10 Things You Need To Know About EEOC's New Retaliation Guidance

Insights
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On August 29, 2016, the Equal Employment Opportunity Commission (EEOC) released its Enforcement Guidance on Retaliation and Related Issues. The document is a helpful tool for employers when navigating the often-treacherous retaliation road, and will be used by agency investigators, plaintiffs' attorneys, and courts as a guidepost when examining employer actions. Here are 10 things you need to know about the guidance in order to stay up to speed.

1. The Guidance Is Not Gospel.
First things first: this guidance is not controlling law. It is not on par with statutes, regulations, and court decisions. However, that does not mean that you should ignore the document. Not only does it compile a treasure trove of controlling authority in the form of case citations and references to law, but courts will often look to agency guidance when called upon to examine a thorny issue.

2. The Guidance Was Necessary.
This guidance replaces the agency's discussion on retaliation contained in its 1998 Compliance Manual, the last such document on the topic. A lot has changed in the intervening 18 years, necessitating the updated and revised document. Most notably, the number of retaliation claims filed against employers each year has skyrocketed.

In 2015, for example, nearly 40,000 EEOC retaliation charges were filed against employers, an all-time high and a 119% increase since 1998. Moreover, retaliation charges have been the most frequently alleged claims filed with the agency since 2009, accounting for over 44% of all charges in 2015.

3. The Guidance Covers A Broad Array Of Claims.
The guidance covers all of the types of retaliation claims governed by the EEOC, which includes Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), the Equal Protection Act (EPA), Title II of the Genetic Nondiscrimination Act (GINA), and Section 501 of the Rehabilitation Act.

4. The Guidance Discusses What Activity Is "Protected."
Not every employee action can form the basis of a retaliation charge; only a certain kind of "opposition" will serve as a valid basis. The EEOC guidance states that opposition will only satisfy

this standard if it is reasonable, and that the employee must base the opposition on a good faith belief that the employer conduct is, or could become, unlawful.

The original draft of the guidance, proposed by the EEOC in January 2016, took several positions that seemed contrary to current controlling authority on the subject. Therefore, Fisher Phillips submitted comments to the agency in February 2016 with the aim of ensuring a balanced approach. The final version of the guidance includes several revisions suggested by the firm that will aid employers when it comes to defining "opposition."

For example, the initial version minimized the impact of a helpful 2001 Supreme Court case on retaliation, *Clark County School District v. Breeden.* The firm comments requested that the agency elevate the discussion of *Breeden* from a mere footnote so that it could "play a more central role in the opposition section." The comments also suggested that the agency adopt a more deferential attitude towards the case, given that it stands as controlling law over all federal courts and agencies, including the removal of language marginalizing the case as having "unusual facts."

The final guidance does just that, removing such dismissive language, elevating the *Breeden* discussion to its own section, and affording employers with ample authority to defend claims on the opposition standard.

5. The Guidance's Discussion On "Adverse" Conduct Takes An Expansive Approach.
The guidance follows the Supreme Court's 2006 pronouncement in *Burlington Northern v. White* which decided that a "materially adverse action" subject to challenge under anti-retaliation provisions encompass a broader range of actions than an "adverse action" subject to challenge under typical statutory non-discrimination provisions. Therefore, the agency provides a laundry list of employer activities that could form the basis of an "adverse" action under retaliation theory.

While most employers understand that demotions, suspensions, and terminations can justify a retaliation claim, the guidance also points out that actions such as threats, warnings, low evaluations, and transfers could be enough to dissuade an employee from engaging in protected activity, thus satisfying the second prong of a retaliation claim.

6. The Guidance Discusses The Key "Causation" Element.
Fisher Phillips's comments on the agency's proposed "causation" standard were the most extensive because the firm believed they were most in need of revision. Critically, the initial EEOC proposal was dismissive of another helpful Supreme Court case, *University of Texas Southwest Medical Center v. Nassar* (2013). That case was particular critical of the agency's 1998 Compliance Manual position on retaliation, expressly rejecting the guidance as lacking in persuasive force and failing to address the specific statutory language. It called the agency's conclusions, in fact, "into serious question."

Nassar established important principals in this field, focused mainly on the standard a worker would need to establish in order to advance a viable claim of retaliation. The initial agency proposal

offered but a brief mention of *Nassar* and this standard, and included a discussion of the EEOC's preferred lower standard that had been rejected by the Supreme Court. The finalized guidance corrects this misstep, creating an entire section to discuss the proper "but-for" causation standard that should apply in cases against private employers.

The firm's comments also pointed out to the agency that its original proposal included a detailed discussion of the many ways in which a causal link could be found between an employee's activities and an employer's adverse action, but not much on how employers could demonstrate the opposite: that no actionable retaliation took place.

The agency responded to this suggestion by creating an entire new section entitled "Examples of Facts That May Defeat a Claim of Retaliation," which employers should find helpful when responding to charges of retaliation. It includes examples such as poor performance, inadequate qualifications, negative job references, misconduct, reductions in force or downsizing, and others.

7. The Guidance Includes A "Promising Practices" List.

The guidance offers employers a list of five suggestions that it believes will reduce the risk of violations. It revised the list from being called "best practices" in the proposed version to "promising practices" in the final guidance because, according to the EEOC, "there is not a single best approach for every workplace or circumstance."

The guidance recommends (a) implementing a written anti-retaliation policy; (b) training all supervisors on the anti-retaliation policy; (c) providing advice and individualized support for those who could be in a position to retaliate and those who could be in the firing line for retaliatory action; (d) proactively following up after protected activity or opposition has taken place; and (e) reviewing your internal employment actions to ensure full compliance with the EEO laws on retaliation.

While most of these actions are fairly intuitive and are part of most employers' thorough and mature human resources compliance efforts, we recommend specifically citing to these "promising practices" when defending against charges of discrimination.

8. The Guidance Tackles ADA Interference Claims.

The guidance points out that, unlike other statutory claims, the ADA also contains a non-interference provision which prohibits actions getting in the way of employees exercising or enjoying their ADA rights. It goes beyond simple retaliation protection, offering coverage for anyone who is subject to coercion, threats, intimidation, or other interference with respect to ADA rights. The guidance delves into this topic by providing five hypothetical scenarios demonstrating statutory violations and a bullet point list of prohibited tactics.

9. The Guidance Reminds You To Not Take It Personally.

The guidance concludes with the agency pointing employers towards an article written by an EEOC manager regarding how supervisors should respond if accused of discrimination or harassment. In the article entitled, "Retaliation – Making It Personal," the EEOC acknowledges that it may be

difficult for managers not to take EEO allegations personally, but cautions them not to take actions that could be perceived as retaliatory.

Some suggestions include avoiding public discussion of the allegation, keeping sure not to isolate the complaining employees, avoiding reactive behavior, not interfering with the EEOC process, and avoiding making threats to the employee in question.

10. The Guidance Is Complemented By Other Resources.
Aside from the guidance, the agency also issued two short user-friendly resource documents: a question-and-answer publication summarizing the guidance document, and a short Small Business Fact Sheet condensing the major points in the guidance in non-legal language. Combined they form a helpful collection of material with which you will want to familiarize yourself. Whether developing policies, conducting training, responding to charges of discrimination, or otherwise defending your organization's actions, these materials should be the part of every human resource professional's toolkit.

For more information, visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

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