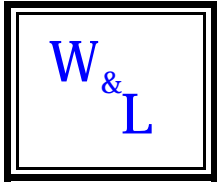


# EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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## **PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT EXPANDS TRUMP ADMINISTRATION'S GUIDANCE SIGNIFICANTLY**

On September 29, 2023, the Equal Employment Opportunity Commission (EEOC) proposed new enforcement guidance on harassment, subject to public input for a period of 30 days after its publication (November 1). A similar guidance that was issued during the Trump Administration never was finalized, allegedly due to LGBTQ-related issues. The Trump Administration proposed a guidance closely tracking the case law, but the new guidance seems to extend the case law. This article will first address some of the ways the new proposed guidance seems to expand the existing harassment case law. Such EEOC interpretations are followed by the courts only to the extent they are found to be persuasive.

Addressing a situation where an employee did not complain until four months later, and after accepting a position with another employer, the EEOC says the employer is liable for the initial incident because the employee could not have avoided this harm by complaining earlier.

The EEOC states that there may be reasonable delays in complaining or in failing to use the employer's complaint procedure. One is where an employee had a reasonable belief that the complaint process was ineffective, such as where persons designated to receive complaints were close friends of the harasser. Another is where the employee reasonably feared retaliation as a result of complaining about harassment, such as where the employee or another employee had previously been subjected to retaliation for complaining about harassment. Other circumstances are where the employee took other reasonable steps rather than using the employer's complaint process, such as filing a union grievance, or reporting the harassment to another entity and reasonably expecting that entity to correct the problem.

The employer's duty to take corrective action may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.

Notice of harassing conduct directed at one employee might serve as notice not only of the harasser's potential of further harassment of the same employee, but also of the harasser's potential to harass others.

The guidelines address systemic harassment, harassment affecting multiple complainants. It states that evidence of widespread harassment could be used to establish that each employee working on a shift was individually subjected to an objectively hostile work environment.

To address liability in a pattern-or-practice case, the employer must adopt a systemic remedy, rather than only address harassment of particular individuals. If there have been frequent individual incidents of harassment, then the employer must

take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive company-wide procedures.

The above items seem to be somewhat of an expansion of the current case law. In addition to these aggressive interpretations, the guidelines summarize various aspects of the harassment issue.

### **OTHER PORTIONS OF PROPOSED HARASSMENT GUIDELINES ADDRESS CRITICAL ISSUES**

Evidence must show that the complainant was subjected to harassment because of the complainant's protected characteristic. Absent an explicit change to the terms and conditions of employment, harassing conduct based on a protected characteristic is actionable when it is sufficiently severe or pervasive to create an objectively and subjectively hostile work environment. However, the statute does not impose a general civility code, but takes a "middle path" that requires the conduct to be more than merely offensive but does not require the conduct to cause psychological harm. The circumstances include the frequency and severity of the conduct; the degree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee's work performance; and the degree to which it caused complainant psychological harm. There is not a "magic number" of harassing incidents that automatically establishes a hostile work environment nor a minimum threshold for severity.

The more directly harassment affects the complainant, the more likely it is to negatively affect the complainant's work environment. Thus, harassment is generally more probative of a hostile work environment if it occurs in the complainant's presence than if the complainant learns about it secondhand. In some circumstances, a single incident of harassment can result in a hostile work environment. Determination of whether the harassment was objectively hostile requires "an appropriate sensitivity to social context," and should be made from the perspective of a reasonable person of the complainant's protected class.

The complainant can challenge an entire pattern of conduct, as long as at least one incident that contributed to the hostile work environment is timely. Harassing conduct can affect an employee's work environment even if it is not directed at that employee, although the more directly it affects the complainant, the more probative it is likely to be of a hostile work environment. A hostile work environment claim may include conduct that occurs in a work-related context outside an employee's regular workplace. Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace.

The liability standard for a hostile work environment depends on whether the harasser is a proxy or alter-ego of the employer; supervisor; or non-supervisory employee, co-worker or non-employee. If the harasser is an alter-ego or proxy of the employer, the employer is automatically liable for unlawful harassment. The employer is vicariously liable for a hostile work environment created by a supervisor. If the supervisor took a tangible employment action as part of the hostile work environment, then the employer is automatically liable for the hostile work environment. If the supervisor did not take a tangible employment action, then the employer can raise the affirmative defense that: (1) the employer acted reasonably to prevent and promptly correct the harassment; and (2) the complaining employee unreasonably failed to use the employer's complaint procedure or take other steps to avoid or minimize harm from the harassment.

