### A. What is a start-up? What is a small business?

<table>
<thead>
<tr>
<th>Small Business</th>
<th>“Lifestyle Start-up”</th>
<th>Start-Up</th>
</tr>
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<tbody>
<tr>
<td>A small business can be a business that is selling a product or service. The very practical goal of the entrepreneur is to build a business to generate income and make money. The entrepreneur is seeking income and steady streams of revenue.</td>
<td>+ Generally, where you don’t want to be as an investor. + A “lifestyle” start-up often can be viewed as a venture that may have started as a start-up but really ended up as a small business (whether or not profitable) which is regularly distributing cash to its founders or investors, rather than actively seeking to scale and grow the Company.</td>
<td>A start-up is founded by one or more entrepreneurs and distinguished from a small business as follows: + The goal of a start-up is usually an exit, and obtaining income and steady revenue for the benefit of investors and the founders takes a back-seat to this primary goal. The goal: to build-value and to scale a business as quickly as possible and to exit at a high valuation, traditionally through a sale or merger, on the one hand, or a an initial public offering, on the other hand. + A start-up is often characterized by a company that is seeking regular equity investment in rounds of financing, with a focus on growth and scaling the business, irrespective of profitability on day one. + A start-up typically will incorporate equity as compensation and incentive to attract and keep talent, which requires the founders to keep an eye on the Company’s valuation as being a key</td>
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</table>
ingredient to attracting and retaining talent and investment.

+ A start-up may or may not involve technology, but traditionally will involve technology companies. Since most services business do not scale well or quickly (you are looking for a “J” curve in terms of growth, rather than something that scales more slowly), most start-ups tend to focus on products or provide a platform to connect end-users to provide services and those seeking services, but do not necessarily provide services themselves. (e.g. a law firm, a consultancy or an accountancy is generally not viewed as a start-up).

Investors in start-ups tend to shy away from start-ups that spend too much time distracting their founders through providing services.

+ A start-up traditionally is re-investing its capital and earnings back into the business, rather than distributing dividends, and seeking anything and everything to try to grow the Company’s valuation.
### B. Corporations vs. LLCs

<table>
<thead>
<tr>
<th>Entity</th>
<th>General Features</th>
<th>General Pros/Cons</th>
<th>Delaware or Not</th>
<th>Comment</th>
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</thead>
</table>
| Corporation | A corporation is an entity that is a separate legal entity for legal and tax purposes (assuming it is a C corporation, which is the default and not elected with the IRS to be a subchapter S corporation). A corporation is governed by its board of directors, who are appointed by its stockholders. Day-to-day operations are run by officers who are appointed by the board of directors. A corporation is bound by its Articles (or Certificate) of Incorporation and By-Laws. Corporations are highly-structured legal entities with very clearly-defined fiduciary duties owed by directors and officers to the Corporation's stockholders (and when in the zone of insolvency, to | Pros:  
+ Good Vehicle for Distributing Equity and Raising Capital. A corporation is a very good vehicle for a start-up and for any company that is seeking to use equity as currency both to raise capital and to incentive employees.  
+ Lower Legal Expenses/Costs. For start-ups, corporations also have very standard documentation especially in the early-stages and with future Preferred financing rounds using NVCA (National Venture Capital Association) documents, this means lower cost as the documentation for start-ups is both widely available and widely used, subject to some | Delaware is the default jurisdiction and source of corporate law for overwhelming percentage of companies in America. **Advantages of Delaware:**  
1. Fast and efficient jurisdiction where things get done quickly. Some states still take a number of days to process different filings; everything in Delaware is aimed to be business-focussed and streamlined; unlike some states like NY, for example, Delaware has a form of filing to permit changing status from a corporation to an LLC and vice-versa. |
<table>
<thead>
<tr>
<th>creditors under Delaware law). Formalities are very important for maintaining protection from legal liabilities in a corporation.</th>
<th>variation. You have some additional costs in corporate formalities (minutes and resolutions) that would not otherwise be applicable in an LLC, but overall, lower legal cost.</th>
</tr>
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<tbody>
<tr>
<td><strong>Cons:</strong></td>
<td>2. Established body of corporate law, fewer questions and more sophisticated so issues of the day tend to be addressed and easier to find guidance. Many laws are also business-friendly (e.g. the Delaware jurisprudent on usury tends to favor lenders, recalling that Delaware is the home of a number of credit card issuers). In addition to the jurisprudence advantage of case law, unlike many other states, Delaware’s legislature is very pro-active in reviewing and updating their corporate and LLC statutes annually to address issues as they arise and update for new developments in technology and otherwise (e.g. in August, Delaware became the first state to adopt changes to their corporate statutes relating to stock ledgering to specifically adapt for block-chain technology) and fix anything</td>
</tr>
<tr>
<td>+ <em>Double-taxation.</em> A corporation is very tax-inefficient since a corporation is its own separate entity for tax purposes and files its own taxes. Any post-tax distributions to shareholders are then also viewed as income, which gets taxed as personal income to the shareholders.</td>
<td></td>
</tr>
<tr>
<td>For example, if Corporation XYZ has five shareholders each owning 20% and for FY 2017 makes $1,000. Assuming a 50% effective tax rate, Corporation XYZ will report its taxes and pay $500 in taxes, retaining $500. If it decides to distribute the remaining $500 to its five shareholders, each shareholder</td>
<td></td>
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</table>
will get $100 and also have to pay taxes on the $100 rec’d by them. If each of these shareholders had an effective tax rate of 40%, each would receive $60 net of taxes, thus $1000 became $300 after being taxed twice. In an LLC, by contrast, with 5 equal 20% members, each member would receive $200 and assuming an effective tax rate of 40% for each Member, each would retain $120, so, in this example, of the $1000 distributed, $600 would be net of tax.

+ Lack of Flexibility for Allocating Profits/Loss. A corporation isn’t very flexible for purposes of allocating and mixing-and-matching profits and loss among its owners.

problematic: Delaware is well-aware of its status and revenues coming into the state as the leading jurisdiction for corporations and is actively seeking to protect its franchise.

3. Disputes btw parties more efficient as specific court in Delaware that is highly specialized to handle matters of corporate and LLC law, the Delaware Court of Chancery, which can offer more predictable results; many items are often favorable to companies (some, obviously less so).

Disadvantages of Delaware:

It can be additional expense as many business may be operating outside of Delaware and will need to file to authorize or qualify their company to do business in their home state, which they
**Pros:**

- **Tax-Efficient.** Unlike a corporation, an LLC is a pass-thru. All income is deemed to be passed-thru to the members of the LLC. *(Downside: whether or not the income is actually distributed, which means that members can incur tax liabilities for income that was never distributed to them by the LLC).*

- **Tremendous Flexibility for Allocating Profits/Loss.** An LLC is like a partnership and allows for tremendous flexibility in governance as well as allocating economics.

**Advantages of Delaware:**

- One additional advantage of Delaware law over many other jurisdictions for LLCs, is that although there has been some back-and-forth between the Delaware Supreme Court and the Court of Chancery over issues of the primacy of fiduciary obligations vs. embracing “freedom of contract” between sophisticated parties in LLC operating agreements, Delaware permits a reduction in fiduciary duty of the members if explicitly set.
(sometimes called a “managing member” but being a member is not always a criteria for being a manager), co-managers or board of managers, or by its members. LLCs are structurally very similar to partnerships in terms offering tremendous flexibility. LLCs are largely creatures of contract governed by their Certificate of Formation and their LLC Operating Agreement which is signed by all of the Members; a number of states, however, have LLC statutes that offer a number of default provisions that would apply if not addressed in the operating agreement.

Formalities (e.g. no general requirement for an annual meetings of members) are less important in an LLC to maintain legal liability so long as the company is following its operating agreement and meeting minimum statutory requirements relating to items like access to books and records.

| For example, if Popeye contributed $50,000 to a burger and shake enterprise with Wimpy and Olive Oyl providing labor as business partners --- If Wimpy wanted to be paid on all income from an LLC generated from burgers on Wednesdays and Fridays, and Olive Oyl wanted to receive all income from the LLC from burgers on other days of the week plus 100% of all income from milkshakes regardless of the days of the week, and Popeye wanted a 10% cut of net income from t-shirt sales plus a preferred return of 10% plus return of his capital contributed to the enterprise prior of distributions of profit to Wimpy or Olive Oyl, the LLC can accomplish this. |
| + Tax-Flexibility in Bringing New Members into the Company. Membership interests can be structured as a profits interest in future profits without a liquidation value as of the date forth in the LLC Operating Agreement. This greatly reduces liability. There may be certain circumstances where due to the nature of the business or to attract investors or keep junior business partners happy, where a Company lawyer would not wish to reduce fiduciary duties for the managers, but this is an extremely powerful and useful tool with a real benefit for choosing Delaware as a jurisdiction over other jurisdictions which mandate a minimum fiduciary duty, effectively, Delaware is winning the “race to the bottom” by providing opportunities for parties to negotiate deals they want to negotiate and structure relationships in negotiated manner rather than mandated by statute. |
of a new Member joining an LLC; this means from a tax perspective, you can minimize gain on the date of grant of a profits interest in the LLC if structured properly.

Cons:

+ Partnership Tax and Allocation Provisions are Complex and Extremely Flexible. These agreements are not light reading and not user-friendly for either lawyers or non-lawyers. An LLC often requires a bit more accounting effort and understanding of concepts like: capital accounts, capital vs. profit/loss, allocations vs. distributions, and similar concepts that are a lot to digest that you would not need to even think too much about in a corporation format.

Every LLC operating agreement and every LLC can vary tremendously --- a 10% member in 15 different LLCs could have
very different rights (economically and otherwise) in each different LLC. This means that the process of negotiating an LLC or grant or sale of an LLC interest, which may involve negotiating changes to an LLC operating agreement, depending on negotiating power and leverage, often requires a lot more time and effort and that parties tend to lawyer-up.

+ Not As Easy Vehicle for Distributing Equity and Raising Capital. Similarly, while you can accomplish similar structures to a corporation, an LLC is much more cumbersome.

+ Lower Legal Expenses/Costs. For start-ups and small businesses, the tax-efficiency comes at a price, which means that your legal expenses often to the extent you are negotiating with business partners or investors, can be higher and require more time and attention in explaining concepts and
dealing with greater complexity than in context of the corporation format.

+ **IRS Classification of “Employee” Problem.** The IRS has made it clear that partnerships and LLCs cannot have partners or members who are also “employees” of the Company. While an LLC member may receive guaranteed payments, this presents a challenging structuring problem for companies that wish to convey equity or quasi-equity directly to key employees. Phantom equity plans, which may not provide the tax-advantage of potential long-term capital gains treatment, are often a solution.

+ **LLCs are not always a great solution for non-US investors.** Often for tax reasons and to achieve tax treaty benefits, it may be advisable to set-up a corporation rather than an LLC if attracting non-US investment or a founder or other key equity-
holder is a non-US person.

## C. Capital Raising and Incentivizing Key Employees.

<table>
<thead>
<tr>
<th>Corporation</th>
<th>LLC</th>
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<tbody>
<tr>
<td>+ In structuring a capital raise, companies need to think about:</td>
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<tr>
<td>- What is the story of the Company and why invest now?</td>
<td></td>
</tr>
<tr>
<td>- What is the Company’s plan on use of proceeds and milestones before the next capital raise?</td>
<td></td>
</tr>
<tr>
<td>- Remember, the earlier-the-stage, the more investors are really investing in the founders, even more than assessing the idea, competitive advantage and market opportunity.</td>
<td></td>
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<tr>
<td>- In structuring a raise, be aware of what is the market (is it pro-investor, or is it pro-company) and a few things to bear in mind:</td>
<td></td>
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<tr>
<td>For early-stage fundraising, not everything should be structured to be pro-Company; a good term sheet should be attractive to</td>
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investors and give them a reason to invest and how you message the term sheet, with the advice of experienced counsel, can say a lot about the Company and how it wishes to treat its investors. Especially if friends and family are involved, founders should be careful to structure the term sheet in a balanced and thoughtful manner.

Think of future investors and future rounds. On the flip-side, founders should be careful to keep a clean capital structure, and steer clear of pre-emptive rights or giving away too much economics that makes it more difficult for future rounds of financing.

Understanding and "owning" the capitalization table rather than relying on service providers (like your lawyer) is a key point for founders of start-ups (as the focus is on equity splits, dilution and the Company’s valuation, and what valuation thresholds will need to be reached in order to get an exit that is attractive to investors and gives the founders a minimum payout for all of their time and labor on a very difficult process of getting a start-up launched off the ground and growing), and to a lesser degree, founders of small businesses.

A corporation is generally a more... While an LLC can be successful in...
efficient structure to raise capital and give people shares. You can structure different classes of equity. Psychologically, for whatever reason, people tend to be more accepting of getting shares for their investment.

**Remember, from a securities law perspective, most capital raising activity relating to solicitation of investors and offering securities is a regulated process that requires registration with the SEC and state blue sky administrators, unless a private placement exemption is available.**

raising capital, the structure is unwieldy the more folks join as Members.

The operating agreement is an unnecessarily complex document with partnership tax allocation provisions and other tax-related provisions that are very complex and difficult to explain to founders and investors. This hinders fund-raising and slows things down and folks definitely feel a greater psychological need to lawyer-up. Many lawyers representing potential investors or other principal founders in reviewing an LLC operating agreement, including some very strong corporate lawyers, do not understand LLCs well and may gum up the process of negotiation as they are getting up-to-speed or not advising their clients well. Nobody, other than the tax lawyers, truly understand the tax provisions well.

On the tax side, however, the LLC structure provides a lot of flexibility that could potentially provide more
tax-efficient investment for sophisticated investors and founders.

Using Convertible Notes and Potential Cancellation of Indebtedness Income Issue. Raising capital through convertible notes and debt securities (which for start-ups and seed rounds is still par for the course, even with the advent of SAFE agreements and series seed preferred financing) creates unique potential issues for founders and members of LLCs: if an LLC fails and winds-up/dissolves or goes bankrupt with outstanding convertible notes that have not converted prior to such event, the Company would be deemed to incur “cancellation of indebtedness” income by the IRS which would not stop at the Company-level, but since the Company is viewed as a pass-thru for tax purposes, would be allocated among the Members of the Company.

Remember, from a securities law perspective, most capital raising
activity relating to solicitation of investors and offering securities is a regulated process that requires registration with the SEC and state blue sky administrators, unless a private placement exemption is available.

| activity relating to solicitation of investors and offering securities is a regulated process that requires registration with the SEC and state blue sky administrators, unless a private placement exemption is available. |

| Incentivizing Key Employees | One key point to think about is what type of “equity” is being provided to incentivize key persons at a Company. |

| + Traditional “real equity” which includes both profit participation and participation if the Company is sold or has a public offering down the road? |

| + “Quasi-profit-participation-type” equity in which the key principal receives profit participation and participation on an exit only for so long as such person is still actively engaged and working for the Company? |

| + Questions: |

| + How tied is the participation to actively being at the Company vs. something that is vested that cannot de-vest after the person leaves. |

<p>| + If it is quasi-equity that vanishes when someone leaves, is that person bought out at Fair Market Value or a pittance? |</p>
<table>
<thead>
<tr>
<th>How are people treated in circumstances of death, disability, bankruptcy or legal incompetency?</th>
</tr>
</thead>
<tbody>
<tr>
<td>This is often a matter of philosophy of the Founders and the approach can also vary by industry. A Company does have some incentive to retain or keep some equity to be able to re-allocate it to newer talent, but often this comes at the expense of the existing principals, so a de-vesting approach is common, especially at financial companies like investment banks and private equity funds.</td>
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<tr>
<th>If a Company is going to be handing out equity to multiple people, using a corporation as a vehicle is much more efficient.</th>
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<tbody>
<tr>
<td>On the tax-side, you need to be careful when granting equity, as the value of the equity granted to an employee or consultant at time of grant will be deemed taxable to such recipient at fair market value. One way to minimize this problem can be to obtain a 409(a) valuation by a valuation firm, accountancy or investment bank. Another way to minimize this problem is to consider using options as compared to outright equity.</td>
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<tr>
<th>LLCs are not as efficient vehicles for distributing equity or profits interests and participation to key employees and consultants. In addition, due to IRS developments in recent years, structuring a grant of a membership interest to an employee can be a difficult endeavor to the extent that the founders wish to continue an “employment” relationship with such recipient.</th>
</tr>
</thead>
<tbody>
<tr>
<td>On the tax-side, there is a lot more flexibility in granting a “profits interest” rather than a “capital interest” which is tied to the growth or accretion of value from the time of a Member joining the Company to</td>
</tr>
</tbody>
</table>
the time of the Member’s exit (as compared to receiving a capital interest that would provide some baseline liquidation value upon dissolution on the first day of such Member joining the Company).

Another point of flexibility is that an LLC allows both granting specific Members profits tied to very specific profits streams or milestones to the extent that the business has multiple revenue streams.

D. Transition into Growth Stage.

E. Key Lessons / Key Take-Aways.
SUBJECT:  

EEOC Enforcement Guidance on Retaliation and Related Issues

PURPOSE:  

This transmittal covers the issuance of the EEOC Enforcement Guidance on Retaliation and Related Issues, a sub-regulatory document that provides guidance regarding the statutes enforced by the EEOC. It is intended to communicate the Commission’s position on important legal issues.

EFFECTIVE DATE:  

Upon issuance.

EXPIRATION DATE:  

This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA:  

This document supersedes the EEOC Compliance Manual Section 8: Retaliation (1998).

ORIGINATOR:  

Office of Legal Counsel

/s/  
Jenny R. Yang  
Chair
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I. INTRODUCTION

A. Background

The federal employment discrimination laws depend on the willingness of employees and applicants to challenge discrimination without fear of punishment. Individuals rely on the statutory prohibitions against retaliation, also known as “reprisal,” when they complain to an employer about an alleged equal employment opportunity (EEO) violation, provide information as a witness in a company or agency investigation, or file a charge with the Equal Employment Opportunity Commission (Commission or EEOC).

This Enforcement Guidance replaces the EEOC’s Compliance Manual Section 8: Retaliation, issued in 1998. Since that time, the Supreme Court and the lower courts have issued numerous significant rulings regarding employment-related retaliation.1 Further, the percentage of EEOC private sector and state and local government charges alleging retaliation has essentially doubled since 1998.2 Retaliation is now the most frequently alleged basis of discrimination in all sectors, including the federal government workforce.3

This document sets forth the Commission’s interpretation of the law of retaliation and related issues. In crafting this guidance, the Commission analyzed how courts have interpreted and applied the law to specific facts. Regarding many retaliation issues, the lower courts are uniform in their interpretations of the relevant statutes. This guidance explains the law on such issues with concrete examples, where the Commission agrees with those interpretations. Where the lower courts have not consistently applied the law or the EEOC’s interpretation of the law differs in some respect, this guidance sets forth

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2 Beginning in fiscal year (FY) 2009, charges of retaliation surpassed race discrimination as the most frequently alleged basis of discrimination. In FY 2015, retaliation claims were included in 44.5% of all charges received by the EEOC, and 35.7% of the Title VII charges received. See Charge Statistics, FY 1997 Through FY 2015, Equal Emp’t Opportunity Comm’n, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 18, 2016).

3 In the federal sector, retaliation has been the most frequently alleged basis since 2008, and between fiscal years 2009 and 2015, retaliation findings comprised between 42% and 53% of all findings of EEO violations. See Equal Employment Opportunity Data Posted Pursuant to the No Fear Act, Equal Emp’t Opportunity Comm’n, https://www.eeoc.gov/eeoc/statistics/nofear/index.cfm (last visited Aug. 18, 2016).
the EEOC’s considered position and explains its analysis. The positions explained below represent the Commission’s well-considered guidance on its interpretation of the laws it enforces. This document also serves as a reference for staff of the Commission and staff of other federal agencies who investigate, adjudicate, litigate, or conduct outreach on EEO retaliation issues. It will also be useful for employers, employees, and practitioners seeking detailed information about the EEOC’s position on retaliation issues, and for employers seeking promising practices.

B. Overview

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, or may engage in, activity in furtherance of the EEO laws the Commission enforces. The EEO anti-retaliation provisions ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without employers taking materially adverse actions in response.

Retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in activity in furtherance of the EEO laws the Commission enforces. Each of the EEO laws prohibits retaliation and related conduct: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in

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4 For example, complaining or threatening to complain about alleged discrimination against oneself or others may constitute protected activity. See infra § II-A.2.e. (Examples of Opposition). In addition, the doctrine of anticipatory retaliation (also called preemptive retaliation) prohibits an employer from threatening adverse action against an employee who has not yet engaged in protected activity for the purpose of discouraging him or her from doing so. See, e.g., Bechel v. Wal-Mart Assoc., Inc., 301 F.3d 621, 624 (7th Cir. 2002) (holding that threatening to fire plaintiff if she sued “would be a form of anticipatory retaliation, actionable as retaliation under Title VII”); Sauers v. Salt Lake Cty., 1 F.3d 1122, 1128 (10th Cir. 1993) (“Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.”). Note: issues related to waivers and releases that might be retaliatory are not addressed in this guidance.

5 Section 704(a) of Title VII, 42 U.S.C. § 2000e–3(a), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), Section 501 of the Rehabilitation Act (Section 501), the Equal Pay Act (EPA),

6 Section 4(d) of the ADEA, 29 U.S.C. § 623(d), provides:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

7 Section 503 of the ADA, 42 U.S.C. § 12203, provides:

(a) Retaliation
No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation
It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures.
The remedies and procedures available under sections 12117, 12133, and 12188 of this title [sections 107, 203 and 308] shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively, of this chapter [title I, title II and title III].

8 Section 501 of the Rehabilitation Act, 29 U.S.C. § 791(f) (“Standards used in determining violation of section”), covering designated federal government applicants and employees, provides:

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

9 The EPA incorporates the anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3). This provision does not delineate types of protected activity such as opposition and participation, but its language has been construed to prohibit retaliation for both oral and written complaints, whether made internally to an employer or externally to the EEOC or a state/local Fair Employment Practices Agency. See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14–16 (2011) (interpreting the FLSA anti-retaliation provision to find
and Title II of the Genetic Information Nondiscrimination Act (GINA). These statutory provisions prohibit government or private employers, employment agencies, and labor organizations from retaliating because an individual engaged in “protected activity.” Generally, protected activity consists of either participating in an EEO process or opposing conduct made unlawful by an EEO law.

Section II of this guidance explains the concepts of participation and opposition, what types of employer actions can be challenged as retaliation, and the legal standards for determining whether the employer’s action was caused by retaliation in a given case.

Section III addresses the additional ADA prohibition of “interference” with the exercise of rights under the ADA. The interference provision goes beyond the

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10 Section 207(f) of Title II of GINA, 42 U.S.C. § 2000ff–6(f), provides:

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

11 The terms “employer” and “employee” are used throughout this document to refer to all those covered under the EEO laws. The EEOC Compliance Manual Section 2: Threshold Issues (2000), https://www.eeoc.gov/policy/docs/threshold.html, provides guidance to determine whether a particular entity is subject to these laws based on its size or other characteristics, and whether a worker is considered an “employee” for purposes of the EEO laws regardless of whether called an “independent contractor” or other name. Federal employers are included as covered entities prohibited from engaging in retaliation under each of the employment discrimination statutes. See Gomez-Perez v. Potter, 553 U.S. 474, 487 (2008) (inferring a cause of action in the federal sector for retaliation under the ADEA and describing § 633 of the ADEA as a “broad prohibition of ‘discrimination’ rather than a list of specific prohibited practices”).

12 Where it appears that an allegation of retaliation raised in an EEOC charge may be solely subject to the jurisdiction of another federal agency or a state or local government, rather than EEOC, the charging party should be referred promptly to the appropriate agency. For example, claims of retaliation for union activity should be referred to the National Labor Relations Board. Similarly, claims of retaliation for raising violations of federal wage and hour laws, such as reprisal for raising timekeeping violations, or withholding of overtime pay, should be referred to the Department of Labor, Wage and Hour Division.

13 See 42 U.S.C. § 12203(b); supra note 7.
retaliation prohibition to make it also unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual’s exercise of any right under the ADA, or with an individual who is assisting another to exercise ADA rights.

Section IV addresses remedies, and Section V addresses promising practices for preventing retaliation or interference.

The breadth of these anti-retaliation protections does not mean that employees can immunize themselves from consequences for poor performance or improper behavior by raising an internal EEO allegation or filing a discrimination claim with an enforcement agency. Employers remain free to discipline or terminate employees for legitimate, non-discriminatory, non-retaliatory reasons, notwithstanding any prior protected activity.\(^\text{14}\) Whether an adverse action was taken because of the employee’s protected activity depends on the facts. If a manager recommends an adverse action in the wake of an employee’s filing of an EEOC charge or other protected activity, the employer may reduce the chance of potential retaliation by independently evaluating whether the adverse action is appropriate.

Short companion publications on retaliation are available on the EEOC’s website:


II. ELEMENTS OF A RETALIATION CLAIM

A retaliation claim challenging action taken because of EEO-related activity has three elements:

(1) **protected activity:** “participation” in an EEO process or “opposition” to discrimination;\(^\text{15}\)

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\(^{14}\) *Glover v. S.C. Law Enf’t Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (“[A]n EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice.” (quoting *Brown v. Ralston Purina Co.*, 557 F.2d 570, 572 (6th Cir. 1977))); *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1390–91 (8th Cir. 1988) (upholding dismissal of employee for past conduct and for an “abusive attempt” to have a witness change her story). However, the Commission disagrees with the notion that this principle should be extended to allow an employer to retaliate against an employee for positions taken or manner of advocacy in an adversarial EEO proceeding. *See, e.g.*, *Benes v. A.B. Data, Ltd.*, 724 F.3d 752, 754 (7th Cir. 2013).

