

The Legal Intelligencer

Trump Administration Withdraws EEOC Guidance as to Harassment Based on Gender Identity or Sexual Orientation

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The Trump administration has officially withdrawn Biden administration guidance on whether harassment based on sexual orientation and gender identity is unlawful.

The withdrawal occurred on Jan. 22, 2026, during a public agency hearing, when Equal Employment Opportunity Commission (EEOC) Chair Andrea Lucas and her fellow Republican appointee, Commissioner Brittany Panuccio, voted in favor of recalling the 2024 anti-harassment guidance that recognized harassment based on sexual orientation and gender identity as unlawful under Title VII of the Civil Rights Act of 1964.

The Trump administration has long opposed the guidance and has defined sex as immutable and binary.

Critics have argued that the Trump administration's position conflicts with the U.S. Supreme Court's 2020 ruling in *Bostock v. Clayton County, Georgia* that Title VII prohibits employers from making hiring or termination decisions as to employees or applicants based on their gender identity (including being transgender) or sexual orientation as unlawful sex discrimination. Lucas,



Neil Schur, left, and Dona Kahn, right, with Anderson Kill.

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in turn, has recognized that *Bostock* remains good law as to hiring, firing, and promotion decisions but disagrees as to harassment. She contends that repeatedly misgendering someone cannot be considered unlawful harassment.

The agency's sole Democratic commissioner, Kalpana Kotagal, said she was "deeply disappointed" by the rescission of the 2024 guidance. "The position that gay or trans individuals are protected from hiring or firing discrimination, but not from harassment, doesn't make sense," she said.

The now-recalled 2024 guidance clarified the types of conduct that may rise to the level of

discrimination on the basis of gender identity or sexual orientation. Examples included:

- Asking intrusive questions about an employee or applicant's sexual orientation, gender identity, gender transition or intimate body parts;
- Repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity; and
- Denying access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

In mid-February, Democratic lawmakers reintroduced a bill in both the House of Representatives and Senate that would establish workplace harassment as a violation of federal civil rights law and solidify protections for LGBTQ+ workers, condemning the EEOC's backtrack on these issues. The bill is unlikely to be passed in the current House and Senate, as this legislation has been proposed each session since 2019, but it has heightened relevance this year in light of the 2024 guidance's recall.

The bottom line is this: Hiring and firing based on gender identity or sexual orientation is illegal, but it is an open question as to whether repeatedly misgendering someone can be considered unlawful harassment. Employers should monitor the law on this issue, as there will likely be litigation in the coming months addressing whether misgendering or other allegedly discriminatory behavior based on gender identity or sexual orientation during employment constitutes unlawful harassment. Plaintiffs will likely argue that a court should extend the *Bostock* ruling to include such behavior, as there is no logical reason to distinguish hiring and firing decisions from potentially harassing discriminatory behavior during employment. Defendants will likely respond that the *Bostock* ruling did not reach that issue, making it a question of first impression.

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