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EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES DRAFT PROPOSED ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

Recently, the U.S. Equal Employment Opportunity Commission ("EEOC") published Draft Proposed Enforcement Guidance on Retaliation and Related Issues in order to get public input. The EEOC handles employment discrimination laws, including retaliation claims by employees who engage in "protected activity," such as employees who complain about discrimination, file a charge of discrimination, or participate in an employment discrimination proceeding. Despite the fact that retaliation is the most frequently alleged type of charge filed with the EEOC, it last published guidance on the matter in 1998. It has used this Draft Proposed Guidance as a way to clarify its stance on certain points of law and an attempt to expand the definition of retaliation.

Among the proposed changes is the EEOC's rejection of the "manager rule," whereby an employee who has a job responsibility that involves policing discrimination in the workplace (e.g., human resource manager) is not engaged in "protected activity" if that person is simply performing his or her job. The EEOC proposes to focus on the "oppositional nature of the employee's complaints or criticisms" instead of the employee's job duties. Therefore, while someone such as a human resources manager would not always be protected under the retaliation provisions, that person would also not have to step outside of their role and assume a position adverse to the employer to receive protection.

The EEOC considers internal complaints to be included in the "participation" aspect of retaliation, regardless of whether a formal charge is filed. Additionally, the EEOC proposes that an individual engaged in "participation" in an employment discrimination proceeding does not have to be "reasonable" in either the belief that discrimination occurred or in how the employee presents himself. In fact, the participation could be wrong, defamatory, or malicious. Oppositional activity must still be objectively reasonable to be protected.

In a nod to the National Labor Relations Board, which has held that discussing compensation among employees constitutes protected, concerted activity, the EEOC's Draft Proposed Guidance state that conversations about pay "may constitute protected opposition under the equal employment opportunity laws, making employer retaliation actionable based upon the facts of a given case." The EEOC gives the example of an employee who discusses the fact

that she is being discriminated against due to her gender, as evidence by her lower pay than similarly situated male employees.

The Draft Proposed Guidance also expand on the definition of “materially adverse employment action” to include: disparaging the employee to others or in the media; making false reports to government authorities; threatening reassignment; scrutinizing the employee’s work or attendance more closely than that of other employees, without justification; giving an inaccurately lowered performance appraisal or job reference, even If not unfavorable; removing supervisory responsibilities; engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently “severe or pervasive” to create a hostile work environment; requiring reverification of work status, threatening deportation, or initiating other action with immigration authorities; and taking any other action that might deter reasonable individuals from engaging in protected activity. Although the EEOC acknowledges that some courts would find these actions insufficient to constitute a materially adverse employment action, it believes that this interpretation is supported by Supreme Court reasoning.

The public has until February 24, 2016 to submit input, and after that, final guidance will be published. Although, even when finalized, the guidance is simply a reference tool for investigators and not law, employers should be aware of the EEOC’s new proposed guidance, particularly the above points. Not only will the EEOC be using these in order to issue initial determinations, but these are items the EEOC is likely to aggressively pursue in litigation as well.