\(^{15}\) *See* note 4 (anticipatory retaliation can occur before any protected activity, e.g., employer policies that threaten workers with disciplinary action if they engage in protected activity, or other policies that would deter an employee from exercising an EEO right).
(2) **materially adverse action** taken by the employer; and

(3) requisite level of **causal connection** between the protected activity and the materially adverse action.

### A. Protected Activity

The first question when analyzing a claim that a materially adverse action was retaliatory is whether there was an earlier complaint or other EEO activity that is protected by the law (known as “protected activity”). Protected activity includes “participating” in an EEO process or “opposing” discrimination. These two types of protected activity arise directly from two distinct statutory retaliation clauses that differ in scope. Participation in an EEO process is more narrowly defined to refer specifically to raising a claim, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under the EEO laws, but it is very broadly protected. By contrast, opposition activity encompasses a broader range of activity by which an individual opposes any practice made unlawful by the EEO statutes. The protection for opposition is limited, however, to those individuals who act with a reasonable good faith belief that a potential EEO violation exists and who act in a reasonable manner to oppose it.

#### 1. Participation

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.

The anti-retaliation provisions make it unlawful to discriminate because an individual has 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. This language, known as the “participation clause,” provides protection from retaliation for many actions, including filing or serving as a witness for any side in an administrative proceeding or lawsuit alleging discrimination in violation of an EEO law. The participation clause applies even if the underlying allegation is not meritorious or was not timely filed.

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16 In the Commission’s view, playing any role in an internal investigation should be deemed to constitute protected participation. Otherwise, those providing information that supports the employer rather than the complainant could be left unprotected from retaliation.

17 “It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge.” *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Circuit)
The Commission has long taken the position that the participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct. Although the Supreme Court has not addressed this question, the participation clause by its terms contains no limiting language, and protects from retaliation employees’ participation in a complaint, investigation, or adjudication process. In contrast to the opposition clause, which protects opposition to practices “made . . . unlawful” by the statute, and therefore requires a reasonable good faith belief that conduct potentially violates the law, the participation clause protects participating “in any manner in an investigation, proceeding, or hearing” under the statute. 42 U.S.C. § 2000e-3(a). As one appellate court explained, “[r]eading a reasonableness test into section 704(a)’s participation clause would do violence to the text of that provision and would undermine the objectives of Title VII.”

The Supreme Court has reasoned that broad participation protection is necessary to achieve the primary statutory purpose of anti-retaliation provisions, which is “maintaining unfettered access to statutory remedial mechanisms.”

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18 See, e.g., Brief of the EEOC as Amicus Curiae Supporting the Appellant, Risley v. Fordham Univ., No. 01–7306 (2d Cir. filed Aug. 21, 2001), https://www.eeoc.gov/eeoc/litigation/briefs/risley.txt (arguing that “Title VII prohibits an employer from retaliating against an employee for filing a charge with the EEOC without regard to whether the employee reasonably believed that the actions challenged in the charge violated Title VII”); EEOC Decision No. 71–1115, 1971 WL 3855 (Jan. 11, 1971) (citing Pettway, the Commission held that even though the record did not show that charging party’s allegations of race discrimination were made in bad faith, “[i]n any event, any disparate treatment accorded her because of her protestations and filing of charges is in violation of [Title VII]”).

19 Glover, 170 F.3d at 414 (concluding that the application “of the participation clause should not turn on the substance of the testimony” (citing Pettway v. Am. Cast Iron Pipe Co., 411 F.2d at 1006 n.18 (5th Cir.1969))); Merritt v. Dillard Paper Co., 120 F.3d 1181, 1187 (11th Cir. 1997) (holding anti-retaliation protection for participation is not conditioned on the type of testimony or motive of the individual, because “[c]ourts have no authority to alter statutory language”); Wyatt v. City of Bos., 35 F.3d 13, 15 (1st Cir. 1994) (“[T]here is nothing in [the participation clause’s] wording requiring that the charges be valid, nor even an implied requirement that they be reasonable.”) (citation omitted); Pettway, 411 F.2d at 1006 n.18, 1007 (holding that even “maliciously libelous statements” in an EEOC charge are protected participation); Ayala v. Summit Constructors, Inc., 788 F. Supp. 2d 703, 720–21 (M.D. Tenn. 2011) (holding that anti-retaliation protection for participation is “not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong” (quoting Johnson v. Univ. of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000))).

20 Glover, 170 F.3d at 414 (“The plain language of the participation clause itself forecloses us from improvising such a reasonableness test.”).

21 Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that Title VII extends to protect individuals from retaliation by current, former, or prospective employers).
the participation clause cannot depend on the substance of testimony because, “[i]f a witness in [an EEO] proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming.” 22 These protections ensure that individuals are not intimidated into forgoing the complaint process, and that those investigating and adjudicating EEO allegations can obtain witnesses’ unchilled testimony. 23 It also avoids pre-judging the merits of a given allegation. For these reasons, the Commission disagrees with decisions holding to the contrary. 24

This does not mean that bad faith actions taken in the course of participation are without consequence. False or bad faith statements by either the employee or the employer should be taken into appropriate account by the factfinder, investigator, or adjudicator of the EEO allegation when weighing credibility, ruling on procedural matters, deciding on the scope of the factfinding process, and deciding if the claim has merit. It is the Commission’s position, however, that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation.

Although courts often limit the participation clause to administrative charges or lawsuits filed to enforce rights under an EEO statute, and instead characterize EEO complaints made internally (e.g., to a company manager or human resources department) as “opposition.” 25 the Supreme Court in Crawford v. Metropolitan Government of

22 Glover, 170 F.3d at 414.
23 Merritt, 120 F.3d at 1186 (holding that the participation clause applies even where a witness does not testify for the purpose of assisting the claimant, or does so involuntarily).
24 See, e.g., Gilooly v. Mo. Dep’t of Health & Senior Servs., 421 F.3d 734, 740 (8th Cir. 2005) (ruling that it “cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees without suffering repercussions simply because the investigation was about sexual harassment”); Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (holding that employee’s letter to the EEOC containing false, malicious statements was not protected participation).
25 See, e.g., Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 49 (2d Cir. 2012) (ruling that the participation clause includes participation in internal investigations only after a charge has been filed); Hatmaker v. Mem’l Med. Ctr., 619 F.3d 741, 746–47 (7th Cir. 2010) (holding that the participation clause does not cover internal investigations before the filing of a charge with the EEOC, but not addressing Supreme Court precedents); Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) (declaring to decide whether the participation clause covers all internal investigations, and ruling that “at least where an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee’s participation is participation ‘in any manner’ in the EEOC investigation”); see also EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (distinguishing case from Clover on the ground that no EEOC charge had been filed before the alleged retaliatory act, the court concluded that plaintiff’s internal sexual harassment complaint could not be protected under the participation clause).
Nashville & Davidson County explicitly left open the question of whether internal EEO complaints might be considered “participation” as well.26 The Commission and the Solicitor General have long taken the view that participation and opposition have some overlap, in that raising complaints, serving as a voluntary or involuntary witness, or otherwise participating in an employer’s internal complaint or investigation process, whether before or after an EEOC or Fair Employment Practices Agency (FEPA) charge has been filed, is covered under the broad protections of the participation clause, although it is also covered as “opposition.”27 The plain terms of the participation clause prohibit retaliation against those who “participated in any manner in an investigation, proceeding, or hearing” under the statute. 42 U.S.C. § 2000e-3(a) (emphasis added). As courts have observed, these statutory terms are broad, unqualified, and not expressly limited to investigations conducted by the EEOC.28 Similarly, contacting a federal agency employer’s internal EEO Counselor under 29 C.F.R. § 1614.105 to allege discrimination is participation.29

This application of the participation clause is supported by the Supreme Court’s decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), which created an affirmative defense to discriminatory harassment liability based on the availability and proper functioning of internal complaint and investigation processes. The adoption of such policies or the fact that an employee unreasonably failed to utilize them governs liability for various types of harassment claims. An effective process necessitates that employees be willing to participate, whether by providing information that is pro-employer, pro-employee, or neutral. Such participation enables an employer to take prompt corrective action where needed, and may later shield the employer from liability under the EEO laws.30 It

28 Merritt, 120 F.3d at 1186 (reasoning that “[t]he word ‘testified’ is not preceded or followed by any restrictive language that limits its reach” and it is followed by the phrase “in any manner,” indicating its intended broad sweep); United States v. Wildes, 120 F.3d 468, 470 (4th Cir. 1997) (reasoning that the statutory term “any” is a term of great breadth).
29 Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (ruling that federal employee’s pre-complaint contact with agency EEO Counselor is participation under Title VII).
30 See, e.g., Beard v. Flying J, Inc., 266 F.3d 792, 799 (8th Cir. 2001) (holding that affirmative defense was not established where employer interviewed only alleged harasser and victim, not other employees who could have told of harassment, and where investigation ended only with a
follows that participation in such complaint and investigation processes is participation in an “investigation” or “proceeding” within the meaning and interpretation of the statute.

2. Opposition

In addition to participation, an individual is protected from retaliation for opposing any practice made unlawful under the EEO laws. Protected “opposition” activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination. The manner of opposition must be reasonable, and the opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful.

The EEO anti-retaliation provisions also make it unlawful to retaliate against an individual for opposing any practice made unlawful under the employment discrimination statutes. Depending on the facts, the same conduct may qualify for protection as both “participation” and “opposition.” However, the opposition clause protects a broader range of conduct than the participation clause.

a. Expansive Definition

The opposition clause of Title VII has an “expansive definition,” and “great deference” is given to the EEOC’s interpretation of opposing conduct. As the Supreme Court stated in Crawford v. Metropolitan Government of Nashville and Davidson County, “‘[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s opposition to the activity.’” For example, accompanying a coworker to the human resources office in order to file an internal EEO warning for the harasser to cease alleged conduct that included actions the court later characterized as “battery”); Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1314–15 (11th Cir. 2001) (holding that an employer must have responded to an internal harassment complaint in a “reasonably prompt manner” to establish part of the defense).

31 Crawford v. Metro. Gov’t of Nashville & Davidson Cty., 555 U.S. 271, 276–80 (2009); see also Valentín-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (“[P]rotected conduct includes not only the filing of administrative complaints . . . but also complaining to one’s supervisors.”); EEOC v. Romeo Cnty. Sch., 976 F.2d 985, 989–90 (6th Cir. 1992) (holding that retaliation claim was actionable under the FLSA, as incorporated into the Equal Pay Act, for complaint to supervisor about male counterparts being paid $1/hour more); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989).

32 EEOC v. New Breed Logistics, 783 F.3d 1057, 1067 (6th Cir. 2015) (quoting Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579, 580 n.8 (6th Cir. 2000)).

33 Crawford, 555 U.S. at 276 (first emphasis added) (adopting the Commission’s position in the EEOC Compliance Manual, as quoted in Brief for the United States as Amicus Curiae).
complaint,\textsuperscript{34} or complaining to management about discrimination against oneself or coworkers, likely constitutes protected activity.\textsuperscript{35} Opposition includes situations where “an employee [takes] a stand against an employer’s discriminatory practices not by ‘instigating’ action, but by standing pat, say by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.”\textsuperscript{36} It is also opposition when an employee who did not initiate a complaint answers an employer’s questions about potential discrimination.\textsuperscript{37}

The opposition clause applies if an individual explicitly or implicitly communicates his or her belief that the matter complained of is, or could become, harassment or other discrimination.\textsuperscript{38} The communication itself may be informal and need not include the words “harassment,” “discrimination,” or any other legal terminology, as long as circumstances show that the individual is conveying opposition

\textsuperscript{34} Id. at 279 n.3 (“[E]mployees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others.”); see also Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 47–48 (1st Cir. 2010) (holding that plaintiff engaged in opposition by assisting a female scientist under his supervision in filing and pursuing an internal sexual harassment complaint, even though he did not “utter words” when he and the subordinate met with a human resources official, since his action in accompanying her “effectively and purposefully communicated his opposition to” the alleged harassment).

\textsuperscript{35} See, e.g., Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) (holding that 
complaining about discrimination against coworkers and refusing to fulfill employer’s request to gather derogatory information about those who complained was protected opposition). The Commission has challenged retaliation against individuals who complain to management about discrimination against others. See, e.g., EEOC v. Mountaire Farms, Inc., No. 7:13–CV–00182 (E.D.N.C. consent decree entered Nov. 2013) (settlement of retaliation claim against company translator who made repeated complaints to supervisors and the human resources department about incidents of mistreatment of Haitian workers at the company in comparison to non-Haitian workers).

\textsuperscript{36} Crawford, 555 U.S. at 277; Collazo, 617 F.3d at 47 (ruling that employee “opposed” a supervisor’s harassment by, \textit{inter alia}, speaking to the supervisor individually and eliciting a limited apology); EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406 (4th Cir. 2005) (ruling that a supervisor “opposed” unlawful retaliation by refusing to sign a discriminatory negative evaluation of subordinate).

\textsuperscript{37} Crawford, 555 U.S. at 277–78 (explaining that the opposition clause in Title VII extends beyond “active, consistent” conduct “instigat[ed]” or “initiat[ed]” by the employee, the Court stated that “[t]here is . . . no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”). In the Commission’s view, responding to an employer’s questions about potential discrimination is protected both as participation, \textit{see supra} note 27, and as opposition.

\textsuperscript{38} See, e.g., Examples 4–5 and 8, and \textit{infra} note 75; see also Barber v. CSX Distrib. Servs., 68 F.3d 694, 701–02 (3d Cir. 1995) (ruling that plaintiff’s letter to human resources complaining that job he sought went to a less qualified individual did not constitute ADEA opposition, because the letter did not explicitly or implicitly allege age was the reason for the alleged unfairness).
or resistance to a perceived potential EEO violation. Individuals may make broad or ambiguous complaints of unfair treatment, in some instances because they may not know the specific requirements of the anti-discrimination laws. Such communication is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.

Although the opposition clause applies broadly, it does not protect every protest against perceived job discrimination. The following principles apply.

b. Manner of Opposition Must Be Reasonable

Courts and the Commission balance the right to oppose employment discrimination against the employer’s need to have a stable and productive work environment. For this reason, the protection of the opposition clause only applies where the manner of opposition is reasonable.

Complaints to Someone Other Than Employer. “Courts have not limited the scope of the opposition clause to complaints made to the employer; complaints about the employer to others that the employer learns about can be protected opposition.”

Although opposition typically involves complaints to managers, it may be a reasonable manner of opposition to inform others of alleged discrimination, including union officials, coworkers, an attorney, or others outside the company. For instance, it is

39 Okoli v. City of Balt., 648 F.3d 216, 224 (4th Cir. 2011) (ruling that it was sufficient to constitute “opposition” that plaintiff complained about “harassment” and described some facts about the sexual behavior in the workplace that was unwelcome, and that she did not need to use the term “sexual harassment” or other specific terminology); EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 964 (9th Cir. 2009) (holding that allegations need not have identified all incidents of the discriminatory behavior complained of to constitute opposition because “a complaint about one or more of the comments is protected behavior”); Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000) (ruling that reasonable jury could conclude plaintiff “opposed discriminatory conduct” when she told her harasser, who was also her supervisor, to stop harassing her).


41 Cf. Crawford, 555 U.S. at 276 (endorsing the EEOC’s position that communicating to one’s employer a belief that the employer has engaged in employment discrimination “virtually always” constitutes “opposition” to the activity, and stating that any exceptions would be “eccentric cases”); see, e.g., Minor v. Bostwick Labs., Inc., 669 F.3d 428, 438 (4th Cir. 2012) (holding that plaintiff’s meeting with a corporate executive to protest a supervisor’s direction to falsify time records to avoid overtime was FLSA protected activity).

42 See Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 42 (1st Cir. 2013) (observing that “there is no dispute that writing one’s legislator is protected conduct”); Conetta v. Nat’l Hair Care Ctrs., Inc., 236 F.3d 67, 76 (1st Cir. 2001) (ruling that employee’s complaints of sexual harassment to coworker who was a son of general manager was protected opposition); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000) (stating that “there is no qualification on . . . the party to whom the complaint is made known,” and it may include management, unions, other employees, newspaper reporters, or “anyone else”).
protected opposition for an employee to contact the police seeking criminal prosecution of a coworker who engaged in a workplace assault motivated by disability, race, or sex, even though it is not a complaint to a manager or to a government agency that enforces EEO laws.\textsuperscript{43}

**Complaints Raised Publicly.** Depending on the circumstances, calling public attention to alleged discrimination may constitute reasonable opposition, provided that it is connected to an alleged violation of the EEO laws.\textsuperscript{44} Opposition may include even activities such as picketing.\textsuperscript{45} It includes making informal or public protests against discrimination, “including . . . writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges,”\textsuperscript{46} provided that it is not done in so disruptive or excessive a manner as to be unreasonable.\textsuperscript{47} Moreover, going outside a chain of command or prescribed internal complaint procedure in order to bring forth discrimination allegations may be reasonable.\textsuperscript{48}

\textsuperscript{43} “Although involving the police in an employment dispute will not always be considered part of the protected conduct that prohibits retaliatory action, where, as here, it allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it cannot be deemed the ‘unprofessional’ conduct for which an employee can be terminated.” *Scarborough v. Bd. of Trs. Fla. A&M Univ.*, 504 F.3d 1220, 1222 (11th Cir. 2007) (concluding a reasonable jury could find that university employee engaged in protected activity by involving the campus police after he was threatened and physically accosted as a result of rejecting his supervisor’s sexual advances).

\textsuperscript{44} *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983) (observing that all actions of opposition to an employer’s practices constitute some level of disloyalty, and therefore in order to reach the level of being unreasonable, such opposition must “significantly disrupt[] the workplace” or “directly hinder[]” the plaintiff’s ability to perform his or her job); *EEOC v. Kidney Replacement Servs.*, No. 06–13351, 2007 WL 1218770, at *4–6 (E.D. Mich. 2007) (concluding that medical workers engaged in reasonable opposition when they raised their sexual harassment complaints directly to the onsite supervisor at the correctional facility to which their employer had assigned them, even though they were in effect raising a complaint to their employer’s customer).

\textsuperscript{45} See, e.g., *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1136 (5th Cir. 1981) (holding that picketing in opposition to employer’s alleged unlawful practice was protected activity under Title VII even though employer’s business suffered); EEOC Dec. 71–1804, 3 FEP 955 (1971) (holding that right to strike over unlawful discrimination cannot be bargained away in union contract).

\textsuperscript{46} *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990); see also *Crown Zellerbach*, 720 F.2d at 1013–14 (holding that employer violated Title VII when it imposed disciplinary suspension in retaliation for public protest letter by several employees of an “affirmative action award” given to a major customer; reasoning that even though the letter could potentially harm the employer’s economic interests, it was a reasonable manner of opposition because it did not interfere with job performance).

\textsuperscript{47} See, e.g., *Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000) (collecting cases).

\textsuperscript{48} See supra notes 40–45.
Advising Employer of Intent to File, or Complaining Before Matter is Actionable.

It is also a reasonable manner of opposition for an employee candidly to tell the employer of her intention to file a charge with the EEOC or a complaint with a state or local FEPA, union, court, employer’s human resources department, higher-level manager, or company CEO. For example, where an employee intends to file an EEOC charge challenging a disparity in pay with a male coworker as sex discrimination, disclosing this to her manager would be protected opposition. Moreover, it is reasonable opposition for an employee to inform the employer about alleged or potential discrimination or harassment, even if the alleged harassment has not yet risen to the level of a “severe or pervasive” hostile work environment.

Examples of Unreasonable Manner of Opposition. On the other hand, it is not reasonable opposition if an employee, for example, makes an overwhelming number of patently specious complaints, or badgers a subordinate employee to give a witness statement in support of an EEOC charge and attempts to coerce her to change that statement. The activity also will not be considered reasonable if it involves an unlawful act, such as committing or threatening violence to life or property. These examples are not exhaustive; whether the manner of opposition is unreasonable is a context- and fact-specific inquiry.

Opposition to perceived discrimination also does not serve as license for the employee to neglect job duties. If an employee’s protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge.

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49 *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) (finding that plaintiff had engaged in protected activity when she informed her employer she intended to file a sex discrimination charge, even though she later changed her mind), *cert. denied*, 522 U.S. 1147 (1998).

50 See infra notes 55–64 and accompanying text for extended discussions of this issue.

51 *Rollins v. Fla. Dep’t of Law Enf’t*, 868 F.2d 397, 399, 401 (11th Cir. 1989) (describing “the sheer number and frequency” of plaintiff’s “mostly spurious” discrimination complaints as “overwhelming,” and holding that the manner of opposition was not reasonable).

52 *Jackson v. Saint Joseph State Hosp.*, 840 F.2d 1387, 1392 (8th Cir. 1988) (noting that district court characterized employee’s attempts to persuade coworker to revise witness statement she had provided as “grossly persistent,” “disruptive,” “almost frantic,” and “bizarre”).

53 See, e.g., *Coutu v. Martin Cty. Bd. of Comm’rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (ruling that evidence showed plaintiff was terminated for spending an inordinate amount of time in “employee advocacy” activities and failing to complete other aspects of her personnel job).
c. Opposition May Be Based on Reasonable Good Faith Belief, Even if Conduct Opposed Is Ultimately Deemed Lawful

As with participation, a retaliation claim based on opposition is not defeated merely because the underlying challenged practice ultimately is found to be lawful. For statements or actions to be protected opposition, however, they must be based on a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated. Because there is conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII, the reasonable belief standard can apply to protect complainants as well as witnesses or bystanders who intervene or report what was observed.

54 Trent v. Valley Elec. Ass’n, Inc., 41 F.3d 524, 526 (9th Cir. 1994) (“[A] plaintiff [in an opposition case] does not need to prove that the employment practice at issue was in fact unlawful under Title VII . . . [A plaintiff] must only show that she had a “reasonable belief” that the employment practice she protested was prohibited under Title VII.”); see also Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1045 (7th Cir. 1980) (“Limiting retaliation protections to those individuals whose discrimination claims are meritorious would ‘undermine[] Title VII’s central purpose, the elimination of employment discrimination by informal means; destroy[] one of the chief means of achieving that purpose, the frank and non-disruptive exchange of ideas between employers and employees; and serve[] no redeeming statutory or policy purposes of its own.’”). For this reason, if an employer takes a materially adverse action against an employee because it concludes that the employee has acted in bad faith in raising EEO allegations, it is not certain to prevail on a retaliation claim, since a jury may conclude that the claim was in fact made in good faith even if the employer subjectively thought otherwise. Cf. Sanders v. Madison Square Garden, 525 F. Supp. 2d 364, 367 (S.D.N.Y. Sept. 5, 2007) (“[I]f an employer chooses to fire an employee for making false or bad accusations, he does so at his peril, and takes the risk that a jury will later disagree with his characterization.”); see also supra note 18.

55 Cf. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 282 (4th Cir. 2015) (en banc) (holding that “an employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress”); see also Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 470 (6th Cir. 2012) (holding that complaints of sexual harassment were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex, because “[a] plaintiff does not need to have an egg-shell skull in order to demonstrate a good faith belief that he was victimized”); Ayala v. Summit Constructors, Inc., 788 F. Supp. 2d 703, 719–22 (M.D. Tenn. 2011) (ruling that even where a reasonable good faith requirement applies, an allegation is not unreasonable or made in bad faith simply because it may have overstated the concerns or misinterpreted the reasons for the challenged action).

56 See, e.g., Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1352 (11th Cir. 1999) (holding that when applying the reasonable belief standard to a witness, “the relevant conduct . . . is only the conduct that person opposed, which cannot be more than what she was aware of”). Because witnesses typically may have observed only part rather than all of the events at issue in a case, the Commission has argued that the reasonable belief standard need not be applied to third-party witness testimony. See Brief of EEOC as Appellant, EEOC v. Rite Way Serv., Inc., 819 F.3d 235 (5th Cir. 2016) (No. 15-60380), https://www.eeoc.gov/eeoc/litigation/briefs/riteway.html.
EXAMPLE 1
Protected Opposition –
Reasonable Good Faith Belief

An employee complains to her office manager that her supervisor failed to promote her because of her sex after an apparently less qualified man was selected. Because the complaint was based on a reasonable good faith belief that discrimination occurred, she has engaged in protected opposition regardless of whether the promotion decision was in fact discriminatory.

EXAMPLE 2
Not Protected Opposition –
Complaint Not Motivated By
Reasonable Good Faith Belief

Same as above, except the job sought by the employee was in accounting and it required a CPA license, which she lacked and the selectee had. She knew that it was necessary to have a CPA license to perform this job. She has not engaged in protected opposition because she did not have a reasonable good faith belief that she was rejected because of sex discrimination.

