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BLOGS

Archives;Discipline;Discrimination;Harassment;Workplace Policies

Are You Implementing Anti-Retaliation Best Practices'?

The Equal Employment Opportunity Commission (EEOC) is preparing to issue a new enforcement guidance on Retaliation and Related Issues. The impending guidance, available [here](#), is not yet final, but has been published by the EEOC for public comment. Once the guidance is finalized, it will not technically carry the force of law, but it will feel like it does. While courts are not obligated to follow EEOC guidance, the EEOC itself relies on its own enforcement guidance documents when addressing discrimination charges or litigating on behalf of claimants. Employers should, therefore, take the new guidance seriously.

The EEOCs draft Retaliation and Related Issues guidance addresses the legal elements of a retaliation claim, as well as the types of legally protected activities that give rise to anti-retaliation rights under employment discrimination laws and other employment laws such as federal labor law. In addition, the guidance includes best practices for employers to follow when it comes to written employment policies, employee training, prevention measures, and proactive support and follow-up for employees who have made protected complaints to ensure that retaliation is not occurring.

We have [previously posted](#) on some of the best practices reflected in the draft EEOC guidance, as well as other retaliation prevention tips. If your company has not already taken these measures to heart and adopted them, it should stay tuned for the final EEOC guidance and use this as an opportunity to proactively adopt anti-retaliation prevention steps. Among other things, an anti-retaliation policy is critical, and the EEOC draft guidance encourages employers to include examples of retaliation that managers may not otherwise realize are actionable, including actions that would not be cognizable as discriminatory disparate treatment but are actionable as retaliation because they would deter a reasonable person from engaging in protected activity. Including examples can help employees better understand an employers policies, but employers should also remember that what makes conduct actionable or unlawful is heavily dependent on the facts and specifics of a situation. As such, any policy examples should be followed by language that makes clear that, whether or not a particular action is retaliatory, will depend on the specific facts and circumstances and whether an adverse action was taken because of an employees legally protected activity or for other legitimate, lawful reasons.

The public comment period for the EEOCs draft guidance ends February 24, 2016. There is no set date for the final, published version, but you can look for future updates from us.