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RETALIATION: Winning the Battle, Losing the War

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I. EEOC FY 2018 STATISTICS

The EEOC recently released its charge statistics from fiscal year 2018, which ran from Oct 1, 2017 through Sept 30, 2018. ***Retaliation was the most common claim in FY 2018***, representing 51.6% of all charges filed. Further, note that the EEOC's online portal, launched in November 2017, makes it incredibly easy for individuals to sign in and file charges.

Key Takeaways

- Take this heightened awareness as an opportunity to review and, if necessary, revise antiharassment, anti-discrimination and/or anti-retaliation policies. It is crucial that these policies provide multiple avenues for employees to report incidents of perceived harassment, discrimination and retaliation.

- As employers face more internal complaints of harassment – this retaliation number further highlights the critical importance of a robust and well-honed investigation process. Employers need to handle investigations very carefully and be mindful that the complainant (and the witnesses) may also be the source of your next retaliation complaint. Investigators and managers must be carefully trained to avoid situations which can lead to complaints or retaliation.

II. TIPS FOR AVOIDING RETALIATION CLAIMS UNDER THE EEOC'S RETALIATION GUIDANCE

Because of the alarming frequency of charges and the need for employees to report discrimination without fear of reprisal, in 2016, the EEOC issued an enforcement guidance on retaliation. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. Even though the EEOC's position is not necessarily the final word on these issues, as courts often disagree with the EEOC's interpretation of federal discrimination laws, employers should know how EEOC staff, including its investigators and litigators, will approach retaliation charges. Here is a look at the guidance with tips on how to avoid becoming another retaliation charge statistic.

A. Overview of Retaliation and Protected Activities

The federal discrimination laws enforced by the EEOC, such as Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA") and others, prohibit employers from taking adverse action against an employee or applicant because the individual engaged in "protected activity." Adverse actions that be retaliatory by the EEOC include not just discipline or discharge, but also transferring the employee to a less desirable position or shift, giving a negative or lower performance evaluation, increasing scrutiny, or making the person's work more difficult.

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