

# HR COMPLIANCE OVERVIEW



## What Employers Should Know About EEO Retaliation

The U.S. Equal Employment Opportunity Commission (EEOC) is a federal agency responsible for enforcing federal equal employment opportunity (EEO) laws. Each EEO law listed below covers certain private-sector employers and prohibits retaliation and related conduct. Retaliation occurs when an employer penalizes an employee or applicant for asserting his or her right to be free from discrimination under the EEO laws, including:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- The Equal Pay Act of 1963 (EPA)
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Titles I and V of the Americans with Disabilities Act of 1990 (ADA)
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)
- The Pregnant Workers Fairness Act of 2022 (PWFA)

Retaliation is the most frequently alleged basis of discrimination in charges filed with the EEOC. Claims of retaliation can result in time-consuming administrative proceedings and expose employers to financial and reputational harm. This Compliance Overview provides a summary of employer obligations under the EEO anti-retaliation laws and best practices to prevent retaliation.

### LINKS AND RESOURCES

- EEOC enforcement [guidance](#) on retaliation and related issues
- EEOC [Q&A](#) on enforcement guidance on retaliation and related issues

## Retaliation Basics

Retaliation occurs when:

1. An individual engages in protected activity;
2. An employer takes a materially adverse action against the individual; and
3. The protected activity caused the action.

## Key Definitions

“Protected activity” occurs when individuals assert their right to be free from employment discrimination.

“Materially adverse action” means any action that might deter a reasonable person from asserting their rights under the EEO laws.

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## Overview of EEO Laws

EEO laws prohibit employers from retaliating against employees or applicants for asserting their right to be free from discrimination. To help prevent retaliation, employers should familiarize themselves with the various forms of discrimination prohibited under each EEO law and assess whether they are subject to the laws.

EEO Law	Covered Employers	Prohibited Discrimination
<b>Title VII</b>	Private-sector employers with <b>15 or more employees</b> for at least 20 weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred	<ul style="list-style-type: none"><li>• Prohibits discrimination on the basis of race, color, religion, national origin, sex (including pregnancy, childbirth or related medical conditions)</li><li>• Requires reasonable accommodation of sincerely held religious beliefs and practices unless doing so would impose an undue hardship on the employer</li></ul>
<b>EPA</b>	Virtually all private-sector employers	<ul style="list-style-type: none"><li>• Prohibits payment of different wages to men and women if they perform equal work in the same workplace</li></ul>
<b>ADEA</b>	Private-sector employers with <b>20 or more employees</b> for at least 20 weeks in the current or preceding calendar year	<ul style="list-style-type: none"><li>• Prohibits discrimination against someone who is age 40 or older on the basis of age</li></ul>
<b>ADA</b>	Private-sector employers with <b>15 or more employees</b> for at least 20 weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred	<ul style="list-style-type: none"><li>• Prohibits discrimination against a qualified person with a disability</li><li>• Requires reasonable accommodation of known physical or mental limitations of an otherwise qualified individual with a disability unless doing so would impose an undue hardship on the employer</li></ul>
<b>GINA</b>	Private-sector employers with <b>15 or more employees</b> for at least 20 weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred	<ul style="list-style-type: none"><li>• Prohibits discrimination on the basis of genetic information (e.g., family medical history, genetic tests of an individual or an individual's family members, information about any disease, disorder or condition)</li></ul>
<b>PWFA</b>	Private-sector employers with <b>15 or more employees</b> for at least 20 weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred	<ul style="list-style-type: none"><li>• Requires reasonable accommodation of a qualified individual's known limitation related to pregnancy, childbirth or related medical conditions</li></ul>

Note that federal, state and local government agencies, employment agencies and labor unions are also covered by some or all of these laws but may be subject to different employee thresholds.

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## Covered Individuals

The protections against retaliation apply to all employees of any employer covered by the EEO laws, including:

- Applicants;
- Current employees (full-time, part-time, probationary, seasonal and temporary); and
- Former employees.

The EEO laws protect employees from retaliation regardless of their citizenship or work authorization status.

## Retaliation Defined

Retaliation occurs when an employer punishes individuals for asserting their right to be free from discrimination under the EEO laws. To prove a legal claim of retaliation, an individual alleging retaliation must establish each of the factors below:

1. The individual engaged in prior **protected activity**;
2. The employer took a **materially adverse action**; and
3. Retaliation **caused** the employer's action.

