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EEOC Issues Anti-Retaliation Guidance

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On Aug. 29, the U.S. Equal Opportunity Employment Commission (EEOC) issued its much awaited Enforcement Guidance on Retaliation and Related Issues – its first enforcement guidance on workplace retaliation in more than 18 years. In addition to retaliation, this guidance also addresses the "interference" provision under the Americans with Disabilities Act (ADA), which prohibits threats, coercion or other actions that inhibit the exercise of ADA rights. This guidance was highly anticipated as "retaliation is asserted in nearly 45 percent of all charges [received] and is the most frequently alleged basis of discrimination," as stated by EEOC Chair Jenny R. Yang. In the last decade, charges of retaliation have even surpassed race discrimination, and in the federal sector, retaliation is a widespread problem, accounting for between 42 and 53 percent of all EEOC violations that occurred between 2009 and 2015. The practices and examples in the guidance will be a guiding light not only in helping employers reduce the likelihood of retaliation, but also for employees in helping them understand their rights. The guidance addresses retaliation and its prevention under each of the statutes enforced by the EEOC, including the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, Title V of the Americans with Disabilities Act, the Equal Pay Act, Section 501 of the Rehabilitation Act, and Title II of the Genetic Information Nondiscrimination Act. The guidance comes after extensive public input which stemmed from the Jan. 21, draft guidance and integrates responses from approximately 60 organizations and individuals representing diverse viewpoints. According to the press release, the guidance covers such topics as "the scope of employee activity protected by the law; legal analysis to be used to determine if evidence supports a claim of retaliation; remedies available for retaliation; rules against interference with the exercise of rights under the ADA; and detailed examples of employer actions that may constitute retaliation." The guidance updates stem from many recent decisions, including more than half a dozen U.S. Supreme Court decisions issued since the 1998 guidance. In drafting, the EEOC relied on several key Supreme Court decisions, including the 2009 decision in *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271, 280 (2009), in which the court found that retaliation provisions shield both employees who complain about an unlawful employment practice and those who disclose those practices to an internal investigator, and found that opposition to discriminatory practices has an "expansive definition." The guidance states that retaliation's statutory terms "are broad, unqualified, and not expressly limited to investigations conducted by the EEOC." Furthermore, the EEOC also relied on the Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 69 (2006), which expanded the scope of retaliation claims to include any employer action that "might well deter a reasonable employee from complaining about discrimination." The ultimate takeaway from the issuance of this final guidance is that the EEOC's position is broad when it concerns employer actions that may constitute retaliation. As a result, when addressing such issues, employers must consider treading lightly.

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