Legal Matters®

Employment
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Employers must prepare for EEOC's sweeping new harassment guidelines

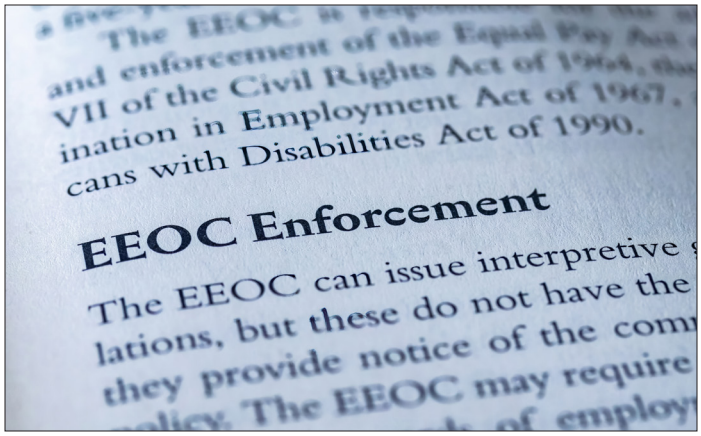
For the first time in 25 years, the U.S. Equal Employment Opportunity Commission updated its guidance on what constitutes harassment to make it more relevant to today's workplaces.

To avoid becoming the subject of an EEOC enforcement action, here's a basic summary of some of the guidelines' new understandings of unlawful harassment.

Perhaps the biggest change involves harassment based on sexual orientation and gender identity. In 2020, the U.S. Supreme Court ruled in the landmark case of Bostock v. Clayton County, Georgia that sex discrimination includes these categories. In response, the EEOC has provided examples of workplace conduct that may amount to harassment in this context. Examples include "outing" an LGBTQ+ person, intentionally "misgendering" employees by using different pronouns than what they request and denying employees access to the rest room or other similar facility for the gender they identify with.

Gender-based harassment also now explicitly includes harassment based on reproduction. Among other things, mistreating an employee for their pregnancy, for their need to nurse or pump breast milk or for pregnancy-related conditions might fall into this category.

The EEOC has also clarified that race harassment need not directly reference a person's race. It could also include harassment based on characteristics linked to race, such as a name, an accent, a hairstyle,



hair texture or style of dress. Additionally, the EEOC has specified that harassment based on color – such as pigmentation, complexion or skin tone – is actionable as race harassment.

Meanwhile, the new guidance clarifies that being discriminated against or harassed for having no religion or being an atheist is considered religious discrimination. Similarly, it clarifies that a worker's or an employer's sincerely held religious beliefs will not shield them from the consequences of expressing their beliefs in a way that violates other employees' rights. An example of this could be a worker who refuses to use a transgender or nonbinary co-worker's chosen pronouns

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Supreme Court decision could clear way for more bias suits

Title VII of the federal Civil Rights Act makes it illegal for employers to undertake a negative employment action against an employee or job applicant based on a "protected category" like race, religion, ethnicity or sex. In this context, all employers should make note of *Muldrow v. City of St. Louis, Missouri*, a recent U.S. Supreme Court decision that could make it easier for employees to bring Title VII discrimination suits over allegedly discriminatory transfers to a new position.

The case in question involved St. Louis police sergeant Jatonya Muldrow, a longtime plainclothes officer who was involuntary transferred from her job in the intelligence unit to one in a different unit that required her to wear a uniform and supervise other officers.

Muldrow's rank and pay remained the same, but she claimed her new role was less prestigious and lacked the same perks, such as a take-home vehicle and a regular Monday-through-Friday schedule.

After the transfer, Muldrow brought a Title VII suit against the city, arguing that the transfer constituted sex discrimination.

The 8th U.S. Circuit Court of Appeals ruled a trial judge correctly dismissed the case because Muldrow couldn't show that her transfer caused here a "materially significant disadvantage." Specifically, the court noted that the transfer did not result in a "diminution" in her title, salary or benefits and caused only "minor" changes to her working conditions.

But the Supreme Court reversed, ruling that an employee only needs to prove a job transfer caused them "some harm" with respect to a term or condition of employment in order to have a Title VII case and that such harm need not be significant.

