



12 Days Of Handbook Updates: Harassment Policies

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This is the sixth of our 12 Days of Handbook Updates that take you through 12 important topics for employers as we round out the year.

Holiday party coming up? Now may be a good time for employers to give their harassment policies a quick refresh. On Sept. 29, the Equal Employment Opportunity Commission (EEOC) issued [Proposed Enforcement Guidance on Harassment in the Workplace](#). If the proposed guidance is finalized in the new year, as expected, it will be the first time since 1999 that federal harassment policy guidance has been updated. (The EEOC attempted to update the guidance in 2017, but it was stalled).

Here are four main takeaways:

Pregnancy, childbirth, or related medical conditions fall within sex-based harassment

- The proposed guidance says these categories include lactation, and may also cover women's reproductive decisions such as contraception or abortion
- Keep in mind that the [Pregnancy Discrimination Act](#) made discrimination based on pregnancy, childbirth, or related medical conditions a violation of Title VII

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Religious expression may not be protected if it creates a hostile work environment

- The proposed guidance notes “employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment.”

Sexual orientation and gender identity fall within sex-based harassment

- The proposed guidance also provides examples of harassment based on sexual orientation and gender, such as repeatedly misgendering an employee or denying an employee access to a bathroom consistent with the individual’s gender identity
- Keep in mind that in [Bostock](#), the U.S. Supreme Court made clear that firing individuals because of their sexual orientation or transgender status violates Title VII, so sexual orientation and gender should probably already be listed as protected categories in your handbooks

Harassment based on sex includes “nonsexual conduct based on sex”

- The EEOC has already said that sexual harassment can contain “non-sexual conduct that is [based on your gender](#),” so hopefully this policy is in your handbook already – but often it's not, so we thought it's worth noting.
- The idea of “non-sexual conduct” being sexual harassment can be confusing, so you may want to provide employees with some examples in your handbook, such as these from the proposed guidance:
 - Sexist comments, such as: Men do not belong in nursing
 - Facially sex-neutral offensive conduct motivated by sex, such as bullying directed at a particular sex

The EEOC’s guidance is likely to be finalized in early 2024, so stay tuned. In the meantime, employers are encouraged to review their harassment policies and make sure they are up to date with current law and approved EEOC guidance. Party on.