

# 10 Key Facts About EEOC's New Retaliation Guidance

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Here are 10 key facts about EEOC's new retaliation guidance:

### 1. EEOC Guidance Is Not Legally Binding, But Still Critical

The Equal Employment Opportunity Commission (EEOC) has released its updated *Enforcement Guidance on Retaliation and Related Issues*. While this document is not controlling law like statutes or court decisions, it plays a significant role in how employer conduct is evaluated. Courts and investigators frequently refer to such guidance when navigating complex retaliation cases. So while it may not be gospel, it offers critical insight into how legal standards may be interpreted.

### 2. Why This Update Was Long Overdue

The last EEOC retaliation guidance was issued in 1998. Since then, the legal landscape has changed significantly. Retaliation charges have surged over the past two decades, reaching nearly 40,000 claims in 2015—an all-time high and a 119% increase since 1998. Since 2009, retaliation has consistently been the most common claim filed with the agency, accounting for over 44% of all charges in 2015 alone. This new guidance addresses those changes and updates employers on how to better understand and respond to retaliation claims.

### 3. Broad Coverage Across Federal Anti-Discrimination Laws

The updated guidance addresses retaliation under multiple federal laws including:

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act (ADEA)
- The Americans with Disabilities Act (ADA)
- The Equal Pay Act (EPA)
- The Genetic Information Nondiscrimination Act (GINA)
- Section 501 of the Rehabilitation Act

This makes the document a comprehensive resource for any employer seeking to navigate retaliation concerns across multiple federal mandates.

### 4. Defining What Qualifies as Protected Activity

Not all complaints or actions by employees are protected under retaliation law. The EEOC makes it clear that only “reasonable opposition” to perceived unlawful practices is protected. Employees must act in good faith and have a reasonable belief that what they are opposing is, or may become, unlawful.

The final version of the guidance makes significant improvements over the original 2016 draft, incorporating feedback from employment law firms like Fisher Phillips. For instance, the Supreme Court case *Clark County School District v. Breeden* is now given proper weight, helping employers better understand what qualifies as protected opposition.

## **5. Adverse Action Standard Is Interpreted Broadly**

One of the most impactful aspects of the guidance is its explanation of what constitutes “adverse” employer conduct. It follows the 2006 Supreme Court decision in *Burlington Northern v. White*, which expanded the definition of adverse actions beyond obvious measures like termination or demotion.

Now, actions such as poor performance reviews, job transfers, threats, or even verbal warnings could be considered retaliatory if they would deter a reasonable person from engaging in protected activity. This broader standard significantly increases the kinds of actions that might be challenged under retaliation laws.

## **6. Clarifying the Key Causation Element in Retaliation Claims**

One of the most debated issues in retaliation cases is causation—did the employer take adverse action *because* the employee engaged in protected activity? Initially, the EEOC’s draft guidance downplayed the importance of the Supreme Court’s decision in *University of Texas Southwestern Medical Center v. Nassar* (2013), which mandated a strict “but-for” causation standard.

Following extensive feedback, the final guidance now includes an entire section on *Nassar* and emphasizes the high threshold employees must meet to prove retaliation. Importantly, the guidance also introduces a new section titled “Examples of Facts That May Defeat a Claim of Retaliation,” providing employers with valuable defenses, such as poor job performance or organizational downsizing.

## **7. “Promising Practices” Employers Should Consider Implementing**

To help mitigate the risk of retaliation claims, the EEOC offers a list of five “promising practices,” a term used instead of “best practices” to reflect workplace variability. These include:

- Having a written anti-retaliation policy
- Training supervisors and managers on this policy
- Offering individual guidance to those involved in protected activity or retaliation risk
- Monitoring the workplace climate following protected activity
- Auditing employment decisions to ensure EEO compliance

While many organizations already implement some of these measures, the guidance encourages formalizing them to improve compliance and defensibility.

## **8. Additional Focus on ADA Interference Provisions**

The guidance provides important clarity on the unique provisions of the Americans with Disabilities Act (ADA). Beyond just protecting against retaliation, the ADA includes a separate prohibition against interference. This means employers cannot intimidate, threaten, or otherwise coerce individuals exercising their ADA rights.

The guidance includes five practical scenarios to demonstrate unlawful interference and a list of actions to avoid, such as pressuring employees to forgo accommodations or retaliating for requesting them. This expansion goes beyond traditional retaliation analysis and serves as an important reminder for employers managing ADA requests.

## 9. Supervisors Must Avoid Taking Allegations Personally

The EEOC acknowledges that being accused of discrimination or harassment can be emotionally charged for supervisors. However, the guidance warns against any retaliatory reaction. A referenced article titled “Retaliation – Making It Personal” encourages supervisors to:

- Refrain from public discussions of allegations
- Avoid isolating the employee who filed a complaint
- Continue professional interactions without resentment
- Let the EEO process play out without interference

These behavioral recommendations are aimed at minimizing both legal exposure and workplace conflict.

## 10. Supplementary EEOC Resources You Should Review

In addition to the guidance itself, the EEOC has published two companion documents:

- A Q&A publication summarizing the main points in accessible language
- A Small Business Fact Sheet tailored for employers with fewer resources

Together, these resources form a toolkit that can be used for policy creation, manager training, or as references when facing discrimination claims. Every HR professional and employment counsel should familiarize themselves with these materials to stay ahead of regulatory developments.

## Why This Guidance Matters More Than Ever

The EEOC’s updated guidance on retaliation reflects the evolving challenges in workplace discrimination law. While not legally binding, the document is a powerful resource for employers aiming to remain compliant, avoid litigation, and foster a fair workplace environment. With retaliation claims on the rise, understanding these 10 key facts and implementing “promising practices” will be crucial for proactive risk management and maintaining a culture of accountability and inclusion.

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