

# FISHER PHILLIPS OFFERS COMMENTS ON EEOC'S PROPOSED RETALIATION GUIDANCE

Insights  
Feb 25, 2016

Fisher Phillips recently submitted comments to the Equal Employment Opportunity Commission (EEOC) regarding the agency's proposed Enforcement Guidance on Retaliation. The comments reflect an effort by the firm to ensure that a balanced approach to retaliation claims be taken by the agency and any courts that choose to follow its direction, emphasizing the rights of employers just as much as their responsibilities under the law. A copy of the comments can be found [here](#) or at the attached PDF file.

## Concerns Over Skyrocketing Number Of Retaliation Claims

The percentage of retaliation charges filed against employers has roughly doubled since 1998, making retaliation the most frequently alleged type of violation raised with the EEOC. In fact, as revealed by newly released statistics, the number of retaliation charges in the past year was at an all-time high: 39,757 retaliation charges were filed against employers in FY 2015. This represents a 119% increase in the number of such claims filed over the past 18 years, up from only 18,198 in FY 1997.

The overwhelming majority of these retaliation claims are dismissed without any finding of liability, meaning that the vast number of charges are meritless to begin with. In FY 2015, 82.4% of all retaliation claims were either found not to be valid because the agency investigator found no cause to continue with the claim, or were administratively closed because the charging party disappeared from contact, failed to communicate with the agency, withdrew the charge without obtaining relief, or other similar reasons.

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More importantly, the number of meritless retaliation charges filed against employers has skyrocketed over the past 18 years. Since 1997, there has been a 120% increase in the number of retaliation charges dismissed for lack of substantial evidence. Fisher Phillips recognizes that employers must expend significant resources responding to such claims, even if frivolous in nature. The firm believes the proposed EEOC Guidance might serve to assist in reducing the number of frivolous claims filed by clearly articulating the proper legal standards.

### **Firm Comments Seek Balance In Enforcing Retaliation Standards**

Submitted on behalf of a consortium of 18 state hospitality associations, collectively counting over 46,000 lodging and foodservice establishments as members and together employing hundreds of thousands of individuals working across a wide spectrum of responsibilities, the firm's comments highlight the standards set in retaliation cases by two Supreme Court cases: *University of Texas Southwestern Medical Center v. Nassar* (2013) and *Clark County School Dist. v. Breeden* (2001).

The comments request that the EEOC revise the proposed Guidance (draft [here](#)) to more clearly define employer's rights when defending retaliation claims, and more clearly educate employees on the high burden they must meet when bringing such claims. While the finalized Guidance will not have the force of law, it will stand as a useful and often-used tool for agency investigators examining Charges of Discrimination, employees and their legal counsel in determining whether to pursue a legal claim, judges called upon to rule on retaliation claims, and employers who seek to comply with the law when making personnel decisions.

The finalized Guidance is expected to be published later this year, and we will summarize the contents once released.

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*This Legal Alert provides an overview of a specific legal development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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