

The EEOC Issues New Guidance for Employers on Retaliation



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The Equal Employment Opportunity Commission (EEOC) has issued a new publication entitled “Final Enforcement Guidance on Retaliation and Related Issues.” This publication replaces the 1998 Compliance Manual Section 8: Retaliation, and addresses retaliation under a number of federal employment statutes: 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); Section 501 of the Rehabilitation Act, the Equal Pay Act (EPA); and Title II of the Genetic Information Nondiscrimination Act (GINA). It is accompanied by two shorter publications meant to provide a general overview of the guidelines: “Questions and Answers: Enforcement Guidance on Retaliation and Related Issues” and “Small Business Fact Sheet: Retaliation and Related Issues.”

The new guidelines are a response to significant recent developments in the area of employment-related retaliation that have occurred over the last several years, including seven decisions from the United States Supreme Court. According to the EEOC, the number of charges filed alleging retaliation has essentially doubled since the publication of the 1998 Compliance Manual. Claims of retaliation are now the most frequently alleged basis of discrimination, accounting for nearly 45 percent of all charges filed in 2015.

The guidelines contain a fairly detailed overview of the types of conduct that fall within the scope of “protected activities” entitling an employee to protection from retaliation under federal laws. Such activities fall into one of two categories: the “participation clause” and the “opposition clause.” The

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guidelines contain several examples of factual scenarios to provide guidance as to when an employee's conduct may constitute a protected activity.

The guidelines also contain a specific section to address the "interference" provision of the ADA, which, in addition to prohibiting retaliation for employees who have exercised ADA rights, also contains a prohibition on interfering with an employee's ability to exercise ADA rights. Such conduct can take the form of threats, intimidation or coercion of an employee to relinquish his or her rights under the ADA.

The contents of the new guidelines include a range of information such as the elements of a retaliation claim, available remedies, and promising practices to assist employers in updating their employment policies and educating and training employees, managers and supervisors. The guidelines provide valuable insight into changes in the legal landscape of retaliation in recent years.