Insights: Alerts

EEOC Issues Updated Guidance on Workplace Retaliation

SEPTEMBER 2, 2016 Written by Kathleen B. Dodd Barton, S. Wesley Butler, Thomas H. Christopher and Susan W. Pangborn

On August 25, 2016, the Equal Employment Opportunity Commission ("EEOC") issued updated guidance on workplace retaliation issues. The EEOC enforces Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act ("EEO laws"), all of which prohibit retaliation against an individual for engaging in "protected activity." The retaliation guidelines were first issued in 1998, but the EEOC felt that updated guidelines were necessary because of significant Supreme Court and local rulings regarding employment-related retaliation since 1998. The EEOC also noted retaliation charges have doubled since 1998, and retaliation is now the most frequently alleged basis of discrimination in all workforce sectors.

Highlights of the Updated Retaliation Guidelines

Under the EEO laws, an individual is protected from retaliation for "participating" in an investigation, proceeding, or hearing under the EEO laws. This is known as the "participation clause." An individual is also protected from retaliation for "opposing" any practice made unlawful under the EEO laws. This is known as the "opposition clause." Courts have generally limited the participation clause to activities relating to administrative charges or lawsuits. In the updated guidelines, however, the EEOC takes the position that an individual who participates in an employer's internal investigation of a discrimination complaint, whether a charge has been filed or not, is protected by the "participation clause," as well as the "opposition clause."

A plaintiff alleging a retaliation claim must prove that "materially adverse action" was taken by the employer. In the updated guidelines, the EEOC follows a 2006 Supreme Court opinion interpreting that phrase to include any employer action that "might well deter a reasonable employee from complaining about discrimination." The EEOC also states that a "materially adverse action" does not have to be work-related, could include threatening to take a materially adverse action against a close family member of the employee (such as cancelling a vendor contract with an employee's spouse), and could exist even when the employee was not actually deterred.

The updated guidelines also address the ADA's prohibition on "interfering" with the exercise or enjoyment of ADA rights or with assisting another in exercising or enjoying those rights. This prohibition on interference is broader than the ADA's anti-retaliation provision and makes "coercion, threats, intimidation, or interference" with respect to ADA rights unlawful. In the updated guidelines, the EEOC provides examples of interference under the ADA that would not necessarily rise to the level of retaliation, such as coercing a disabled individual to relinquish an accommodation to which he or she was entitled or intimidating an applicant from requesting an accommodation for the application process by indicating such request will result in the applicant not being hired.

The updated guidelines provide numerous examples of prohibited conduct and how the elements of a retaliation claim are and are not satisfied. In the updated guidelines, the EEOC also discusses “promising practices” an employer may wish to consider to reduce the risk of violations, such as maintaining a written anti-retaliation policy, training employees and supervisors on the policy and retaliation prohibitions, counseling managers on how to deal with discrimination allegations against them, checking in with employees, managers, and witnesses during an EEO investigation to learn of any concerns about possible retaliation, and reviewing significant proposed employment actions to ensure they are based on a legitimate, nondiscriminatory reason.

Practical Implications

Overall, the updated guidelines do not announce any significant new standards for evaluating a retaliation claim. However, the updated guidelines include many useful examples of prohibited retaliation that can help an employer gain a better understanding of this often-overlooked but critical area of employment discrimination law. Employers should review the examples in the updated guidelines and consider using the examples to train managers. The updated retaliation guidelines can be accessed by clicking here.

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