Is There A Silver Lining In The EEOC's Continuing Quest To Make Employees Untouchable?

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At this point, it's all over but the shouting. In January, the EEOC issued its proposed enforcement guidance on retaliation charges filed by employees. The public comment period for the proposed guidance is now closed. (If you haven't gone through it yet, settle in, make yourself comfortable and read the 73-page proposed guidance found here). The proposed guidance will likely be adopted soon and it will likely affect almost half of the EEOC charges filed by employees. That's because a retaliation charge is either the primary claim, or is combined with another claim (i.e., harassment, discrimination) in approximately 45 percent of all EEOC charges filed. There has been and will continue to be grumbling from employers and their management-side attorneys who love them about the many ways in which the EEOC's aggressive regulatory efforts, such as, the EEOC's suggestion that a termination decision occurring *five years after* an employee engaged in protected activity could actually be causally connected to support an inference of retaliation. But I digress. So is there any silver lining *for employers* in the EEOC's proposed guidance? *Perhaps so.* That is because if you are still awake by page 68 of the proposed guidance, you will read that the EEOC suggests "best practices" for employers to undertake to "help reduce the risk of violations." Those practices include maintaining a written anti-retaliation *policy* complete with "practical guidance on the employer's expectations" and a *reporting* mechanism for employees to voice concerns. Employers should also, suggests the EEOC, *train* employees on the employer's written anti-retaliation policy, and *investigate* all complaints in a timely and professional manner. If that advice sounds familiar to you, it should, because it's likely the same advice your legal counsel has been giving you for years. But wait; do you remember why your counsel started giving you that advice in the first place? Keep in mind that most management-side legal advice is not simply given because it's a nice thing to do, or even a "best practice." Rather, advice in this context is often/mostly /always given in order to protect *you, the employer* from risk and allow you to take advantage of court-created legal defenses to liability for employment claims. That is, since a trilogy of cases decided by the U.S. Supreme Court in 1998 and 1999, employers have been proactively instituting policies, training, investigation and remediation practices as a means to defend themselves against liability in certain cases alleging *discrimination* and *harassment* on the basis of sex, age, national origin, religion and age and to dramatically reduce liability for punitive damages. So does the EEOC's proposed guidance signal

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that it is open to extending an employer's "compliance program defense" to claims of retaliation? The EEOC will undoubtedly answer "no," but there is a lot to use from the proposed guidance to argue that it should.