

When The EEOC Speaks, Employers Should Listen

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Employers who want a leg up should follow the Equal Employment Opportunity Commission (EEOC)'s new guidance. Although following EEOC guidance is not required, it is good business practice. This is particularly true since there were over 90,000 complaints against employers in 2017.

In 2016, an EEOC Workplace Harassment Taskforce issued a report on harassment in the workplace. In January 2017, the EEOC issued an approximately 70 page draft of guidance on harassment based on the Taskforce's findings. The draft was put out to the public for comment. Since then, the EEOC revised its guidance and sent it to the Office of Management and Budget (OMB) at the Whitehouse for approval. As of today, the guidance has still not been approved. Nevertheless, the guidance provides employers with a glimpse into the EEOC's thinking and highlights changes in the agency's interpretation of the law.

The EEOC guidance describes workplace harassment as a "persistent problem." According to the guidance, multiple factors have contributed to this problem. To combat harassment, employers must have a stronger commitment to stop workplace harassment and not just to prevent litigation. Employer policies should provide employees with clear guidelines to report harassment and establish clear procedures to stop employees from engaging in harassing conduct. The EEOC recommends that training be tailored to each employer's specific workforce and workplace. The guidance emphasizes the importance of correctly training middle managers and frontline supervisors to prevent harassment. They are often the first to be approached by employees with harassment complaints. The guidance also recommends greater involvement by co-workers in preventing harassment, which can be accomplished through such measures as by-stander intervention training. This training teaches co-workers to intervene when they witness harassing behavior. The EEOC also recommends workplace civility training, which focuses on promoting respect and civility in the workplace. This type of training is likely to create a workplace environment which is less ripe for harassment.

The EEOC's most controversial guidance widens the scope of what it considers illegal harassment under federal law to include harassment based on sexual orientation and gender identity. This guidance is controversial because federal law does not specifically categorize harassment based on sexual orientation or gender identity as illegal sexual harassment. Courts have taken different views on whether discrimination based on either is illegal under federal law. However, the new guidance specifically identifies harassment based on an individual's sexual orientation, transgender status or an individual's intent to transition as sexual harassment.

Takeaway: Employers should incorporate the EEOC's new guidance into their harassment prevention efforts.

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