## Protected Activity

Protected activity includes any activity in which individuals assert their rights under the EEO laws. Protected activity may take the form of **participation** in an EEO process or **opposition** to discrimination.

### *Participation in an EEO Process*

Participation in an EEO process includes filing an EEO complaint, serving as a witness or participating in any other way in an EEO matter. Protections for participating in an EEO process apply in all circumstances, including when:

- The underlying allegation is unsuccessful or untimely;
- The participation is in an employer's internal EEO process, even if a charge of discrimination has not been filed with the EEOC;
- The participation is in an EEO proceeding involving a different employer; and
- The underlying allegation is not based on a reasonable good faith belief that an EEO violation has occurred.

Notably, even if an employee brings bad faith allegations in an EEO process, the employer **cannot** punish or otherwise retaliate against the employee for doing so. Instead, employers should raise these issues in the EEO process.

### *Opposing Discrimination*

Opposing discrimination includes any communication or act in opposition to a perceived EEO violation. This includes informal opposition that does not include legal terminology such as "discrimination" or "harassment."

To be protected from retaliation, the opposition **must** be:

- Based on a reasonable good faith belief that the opposed conduct is unlawful or could become unlawful if repeated (even if the individual cannot prove that the opposed conduct is discriminatory or illegal); and

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- ☑ Conducted in a reasonable manner.

To be protected from retaliation, the opposition must **not** be:

- ☒ Conducted in an unreasonable manner, such as through the use of threats of violence or by badgering a subordinate employee to give a witness statement; nor
- ☒ Conducted in a manner that causes an individual to neglect job duties or otherwise renders an individual ineffective in their position.

## Examples of Opposition to Discrimination

- |                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                |
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| <ul style="list-style-type: none"><li>• Complaining or threatening to complain about alleged discrimination against oneself or others</li><li>• Providing information in an investigation in an employer’s internal investigation of an EEO matter</li><li>• Refusing to obey an order reasonably believed to be discriminatory</li><li>• Advising an employer on EEO compliance</li></ul> | <ul style="list-style-type: none"><li>• Resisting sexual advances or intervening to protect others</li><li>• Allowing others to express opposition</li><li>• Requesting a reasonable accommodation for disability or religion</li><li>• Complaining about compensation disparities</li><li>• Discussing EEO concerns with co-workers</li></ul> |
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## Materially Adverse Action

An action is materially adverse if it might discourage a reasonable person from engaging in protected activity, regardless of whether it actually prevents an individual from engaging in protected activity. The chart below provides examples of potentially materially adverse actions. However, whether a particular action is materially adverse depends on the facts and circumstances of each case.

## Examples of Materially Adverse Actions

- |                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"><li>• Termination</li><li>• Suspension</li><li>• Demotion</li><li>• Denial of promotion</li><li>• Refusal to hire</li><li>• Denial of job benefits</li><li>• Removal of supervisory responsibilities</li><li>• Threats, warnings or reprimands</li></ul> | <ul style="list-style-type: none"><li>• Negative or lowered performance evaluations</li><li>• Transfers to less prestigious or desirable work or work locations</li><li>• Increased scrutiny of work or attendance</li><li>• Requiring reverification of work status</li><li>• Taking or threatening to take an adverse action against the individual’s close family member</li></ul> |
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## Causation

To constitute retaliation, the materially adverse action must be taken **because of the protected activity**. In other words, even if there were multiple causes for the adverse action, retaliation occurs only when the employer would not have taken the adverse action but for a retaliatory motive.

### *Factors That May Support a Retaliation Claim*

Some factors, either alone or together, that may support an inference that retaliation caused the adverse action include:

- Close timing between the protected activity and the adverse action;
- Verbal or written statements demonstrating a retaliatory motive (e.g., a statement that an employee who raises concerns is a troublemaker or statements to witnesses that they should be loyal to their employer);
- Evidence that the individual was disciplined for actions that are regularly undisciplined or that another individual was not disciplined as severely for the same action; and
- Proof that the employer's stated reason for the adverse action is false (e.g., the employer alleges an individual was terminated for poor performance despite the individual's consistently high performance evaluations).

