



The EEOC's Proposed Enforcement Guidance on Unlawful Harassment

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The Equal Employment Opportunity Commission (EEOC) has issued proposed enforcement guidance on unlawful harassment (the "Proposed Guidance"). The Proposed Guidance is intended to be a follow-up to the EEOC's Select Task Force on the Study of Harassment in the Workplace in 2016 ("2016 Harassment Study"). The Proposed Guidance provides a detailed explanation of the EEOC's position on the three components of a hostile work environment claim: 1) covered bases and causation; 2) hostile work environment threshold; and 3) liability.

The discussion regarding covered bases provides examples of the different covered bases under the various equal employment laws including: race, color, national origin, religion, sex, age, disability, and genetic information. Further, the Proposed Guidance specifically sets forth the EEOC's position that as a protected base "sex" includes, but is not limited to, gender identity and sexual orientation issues; sex stereotyping; and pregnancy, childbirth, or related medical issues.

The discussion regarding the hostile work environment threshold focuses on providing details as to what is considered severe or pervasive; that harassing conduct must be subjective and objectively hostile; and that the conduct at issue must be sufficiently related. In this discussion, the Proposed Guidance highlights the EEOC's position that "conduct that is subjective and objectively hostile is also necessarily unwelcome" and that this position differs from the courts' approach that a plaintiff must prove that the conduct was unwelcome as an element of the prima facie case.

The Proposed Guidance also sets forth a detailed discussion of the liability standards applicable to hostile work environment claims that arise from different levels of employees within an organization. Specifically, the Proposed Guidance sets forth the following standards when certain employees engage in harassing conduct:

- **Alter Ego/Proxy:** If an alter ego/proxy of the employer engages in harassing conduct, the employer is strictly liable.
- **Supervisor With Tangible Employment Action:** If a supervisor's harassing conduct results in a tangible employment action, the employer will be vicariously liable and no defense exists.
- **Supervisor Without Tangible Employment Action:** If a supervisor's harassing conduct does not result in a tangible employment action, the employer is vicariously liable but can offer an affirmative defense if it can show that 1) it exercised reasonable care to prevent and promptly correct the harassing conduct; and 2) the employee failed to take advantage of any preventative or corrective avenues offered by the employer.
- **Non-Supervisor:** If the employee is not a supervisor (or if the alleged harasser is not an employee), the employer will be liable for the harassing conduct if it 1) failed to act reasonably to prevent the harassment; or 2) failed to take reasonable action to address the harassment when it knew or should have known of it.

Finally, the Proposed Guidance also offers recommendations as to preventative steps employers can take based on the principles set forth in the 2016 Harassment Study including developing a harassment prevention strategy that includes engaged leadership, consistent accountability, strong harassment policies, easily accessible and trusted complaint procedures, and regular harassment training that is tailored to the employees in the audience.

Specifically, the Proposed Guidance recommends that harassment prevention training should be:

1. promoted by senior leaders;
2. repeated on a regular basis;
3. provided to all employees of the organization;
- 4.

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- provided in all languages commonly used by employees;
5. tailored to the specific organization and employees attending the training;
 6. conducted by qualified, live, interactive trainers, if possible, or, if not, designed to engage the employee participants; and
 7. routinely evaluated by participants and revised as needed.

Interestingly, the Proposed Guidance also recommends implementing other forms of training, such as civility training, to prevent harassment. This recommendation appears to contradict the National Labor Relations Board's recent decisions which have generally protected employees' rights to make comments related to the terms and conditions of their employment, even if such comments would be considered disrespectful. The Proposed Guidance does not offer any recommendations as to how to reconcile the EEOC's recommendation regarding civility training with the NLRB's current position on employee rights.

The EEOC will be accepting comments on the Proposed Guidance until March 21, 2017.

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