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CLIENT ALERT

EEOC Issues Final Guidance on Employer Retaliation

SEPTEMBER 1, 2016

On August 25, 2016, the Equal Employment Opportunity Commission (EEOC) issued its Enforcement Guidance on Retaliation and Related Issues, superseding the Commission's 1998 Compliance Manual on Retaliation. The long-awaited guidance comes after a public notice and comment period in which the agency solicited and received feedback from approximately 60 organizations and individuals. The guidance addresses retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), 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). Separately, the guidance also discusses the ADA's "interference" provision, which prohibits coercion, threats, or other acts that interfere with employees' exercise of ADA rights.

In an accompanying press release, the EEOC noted that retaliation is the most frequently alleged basis of discrimination, accounting for approximately 45 percent of all charges filed with the agency. Given these statistics, the EEOC issued the new guidance with the intent to assist employers in reducing the likelihood of committing retaliatory acts, and to help individuals understand their rights to be free from retaliation under federal anti-discrimination laws. Although the guidance is not legally binding, it is instructive in understanding how the EEOC will likely interpret retaliation standards and where enforcement efforts may be focused. The guidance discusses a number of topics of particular significance to employers:

- **The scope of employee activity protected by law**. The EEOC distinguishes between two categories of protected activity—"participation" and "opposition"—both of which are protected from employer retaliation.

  Under the participation clause, it is unlawful to retaliate against an individual because he or she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under anti-discrimination laws. Significantly, the "participation clause" applies regardless of the validity of the underlying discrimination allegations. Moreover, despite many court decisions holding otherwise, the EEOC opines that internal complaints made before the actual filing of a discrimination charge constitute protected "participation."

  In contrast to the "participation clause," which has no reasonableness requirement, the "opposition clause" only protects individuals' actions that are based on a reasonable good faith belief of unlawful discrimination. Examples of opposition include complaining or threatening to complain about alleged discrimination against oneself or others, providing information in an employer's internal investigation of an equal employment opportunity matter,

refusing to obey an order reasonably believed to be discriminatory, resisting sexual advances or intervening to protect others, and passive resistance (allowing others to express opposition).

- **Detailed examples of employer actions that may constitute retaliation**. The EEOC posits that an “adverse action”—an unlawful employer action against an individual based on his or her protected activity—broadly reaches “any action that might well deter a reasonable person from engaging in protected activity.”An adverse action need not deter protected activity on its own, nor must the individual be actually deterred from participating in protected activity. Moreover, an action may constitute “adverse action” even if it is not work-related, has no tangible effect on employment, occurs outside the workplace, or does not directly concern the complaining individual at all. The EEOC provides wide-ranging examples of actions that could constitute “adverse action,” from examining an employee’s work or attendance more closely, transferring an employee to less prestigious or desirable work or work locations, engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity (even if it is not yet “severe or pervasive” as required for a hostile work environment), to threatening to fire an employee’s fiancé.
- **Legal analysis to determine if evidence supports a claim of retaliation**. Retaliation may be established by showing an individual engaged in prior protected activity; the employer took a materially adverse action; and retaliation caused the employer’s action. The EEOC adopts the position that an individual may establish a sufficient causal connection between an individual’s protected activity and an adverse action based on a “convincing mosaic” of circumstantial evidence, which it describes as a combination of evidence that results in an inference of an employer’s retaliatory intent. The EEOC notes that individuals may rely on any or all of the following evidence, although none are necessary: suspicious timing, verbal or written statements, comparative evidence, inconsistent or shifting explanations, and any other evidence that the employer’s explanation for its action was pretextual. An employer may establish that any adverse action taken was not in retaliation for the protected activity under the applicable causation standard by showing that it was unaware of the employee’s protected activity or had a legitimate non-retaliatory reason for the challenged action, such as an employee’s poor performance or misconduct.
- **Rules against interference with the exercise of rights under the ADA**. The ADA’s “interference” provision is broader than the anti-retaliation provision and will thus reach instances when conduct does not meet the “materially adverse” standard required for retaliation. Despite its broad nature, it is the EEOC’s view that the interference provision does not apply to any and all conduct or statements that an individual finds intimidating. Rather, it covers only conduct that is reasonably likely to interfere with the exercise or enjoyment of an ADA right. Examples of interference include: coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled, intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired, and issuing a policy or requirement that purports to limit an employee’s rights to invoke ADA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”).
- **Remedies for retaliation**. Individuals subject to retaliation may seek preliminary relief, which can enjoin retaliation before it occurs or continues while the EEOC is processing a charge; compensatory and punitive damages, which are paid to compensate an individual and to punish the employer; and other equitable relief, such as back pay, front pay, or job reinstatement.

In addition to the enforcement guidance, the EEOC has issued additional materials for employers, including a question-and-answer document on retaliation issues and a small business fact sheet.

