U.S. Equal Employment Opportunity Commission

PRESS RELEASE
1-21-16

EEOC Seeks Public Input on Draft Proposed Enforcement Guidance on Retaliation and Related Issues

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) announced today that it has voted to seek public input on proposed enforcement guidance addressing retaliation and related issues under federal employment discrimination laws. The Commission's enforcement guidance documents inform the public about the Commission's interpretation of the law and promote voluntary compliance.

All of the laws EEOC enforces make it illegal to fire, demote, harass, or otherwise "retaliate" against applicants or employees because they complained to their employer about discrimination on the job, filed a charge of discrimination with EEOC, participated in an employment discrimination proceeding (such as an investigation or lawsuit), or engaged in any other "protected activity" under employment discrimination laws.

The Commission's last guidance update on the subject of retaliation was issued in 1998. Since that time the Supreme Court and lower courts have issued numerous significant rulings regarding retaliation under employment discrimination laws.

"Retaliation is a persistent and widespread problem in the nation's workplaces," said EEOC Chair Jenny R. Yang. "Ensuring that employees are free to come forward to report violations of our employment discrimination laws is the cornerstone for effective enforcement. If employees face retaliation for filing a charge, it undermines the protections of our federal civil rights laws. The Commission's request for public input on this proposed enforcement guidance will promote transparency. It will also strengthen EEOC's ability to help employers prevent retaliation and to help employees understand their rights."

The percentage of retaliation charges has roughly doubled since 1998, making retaliation the most frequently alleged type of violation raised with EEOC. Nearly 43 percent of all private sector charges filed in fiscal year 2014 included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation violations comprised 53 percent of all violations found in the federal sector in fiscal year 2015.

The draft guidance is available for review at http://www.regulations.gov/#!docketDetail;D=EEOC-2016-0001

The 30-day input period ends on February 24, 2016. Please provide input in narrative form; do not submit redlined versions of the document. The public is invited to submit its input using www.regulations.gov in letter, email, or memoranda format. Alternatively, hard copies may be mailed to Public Input, EEOC, Executive Officer, 131 M Street, N.E., Washington, D.C. 20507.

The input provided will be posted publicly on www.regulations.gov and may show email addresses. Please do not include other personal information that you would not want made public, e.g., home address, telephone number, etc.

After reviewing the public input received, the Commission will consider appropriate revisions to the draft guidance before finalizing it. A final guidance on retaliation and related issues would replace the existing Compliance Manual on Retaliation that was issued in 1998.

Last summer, the Commission gathered public input on retaliation issues and best practices from a wide range of witnesses at a June 17, 2015 meeting on "Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention."

EEOC enforces federal laws prohibiting employment discrimination. Further information about EEOC is available on its web site at www.eeoc.gov.

U.S. Equal Employment Opportunity Commission

Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964

- "Transgender" refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.
- In addition to other federal laws, the U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, national origin, religion, and sex (including pregnancy, gender identity, and sexual orientation). Title VII applies to all federal, state, and local government agencies in their capacity as employers, and to all private employers with 15 or more employees.
- In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012), the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII, and in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015), the EEOC held that:
  - denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
  - an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and,
  - an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).
- Contrary state law is not a defense under Title VII. 42 U.S.C. § 2000e-7.
- In *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, -- F.3d --, 2016 WL 1567467 (4th Cir. 2016), the United States Court of Appeals for the Fourth Circuit reached a similar conclusion by deferring to the Department of Education's position that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity.
- Gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment. As the Commission observed in *Lusardi*: "[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."
- Like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination.
- Further information from other federal government agencies includes: *A Guide to Restroom Access for Transgender Workers*, issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), https://www.osha.gov/Publications/OSHA3795.pdf, and *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/, issued by the U.S. Office of Personnel Management.
- If you believe you have been discriminated against, you may take action to protect your rights under Title VII by filing a complaint:
  - **Private sector and state/local government employees** may file a charge of discrimination by contacting the EEOC at 1-800-669-4000 or go to https://www.eeoc.gov/employees/howtofile.cfm.
  - **Federal government employees** may initiate the complaint process by contacting an EEO counselor at your agency; more information is available at https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

U.S. Equal Employment Opportunity Commission

PRESS RELEASE
5-9-16

EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today issued a new resource document that addresses the rights of employees with disabilities who seek leave as a reasonable accommodation under the Americans with Disabilities Act of 1990 (ADA). The document is entitled *Employer-Provided Leave and the Americans with Disabilities Act*.

