



Office 909-997-8162

## **EEOC Protected Activity**

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On August 29, 2016 EEOC issued for the first time since 1998<sup>1</sup> guidance on retaliation what it is and isn't. The 70 page document can be read [here](#).

Considering 45% of all EEOC claims in 2015 were based on retaliation, this news letter breaks down for you some of the key points you need to know as an employer to protect your company.

The definition of retaliation has not changed, **retaliation** occurs when an employer takes a *materially adverse action* against an employee because the employee *engaged in or may engage in a protected activity*. EEOC defines this with much broader strokes than defined by courts when it interrupts laws.

One type of protected activity is participation. An individual is protected from retaliation for having made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA. Participation may include, for example, filing or serving as a witness in an administrative proceeding or lawsuit alleging discrimination.<sup>2</sup>

EEOC lists the following types of protected activity<sup>3</sup>

1. Complaining about discrimination against oneself or others – Come on you knew this one 😊
2. Threatening to complain about discrimination against oneself or others
3. Providing information in an employer's investigation of discrimination or harassment
4. Refusing to obey an order reasonably believed to be discriminatory
5. "Passive resistance" – The EEOC gives the example here of a supervisor refusing a request to dissuade subordinates from filing EEO complaints. Apparently, the refusal doesn't need to be articulated. Just not acting on the request is considered protected.
6. Advising an employer on EEO compliance
7. Resisting harassing behavior – The EEOC gives the example of an employee telling a supervisor to "leave me alone" and "stop it." The fact that it's a supervisor seems important here because the supervisor's knowledge is imputed to the employer.
8. Intervening to protect others from harassing behavior – Again, the EEOC example involves a co-worker intervening to stop harassment by a supervisor.

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<sup>1</sup> <http://www.jdsupra.com/legalnews/eec-issues-new-retaliation-guidance-58357/>

<sup>2</sup> page 6 EEOC guidance

<sup>3</sup> [http://www.mondaq.com/article.asp?articleid=523484&email\\_access=on](http://www.mondaq.com/article.asp?articleid=523484&email_access=on)



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9. Requesting accommodation for a disability or religion
10. Complaining that pay practices are discriminatory – There doesn't need to be an explicit reference to discrimination. If a woman says her pay is unfair and asks what men in the job are being paid, the EEOC deems that protected.

The EEOC has issued an [FAQ](#) for employers to review.