

EEOC'S RETALIATION GUIDANCE PROVIDES ROADMAP FOR PREVENTING RETALIATION

On August 25, 2016, the EEOC issued new Guidance on Retaliation and Related Issues ("Guidance") to replace Section 8 of the EEOC's Compliance Manual issued in 1998. The Guidance is helpful for employers in many ways. First, the Guidance reminds employers about why they should care about retaliation – noting that retaliation claims have doubled since 1998 and are the most common claim filed with the EEOC today. Second, the Guidance provides an informative overview for employers of what is and is not unlawful retaliation. Finally, and perhaps most importantly for employers, the Guidance includes an entire section (Section V) of "promising practices" that if followed may help employers reduce the chances of retaliation violations.

Summary of Practices: The Guidance contains an entire section (about three pages long) outlining practices to consider to prevent retaliation. It is worth a read especially for midsize to large employers more at risk for these types of claims. In total there were five areas covered which I have summarized below:

1. Have a Written Policy: Have a written anti-retaliation policy that is easy to understand, widely distributed and includes practical and workplace specific guidance for employees about what to do and not to do.
2. Train Employees: Train employees – *all* employees – on your policy and retaliation issues specific to your workplace. In addition, send a top down message that retaliation will not be tolerated.
3. Provide Real Time Guidance to Impacted Employees: When a complaint is made, coach the impacted employees (complainant, accused, and witnesses) regarding retaliation including what it is and how to report it. In addition, give specific guidance to the accused about how to avoid actual or perceived retaliation and give that person a resource they can reach out to for help if they are unsure as to what can or cannot be done.
4. Follow Up With Impacted Employees: Check in regularly with the complainant, the accused and even witnesses, following a complaint to help catch early or prevent concerns of real or perceived retaliation.
5. Review All Employment Actions: Have an independent party, like HR (preferably) or an up-line manager, review all material personnel decisions (promotions, suspensions, performance reviews, write ups, etc.) to ensure that they have a sound factual basis and can be defended if later attacked as unlawful.

Next Steps: The Guidelines make clear that these “promising practices” are just suggestions (read, not mandatory but a good idea). So that begs the question – what, if anything, should we do? I would recommend that at a minimum you review the suggestions and implement those that are “easy” for your Company. Although not mandatory – if faced with an EEOC complaint the more “practices” you can show you have adopted the better.

Although what is “easy” will vary by Company, some of the easiest steps (for employers of most sizes) appear to be:

- Making sure you have a written policy and that the policy is easy to read and includes some workplace specific examples of what to do and what not to do.
- Distributing and explaining your policy annually (preferably with written acknowledgment).
- Having a standard script that you use when investigating employee complaints which explains what retaliation is, that it is not permitted, and what to do in the event that retaliation is perceived.
- Giving managers a specific pep talk about what they can and cannot do when they are the subject of a complaint and giving them a resource to consult if they have questions.
- Sending an email or otherwise having high-level management communicate that the Company encourages employees to raise concerns and that retaliation is not tolerated. Consider doing this at least annually when the policy is being re-distributed for review and signature.

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