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Retaliation in the Workplace: *Guidance from the EEOC*

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For the first time in almost 20 years, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued proposed Enforcement Guidance on Retaliation and Related Issues in the workplace under federal anti-discrimination laws. The EEOC is scheduled to issue its final guidance after considering public comments. While the EEOC's guidance documents are not binding law, they provide the public valuable insight about the Commission's interpretation of the law, which also impacts future EEOC investigations.

Retaliation risks are high

Retaliation claims continue to rise across the country, consisting of 44.5 percent of all charges filed by the EEOC in 2015. This number has nearly doubled since 1998 and stands as the most frequently alleged violation with the EEOC.¹

The EEOC enforces federal laws that make it illegal to terminate, demote, harass or otherwise retaliate against applicants or employees because they complained to their employer about on-the-job discrimination, filed a discrimination charge with the EEOC, participated in an employment proceeding (e.g., investigation or lawsuit) or engaged in any other legally protected activity.

Eradicating retaliation in the work environment and helping personnel understand their rights are ongoing priorities. When issuing the EEOC-proposed guidance, Commission chair Jenny Yang stated, "Retaliation is a persistent and widespread problem in the nation's workplaces. Ensuring that employees are free to come forward to report violations of our

employment discrimination laws is the cornerstone for effective protections of our federal civil rights laws."²

Proposed enforcement guidance

The EEOC offers a document that proposes changes to its official guidelines on workplace retaliation. Some of the key elements include elements of a retaliation

claim and; best practices for employers to implement to reduce the likelihood that unlawful retaliation will occur and to strengthen the employer's position in the event of a complaint or lawsuit.

Retaliation claim elements

Generally, an employee claiming retaliation must be able to prove the elements addressed below.

Participation in a legally protected activity – Before the proposed 2016 guidance, an employee must show

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that he or she participated in a legally protected activity. The guidance proposes broadening the definition of protected activities by including a worker who lodges an internal complaint with the employer or participates in an internal investigation without the requirement of a corresponding EEOC, state or local government agency charge.³

Adverse employment action and causal connection – Generally, retaliation constitutes actions that are materially adverse, meaning any action that might deter a reasonable person from engaging in a protected activity, such as being terminated. EEOC-proposed guidance also offers additional examples of materially adverse actions, such as:

- Threatening reassignment
- Removing supervisory responsibilities
- Engaging in abusive verbal or physical behavior even if it doesn't rise to the level of a hostile work environment
- Giving an inaccurately lowered performance appraisal or job reference, even if not unfavorable.⁴

Before the proposed 2016 guidance, in order to succeed on a retaliation claim, a worker must show that the employer took the adverse action because of the worker's protected activity.⁵ In its proposed 2016 guidance, the EEOC takes the position that a causal connection can be proved by presenting a "convincing mosaic of circumstantial evidence that would support the inference of retaliatory animus."

Best practice tips for retaliation prevention

In its proposed guidance the EEOC states that to reduce incidents of retaliation, employers can recognize both the potential for retaliation and the interaction of the psychological and organizational characteristics that contribute to the likelihood of retaliation.⁶ Consequently, a variety of risk management suggestions are put forth to best protect all parties potentially impacted by workplace retaliation, including but not limited to the persons being subjected to retaliation, those accused of engaging in retaliatory acts, and witnesses (e.g., co-workers). Best practices are not legal requirements, but instead viewed as measures to help reduce the risk of retaliation. Rooted in the proposed EEOC guidance, an ESO should consider the following best practices:

Non-retaliation policy – An ESO should implement a clearly worded stand-alone non-retaliation policy that includes multiple avenues of internal complaint (with access to an informal resolution mechanism). Other EEOC-recommended policy elements include:⁷

- Examples of retaliation that would deter a reasonable person from engaging in protected activities.
- Proactive steps for avoiding actual or perceived retaliation (e.g., interactions by supervisors with personnel who have lodged discrimination complaints against them).
- Explanation that those found to have engaged in retaliation will be subject to discipline (up to and including termination).
- No policy terms that make personnel fear retaliation, such as warning that reports of discrimination found to be false will subject the worker to disciplinary action.

Training – Consider the following best practices for customized training:

- Periodically educate (through a variety of formats) all ESO members, particularly those with supervisory authority on the organization's anti-retaliation policy.
- Raise awareness of what conduct is considered participation in protected activities.
- Emphasize that those accused of discrimination, harassment, retaliation or other equal employment opportunity violations cannot act on feelings of retribution or revenge, even while also acknowledging that those emotions may occur.
- Consider overall encouragement of workplace civility, which may help curb retaliatory behavior.⁸

Provide support for all parties involved – Automatically communicate with all parties involved in an equal employment opportunity allegation, including complainants and people accused of retaliation, as well as witnesses. Timely communication is necessary to help prevent retaliation, encourage reporting of retaliation and counsel supervisors on how to conduct themselves after having been accused of discrimination.⁹

Proactive follow-up – Periodically and positively check in with the parties involved in an allegation of discrimination or other equal opportunity violation.¹⁰ Not proactively following up with ESO members during the impending investigation or after the resolution of the incident will increase exposure of retaliation. Many retaliation claims stem from alleged retaliation that occurred well after the perceived resolution of the underlying problem.

Review consequential personnel actions to ensure non-discrimination and non-retaliation – Consider designating persons within the organization with experience or expertise in human resources, management or equal opportunity compliance to ensure consequential employment or personnel actions, like termination or demotion, are based on legitimate non-discriminatory and non-retaliatory reasons. Similarly, such designees could ensure performance assessments or reviews are free from unlawful motivations and grounded in facts.¹¹

Conclusion

When finalized, the EEOC's Enforcement Guidance on Retaliation and Related Issues will not be considered legally binding. However, the EEOC will apply the guidance when investigating and litigating retaliation claims. Moreover, ESOs and other employers should pay particular attention to the EEOC's best practices suggestions, as failing to adhere to these standards will likely impact future EEOC investigations and could lead to heightened exposure to liability.

¹ EEOC charge statistics FY 1997-2015

² EEOC press release 1-21-16 titled "EEOC Seeks Public Input on Draft Proposed Enforcement Guidance on Retaliation and Related Issues"

³ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, page 8

⁴ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, pages 37-43

⁵ University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013)

⁶ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, page 68

⁷ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, pages 68-70

⁸ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, pages 70-71

⁹ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, page 72

¹⁰ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, pages 72-73

¹¹ Proposed 2016 EEOC Enforcement Guidance on Retaliation and Related Issues, page 73