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EEOC Releases Proposed Enforcement Guidance on Retaliation; Seeks Public Comment

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On January 21, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released for public review and input [draft enforcement guidance](#) on the subject of retaliation and related issues under the federal employment discrimination laws. The new guidance document, once finalized, will replace the EEOC's last guidance update on the subject of retaliation issued in 1998. According to the EEOC, retaliation is presently the most frequently alleged type of violation raised with the EEOC, with retaliation claims included in nearly 43% of all private sector charges filed in 2014.

The proposed guidance constitutes a significant expansion of the prior guidance, including citations to updated case law on the topic of retaliation since 1998, as well as providing many real-world examples of conduct that the EEOC considers to be retaliatory versus non-retaliatory. Several recent Supreme Court decisions play a large role in the substantive updates to the guidance. These include Burlington Northern and Santa Fe Railway v. White, which broadened the definition of “adverse action” for which an employee can claim retaliation, to include any materially adverse action that may deter a person from engaging in a protected activity, for example transfer to harder work, exclusion from a weekly training meeting, or unfavorable schedule change; and University of Texas Southwest Medical Center v. Nassar, which heightened the standard for an employee to prove retaliation, requiring the employee to show that the employer took the adverse action because the employee engaged in protected activity, not just that the protected activity was a factor in the determination.

The draft guidance also contains a new “best practices” section, advising employers to (1) maintain written anti-retaliation policies, (2) provide training for managers, supervisors, and employees on the policy, (3) in response to employee EEO allegations, provide information on the policy to all parties and witnesses involved, and (4) review consequential employment actions with an internal EEO specialist, or counsel, to ensure EEO compliance.

Client Tip: *The EEOC will consider revisions to the draft guidance before finalizing and releasing. While EEOC guidance documents do not constitute binding authority, many courts are inclined to give strong deference to EEOC guidance and rulings based on its expertise on the topic. EEOC guidance documents also provide helpful summaries of current law and*

recommendations for compliance. Employers should review the EEOC's guidance on retaliation when finalized and consider implementing the EEOC's recommended best practices regarding retaliation policies and procedures.