Applying the reasonable belief standard for opposition to alleged harassment in Clark County School District v. Breeden, 532 U.S. 268 (2001) (per curiam), the Supreme Court held that, on the particular facts of the case, no reasonable person could have believed that a male, serving with plaintiff on a hiring panel screening job applicants, had engaged in potential unlawful harassment when he, on one occasion, read aloud a job applicant’s description of sexual conduct, stated that he did not know what it meant, and then laughed when another male employee said, “I’ll tell you later.” The Court in Breeden noted: “The ordinary terms and conditions of the [plaintiff’s] job required her to review the sexually explicit statement in the course of screening job applicants. Her coworkers who participated in the hiring process were subject to the same requirement,” and the plaintiff “conceded that it did not bother or upset her” to read the statement in the application. Accordingly, the Court held that the plaintiff’s complaints about the incident did not constitute protected opposition, and she could not maintain a retaliation claim under Title VII.57

57 See Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 194–95 (3d Cir. 2015) (ruling that plaintiff’s complaint to school principal about his off-hand comment that many of the teachers looked old enough to be grandparents was not protected activity, but that it was protected activity when she sent a letter to human resources complaining about age discrimination in which she noted the “grandparent” comment, increased scrutiny, being referred to as “old school” by colleagues, lack of assistance in disciplining her students, negative evaluations, the principal questioning students
Breeden did not alter the well-established observation that “[c]omplaining about alleged sexual harassment to company management is classic opposition activity.”\textsuperscript{58} Indeed, the hostile work environment liability standard is predicated on encouraging employees to “report harassing conduct before it becomes severe or pervasive.”\textsuperscript{59} In \textit{Faragher}, 524 U.S. 775, and \textit{Ellerth}, 524 U.S. 742, the Supreme Court created an affirmative defense to discriminatory harassment liability based in part on an employee’s failure “to take advantage of any preventive or corrective opportunities provided by the employer.”\textsuperscript{60} It is well-recognized that “the victim is compelled by the \textit{Faragher/Ellerth} defense to make an internal complaint.”\textsuperscript{61}

If an employee’s internal complaint were not protected, therefore, an employee would be in a catch-22: either complain to the employer about offensive conduct experienced or witnessed before it becomes severe or pervasive (taking the risk that the employer would be permitted to fire her for complaining), or wait to complain until the harassment is so severe or pervasive that she is certain she will be protected from retaliation (taking the risk of further harm, and that her failure to complain sooner will relieve the employer of liability even if a court later finds there was a hostile work environment). Under \textit{Faragher} and \textit{Ellerth}, “the victim is commanded to ‘report the misconduct, not investigate, gather evidence, and then approach company officials.’”\textsuperscript{62}

Therefore, even reporting an isolated single incident of harassment is protected opposition if the employee “reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create

\textsuperscript{58} \textit{Wasek}, 682 F.3d at 470–71.

\textsuperscript{59} 524 U.S. at 764 (emphasis added). Such complaints play a critical role in EEO compliance and enforcement, because typically “if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability.” EEOC, \textit{Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors} (1999), \url{https://www.eeoc.gov/policy/docs/harassment.html}.

\textsuperscript{60} \textit{Faragher}, 524 U.S. at 807.

\textsuperscript{61} \textit{Boyer-Liberto}, 786 F.3d at 282.

\textsuperscript{62} \textit{Id.} at 282–83 (quoting \textit{Matvia v. Bald Head Island Mgmt., Inc.}, 259 F.3d 261, 269 (4th Cir. 2001) (holding that employee could not pursue harassment claim where she waited until more incidents occurred before complaining); \textit{Barrett v. Applied Radiant Energy Corp.}, 240 F.3d 262, 267 (4th Cir. 2001) (holding that an employee’s “generalized fear of retaliation does not excuse a failure to report . . . harassment”)).
such an environment or that such an environment is likely to occur.” Likewise, it is protected opposition if the employee complains about offensive conduct that, if repeated often enough, would result in an actionable hostile work environment.

It is reasonable for an employee to believe conduct violates the EEO laws if the Commission, as the primary agency charged with enforcement, has adopted that interpretation.

EXAMPLE 3
Protected Opposition – Complaints to Management Consistent with Legal Position Taken by the EEOC

An employee believes he is being harassed by coworkers based on his sexual orientation, and complains to his manager and human resources. This is protected activity under Title VII because, in light of the EEOC’s stated legal position and enforcement efforts, it is reasonable for an

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63 Boyer-Liberto, 786 F.3d at 282, 268 (“[A]n employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.”); see also Magyar v. Saint Joseph Reg’l Med. Cir., 544 F.3d 766, 771 (7th Cir. 2008) (explaining that a plaintiff need only have a “sincere and reasonable belief” that she was opposing an unlawful practice, so the conduct complained of need not have been persistent or severe enough to be unlawful, but need only “fall[] into the category of conduct prohibited by the statute”); Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1307 (11th Cir. 2007) (reasoning that the Faragher-Ellerth “design works only if employees report harassment promptly, earlier instead of later, and the sooner the better”).

64 This view, which extends beyond the holding in Boyer-Liberto, was advocated by the Commission in its amicus brief filed in that case. See, e.g., EEOC’s Brief as Amicus Curiae Supporting Appellant’s Petition for Rehearing en banc, Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 2015) (en banc) (No. 13–1473) (arguing that “employees engage in protected opposition for retaliation purposes if they complain about racially offensive conduct that would create a hostile work environment if repeated often enough”), https://www.eeoc.gov/eeoc/litigation/briefs/fontainebleau.html. The Commission has long disagreed with cases that find no protection from retaliation for employees complaining of harassment because it is not yet “severe or pervasive” or could not be reasonably viewed as such.

65 For example, asserting in a retaliation case that an employee’s complaints related to sexual orientation discrimination should be deemed protected activity in light of the EEOC’s interpretation of Title VII, the Commission explained: “To hold otherwise would require discrimination victims or witnesses – usually ‘lay’ persons – to master the subtleties of sex-discrimination law before securing safe harbor in the broad remedial protections of Title VII’s anti-retaliation rule.” Brief of EEOC as Amicus Curiae in Support of Panel Rehearing, Muhammad v. Caterpillar, Inc., 767 F.3d 694 (7th Cir. 2014) (No. 12–1723), https://www.eeoc.gov/eeoc/litigation/briefs/caterpillar2.html.
individual to believe that sexual orientation discrimination is actionable as sex discrimination under Title VII.

**d. Who Is Protected from Retaliation for Opposition?**

In the Commission’s view, all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors. The statutory purpose of the opposition clause is promoted by

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66 Baldwin v. Dep’t of Transp., EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (EEOC July 15, 2015), [https://www.eeoc.gov/decisions/0120133080.pdf](https://www.eeoc.gov/decisions/0120133080.pdf); see also Brief of EEOC as Amicus Curiae, Evans v. Ga. Reg’l Hosp., No. 15–15234 (11th Cir. filed Jan. 11, 2016), [https://www.eeoc.gov/eeoc/litigation/briefs/evans4.html](https://www.eeoc.gov/eeoc/litigation/briefs/evans4.html). A number of courts have since agreed with the EEOC’s position that Title VII’s prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. See e.g., Isaacs v. Felder Servs., 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015); Videckis v. Pepperdine Univ., 2015 WL 8916764, at *8 (C.D. Cal. Dec. 15, 2015) (Title IX case); cf. Roberts v. UPS, 115 F. Supp. 344, 363–68 (E.D.N.Y. 2015) (construing state law); but see Hively v. Ivy Tech Cmty. Coll., No. 15–1720, 2016 WL 4039703, at *6–14 (7th Cir. July 28, 2016). Yet protection against retaliation for opposing sexual orientation discrimination is not limited to those jurisdictions that have agreed with the EEOC. An individual is protected from retaliation for opposing practices that discriminate based on sexual orientation even if a court has not adopted the EEOC’s position on sexual orientation discrimination. See, e.g., Birkholz v. City of New York, No. 10–CV–4719 (NGG)(SMG), 2012 WL 580522, at *7–8 (E.D.N.Y. Feb. 22, 2012) (“If opposition to sexual-orientation-based discrimination was not protected activity, employees subjected to gender stereotyping would have to base their decision to oppose or not oppose unlawful conduct on a brittle legal distinction [between sexual orientation and sex discrimination], a situation that might produce a chilling effect on gender stereotyping claims.”). Similarly, if an employee requested that an employer provide her with light duty due to her pregnancy, as provided to other employees for other reasons, the request would constitute protected activity based on a reasonable good faith belief, even if the legal application of the rules is new or the facts of her employer’s workplace may not be fully known to her. See generally EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015), [https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

protecting all communications about potential EEO violations by the very officials most likely to discover, investigate, and report them; otherwise, there would be a disincentive for them to do so. 68

A managerial employee with a duty to report or investigate discrimination still must satisfy the same requirements as any other employee alleging retaliation under the opposition clause – meeting the definition of “opposition,” using a manner of opposition that is reasonable, and having a reasonable good faith belief that the opposed practice is unlawful (or would be if repeated), as well as proving a materially adverse action, the requisite causation, and liability. 69

e. Examples of Opposition

Protected opposition includes actions such as: complaining or threatening to complain about alleged discrimination against oneself or others; providing information in an employer’s internal investigation of an EEO matter; refusing to obey an order reasonably believed to be discriminatory; advising an employer on EEO compliance; resisting sexual advances or intervening to protect others; passive resistance (allowing others to express opposition); and requesting reasonable accommodation for disability or religion.

68 Even where courts have applied a different rule for human resources personnel or others whose job duties involve processing internal EEO complaints, a number of courts have concluded that such employees are nonetheless protected when they “step[] outside” that role. See, e.g., Littlejohn v. City of New York, 795 F.3d 297, 318 (2d Cir. 2015) (holding that an internal EEO director does not engage in protected opposition by fulfilling a job duty to report or investigate other employees’ discrimination complaints, but that actively supporting other employees in exercising Title VII rights, personally complaining, or being critical of discriminatory employment practices is opposition); Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 49 (1st Cir. 2010) (reasoning that “an employer cannot be permitted to avoid liability for retaliation simply by crafting equal employment policies that require its employees to report unlawful employment practices,” and holding that even assuming arguendo that a “step outside” rule applies under Title VII, plaintiff stepped outside his managerial duties when he supported a subordinate in lodging and pursuing a sexual harassment complaint and was therefore protected).

69 Warren, 24 F. App’x at 265 (holding that plaintiff, who served as senior EEO compliance officer and Chief of Human Resources, engaged in protected opposition when she met with the employer’s counsel to report alleged mishandling of discrimination matters, but finding she was terminated for her own mismanagement and not in retaliation for her reports).
• **Complaining or threatening to complain about alleged discrimination against oneself or others**

**EXAMPLE 4**
**Protected Opposition – Complaint About Sexual Harassment, Even if Not Yet Severe or Pervasive**

An employee complains to her supervisor about graffiti in her workplace that is derogatory toward women. Although she does not specify that she believes the graffiti creates a hostile work environment based on sex, her complaint reasonably would have been interpreted by the supervisor as opposition to sex discrimination, due to the sex-based content of the graffiti. The graffiti does not need to rise to the level of severe or pervasive hostile work environment harassment in order for her complaint to be reasonable opposition.

• **Providing information in an employer’s internal investigation of an EEO matter**

**EXAMPLE 5**
**Protected Opposition – Providing Information to Employer to Corroborate Part of Coworker’s Harassment Allegation**

An employee who has not lodged any complaint of her own is identified as a witness in an employer’s internal investigation of a coworker’s sexual harassment allegations. The employee is interviewed by the employer and provides corroborating information about sexual harassment she witnessed and/or experienced. This is protected opposition, even though she has not lodged an internal complaint of her own.

70 As discussed in § II-A.1., because participation and opposition have some overlap, the Commission and the Solicitor General have long taken the view that raising complaints, serving as a voluntary or involuntary witness, or otherwise participating in an employer’s internal complaint or investigation process can be seen as participation. If they are characterized as opposition, the analysis here would apply.

71 **Crawford v. Metro. Gov’t of Nashville & Davidson Cty.,** 555 U.S. 271, 279–80 (2009) (holding that participating in an employer’s internal investigation of another worker’s harassment complaint was protected activity because opposition extends beyond “active, consistent” conduct “instigat[ed]” or “initiat[ed]” by the employee). In *Crawford*, the court explained “nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own
Refusing to obey an order reasonably believed to be discriminatory

Refusing to obey an order constitutes protected opposition if the individual reasonably believes that the order requires him or her to carry out unlawful employment discrimination. Protected opposition also includes refusal to implement a discriminatory policy.  

EXAMPLE 6
Protected Opposition — Refusal to Obey Order to Make Assignments Based on Race

Plaintiff, who works for an employment agency referring individuals to fill temporary and permanent positions with corporate clients, is instructed by his manager not to refer any African Americans to a particular client per the client’s request. Plaintiff tells the manager this would be discriminatory, and Proceeds instead to refer employees to this client on an equal opportunity basis. Plaintiff’s refusal to obey the order constitutes “opposition” to an unlawful employment practice.

initiative but not one who reports the same discrimination in the same words when her boss asks a question,” id. at 277–78, and that any other rule would undermine the Faragher-Ellerth framework because “prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others,” id. at 279. See also Jute v. Hamilton Sundstrand Corp., 420 F.3d 166 (2d Cir. 2005) (holding that Title VII’s anti-retaliation provision protects a person who volunteers to testify on behalf of a coworker, even if the person is never actually called to testify). Cf. EEOC v. Creative Networks, LLC, No. CV 05–3032–PHX–SMM, 2010 WL 276742, at *8 (D. Ariz. Jan. 15, 2010) (ruling that Title VII’s retaliation provision protects a worker whether “poised to support coworker’s discrimination claim, dispute the claim, or merely present percipient observations”).

Crawford, 555 U.S. at 277 (“[W]e would call it ‘opposition’ if an employee took a stand against an employer’s discriminatory practices not by ‘instigating’ action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.”); EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) (ruling that personnel director’s refusal to fire employee because of his race constituted protected activity because he was opposing the employer’s discriminatory policy of excluding African-American employees from important positions).

“A manager may be shown to have engaged in protected conduct if she refused to implement a discriminatory policy or took some action against it.” Foster v. Time Warner Entm’t. Co., 250 F.3d 1189, 1994 (8th Cir. 2001) (holding that customer service manager engaged in protected opposition activity where she repeatedly questioned her new supervisor about how a revised sick leave policy affected ADA accommodations previously granted to an employee with epilepsy whom she supervised, and then refused to implement the new policy by continuing to allow the employee to work flexible hours); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 581 (6th Cir. 2000) (concluding that action taken by a university vice president, in his capacity as an
Advising an employer on EEO compliance

EXAMPLE 7
Protected Opposition – Human Resources Manager
Reports ADA Violations to Company

XYZ Corp.’s human resources manager came to believe that the company was improperly denying certain requested reasonable accommodations to which individuals with disabilities were entitled under the ADA. Shortly after she reported this to supervisory management, her employment was terminated. Even though her reports to supervisors fell within the ambit of her managerial duties, her reports of unlawful company actions were protected opposition. Protected activity includes EEO complaints by managers, human resources staff, and EEO advisors – even when those complaints happen to grow out of the individual’s job duties – provided the complaint meets all the other relevant requirements for protected activity.74

Resisting sexual advances or intervening to protect others

EXAMPLE 8
Protected Opposition – Resisting Supervisor’s Sexual Advances

In response to a supervisor’s repeated sexual comments to her, an employee tells the supervisor “leave me alone” and “stop it.” A coworker intervenes on her behalf, also asking the manager to stop. The employee’s resistance and the coworker’s intervention both constitute protected opposition. A materially adverse action by the supervisor in retaliation would be actionable.75

affirmative action official, to respond to hiring decisions that he believed discriminated against women and minorities, constituted protected opposition under Title VII).  

74 Foster, 250 F.3d at 1194–95; see also supra notes 67–69. 

75 EEOC v. New Breed Logistics, 783 F.3d 1057, 1067 (6th Cir. 2015) (holding that demanding a supervisor stop harassment is protected opposition, i.e., when one “resists or confronts the supervisor’s unlawful harassment”); Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000) (holding that a reasonable jury could conclude plaintiff engaged in protected opposition when she told her supervisor to stop harassing her); EEOC v. IPS Indus., Inc., 899 F. Supp. 2d 507, 521 (N.D. Miss. 2012) (ruling that employee’s informally confronting her supervisor about his insinuations that the employee was involved in a relationship with a coworker, telling the supervisor not to touch her again after he reached around behind her, and informing him that she
● Passive resistance

Passive opposition refers to certain acts that allow others to express opposition, such as refusing to implement an instruction to interfere with other employees’ complaints. Such an action may itself be protected under the opposition clause.

EXAMPLE 9
Protected Opposition – Refusal to Implement Instruction to Interfere with Exercise of EEO Rights

A supervisor does not carry out his management’s instruction to dissuade his subordinates from filing discrimination complaints. The supervisor’s refusal is protected opposition, and a materially adverse action by management against the supervisor because of his refusal to prevent complaints would be actionable retaliation.

● Requesting reasonable accommodation for disability or religion

A request for reasonable accommodation of a disability constitutes protected activity under the ADA, and therefore retaliation for such requests is unlawful. By the same rationale, persons requesting religious accommodation under Title VII are protected against retaliation for making such requests. Although a person making such a request would only return to work if he stopped touching her, were not “mere rejections” of inappropriate sexual conduct, but rather constituted protected opposition; Ross v. Baldwin Cty. Bd. of Educ., No. 06–0275, 2008 WL 820573, at *6 (S.D. Ala. Mar. 24, 2008) (“It would be anomalous, and would undermine the fundamental purpose of the statute, if Title’s VII’s protections from retaliation were triggered only if the employee complained to some particular official designated by the employer.”). These protections could also extend to non-verbal resistance to an unwanted sexual advance by a supervisor, such as walking away or removing the supervisor’s hand from the employee’s body.

76 McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (ruling that employee stated cause of action for retaliation when he alleged that his employer retaliated against him for failing to prevent subordinate from filing a sexual harassment complaint).

77 Solomon v. Vilsack, 763 F.3d 1, 15 n.6 (D.C. Cir. 2014) (citing rulings from every federal judicial circuit holding that requests for reasonable accommodation are protected activity); 9 Lex K. Larson, Employment Discrimination § 154.10, at p. 154–105 & n. 25 (2d ed. 2014) (“In addition to the activities specifically protected by the statute, courts have found that requesting reasonable accommodation is a protected activity.”).

78 EEOC, Compliance Manual Section 12: Religious Discrimination § 12-V.B (2008) (“EEOC has taken the position that requesting religious accommodation is protected activity.”), https://www.eeoc.gov/policy/docs-religion.html; see also Ollis v. HearthStone Homes, Inc., 495 F.3d 570 (8th Cir. 2007) (upholding jury verdict finding that an employee’s complaints about
might not literally “oppose” discrimination or “participate” in a complaint process, the individual is protected against retaliation for making the request. One court explained: “It would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation.”

**EXAMPLE 10**
Protected Opposition – Request for Exception to Uniform Policy as a Religious Accommodation

After a retail employee’s supervisor denies her request to wear her religious headscarf as an exception to the new uniform policy, the corporate human resources department instructs the supervisor to grant the request because there is no undue hardship. Angry about being overruled, the supervisor thereafter gives the employee an unjustified poor performance rating and denies her request to attend training that he approves for her coworkers. The employee’s request for an exception as a religious accommodation was protected activity, and the supervisor’s action in response is retaliation in violation of Title VII.

**f. Inquiries and Other Discussions Related to Compensation**

Federal protections for inquiring about or otherwise discussing compensation information include, among others: protections enforced by the EEOC that prohibit retaliation for protected activity; protections enforced by the U.S. Department of Labor that prohibit discrimination by federal contractors and subcontractors for discussing compensation; and protections enforced by the National Labor Relations Board for discussion of wages as concerted activity.

Taking adverse action for discussing compensation may implicate the EEO anti-retaliation protections as well as a number of other federal laws, some examples of which follow in order to illustrate how related authorities apply. Additional protections exist under various state laws.

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required participation in activities violate his religious beliefs constituted protected activity under Title VII); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 190 (3d Cir. 2003).

79 Soileau v. Guilford of Me., 105 F.3d 12, 16 (1st Cir. 1997); see also A.C. v. Shelby Cty. Bd. of Educ., 711 F.3d 687, 698 & n.4 (6th Cir. 2013).

According to the U.S. Department of Labor, approximately 60% of private sector workers surveyed nationally reported that they were either contractually forbidden or strongly discouraged by management from discussing their pay with their colleagues. Although most private employers are under no obligation to make wage information public, actions taken by an employer to prohibit employees from discussing their compensation with one another may impede knowledge of discrimination and deter protected activity, whether pursuant to a so-called “pay secrecy” policy or other employer action.

(1) Compensation Discussions as Opposition Under the EEO Laws

When an employee communicates to management or coworkers to complain or ask about compensation, or otherwise discusses rates of pay, the communication may constitute protected opposition under the EEO laws, making employer retaliation actionable based upon the facts of a given case. For example, talking to coworkers to gather information or evidence in support of a potential EEO claim is protected opposition, provided the manner of opposition is reasonable.

EXAMPLE 11
Protected Opposition – Wage Complaint Reasonably Interpreted as EEO-Related

A temporary custodian learns that she is being paid a dollar less per hour than previously hired male counterparts. She approaches her supervisor and says she believes they are “breaking some sort of law” by paying her lower wages than previously paid to male temporary custodians. This is protected opposition. Similarly, it would be protected

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82 See Jackson v. Saint Joseph State Hosp., 840 F.2d 1387, 1390–91 (8th Cir. 1988) (majority and dissent agreeing that gathering information or evidence from coworkers is protected activity, though reaching different conclusions about whether employee’s manner of opposition was reasonable on facts of the case); EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66, 72 (S.D.N.Y. 1975) (holding that employee’s discreet request to one of the company’s clients with whom he worked, asking for written statement describing work duties in support of his pending EEO claim, was protected activity).

83 EEOC v. Romeo Cnty. Sch., 976 F.2d 985, 989–90 (6th Cir. 1992) (holding that female temporary custodian stated a retaliation claim under the Equal Pay Act for alleged actions in response to her oral complaint to a supervisor that male counterparts earned $1/hour more); see also Blizzard v. Marion Tech. Coll., 698 F.3d 275, 288–89 (6th Cir. 2012) (ruling that plaintiff’s
opposition if she had said “I don’t think I am being paid fairly. Would you please tell me what men in this job are being paid?”

**EXAMPLE 12**

**Protected Opposition – Discussion of Suspected Pay Discrimination Despite Employer’s Policy Prohibiting Discussions of Pay**

An African-American employee discussed with coworkers her belief that she was being discriminated against based on race because her pay was lower than that of Caucasian employees doing similar work. Her employer then disciplined her for engaging in discussions about suspected pay discrimination. The discipline constitutes unlawful retaliation for protected opposition. The fact that the employer has a “Code of Conduct” prohibiting discussions of pay would not insulate it from liability for retaliation under Title VII.

**(2) Related Protections Under Other Federal Authorities**

In addition to the retaliation provisions of the laws enforced by the EEOC, there are also various other federal protections for discussions related to compensation that apply to certain employers. Two examples include Executive Order (E.O.) 11246 and the National Labor Relations Act (NLRA).

**a. Executive Order 11246, as amended – Federal Contractors and Subcontractors**

Under E.O. 11246, as amended by E.O. 13665 (April 8, 2014), federal contractors and subcontractors are prohibited from discharging or otherwise discriminating in any way against employees or applicants who inquire about, discuss, or disclose their compensation or that of other employees or applicants.\(^{84}\) This nondiscrimination requirement protects any compensation inquiries, discussions, or disclosures. Neither opposition to alleged discrimination nor participation in EEO activity is a necessary element of a pay transparency violation of E.O. 11246. Rather, the pay transparency provisions protect even simple inquiries between coworkers about their compensation,

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84 E.O. 11246, as amended, applies to companies with federal contracts or subcontracts in excess of $10,000. See 41 C.F.R. § 60–1.5.
and generally prohibit contractors from having policies that prohibit or tend to restrict employees or applicants from discussing or disclosing compensation.\textsuperscript{85}

The Office of Federal Contract Compliance Programs (OFCCP) at the U.S. Department of Labor enforces E.O. 11246 and has issued regulations implementing the pay transparency provisions of E.O. 13665, which became effective on January 11, 2016.\textsuperscript{86} Though their protection is broad, the regulations contain two specific contractor defenses to a claim of pay transparency discrimination. A contractor may show that it disciplined the employee for violating a uniformly applied rule, policy, practice, or agreement that does not prohibit or tend to prohibit applicants or employees from discussing or disclosing compensation. A contractor may also show that it disciplined an employee because the employee (a) had access to the compensation information of other employees or applicants as part of his or her essential job duties, and (b) disclosed such information to individuals who did not otherwise have access to it, unless the employee was discussing his or her own compensation, or unless the disclosure occurred in certain specified circumstances.\textsuperscript{87}

\textbf{b. National Labor Relations Act (NLRA)}

The NLRA protects non-supervisory employees who are covered by that law from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort.\textsuperscript{88} The NLRA prohibits employers from


\textsuperscript{86} Regulations promulgated by OFCCP implementing E.O. 13665 can be found on OFCCP’s pay transparency web page at \url{https://www.dol.gov/ofccp/PayTransparency.html} (last visited Aug. 18, 2016). Contractors and individuals with questions about the OFCCP pay transparency protections or how to file a complaint may contact OFCCP by calling 1-800-397-6251, sending an e-mail to \url{OFCCP-Public@dol.gov}, or contacting the nearest OFCCP office. More information is available on the OFCCP web site at \url{https://www.dol.gov/ofccp/}.

\textsuperscript{87} Under the OFCCP regulations, the two circumstances in which disclosures can be made are: (1) the disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, or in accordance with the contractor’s legal duty to furnish information; or (2) the disclosure occurs during discussions with management officials, or while using the contractor’s internal complaint process, about possible disparities involving another employee’s compensation, or the disclosure was of compensation information received through means other than access granted through their essential job functions.

