CLIENT ALERTS & INSIGHTS

EEOC Issues New Workplace Harassment Guidance

MAY 7, 2024

Authors: W. Eric Baisden, Adam Primm

For the first time in a quarter-century, the U.S. Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance on workplace harassment. The April 29-guidance consolidates and supersedes several iterations of EEOC guidance issued between 1987 and 1999.

The guidance highlights issues involving workplace harassment. According to the EEOC, one-third of the employment discrimination charges filed with the agency in the last five years include allegations of unlawful harassment based on race, sex, disability, or other protected characteristics. The guidance cites a litany of conduct that may constitute unlawful harassment based on race, color, national origin, religion, sex, age, disability, genetic information, and retaliation, and analyzes the various standards for employer liability for such harassment, including examples of seventy-seven hypothetical scenarios which may be actionable.

Notably, the guidance drew the ire of some who perceive the EEOC as impermissibly expanding the interpretation of Title VII. The applicability of a 2020 U.S. Supreme Court case-*Bostock v. Clayton County*-finds itself at the center of debate. *Bostock* held that Title VII discrimination includes discrimination based on sexual orientation and gender identity. In the guidance's "Addendum Pursuant to 29 C.F.R. § 1695.6(c) on EEOC Responses to Major Comments Received on the Proposed Enforcement Guidance on Harassment in the Workplace," some commentors argue that *Bostock* did not address the applicability of anti-discrimination laws to sex-segregated bathrooms and other bases of potential harassment cited in the guidance. The EEOC responded broadly:

Sex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity. Accordingly, sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed. Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; 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.

In a November 1, 2023-letter published when the guidance was proposed, twenty state attorneys general-led by Jonathan Skrmetti of Tennessee-argue that the guidance "contravenes the [EEOC's] statutory authority" and its "Title VII stance will unleash unconstitutional chaos in the Nation's workplaces" by requiring employers "to affirm or convey to employees and customers-often against religious conviction or deeply held personal belief-messages that a person can be a gender different

from his or her biological sex, that gender has no correlation to biology, or that they endorse the use of pronouns like 'they/them,' 'xe/xym/xyrs,' or 'bun/bunself.'" The letter asserts that the EEOC uses *Bostock* as a "silver bullet for imposing breathtakingly broad transgender-based liability in contexts the Supreme Court never considered."

Impact on Employers

The EEOC's guidance is just that-guidance. Or in the EEOC's words, a "resource" for employers, employees, practitioners, EEOC staff, and the courts. The guidance's contents "do not have the force and effect of law" and "are not meant to bind the public in any way." However, employers should be aware that the guidance may lay the foundation for employees to allege workplace harassment in broader contexts, especially sexual orientation and gender identity. That said, the guidance may be primed for challenge by those who argue that it inappropriately attempts to broaden interpretations of Title VII and other anti-discrimination laws.

For more information, contact an attorney in Benesch's Labor & Employment Practice Group.

W. Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.