant to train due to cost concerns or a concern that training will lead to increased claims that lack any real merit and may perhaps even lead to bogus claims made by employees in bad faith. However, periodic training helps prevent harassment and provides additional defenses to employers in cases where claims are asserted. In addition, an increase in claims or meritless claims is rarely the case when an employer has strong policies and conducts routine, periodic anti-discrimination and harassment training.

### **Action Steps for Employers**

Employers who are interested in providing input on the proposed guidance may do so by submitting comments through [www.regulations.gov](http://www.regulations.gov), or by sending written feedback to: Public Input, EEOC, Executive Officer, 131 M Street, N.E., Washington, D.C. 20507. The EEOC will consider input from the public before finalizing and issuing the guidance.

In addition, the attention to these issues provides a great opportunity/reminder for employers to review their anti-harassment policies and complaint procedures; to revise those policies and procedures if necessary; and to conduct some anti-harassment training for employees. Proactivity in this area will yield long term benefits down the road in terms of less likelihood of claims and better defenses for employers when claims are asserted.

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