\textsuperscript{88} See, e.g., \textit{NLRB v. Main St. Terrace Care}, 218 F.3d 531 (6th Cir. 2000) (concluding that employer violated the NLRA by imposing a rule prohibiting pay discussions, even though it was unwritten and not routinely enforced, and improperly fired plaintiff because, in violation of oral instruction by managers, she discussed wages with coworkers to determine whether they were being paid fairly); \textit{Wilson Trophy Co. v. NLRB}, 989 F.2d 1502, 1510 (9th Cir. 1993) (“As [the employer] concedes, an unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid under the Act.”); \textit{Jeanette Corp. v. NLRB}, 532 F.2d 916, 918 (3d Cir. 1976) (holding that employer’s rule broadly prohibiting wage
discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants. The NLRA protection, however, does not extend to supervisors, managers, agricultural workers, and employees of rail and air carriers. More information about the scope of the NLRA protections, charge filing, and compliance and enforcement can be found on the National Labor Relations Board’s website at https://www.nlrb.gov/.

3. Range of Individuals Who Engage in Protected Activity

| Anti-retaliation protections extend to many individuals, including those who make formal or informal allegations of EEO violations (whether or not successful), those who serve as witnesses or participate in investigations, those who exercise rights such as requesting religious or disability accommodation, and even those who are retaliated against after their employment relationship ends. |

As the above discussion illustrates, protected activity can take many forms. Individuals who engage in protected activity include:

- those who participate in the EEO process in any way, including as a complainant, representative, or witness for any side, regardless of their job duties or managerial status; \(^{89}\) 
- those who oppose discrimination on behalf of themselves or others, \(^{90}\) even if their underlying discrimination allegation ultimately is not successful; \(^{91}\)

\(^{89}\) See supra §§ II-A.1. (discussion of participation as protected activity) and II-A.2. (discussion of opposition as protected activity). However, the anti-retaliation provisions are not a “catch-all” providing rights to anyone who has challenged his or her employer in the past for any reason. See, e.g., Rorrer v. City of Stow, 743 F.3d 1025, 1046–47 (6th Cir. 2014) (holding that plaintiff’s prior testimony in arbitration of non-EEO claims was not protected activity that could support subsequent ADA retaliation claim).

\(^{90}\) Kelley v. City of Albuquerque, 542 F.3d 802, 820–21 (10th Cir. 2008) (concluding that attorney who represented city in EEO mediation was protected against retaliation when his opposing counsel, who subsequently was elected mayor, terminated his employment); Moore v. City of Phila., 461 F.3d 331, 342 (3d Cir. 2006) (holding that white employees who complain about a racially hostile work environment against African-Americans are protected against retaliation for their complaints); EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (holding that Title VII protects plaintiff against retaliation even where plaintiff did not himself engage in protected activity, but rather his coworker engaged in protected activity on his behalf).

\(^{91}\) Supra note 54; see also Learned v. City of Bellevue, 860 F.2d 928, 932–33 (9th Cir. 1988) (“[I]t is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation . . . . If the availability of that protection
those who tell their employer of their intention to file a charge or lawsuit, even if the filing is not ultimately made; 92

those whose protected activity involved a different employer (e.g., an applicant who is not hired because she filed an ADA charge against her former employer for failure to provide a sign language interpreter, or because she opposed her previous employer’s exclusion of qualified applicants with hearing impairments); 93

those whose protected activity occurred while they were still employed but who are not retaliated against until later, after the employment relationship ends 94 (e.g., when a former employer retaliates by giving an unjustified, untruthful negative job reference, by refusing to provide a job reference, or by informing an individual’s prospective employer about the individual’s prior EEO complaint); 95

were to turn on whether the employee’s charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.”).

92 See, e.g., EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997) (holding that plaintiff engaged in protected activity when she informed her supervisor that she intended to file charge); Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (ruling that writing a letter to employer and union threatening to file EEOC charge is protected); cf. Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (ruling that federal employee’s contact with agency EEO Counselor is participation under Title VII).

93 For example, in McMenemy v. City of Rochester, 241 F.3d 279, 283–84 (2d Cir. 2001), a firefighter’s initiation of an investigation into a union president’s sexual assault of a union secretary was held to be “protected activity.” The court rejected a lower court ruling that “protected activity” only includes opposition to unlawful employment practices by the same covered entity that engaged in the alleged retaliatory acts. In rejecting this argument, the court adopted the EEOC’s position that “[a]n individual is protected against retaliation for participation in employment discrimination proceedings involving a different entity.” Id. This is especially true, the court held, where “the two employers have a relationship that may give one of them an incentive to retaliate for an employee’s protected activities against the other.” Id. at 284–85; see also Christopher v. Stouder Mem ’l Hosp., 936 F.2d 870, 873–74 (6th Cir. 1991) (concluding that defendant’s frequent reference to plaintiff’s sex discrimination action against prior employer warranted inference that defendant’s refusal to hire was retaliatory).

94 Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997) (ruling that plaintiff may sue a former employer for retaliation when it provided a negative reference to a prospective employer for whom plaintiff subsequently applied to work, because Title VII’s definition of employee lacks any “temporal qualifier”).

95 See, e.g., infra Example 19; Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 178–80 (2d Cir. 2005) (holding that evidence could support a finding that plaintiff’s job offer was rescinded after his prospective employer was told by his former employer that plaintiff, who had been listed as a favorable witness in a coworker’s EEO litigation, “had a lawsuit pending” against the company); Hillig v. Rumsfeld, 381 F.3d 1028, 1033–35 (10th Cir. 2004) (holding that plaintiff may allege an unjustified negative job reference was retaliatory and need not prove that she would have
those who raise discrimination allegations but are not covered by the substantive provisions of the applicable discrimination laws (e.g., retaliation against an individual for filing a disability discrimination charge, even if it is ultimately determined that she is not qualified for the position held or desired,96 or retaliation against an individual for raising an age discrimination allegation, even if he is not age 40 or over);97 and

those whose protected activity relates to any provision of the ADA, not just the employment discrimination title of the statute (e.g., opposition to disability discrimination in state and local government services, public accommodations, commercial facilities, or telecommunications).98

In addition, those whom an employer mistakenly believes have engaged in protected activity are protected from retaliation.99 See also infra § II.B.4. (Third Party Retaliation).

**B. Materially Adverse Action**

Retaliation expansively reaches any action that is “materially adverse,” meaning any action that might well deter a reasonable person from engaging in protected activity.

1. **General Rule**

The anti-retaliation provisions make it unlawful to take a materially adverse action against an individual because of protected activity. The Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), that a “materially adverse action” subject to challenge under the anti-retaliation provisions encompasses a broader range of actions than an “adverse action” subject to challenge

received the job absent the reference); see also *L.B. Foster Co.*, 123 F.3d at 753–54; *Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997); *Serrano v. Schneider, Kleinick, Weitz, Damashek & Shoot*, No. 02–CV–1660, 2004 WL 345520, at *7–8 (S.D.N.Y. Feb. 24, 2004) (holding that informing a prospective employer about an employee’s lawsuit constitutes an adverse action under Title VII, because “surely” the plaintiff’s former supervisor “knew or should have known” that, by revealing the fact that the plaintiff had sued her former employer, “he could severely hurt her chances of finding employment”).


99 *Fogleman v. Mercy Hosp.*, 283 F.3d 561, 572 (3d Cir. 2002) (holding that employee who did not engage in protected activity could nevertheless challenge retaliation where employer took adverse action because it erroneously believed plaintiff had engaged in protected activity); *Brock v. Richardson*, 812 F.2d 121, 123–25 (3d Cir. 1987) (holding that FLSA’s anti-retaliation provision prohibits retaliation by employer where employer believed employee had engaged in protected activity, even though employee had not done so).
under the non-discrimination provisions.\textsuperscript{100} In light of the purpose of anti-retaliation protection, it expansively covers any employer action that “might well deter a reasonable employee from complaining about discrimination.”\textsuperscript{101} An action need not be materially adverse standing alone, as long as the employer’s retaliatory conduct, considered as a whole, would deter protected activity.\textsuperscript{102} Although “normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence,” the standard can be satisfied even if the individual was not in fact deterred.\textsuperscript{103}

The \textit{Burlington Northern} decision made clear that whether an action is reasonably likely to deter protected activity depends on the surrounding facts – although the standard is “objective,” it is phrased in “general terms” because the “significance of any given act will often depend on the particular circumstances. Context matters.”\textsuperscript{104} An “act that would be immaterial in some situations is material in others.”\textsuperscript{105} Indeed, the Supreme Court has held that transferring plaintiff to a harder, dirtier job within the same pay grade and job category and suspending her without pay for 37 days even though the lost pay was later reimbursed, were both “materially adverse actions” that could be challenged as retaliation.\textsuperscript{106} Other examples of actionable retaliation cited by the Supreme Court include the FBI’s refusing to investigate “death threats” against an agent, the filing of

\textsuperscript{100} See \textit{Burlington N. & Santa Fe Ry. Co. v. White}, 548 U.S. 53, 67 (2006) (“Title VII’s substantive [discrimination] provision and its antiretaliation provision are not coterminous” because the “scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm . . . . Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.”). Thus, it also extends beyond the scope of “adverse actions” involving federal employees that are subject to the jurisdiction of the Merit Systems Protection Board.

\textsuperscript{101} \textit{Id.} at 69.

\textsuperscript{102} \textit{See, e.g., Vega v. Hempstead Union Free Sch. Dist.}, 801 F.3d 72 (2d Cir. 2015) (holding that a high school teacher stated a claim for retaliation based on the combination of “his assignment of notoriously absent students, his temporary paycheck reduction, and the District’s failure to notify him of a curriculum change”); \textit{Sanford v. Main St. Baptist Church Manor, Inc.}, 327 F. App’x 587, 599 (6th Cir. 2009) (holding that although some of the incidents alone may not rise to the level of an adverse action, “the incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge”).

\textsuperscript{103} \textit{Burlington N.}, 548 U.S. at 68; see, \textit{e.g., Patane v. Clark}, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer’s argument that the challenged action was not sufficiently adverse under \textit{Burlington Northern} since it did not dissuade the plaintiff herself from reporting sexual harassment again when it recurred, the court also commented that this argument was “entirely unconvincing, since it would require that \textit{no} plaintiff who makes a second complaint about harassment could \textit{ever} have been retaliated against for an earlier complaint”).

\textsuperscript{104} \textit{Burlington N.}, 548 U.S. at 69 (citing \textit{Oncale v. Sundowner Offshore Servs.}, 523 U.S. 75, 81–82 (1998)).

\textsuperscript{105} \textit{Id.} (citation omitted).

\textsuperscript{106} \textit{Id.} at 71–73.
false criminal charges against a former employee, changing the work schedule of a parent who has caretaking responsibilities for school-age children, and excluding an employee from a weekly training lunch that contributes to professional advancement.  

This broad definition of “materially adverse” from Burlington Northern applies not only to private and state and local government employment, but also to federal sector employment under all the statutes enforced by the EEOC.  

2. Types of Materially Adverse Actions

Work-Related Actions. The most obvious types of adverse actions are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge.  

Other types of adverse actions may include work-related threats, warnings, reprimands, transfers, negative or lowered evaluations, transfers to less
prestigious or desirable work\textsuperscript{114} or work locations,\textsuperscript{115} and any other type of adverse treatment that in the circumstances might well dissuade a reasonable person from engaging in protected activity. For example, as one appellate court observed, “[a] formal reprimand issued by an employer is not a ‘petty slight,’ ‘minor annoyance,’ or ‘trivial’ punishment; it can reduce an employee’s likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy.”\textsuperscript{116} Another court of appeals reasoned that the same can be said of lowered performance appraisals:

If the Supreme Court views excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional development as materially adverse conduct, see Burlington [Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 69 (2006)], then markedly lower performance-evaluation scores that significantly impact an

\textsuperscript{114} See, e.g., O’Neal v. City of Chi., 588 F.3d 406, 409–10 (7th Cir. 2009) (holding that alleged repetitive reassignments negatively affecting plaintiff’s eligibility to be promoted from sergeant to lieutenant on the police force constituted materially adverse action); Billings v. Town of Grafton, 515 F.3d 39, 53 (1st Cir. 2008) (ruling that although the plaintiff’s own displeasure, standing alone, would be insufficient to render an action materially adverse, there was sufficient evidence for a jury to find that in retaliation for complaining about sexual harassment she had been subject to a materially adverse action when she was transferred to an objectively less prestigious position that reported to a lower-ranked supervisor, provided much less contact with the Board of Selectmen, the Town, and members of the public, and required less experience and fewer qualifications).

\textsuperscript{115} Loya v. Sebelius, 840 F. Supp. 2d 245, 252–53 (D.D.C. 2012) (holding that it was materially adverse to move plaintiff’s office to a different building in the same complex, where the move isolated her from her colleagues, made it difficult for her to complete her job duties, diminished her standing as a senior staff member, contributed to a loss of responsibilities, cut off her access to administrative support services, forced her to travel between buildings in dangerously wet or icy walking conditions, and made it difficult for her to manage her diabetes).

\textsuperscript{116} Millea, 658 F.3d at 165; see also Alvarado v. Metro. Transp. Auth., No. 07 Civ. 3561(DAB), 2012 WL 1132143, at *13 (S.D.N.Y. Mar. 30, 2012) (holding that retaliation claim could proceed to trial where “Letter of Instruction” was permanently placed in the plaintiff’s personnel file and could be used in future disciplinary actions); cf. White v. Dep’t of Corr. Servs., 814 F. Supp. 2d 374, 388 (S.D.N.Y. 2011) (ruling that although a counseling memo and negative comment in a performance evaluation may not be adverse actions in themselves, a jury could find them actionable when considered in combination with a notice of discipline).
employee’s wages or professional advancement are also materially adverse.\footnote{Halfacre, 221 F. App’x at 433 (citing Burlington N., 548 U.S. at 69–70, in which the Supreme Court stated that excluding an employee from a weekly training lunch “might well deter a reasonable employee from complaining”); see also Pérez-Cordero v. Wal-Mart P.R., Inc., 656 F.3d 19, 31 (1st Cir. 2011) (“Although Pérez-Cordero did not suffer a tangible employment detriment in response to this protected activity, such as a retaliatory firing, we have previously held that the escalation of a supervisor's harassment on the heels of an employee's complaints about the supervisor is a sufficiently adverse action to support a claim of employer retaliation.”).}

Actions That Are Not Work-Related. A materially adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside of work, as long as it might well dissuade a reasonable person from engaging in protected activity. Prohibiting only employment-related actions would not achieve the goal of avoiding retaliation because “an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.”\footnote{Burlington N., 548 U.S. at 63; see, e.g., Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347–48 (6th Cir. 2008) (ruling that setting fire to employee’s car and threatening to “kill the bitch” was actionable as retaliation); Aviles v. Cornell Forge Co., 183 F.3d 598, 604 (7th Cir. 1999) (ruling that falsely telling police that employee had a gun and had threatened to shoot supervisor, resulting in police injuring employee so severely he was unable to work for six weeks, was actionable as retaliation); Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996) (ruling that filing false criminal charges was actionable as retaliation).} The Supreme Court in Burlington Northern observed that, although the substantive anti-discrimination provisions seek elimination of discrimination that affects employment opportunities because of employees’ racial, ethnic, or other protected status, the anti-retaliation provisions seek to secure that objective by preventing an employer from interfering in a materially adverse way with efforts to enforce the law’s basic guarantees.\footnote{Burlington N., 548 U.S. at 63–64.}

Additional Examples. Other examples of materially adverse actions may include:

- disparaging the person to others or in the media;\footnote{Szeinbach v. Ohio State Univ., 493 F. App’x 690, 694–96 (6th Cir. 2012) (holding that retaliatory accusations of misconduct in plaintiff’s academic research, made in emails to a journal editor and professors at other universities, could be materially adverse); Dixon v. Int’l Bhd. of Police Officers, 504 F.3d 73, 84 (1st Cir. 2007) (affirming a jury verdict in plaintiff’s favor, the court held that comments by a union president on television program regarding plaintiff being unfit for her job and implying she would pay a price for her discrimination claim constituted retaliation).}
- making false reports to government authorities;\footnote{Greengrass v. Int’l Monetary Sys., Ltd., 776 F.3d 481, 485–86 (7th Cir. 2015) (ruling that employer’s listing of employee’s name in public filing with the Securities and Exchange}
• filing a civil action;\textsuperscript{122}
• threatening reassignment;
• scrutinizing work or attendance more closely than that of other employees, without justification;
• removal of supervisory responsibilities;\textsuperscript{123}
• abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently “severe or pervasive” to create a hostile work environment;
• requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity;\textsuperscript{124}

\begin{itemize}
\item Commission was materially adverse); \textit{Lore v. City of Syracuse}, 670 F.3d 127, 164 (2d Cir. 2012) (ruling that a statement to the press that employee had stolen paychecks could be found to be materially adverse action, because “though not affecting the terms or conditions of Lore’s employment, [the statement] might well have dissuaded a reasonable police officer from making a complaint of discrimination”); \textit{see also Berry}, 74 F.3d at 986 (holding that instigating criminal theft and forgery charges against former employee who filed EEOC charge was retaliatory).
\item \textit{Burlington N.}, 548 U.S. at 66–67 (citing with approval the example of an employer’s lawsuit against an employee held actionable under the NLRA’s anti-retaliation provision, as explained in \textit{Bill Johnson’s Restaurants, Inc. v. NLRB}, 461 U.S. 731, 740 (1983)).
\item \textit{Compare Geleta v. Gray}, 645 F.3d 408, 412 (D.C. Cir. 2011) (ruling that fact issue for jury existed as to material adversity when, among other things, plaintiff went from supervising 20 employees to supervising none), \textit{and Burke v. Gould}, 286 F.3d 513, 515, 521–22 (D.C. Cir. 2002) (denying employer’s motion for summary judgment on retaliation claim challenging removal of supervisory duties from “supervisory computer systems analyst”), \textit{with Higbie v. Kerry}, 605 F. App’x 304, 308–11 (5th Cir. 2015) (ruling that employer’s moving of employee’s desk and modifying his role were not materially adverse actions because employee had only an intermittent supervisory role in any event).
\item \textit{The Commission has repeatedly filed lawsuits based on such facts. EEOC v. Queen’s Med. Cir.}, Civil Action No. 01–CV–00389 (D. Haw. consent decree entered July 2002) (settlement of retaliation case alleging that shortly after employee lodged an internal complaint, employer contacted the Immigration and Naturalization Service to retract its support for his permanent visa application, resulting in the INS initiating a hearing into his immigration status and therefore requiring him to hire a lawyer to defend his lawful resident status; case was settled for $150,000 for emotional distress damages); \textit{EEOC v. Holiday Inn Express}, No. 0:00–cv-0034 (D. Minn. consent decree entered Jan. 11, 2000) (employer who allegedly reported workers to INS after they engaged in protected activity under NLRA and Title VII settled discrimination and retaliation claims for $72,000; INS deferred deportation action for two years to allow the workers time to be witnesses in case); \textit{see also Bartolon-Perez v. Island Granite & Stone, Inc.}, 108 F. Supp. 3d 1335, 1340–41 (S.D. Fla. 2015) (citing Title VII case law, the court held that a factfinder could conclude an employer engaged in retaliation under the FLSA where it knew about plaintiff’s immigration status but waited until after he engaged in protected activity to “hold it . . . over his head”); \textit{cf. EEOC v. Restaurant Co.}, 490 F. Supp. 2d 1039, 1050–51 (D. Minn. 2007) (denying
• terminating a union grievance process or other action to block access to otherwise available remedial mechanisms;\textsuperscript{125}

• taking (or threatening to take) a materially adverse action against a close family member (who could bring a claim as an aggrieved individual in addition to the person who engaged in protected activity),\textsuperscript{126} and

• any other action that might well deter reasonable individuals from engaging in protected activity.\textsuperscript{127}

A fact-driven analysis applies to determine if the challenged employer action(s) in question would be likely to deter participation or opposition. To the extent some lower courts applying Burlington Northern have found that some of the above-listed actions can never be significant enough to deter protected activity, the Commission concludes that such a categorical view is contrary to the context-specific analysis, broad reasoning, and specific examples endorsed by the Supreme Court.

Matters are not actionable as retaliation if they are not likely to dissuade an employee from engaging in protected activity in the circumstances. For example, courts have concluded on the facts of given cases that a temporary transfer from an office to a cubicle consistent with office policy was not a materially adverse action\textsuperscript{128} and that occasional brief delays by an employer in issuing refund checks to an employee that involved small amounts of money were not materially adverse.\textsuperscript{129} Such actions were not deemed likely to deter protected activity, as distinguished from the transfer to harder work, the exclusion from a weekly training lunch, or the unfavorable schedule change described by the Supreme Court in Burlington Northern as materially adverse.

\textsuperscript{125}See, e.g., EEOC v. Bd. of Governors, 957 F.2d 424, 430 (7th Cir. 1992).


\textsuperscript{127}Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1268–70 (11th Cir. 2010) (ruling that terminating plaintiff sooner than planned due to her protected activity was actionable as retaliation); Passer v. Am. Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991) (holding that canceling a symposium in honor of retired employee who filed ADEA charge was retaliatory).

\textsuperscript{128}Roncallo v. Sikorski Aircraft, Inc., 447 F. App’x 243 (2d Cir. 2011).

\textsuperscript{129}Fanning v. Potter, 614 F.3d 845, 850 (8th Cir. 2010) (ruling that a brief delay in payment of $300 quarterly health benefit refund representing less than 2% of plaintiff’s monthly income was not materially adverse). By contrast, the Commission has challenged retaliatory withholding of funds due to an employee. See, e.g., EEOC v. Cardiac Sci. Corp., Civil Action No. 2:13–cv–01079 (E.D. Wis. consent decree entered July 2014) (settlement of retaliation claim based on employer’s alleged refusal to provide severance payments and benefits and payments previously promised because it learned employee had previously filed an EEOC charge).
If the employer’s action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal. The degree of harm suffered by the individual “goes to the issue of damages, not liability.” Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing charges. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions.

Determining whether an action is reasonably likely to deter protected activity under *Burlington Northern* is fact-dependent.

**EXAMPLE 13**

**Exclusion from Team Lunches**

A federal agency employee filed a formal complaint with her agency EEO office alleging that she was denied a promotion by her supervisor because of her sex. One week later, her supervisor invited a few other employees out to lunch. She believed that her supervisor excluded her from lunch because of her complaint. Even if the supervisor chose not to invite the employee because of her complaint, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity. By contrast, if her supervisor invited all employees in her unit to regular weekly lunches, and she is excluded because she files the sex discrimination complaint, this might constitute unlawful retaliation since it could reasonably deter her or others from engaging in protected activity.

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130 *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3d Cir. 1997) (“[A]n employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result.”).

131 *Hashimoto*, 118 F.3d at 676; see also *L.B. Foster*, 123 F.3d at 754 n.4 (ruling that a retaliatory job reference violated Title VII even though it did not cause failure to hire, because such a consequence is relevant only to damages, not liability).

132 *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986).

133 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (“A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.”).
EXAMPLE 14
Workplace Surveillance

An employee filed an EEOC charge alleging that he was racially harassed by his supervisor and coworkers. He also alleged that, after he had complained to management about the harassment, his supervisor asked two coworkers to conduct surveillance on the employee and report back about his activities. The surveillance constitutes a materially adverse action because it is likely to deter protected activity, and it is unlawful if it was conducted because of the employee’s protected activity.

EXAMPLE 15
Threats to Report Immigration Status

A contractor employs farm workers and other laborers whom it places in rural agricultural and manufacturing facilities operated by its corporate clients. Together, the contractor and these facilities are joint employers under the EEO laws. The contractor and its clients suspect that many of the employees may be undocumented workers but, in order to meet their staffing needs, they do not attempt to verify their authorization to work as required by the immigration laws. Several of the female farm workers and laborers, who are in fact undocumented, complain to a client supervisor and to the contractor about sexual harassment by male coworkers, including physical assaults and persistent unwelcome sexual remarks and advances. The client supervisor and the contractor threaten to expose the workers’ immigration status if they continue to complain about the harassment. Threatening to report the workers’ suspected immigration status to government authorities, or actually reporting the workers, is materially adverse and actionable as retaliation against workers who have engaged in protected activity under the EEO laws because it is likely to deter them from engaging in protected activity. If an EEOC charge is filed, both the contractor and the facility owner can each be found liable for retaliation. Neither the workers’ undocumented status, nor the fact that they were placed by a contractor acting as a staffing firm, is a defense.¹³⁴

EXAMPLE 16
Workplace Sabotage, Assignment to Unfavorable Location, and Abusive Scheduling Practices

After an employee cooperated in a workplace investigation of a coworker’s race discrimination complaint, a supervisor intentionally left a window ajar to prevent the employee from setting the building alarm (one of his job duties) and thereby subjected him to discipline. The supervisor also engaged in punitive scheduling, including shortening off-duty time between workdays and changing the employee’s work schedule in a way that would require him to work alone at a more dangerous facility than the one at which he usually worked. These acts of workplace sabotage, his assignment to an unfavorable location, and the punitive scheduling constitute materially adverse actions.¹³⁵

EXAMPLE 17
Disclosure of Confidential EEO Information and Assignment of Disproportionate Workload

Three weeks after a federal employee sought EEO counseling regarding her complaint of disability and gender discrimination, her supervisor posted the EEO complaint on the agency’s intranet where coworkers accessed it. The supervisor also increased her workload to five or six times

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¹³⁵ *Hicks v. Baines*, 593 F.3d 159, 167–70 (2d Cir. 2010) (applying *Burlington Northern* standard to find punitive scheduling was materially adverse on the facts of the case). A materially adverse action could also include, for example, moving a retail employee who has a straight schedule to “on-call” scheduling, or revoking a previously-approved flexible schedule. *See, e.g., Washington v. Illinois Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (holding that because employee’s flex-time schedule was previously approved to care for her child with a disability, its revocation could be materially adverse given the financial and other consequences that resulted).
that of other employees. Both of the supervisor’s actions are materially adverse and actionable as alleged retaliation.\textsuperscript{136}

3. Harassing Conduct as Retaliation

Sometimes retaliatory conduct is characterized as “retaliatory harassment.” The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the \textit{Burlington Northern} standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.\textsuperscript{137} If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.

