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EEOC ISSUES NEW ENFORCEMENT GUIDANCE ON WORKPLACE RETALIATION

Recently, the U.S. Equal Employment Opportunity Commission ("EEOC") issued New Enforcement Guidance on workplace retaliation (the "Guidance"). The Guidance was influenced by several Supreme Court decisions addressing retaliation under EEOC-enforced laws and a significant increase of retaliation claims found in EEOC charges. In addition to the Guidance, the EEOC issued a question-and-answer reference guide and a small business fact sheet for additional guidance.

To establish a claim for retaliation, an employee must show that: 1) he or she engaged in "protected activity"; 2) the employer took a materially adverse employment action against the employee; and 3) retaliation was a cause of the employer's action. The Guidance clarifies the EEOC's interpretation of each of these elements and provides real world examples.

EXPANSIVE DEFINITION OF "PROTECTED ACTIVITY"

The Guidance emphasizes that "protected activity" should be interpreted broadly. Protected activity includes "participating" in an equal employment opportunity ("EEO") process or "opposing" discrimination. Under the participation clause, the Guidance makes clear that participating in an EEO process not only protects employees who file or participate in matters before the EEOC but also employees who file or participate in an employer's internal complaint or investigation process. Moreover, the participation clause protects EEO participation regardless of whether an individual has a reasonable, good faith belief that a violation has occurred. As to the opposition clause, it protects employees from communicating opposition to a perceived EEO violation. Opposition activity protects a broader range of conduct than participation activity, including passive activities such as letter writing or accompanying a coworker to file an internal EEO complaint.

BROAD VIEW OF MATERIALLY ADVERSE EMPLOYMENT ACTION

The Guidance also emphasizes that a material adverse employment action encompasses not only work-related employment actions (termination, demotion, reduction in pay, etc.) but also any action that might deter a reasonable person from engaging in protected activity. The Guidance provides several examples that include a manager's exclusion of an employee from team lunches or disparaging an employee to others outside of work.

LESSENED CAUSAL CONNECTION

The Guidance provides a less stringent causation standard. Unlawful retaliation is established when a causal connection is established between a materially adverse action and the employee's protected activity. An employee need not prove that retaliation was the employer's sole cause of the materially adverse employment action. Rather, there can be multiple causes, and an employee need only prove that retaliation was a cause of the employer's action. Further, an employee may show causation through different pieces of evidence, either alone or together, that support an inference of retaliation. Examples include suspicious timing, oral or written statements, inconsistent or shifting explanations, etc. The Guidance also provides examples of certain evidence that may defeat an employee's claim for retaliation. Evidence of a legitimate non-retaliatory reason for the challenged action (such as poor performance, misconduct, reduction in force or other downsizing, etc.) or that an employer was unaware of protected activity may disprove a causal connection.

PRACTICAL TAKEAWAYS

Employers should review and update their anti-retaliation policies and practices to ensure compliance with the EEOC's New Enforcement Guidance. Further, employers should train their managers and supervisors on how to recognize protected activity and how to avoid retaliation.

If you have any questions, need assistance in evaluating or implementing your anti-retaliation policy or would like additional information about the EEOC's New Enforcement Guidance, please contact Bruce M. Bagdady at (248) 457-7839 or bbagdady@hallrender.com or your regular Hall Render attorney.

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