In light of this decision, employers need to evaluate carefully any job transfer decision to ensure there's a legitimate, nondiscriminatory reason for the transfer, as even small negative changes could result in a lawsuit. Additionally, the court's reasoning potentially reaches beyond just job transfers, opening the door to employees claiming that other types of employment actions caused "some" harm in violation of Title VII, and could extend to antidiscrimination laws like the Age Discrimination in Employment Act and the Americans with Disabilities Act.

Given this, it's a good idea to have an employment lawyer evaluate your personnel policies to ensure you're not putting your business at risk of an expensive and damaging lawsuit.

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Before filling openings with 16- and 17-year-olds, consider legal risks

Over the past several years, employers in many industries have experienced worker shortages. This has led them to consider filling openings for non-hazardous occupations with 16- and 17-year-olds that in the past would have gone to adults. If your company is in a situation where you are considering hiring workers in this age range, it is very important to comply with rules established under the federal Fair Labor Standards Act to ensure you are not setting yourself up for fines and even jail time for violating FLSA's child labor law provisions.

Your best bet is to talk to a labor and employment attorney to review your hiring and workplace policies as they relate to minors. But in the meantime, here are some important things to consider.

First, make sure you're not engaging in "oppressive child labor," which FLSA prohibits. "Oppressive child labor" means using 16- and 17-year-olds in non-agricultural positions that the feds would consider "hazardous." This includes, among other things, manufacturing and storing of explosives or articles that contain explosive contents; working as an outside helper or driving on roads, mines and excavations near logging operations; coal mining; forest fire fighting and prevention; working with power-driven woodworking machines; and working with heavy power-driven equipment in a variety of occupations. There's a lot more categories as well – an attorney can review them with you.

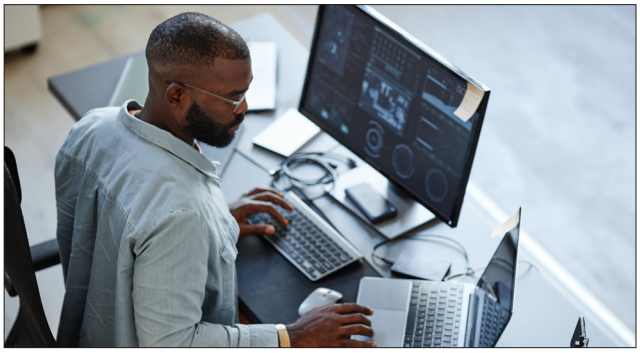
On the other hand, FLSA allows you to employ 16- and 17-year-olds for unlimited hours in any non-agricultural, non-hazardous position. However, a number of states have more onerous restrictions for employers, including hour limits and mandatory rest and meal break periods that they don't require for adults.

Under certain circumstances, FLSA may allow employers to put 16- and 17-year-olds to work in certain hazardous non-agricultural occupations as an apprentice, but it must be in a recognized trade that offers apprenticeships; the apprentice must be registered by the U.S. Department of Labor as employed under its standards; and any hazardous work an apprentice performs must be intermittent, necessary to the apprentice's training and under the close supervision of a journeyman.

Finally, employers need to review the laws of all states where they operate to ensure full compliance.

Worker deemed 'exempt' despite responsibilities that include nonexempt tasks

An "exempt" employee is a worker who is not subject to the federal Fair Labor Standards Act's FLSA minimum wage and overtime pay requirements. Instead, they receive a set salary at or above a certain government-defined level that cannot be reduced based on the hours they work or how they perform. Exempt workers are typically educated, trained white-collar employees who work in a professional, administrative, executive, or outside sales capacity as defined by their role and tasks.



But what about someone whose job duties, education level, rate of pay and certifications suggest they're "exempt," but their responsibilities also include certain "non-exempt" tasks? A recent ruling by a federal judge in Virginia suggests that employers might, under the right circumstances, still be able to classify the worker as exempt.

In that case, a staffing company placed computer professional Walter Davenport into a position doing work for IBM at a data center for health care giant Anthem. His job was apparently to provide on-site support for a complex environment of more than 7,000 servers across the Anthem network. He allegedly served as a "go-to" person for all server issues both during the workday and off-hours.

