

THE SPARK PLUG

Virginia Automotive Association's Twice Monthly Member Update

EEOC UPDATES ITS HARASSMENT GUIDANCE

The Equal Employment Opportunity Commission (EEOC) has published draft enforcement guidance regarding workplace harassment. Highlights of the proposed guidance include broad protections for LGBTQ+ employees, virtual workplace harassment, and non-work-related social media activity that contributes to a hostile work environment.

- **LGBTQ+ Protections.** According to the proposed guidance, examples of harassment based on an individual's gender identity may include (i) harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; (ii) intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity; or (iii) denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.
- **Virtual Workplace Harassment.** The proposed guidance cites examples of conduct that could be considered harassment, including: (i) sexist comments made during a video meeting; (ii) racist imagery that is visible in an employee's workspace while the employee participates in a video meeting; and (iii) sexual comments made during a video meeting about a bed being near an employee in the video image. While these examples cited by the agency focus on video conference technology, the EEOC opines that harassing conduct can also occur over instant messaging systems, internal electronic bulletin boards, and other virtual communications systems.
- **Harassment Over Social Media.** While noting that employers are generally not responsible for conduct that occurs in non-work-related contexts, the EEOC advises that an employer can be held liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment. In the context of social media, the EEOC notes that communications through social media accounts can affect the "terms and conditions of employment" and therefore may constitute harassing conduct. To illustrate this point, the proposed guidance offers the following example: "If an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment." Put starkly, according to the EEOC, social media posts that an employee has not personally viewed can contribute to a hostile work environment simply because the employee learned about the post as a result of the employee's coworkers discussing the post at work.
- **Employer Takeaways.** While the EEOC's new proposed harassment guidance, even if it becomes final, does not have the force of law, it is clear that the modern workplace environment can create opportunities for workplace harassment that can catch employers by surprise. Accordingly, we recommend employers review and update their existing policies and procedures based on these changes to the workplace.