

# Employment Practices Liability

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## EEOC Issues New Enforcement Guidance Regarding Retaliation Claims

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**Executive Summary:** The EEOC has issued its final Enforcement Guidance regarding retaliation claims. The Enforcement Guidance emphasizes the agency's broad interpretation of the protections afforded to employees who participate in EEO proceedings or complain about discriminatory practices.

**Overview of Guidance:** Nearly 45 percent of all EEOC charges include a claim for retaliation, making it the most frequent basis of alleged unlawful treatment. In an effort to address this trend, the EEOC published a new Enforcement Guidance regarding retaliation claims, as well as a user-friendly Questions-and-Answers reference guide and a Small Business Fact Sheet. The Enforcement Guidance provides a comprehensive summary of the law regarding the retaliation provisions in Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act. The Enforcement Guidance also includes real-world examples aimed at helping employers identify and prevent more nuanced examples of retaliation.

Employers should take particular note of the following:

- **EEOC Emphasizes "Expansive Definition" of Protected Activity.** The EEOC's final Enforcement Guidance emphasizes that the term "protected activity" should be interpreted broadly. In particular, the EEOC emphasized that the so-called "participation clause" (which prohibits retaliation against persons filing, testifying in, or otherwise participating in an EEO investigation or proceeding) protects employees who file or participate in an employer's internal complaint or investigation process (not just those who file or participate in matters before the EEOC). Moreover, "participation" activity remains protected even if the underlying discrimination allegation is not based on a reasonable, good faith belief that a violation occurred. The EEOC also followed the National Labor Relations Board's lead and emphasized that protected activity often includes communicating with managers and co-workers to complain or ask about compensation.
- **Broad Definition of "Adverse Employment Action."** The EEOC also emphasized that unlawful retaliation encompasses not

only tangible employment actions (e.g., termination, reduction in pay, demotion, etc.) but also any action that reasonably deters an employee from engaging in protected activity. This may include changing an employee's work schedule, threatening reassignment to a different job classification, scrutinizing an employee's work more harshly than the work of others, and refusing to investigate an employee's complaints.

- **Causation.** The EEOC's new Enforcement Guidance also advocates a more lenient causation standard. The EEOC opined that a "convincing mosaic" of circumstantial evidence may be all that is necessary for employees to prove that they suffered an adverse employment action because they engaged in protected activity.

**Employers' Bottom Line:** To prepare for the likely surge in retaliation claims prompted by the EEOC's new guidance, employers should:

1. Update their anti-retaliation policies as necessary, including adding real-world examples and explicitly stating that: a) retaliation is prohibited by the organization, b) will be grounds for disciplinary action and c) employees are required to report accusations of retaliation. The policy should include multiple options for reporting retaliation to ensure an employee is not required to make a report to the person accused of retaliation.
2. Provide training to all managers and non-supervisory employees on a regular basis regarding the prevention of retaliation.
3. Immediately notify an employee accused of discrimination that retaliation is prohibited and consider reassigning him/her to prevent the possibility of any retaliation.
4. Proactively follow up with employees who have complained of discriminatory treatment, either internally or to a federal or state agency, to ensure there are no concerns regarding retaliation.

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