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New EEOC Proposed Guidelines May Signal What is to Come in the Area of Sex-Based Workplace Discrimination

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A few weeks ago, the public comment period for the U.S. Equal Employment Opportunity Commission's (EEOC) proposed guidance on unlawful workplace harassment closed, drawing mixed responses from commentators. The purpose of the proposed guidance, which was issued this past January, is to educate practitioners, employers and employees on the agency's position toward the different types of harassment that Title VII prohibits.

Under the proposed guidance, the EEOC's definition of harassment based on sex, which is protected by Title VII, now includes an "individual's transgender status or the individual's intent to transition," "gender identity" and "sexual orientation." "Using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner" also constitutes sex-based harassment.

The proposed guidance comes on the heels of the EEOC's June 2016 Select Task Force Report on Workplace Harassment, which examined the prevalence of workplace harassment and offered recommendations for responding to and preventing it. According to the report, nearly one-third of all charges filed with the EEOC are for workplace harassment and 45 percent of all charges filed in the private sector are for sexual harassment. As such statistics make clear, workplace harassment – particularly sexual harassment – is an issue all employers should have on their radar.

On April 4, the United States Court of Appeals for the Seventh Circuit became the first federal appellate court to rule that sexual orientation is indeed protected under Title VII. Thus, it appears that the EEOC's guidance may signal what is to come in the area of sex-based workplace discrimination.

Although the law has not changed outside of the Seventh Circuit, as the EEOC and other federal courts continue to deliberate over what is protected under Title VII, employers should look to include sexual orientation and gender identity in their policies and training on discrimination. Being proactive will not only serve to create a better environment for employees but will also make good business sense in the long run.