

EEOC's Updated Retaliation Enforcement Guidance Seeks to Expand the Reach of its Anti-Retaliation Laws

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Effectively responding to employee discrimination complaints by current employees without running afoul of federal and state anti-retaliation laws presents a slippery slope for all employers. In fact, retaliation complaints make up nearly half of all discrimination charges filed with the EEOC today. Thus, it is critical that employers, their managers, supervisors, and employees understand who the laws protect and what constitutes retaliation.

On Thursday the EEOC sought to clarify these standards by issuing updated proposed enforcement guidance. The proposal is the first update to the EEOC's Compliance Manual since 1998. The proposal was prompted by significant developments in the law and the marked increase of retaliation claims over the last eighteen years.

The 76-page proposal covers the definition of retaliation, the elements of a retaliation claim, interference claims under the Americans with Disabilities Act, remedies, and best practices. Rather than summarize all of the above, I will highlight the most significant developments below.



"Our tolerance is not zero, it's watch out below."

"But for" Causation

Retaliatory acts are those taken *because* the employee engaged in protected activity. Consistent with the Supreme Court's opinion in [University of Texas Southwestern Medical Center. v. Nassar](#), the guidance adopts a "but for" causation standard. Under this standard, the employee must show that "but for" a retaliatory motive, the employer would not have taken the adverse action. Significantly, the employee need not show retaliation was the "sole cause" of the adverse action. This effectively eliminates a mixed-motive defense to retaliation claims.

Opposition

The EEOC guidance also proposes an expansive definition of “opposition.” Individuals who oppose discrimination, by explicitly or implicitly communicating a belief that the employer may be engaging in employment discrimination, are protected. Citing the Supreme Court decision in [Crawford v. Metro. Gov’t of Nashville & Davidson County, Tennessee](#), the guidance explains that its expansive definition includes employees who do not instigate action, but rather “stand pat” by refusing to take action. Opposition may also include employees who accompany a coworker to make an internal discrimination complaint, as well as employees who merely answer questions during an investigation into potential discrimination.

Adverse Action

Following [Burlington Northern and Santa Fe Railway v. White](#), the guidance proposes adoption of a broader definition of “adverse action” than the definition employed under EEO non-discrimination laws. In retaliation cases, “adverse action” includes any action that is “materially adverse” to the employee — that is any action that may deter an employee from engaging in protected activity. Less severe work-related actions, such as reprimands, lowered evaluations, and verbal abuse, as well as non-work-related actions, such as disparaging an employee to the public constitute adverse action under the proposed standard.

The guidance also adopts the “zone of interests” rule set forth by the Supreme Court in [Thompson v. North American Stainless, LP](#). That rule allows third parties harmed by an employer’s retaliatory acts to bring a claim. For example, an employee discharged because of a family member’s protected action would have standing to bring a retaliation claim.

Manager Rule

The guidance explicitly rejects the “manager rule” adopted by several circuits. As such, it is likely that the EEOC will continue to pursue actions on behalf of managers who oppose discrimination in their management role even in those jurisdictions following the manager rule.

Best Practices

Finally, the EEOC suggests best practices to reduce the retaliatory actions in the work place. Such practices include (1) establishing written policies with user friendly examples of employer dos and don’ts, (2) employing general and specialized training for managers, supervisors, and employees, (3) providing advice and individualized support to employees involved in employer investigations, (4) proactively following up with affected employees during the pendency of an investigation, and (5) reviewing all consequential employment actions to ensure compliance with EEO anti-retaliation statutes.

The EEOC is currently seeking public comment on the proposed enforcement guidance. You can download a copy [here](#). The 30-day comment period ends on February 24, 2016.

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