

# LEGAL ALERT

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## Important New EEOC Guidance on Retaliation Claims Soon to be Finalized

February 9, 2016

The Equal Employment Opportunity Commission is speaking up because retaliation claims are on the rise. On January 21, 2016 – for the first time in 18 years – the EEOC announced proposed changes to its enforcement guidance concerning workplace retaliation claims. Employers, now more than ever, must be vigilant when responding to discrimination claims, and ensure that their employment policies are being carefully followed. Human Resources professionals and supervisors are obligated to investigate complaints of employment discrimination, and when such concerns are not treated seriously by all company personnel, a retaliation claim may arise. Employers should be aware that retaliation claims may succeed in administrative proceedings and lawsuits even when the underlying claims of discrimination are unfounded.

According to the press release issued by the EEOC, the percentage of retaliation claims has roughly doubled since 1998. For example, in 2014, nearly 43% of all private sector charges of employment discrimination included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis of discriminatory conduct since 2008, and made up 53% of all violations within fiscal year 2015. As a result, the EEOC has surveyed recent court rulings, and prepared new recommendations to employers that include illustrative examples of problematic conduct. Notably, the draft guidance contains a best practices section which encourages employers to adopt policies containing:

- Plain anti-retaliation language;
- Examples of improper conduct that managers may not realize are actionable;
- Steps for avoiding actual or perceived retaliation;
- A reporting mechanism for employees concerned about retaliation;
- A clear explanation that retaliation can be subject to workplace discipline, up to and including termination;
- Training to employees on the anti-retaliation policy;
- Information on appropriately addressing claims of retaliation with sensitivity; and
- Proactive follow up regarding claims of retaliation.

Companies should be aware that the best practices section is not a safe harbor, and that employees can maintain EEOC charges and lawsuits relating to retaliation even if their employers have adopted all of the policy items in this partial list. Click [here](#) for a complete accounting of the proposed guidance. The comment period is set to close relatively soon – on February 24, 2016. After the EEOC considers the public input it receives, it may revise the draft guidance before a final version is released. To the extent that companies wish to provide comments to the EEOC concerning its proposed guidance, their representatives may submit narratives [here](#).



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Elizabeth Livingston is a litigator with extensive experience representing a wide range of clients from public and privately-held corporations to government entities to small businesses and nonprofit organizations. She also assists business owners and management personnel with employment issues, including recommending hiring and firing procedures, drafting and revising employee handbooks, drafting independent contractor/consulting/work-for-hire agreements, navigating wage payment and collection matters, crafting severance agreements, and considering potential liability relating to employment practices. Elizabeth has represented multiple clients in employment discrimination litigation, including successfully defending employers against claims of race discrimination, disability discrimination, sexual harassment, and retaliation – experience that informs the employment-related advice that she provides to clients.

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