As the EEOC suggests, employers should adopt and maintain clear, written anti-retaliation policies, train all employees on anti-retaliation polices, improve practices and responses to retaliation complaints, proactively follow-up with on any alleged retaliation, and review proposed adverse employment actions to ensure compliance with anti-retaliation laws before implementing such decisions.

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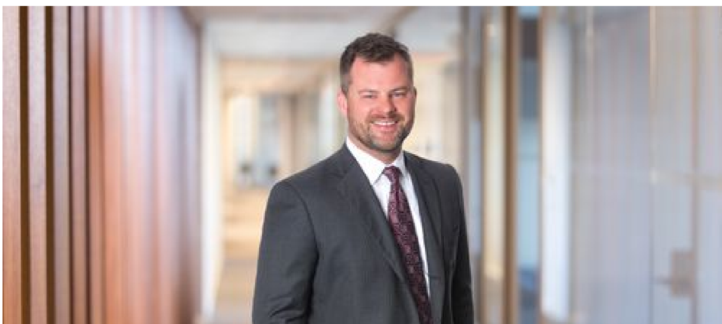

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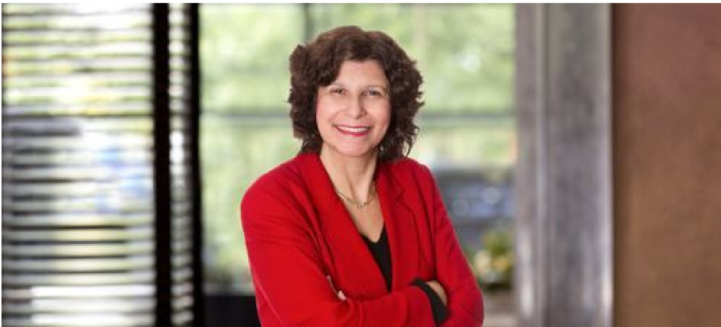

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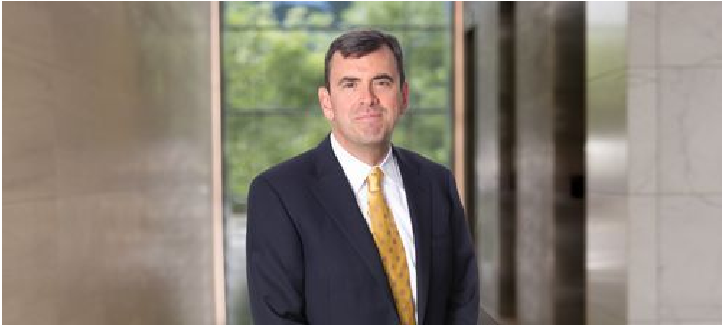

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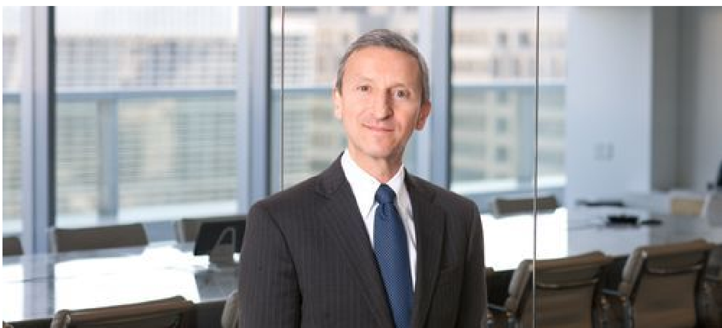

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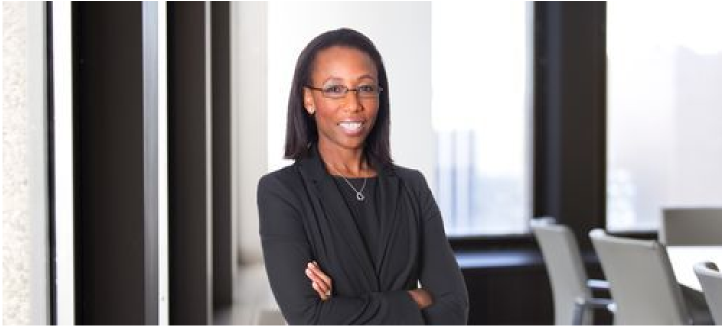

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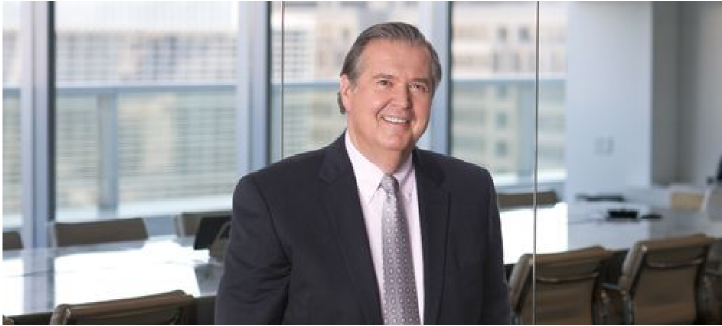

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