### *Factors That May Defeat a Retaliation Claim*

Other factors may suggest that a materially adverse action taken against an individual who engaged in protected activity was **not** retaliatory, including:

- The employer was not aware of the protected activity;
- The employer had a legitimate, nonretaliatory motive for the adverse action, such as:
  - Poor performance;
  - Lack of qualifications for the position sought;
  - Qualifications, application, or interview performance inferior to those of the individual selected for the position;
  - Negative job references;
  - Misconduct (e.g., threats, insubordination, unexcused absences, dishonesty, abusive conduct, theft); or
  - Reduction in force;
- Other employees who did not engage in protected activity received similar treatment; and
- There is evidence that the challenged adverse action would have occurred anyway, despite the existence of a retaliatory motive.

## ADA and PWFA Interference

In addition to the prohibition on retaliation, under the ADA and PWFA, employers are prohibited from taking any action that is reasonably likely to interfere with the exercise or enjoyment of ADA or PWFA rights or with the assistance of another in exercising or enjoying those rights. In some instances, employer acts may constitute both retaliation and interference. Employers may be in violation of the ADA or PWFA interference provisions even if a threat of interference is not carried out and regardless of whether an individual is actually deterred from exercising or enjoying ADA or PWFA rights.

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## EXAMPLES OF ADA/PWFA INTERFERENCE

- Coercing an individual to relinquish or forgo a disability or pregnancy accommodation
- Intimidating an individual from requesting an accommodation
- Issuing a policy or requirement that purports to limit an employee’s rights to invoke ADA or PWFA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”)

## Enforcement

Individuals who believe they have been retaliated against in violation of the EEO laws may initiate an action against an employer by filing a Charge of Discrimination with the EEOC. If a local or state law prohibits the same form of discrimination prohibited under the applicable federal EEO law, individuals may be required to file a charge with the state or local agency that enforces the law, and the EEOC may work with the agency to investigate and resolve the charge.

All EEO laws enforced by the agency, other than the EPA, require individuals to file an EEOC charge before they may file a lawsuit in federal court.

## Time Limits for Filing an EEOC Charge

Under Title VII, the ADEA, the ADA, GINA and the PWFA, individuals have **180 days** from the date the alleged retaliation took place to file a charge with the EEOC. For claims under Title VII, the ADA, GINA or the PWFA, the filing deadline is extended to 300 days if a **state or local agency** enforces a state or local law that prohibits the same form of discrimination prohibited under those EEO laws. For claims under the ADEA, the filing deadline is only extended to 300 days if a **state agency** enforces a law that prohibits age discrimination.

Individuals alleging violations of the EPA may file a lawsuit in federal court without first filing a charge with the EEOC. However, if an individual chooses to file a charge with the EEOC, they must do so within **two years** from the date of the alleged violation (or three years in the case of a willful violation).

## Responding to a Charge

When a charge is filed, the EEOC will notify the employer within **10 days**. The notice will provide important information such as the nature of the claim, the EEO law(s) at issue and the charging individual’s summary of the facts. Employers should carefully review the notice for relevant deadlines and ensure they understand what information they need to provide and the allegations against them. The EEOC may ask employers to:

- Provide a **position statement** that sets forth the employer’s side of the story;
- Respond to a **Request for Information** that requires the employer to submit relevant documents for review;
- Permit an **on-site visit**; or
- Provide contact information for or have employees available for **witness interviews**.

Employers typically have **30 days** to respond to the charge and provide all requested information. Employers who believe they need more time to respond should contact their assigned EEOC investigator as soon as possible to request an extension.

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## Potential Resolutions

- **Mediation:** If a charge is eligible for mediation, the EEOC will notify both parties and invite them to participate. If the parties agree to mediate the charge and the mediation is successful, the charge will be closed and the EEOC will not conduct an investigation. If mediation is unsuccessful, the charge will be investigated.
- **Voluntary Settlement:** The parties may enter into a voluntary settlement agreement at any time during the investigation, even if the parties forgo the EEOC’s voluntary mediation program. If the parties reach a voluntary agreement, the charge will be dismissed.
- **EEOC Determination:** If the parties do not voluntarily settle the charge, the EEOC will conduct an investigation and make a determination on the merits of the charge.
  - If the EEOC does not find reasonable cause to believe that retaliation occurred, the charging individual will be issued a notice called a **Dismissal and Notice of Rights**. The notice informs the individual of their right to file a lawsuit in federal court;
  - If the EEOC finds reasonable cause to believe that retaliation occurred, both parties will be issued a **Letter of Determination** stating the EEOC’s finding and inviting the parties to attempt to resolve the charge through an informal process known as **conciliation**; and
  - If conciliation is unsuccessful, the EEOC may choose to sue the employer in federal court. If the EEOC decides not to litigate, it will issue a Notice of Right to Sue to the charging party.

