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PERSPECTIVE

Workplace harrassment: a new landscape

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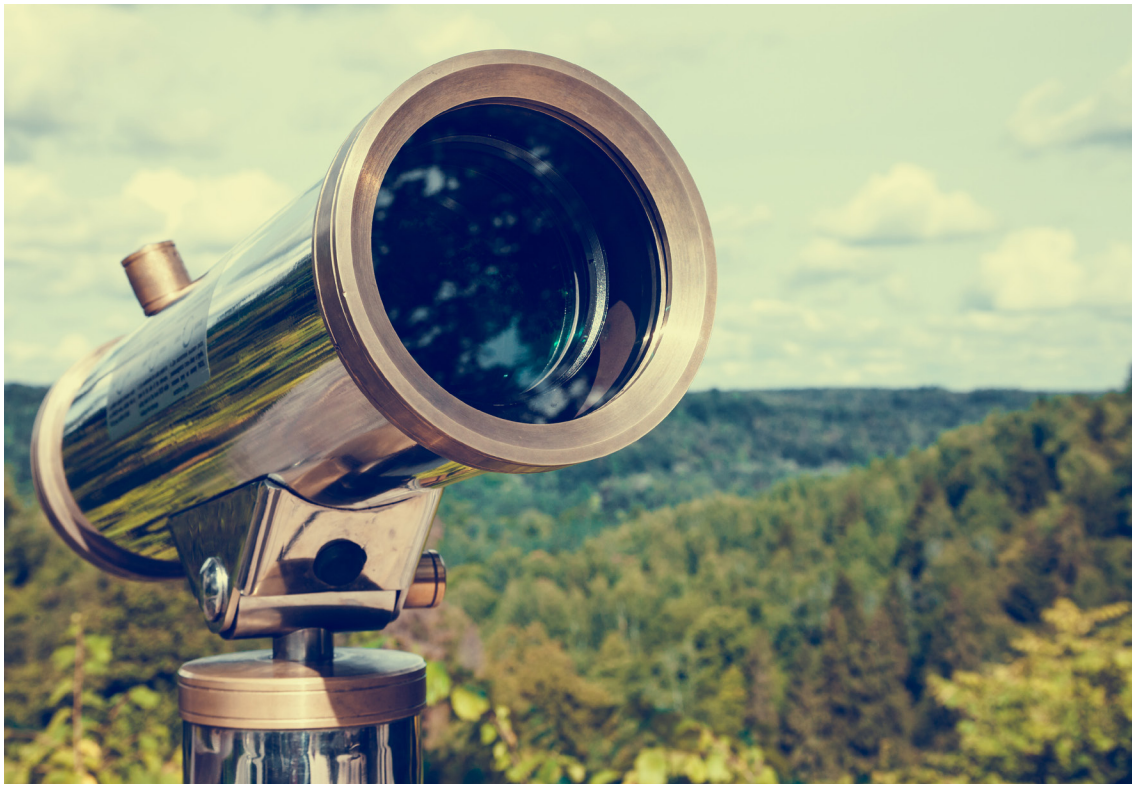

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On April 29, the Equal Employment Opportunity Commission (EEOC) issued new guidance on what constitutes workplace harassment. It was the first formal update of the agency's harassment guidelines in 25 years, and it was more than seven years in the making.

The guidelines state that discrimination and harassment are covered by federal EEO laws, such as Title VII, only if they are based on one or more protected characteristics including race, national origin, or sex. In response to recent developments, however, the new guidelines significantly widen the scope of potential harassment claims.

Remote conduct

One development impacting the EEOC's new guidelines was the prevalence of remote work. Considerably more workers now do their jobs remotely in the aftermath of the COVID-19 pandemic; workplace harassment has thus been expanded to address conduct that occurs outside the regular workplace. According to the EEOC, conduct "within a virtual work environment" can contribute to an unlawful hostile work environment.

A harassment claim may now involve conduct that takes place at an offsite employer-hosted party or through the use of work-related communications systems, accounts, devices, or platforms. Workers can assert harassment claims on the basis of communications made through work email, instant messaging, videoconferencing, or official social media accounts. This would capture racist or sexist comments made during a video meeting, racist imagery visible in an employee's workspace during a video meeting, or comments made during a video meeting about a bed being near an employee on screen.

