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Key Takeaways for Employers from the EEOC's Proposed Enforcement Guidance on Harassment

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Thirty years ago, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment is an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. While harassment law and the related issues facing employers have evolved dramatically since *Vinson*, it was not until 2013 that workplace harassment moved to the forefront of the EEOC's national enforcement priorities.

Between 2012 and 2015, the EEOC's statistics show that harassment claims increased from approximately 25 percent of all charges filed annually to more than 30 percent of all charges. Recognizing this increase, the EEOC commissioned a Select Task Force, co-chaired by now acting EEOC Chair and Republican Victoria A. Lipnic and Democratic Commissioner Chai R. Feldblum, to study the reason for the pervasiveness of harassment in the workplace. In June 2016, the EEOC issued the [Select Task Force on the Study of Harassment in the Workplace Report](#) (the 2016 Report), which articulated the belief that most employer-conducted training focused too much on legal liability and not enough on creating "a holistic culture of non-harassment." Accordingly, the 2016 Report provided recommendations to employers regarding effective workplace "civility" and harassment training.

As a companion piece to the 2016 Report, in January 2017, the EEOC released for public comment [Proposed Enforcement Guidance on Unlawful Harassment](#) (the 2017 Proposed Guidance), which emphasizes that the EEOC's focus on this issue is not waning. The 2017 Proposed Guidance, which is intended to update the EEOC's 1990 guidance (16 pages focused only on sexual harassment), covers all categories of harassment (age, sex, LGBT discrimination, religion, age, national origin, disability and genetic information); defines what constitutes harassment; looks at when a basis for employer liability exists; and offers suggestions for preventive practices. Although the 2017 Proposed Guidance does not have the force of law, the EEOC's investigators will rely on it when investigating employers who allegedly violate harassment laws. All of this clearly signals that enforcing the laws governing workplace harassment continues to be one of the EEOC's top priorities.

Key Takeaways: "Promising Practices"

Although the 2017 Proposed Guidance takes great pains to explain the EEOC's views on employer liability, the elements of a harassment claim, and employers' responsibilities relating to supervisor, co-worker and non-employee harassment, the "Promising Practices" section may be the most useful to employers. In that section, the EEOC identifies "five core principles" that it believes are necessary for preventing and addressing harassment: 1) committed leadership; 2) demonstrated accountability; 3) strong, comprehensive policies; 4) trusted and accessible complaint procedures; and 5) regular, interactive training tailored specifically to the audience and the organization.

Leadership and Accountability. The EEOC believes that "consistent demonstrated commitment of senior leaders to create and maintain a culture of respect in which harassment is not tolerated" is the "cornerstone" of a successful harassment prevention strategy. According to the EEOC, this commitment may be demonstrated

by, among other things, allocating sufficient resources for effective harassment prevention strategies, assessing harassment risk factors and taking steps to minimize or eliminate those risks.

Comprehensive and Effective Anti-Harassment Policy. The EEOC recommends that every employer maintain an anti-harassment policy that is written and communicated in a clear, easy-to-understand format; translated to all languages commonly used by employees; provided to employees upon hire and during trainings; and placed on the company's intranet, in the employee handbook and in locations frequented by employees. There are ten components that the EEOC expects to find in a comprehensive and effective policy:

1. An unequivocal statement that harassment based on any legally protected characteristic is prohibited and will not be tolerated.
2. An easy-to-understand description of prohibited conduct, including examples.
3. A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues.
4. A statement that employees are encouraged to report conduct they believe constitutes unlawful harassment (or that, if left unchecked, may rise to the level of unlawful harassment), even if they are not sure the conduct violates the policy.
5. A statement that the employer will provide a prompt, impartial and thorough investigation.
6. A statement that the identity of individuals who report harassment, alleged victims, witnesses and alleged harassers will be kept confidential to the extent possible consistent with a thorough and impartial investigation depending on any relevant legal requirements.
7. A statement that employees are encouraged to respond to questions or to otherwise participate in investigations into alleged harassment.
8. A statement that information obtained during an investigation will be kept confidential to the extent possible, consistent with a thorough and impartial investigation and in keeping with relevant legal requirements.
9. An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred.
10. An unequivocal statement that retaliation is prohibited and will not be tolerated, and an assurance that alleged victims, individuals who in good faith report harassment or participate in investigations, and other relevant individuals will be protected from retaliation.

Effective and Accessible Harassment Complaint System. The EEOC recommends that an effective and accessible complaint system is one that welcomes questions, concerns and complaints; encourages employees to report problematic conduct early; treats victims, complainants, witnesses, alleged harassers and others with respect; operates promptly, thoroughly and impartially, and imposes appropriate consequences for misconduct. In addition, the EEOC recommends that an effective complaint system and investigation process:

- Is fully resourced, enabling the organization to respond promptly, thoroughly and effectively to complaints;
- Is translated into all languages commonly used by employees;
- Provides multiple avenues of complaint, if possible;
- Provides prompt, thorough and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses and other relevant individuals are subjected to retaliation and imposes sanctions on individuals responsible for retaliation;

- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and also, where appropriate, the preventative and corrective action taken as a result.

The 2017 Proposed Guidance also instructs that those employees who are responsible for receiving, investigating and resolving complaints or otherwise implementing the harassment complaint system should:

- Be well-trained, objective and neutral;
- Have the authority, independence and resources required to receive, investigate and resolve complaints appropriately;
- Take all questions, concerns and complaints seriously, and respond promptly and appropriately;
- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

Effective Harassment Training. The 2017 Proposed Guidance provides that regular, interactive, comprehensive training of all employees is essential in ensuring that employees understand an employer's harassment policies and complaint system. The EEOC believes that training should be advocated by senior leaders; repeated and reinforced regularly; provided to employees at every level and location of the organization; provided in all languages commonly used by employees; tailored to the specific workplace and workforce; conducted by qualified, live, interactive trainers, if feasible; and routinely evaluated and revised as necessary. Moreover, the 2017 Proposed Guidance provides that to be effective, harassment training should include:

- Descriptions of unlawful harassment and conduct that, if left unchecked, might rise to the level of unlawful harassment;
- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct they believe may be prohibited;
- Explanations of the complaint process; and
- Explanations of the range of possible consequences for engaging in prohibited conduct.

The EEOC also recommends that managers and supervisors receive additional training on how to prevent, identify, stop, report and correct harassment; avoid retaliation; and recognize the consequences of not fulfilling their anti-harassment and anti-retaliation responsibilities.

Although most employers are acutely aware of the need to prevent and correct unlawful workplace harassment, the scope of the 2017 Proposed Guidance demonstrates the complexities of this area of the law and the immense challenges for employers. With the publication of the 2017 Proposed Guidance, the EEOC has put employers on notice of the actions it expects employers to take regarding training, policies, and complaints and, no doubt, the EEOC will judge employers against those expectations.