## Filing a Lawsuit in Federal Court

In most cases, the EEOC has the authority to file a lawsuit after it determines there is reasonable cause to believe that discrimination has occurred and the parties are unable to resolve the matter through conciliation. However, the EEOC has discretion in deciding which cases it litigates. It ultimately litigates a small percentage of all charges filed.

Individuals may also file a lawsuit in federal court for violations of the EEO laws. However, before filing a lawsuit, individuals must satisfy the below requirements under each EEO law:

EEO LAW	REQUIREMENT
Title VII ADA GINA PWFA	<ul style="list-style-type: none"><li>• Individuals must first file a charge with the EEOC and receive a Notice of Right to Sue from the EEOC.</li><li>• Individuals have <b>90 days</b> after receiving a Notice of Right to Sue to file a lawsuit in federal court.</li></ul>
ADEA	<ul style="list-style-type: none"><li>• Individuals must file a charge with the EEOC but <b>do not</b> need to obtain a Notice of Right to Sue.</li><li>• Individuals can file a lawsuit <b>60 days</b> after the charge was filed with the EEOC but no later than <b>90 days</b> after the EEOC issues a notice that its investigation is concluded.</li></ul>
EPA	<ul style="list-style-type: none"><li>• Individuals <b>do not</b> need to file a charge with the EEOC or obtain a Notice of Right to Sue.</li><li>• Individuals must file a lawsuit within <b>two years</b> from the date of the alleged violation or, in the case of a willful violation, within <b>three years</b>.</li></ul>

## Penalties and Other Remedies

In a retaliation case, individuals may be eligible for various forms of relief, including:

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1. **Preliminary Relief:** In some cases, the EEOC has the authority to sue for temporary or preliminary relief while completing its processing of a retaliation charge. This preliminary relief requires the employer to stop retaliation before it occurs or continues.
2. **Compensatory and Punitive Damages:** Employers may be required to pay monetary damages to compensate the victim and punish the employer for retaliation.
3. **Other Remedies:** Employers may also be liable for other relief such as back pay, front pay or job reinstatement. Employers may also be required to make changes to policies and procedures, managerial training and reporting to the EEOC or take other measures designed to prevent violations and promote future compliance.

## Best Practices for Preventing Retaliation

Retaliation claims can result in time-consuming administrative and legal proceedings and expose employers to financial and reputational harm. To help reduce the likelihood of retaliation, employers may consider implementing the best practices below. However, adopting these practices will not shield employers from liability for violations, and these practices may need to be tailored to different workplaces and circumstances.

### Written Employer Policies

#### *Anti-retaliation Policies*

To help prevent retaliation claims, employers should implement a written anti-retaliation policy that is distributed to all employees, either as a standalone document or in the employee handbook. An effective anti-retaliation policy should generally include the following:

- Easy-to-understand definitions and examples of protected activity and retaliation so that employees and managers know how to appropriately respond to employee actions;
- Description of the parties protected by the policy (i.e., all current, prospective and former employees);
- Practical steps to avoid retaliation and guidance to managers and supervisors on how to handle allegations of discrimination, including how to escalate complaints to their superiors or HR as necessary and how to interact with employees who have made allegations against them;
- Statement that retaliation may result in discipline, up to and including termination of employment; and
- Information on how to access any internal reporting mechanism(s) through which employees can raise concerns, including any relevant contact information.

#### *Other Policies*

Employers may also want to review existing formal and informal policies to ensure they do not contain provisions that could deter employees from engaging in protected activity. For example, a policy that deters or punishes employees for discussing or disclosing wages could constitute retaliation.

### Training

Employers should train all employees on their rights and obligations under the organization's anti-retaliation policy. Employers may consider supplemental training for managers, supervisors, HR staff and other personnel tasked with responding to employee complaints.

