CLIENT ALERT: EEOC Updates Harassment Guidance

On April 29, 2024, the U.S. Equal Employment Opportunity Commission ("EEOC") released updated Enforcement Guidance on Harassment in the Workplace for the first time in over twenty years (the "Guidance"). In the Guidance, the EEOC clarifies its position on the legal analysis that applies to claims of harassment in the modern workplace under Title VII and other federal anti-discrimination laws. While the Guidance does not have the force of law, it is instructive with respect to the ways in which claims of harassment will be handled by the EEOC. It is effective immediately.

Key Takeaways:

- **Harassment Based On "Color"** – The Guidance states that harassment based on "color" is an independent protected characteristic that is not always related to an individual's race and can be based solely on an individual's pigmentation, complexion, skin shade or tone.
- **Harassment Based On Sex Includes Harassment Based On Gender Identity And Sexual Orientation** – The Guidance explicitly cites the Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*, in which the Court held that discrimination against an employee because of their sexual orientation or gender identity is tantamount to discrimination on the basis of sex.
- **Harassment Involving Decisions Related To Pregnancy Or Childbirth** – The Guidance indicates that harassing conduct relating to issues such as lactation, contraception, or abortion may also be considered unlawful sex-based harassment.
- **"Intersectional" And "Intraclass" Harassment** – The Guidance confirms that harassment may exist where an individual can show that they were harassed on account of their membership in multiple or a combination of protected categories (i.e. female and over the age of 40) (referred to as "intersectional harassment"), and, that harassment can take place between members of the same protected category ("intraclass harassment").
- **Retaliatory Harassment May Exist Despite A Lack Of Severe Or Pervasive Conduct** – The Guidance states that a claim of a retaliatory hostile work environment may succeed where the complainant can show that the alleged conduct might "deter a reasonable person from engaging in protected activity"; the challenged conduct need not be severe or pervasive such that it alters the terms and conditions of an individual's employment to present a viable claim of retaliatory harassment.
- **Harassment Can Take Place Over Video-Conferencing And In Remote Work Environments** – The Guidance addresses the shift in some workforces to remote environments, noting: "As with a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment." Examples of harassment that can occur in a remote environment include, but not are not limited to, comments made during a video meeting, comments typed in a group chat, or imagery that is visible in an employee's

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workspace while the employee participates in a video meeting.

What Does This Mean For Employers?

Though the Guidance does not have the force of law, it will certainly be relied on by the EEOC when cases are adjudicated before the Commission. Additionally, the Guidance is likely to be relied upon by employment attorneys and judges as persuasive authority when analyzing claims of unlawful harassment.

Employers with questions regarding the EEOC's Updated Guidelines are encouraged to consult with their MBJ attorney.

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