4. Third Party Retaliation – Person Claiming Retaliation Need Not Be the Person Who Engaged in Opposition

\textbf{a. Materially Adverse Action Against Employee}

Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee.\textsuperscript{138} For example, the Supreme Court explained that it is “obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”\textsuperscript{139} Similarly, if an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee’s husband (even though he was employed by a contractor, not the employer), it would dissuade a reasonable worker from engaging in protected activity.

\textsuperscript{136} \textit{Cf. Mogenhan v. Napolitano}, 613 F.3d 1162, 1166–67 (D.C. Cir. 2010) (ruling it was materially adverse to publicize an employee’s EEO complaint to her colleagues and to “bury[ ] her in work,” “perhaps alone but certainly in combination”).

\textsuperscript{137} \textit{See, e.g.}, \textit{Martinelli v. Penn Millers Ins. Co.}, 269 F. App’x 226, 230 (3d Cir. 2008) (ruling that after \textit{Burlington Northern}, an employee claiming “retaliation by workplace harassment” is “no longer required to show that the harassment was severe or pervasive”); \textit{EEOC v. Chrysler Grp., LLC}, No. 08–C–1067, 2011 WL 693642, at *8–11 (E.D. Wis. Feb. 17, 2011) (holding that reasonable jury could conclude employees were subjected to unlawful retaliation under \textit{Burlington Northern} standard when human resources supervisor verbally harassed them by screaming and pounding his fists on the table while threatening termination if they filed grievances). The Commission also articulated this position in its 2012 final rulemaking to update federal sector regulations. \textit{See} \textit{Federal Sector Equal Employment Opportunity}, 77 Fed. Reg. 43,498, 43,502 (July 25, 2012) (codified at 29 C.F.R. § 1614), \url{https://federalregister.gov/a/2012-18134}.


\textsuperscript{139} \textit{Thompson}, 562 U.S. at 174.
activity. Although there is no “fixed class of relationships for which third-party reprisals are unlawful[.] . . . firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so.”

b. Standing to Challenge: “Zone of Interests”

Where there is actionable third party retaliation, both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim. The third party may bring a claim even if he did not engage in the protected activity, and even if he has never been employed by the defendant employer. “Regardless of whether the plaintiffs are employed by the defendant, . . . the harm they suffered is no less a product of the defendant’s purposeful violation of the anti-retaliation provision.” As the Supreme Court stated, the third party was not an “accidental victim”; “[t]o the contrary, injuring him was the employer’s intended means of harming the [employee who engaged in protected activity].” Thus, the third party “falls within the ‘zone of interests’ sought to be protected by [the retaliation provision]” and has standing to seek recovery from the employer for his harm.

C. Causal Connection

A materially adverse action does not violate the EEO laws unless there is a causal connection between the action and the protected activity.

1. Causation Standards

Unlawful retaliation is established when a causal connection is established between a materially adverse action and the individual’s protected activity. The

140 McGhee v. Healthcare Servs. Grp., Inc., No. 5:10cv279/RS–EMT, 2011 WL 818662, at *2–3 (N.D. Fla. Mar. 2, 2011) (ruling that plaintiff could proceed with a Title VII retaliation claim based on allegations that after his wife filed an EEOC charge against her employer, plaintiff was fired from his job with a company that held a contract with his wife’s employer, allegedly at the request of his wife’s employer).

141 Thompson, 562 U.S. at 178.


143 Thompson, 562 U.S. at 178.

retaliatory animus need not necessarily be held by the employer’s official who took the materially adverse action; an employer still may be vicariously liable if one of its agents, motivated by discriminatory or retaliatory animus, intentionally and proximately caused the official to take the action. A retaliation claim will not succeed absent enough evidence to prove retaliation under the applicable causation standard.

a. “But-For” Causation Standard for Retaliation Claims Against Private Sector and State and Local Government Employers

In private sector and state and local government retaliation cases under the statutes the EEOC enforces, the causation standard requires the evidence to show that “but for” a retaliatory motive, the employer would not have taken the adverse action, as set forth by the Supreme Court in University of Texas Southwest Medical Center v. Nassar. By contrast, the “motivating factor” causation standard for discrimination claims can be met even if the employer would have taken the same action absent a discriminatory motive.

The “but-for” causation standard does not require that retaliation be the “sole cause” of the action. There can be multiple “but-for” causes, and retaliation need only be “a but-for” cause of the materially adverse action in order for the employee to prevail.

145 Staub v. Proctor Hosp., 562 U.S. 411, 418–22 (2011) (applying “cat’s paw” theory to a retaliation claim under the Uniformed Services Employment and Reemployment Rights Act, which is “very similar to Title VII”; holding that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable”); Zamora v. City of Hous., 798 F.3d 326, 333–34 (5th Cir. 2015) (applying Staub, the court held there was sufficient evidence to support a jury verdict finding retaliatory suspension); Bennett v. Riceland Foods, Inc., 721 F.3d 546, 552 (8th Cir. 2013) (applying Staub, the court upheld a jury verdict in favor of white workers who were laid off by management after complaining about their direct supervisors’ use of racial epithets to disparage minority coworkers, where the supervisors recommended them for layoff shortly after workers’ original complaints were found to have merit).

146 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) (holding that “but-for” causation is required to prove Title VII retaliation claims raised under 42 U.S.C. § 2000e–3(a), even though claims raised under other provisions of Title VII only require “motivating factor” causation).

147 Preponderance of the evidence (more likely than not) is the evidentiary burden under both causation standards. Id. at 2534; see also Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 178 n.4 (2009) (emphasizing that under the “but-for” causation standard “[t]here is no heightened evidentiary requirement”).

148 Nassar, 133 S. Ct. at 2534; see also Kwan v. Andalex Grp., 737 F.3d 834, 846 (2d Cir. 2013) (“[B]ut-for’ causation does not require proof that retaliation was the only cause of the employer’s action, but only that the adverse action would not have occurred in the absence of a retaliatory motive.”). Circuit courts analyzing “but-for” causation under other EEOC-enforced laws also have explained that the standard does not require “sole” causation. See, e.g., Ponce v.
The Supreme Court has explained how “but-for” causation can be demonstrated even if multiple causes exist:

“[W]here A shoots B, who is hit and dies, we can say that A [actually] caused B’s death, since but for A’s conduct B would not have died.” LaFave 467–468 (italics omitted).

The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.\textsuperscript{149}

b. “Motivating Factor” Causation Standard for Title VII and ADEA Retaliation Claims Against Federal Sector Employers

By contrast, in federal sector Title VII and ADEA retaliation cases, the Commission has held that the “but-for” standard does not apply because the relevant federal sector statutory provisions do not employ the same language on which the Court based its holding in \textit{Nassar}.\textsuperscript{150} The federal sector provisions contain a “broad prohibition of ‘discrimination’ rather than a list of specific prohibited practices,” requiring that employment “be made free from any discrimination,” including retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor.\textsuperscript{151}

\textit{Billington}, 679 F.3d 840, 846 (D.C. Cir. 2012) (explaining in Title VII case where the plaintiff chose to pursue only but-for causation, not mixed motive, that “nothing in Title VII requires a plaintiff to show that illegal discrimination was the sole cause of an adverse employment action”); \textit{Lewis v. Humboldt Acquisition Corp.}, 681 F.3d 312, 316–17 (6th Cir. 2012) (ruling that “but-for” causation required by language in Title I of the ADA does not mean “sole cause”); \textit{Alaniz v. Zamora-Quezada}, 591 F.3d 761, 777 (5th Cir. 2009) (rejecting defendant’s challenge to Title VII jury instructions because “a ‘but for’ cause is simply not synonymous with ‘sole’ cause”); \textit{Miller v. Am. Airlines, Inc.}, 525 F.3d 520, 523 (7th Cir. 2008) (“The plaintiffs do not have to show, however, that their age was the sole motivation for the employer’s decision; it is sufficient if age was a “determining factor” or a “but for” element in the decision.”).

\textsuperscript{149} \textit{Burrage v. United States}, 134 S. Ct. 881, 888–89 (2014) (citing \textit{State v. Frazier}, 339 Mo. 966, 974–975, 98 S.W. 2d 707, 712–713 (1936)).

\textsuperscript{150} See, e.g., \textit{Nita H. v. Dep’t of Interior}, EEOC Petition No. 0320110050, 2014 WL 3788011, at *10 n.6 (EEOC July 16, 2014) (holding that the “but-for” standard does not apply in federal sector Title VII case); \textit{Ford v. Mabus}, 629 F.3d 198, 205–06 (D.C. Cir. 2010) (holding that the “but-for” standard does not apply to ADEA claims by federal employees).

\textsuperscript{151} See \textit{Gomez-Perez v. Potter}, 553 U.S. 474, 487–88 (2008) (holding that the broad prohibition in 29 U.S.C. § 633a(a) that personnel actions affecting federal employees who are at least 40 years of age “shall be made free from any discrimination based on age” prohibits retaliation by
2. Evidence of Causation

In order for the employee to prevail in demonstrating a violation, the evidence must show that it is more likely than not that retaliation has occurred. It is not the employer’s burden to disprove the claim. 152

There are instances in which the evidence demonstrates that the employer acknowledges or betrays a retaliatory motive for its materially adverse action, orally or in writing. 153 In many cases, however, the employer proffers a non-retaliatory reason for the challenged action. For example, the employer may assert that it could not have been motivated by retaliation because it was not aware of the protected activity, 154 or that even if it was aware the employee made complaints, it did not know that they concerned discrimination. 155 Or, an employer may contend that it was not motivated by retaliation but by a legitimate unrelated reason, such as: poor job performance or misconduct; 156 inadequate qualifications for the position sought; 157 or, with regard to negative job

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federal agencies); see also 42 U.S.C. § 2000e–16(a) (providing that personnel actions affecting federal employees “shall be made free from any discrimination” based on race, color, religion, sex, or national origin).

152 In private sector and state and local government employment cases, EEOC gathers evidence and determines whether, based on its investigation, there is “reasonable cause” to believe that retaliation or discrimination occurred.

153 For example, in one case the employer told the employee being terminated that “[y]our deposition was the most damning to [the employer’s] case, and you no longer have a place here. . . .” Merritt v. Dillard Paper Co., 120 F.3d 1181, 1190–91 (11th Cir. 1997).

154 See, e.g., Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010) (ruling that jury instruction was erroneous where it did not allow finding that decisionmakers had requisite knowledge of plaintiff’s protected activity based on evidence they acted under instructions from management officials who had knowledge).

155 Compare Zokari v. Gates, 561 F.3d 1076, 1081–82 (10th Cir. 2009) (holding that plaintiff failed to adduce any evidence that employer knew he had refused English class because he believed employer’s suggestion to attend was discriminatory), with Hennagir v. Utah Dep’t of Corr., 587 F.3d 1255, 1267 (10th Cir. 2009) (finding that given employer’s awareness of plaintiff’s charge, that plaintiff’s supervisor was specifically named as a transgressor in the charge, and that the supervisor lowered the plaintiff’s performance evaluation the day after the employer received the charge, a reasonable jury could infer that the supervisor was aware of the charge when he lowered the evaluation).

156 Brown v. City of Jacksonville, 711 F.3d 883, 892–94 (8th Cir. 2013) (concluding that employer was not liable for retaliation based on evidence that termination was based on plaintiff’s mistreatment of coworkers and inefficient work performance); Hypolite v. City of Hous., 493 F. App’x 597, 606 (5th Cir. 2012) (concluding that evidence showed suspension was not motivated by retaliatory animus but by employee’s using e-mail improperly and making racial slurs).

157 Compare Hoppe v. Lewis Univ., 692 F.3d 833, 843 (7th Cir. 2012) (concluding that employer had legitimate, non-retaliatory reason for firing aviation ethics teacher because she had never worked in aviation field, lacked formal aviation training, and had no relevant degrees, regardless of her past experience teaching philosophy and positive student reviews), with Patrick v. Ridge,
references, truthfulness of the information in the reference.\textsuperscript{158}

There may be proof that the employer’s asserted non-retaliatory explanation is pretextual, such as evidence that the former employer routinely declines to offer information about its former employees’ job performance but departed from that policy with regard to an individual who engaged in protected activity.\textsuperscript{159} If an employer’s proffered explanation is shown to be false, a factfinder may infer retaliation or alternatively may conclude that the falsehood was given for a different reason (e.g., to cover up embarrassing facts). This determination must be made based on the totality of the evidence.

**EXAMPLE 18**

**Explanation for Non-Selection Was Pretext for Retaliation**

An employee alleges that she was denied a promotion because she opposed the under-representation of women in management jobs and was therefore viewed as a “troublemaker.” The employer asserts that the selectee was better qualified for the job because she has a master’s degree, whereas the employee only has a bachelor’s degree. If the employee has significantly greater experience working at this company and experience has long been the company’s most important criterion for selecting managers, this explanation may be found to be a pretext for retaliation.

3. **Examples of Facts That May Support Finding of Retaliation**

Different types or pieces of evidence, either alone or in combination, may be relevant to determine if the above causation standard has been met. In other words,

\textsuperscript{158} E.g., Fields v. Phillips Sch. of Bus. & Tech., 870 F. Supp. 149, 153–154 (W.D. Tex.), aff’d mem., 59 F.3d 1242 (5th Cir. 1994) (concluding that evidence established that negative reference for plaintiff, a former employee, was based on the former supervisor’s personal observations of plaintiff during his employment and contemporary business records documenting those observations).

\textsuperscript{159} Cf. Thomas v. iStar Fin., Inc., 448 F. Supp. 2d 532, 536 (S.D.N.Y. 2006) (ruling that providing a neutral reference was not evidence of retaliatory motive where such references are consistent with established company policy).
different pieces of evidence, considered together, may allow an inference that the materially adverse action was retaliatory.\footnote{Some courts have used the concept of a “convincing mosaic” to describe the combination of different pieces of evidence to show retaliatory intent. This is not a legal requirement or a causation standard, but rather simply a description of combining different pieces of evidence to satisfy the applicable causation standard. Ortiz v. Werner Enters., Inc., No. 15-2574, 2016 WL 4411434, at *3–4 (7th Cir. Aug. 19, 2016); Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R., 671 F.3d 49, 56 (1st Cir. 2012) (holding that “[w]hen all of these pieces are viewed together and in [plaintiff’s] favor, they form a mosaic that is enough to support the jury’s finding of retaliation,” even though challenged termination occurred five years after he filed his ADEA lawsuit); see also Nita H. v. Dep’t of Interior, EEOC Petition No. 0320110050, 2014 WL 3788011, at *10 (EEOC July 16, 2014) (adopting and applying the “convincing mosaic” concept, the Commission rejected the employer’s contention that this requires plaintiff to make all the evidence fit in an interlocking pattern with no spaces).}

The evidence may include, for example, suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer’s proffered reason for the adverse action, or any other pieces of evidence which, when viewed together, may permit an inference of retaliatory intent.\footnote{Suspicious timing. The causal link between the adverse action and the protected activity is often established by evidence that the adverse action occurred shortly after the plaintiff engaged in protected activity. However, temporal proximity is not necessary to establish a causal link. Even when the time between the protected activity and the adverse action is lengthy, other evidence of retaliatory motive may establish the causal link. For example, actions related to the continued processing of a complaint may not necessarily suggest a causal link.}

Suspicious timing. The causal link between the adverse action and the protected activity is often established by evidence that the adverse action occurred shortly after the plaintiff engaged in protected activity.\footnote{See, e.g., Quiles-Quiles v. Henderson, 439 F.3d 1, 8–9 (1st Cir. 2006) (concluding that jury could infer causation from evidence that harassment by supervisors intensified shortly after plaintiff filed an internal complaint); Hossaini v. W. Mo. Med. Ctr., 97 F.3d 1085, 1089 (8th Cir. 1996) (holding that a reasonable factfinder could infer that defendant’s explanation for plaintiff’s discharge was pretextual where defendant launched investigation into allegedly improper conduct by plaintiff shortly after she engaged in protected activity).} However, temporal proximity is not necessary to establish a causal link.\footnote{Abbott v. Crown Motor Co., 348 F.3d 537 (6th Cir. 2003) (ruling that causation shown notwithstanding 11-month interim because supervisor stated his intention to “get back at” those who had supported the discrimination allegations); Kachmar v. SunGard Data Sys., 109 F.3d 173, 178 (3d Cir. 1997) (ruling that district court erroneously dismissed plaintiff’s retaliation claim because termination occurred nearly one year after her protected activity; when there may be reasons why adverse action was not taken immediately, absence of immediacy does not disprove causation); Shirley v. Chrysler First, Inc., 970 F.2d 39, 44 (5th Cir. 1992).} Even when the time between the protected activity and the adverse action is lengthy, other evidence of retaliatory motive may establish the causal link.\footnote{See, e.g., Muñoz, 671 F.3d at 56–57 (concluding that evidence supported jury’s finding that plaintiff, a doctor, was discharged in retaliation for ADEA lawsuit filed 5 years earlier, where the evidence showed plaintiff was fired for common conduct for which others were not disciplined, he was not given an opportunity to defend himself, and had been threatened years earlier by one of the decisionmakers that if he filed the suit he would never work at the hospital or in Puerto Rico).}
remind an employer of its pendency or stoke an employer’s animus. Moreover, an opportunity to engage in a retaliatory act may not arise right away. In these circumstances, a materially adverse action might occur long after the original protected activity occurs, and retaliatory motive is nevertheless proven.\textsuperscript{165}

\textbf{Oral or written statements.} Oral or written statements made by the individuals recommending or approving the challenged adverse action may reveal retaliatory intent by expressing retaliatory animus or by revealing inconsistencies, pre-determined decisions, or other indications that the reasons given for the adverse action are false.\textsuperscript{166} Such statements may have been made to the employee or to others.\textsuperscript{167}

\textbf{Comparative evidence.} An inference that the adverse action was motivated by retaliation could also be supported by evidence that the employer treated more favorably a similarly situated employee who had not engaged in protected activity. For example, where a disciplinary action was taken for alleged retaliatory reasons, evidence of selective enforcement (i.e., that infraction regularly goes undisciplined in that workplace, or that another employee who committed the same infraction was not disciplined, or was not disciplined as severely) could be sufficient to infer retaliatory motive.\textsuperscript{168} Similarly, absent evidence of new performance problems, a retaliatory motive might be inferred


\textsuperscript{166} See, e.g., Burnell v. Gates Rubber Co., 647 F.3d 704, 709–10 (7th Cir. 2011) (concluding that evidence of plant manager’s statement to African-American employee that he was “playing the race card” was sufficient to deny employer’s motion for summary judgment on claim of retaliatory termination for race discrimination complaints); Abbott, 348 F.3d at 544 (ruling that summary judgment for employer on retaliation claim was improper where evidence showed supervisor stated he would “get back at those who had supported the charge of discrimination,” told plaintiff he was being discharged for bringing “the morale of the shop down,” and told the managing partner he fired plaintiff because he had put his nose in other people’s business by testifying in support of coworker’s discrimination allegations).

\textsuperscript{167} See, e.g., Burnell, 647 F.3d at 709–10 (ruling summary judgment for employer improper based on evidence that included statements made to plaintiff); Abbott, 348 F.3d at 544 (ruling summary judgment for employer improper based on statements made both to plaintiff and to others).

\textsuperscript{168} Spengler v. Worthington Cylinders, 615 F.3d 481, 494–95 (6th Cir. 2010) (concluding that evidence showed that plaintiff, who was discharged after raising an age discrimination allegation, was a valuable employee and that the rule pursuant to which he was terminated had been selectively enforced).
where an employee had higher performance appraisals prior to engaging in protected activity.\footnote{See supra notes 113 and 116.}

**Inconsistent or shifting explanations.** If the employer changes its stated reason for the challenged adverse action over time or in different settings (e.g., reasons stated to employee in termination meeting differ from reasons employer cites in position statement filed with the EEOC), pretext may be inferred.\footnote{Pantoja v. Am. NTN Bearing Mfg. Corp., 495 F.3d 840, 851 (7th Cir. 2007) (ruling that inconsistent explanations by employer presented issue for jury); Loudermilk v. Best Pallet Co., 636 F.3d 312, 315 (7th Cir. 2011) (ruling that pretext could be shown because between the EEOC investigation and the litigation, the employer shifted its explanation for plaintiff’s termination from reduction in force to mutual decision and then to violation of a company policy).} The inference of discrimination drawn from such changes, however, will be undermined to the extent the inconsistencies are innocuous or can be credibly explained by the employer (e.g., additional information is discovered).

Other evidence that employer’s explanation was pretextual. There may be other evidence that the employer’s justification for the challenged action is not believable and that the explanation is a pretext to hide retaliation.\footnote{See, e.g., Tuli v. Brigham & Women’s Hosp., 656 F.3d 33, 42 (1st Cir. 2011) (concluding that although supervisor contended that his actions were designed simply to give credential review committee a legitimate assessment of complaints against plaintiff, the evidence showed he overstated his objections and failed to disclose that he had been the subject of several prior complaints by plaintiff, which could lead the jury to conclude that his motives were attributable to discriminatory and/or retaliatory animus); Spengler, 615 F.3d at 495 (ruling that pretext could be shown because employer’s explanation that seasonal employees are discharged after 12 months was inconsistent with testimony that the policy was only applied in the event of a production slowdown, which had not occurred); Franklin v. Local 2 of the Sheet Metal Workers Int’l Ass’n, 565 F.3d 508, 521 (8th Cir. 2009) (ruling that defendant’s reading aloud at union meetings of legal bills identifying employees who had filed discrimination charges against the union may have been retaliatory, since degree of detail disclosed was not necessary given proffered non-retaliatory explanation that it was done in order to obtain member approval for expenditures).}

**EXAMPLE 19**
**Evidence of Retaliatory Intent – Manager Advised No-Hire Based on Prior EEO Activity**

An employee files a suit against company A, alleging that her supervisor sexually harassed and constructively discharged her. The suit is ultimately settled. She applies for a new job with company B and receives a conditional offer subject to a reference check. When B calls A, the employee’s former supervisor says that she was a
“troublemaker,” started a sex harassment lawsuit, and was not anyone B “would want to get mixed up with.” B then withdraws its conditional offer. These statements support the conclusion that because of the employee’s prior sexual harassment allegation, A provided a negative job reference and B rescinded its job offer. Both A and B can be liable for retaliation.

EXAMPLE 20
Evidence of Retaliatory Intent – Manager Departed from Practice

Jane, a saleswoman, has been employed at a retail store for more than a decade, and has always exceeded her sales quota and received excellent performance appraisals. Shortly after the company learned that Jane had provided a witness statement to the EEOC in support of a coworker’s sexual harassment claim, it terminated Jane, citing her failure to provide 48-hours advance notice to her supervisor about a shift swap with a coworker. She alleges retaliatory termination, and evidence reveals that same-day notice of shift swap was a widespread company practice that had commonly been permitted. This evidence, in combination with the proximity in time of her discharge to the company’s learning of her protected activity, could support the conclusion that the discharge was retaliatory.

4. Examples of Facts That May Defeat a Claim of Retaliation

Even if protected activity and a materially adverse action occurred, evidence of any of the following facts alone or in combination may be credited by the factfinder in a given case and, as a result, lead to the conclusion that the action was not in retaliation for the protected activity under the applicable causation standard.

Employer Unaware of Protected Activity. Retaliation cannot be shown without establishing that the employer (either the decisionmaker or someone who influenced the decisionmaker) knew of the prior protected activity. Absent knowledge, there can be no retaliatory intent, and therefore no causal connection.  

172 As discussed supra note 145, an employer can be liable under “cat’s paw” theory where an individual due to retaliatory animus influenced a decisionmaker who did not know of the protected conduct or animus.

173 See, e.g., Stephens v. Erickson, 569 F.3d 779, 788 (7th Cir. 2009) (holding that plaintiff failed to show that interviewers who scored his oral interview were aware of his previous discrimination complaints).
Legitimate Non-Retaliatory Reason for Challenged Action. An employer may proffer a legitimate non-retaliatory reason for the challenged action. Examples of non-retaliatory reasons include:

- poor performance;
- inadequate qualifications for position sought;
- qualifications, application, or interview performance inferior to the selectee;
- negative job references;
- misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and
- reduction in force or other downsizing.

Though the employer does not have the burden to disprove retaliation, the employer may have evidence supporting its proffered explanation for the challenged action, such as comparative evidence revealing like treatment of similarly situated individuals who did not engage in protected activity, or supporting documentary and/or witness testimony.