These steps usually consist of promulgating a policy against harassment, establishing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities, and monitoring the workplace to ensure adherence to the employer policy. The guidelines go on to specify features that at a minimum must be contained in the anti-harassment policy to be effective, as well as features for the complaint process to be effective.

An employer has notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it, or if such an individual reasonably should have known about the harassment.

The alleged harasser should not have supervisory authority over the individual who conducts the investigation and the individual should not have any direct or indirect control over the investigation. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred. After completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws. After taking corrective action, the employer should monitor the situation to insure that the harassment has stopped. The employer is not required to impose discipline if, after a thorough investigation, it concludes that the alleged harassment did not occur, or if it has inconclusive findings. Nevertheless, if the employer is unable to determine whether the alleged harassment occurred, the employer may wish to consider preventive measures, such as counseling, training, monitoring, or issuing general workforce reminders about the employer's anti-harassment policy.

The guidance also addresses emerging legal requirements such as harassment based on conditions related to pregnancy and childbirth, including abortions; LGBTQ harassment; and issues pertaining to the accommodation of religious expression. The guidelines indicate that harassment can include denial of access to a bathroom or other facility consistent with an employee's gender identity, as well as use of an inconsistent name or pronoun.

### **DOL PROPOSAL DRAMATICALLY INCREASES SALARY LEVEL NECESSARY FOR OVERTIME EXEMPTION**

Workers who are salaried, who make more than a certain amount of money per year and work in a "bona fide executive, administrative, or professional capacity" are not covered by requirements for employers to pay employees at time-and-a-half for any time they work beyond 40 hours in a week. Employees must meet all three of these factors for the exemption to apply. On August 30, 2023, the Department of Labor (DOL) announced a new proposed rule to update these regulations. Specifically, the DOL's proposed rule would:

- Increase the regulations' standard salary level from \$684.00 per week (\$35,568.00 per year) to \$1,059.00 per week (\$55,068.00 per year).
- Automatically update earnings thresholds every three years so they keep pace with changes in worker salaries, changes which would keep up with the cost of living and allow employers to know when salary updates would happen and how they would be calculated.
- Increase the total annual compensation required for highly-compensated employees from \$107,432.00 per year to \$143,988.00 per year.

The proposed rule starts a regulatory process to change the rule, beginning with a 60-day public comment period. It is estimated that the rule, if finalized, would render approximately 3.6 million workers currently classified as overtime exempt eligible for overtime, but the rule will cost employers \$1.2 billion to implement.

There will almost certainly be legal challenges to the rule. In November 2016, a federal judge blocked the Obama Administration from raising the overtime threshold to \$47,476.00 a year, after certain states and businesses challenged it. The Trump Administration then raised the level to its current rate, the first increase since 2004.

The final rule, if implemented, will actually raise the salary level even higher because DOL will use the most recent data available. For example, DOL states that if the rule is finalized in the 4<sup>th</sup> Quarter of 2023, it "projects that the salary threshold could be \$1,140.00 per week or \$59,285.00 for a full-year worker."

Employers may sometime in the future have to consider either raising salaries to certain exempt persons or move them to an hourly rate or a fixed-pay-for-fluctuating hours arrangement. There will be a big adjustment for employees and employers in terms of timekeeping practices as well.

**DOL ALSO RAISES 2024 MINIMUM WAGES FOR  
FEDERAL CONTRACTORS**

On September 27, 2023, DOL issued updated minimum wages for federal contractors for 2024. Contracts entered into with the federal government on or after January 30, 2022 will have a new minimum wage of \$15.20 per hour. A \$12.90 hourly minimum wage will apply to those contracts created on or after January 1, 2015, but before January 30, 2022.

A day earlier, a Texas federal court ruled that the Procurement Act does not give the President the authority to use an Executive Order to increase starting pay for workers who contract with the federal government. This ruling is the first court win for those opposing Biden's \$15.00 Wage Executive Order, which was issued in April of 2021. However, the judge declined to issue a nationwide injunction, in that courts in certain other jurisdictions have upheld the contractor wage minimum. *Texas v. Biden*, S.D. Tex. (9/26/23). Thus, the court ruling only affects the states of Texas, Louisiana, and Mississippi, the states that challenged the wage increase in 2022.

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