Though the staffing company classified Davenport as an exempt employee under FLSA's exemption for computer professionals, his duties also apparently included less-skilled "non-exempt" tasks such as powering servers on and off, installing software and escorting vendors through the facility.

Davenport brought a claim under FLSA, arguing that he was entitled to premium pay for overtime hours he had worked. Specifically, he contended that he should have been classified as nonexempt based on the nonexempt duties he was required to perform.

But a U.S. District Court judge disagreed, emphasizing that his "primary" duties, paired with his annualized salary and education level, supported a conclusion that he was exempt.

Although the employer prevailed here, the decision suggests companies that try and avoid FLSA overtime requirements by giving nonexempt employees a few exempt duties and classifying them as exempt could risk liability for back pay and damages. Run your classifications by an attorney to ensure you are following the law.

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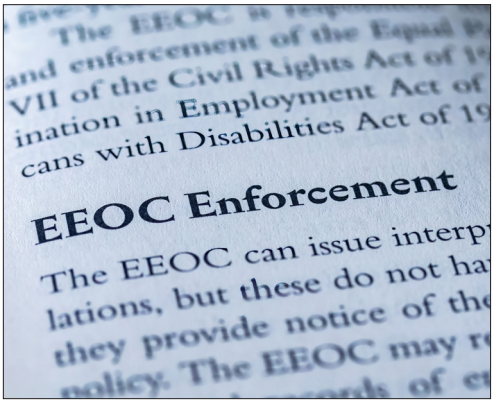
on the grounds that it violates their religious beliefs. If they're disciplined for gender harassment, they can't raise "religious liberty" as a defense.

The guidance further clarifies that harassment in a virtual environment is actionable as well. For example, an employee having an offensive image like a swastika or confederate flag visible in the background while in a Zoom meeting could potentially lead to a claim.

You should review your existing policies and make any changes needed to get them in compliance with the updated guidance. You also need to ensure your policies comply with your state's antidiscrimination and anti-harassment laws.

Additionally, training your workforce will help ensure that harassment is less likely to occur, and the fact that you've done such training may help defeat allegations that you weren't doing enough to prevent issues from arising.

A good employment attorney can help you review your policies and update them while ensuring that your workforce is properly trained.



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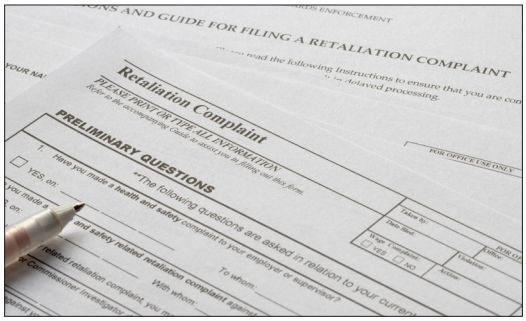
Employers may face consequences for 'third-party' retaliation



A recent decision from the Michigan Supreme Court highlights an area of risk for employers: third-party retaliation claims.

These cases arise when a worker claims their employer retaliated against them as an indirect attack against someone else who had engaged in activity that is protected by the law (such as reporting harassment or discrimination in the workplace, reporting unsafe conditions or availing themselves of family or medical leave).

In this case, Michigan Department of Corrections (MDOC) employee Lisa Griffey, a Black woman, claimed she had been experiencing a racially hostile environment for two years. She also claimed the situation got worse after she filed an official complaint with her supervisor.

Her husband Cedric, also an MDOC employee, was subjected to several internal investigations, which he believed to be in retaliation for his wife's complaints. The Griffeys took MDOC to court, where they obtained a sizeable verdict.

Subsequently, two other MDOC employees, Richard Miller and Brent Whitman, both of whom were close friends of Cedric, brought suit against MDOC alleging third-party retaliation. Specifically, they claimed they were investigated and terminated in retaliation for their friendship with Cedric, not for any workplace violations that allegedly turned up in the investigations.

A lower court ruled that they could not bring a retaliation claim because they had not personally engaged in any protected conduct.

But the Michigan Supreme Court reversed, finding that the allegations that they were fired for their friendship with Cedric in response to Cedric's protected acts were sufficient for them to bring their claims. Now they have a chance to present their case to a jury.