

Proposed Guidance Highlights the EEOC's Continued Focus on Retaliation Claims

Employers face claims of retaliation at an increasingly alarming rate. Nearly 43% of all charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) in FY 2014 included some allegation of retaliatory conduct. While retaliation is by no means a new concern for the EEOC, the [Proposed Enforcement Guidance on Retaliation and Related Issues](#) issued on January 21, 2016 shows very clearly that the agency intends to take an even more aggressive approach to address what it perceives as an epidemic of retaliation affecting the workplace.

The EEOC last issued guidance on the topic of retaliation in 1998. Since then, the percentage of retaliation charges has almost doubled and the U.S. Supreme Court has issued several significant decisions concerning the scope of the anti-retaliation protections under federal employment statutes, as discussed in the [August 5, 2013 Labor and Employment Law Report](#) and the [January 28, 2011 Labor and Employment Law Report](#). Citing this backdrop, the EEOC chose to issue the proposed guidance to make known the agency's current position on several key topics relating to retaliation. Although not carrying the weight of law or regulation, the enforcement guidance, once adopted, will establish the various standards EEOC staff can be expected to apply while investigating charges or litigating cases.

Perhaps not surprisingly, the EEOC's proposed guidance advances a broader, claimant-friendly application of federal anti-retaliation statutes. For instance, the EEOC's classification of conduct as either "participation activity" or "opposition activity" – the two types of activities protected by most federal employment laws – differs sharply from the standard applied almost universally by courts. Whereas nearly all courts hold that participation activity requires some connection to the administrative or litigation process (such as filing a charge or serving as a witness), the EEOC takes the position that even making an *internal* complaint with an employer constitutes participation activity. This is significant because, unlike with opposition activity – which filing an internal complaint unquestionably is – an employee need not reasonably believe that unlawful discrimination actually occurred for participation activity to be cloaked with statutory protection. In other words, according to the EEOC, an employee should be able to lodge a knowingly baseless internal complaint of discrimination without any potential for repercussion. This is a dramatic departure from the current state of the law.

Also, while the EEOC acknowledges that opposition activity is only protected if the manner of opposition is reasonable, the proposed guidance would make it extremely difficult for an employer to ever establish that an employee's conduct was so outrageous that it loses the protection of federal anti-retaliation laws. For example, the EEOC states that protected opposition activity may include engaging in a production slow-down, writing critical letters to customers, or protesting against discrimination in an industry or society in general – without any connection to a specific workplace – even if that conduct causes the employer financial harm.

The proposed guidance shows that the EEOC intends to push the limits of federal anti-retaliation laws to expand the scope of employee protections. To prepare for this, employers should re-evaluate their policies and procedures to ensure that the appropriate mechanisms are in place to minimize even the specter of retaliation. In this regard, the proposed guidance lists several "best practices" that the EEOC believes employers should follow, including:

- Maintaining written policies which provide examples of prohibited retaliation, a complaint procedure, and a clear explanation that engaging in retaliation can result in discipline, up to and including termination;
- Training all managers, supervisors and employees on the employer's written anti-retaliation policy and emphasizing to all employees that the employer will not tolerate retaliation;
- Establishing a protocol to remind managers or supervisors who are accused of discrimination of the employer's anti-retaliation policy, and to provide tips to help managers and supervisors avoid engaging in conduct which might constitute unlawful retaliation or be perceived as such;
- Following up with employees, managers and witnesses while an EEO matter is pending to ask if they have any concerns about potential or perceived retaliation; and
- Reviewing proposed employment actions, ideally by designating a management or human resources representative who can ensure that employees or witnesses involved in an EEO matter are not subjected to unlawful retaliation.

The EEOC's proposed guidance is open for public comment until February 24, 2016.

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