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Jackson Lewis Files Comments on EEOC's Proposed Guidance on Unlawful Harassment

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Jackson Lewis has submitted comments to the Equal Employment Opportunity Commission on the *Proposed Enforcement Guidance on Unlawful Harassment*. The Proposed Guidance sets out to define what constitutes harassment, examine when a basis for employer liability exists if harassment is proven, and offer suggestions for preventive practices. (For more, see our article, New Proposed Anti-Harassment Guidance Addresses Many Issues.)

Our comments are divided into three sections: 1) issues where the Proposed Guidance provides employers with needed clarity; 2) suggestions for changes to the Proposed Guidance; and 3) portions of the Proposed Guidance where additional clarification is needed from the EEOC.

Legal Overview

Much of the Proposed Guidance is based on two landmark Supreme Court rulings that are almost 20 years old: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries Inc. v. Ellerth,* 524 U.S. 742 (1998). In *Faragher* and *Ellerth,* the Supreme Court made clear that when a non-supervisor harasses an employee, the employee must show the company was negligent in allowing the harassment to occur. However, when a supervisor harasses an employee, the company is automatically liable for the harassment, subject to an affirmative defense. Further, when the supervisor's harassment does not involve a tangible employment action, an employer may avoid liability by showing that:

- the employer exercised reasonable care to prevent and correct any harassing behavior, and
- the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer.

Faragher/Ellerth encouraged companies to establish robust policies against harassment and conduct harassment prevention training. Employers are well aware that when an employee complains about harassment, the appropriate response generally requires a thorough investigation. If improper conduct is confirmed, discipline should be issued that is commensurate with the conduct.

Summary of Jackson Lewis Comments

Potentially Promising Aspects of Proposed Guidance

The Proposed Guidance recognizes that to be unlawful, alleged harassing conduct must be tied to a protected category, such as gender, age, race, or disability. This acknowledgment is important because companies should not face legal liability for rude behavior stemming from personality conflicts that have nothing to do with discrimination.

By stating that an employee who complains of harassment in "good faith" should not face adverse employment actions, the Proposed Guidance appropriately implies that a company may discipline an employee who makes a complaint of harassment in bad faith. The EEOC's updated *Enforcement Guidance on Retaliation and Related Issues* stakes out a position that would significantly limit the circumstances under which a company may discipline an employee who complains about discrimination, even if the complaint is false and/or in bad faith. (See our article, Updated EEOC Retaliation Guidance Suggests Scrutiny for Internal Investigation Practices.)

Interestingly, the EEOC's Proposed Guidance signals that the EEOC will not be rigid in expecting a complaining party to never experience even minor inconvenience when an employer works to prevent further harassment. Instead, the EEOC takes a balancing approach: a company may place some burdens on the complaining party as part of the corrective action it imposes on the harasser, as long as

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the company makes every reasonable effort to minimize those burdens or adverse consequences.

The final promising aspect of the EEOC's Proposed Guidance is the Commission's recognition that employers often have fewer tools when attempting to address a hostile work environment caused by non-employees (*e.g.,* vendors or customers). While the EEOC expects employers to fully consider all options in remedying harassment from non-employees, it is encouraging the EEOC acknowledges that it is easier for a company to control the conduct of its employees as compared to non-employees.

Portions of Proposed Guidance that Should Be Changed

The Proposed Guidance does not adequately distinguish between conduct that a complaining party witnesses and conduct of which the complaining party only learns about second hand. Jackson Lewis urges the EEOC to add language to make clear that second-hand accounts of harassment are not relevant unless they are (1) reasonably proximate in time, (2) corroborated to the extent possible, and (3) detailed enough to ascertain whether they directly contribute to the intensity of any harassment experienced.

The Proposed Guidance declines to take into account workplace context when determining whether conduct creates an objectively hostile work environment. Jackson Lewis points out that the Supreme Court, in a decision written by Justice Antonin Scalia, ruled that context does matter (Justice Scalia wrote of the difference between a sports coach smacking a player on the buttocks compared to a supervisor doing the same to a secretary). While workplace culture does not excuse discrimination, Jackson Lewis recommends the EEOC take workplace context into account when determining whether the workplace is objectively hostile.

Since the Supreme Court's Faragher/Ellerth rulings, "supervisor" status often becomes a key issue in determining an employer's liability. In the EEOC's view, a coworker is a supervisor if the complaining party reasonably believed the coworker had the power to recommend or influence tangible employment actions (*e.g.,* hiring, firing, and demotions) against the complaining party. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had absolutely no power to take or influence tangible employment actions against a complaining party. We urge the EEOC to follow the Supreme Court's instruction to limit the supervisor inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the victim. *Vance v. Ball State Univ.,* 133 S. Ct. 2434, 2443 (2013).

The Proposed Guidance would hold an employer liable for a sufficiently severe single incident of harassment by a supervisor. The EEOC admits this will lead to "harsh outcomes for otherwise law-abiding employers." In keeping with the spirit of *Faragher* and *Ellerth,* we recommend the EEOC take the approach of following appellate case law, which does not hold an employer liable for a single incident of harassment where there was nothing more the employer could have done to prevent the harassment.

The Proposed Guidance would absolve an employee from complaining about harassment from a supervisor when an employee's failure to do so was based on a reasonable fear of retaliation. Jackson Lewis highlights that this standard does not give sufficient teeth to the employee's obligations set forth in *Faragher/Ellerth.* In those rulings, the Supreme Court carefully balanced employer and employee obligations: employers need to exercise reasonable care to prevent and correct harassment and employees need to utilize an employer's harassment prevention mechanisms. Jackson Lewis points out that requiring employees to report harassment will not only prevent harassment, but is also more likely to preserve the employment relationship between the employer and the harassment victim. With these important policy goals in mind, Jackson Lewis requests that the EEOC minimize leeway of complaining parties to avoid their obligations to complain.

Portions of Proposed Guidance Deserving of Additional Clarification

The Proposed Guidance advocates that an employee's delay in complaining about another employee's or a supervisor's conduct should have no bearing in whether an employee subjectively believes the conduct creates a hostile work environment. Jackson Lewis requests that the EEOC provide more explanation of the circumstances where delays should not be a factor in evaluating a complaining party's subjective belief that the conduct creates a hostile work environment.

The Proposed Guidance points to conduct outside the workplace that potentially may lead to a hostile work environment. Jackson Lewis asks the EEOC to provide appropriate parameters on when such outside workplace conduct has the potential for creating a hostile work environment.

The Proposed Guidance recommends an employer take corrective actions even in cases where an employer's investigation does not find that harassment has occurred. Jackson Lewis acknowledges that employers should be vigilant in reminding employees of rules against harassment. However, Jackson Lewis questions whether corrective action is appropriate in the case of every complaint that is not substantiated and that the EEOC's Proposed Guidance should recognize sometimes corrective action

may not be required and specify those situations where it would be required.

Takeaways

Employers will want to stay tuned for the EEOC's finalized version of its *Enforcement Guidance on Unlawful Harassment.* Regardless of changes, management and human resource executives will need to continue anti-harassment efforts that have been put into place over the last 20 years: maintain clear and robust anti-harassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. Jackson Lewis attorneys are well-versed in all these anti-harassment efforts and you should contact the Jackson Lewis attorney with whom you regularly work if you need assistance in this important area.