EXAMPLE 21
Negative Reference Was Truthful, Not Retaliatory

An employee alleges that his former private sector employer gave him a negative job reference because he had filed an EEO discrimination claim after being terminated. The employer produces evidence that it usually provides information about previous employees’ job performance and that its negative statements to the prospective employer were honest assessments of the former employee’s job performance. Unless it can be concluded that the negative reference was because of the discrimination claim, retaliation would not be found.

EXAMPLE 22
Action Not Motivated By Retaliation

Plaintiff, the office manager of a service company, believed her non-selection for various managerial positions was due to sex discrimination, and she posted on an online social media platform, “anyone know a good EEO lawyer? need
one now.” Management saw this and shared it with human resources. Plaintiff was subsequently discharged and alleged it was retaliatory. However, the evidence showed the termination was due to Plaintiff’s extensive unauthorized use of overtime and her repeated violations of company finance procedures, which were enforced for other employees, and for which Plaintiff had been previously issued written discipline. Even though management was aware of Plaintiff’s protected activity (her intention to take action on a potential EEO claim), Plaintiff cannot prove retaliatory discharge.

Evidence of Retaliatory Motive But Adverse Action Would Have Happened Anyway. In a case where the “but for” standard applies, the claim will fail unless retaliation was a “but-for” cause of the adverse action. In other words, causation cannot be proven if the evidence shows that the challenged adverse action would have occurred anyway, even without a retaliatory motive.

EXAMPLE 23
“But-For” Causation Not Shown

A private sector employee alleges retaliatory termination. The evidence shows that management admitted to being “mad” at the employee for filing a prior religious discrimination charge, but this was not enough to show that her protected activity was a “but-for” cause of her termination, where she was fired for her repeated violations of workplace safety rules and for insubordination. The employee admitted to repeatedly violating the rules and to being uncooperative with her supervisor. Further, the evidence shows that the employee was warned prior to her filing the EEO claim that her continued violation of the safety rules could result in her termination.174

174 See Etienne v. Spanish Lake Truck & Casino Plaza, LLC, 547 F. App’x 484, 489–90 (5th Cir. 2013) (affirming summary judgment for the employer on a Title VII retaliation claim, the court applied Nassar and concluded that the employee failed to show that retaliatory motive was the “but-for” cause for her discharge, not merely a motivating factor).
III. ADA INTERFERENCE PROVISION

The ADA prohibits not just retaliation, but also “interference” with the exercise or enjoyment of ADA rights. The interference provision is broader than the anti-retaliation provision, protecting any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights.

In addition to retaliation, the ADA prohibits “interference” with the exercise or enjoyment of ADA rights, or with the assistance of another in exercising or enjoying those rights. The scope of the interference provision is broader than the anti-retaliation provision. It protects any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights. 42 U.S.C. § 12203(b). As with ADA retaliation, an applicant or employee need not establish that he is an “individual with a disability” or “qualified” in order to prove interference under the ADA.

The statute, regulations, and court decisions have not separately defined the terms “coerce,” “intimidate,” “threaten,” and “interfere.” Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.

Of course, many instances of employer threats or coercion might in and of themselves be actionable under the ADA as a denial of accommodation, discrimination, or retaliation, and many examples in this section could be actionable under those theories of liability as well. Because the “interference” provision is broader, however, it will

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175 The ADA interference provision uses the same language as a parallel provision in the Fair Housing Act, and Congress intended it to be interpreted in the same way. H.R. Rep. No. 101–485, pt. 2, at 138 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 421 (“The Committee intends that the interpretation given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act . . . be used as a basis for regulations for this section.”). The National Labor Relations Act (NLRA) also contains an interference provision with similar language to the ADA provision. See 29 U.S.C. § 158(a)(1) (making it unlawful under the NLRA for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the Act]”).

176 See Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003) (holding that in comparison to the retaliation provision, the interference provision protects a broader class of persons against less clearly defined wrongs; demands that plaintiff stop taking her medications and perform duties contrary to her medical restrictions or be forcibly retired constituted actionable interference).

177 The EEOC regulation implementing the interference provision additionally includes the term “harass.” See 29 C.F.R. § 1630.12(b) (providing it is “unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or because the individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part”). The inclusion of the term “harass” in the regulation is intended to characterize the type of adverse treatment that may in some circumstances violate the interference provision.
reach even those instances when conduct does not meet the “materially adverse” standard required for retaliation. Examples of conduct by an employer prohibited under the ADA as interference would include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- threatening an employee with loss of employment or other adverse treatment if he does not “voluntarily” submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- issuing a policy or requirement that purports to limit an employee’s rights to invoke ADA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”);
- interfering with a former employee’s right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.

The interference provision does not apply to any and all conduct or statements that an individual finds intimidating. In the Commission’s view, it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights.

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178 Brown, 336 F.3d at 1192–93 (ruling that the ADA’s interference provision is not so broad as to prohibit “‘any action whatsoever that in any way hinders a member of a protected class,’” and observing that supervisor’s statement that other employees were complaining about plaintiff’s long lunches and early departures did not alone violate the interference provision) (citation omitted).

179 See Brief of the EEOC as Amicus Curiae in Support of the Plaintiff-Appellant, Brown v. City of Tucson, 336 F.3d 1181 (9th Cir. 2003) (No. 01–16938).
EXAMPLE 24
Manager Pressures Employee Not to Advise Coworker of Right to Reasonable Accommodation

Joe, a mail room employee with an intellectual disability, is having difficulty remembering the supervisor’s instructions that are delivered orally at morning staff meetings. Dave, a coworker, explains to Joe that he may be entitled to written instructions as a reasonable accommodation under the ADA and then takes Joe to the human resources department to assist him in requesting accommodation. When the supervisor learns what has happened, he is annoyed that he may have to do “more work” by providing written instructions, and he tells Dave that if he continues to “stir things up” by “putting foolish ideas in Joe’s head” with this “accommodation business,” he will regret it. The supervisor’s threat against Dave for assisting another employee in exercising his ADA rights can constitute interference.

EXAMPLE 25
Manager Refuses to Consider Accommodation Unless Employee Tries Medication First

When reviewing medical information received in support of an employee’s request for accommodation of her depression, the employer learns that, although the employee’s physician had previously prescribed a medication that might eliminate the need for the requested accommodation, the employee chose not to take the medication because of its side effects. The employer advises the employee that if she does not try the medication first, he will not consider the accommodation. The employer’s actions constitute both denial of reasonable accommodation and interference in violation of the ADA.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

EXAMPLE 26
Manager Warns Employee Not to Request Accommodation

An employee with a vision disability needs special technology in order to use a computer at work. She
requests paid administrative leave as an accommodation to visit an off-site vocational technology center with the employer’s human resources manager in order to decide on appropriate equipment, as well as for several subsequent appointments at the center during which she will be trained on the computer program selected. Her supervisor objects, but the human resources manager advises him that this is part of the process of accommodating the employee with the equipment under the ADA, and that the leave should be granted. The supervisor calls the employee into his office and tells her that he will allow it this time, but if she ever brings up the ADA again, she “will be sorry.” The supervisor’s threat constitutes interference with the exercise of ADA rights in violation of the statute, even if not accompanied or followed by any adverse action.

**EXAMPLE 27**
Manager Conditions Accommodation on Withdrawal of Formal Accommodation Request

After a lengthy interactive process, an employee with multiple sclerosis is granted a change in schedule as an accommodation. When her condition subsequently worsens, she requests additional accommodations, including telecommuting on days when her symptoms flare up and prevent her from walking. The employer has a policy that prohibits telework. When her supervisor consults human resources, he is advised that the ADA may require making an exception to the usual policy as a reasonable accommodation, unless it would pose an undue hardship. Instead of proceeding with the interactive process, the supervisor tells the employee that if she withdraws her request for accommodation, he will informally allow her to work from home one day per week, but that, if she persists with her formal accommodation request, he will tell human resources that her job cannot be performed from home. The supervisor’s actions constitute interference in violation of the ADA.

**EXAMPLE 28**
Manager Threatens Employee with Adverse Action If She Does Not Forgo Accommodation Previously Granted

Due to post-traumatic stress disorder following a nighttime attack, an employee is accommodated with shift
assignments that assure that she can commute to and from work during daytime hours. She is subsequently assigned a new supervisor who threatens to have her transferred, demoted, or placed on medical retirement if she does not work a “normal schedule.” Based on these facts, the supervisor has violated the interference provision of the ADA.

EXAMPLE 29
Refusal to Consider Applicant Unless He Submits to Unlawful Pre-Employment Medical Examination

A job applicant declines an interviewer’s request to submit to a pre-offer medical examination, citing the ADA’s prohibition against conducting medical examinations prior to making a conditional offer of employment. The interviewer refuses to consider the application without the examination, so the applicant submits to it. Regardless of whether or not the applicant is qualified or is hired, the employer engaged in interference as well as an improper disability-related examination in violation of the ADA.

IV. REMEDIES

A. Temporary or Preliminary Relief

The EEOC has the authority to seek temporary injunctive relief before final disposition of a charge when a preliminary investigation indicates that prompt judicial action is necessary to carry out the purposes of Title VII, and the ADA and GINA incorporate this provision. Although the ADEA and the EPA do not authorize a court to give interim relief pending resolution of an EEOC charge, the EEOC can seek such relief as part of a lawsuit for permanent relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Temporary or preliminary relief allows a court to stop retaliation before it occurs or continues. Such relief is appropriate if there is a substantial likelihood that the challenged action will be found to constitute unlawful retaliation and if the charging party and/or the public interest will likely suffer irreparable harm because of the retaliation. Although courts have ruled that financial hardships are not irreparable, other harms that accompany loss of a job may be irreparable. For example, courts have held that forced

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180 42 U.S.C. § 2000e–5(f)(2) (“Whenever a charge is filed . . . and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.”); 42 U.S.C § 12117 (ADA); 42 U.S.C. § 2000ff–6(a) (GINA).
retirees showed irreparable harm and qualified for a preliminary injunction where they lost work and future prospects for work, consequently suffering emotional distress, depression, a contracted social life, and other related harms.\textsuperscript{181}

\textbf{EXAMPLE 30}
\textbf{Preliminary Relief Granted to Prohibit Retaliatory Transfer During Pendency of EEO Case}

An employee filed an enforcement action in court to obtain compliance with the relief obtained in his Title VII national origin discrimination case. Within two months, his employer ordered him to transfer from its Los Angeles office to its facility in Detroit or be discharged. The court granted preliminary relief to forestall the alleged retaliatory transfer and permit the employee to retain employment pending its adjudication of the merits.\textsuperscript{182}

A temporary injunction also is appropriate if the respondent’s retaliation will likely cause irreparable harm to the Commission’s ability to investigate the charging party’s original charge of discrimination. For example, if the alleged retaliatory act might discourage others from providing testimony or from filing additional charges based on the same or other alleged unlawful acts, preliminary relief is justified.\textsuperscript{183}

\textbf{EXAMPLE 31}
\textbf{Preliminary Relief Prohibiting Intimidation of Witnesses}

During the EEOC’s systemic investigation of sexual harassment at a large agricultural producer with many low-

\textsuperscript{181} \textit{EEOC v. Chrysler Corp.}, 733 F.2d 1183, 1186 (6th Cir. 1984); \textit{see also EEOC v. City of Bowling Green}, 607 F. Supp. 524, 527 (W.D. Ky. 1985) (granting preliminary injunction preventing defendant from mandatorily retiring police department employee because of his age; although plaintiff could have collected back pay and been reinstated at later time, he would have suffered from inability to keep up with current matters in police department and would have suffered anxiety or emotional problems due to compulsory retirement).

\textsuperscript{182} \textit{Garcia v. Lawn}, 805 F.2d 1400, 1405–06 (9th Cir. 1986).

\textsuperscript{183} \textit{Id.} (ruling that the employer’s retaliation would have a chilling effect on other employees’ willingness to exercise their rights or testify for plaintiff, and therefore would cause irreparable harm); \textit{cf. EEOC v. Peters’ Bakery}, 13–CV–04507–BLF (N.D. Cal. preliminary injunction issued July 2015) (ruling that harassment about the pending claim, combined with the likelihood of success on the merits, may support entry of a preliminary injunction prohibiting an employer from terminating an employee during the pendency of a federal EEO lawsuit, because “permitting [the individual] to be terminated under such circumstances may well have a chilling effect on other employees who might wish to file charges with the EEOC, and thus could interfere with the EEOC’s mission”).
wage, seasonal employees, the Commission learned that management was creating an environment of intimidation to deter current and former employees from cooperating as witnesses. The court granted the Commission preliminary relief prohibiting any retaliatory measures against the EEOC’s potential class members, witnesses, or their family members, as well as any actions that would discourage association with those individuals. It also enjoined the company from paying or offering to pay for favorable testimony in the EEOC’s case.  

B. Compensatory and Punitive Damages for Retaliation

Compensatory and punitive damages are potentially available under the anti-retaliation provisions in accordance with the standards explained below. Note: punitive damages are only available against private employers, not against government entities.

1. Title VII and GINA

Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, compensatory and punitive damages are available for a range of violations under Title VII, including retaliation. A cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from $50,000 for employers with 15–100 employees, to $300,000 for employers with more than 500 employees. Section 207 of GINA incorporates all the same remedies available under Title VII. Punitive damages are available when a practice is undertaken “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1). Eligibility for punitive damages depends on the employer’s state of mind, not on the “egregiousness” of the employer’s misconduct.

2. ADEA and EPA

Compensatory and punitive damages are available for retaliation claims brought under the ADEA and the EPA, even though such relief is not available for non-retaliation

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184 See EEOC v. Evans Fruit Co., No. CV–10–3033–LRS, 2010 WL 2594960, at *1–2 (E.D. Wash. June 24, 2010) (granting EEOC’s request for preliminary injunction while the investigation continues) (citing the likelihood of irreparable injury if alleged witness tampering was allowed to continue, in that “(a) the Commission’s prosecution of its case is likely to be chilled; (b) the Commission’s investigation of retaliation charges now pending . . . is likely to be chilled; and (c) current and past . . . employees are likely to be deterred from exercising their rights under Title VII”).

claims under those statutes. Any compensatory and punitive damages obtained under the EPA and the ADEA are not subject to statutory caps.

3. ADA and Rehabilitation Act

Title V of the ADA sets forth the retaliation and interference provisions but contains no remedy provision of its own. Among courts, there remains a split of authority regarding whether compensatory and punitive damages are available for retaliation or interference in violation of the ADA. Although the Civil Rights Act of 1991’s damages provision does not explicitly mention retaliation claims under the ADA, the Commission and the U.S. Department of Justice maintain that compensatory and punitive damages are available for retaliation or interference in violation of the ADA.

The ADA retaliation provision refers to 42 U.S.C. § 12117 for its remedy, which in turn adopts the remedies set forth in Title VII at 42 U.S.C. § 2000e–5 and 42 U.S.C. § 1981a(a)(2). Moreover, the reference in the damages provision of the Civil Rights Act of 1991 to the intentional discrimination provision of the ADA (section 102, 42 U.S.C. § 12112) must encompass retaliation as a form of intentional discrimination. Accordingly, availability of damages for ADA and Rehabilitation Act retaliation claims should be assessed under the standards applicable to Title VII.

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186 The FLSA, as amended in 1977, 29 U.S.C. § 216(b), authorizes compensatory and punitive damages for retaliation claims under both the EPA and the ADEA. See Moore v. Freeman, 355 F.3d 558, 563–64 (6th Cir. 2004); Moskowitz v. Trs. of Purdue Univ., 5 F.3d 279, 283–84 (7th Cir. 1993).


188 See Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellee Cross-Appellant, Mascarella v. CPlace Univ. SNF, No. 15–30970 (5th Cir. filed June 10, 2016), https://www.eeoc.gov/eeoc/litigation/briefs/mascarella.html.

189 Although some courts have held that state government employers may have sovereign immunity from retaliation claims by individuals for money damages under the ADA, see, e.g., Demshki v. Monteith, 255 F.3d 986, 988 (9th Cir. 2001), such employers are still subject to suit by the U.S. government, which can obtain full relief including damages for the individual. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001); United States v. Miss. Dep’t of Pub. Safety, 321 F.3d 495, 499 (5th Cir. 2003). Therefore it is in the interest of such employers to take the same care as all others to comply with retaliation prohibitions.
C. Other Relief

Under all the statutes enforced by the EEOC, relief may also potentially include back pay if the retaliation resulted in termination, constructive discharge, or non-selection, as well as front pay or reinstatement. Equitable relief also frequently sought by the Commission includes changes in employer policies and procedures, managerial training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

V. PROMISING PRACTICES

Although each workplace is different, there are many different types of promising policy, training, and organizational changes that employers may wish to consider implementing in an effort to minimize the likelihood of retaliation violations. The Commission uses the term “promising practices” here because these steps may help reduce the risk of violations. However, the Commission is aware there is not a single best approach for every workplace or circumstance.

Moreover, adopting these practices does not insulate an employer from liability or damages for unlawful actions. Rather, meaningful implementation of these steps may help reduce the risk of violations, even where they are not legal requirements.

A. Written Employer Policies

Employers should maintain a written, plain-language anti-retaliation policy, and provide practical guidance on the employer’s expectations with user-friendly examples of what to do and not to do. The policy should include:

- examples of retaliation that managers may not otherwise realize are actionable, including actions that would not be cognizable as discriminatory disparate treatment but are actionable as retaliation because they would likely deter a reasonable person from engaging in protected activity;

- proactive steps for avoiding actual or perceived retaliation, including practical guidance on interactions by managers and supervisors with employees who have lodged discrimination allegations against them;

- a reporting mechanism for employee concerns about retaliation, including access to a mechanism for informal resolution; and

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190 A number of these practices were developed from testimony and discussion at the EEOC’s Meeting on Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention, held on June 17, 2015. Written witness statements, as well as a transcript and video of the meeting, are available at https://www.eeoc.gov/eeoc/meetings/6-17-15/.
• a clear explanation that retaliation can be subject to discipline, up to and including termination.

Employers should consider any necessary revisions to eliminate punitive formal or informal policies that may deter employees from engaging in protected activity, such as policies that would impose materially adverse actions for inquiring, disclosing, or otherwise discussing wages. Although most private employers are under no obligation to disclose or make wages public, actions that deter or punish employees with respect to pay inquiries or discussions may constitute retaliation under provisions in federal and/or state law. See supra § II-A.2.f. (Inquiries and Other Discussions Related to Compensation).

B. Training

Employers should consider these ideas for training:

• Train all managers, supervisors, and employees on the employer’s written anti-retaliation policy.

• Send a message from top management that retaliation will not be tolerated, provide information on policies and procedures in several different formats, and hold periodic refresher training.

• Tailor training to address any specific deficits in EEO knowledge and behavioral standards that have arisen in that particular workplace, ensuring that employees are aware of what conduct is protected activity and providing examples on how to avoid problematic situations that have actually manifested or might be likely to do so.

• Offer explicit instruction on alternative proactive, EEO-compliant ways these situations could have been handled. In particular, managers and supervisors may benefit from scenarios and advice for ensuring that discipline and performance evaluations of employees are motivated by legitimate, non-retaliatory reasons.

• Emphasize that those accused of EEO violations, and in particular managers and supervisors, should not act on feelings of revenge or retribution, although also acknowledge that those emotions may occur.

• Include training for management and human resources staff regarding how to be responsive and proactive when employees do raise concerns about potential EEO violations, including basics such as asking for clarification and additional information to ensure that the question or concern raised is fully understood, consulting as needed with superiors to address the issues raised, and following up as soon as possible with the employee who raised the concern.
• Do not limit training to those who work in offices. Provide EEO compliance and anti-retaliation training for those working in a range of workplace settings, including for example employees and supervisors in lower-wage manufacturing and service industries, manual laborers, and farm workers.

• Consider overall efforts to encourage a respectful workplace, which some social scientists have suggested may help curb retaliatory behavior.

C. Anti-Retaliation Advice and Individualized Support for Employees, Managers, and Supervisors

An automatic part of an employer’s response and investigation following EEO allegations should be to provide information to all parties and witnesses regarding the anti-retaliation policy, how to report alleged retaliation, and how to avoid engaging in it. As part of this debriefing, managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.

• Provide tips for avoiding actual or perceived retaliation, as well as access to a resource individual for advice and counsel on managing the situation. This may occur as part of the standard debriefing of a manager, supervisor, or witness immediately following an allegation having been made, ensuring that those alleged to have discriminated receive prompt advice from a human resources, EEO, or other designated manager or specialist, both to air any concerns or resentments about the situation and to assist with strategies for avoiding actual or perceived retaliation going forward.

D. Proactive Follow-Up

Employers may wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation, and to provide guidance. This provides an opportunity to identify issues before they fester, and to reassure employees and witnesses of the employer’s commitment to protect against retaliation. It also provides an opportunity to give ongoing support and advice to those managers and supervisors who may be named in discrimination matters that are pending over a long period of time prior to reaching a final resolution.

E. Review of Employment Actions to Ensure EEO Compliance

Consider ensuring that a human resources or EEO specialist, a designated management official, in-house counsel, or other resource individual reviews proposed
employment actions of consequence to ensure they are based on legitimate non-discriminatory, non-retaliatory reasons. These reviewers should:

- require decisionmakers to identify their reasons for taking consequential actions, and ensure that necessary documentation supports the decision;

- scrutinize performance assessments to ensure they have a sound factual basis and are free from unlawful motivations, and emphasize the need for consistency to managers;

- where retaliation is found to have occurred, identify and implement any process changes that may be useful; and

- review any available data or other resources to determine if there are particular organizational components with compliance deficiencies, identify causes, and implement responsive training, oversight, or other changes to address the weaknesses identified.

Questions and Answers: Enforcement Guidance on Retaliation and Related Issues

Each of the Equal Employment Opportunity (EEO) laws prohibits retaliation and related conduct: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), Title V of the Americans with Disabilities Act (ADA), Section 501 of the Rehabilitation Act (Rehabilitation Act), the Equal Pay Act (EPA), and Title II of the Genetic Information Nondiscrimination Act (GINA).


The following questions and answers address major points from the guidance. A short Small Business Fact Sheet on this topic is available at https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm.

1. What is retaliation?

Retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws. Asserting EEO rights is called "protected activity."

Sometimes there is retaliation before any "protected activity" occurs. For example, an employment policy itself could be unlawful if it discourages the exercise of EEO rights.

2. What must someone show to prove a legal claim of retaliation?

In a case alleging that an employer took a materially adverse action because of protected activity, legal proof of retaliation requires evidence that:

- An individual engaged in prior protected activity;
- The employer took a materially adverse action; and
- Retaliation caused the employer's action.

3. What type of EEO activity by an applicant or employee is protected from retaliation?

Generally, "protected activity" is either participating in an EEO process or reasonably opposing conduct made unlawful by an EEO law.

4. What does it mean to "participate in an EEO process"?

An employer must not retaliate against an individual for "participating" in an EEO process. This means that an employer cannot punish an applicant or employee for filing an EEO complaint, serving as a witness, or participating in any other way in an EEO matter, even if the underlying discrimination allegation is unsuccessful or untimely. EEOC's view is that this extends to participation in an employer's internal EEO complaint process, even if a charge of discrimination has not yet been filed with the EEOC.

Participation in the EEO process is protected whether or not the EEO allegation is based on a reasonable, good faith belief that a violation occurred. This does not mean that falsehoods or bad faith are without consequence. An employer is free to bring these to light in the EEO matter, where it may rightly affect the outcome. But it is unlawful retaliation for an employer to take matters into its own hands and impose consequences for participating in an EEO matter.

5. What does it mean to "oppose" conduct made unlawful by an EEO law?

Employers must not retaliate against an individual for "opposing" a perceived unlawful EEO practice. This means that an employer must not punish an applicant or employee for communicating opposition to a perceived EEO violation. For example, it is unlawful to retaliate against an applicant or employee for:

- complaining or threatening to complain about alleged discrimination against oneself or others;
- providing information in an employer's internal investigation of an EEO matter;
- refusing to obey an order reasonably believed to be discriminatory;
- advising an employer on EEO compliance;
- resisting sexual advances or intervening to protect others;
- passive resistance (allowing others to express opposition);
adverse" actions may include:

- complaining to management about EEO-related compensation disparities;
- requesting reasonable accommodation for disability or religion;
- talking to coworkers to gather information or evidence in support of a potential EEO claim.

Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.

The protection for opposition is limited to those individuals who act with a reasonable good faith belief that the conduct opposed is unlawful or could become unlawful if repeated. In the EEOC's view, it can be reasonable to complain about behavior that is not yet legally harassment (i.e., even if the mistreatment has not yet become severe or pervasive). It is also reasonable for an employee to believe that conduct violates the EEO laws if the EEOC has adopted that interpretation, even if some courts disagree with the EEOC on the issue.

Opposition also must be conducted in a reasonable manner. For example, threats of violence, or badgering a subordinate employee to give a witness statement, are not protected opposition.

6. Who is protected from retaliation?

The protections against retaliation apply to all employees of any employer, employment agency, or labor organization covered by the EEO laws. This includes applicants, current employees (full-time, part-time, probationary, seasonal, and temporary), and former employees. For example, a supervisor cannot refuse to hire an applicant because of his EEO complaint against a prior employer, or give a false negative job reference to punish a former employee for making an EEO complaint.

These protections apply regardless of an applicant or employee's citizenship or work authorization status, because the EEO laws protect applicants and employees regardless of citizenship or work authorization. For example, assume an employer suspects a worker is undocumented but does not attempt to verify her authorization to work as required by the immigration laws. If the worker raises an EEO complaint, such as sexual harassment or national origin discrimination, and the employer then threatens to expose the worker's immigration status as punishment for complaining about EEO violations, the employer would violate the ban on retaliation.

