

## KD Employment Law Alert: EEOC Drafts Proposed Enforcement Guidance on Retaliation

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Last month the EEOC announced yet another new initiative aimed at eliminating systemic discrimination in the workplace: retaliation. The agency has sought public input before finalizing new Enforcement Guidance on Retaliation, which was last updated in 1998. “Retaliation is a persistent and widespread problem in the nation’s workplaces,” said EEOC Chair Jenny R. Yang. “Ensuring that employees are free to come forward to report violations of our employment discrimination laws is the cornerstone for effective enforcement. If employees face retaliation for filing a charge, it undermines the protections of our federal civil rights laws. The Commission’s request for public input on this proposed enforcement guidance will promote transparency. It will also strengthen EEOC’s ability to help employers prevent retaliation and to help employees understand their rights.” According to the EEOC, “[t]he percentage of retaliation charges has roughly doubled since 1998, making retaliation the most frequently alleged type of violation raised with EEOC. Nearly 43% of all private sector charges filed in fiscal year 2014 included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation violations comprised 53% of all violations found in the federal sector in fiscal year 2015.”

Inasmuch as the agency’s 73 page Guidance is still in draft form, we will await the finalized version prior to analyzing its implications in depth. For now, we have extracted some of the highlights directly from the EEOC’s proposed Guidance, which we hope will facilitate your understanding of the concept and sheer breadth of unlawful retaliation.

### WHO IS PROTECTED

An individual is protected from retaliation for opposing any practice made unlawful under the EEO laws. Protected “opposition” activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination.

### EXAMPLES OF OPPOSITION

Protected opposition includes actions such as: complaining about alleged discrimination against oneself or others, or threatening to complain; providing information in an employer’s internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.

### INQUIRIES AND OTHER DISCUSSIONS RELATED TO COMPENSATION

Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of EEO violations (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those who are retaliated against after their employment relationship ends.

Retaliation expansively reaches any action that is “materially adverse,” meaning any action that might well deter a reasonable person from engaging in protected activity.

## CAUSAL CONNECTION

A materially adverse action does not violate the EEO laws unless the employer took the action *because the charging party engaged in protected activity*.

## LIABILITY

Employer liability requires either that the retaliation was committed by someone with explicit or implicit delegated authority, or that the employer granted the individual who engaged in the retaliation power that materially assisted him in carrying out the retaliation.

## ADA INTERFERENCE PROVISION

The ADA prohibits not just retaliation, but also “interference” with the exercise or enjoyment of ADA rights. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights.

## INQUIRIES AND OTHER DISCUSSIONS RELATED TO COMPENSATION

Protections against retaliation for inquiring about or otherwise discussing compensation information include: protections enforced by the EEOC that prohibit retaliation for protected activity; protections enforced by the U.S. Department of Labor that prohibit adverse action against employees who discuss their compensation; and protections enforced by the National Labor Relations Board for discussion of wages as concerted activity.

## RANGE OF INDIVIDUALS WHO ENGAGE IN PROTECTED ACTIVITY

Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of EEO violations (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those who are retaliated against after their employment relationship ends.

## ADVERSE ACTION

Retaliation expansively reaches any action that is “materially adverse,” meaning any action that might well deter a reasonable person from engaging in protected activity.

## TRAINING

### EMPLOYERS SHOULD CONSIDER THESE IDEAS FOR TRAINING:

- Train all managers, supervisors, and employees on the employer’s written anti-retaliation policy.
- Send a message from top management that retaliation will not be tolerated, provide information on policies and procedures in several different formats, and hold periodic refresher training.

- Tailor training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace, 207 ensuring that employees are aware of what conduct is “protected” activity” and providing examples on how to avoid problematic situations that have actually manifested or might be likely to do so.
- Offer explicit instruction on alternative pro-active, EEO-compliant ways these situations could have been handled. In particular, managers and supervisors may benefit from scenarios and advice for ensuring that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons.
- Emphasize that those accused of EEO violations, and in particular managers and supervisors, cannot act on feelings of revenge or retribution, 212 although also acknowledge that those emotions may occur.
- Do not limit training to those who work in offices. Provide EEO compliance and anti-retaliation training for those working in a range of workplace settings, including for example employees and supervisors in lower-wage manufacturing and service industries, manual laborers, and farm workers.
- Consider overall efforts to encourage workplace civility, which some social scientists have suggested may help curb retaliatory behavior.

## REVIEW CONSEQUENTIAL EMPLOYMENT ACTIONS TO ENSURE EEO COMPLIANCE

Consider ensuring that an experienced Employment Law attorney, human resources or EEO specialist, a designated management official, in-house counsel, or other resource individual review proposed employment actions of consequence to ensure they are based on legitimate non- discriminatory, non-retaliatory reasons. These reviewers should:

- Require decision-makers to “know, understand, and easily identify” their reasons for taking consequential actions, and ensure that necessary documentation supports the decision.
- Scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations.