CLIENT ALERT FINAL VERSION OF GUIDANCE BROADENS THE SCOPE OF "WORKPLACE RETALIATION"

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On September 1, 2016 the Equal Employment Opportunity Commission ("EEOC") issued its final version of its guidance on workplace retaliation. This guidance was issued on the EEOC's assessment that workplace retaliation has become a more common occurrence than in recent years. The guidance takes some of its direction from United States Supreme Court decision, *Crawford v. Metropolitan Government of Nashville,* which found retaliation provisions can shield both workers who complain about an unlawful employment practice and those who disclose such practices when questioned by an internal investigator. Previously, an employee was only protected from retaliation if they participated in an investigation or opposed an unlawful practice. Such that unlawful retaliation could only exist when an employee opposes a discriminatory practice, but also when participating in an internal company investigation. The EEOC has now changed that. The EEOC's new guidance extends the type of conduct that can be "retaliatory" beyond simply working conditions, to include a wide range of conduct such as a change of job duties or any "adverse" action that might discourage an employee from filing a complaint.

Finally, the EEOC's new guidelines also expand the rules prohibiting "interference" with protected rights under the Americans with Disabilities Act. Per the guidelines, management is guilty of "interference" with an employee's exercise of their rights under the ADA by "coercion, intimidation, or interference with the employee obtaining a reasonable accommodation for their disability". The EEOC's definition of "interference" is very broad, and comprises a host of conduct that does not readily appear as interference, such as selective enforcement of attendance policies, transferring an employee to another job, or refusing to consider a job applicant who refuses to submit to a pre-employment medical exam.

WHAT THIS MEANS FOR EMPLOYERS

Guidance from a federal agency is not the same as a law passed by Congress or an appellate to court decision, however, when the Commission issues guidance on a topic, employers can expect increased vigilance from the Commission on enforcement. Consequently, if an employee files a charge with the Commission alleging discrimination, the Commission will likewise investigate whether that employee has experienced conduct might also be retaliatory in nature. Employers need to be aware of these new guidelines when responding to a charge and participating in a commission investigation. By example, depending on the circumstances of a particular situation, simple enforcement of the company's existing policies against an employee claiming discrimination could be viewed as retaliatory by the Commission.

With these new guidelines it is now more important than ever for management to partner with Human Resources when an employee has asserted a right to protection under the employment laws, claims discrimination, or opposes what they believe to be some discriminatory practice.