



# EEOC Issues Final Enforcement Guidance on Retaliation Claims

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In the past few years, there has been an unprecedented increase in the number of workplace-related claims filed against employers. Interestingly, retaliation-based claims are among the most commonly filed complaints by employees. According to Jenny R. Yang, the Chair of the Equal Employment Opportunity Commission (“EEOC”), “[r]etaliation is asserted in nearly 45 percent of all charges we receive and is the most frequently alleged basis of discrimination.”

Retaliation claims, as defined by the EEOC, must consist of three elements: 1. an employee’s participation in a protected activity — generally a complaint of discrimination or harassment; 2. an adverse action taken by the employer or manager against the employee; 3. a causal connection between the protected activity and adverse action.

On August 29, 2016, the EEOC issued the final version of its updated [guidance](#) on workplace retaliation issues, which expands the scope of protected employee activity to keep up with various courts’ interpretations of the law (the “Guidance”). This is the first revision of the EEOC’s retaliation policy in eighteen years. The EEOC first issued a draft of the Guidance in January 2016 and then received input on the Guidance from approximately sixty (60) relevant organizations and individuals on how the EEOC could better clarify the laws that protect employees who file complaints with the EEOC.

The EEOC’s latest Guidance and the need for clarification results from recent developments in case law, including seven Supreme Court decisions that have been issued since the last update in 1998. The Guidance specifically relies on the Supreme Court’s findings in *Crawford v. Metropolitan Government of Nashville and Davidson County* (2009), which held that retaliation provisions protect both employees who make complaints about unlawful employment practices and those who disclose such practices when interviewed by an internal investigator. The Guidance also noted *Burlington Northern and Santa Fe Railway v. White* (2006), a Supreme Court decision that expanded the scope of retaliation beyond compensation and working conditions to include any change of duties or “adverse action” that could discourage an employee from filing a complaint by the EEOC.

The EEOC’s Guidance includes several detailed examples of employer actions that may constitute retaliation that further clarify the scope of retaliation. “The examples and promising practices included in the guidance are aimed at assisting all employers to reduce the likelihood of retaliation. The public input provided during the development of this guidance was valuable to the Commission in producing a document to help employers prevent retaliation and to help employees understand their rights” said Yang.

The Guidance is also accompanied by two other documents: a [question-and-answer](#) and a [Small Business Fact Sheet](#) that summarizes major points of the guidance. Topics specifically explained in the new Guidance include the scope of employee activity protected by the law, legal analysis to be used to determine if the evidence supports a claim of retaliation, remedies available for retaliation, and rules against interference with the exercise of rights under the Americans with Disabilities Act.

As noted, according to the EEOC's reports, retaliation-based claims are among the most commonly filed complaints by employees. Employees can successfully bring claims for retaliation even if a primary claim of discrimination or harassment fails. All employers should have current written policies and procedures in place that strictly prohibit discrimination, harassment, retaliation, and any other type of workplace misconduct. Clear policies against retaliation should be reviewed and regularly updated. Furthermore, in order to manage risk and reduce liability, many employers are now requiring their employees to attend training sessions. At these sessions, employees learn how to recognize and respond to improper workplace conduct. Once employees are aware of what constitutes unlawful conduct and are knowledgeable about the employer's misconduct policy, their behavior is more likely to conform to the employer's expectations.

*If you have any questions or concerns regarding employment related issues, please contact James G. Ryan at [jryan@cullenanddykman.com](mailto:jryan@cullenanddykman.com) or at 516-357-3750.*

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