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Expertise

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In response to the high number of religious workplace discrimination complaints in the last year, the U.S. Equal Employment Opportunity Commission issued new guidelines regarding employment discrimination law that went into effect on March 6. Jay Starkman, CEO of Engage PEO, an HR outsourcing organization that provides compliance guidance, HR and benefits to businesses nationwide, is a former attorney who specialized in employment and commercial law. Starkman discussed the new guidelines and what employers should be conscious of. Starkman recently spoke with Diversity Executive. Below are excerpts from the interview.

How do the new Equal Employment Opportunity Commission guidelines apply to religious dress and grooming practices?

Earlier this year, the EEOC published guidelines about how federal discrimination laws apply to religious dress and grooming practices. In the guidance, the EEOC made clear that employers must make accommodations for and not discriminate in employment as to the following: wearing religious clothing or articles (a Muslim hijab, a Sikh turban or a Christian cross), observing a religious prohibition against wearing certain garments (certain religious practices of women not wearing pants or short skirts), or adhering to shaving or hair length observances (e.g., Sikh uncut hair and beard or Rastafarian dreadlocks).

What clothing/grooming practices are considered unsafe or pose hardships?

The EEOC made clear that this area is governed by the various rules relating to religious accommodations formed under Title VII. For purposes of undue hardship, courts have used a standard of "more than de minimis cost or burden on the operation of the employer's business." The employer must show that the practice actually poses an undue hardship on the operation of the business. This is a relatively high standard. Ultimately, Engage advises clients that it is best to provide reasonable accommodations for the religious practice unless that is truly not possible.

Why was it seen as necessary to issue new guidelines for discrimination?

The courts and EEOC have seen a rise in this type of claim. Just recently, for example, the Justice Department sued the School District of Philadelphia for requiring a Muslim police officer to trim his beard under a grooming policy. The EEOC spokesperson made clear that, "No employee should be forced to violate his religious beliefs in order to earn a living." *United States of America v. School District of Philadelphia*. Do you believe that these new guidelines will curb workplace discrimination? Additional guidance always provides clarity as to potential situations, especially in our litigious society, and thus is welcomed by employers. Most employment lawyers and experts, however, have understood for some time that religious discrimination included the types of practices that were used as examples by the EEOC in its recent guidance. The EEOC did

not, for the most part, change any clear understandings of principles of the law; it simply provided additional clarification and guidance.

What goes into deciding if something is workplace harassment?

One of the sections of the EEOC's guidance dealt with this. In sum, it provides that "religious harassment under Title VII may occur when an employee is required or coerced to abandon, alter or adopt a religious practice as a condition of employment" or "when an employee is subjected to unwelcome statements or conduct based on religion." Harassment can occur from the actions of supervisors or even co-workers if the employer should have known about the conduct and did not take corrective action. To constitute harassment, the conduct must rise to the level of creating a hostile or offensive work environment or result in adverse employment actions.

What can employers do to make sure that they aren't breaching these guidelines?

The short answer is whenever possible, make reasonable accommodations for any religious-based request and have zero tolerance for any harassment practices. This policy should be part and parcel of not just written statements (for example, those contained in a company handbook), but in the training and actions of supervisors. Whenever any doubt exists as to the best course of action, consultation with an employment law expert or professional employment organization should be sought. Since the guidelines went into effect, have you seen a decrease in discrimination complaints? Not at all. First, it is too soon to really tell. However, claims by employees in all areas of discrimination continue to remain at a historically high rate.

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