7. Are employees shielded from the consequences of poor performance or misconduct if they raise an internal EEO allegation or file a discrimination claim with an enforcement agency?

No. Neither participation nor opposition give permission to an employee to neglect job duties, violate employer rules, or do anything else that would otherwise result in consequences for poor performance evaluations or misconduct. Even though the anti-retaliation laws are very broad, employers remain free to discipline or terminate employees for poor performance or improper behavior, even if the employee made an EEO complaint. Whether an employer's action was motivated by legitimate reasons or retaliation will depend on the facts of the case.

If a manager recommends an adverse action in the wake of an employee's filing of an EEOC charge or other protected activity, the employer may reduce the chance of potential retaliation by independently evaluating whether the adverse action is appropriate.

8. When is an employer action serious enough to be retaliation?

Retaliation includes any employer action that is "materially adverse." This means any action that might deter a reasonable person from engaging in protected activity.

"Materially adverse" actions include more than employment actions such as denial of promotion, non-hire, denial of job benefits, demotion, suspension, discharge, or other actions that can be challenged directly as employment discrimination. Retaliation can be an employer action that is work-related, or one that has no tangible effect on employment, or even an action that takes place exclusively outside of work, as long as it may well dissuade a reasonable person from engaging in protected activity.

Whether an action is materially adverse depends on the facts and circumstances of the particular case. The U.S. Supreme Court has held that transferring a worker to a harder, dirtier job within the same pay grade, and suspending her without pay for more than a month (even though the pay was later reimbursed) were both "materially adverse actions" that could be challenged as retaliation. The Supreme Court has also said that actionable retaliation includes: the FBI's refusing to investigate death threats against an agent; the filing of false criminal charges against a former employee; changing the work schedule of a parent who has caretaking responsibilities for school-age children; and excluding an employee from a weekly training lunch that contributes to professional advancement.

By contrast, a petty slight, minor annoyance, trivial punishment, or any other action that is not likely to dissuade an employee from engaging in protected activity in the circumstances is not "materially adverse." For example, courts have concluded on the facts of given cases that temporarily transferring an employee from an office to a cubicle was not a materially adverse action and that occasional brief delays by an employer in issuing refund checks to an employee that involved small amounts of money were not materially adverse.

9. What are some other examples of employer actions that may be actionable as retaliation?

The facts and circumstances of each case determine whether a particular action is retaliatory in that context. For this reason, the same action may be retaliatory in one case but not in another. Depending on the facts, examples of "materially adverse" actions may include:
- work-related threats, warnings, or reprimands;
- negative or lowered evaluations;
- transfers to less prestigious or desirable work or work locations;
- making false reports to government authorities or in the media;
- filing a civil action;
- threatening reassignment; scrutinizing work or attendance more closely than that of other employees, without justification;
- removing supervisory responsibilities;
- engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not yet "severe or pervasive" as required for a hostile work environment;
- requiring re-verification of work status, making threats of deportation, or initiating other action with immigration authorities because of protected activity;
- terminating a union grievance process or other action to block access to otherwise available remedial mechanisms; or
- taking (or threatening to take) a materially adverse action against a close family member (who would then also have a retaliation claim, even if not an employee).

10. Can an action be materially adverse even if it does not stop the employee from asserting her EEO rights?

Yes. If the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it does not actually stop the employee in a particular case from asserting her EEO rights. An employer can also be liable for retaliation if the materially adverse action does not harm the employee; the extent of the harm only affects the amount of relief the individual might be awarded as compensation.

11. Are employees protected against retaliation when they complain about conduct that affects others but does not affect themselves?

Yes. It is unlawful to take an action against employees because they have complained about discrimination that affects other people. It does not matter whether the person is a witness regarding an EEO complaint brought by others, or whether the person is complaining of conduct that directly affects himself.

12. Is it unlawful for an employer to retaliate against someone by taking action against a family member or close friend?

Yes. If an employer takes an action against someone else, such as a family member or close friend, in order to retaliate against an employee, both individuals would have a legal claim against the employer.

13. Do the EEO laws or other statutes protect employee communications about pay?

Yes. Taking adverse action for discussing compensation may implicate a number of different federal laws, whether the action is pursuant to a so-called "pay secrecy" policy or is simply discipline of an employee in an individual case.

Under EEOC-enforced laws, when an employee communicates to management or coworkers to complain or ask about compensation, or otherwise discusses rates of pay, the communication may constitute protected opposition under the EEO laws, making employer retaliation actionable based upon the facts of a given case. Moreover, talking to coworkers to gather information or evidence in support of a potential EEO claim is protected opposition, provided the manner of opposition is reasonable.

In addition, there are also other federal protections for discussions related to compensation. For example, under Executive Order (E.O.) 11246, as amended by E.O. 13665 (Apr. 8, 2014), enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs, federal contractors and subcontractors are prohibited from discharging or otherwise discriminating in any way against employees or applicants who inquire about, discuss, or disclose their compensation or that of other employees or applicants. See https://www.dol.gov/ofccp/. Moreover, the National Labor Relations Act protects non-supervisory employees who are covered by that law from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort. See https://www.nlrb.gov/.

14. Who must prove retaliation?

In order for the employee to prevail in demonstrating a violation, the evidence must show that it is more likely than not that retaliation has occurred. It is not the employer's burden to disprove the claim.

15. What is the legal standard for proving that retaliation caused a materially adverse action?

There are different causation standards for proving retaliation, depending on the type of claim and the employer.

- For retaliation claims against private sector employers and state or local government employers, the Supreme Court has ruled that the causation standard requires that "but for" a retaliatory motive, the employer would not have taken the adverse action. "But for" causation means, even if there are multiple causes, the materially adverse action would not have occurred without retaliation.
- For Title VII and ADEA retaliation claims against federal government employers, due to different statutory wording, the Commission has held that the "motivating factor" causation standard applies. The "motivating factor" standard can be met even if the employer would have taken the same action absent a retaliatory motive.

16. What types of evidence may support a claim of retaliation?
In some cases, the employer's own statements may acknowledge or betray its intention to deter an applicant or employee from engaging in protected activity. However, in many cases, there are different pieces of evidence, either alone or together, that may support an inference that retaliation caused a materially adverse action. Examples include:

- suspiciously close timing between the EEO activity and the materially adverse action;
- verbal or written statements demonstrating a retaliatory motive, comparative evidence (e.g., the individual was disciplined for an infraction that regularly goes undisciplined in that workplace, or that another employee who did not engage in EEO activity committed and was not disciplined as severely);
- demonstrated falsity of the employer's proffered reason for the adverse action; or
- any other pieces of evidence which, viewed alone or in combination with other facts, may support an inference of retaliatory intent.

17. What if the employer claims its challenged action was not motivated by retaliation?

In many cases, an employer will present a non-retaliatory reason for the challenged action. The employer may assert that it acted for a legitimate and unrelated reason such as poor job performance, misconduct, or the individual's lack of qualifications for the job. An employee may respond to these assertions by providing evidence that the employer's explanation is actually a pretext for retaliation. If an employer's explanation is shown to be false, a factfinder may infer retaliation.

18. What are examples of evidence that may support the employer's assertion that it was not motivated by retaliation?

Even if protected activity and a materially adverse action occurred, evidence of any of the following facts, alone or in combination, may undermine a claimant's ability to prove it was caused by retaliation. For example:

- The employer was not, in fact, aware of the protected activity.
- There was a legitimate non-retaliatory motive for the challenged action, that the employer can demonstrate, such as:
  - poor performance;
  - inadequate qualifications for position sought;
  - qualifications, application, or interview performance inferior to the selectee;
  - negative job references (provided they set forth legitimate reasons for not hiring or promoting an individual);
  - misconduct (e.g., threats, insubordination, unexcused absences, employee dishonesty, abusive or threatening conduct, or theft); and
  - reduction in force or other downsizing.
- Similarly-situated applicants or employees who did not engage in protected activity were similarly treated.
- Where the "but-for" causation standard applies, there is evidence that the challenged adverse action would have occurred anyway, despite the existence of a retaliatory motive.

19. What is "interference" with disability rights under the ADA?

The ADA prohibits not only retaliation but also "interference" with statutory rights. Interference is broader than retaliation. Under the ADA's interference provision, it is unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights. Some employer acts may be both retaliation and interference, or may overlap with unlawful denial of accommodation. Examples of interference include:

- coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;
- intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;
- issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");
- interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

20. What remedies are available if retaliation is found?

There is a range of relief available in a retaliation case:

Preliminary relief. The EEOC has the authority to sue for temporary or preliminary relief while completing its processing of a retaliation charge. This asks the court to stop retaliation before it occurs or continues.

Compensatory and punitive damages. Money damages are paid to compensate the victim and to punish the employer for retaliation. However, punitive damages are only available against private employers, not against the government.

Other Relief. Under all the statutes enforced by the EEOC, relief may also include equitable relief such as back pay, front pay, or reinstatement into a job. The Commission also seeks changes in employer policies and procedures, managerial
training, reporting to the Commission, and other measures designed to prevent violations and promote future compliance with the law.

21. Did the Commission obtain public input before issuing the Enforcement Guidance on Retaliation and Related Issues?

Yes. The Commission published a proposed draft of the guidance for public input on January 21, 2016, as a means to gather stakeholder feedback. The Commission's final approved guidance takes into account the feedback received on the draft from approximately 60 organizations and individuals representing a wide range of viewpoints. In preparing the final guidance, the Commission considered all submissions, as well as the stakeholder views expressed at the June 17, 2015 Commission Meeting held on this topic.

22. Are there promising practices that may be implemented to reduce the incidence of retaliation?

Although each workplace is different, there are many different types of promising policy, training, and organizational changes that employers may wish to consider to minimize the likelihood of retaliation violations. Some promising practices include:

- Employers should maintain a written, plain-language anti-retaliation policy, and provide practical guidance on the employer's expectations with user-friendly examples of what to do and not to do.
- Employers should consider training all managers, supervisors, and employees on the employer's written anti-retaliation policy, and sending a message from top management that retaliation will not be tolerated.
- Managers and supervisors alleged to have engaged in discrimination should be provided with guidance on how to handle any personal feelings about the allegations when carrying out management duties or interacting in the workplace.
- Employers may also wish to check in with employees, managers, and witnesses during the pendency of an EEO matter to inquire if there are any concerns regarding potential or perceived retaliation. This may help spot issues before they fester, and to reassure employees and witnesses of the employer's commitment to protect against retaliation.
- Employers may choose to require decision-makers to identify their reasons for taking consequential actions, and ensure that necessary documentation supports the decision. Employers may examine performance assessments to ensure they have a sound factual basis and are free from unlawful motivations, and emphasize consistency to managers.

23. How can a job applicant or employee report retaliation or interference?

An applicant or employee who believes his rights under federal EEO laws have been violated may file 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](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](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

24. Where can employers obtain compliance assistance or more information?

For more information, visit [https://www.eeoc.gov/](https://www.eeoc.gov/), call the EEOC at 800-669-4000 (voice) or 800-669-6820 (TTY), or contact your local EEOC office (a listing is available at [https://www.eeoc.gov/field/index.cfm](https://www.eeoc.gov/field/index.cfm)). Ask for translation assistance if needed.
INTRODUCTION

Tax reform — in particular, changes to the U.S. corporate tax laws and reduction of the corporate tax rate — has been the subject of discussion and legislative proposals for some years around Washington. Tax reform winds gained momentum in late 2016 with the election of Donald Trump as president and retention of Republican control of both chambers of Congress. While there are still many moving pieces and a comprehensive tax reform plan is not yet to take shape as a legislative bill, key elements of such a plan had been proposed by the Trump presidential campaign (before the election) and Republican tax writers in Congress. Those proposals share the objective of reducing individual and corporate federal income tax rates, the latter to 15% (Trump campaign proposal) or 20% (House Republicans’ tax reform proposal or “House Blueprint”) from the current 35%.

Based in part on the likelihood of tax rate reduction and other business-friendly elements of expected tax and regulatory reform, the leading investment banks are anticipating increased U.S. economic growth in their forecasts for 2017.$ As the outlook for growth and investment returns in the United States strengthen compared to other markets, the prospects for increased foreign capital in-flow into the United States also appear favorable.

Nevertheless, visibility remains low at present on the contours of tax reform, and a key revenue-raising component of the House Blueprint, the so-called border adjustability or destination-based cash flow tax, faces fierce headwinds. For U.S. businesses and their tax advisors, this uncertainty, together with uncertainties arising from the G20/OECD BEPS project and other anti-tax avoidance initiatives globally, has started to force a rethink of tax planning strategies in matters such as structuring the ownership of intellectual property and foreign operations more generally (such a rethink among practitioners has caused some to consider postponing tax structuring based cash flow tax, faces fierce headwinds. For U.S. businesses and their tax advisors, this uncertainty, together with uncertainties arising from the G20/OECD BEPS project and other anti-tax avoidance initiatives globally, has started to force a rethink of tax planning strategies in matters such as structuring the ownership of intellectual property and foreign operations more generally (such a rethink among practitioners has caused some to consider postponing tax structuring and others to build in flexibility to unwind a transaction in the event of adverse tax changes).

For foreign investors in the U.S. capital markets, however, uncertainty surrounding current tax reform discussions should be less inhibiting. While the tax reform bill that eventually works its way through Congress will undoubtedly contain surprises, fundamental features of U.S. taxation of foreign capital have not been on the agenda.

Longstanding characteristics of the U.S. tax system have encouraged many forms of foreign investment. Indeed, the United States is sometimes characterized as a tax haven of sorts for inbound foreign capital. Two key aspects of the U.S.’s favorable treatment are its tax exemption of portfolio interest (“portfolio interest exemption” or “PIE”) and exemption of foreign persons’ gains from most dispositions of U.S. stocks and securities (although this latter characteristic also holds true in a number of developed countries particularly in Europe). Because of these features, foreign investors generally can derive portfolio interest and gains free of U.S. tax, without reliance on a tax treaty exempting U.S. tax on interest or capital gains.

In many other respects, of course, the United States is the opposite of a tax haven. As summarized in part below, dividends, whether from portfolio investment or not, are subject to 30% withholding tax unless reduced or eliminated by treaty. Other investments, such as in U.S. real estate or in U.S. businesses not held in corporate form, can cause foreign investors to be considered to be engaged in a U.S. trade or business (“ETB”), or to have a permanent establishment if a treaty applies, and subject to U.S. federal tax rates close to 35% (including a branch profits tax applied at 30% in the absence of reduction or elimination under treaty) for foreign corporations and close to 40% for foreign individuals on income effectively connected with the U.S. trade or business (“effectively connected income” or “ECI”). Consequently, the stakes are high for foreign investors to avoid being treated as engaged in a U.S. trade or business. For example, it is possible for a foreign investor in debt obligations of U.S. borrowers (directly or through a debt fund) to derive portfolio...
interest without U.S. tax, but if the foreign investor is treated as deriving the interest in connection with a lending business in the United States, the investor may be subject to the aforementioned high U.S. tax rates.

2 Extensive structuring can be required to preclude being engaged in U.S. trade or business or if effectively connected income is unavoidable, to minimize the net effective tax rates (using leveraged blockers, etc. where applicable). Clearly, characterization of the United States as a tax haven applies only to those types of investment that do not trigger such high levels of tax.

The first part of this article lays out the landscape of the U.S. taxation of foreign portfolio investment capital — fundamental features of which are expected to continue following current U.S. tax reform efforts. The discussion considers the possibility that current proposals — such as the proposal to limit corporate interest deductions to interest income contained in the House Blueprint, could affect relevant capital markets for foreign investors. For example, in the absence of interest deductions, U.S. companies may seek to issue preferred shares (paying dividends) instead of bonds (paying interest which may qualify for the portfolio interest exemption) for much of their capital needs.

2 Preferred shares are junior to debt, which may be a benefit to the issuer depending on considerations of the issuer’s balance sheet needs versus the risk appetite of the investor. Further, preferred stock may be advantageous to holders from a tax perspective. U.S. corporations may be eligible to exclude from their taxable income a percentage of dividends received from another U.S. corporation (generally a 70% dividends received deduction for portfolio investments). For holders that are U.S. individuals, dividends can also be treated as qualified dividend income taxable at capital gains rates rather than ordinary income rates under current rules.

The second part of this article examines specifically the portfolio interest exemption rules, including the sometimes unclear lines of demarcation between portfolio interest and interest derived from a lending business that is effectively connected income. Those rules would be relevant for investments in the United States loan market, which would appear likely to remain robust even if the corporate bond market were affected by tax reform.

‘FDAP’ Income and 30% Withholding Tax

U.S.-source fixed or determinable annual or periodic (“FDAP”) income is generally subject to 30% gross basis U.S. tax (or a lower applicable treaty rate). FDAP income is defined broadly to include all income included in gross income other than certain specified items, notably, gains derived from the sale of property (including market discount and option premiums). Thus, most types of investment income derived by foreign investors from U.S. investments — interest, dividends, rents, royalties, but not capital gains — constitute FDAP income to the extent not effectively connected with a U.S. trade or business. The current tax reform proposals would not change the 30% rate of U.S. withholding tax on FDAP income.

2 The sale of property exclusion from FDAP income itself has exceptions. Generally, these gains from the sale of property which are included in FDAP income are gain on a debt instrument attributable to original issue discount accrued during the foreign holder’s holding period, and gain from the sale or exchange of patents, copyrights, and similar intangible property to the extent such gain is from payments which are contingent on the use, productivity or disposition of such intangible property.

Interest and Dividends

While interest on debt obligations of U.S. borrowers is generally U.S.-source FDAP income, a prominent feature of the U.S. tax system for foreign investors is the portfolio interest exemption. Pursuant to this exemption, the U.S. forgoes imposition of the 30% gross basis tax (and related withholding obligation) on interest paid on debt obligations meeting certain requirements. This exemption does not apply to interest on bearer obligations, related-party interest (generally interest received by “10% shareholders”), certain contingent interest, or interest received by a bank on an extension of credit made pursuant to a loan agreement in the ordinary course of business. In addition, because the PIE is an exception from the 30% gross basis tax, the exemption does not apply to interest that is treated as effectively connected with a U.S. trade or business. The PIE rules, including the disparate treatment of interest that is ECI, are described further below.

Dividends on stock issued by U.S. corporations, on the other hand, are generally subject to the 30% gross basis tax regardless of whether the dividends are from portfolio investments. No equivalent of the PIE exists for foreign investors in connection with a U.S. trade or business. The PIE rules, including the portfolio interest exemption rules, are described further below.

The divergence in treatment of interest and dividends was reinforced in the Hiring Incentives to Restore Employment (“HIRE”) Act of 2010, which enacted §871(m) to prevent avoidance of withholding tax on dividends by use of derivative instruments giving rise to “dividend equivalent payments.” Prior to the implementation of §871(m), equity derivatives were used extensively by sophisticated foreign investors, which allowed them to obtain the economic equivalent of dividends without U.S. dividend withholding tax. For purposes of the gross basis tax and withholding, §871(m) treats the following payments (i.e., dividend equivalent payments) as U.S.-source dividends:

- any substitute dividend made pursuant to a securities lending or a sale-repurchase transaction that (directly or indirectly) is contingent upon, or determined by reference to, the payment of a dividend from sources within the United States;
- any payment made pursuant to a specified notional principal contract that (directly or indirectly) is contingent upon, or determined by reference to, a payment of a dividend from sources within the United States; and
- any other substantially similar payment determined by Treasury.

2 Unless otherwise indicated, all section references herein are to sections of the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder.

The statute became effective March 18, 2012, and while the effective date of final regulations under §871(m) issued in 2015 has been delayed, with a phase-in period in 2017 and 2018 due to the complexity of implementation (largely a burden on U.S. financial
institutions and hedge funds that have the potential withholding obligation as counterparties to foreign investors), it is clear that imposing withholding tax on U.S.-source dividends and dividend equivalent payments is a mainstay of U.S. tax policy. As noted above, there is a possibility of shift from debt to preferred stock issuance if interest deductibility is curtailed as part of tax reform. Preferred stock is generally not as tax efficient for foreign investors due to dividend withholding tax on dividends. In the absence of the PIE (or another domestic exemption such as may be applicable to foreign governments, as discussed below), investment income from U.S. stocks or securities would be subject to the 30% U.S. withholding tax rate. While investors in tax treaty jurisdictions may be eligible for a reduced withholding rate, proper attention to obtaining U.S. tax treaty benefits is required. For many foreign investors investing through funds, U.S. tax rules under §894 limiting treaty benefits in the case of investment income received through hybrid entities (discussed below) may be a trap for the unwary. In addition, foreign investors seeking to invest in U.S. loans as an alternative to corporate bonds need to be aware that if the investor is treated as engaged in a lending business in the United States, interest income may be treated as ECI and not as portfolio interest (discussed below).

One preferred stock investment context where dividends may be manageable is convertible preferred shares typically issued in the venture capital context. Portfolio companies of a venture capital fund typically do not pay significant dividends. Further, deemed dividends under §305(c) may be avoided because convertible preferred stock typically will have features that will cause it to be treated as other than preferred stock. This is, however, a limited context and in most cases preferred stock investment by a foreign investor will require analysis of U.S. withholding tax cost in respect of dividends.

Another possible impact on corporate bond issuance could result from tax reform that reduces the tax cost of repatriating companies' overseas cash. To the extent U.S. multinationals bring home cash from foreign subsidiaries, there may be less need for debt issuance.

Gain from Disposition of Stock or Securities
Under §865(a), gains from the sale of property such as stock or securities by a foreign person are generally treated as foreign-source income. Furthermore, as noted above, gains from the sale of property are generally excluded from treatment as FDAP income under the rules of §871 and §881. In addition, under a “securities trading safe harbor,” a foreign investor not characterized as a dealer can regularly effect transactions in U.S. stocks and securities without being treated as engaged in a U.S. trade or business. Specifically, under §864(b)(2)(A)(ii), “trade or business within the United States” does not include trading in stocks or securities for the taxpayer's own account, “whether by the taxpayer or his employees or through a resident broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions.”

For foreign investors utilizing derivatives, there is also a helpful source rule for notional principal contracts which generally treat income derived by a foreign person from the contract as foreign source (regardless of whether the counterparty is a U.S. person), with a notable exception for “dividend equivalent” payments as discussed below. See Reg. §1.863-1(a). In addition, under regulations the securities trading safe harbor from being engaged in a U.S. trade or business (discussed below) extends to “contracts or options to buy or sell stocks or securities, on margin or otherwise, for the account and risk of the taxpayer, and any other activity closely related thereto (such as obtaining credit for the purpose of effectuating such buying, selling, or trading).” Reg. §1.864-4(c)(2). Proposed regulations explicitly provide that the trading safe harbor applies to “effecting transactions in derivatives for the taxpayer's own account” where the taxpayer is an eligible non-dealer, and include notional principal contracts in the definition of “derivatives.” Prop. Reg. §1.864(b)-1(a), §1.864(b)-1(b)(2)(ii)(F).

The exclusion of gains from U.S. withholding tax, together with securities trading safe harbor, are important features for foreign investment in the United States. They allow, for example, offshore hedge funds with U.S. managers to derive gains from trading in stocks and securities without being subject to U.S. tax. The current tax reform proposals would not change these favorable features.

Rents from U.S. Real Property
Real property rents are FDAP income to the extent not effectively connected income. Foreign investors in substantial rent-generating U.S. real property will often be treated as engaged in a U.S. trade or business and the rental income from the property will be ECI taxed on a net basis. If the foreign investor is not engaged in a U.S. trade or business and, hence, is treated as deriving passive rental income rather than ECI, however, the rent will constitute FDAP income subject to 30% gross basis tax. Gross basis taxation can result in higher U.S. tax compared to taxation of net income after depreciation and other deductions at regular income tax rates, despite higher tax rates (e.g., maximum marginal federal rate of 39.6% for foreign individuals and 35% for foreign corporations). An investor that owns a single piece of net-leased real estate generally is not treated as engaged in a U.S. trade or business, and there is no bright-line rule delineating the point at which a foreign investor in U.S. real estate becomes engaged in a U.S. trade or business. In these cases, the foreign investor may elect under §871(d) to be taxed on all income from U.S. real estate as though it were effectively connected with a U.S. business. This election may become even more attractive if the net-basis U.S. tax rates are lowered under tax reform.

Gain on Disposition of U.S. Real Property
Under FIRPTA, gain or loss from a foreign person's disposition of U.S. real property interests is treated as gain or loss effectively connected with a U.S. trade or business and taxed on a net basis at the corporate or individual income tax rate as applicable. In the case of foreign corporations, an additional 30% branch profits tax may apply (subject to the application of a tax treaty) to the effectively connected earnings treated as a “dividend equivalent amount.”

Interests in U.S. real property include shares in a U.S. real property holding corporation (USRPHC). Thus, FIRPTA is a carve-out from the general exemption of foreign persons' gains from U.S. stocks and securities. Tax withholding is imposed as a FIRPTA enforcement mechanism. Generally, a person acquiring a U.S. real property interest from a foreign person is required to withhold and pay over to the Internal Revenue Service 15% of the transferor's amount realized, unless the acquirer receives a withholding certificate issued by the IRS.
allowing reduced or zero withholding (the general rate of withholding was increased from 10% to 15% with the enactment of the Protecting Americans from Tax Hikes Act of 2015 (“PATH Act”)). The foreign person recognizing gain on disposition of a U.S. real property interest is required to report the gain (as effectively connected income) on a U.S. tax return, and may claim the tax withheld as a credit.

