

# HR COMPLIANCE BULLETIN

## Highlights

### Retaliation Protections

Federal fair employment laws prohibit employers from retaliating against employees or applicants for asserting their rights or engaging in any other “protected activity” under these laws.

### New COVID-19 FAQs

The EEOC has issued new information on how federal anti-retaliation provisions may apply in situations specifically relating to or involving COVID-19.

### Retaliation Guidance

The EEOC’s newly added FAQs clarify, among other things, that:

- Unlawful retaliation includes any employer action in response to protected activity that could deter a reasonable person from engaging in protected activity; and
- Retaliation protections apply even if the EEOC ultimately determines an underlying claim has no merit, as long as an individual’s protected activity was based on a reasonable, good faith belief that the law was violated.

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## EEOC Addresses Retaliation in New COVID-19 FAQs

On Nov. 17, 2021, the Equal Employment Opportunity Commission (EEOC) issued seven new answers to its frequently asked questions ([FAQs](#)) about what employers may or may not do to comply with federal fair employment laws during the COVID-19 pandemic. The new FAQs specifically address anti-retaliation protections under Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA) and other federal laws prohibiting discrimination based on certain protected traits. Under these laws, employers may face liability if they take any adverse employment actions that could discourage individuals from asserting their rights.

This Compliance Bulletin provides the EEOC’s seven new FAQs below. Employers that are subject to Title VII and other federal fair employment laws should become familiar with these FAQs and review [the EEOC’s full guidance on COVID-19 and federal fair employment laws](#). The EEOC initially issued that guidance on March 18, 2020, and updated it several times since.

An employer is subject to Title VII if it has 15 or more employees. Smaller employers may be subject to similar rules under applicable state or local laws.

## Action Steps

All employers should follow the most current guidelines and suggestions for maintaining workplace safety as issued by the [Centers for Disease Control and Prevention](#) (CDC) and any applicable state or local health agencies. Employers with 15 or more employees should also become familiar with and follow the guidance provided in all the EEOC’s FAQs about compliance with federal fair employment laws. These and all smaller employers should also ensure that they comply with all applicable state and local anti-discrimination laws as well.

Provided to you by [Cowden Associates, Inc.](#)



## M. Retaliation and Interference

The [anti-retaliation protections](#) discussed here only apply to the exercise of rights under the federal equal employment opportunity (EEO) laws. Information about similar protections under other federal workplace laws, such as the [Family and Medical Leave Act](#) or the [Occupational Safety and Health Act](#), is available from the U.S. Department of Labor. Information about similar protections under the Immigration and Nationality Act’s anti-discrimination provision—which prohibits some types of workplace discrimination based on citizenship status, immigration status or national origin and [protects against retaliation for asserting those rights](#)—is available from the Civil Rights Division of the U.S. Department of Justice.

### M.1. Do job applicants and employees (including former employees) have protections from retaliation for exercising equal employment opportunity (EEO) rights in connection with COVID-19?

Yes. Job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the federal [EEO laws](#). The EEO laws prohibit workplace discrimination based on race, color, sex (including pregnancy, sexual orientation and gender identity), national origin, religion, age (40 or over), disability or genetic information. Speaking out about or exercising rights related to workplace discrimination is called “protected activity.”

Protected activity can take many forms. For example, an employee complaining to a supervisor about co-worker harassment based on race or national origin is protected activity. Witnesses to discrimination who seek to assist individuals affected by discrimination are also protected. However, engaging in protected activity does not shield an employee from discipline, discharge, or other employer actions taken for reasons unrelated to the protected activity.

### M.2. What are some examples of employee activities that are protected from employer retaliation?

- **Filing a charge, complaint or lawsuit, regardless of whether the underlying discrimination allegation is successful or timely.** For example, employers may not retaliate against employees who file charges with the EEOC alleging that their supervisor unlawfully disclosed confidential medical information (such as a COVID-19 diagnosis), even if the EEOC later decides there is no merit to the underlying charges. Moreover, a supervisor may not give a false negative job reference to punish a former employee for making an EEO complaint or refuse to hire an applicant because of the applicant’s EEO complaint against a prior employer.
- **Reporting alleged EEO violations to a supervisor or answering questions during an employer investigation of the alleged harassment.** For example, an Asian American employee who tells a manager or human resources official that a co-worker made abusive comments accusing Asian people of spreading COVID-19 is protected from retaliation for reporting the harassment. Workplace discrimination laws also prohibit retaliation against employees for reporting harassing workplace comments about their religious reasons for not being vaccinated. Similarly, workplace discrimination laws prohibit retaliation against an employee for reporting sexually harassing comments made during a work video conference meeting.
- **Resisting harassment, intervening to protect co-workers from harassment or refusing to follow orders that would result in discrimination.** For example, workplace discrimination laws protect a supervisor who refuses to carry out management’s instruction not to hire certain applicants based on the sex-based presumption that they