Disability charges filed with the EEOC reached a new high in fiscal year 2015, increasing over 6 percent from the previous year. The ADA requires employers to provide reasonable accommodations that allow people with disabilities to perform the essential functions of their jobs, unless it would pose an undue hardship for the employer.

One troubling trend the EEOC has identified in ADA charges is the prevalence of employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation. These policies often serve as systemic barriers to the employment of workers with disabilities. They may cause many workers to be terminated who otherwise could have returned to work after obtaining needed leave without undue hardship to the employer. EEOC regulations already provide that reasonable accommodations may include leave, potentially including unpaid leave that exceeds a company's normal leave allowances.

This resource is intended to help educate employers and employees about workplace leave under the ADA to prevent discriminatory denials of leave from occurring. It responds to common questions employers and employees have raised about leave requests that concern an employee's disability. The document creates no new agency policy, but it is one in a series of EEOC Resource Documents that explains how existing EEOC policies and guidance apply to specific situations. It consolidates existing guidance on ADA and leave into one place, addressing issues that arise frequently regarding leave as a reasonable accommodation, including the interactive process, maximum leave policies, "100 percent healed" policies, and reassignment. It also provides numerous examples that illustrate existing legal requirements and obligations for both employees and employers.

"Providing employees with a period of leave for medical treatment or recovery can be a critical reasonable accommodation for people with disabilities," said EEOC Chair Jenny Yang. "This resource document explains to employers and employees in a clear and practical way how to approach requests for leave as a reasonable accommodation so that employees can manage their health and employers can meet their business needs."

Employer-Provided Leave and the Americans with Disabilities Act also addresses undue hardship issues, including the amount and/or length of leave required, the frequency of leave, the predictability of intermittent leave, and the impact on the employer's operations and its ability to serve customers and clients in a timely manner.

"I'm pleased that the Commission has created a user-friendly resource document regarding this often complicated area of law," said Commissioner Chai Feldblum.

"I believe it will be helpful to both employers and employees," Commissioner Victoria Lipnic added. "Leave issues often present some of the toughest situations for employers and employees to deal with in our workplaces. This document provides needed one-stop guidance on how the EEOC approaches many of the common issues we see."

EEOC enforces federal laws prohibiting employment discrimination. Further information about EEOC is available on its website at www.eeoc.gov.

U.S. Equal Employment Opportunity Commission

PRESS RELEASE
5-16-16

EEOC Issues Final Rules on Employer Wellness Programs

Rules Address Incentives; Protect Confidentiality

WASHINGTON, DC--The U.S. Equal Employment Opportunity Commission (EEOC) today issued final rules that describe how Title I of the Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA) apply to wellness programs offered by employers that request health information from employees and their spouses. The two rules provide guidance to both employers and employees about how workplace wellness programs can comply with the ADA and GINA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act, as amended by the Affordable Care Act (Affordable Care Act).

The rules permit wellness programs to operate consistent with their stated purpose of improving employee health, while including protections for employees against discrimination. The rules are available in the Federal Register at https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act and https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act. EEOC also published question-and-answer documents on both rules today, available at https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm and https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm, and two documents for small businesses https://www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm and https://www.eeoc.gov/laws/regulations/facts-gina-wellness-final-rule.cfm.