Employers may also now face liability for conduct that occurs in a non-work-related context if it ends up having consequences in the workplace. Electronic communications using private phones, computers, or social media accounts - employees using non-work social media accounts to make racist, sexist or otherwise offensive jokes about coworkers - could subject an employer to harassment claims if they impact the workplace.

Gender identity, sexual orientation

In 2020, the U.S. Supreme Court decided the case of *Bostock v. Clayton County* (590 U.S. 644 (2020)) holding that termination of an employee due to that employee's sexual orientation or gender identity constituted unlawful sex discrimination in violation of Section 703 (a)(1) of Title VII. The Bostock decision did not, however, address other situations that could constitute discrimination based on sexual orientation or gender identity, such as the use of sex-segregated bathrooms.

The EEOC has now established a position on whether such other conduct violates Title VII. The agency's guidelines extend the definition of harassment to include gender identity, and they add misgendering to the list of hostile workplace activities. This occurs when supervisors or coworkers repeatedly and intentionally use a name or pronoun inconsistent with the

individual's known gender identity, as when a transgender female employee is regularly referred to by her prior name, by male pronouns or by other male references such as"dude."

In these situations, according to the guidance, the employee has been subjected to a hostile work environment based on her gender identity. Other forms of harassment may include "outing" employees by disclosing sexual orientation or gender identity without permission, mistreating them because they do not present in a manner stereotypically associated with their gender, and denying access to bathrooms or other sex-segregated facilities consistent with their gender identity.

Harassing conduct against transgender employees might include questions about whether an employee was "born a man," rumors that "there was a transvestite" at the workplace, instructing workers to wear pants instead of skirts, or asking inappropriate questions about anatomy and sexual relationships.

Reproductive health

The guidance now also addresses pregnancy and reproductive health-related decisions. Under the new rules, harassment may exist when a worker is targeted because of pregnancy, childbirth, or other reproductive medical conditions such as lactation, contraception or abortion. A pregnant employee may thus have a cause of action against her employer if she is suddenly berated for working slowly, her bathroom use is monitored, or her coworkers make derogatory comments towards her.

For the first time, harassment based on an employee's decisions around contraception and abortion are explicitly covered by Title VII. Women may not be fired for taking contraceptives, having abortions or even thinking about having abortions. They may not be pressured into having or not having abortions in order to retain a job or get better assignments.

What does it mean?

Although the new EEOC guidelines substantially expand the grounds for asserting Title VII hostile work environment claims, they do not change the underlying calculus for bringing such claims. For purposes of both FEHA and Title VII, the alleged conduct must be "severe" or "pervasive," but California law says that a single comment or action might be enough to establish a claim.

Under Government Code Section 12923, "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."

For a worker forced one time to use a restroom that doesn't correspond to his or her gender identity, it may be difficult to prove that the test was met. But if that same worker is consistently denied access to their preferred restroom, he or she may choose not to come to work or may leave the worksite to use a restroom. The workplace has become hostile and intimidating for them.

Companies should update their policies and provide training to managers and supervisors so that all instances of potential harassment are identified and addressed quickly and appropriately. When offensive and hostile conduct is pervasive and persistent - even conduct that occurs over telephone lines or Zoom - it will be difficult for an employer to argue that nobody knew about it.

Conclusion

Legal challenges have already been raised against abortion-related protections in the Pregnant Workers Fairness Act, and it may only be a matter of time before similar objections are made to the EEOC's broadened harassment definitions. Unless or until those objections are resolved, companies must take steps to ensure compliance.

This includes providing training to managers and supervisors, as well as acting quickly to suppress hostile comments and conduct toward employees who fall into the "other" classification. This includes those dealing with sexual orientation or gender identity, as well as those with medical conditions and decisions related to pregnancy and contraception.

All employers must familiarize themselves with the EEOC's new workplace harassment guidelines and be prepared to address harass-ment and discrimination in the workplace.

JJ Johnston *is the founder of Johnston Mediation. He has been mediating employment and class action matters for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class-actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.*