Client Alert: MCAD Announces Draft of Updated Harassment Guidelines and Seeks Public Comment

BY BENJAMIN J. HINKS AND ROBERT G. YOUNG • FEBRUARY 1, 2024

On January 25, 2024, the Massachusetts Commission Against Discrimination (MCAD – see Note 1) announced new draft guidelines titled "Guidelines on Harassment in the Workplace" (the "Draft Guidelines"). The Draft Guidelines are intended to replace the MCAD's current guidance which addresses sexual harassment in the workplace. According to the MCAD, the Draft Guidelines "broadly address harassment in the workplace prohibited by Chapter 151B, including sexual harassment."

At the outset, the MCAD provides that workplace harassment is "a form of employment discrimination that deprives employees of their rights and basic well-being in the workplace and is prohibited by Massachusetts law under M.G.L. c. 151B[.]" The MCAD notes that harassment can be sexual in nature, or can take the form of unwelcome conduct that is based on an employee's membership in, or association with a person in, a protected class.

Moreover, the Draft Guidelines cover a comprehensive list of issues aimed at helping employees and employers understand what constitutes harassment, how to address harassment in the workplace, and explaining issues related to investigation and liability. In total, the Draft Guidelines address the following topics: Sexual Harassment in the Workplace, Protected Class Harassment in the Workplace, Harassment Outside the Workplace, Online Harassment, Harassment of Minors, Non-Full-Time Employees and Volunteers, Liability for Harassment, Retaliation, Continuing Violation, Constructive Discharge, Investigation, Training, Policy, and Enforcing the Right to be Free from Harassment at Work. While many of the topics in the Draft Guidelines are addressed by the current MCAD guidance, there are several new topics. This alert is intended to highlight some of the new areas of guidance that may be of interest to Massachusetts employers.

NEW & NOTEWORTHY

Protected Class Harassment

Perhaps the most notable addition to the Draft Guidelines is the guidance on "protected class harassment in the workplace," which covers various types of harassment that are not sexual in nature— an area that the MCAD's current guidance does not address. (see Note 2)

Indeed, the Draft Guidelines make clear that "Chapter 151B antidiscrimination provisions protect the fundamental right to work in an atmosphere free from conduct that is demeaning and hostile to an employee because of protected class." As a reminder, protected classes in the workplace include race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, veteran status, age (over 40), disability, and military service. (see Note 3)

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Quid Pro Quo Protected Class Harassment

One of the more unique topics under the umbrella of protected class harassment is quid pro quo harassment. The MCAD notes that "[q]uid pro quo protected class harassment is atypical but can occur, particularly where an employee is required as a term or condition of employment to mute or change behaviors or characteristics tied to protected class." By way of example, the MCAD provides that quid pro quo harassment based on gender identity could arise where an employer refuses to accept the gender identity that an employee has communicated to the employer and coerces, threatens or cajoles the employee to behave or dress consistent with the employer's view of the employee's gender identity. More broadly, quid pro quo protected class harassment may occur in situations where an employer "conditions an employee's continued employment or receipt of workplace benefits, promotions, assignments, or opportunities, etc. on the employee's willingness to tolerate conduct of a harassing nature."

Intersectional Harassment

Another new addition that may be of interest to employers is the MCAD's guidance on "intersectional harassment." On this issue, the MCAD notes that "[p]rotected class harassment commonly revolves around membership in a single protected class, but harassment may also be attributed to membership in two or more protected classes. This means that an employee may face harassment not necessarily because of their membership in one protected class, but because of their concurrent membership in two or more protected classes."

Importantly, when employers are facing a claim of intersectional harassment, their defense must include a showing that they did not subject the employee to harassment based on the individual protected classes implicated ***or*** the combination of the protected classes.

Online Harassment

Employers should also take note that the Draft Guidelines include a section pertaining to online harassment. The MCAD notes that "[t]he online environment is an ever-present and pervasive aspect of virtually every employee's workplace and personal life, even for those with jobs that do not interface daily with computers. Accordingly, unlawful harassment can occur when coworkers or supervisors use social media or other virtual platforms at work or outside of work."

"Unlawful harassment may also occur via social media and other virtual platforms. Offensive conduct occurring online may be considered in determining both quid pro quo harassment claims and hostile work environment harassment claims, such as the harasser making sexual requests through private online messages or employees posting derogatory information about a coworker online. Social media can be utilized during the workday, outside the workday, in the workplace, or outside the workplace. Harassment occurring through the use of social media can provide a basis for harassment in the workplace or out of the workplace."

Harassment of Minors, Non-Full-Time Employees, and Volunteers

Further, the Draft Guidelines provide a new section pertaining to the harassment of minors, non-full-time employees, and volunteers.

Regarding minors, the MCAD notes that employees under the age of 18 are entitled to the same protections from workplace harassment as adults, apart from protection from age discrimination, which starts at age 40.

The MCAD further makes clear that temporary workers, part-time workers, and contract workers (but not independent contractors) are entitled to the same protections as full-time employees, while interns (whether paid or unpaid) and volunteers do not have protections from workplace harassment under M.G.L. c. 151B. That said, the MCAD encourages employers "to apply anti-harassment policies to interns and volunteers because they may seek recourse pursuant to a source other than M.G.L. c. 151B[,]" such as the Civil Rights Act, M.G.L. c. 12, § 11I, or common-law. Moreover, if an

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intern or a volunteer engages in harassing conduct toward employees, an employer may still be liable for such conduct.

CONCLUSION

Bowditch will continue to monitor the status of the Draft Guidelines and provide an update as it becomes available. In the meantime, interested employers are encouraged to review the Draft Guidelines here. The MCAD is currently seeking public comment on the Draft Guidelines from all interested persons, including members of the bar, employees, and employers. Comments may be sent via email to mcadguidelinescomment@mass.gov on or before March 5, 2024.

Employers with questions about the Draft Guidelines may contact a member of Bowditch's Employment & Labor practice group.

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Note 1: The MCAD is the state agency responsible for enforcing M.G.L. c. 151B, and it investigates, prosecutes, and adjudicates claims of unlawful employment discrimination, including harassment.

Note 2: Unlike sexual harassment, Massachusetts law does not currently require any employers to adopt a workplace policy that specifically addresses protected class harassment. However, the MCAD strongly encourages employers to implement a general anti-harassment policy aimed at eliminating all protected class harassment in the workplace.

Note 3: In contrast, sexual harassment is "a type of sex discrimination in which an employee is subject to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature."

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