Many employers offer workplace wellness programs intended to encourage healthier lifestyles or prevent disease. These programs sometimes use medical questionnaires or health risk assessments and biometric screenings to determine an employee's health risk factors, such as body weight and cholesterol, blood glucose, and blood pressure levels. Some of these programs offer financial and other incentives for employees to participate or to achieve certain health outcomes.

The ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses. Both laws, however, allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings to determine risk factors, if the employer is providing health or genetic services as part of a voluntary wellness program. Last year, EEOC issued proposed rules that addressed whether offering an incentive for employees or their family members to provide health information as part of a wellness program would render the program involuntary.

The final ADA rule provides that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The final

GINA rule provides that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children.

The final rules, which will go into effect in 2017, apply to all workplace wellness programs, including those in which employees or their family members may participate without also enrolling in a particular health plan.

"The EEOC received comments on both rules from a broad array of stakeholders and considered them carefully in developing this final rule," said EEOC Chair Jenny R. Yang. "The Commission worked to harmonize HIPAA's goal of allowing incentives to encourage participation in wellness programs with ADA and GINA provisions that require that participation in certain types of wellness programs is voluntary. These rules make clear that the ADA and GINA provide important safeguards to employees to protect against discrimination."

Program Design

Both rules also seek to ensure that wellness programs actually promote good health and are not just used to collect or sell sensitive medical information about employees and family members or to impermissibly shift health insurance costs to them. The ADA and GINA rules require wellness programs to be reasonably designed to promote health and prevent disease.

Protecting Confidentiality

The two rules also make clear that the ADA and GINA provide important protections for safeguarding health information. The ADA and GINA rules state that information from wellness programs may be disclosed to employers only in aggregate terms.

The ADA rule requires that employers give participating employees a notice that tells them what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information to participate in a wellness program or to receive an incentive.

The interpretive guidance published along with the final ADA rule and the preamble to the GINA final rule identify some best practices for ensuring confidentiality, such as adopting and communicating clear policies, training employees who handle confidential information, encrypting health information, and providing prompt notification of employees and their family members if breaches occur.

EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

U.S. Equal Employment Opportunity Commission

About EEOC's Digital Charge System

Each year, more than 150,000 individuals contact EEOC with inquiries about discrimination and EEOC receives about 90,000 charges per year, making its charge system the agency's most common interaction with the public. To improve customer service, ease the administrative burden on staff, and reduce the use of paper submissions and files, the EEOC is developing online applications for use by the public. The first application for the private sector charge system is Phase I of a Digital Charge System, which was piloted beginning in May 2015 in eleven EEOC offices (Charlotte, Greensboro, Greenville, Norfolk, Raleigh, Richmond and San Francisco, followed by Denver, Phoenix, Detroit and Indianapolis.

As of January 1, 2016, all of EEOC's 53 offices have implemented Phase I of the Digital Charge System.

Key Benefits to the Public and to EEOC of a Digital Charge System

- Increases responsiveness to our customers by allowing them to upload and download documents, to communicate online with EEOC, and to provide more detailed info available thru online resources and links to eeoc.gov;
- Streamlines the enforcement system with dates triggering messages, reminders and action steps;
- Saves resources, including staff time, paper and money using digital documents and communications rather than copying, mailing, phone calls;
- Provides improved management of workflow, and increased accountability and coordination;
- Protects integrity, security, and storage of documents in online system.

Phase I of the Digital Charge System

The first phase of this system allows employers against whom a charge of employment discrimination has been filed to interact online with the EEOC thru a Respondent Portal. The application notifies the respondent by email that a charge has been filed, and through a secure online portal (EEOC Respondent Portal), allows the respondent to:

- View and download the charge;
- Review an invitation to mediate and respond to it;
- Submit a Position Statement and attachments to EEOC;
- Submit a response to a Request for Information to EEOC; and
- Provide/verify respondent contact information, including the designation of a legal representative.

Phase II in 2016

In 2016, EEOC plans to expand the Digital Charge System to add a secure portal for individuals who file a charge of employment discrimination, and to enhance the communications and documents transmitted through the system for both charging parties and respondents.