

EEOC Releases Updated Retaliation Guidance

On August 29, 2016, the EEOC issued Final Enforcement Guidance on Retaliation and Related Issues that replaces its 1998 Compliance Manual section on retaliation. The guidance addresses the separate “interference” provision under the Americans with Disabilities Act (ADA), which prohibits coercion, threats, or other acts that interfere with the exercise of ADA rights. The agency also issued a “Q&A” publication that summarizes the guidance, and a short “Small Business Fact Sheet” that condenses the major points of the guidance in non-legal language.

In 2015 alone, 44.5% of all EEOC charges included a retaliation claim. The new guidance is aimed at assisting employers to reduce the likelihood of retaliation. The guidelines address retaliation under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), Section 501 of the Rehabilitation Act, the Equal Pay Act (EPA), and Title II of the Genetic Information Nondiscrimination Act (GINA).

The new guidance explains the concepts of participation and opposition, what types of employer actions can be challenged as retaliation, and the legal standards for determining whether an employer’s action was caused by retaliation in a given case. It also addresses the additional ADA prohibition of “interference” with the exercise of rights under the ADA, and explains that interference goes beyond retaliation to make it also unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual’s exercise of any right under the ADA, or with an individual who is assisting another to exercise ADA rights. The guidance further addresses remedies for violations and promising practices for preventing retaliation or interference.

Compliance Steps For Employers

The EEOC advises employers to implement certain policy, training, and organizational changes to minimize the likelihood of retaliation violations. Some of these “promising

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practices” include:

- Employers should maintain a written, plain-language anti-retaliation policy, and provide practical guidance on the employer’s expectations with user-friendly examples of what to do and not to do.
- Employers should consider training all managers, supervisors, and employees on the employer’s written anti-retaliation policy, and sending a message from top management that retaliation will not be tolerated.
- Managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.
- Employers may also wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation. This may help spot issues before they fester, and to reassure employees and witnesses of the employer’s commitment to protect against retaliation.
- Employers may choose to require decision-makers to identify their reasons for taking consequential actions, and ensure that necessary documentation supports the decision. Employers may examine performance assessments to ensure they have a sound factual basis and are free from unlawful motivations, and emphasize consistency to managers.

The guidance is available online [here](#).