might use parental leave or have child care needs. The supervisor is also protected if they refuse an instruction to steer these applicants to particular types of jobs.

- **Requesting accommodation of a disability (potentially including a pregnancy-related medical condition) or a religious belief, practice or observance regardless of whether the request is granted or denied.** For example, the EEO laws prohibit an employer from retaliating against an employee for requesting continued telework as a disability accommodation after a workplace reopens. Similarly, requesting religious accommodation, such as modified protective gear that can be worn with religious garb, is protected activity. Requests for accommodation are protected activity even if the individual is not legally entitled to accommodation, such as where the employee's medical condition is not ultimately deemed a disability under the ADA or where accommodation would pose an undue hardship.

### **M.3. Who is protected from retaliation?**

Retaliation protections apply to current employees, whether they are full-time, part-time, probationary, seasonal or temporary. Retaliation protections also apply to job applicants and to former employees (such as when an employer provides a job reference). In addition, these protections apply regardless of an applicant's or employee's citizenship or work authorization status.

### **M.4. When do retaliation protections apply?**

Participating in an EEO complaint process is protected from retaliation under all circumstances.

Other acts by a current, prospective or former employee to oppose discrimination are protected as long as the employee acts on a reasonable good faith belief that something in the workplace may violate [EEO laws](#) and expresses those beliefs in a reasonable manner. An employee is still protected from retaliation for making a complaint about workplace discrimination even if the employee does not use legal terminology to describe the situation.

### **M.5. When is an employer's action based on an employee's EEO activity serious enough to be unlawful retaliation?**

Retaliation includes any employer action in response to EEO activity that could deter a reasonable person from engaging in protected EEO activity. Depending on the facts, this might include actions such as denial of promotion or job benefits, nonhire, suspension, discharge, work-related threats, warnings, negative or lowered evaluations, and transfers to less desirable work or work locations. Retaliation could also include an action that has no tangible effect on employment or even an action that takes place only outside of work if it might deter a reasonable person from exercising EEO rights. The fact that an individual is not actually deterred from opposing discrimination or participating in an EEO complaint-related process or activity does not preclude an employer's action from being considered retaliatory.

However, depending on the specific situation, retaliation likely would not include a petty slight, minor annoyance or a trivial punishment.

### **M.6. Does this mean that an employer can never take action against someone who has engaged in EEO activity?**

No. Engaging in protected EEO activity does not prevent the discipline of an employee for legitimate reasons. Employers are permitted to act based on **non-retaliatory and non-discriminatory** reasons that would otherwise result in discipline. For example, if an employee performs poorly, has low productivity or engages in misconduct, an employer may respond as it normally would, even if the employee has engaged in protected activity. Similarly, an employer may take non-



retaliatory, non-discriminatory action to enforce COVID-19 health and safety protocols, even if such actions follow EEO activity (such as an accommodation request).

## **M.7. Does the law provide any additional protections to safeguard ADA rights?**

Yes. The ADA prohibits not only retaliation for protected EEO activity but also “interference” with an individual’s exercise of ADA rights. Under the ADA, employers may not coerce, intimidate, threaten or otherwise interfere with the exercise of ADA rights by job applicants or current or former employees. For instance, it is unlawful for an employer to use threats to discourage someone from asking for a reasonable accommodation. It is also unlawful for an employer to pressure an employee not to file a disability discrimination complaint. The ADA also prohibits employers from interfering with employees helping others to exercise their ADA rights.

The employer’s actions may still violate the ADA’s interference provision even if an employer does not actually carry out a threat and even if the employee is not deterred from exercising ADA rights.

*Source: Equal Employment Opportunity Commission*