

2024

BUSINESS IN 2023

WEEKLY WEBINAR SERIES

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Introduction



Kristen E. Smith

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TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction / Agenda

Theresa Rusnak– (12:05PM-12:15PM)

- EEOC Releases Updated Guidance on Harassment in the Workplace

Lance Willoughby-Hudson – (12:15PM-12:25PM)

- Updates on AI in the Workplace

Curtis Johnson – (12:25PM-12:35PM)

- You've Received a Subpoena: What Next?

EEOC Releases Updated Guidance on Harassment in the Workplace



Theresa E. Rusnak

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EEOC Proposed Guidance

- On October 2, 2023, the Equal Employment Opportunity Commission published Proposed Enforcement Guidance on Harassment in the Workplace
 - https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
- The Proposed Guidance is open for public comment for 30 days.
- EEOC enforces laws prohibiting work-related harassment based on sex, race, national origin, color, religion, disability, genetic information, and age (40 or over).

EEOC Proposed Guidance

- Emphasis on gender identity
 - This is partially a result of the *Bostock* decision in 2020
- Sexual harassment includes harassment on the basis of sexual orientation and gender identity, including how that identity is expressed
- Intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)
- Denial of access to a bathroom consistent with one's gender identity may be a discriminatory action in its own right

EEOC Proposed Guidance

- Emphasis on Medical Conditions Related to Pregnancy
- Includes harassment based on lactation, contraception, and abortion.
- Ex. Harassing an employee because the employee chooses not to have an abortion, chooses to have an abortion, chooses to use contraceptives, or not, are all actionable under Title VII.

EEOC Proposed Guidance

- Special Mention of Harassment and Religious Beliefs
- Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship.
- Employers, however, also have a duty to protect workers against religiously motivated harassment.
- Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment.

EEOC Proposed Guidance

- Joint Employers
- If a worker is jointly employed by two or more employers, then each of the worker's employers may be responsible for taking corrective action to address any alleged harassment about which it has notice.
- An employer has the same responsibility to prevent and correct harassment of temporary employees as harassment of permanent employees.
- Joint employers are not required to take duplicative corrective action, but each has an obligation to respond to potential harassment, either independently or in cooperation.

EEOC Proposed Guidance

- Emphasis on remote work conduct
- Conduct on work-related communications systems, such as an employer's email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, or official social media accounts is workplace conduct.
- This can include, for instance, sexist comments made during a video meeting, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image.

Updates on AI in the Workplace



Lance Willoughby-Hudson

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EEOC AI BIAS IN HIRING LAWSUIT SETTLEMENT

EEOC v. iTutor Group, et al., E.D.N.Y. No. 22-cv-02565

- Charged under the Age Discrimination in Employment Act for unlawful practices on the basis of age.
- Charging Party applied using her real birthdate and was immediately rejected because she was over the age of 55.
- Charging Party reapplied using a younger date of birth and identical application information and was offered an interview.
- iTutor rejected more than **200 other applicants age 55 and over** from the US because of their age and all had bachelor's degrees (or higher degrees).
- Online application solicited the birthdates of applicants.
- Programmed its tutor application AI software to automatically reject **female applicants age 55 or older and male applicants age 60 or older.**

iTutor's EEOC 2023 Settlement Terms

- \$365,000 to a group of rejected job seekers age 40 and over.
- Back pay and liquidated damages for the more than 200 applicants who were denied jobs.
- Required to invite all rejected applicants due to their age in March and April 2020 to reapply.
- Prohibited from rejecting tutor applicants based on sex or from screening applicants based on sex.
- Required to adopt anti-discrimination policies and conduct anti-discrimination trainings.
- Monitoring by the EEOC
- Reporting requirements for Discrimination complaints

EEOC AI Enforcement Takeaways

- Focus on non-discriminatory characteristics.
- AI should be evaluated on the results it delivers.
- Complete due diligence and confirm AI hiring tools are not producing discriminatory results.

You've Received a Subpoena: What Next?



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Your Questions



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Managing the Struggling Employee:

Mental and Emotional Health and the Law

Labor and Employment Law Fall 2023 Breakfast Briefing

Albany • September 19

Binghamton • September 14

Buffalo • October 3

Corning • September 21

Ithaca • September 28

Long Island • October 17

New York City • October 19

Rochester • September 26

Saratoga Springs • October 10

Syracuse • October 5

Utica • October 12

Watertown • October 24

Westchester • October 27

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October is National Cybersecurity Awareness Month



#SecureOurWorld

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Updates on AI in the Workplace

Lance Willoughby-Hudson, lhudson@bsk.com

You've Received a Subpoena: What Next?

Curt Johnson, cjohnson@bsk.com

New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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