#### *Training for All Employees*

An effective training program for all employees should:

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- ✓ Ensure that all employees receive regular (e.g., annual) training on the organization’s anti-retaliation policy;
- ✓ Offer opportunities for employees to ask questions about the anti-retaliation policy and their rights and obligations. For example, employers could administer live interactive trainings and offer avenues for employees to submit questions anonymously;
- ✓ Provide clear examples of protected activity and potentially retaliatory actions. The examples may be tailored to the workplace or employee population; and
- ✓ Emphasize the employer’s commitment to a fair and transparent workplace by encouraging employees to speak up if they experience or witness unfair treatment and assuring them that they will be protected from retaliation if they do so.

## ***Training for Managers and Supervisors***

An effective training program for managers, supervisors, HR staff and other personnel tasked with responding to employee complaints should:

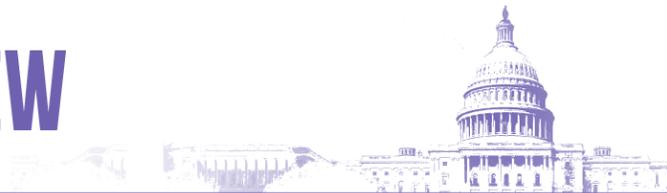
- ✓ Provide guidance on handling and responding to employee complaints, including recognizing when an employee is alleging discrimination or retaliation; defusing and solving conflicts; asking for clarification and additional information if needed; identifying when management is required to act; escalating issues to superiors, HR or in-house counsel; following up with the employee; and documenting complaints;
- ✓ Emphasize the need for objectivity in performance evaluations and employment decisions. Specifically, performance assessments and disciplinary actions must be based on objective criteria and motivated by legitimate, nonretaliatory reasons;
- ✓ Provide guidance to individuals accused of EEO violations by reiterating that such individuals should not act on feelings of revenge or retribution. Employers may also provide scenarios on how managers should interact with accusing employees and resources for managers who may need support or counseling; and
- ✓ Outline potential disciplinary actions for managers who fail to comply with the anti-retaliation policy or respond to employee concerns appropriately.

## **Internal Complaint Process**

Employers may also help prevent retaliation by adopting a fair and consistent internal complaint process for employees to raise concerns regarding discrimination or other EEO violations. For an effective internal complaint process, employers should consider the following practices:

- ✓ Offer more than one reporting avenue for employees to report potential EEO violations. For example, employees could report concerns to HR or via an internal hotline rather than their direct supervisor;
- ✓ Ensure that employees can easily access all available reporting mechanisms. For example, in addition to including this information in the employee handbook, employers may include it on their intranet or a workplace poster;
- ✓ During an investigation into an employee complaint or a pending EEOC charge, provide all parties with a copy of the anti-retaliation policy and remind them of their rights and obligations;
- ✓ In the event an employee complaint warrants internal investigation, assign a neutral party trained to handle such investigations (e.g., an HR director, in-house counsel or outside counsel) to avoid any actual or perceived bias;

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- ☑ Provide individualized guidance to employees accused of discrimination on managing their personal feelings regarding the allegations, maintaining professionalism in their interactions with the accusing employee, and avoiding actual or perceived retaliation going forward;
- ☑ Check in regularly with employees, managers and witnesses during a pending investigation to assess whether there are any concerns regarding potential or perceived retaliation; and
- ☑ Require adequate documentation of all formal and informal employee complaints and the actions taken in response to such complaints. Adequate documentation is important for purposes of investigating the complaint, monitoring potential trends of discrimination and responding to claims of retaliation.

## Review of Employer Actions to Ensure EEO Compliance

Employers may consider assigning an HR specialist, in-house counsel or other designated employee to review proposed employment actions and ensure they are motivated by legitimate, nondiscriminatory and nonretaliatory reasons. The designated reviewers should consider the following procedures:

- ☑ Require managers, supervisors and other decision-makers to submit any proposed adverse employment actions for approval and identify their reasons for the proposed actions;
- ☑ Ensure that managers, supervisors and other decision-makers provide any necessary documentation supporting the rationale for taking consequential actions;
- ☑ Review performance assessments to ensure they have a legitimate factual basis and are based on standards that are consistently applied to all employees;
- ☑ When a proposed action is flagged as potentially retaliatory or discriminatory, counsel decision-makers and identify alternative solutions;
- ☑ Review available organizational data to determine whether there are any patterns of noncompliance, identify causes, and implement responsive training, oversight or other changes; and
- ☑ Administer anonymous employee surveys to identify areas of concern or potential noncompliance.