Exceptions to FIRPTA exist to facilitate certain types of foreign investment. One exception applies to dispositions of shares of a publicly traded class of USRPHC stock (typically public REIT stock) by foreign persons that own, over a five-year testing period, no more than a specified percentage of such stock (formerly 5%, increased to 10% under the PATH Act). Another exception applies to sales of shares in a “domestically controlled REIT.” Further, new exceptions from FIRPTA were enacted in the PATH Act, including for dispositions of U.S. real property interests by qualified foreign pension funds.

Lowering the U.S. corporate and individual tax rates will affect considerations for foreign investors taxed on gains from the disposition of U.S. real property interests. Because such gains are treated under FIRPTA as effectively connected income and taxed at regular income tax rates, investors that do not qualify for an exception to taxation under FIRPTA will benefit from the rate reductions. Moreover, commenters have noted that lowering of U.S. corporate and individual income tax rates as part of tax reform could have the effect of reducing U.S. investor demand for REITs. If the public REIT market were to contract as a result of lowering tax rates, there would be reduced opportunities for foreign investors to invest in publicly traded U.S. REITs without FIRPTA tax. In view of the important function of REITs for foreign investment in U.S. real estate, however, it may be expected that REIT sponsors would continue to organize and manage REITs that allow other benefits for foreign investors (such as the FIRPTA exemption for qualified foreign pension funds).

Under the House Blueprint, it appears that the cumulative federal tax rate on $100 of rental income earned by a regular C corporation (taxed at 20%) and distributed to an individual shareholder (i.e., $80 possibly taxed at 16.5%) may be 33.2%, only slightly higher than the proposed maximum individual tax rate of 33%. However, the effect on REITs is difficult to determine at this point, and there is no specific discussion in the House Blueprint of the tax rate applicable to REIT distributions.

Foreign Governments

Under §892, foreign governments, defined under regulations to mean “only the integral parts or controlled entities of a foreign sovereign,” are generally exempt from U.S. tax on income from investments in U.S. stocks, bonds, or other U.S. securities, and from financial instruments held in the execution of governmental financial or monetary policy. Importantly, however, the exemption for foreign sovereigns does not extend to:

• income from the conduct of a “commercial activity,”
• income received by or from a “controlled commercial entity,” or
• income from the disposition of an interest in a controlled commercial entity.  

With careful structuring, foreign governments and sovereign wealth funds qualifying under that definition can avoid U.S. tax even on U.S.-source dividends and interest not qualifying for the portfolio interest exemption, as well as gains from the sale of stock of a REIT or other USRPHC — provided that the foreign sovereign does not control the REIT or other USRPHC. Current tax reform proposals would not affect the current rules under §892.

Restriction of Treaty Benefits Under §894(c)

An important element of the U.S. tax landscape for investors from many foreign countries is the restriction on treaty benefits under §894(c) for passive income paid to entities. In a nutshell, under regulations, if an entity receiving U.S.-source interest, dividends or royalties (e.g., a fund organized as a U.S. or foreign partnership) is “fiscally transparent” under U.S. law but not under the law of the jurisdiction of an investor in the entity, the investor is considered not to derive the income and hence is ineligible for the benefits of a tax treaty between the United States and the investor's jurisdiction. The regulations under §894(c) can be particularly troublesome because for an entity to be considered “fiscally transparent” in respect of an item of income under the laws of the investor's jurisdiction, such jurisdiction generally (with certain exceptions) must not only

• treat the income as current income of the investor, but also
• treat such income as having the same character and source as the underlying income paid to the entity.  

The principle of the §894(c) regulations has been incorporated in certain U.S. tax treaties, and in Art. 1(6) of the 2016 Model U.S. Tax Treaty.  

The §894(c) regulations can be a trap for investors that are resident in those foreign jurisdictions that treat limited partnerships as corporate (i.e., fiscally nontransparent) entities and that invest in U.S. securities through investment funds treated as partnerships for U.S. tax purposes. The issue is avoided to the extent the investment fund invests in debt securities giving rise to interest income qualifying for the portfolio interest exemption or the investor is a foreign government qualifying for the domestic exemption under §892. Current tax reform proposals would not change the operation of the regulations under §894(c).
The portfolio interest exemption was enacted more than 30 years ago in the Deficit Reform Act of 1984. Congress believed it important that U.S. businesses have the ability to raise capital in the Eurobond market without impairment caused by imposition of withholding tax.

See Staff of the Joint Commission on Taxation, 98th Cong., General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984 (1984) (referred to below as “JCT, General Explanation of DRA”), at 391. The JCT notes that Congress was aware that U.S. companies were utilizing Netherlands Antilles finance subsidiaries to issue bonds free of withholding tax on interest and believed they should be able to issue such bonds directly.

In general, for interest received by a foreign person to qualify for the PIE:

• the underlying obligations must be in registered form;
• the beneficial owner must provide a statement to the withholding agent that the beneficial owner is not a U.S. person;
• the foreign person must not be a “10% shareholder” of the obligor (applying certain attribution rules);
• the interest must not be contingent on certain attributes of the debtor or a related person; and
• it must not be received by a bank on an extension of credit made pursuant to a loan agreement entered into in the ordinary course of its trade or business.

In addition, because the PIE applies to interest income constituting FDAP, interest that is treated as effectively connected income is not portfolio interest and is taxed at regular corporate income tax rates.

A separate specific rule excludes interest received by a controlled foreign corporation from a related person.

Registered Form

To qualify for the portfolio interest exemption, interest must be paid on an obligation in registered form. Prior to an amendment made in the HIRE Act of 2010, debt instruments could qualify for the exemption even if not in registered form, provided that the instruments satisfied the rules for “foreign targeted bearer debt.” These rules made it possible for U.S. companies to issue Eurobonds — i.e., dollar-denominated bonds outside the United States — as bearer bonds consistently with the bond market in many non-U.S. jurisdictions. The HIRE Act eliminated the provisions for foreign-targeted bearer debt with a delayed effective date, such that bonds issued after March 18, 2012, may qualify for the PIE only if in registered form. The provisions for foreign-targeted bearer debt that were eliminated included not only the allowance of PIE but most exceptions that had existed from sanctions relating to bearer debt obligations, including deduction disallowance for interest on bearer debt. The elimination of exceptions from most sanctions available for foreign-targeted bearer debt is consistent with a major tax legislation which was enacted as part of the HIRE Act — namely, the Foreign Account Tax Compliance Act, or FATCA.

The foreign-targeted exception from the §4701 excise tax on issuers of bearer obligations was not eliminated by the HIRE Act and continues in effect.

Under regulations, an obligation is treated as an obligation in registered form if:

• the obligation is registered as to both principal and any stated interest with the issuer (or its agent) and transfer of the obligation may be effected only by surrender of the old instrument and reissuance to the new holder;
• the right to the principal of, and stated interest on, the obligation may be transferred only through a book entry system maintained by the issuer (or its agent) — i.e., a record of ownership that identifies the owner of an interest in the obligation; or
• it is registered as to both principal and any stated interest with the issuer (or its agent) and may be transferred by both of the above methods.

The definition of registered form is contained in Reg. §§5f.103-1(c), and has been set forth identically in Reg. §1.871-14(c)(1)(i). The definition in Reg. §§5f.103-1(c) is imported by cross-reference in Reg. §§5f.163-1(a), and applies to the portfolio interest rules by virtue of the cross-reference in §871(h)(7) to §163(f) for the meaning of “registered form.” Note that under Reg. §1.163-5T(d), pass-through certificates representing interests in pools of loans can be in registered form regardless of whether the underlying loans are in registered form, which helpfully provides a way for loans which may not meet the registered form definition to be structured so that the interest can qualify for the PIE.

An obligation that would otherwise be considered to be in registered form is not so considered if it can be converted at any time in the future into an obligation that is not in registered form. This poses an issue for many issuances of securities which are issued in registered form (either electronically under a “dematerialized book entry system” in a “clearing organization or as a physical global security which may be nominally in bearer form but is “immobilized” in a book entry system maintained by a clearing organization) but which may, under certain circumstances in the future, be issued to holders as physical bearer certificates. The IRS issued two notices, Notice 2006-99 and Notice 2012-20, which addressed the issue favorably for bond issuers.

Notice 2006-99 addressed an arrangement in which no physical certificates are issued and under which ownership interests in bonds are required to be represented only by book entries in a dematerialized book entry system maintained by a clearing organization. Notice 2006-99 provided that an obligation issued under such an arrangement would be treated as in registered form notwithstanding the ability of holders to obtain physical certificates in nonregistered form upon the termination of the business of the clearing organization without a successor.

Notice 2012-20 generally stated that regulations will be issued providing that an obligation will be considered to be in registered form if it is issued through either a dematerialized book entry system maintained by a clearing organization or a clearing organization system in which the obligation is effectively immobilized and maintained under a book entry system, despite the important exceptions that holders may obtain physical certificates in bearer form in the following circumstances:

• termination of the clearing organization's business without a successor,
• default by the issuer, or
• issuance of definitive securities at the issuer's request upon a change in tax law that would be adverse to the issuer but for the issuance of physical securities in bearer form.

Treatment of the obligation as in registered form would cease after the occurrence of one of the above circumstances if a holder, or a group of holders acting collectively, has a right to obtain a physical certificate in bearer form.

Beneficial Owner Statement Requirement
To qualify for the portfolio interest exemption, the U.S. person who would otherwise be required to deduct and withhold tax from the interest (i.e., the withholding agent) generally must receive a statement that the beneficial owner of the obligation is not a U.S. person. The statement must be made by either the beneficial owner of such obligation, or a securities clearing organization, a bank, or other financial institution that holds customers' securities in the ordinary course of its trade or business. Typically, the foreign beneficial owner will provide a statement on a Form W-8 or substitute form. Where the U.S. withholding agent receives the statement from a financial institution that holds customers' securities in the ordinary course, such financial institution is required to have on hand the foreign beneficial owner statement. While the statement requirement is satisfied if the U.S. withholding agent obtains the requisite statement before the expiration of the period of limitation for claiming a refund of tax with respect to such interest, because the withholding agent faces potential penalties for non-withholding if the statement is not timely received, U.S. withholding agents generally will require that the statement be furnished before the interest payment date.

Exclusion of Interest Received by 10% Shareholders
A “10% shareholder” is:
• in the case of an obligation issued by a corporation, any person who owns 10% or more of the total combined voting power of all classes of stock of such corporation entitled to vote, or
• in the case of an obligation issued by a partnership, any person who owns 10% or more of the capital or profits interest in such partnership (i.e., “10% partner”).

Importantly for funds with foreign partners, where shares of a borrower are owned by a partnership, the 10% shareholder test is applied at the level of the partners in the partnership.

For purposes of the 10% shareholder determination, ownership attribution rules apply. These rules generally treat stock owned by a corporation or partnership as owned proportionately by the shareholders or partners, and stock owned by a shareholder or partner as owned by the corporation or partnership (in the same ratio as the relevant shareholder's shareholding percentage or relevant partner's percentage interest in the partnership). In addition, ownership of options to acquire stock is treated as ownership of the underlying shares. However, if an option owner is treated as owning the underlying shares, the attribution rules do not again apply to treat another person as owning such shares. Rules similar to the above attribution rules are to be applied for purposes of determining whether a person is a 10% partner.

Exclusion of Contingent Interest
The exclusion of contingent interest applies to any interest if the amount of such interest is determined by reference to:
• any receipts, sales or other cash flow of the debtor or a related person;
• any income or profits of the debtor or a related person;
• any change in value of any property of the debtor or a related person; or
• any dividend, partnership distributions, or similar payments made by the debtor or a related person.

Related person for this purpose means any person who is related to the debtor within the meaning of §267(b) or §707(b)(1), or who is a party to any arrangement undertaken for a purpose of avoiding the exclusion from of contingent interest from the portfolio interest exemption. Related persons under §267(b) and §707(b)(1) generally include, for example, family members, certain trust relationships, and entities and owners related by greater than 50% ownership, and affiliated entities.

In addition, Treasury is authorized to identify by regulation other types of contingent interest excluded from the portfolio interest exemption, where a denial of the exemption is necessary or appropriate to prevent avoidance of federal income tax. Regulations were issued in connection with §871(m) providing that contingent interest does not qualify as portfolio interest to the extent that the interest is a dividend equivalent within the meaning of the section.
part on determinations under other relevant Code provisions. Some practitioners have under contexts in which a “trade or business” determination is made for analogous guideposts. For example, they might rely in part absence of concrete guidelines in the ETB context for foreign persons investing in loan securities, practitioner that a single loan to a U.S. borrower would cause the foreign lender to be considered engaged in a U.S. trade or business. At what point does a foreign person become engaged in a U.S. trade or business? There are no bright line rules for United States as part of a syndication) but still run afoul of the above exclusion from the portfolio income exemption. It should also be kept in mind that a foreign bank acq credit made by a bank pursuant to a loan agreement entered into in the ordinary course of its trade or business. Both nonbank Lending — Effectively Connected Income It is important to note that the scope of the ECI rules is broader than the exclusion from the portfolio interest exemption of extensions of loan agreement from other debt instr...
originates more than four U.S. loans per year should be viewed as insufficiently continuous and regular in its U.S. lending to be considered engaged in a U.S. trade or business. 35

35 See, e.g., Pinchot v. Commissioner, 113 F.2d 718 (2d Cir. 1940); Pasquel v. Commissioner, 12 T.C.M. 1431 (1953).


Courts have also held generally that mere investment in stocks and securities and management of those investments (even if much activity is required to manage those investments for the maximization of gains) do not give rise to a trade or business. 36 Furthermore, a favorable statutory safe harbor exists for foreign persons trading in stocks or securities for their own account. As a result under U.S. domestic law, even if the level of acquisitions and dispositions (or redemption at maturity) of stocks and securities were to go beyond investments and rise to the level of a trade or business, foreign persons may be treated as not engaged in a U.S. trade or business (and the pertinent income and gains may be treated as FDAP rather than ECI). Specifically, under §864(b)(2)(A)(ii), “trade or business within the United States” does not include trading in stocks or securities for the taxpayer's own account, “whether by the taxpayer or his employees or through a resident broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions.” 37

37 See Higgins v. Commissioner, 312 U.S. 212 (1941); Continental Trading, Inc. v. Commissioner, 265 F.2d 40 (9th Cir. 1959).

The above statutory safe harbor eliminates the need to distinguish between “investing” and “trading” for purposes of the ETB determination. On the other hand, the safe harbor raises the issue of how to distinguish between securities trading and loan origination. The relevant regulations describe the safe harbor as applying to “effecting of transactions in the United States in stocks or securities for the taxpayer's own account,” and define the term “securities” to mean “any note, bond, debenture, or other evidence of indebtedness, or any evidence of an interest in or right to subscribe to or purchase any of the foregoing.” 38 Based on the above definition, one might argue that even a lending business can fall under the safe harbor because it constitutes effecting transactions in notes or other evidence of indebtedness of the borrowers. As may be expected, the IRS takes the view that “trading” does not encompass lending. In a recent Chief Counsel Advice memorandum in which a foreign fund (through its U.S.-based management company) was found to be engaged in U.S. trade or business by reason of lending and other activities, the IRS reasoned that courts in other tax contexts define “trading” as purchasing and selling in secondary markets in order to generate profit based on changes in value of the traded assets. 39

38 See §1.864-2(c)(2)(i).

39 See, e.g., Pinchot v. Commissioner, 113 F.2d 718 (2d Cir. 1940); Pasquel v. Commissioner, 12 T.C.M. 1431 (1953);

Reg. §1.864-4(d)(5)(i) provides that a foreign person is considered to be engaged in the “active conduct of a banking, financing, or similar business in the United States” if a foreign person is engaged in business in the United States during the year and the activities of such business consist of any one or more of certain activities carried on in the United States, including, for example, “making personal, mortgage, industrial, or other loans to the public.” Although that regulation presupposes that the foreign person is engaged in a U.S. trade or business, the U.S. Tax Court has held that the regulation provides a “useful framework” for determining whether a foreign person is engaged in a U.S. trade or business in the first place. 40


In the absence of statutory definitions on point, U.S. tax practitioners have developed guidelines for acquisitions of notes of U.S. obligors intended to prevent the foreign acquirers from being considered to be engaged in a U.S. trade or business. These guidelines typically require, for example, a minimum waiting period (e.g., 24–48 hours or less) following the original lender's funding before the foreign acquirer purchases the loan, and that the foreign acquirer does not negotiate with or earn fees from the borrower. The guidelines developed by U.S. advisors typically have specific additional requirements if the foreign acquirer is related to the original lender, which are intended to prevent the attribution of the related lender's activities to the foreign acquirer. These guidelines have evolved over time with the markets and have become less restrictive in certain respects — e.g., the waiting period prior to purchase is now shorter, if required at all, and typically no longer requires that the purchaser be able to walk away from a purchase commitment upon an occurrence having material adverse effect. The evolution in guidelines generally reflects advisors' current view that the purchaser's negotiation with the borrower is a determining factor for engaging in a U.S. trade or business, but economic risk to the original lender in holding the loan should be less significant.

It may be noted that the peer-to-peer loan marketplace represents a recent market evolution that has attracted substantial involvement of hedge funds, banks and other institutional investors in the space. Negotiation with the borrower is generally absent or minimized and documents are standardized in this space. Consequently, the significance of negotiation as a factor in the ETB determination for foreign investors in this market is minimized.

Foreign persons investing in a U.S. loan or debt fund must ascertain whether the fund is following appropriate ETB guidelines for its acquisitions and operations. This is because under U.S. law, if a partnership is engaged in a U.S. trade or business, partners in the...
partnership are also considered to be engaged in a U.S. trade or business. Of course, if the U.S. federal tax rate is reduced to 20% as proposed in the House Blueprint and the foreign investor is able to fully claim a foreign tax credit for the U.S. tax in its residence jurisdiction, the investor may find that the U.S. tax burden is tolerable even if the investor is considered to be engaged in a U.S. trade or business and the interest is considered effectively connected income. Nevertheless, considering the foreign investor's U.S. tax reporting obligations if engaged in a U.S. trade or business and possible burdens of tax withholding by the partnership, qualification of interest for the portfolio interest exemption and elimination of U.S. tax in the first place is likely optimal.

§875.

CONCLUSION

The current political environment appears propitious for tax reform that may substantially reduce U.S. tax rates. This in turn has contributed to a bullish outlook for growth and enhanced investment returns in the United States, likely increasing prospects for increased capital inflow from foreign investors. Tax reform, while forecast to bring significant changes to U.S. tax law and perhaps affect certain capital markets (e.g., corporate bonds and REITs), is unlikely to materially change the overall framework for U.S. taxation of foreign investment. This stability will be beneficial for those investments that qualify for the portfolio interest exemption and capital gains exemptions/trading safe harbor. For those investments that don't qualify and are subject to U.S. tax as effectively connected income, the good news is that rates will be reduced and hence the U.S. tax may be more tolerable, particularly if the investor is a corporate investor entitled to a foreign tax credit in the investor's residence jurisdiction.

The unfortunate news is that the tax differential between investments qualifying for the portfolio interest exemption and those that give rise to effectively connected income will nevertheless continue to be substantial, and current ambiguity in determining when foreign investment in U.S. loans gives rise to ECI will likely persist. In addition, for foreign investors earning interest income which does not qualify for the PIE and is not ECI, potential traps and uncertainty in treaty application under the §894(c) regulations will likely continue. These uncertainties create risk and inefficiency, requiring close attention and advice for those contemplating investments that may run afoul of the rules. The lack of clarity has existed for some time and since this area is not addressed by current tax reform proposals, there is no expectation that they will be resolved in the near term. Regardless of the slow evolution of tax law, the markets continue to evolve both in traditional areas such as syndicated loans and also newer areas such as the peer-to-peer market. It is hoped that tax will prove to be less of a burden as the markets evolve and reform of the tax laws continues.
The Top 5 IP Mistakes Tech Startups Make

By John Boyd
May 21, 2011

It’s not easy being a technology startup. There are many challenges, including racing towards product and business development milestones, recruitment and management of employees, funding goals and restraints, fierce competition from big and small competitors, changing legal and regulatory landscapes – just to name a few.

One of the costliest mistakes a startup can make is mismanaging intellectual property rights. A company needs to not only manage its own IP rights, but also avoid those of third parties, including competitors. To be on the safe side, therefore, intellectual property management should include efficiently protecting the startup’s IP rights while also avoiding the IP rights of others.

Consider, for example, a typical smartphone that likely implicates each of the following IP rights:

- Utility patent rights
- Design patent rights
- Trademark rights
- Trade dress rights
- Trade secrets
- Copyrights

Regardless of a company’s size, effective and proper IP management is important to any emerging company. Smartphone makers Apple, RIM and Google’s Android partners have the
resources to address these issues with relative ease, but what about the startup or emerging company? Addressing and managing these issues can be a challenge for any company on a tight budget.

Intellectual property rights are important because they can be used to create a legal barrier to competition, establish a portfolio of assets that can be used to generate revenues through licensing or IP transfers or augment the value of a business for purposes of raising seed or venture funding.

It is critical to address these issues as efficiently and as cost effectively as possible.

Here are some of the common mistakes to avoid.

**Mistake #1: Not protecting commercially valuable innovations with patents**

Some companies choose not to protect innovations with patent filings for philosophical reasons – they don’t believe in patent protection despite the benefits provided by an enforceable patent portfolio.

Others never think about filing a patent application because they don’t believe patent protection is available. Others avoid seeking patent protection for valuable IP assets because of cost concerns, a legitimate issue that has to be balanced against what is lost by not having the protection.

What’s tragic about anyone who neglects to file a patent is that under U.S. patent law, any person who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent.”

Virtually “anything made by man under the sun” can be patentable, including software-related inventions and even certain business methods as confirmed by the Supreme Court’s decision in In re Bilski.

**Mistake #2: Spending too much money on patent filings.**

Patent application drafting, filing, prosecution and maintenance can be expensive, particularly when pursuing international filings.

It is important to be cost effective and efficient in managing patent assets because a lot of money and resources can be wasted on improperly managed IP assets. A good patent strategy considers the following issues:
1. Identify which innovations should be protected.
2. Identify in which foreign countries, if any, should patent applications be filed.
3. Prioritize the extent of the company’s investment in pursuing patents by understanding costs of filing patent applications and prosecuting them to issuance – and evaluating against budget constraints.
4. Focus on drafting the strongest most valuable patent claims.

Even large companies make mistakes in preparing, filing and maintaining patent applications. These mistakes include:

- Including just a single granted independent claim when a US patent application can include three independent claims and up to twenty in total for the same filing fee.
- Only including claims with “means plus function” limitations, which are now interpreted narrowly by courts and often create a costly litigation issue.
- Mistakenly pursuing claims that do not cover the product as sold by the company.
- Filing applications in foreign countries with a low likelihood of being granted, maintained or ever enforced. Most non-US applications require yearly fees that escalate over time and patent enforcement is often more difficult compared to the US.

It’s important to develop a strategy that reduces both legal and government fees. This usually requires working closely with a patent attorney or patent agent, but startup team members should be actively involved and do some of the initial work themselves to save money and result in a stronger patent. Companies can employ strategies to create cost effective synergies between inventors and patent attorneys.

**Mistake #3: Failing to include protective IP provisions in agreements with employees, contractors, suppliers and other parties.**

Startups often work with consultants, suppliers, partners and other parties.

All employees and members of the team (including executives and active board members and advisors) should be required to assign any and all intellectual property relating to the business of the startup or generated using the startup’s resources, and they should be obligated to assist the startup in protecting those IP rights.

To the extent any development work, R&D, engineering or design work is outsourced to non-employees, it’s important that the agreement with these non-employees include similar provisions assigning IP rights to the startup.

I’ve seen even large company’s pay for outsourced development or engineering work and overlook including provisions securing the IP rights generated. If you are hiring a third party to
develop something that could embody IP rights, it’s easy to include provisions to own such rights.

**Mistake #4 – Infringing someone else’s trademark rights.**

It is relatively easy to create trademark rights since common law rights can be generated by proper use of the mark in commerce.

Moreover, filing an application to register a trademark is also typically straightforward and worth doing — your startup’s name could become integral to the business and therefore very valuable.

However, third party trademark rights are often overlooked. Before investing resources in a new mark or brand, it’s important to do your diligence and conduct a full clearance search. The goal of a search is to evaluate whether your proposed trademark likely infringes similar marks being used by others.

Trademark infringement occurs when it is likely that consumers would be confused regarding the source or origin of a product or service. Infringement also exists when consumers would perceive an association between the services or products, or an affiliation or sponsorship between companies, that does not really exist. This is referred to as a “likelihood of confusion”. This includes other marks that might look, sound or means the same as your mark.

In addition, a company can be liable for trademark dilution by using a mark in a way that would lessen the uniqueness of a “famous trademark”.

Investigating a trademark’s availability by conducting a full trademark search greatly reduces the chances of being involved in a costly trademark infringement dispute.

Trademark infringement disputes often result in the infringer having to change its mark, including stopping any and all use of the infringing mark on business cards, brochures, products, packaging, letterhead, phone listings, signage, domain names and in all marketing, advertising, and promotional materials.

Having to stop using a mark that you’ve adopted and invested resources is costly and disruptive. Further, the infringer also has to incur the costs of re-branding under a new trademark. If a trademark infringement dispute results in federal court litigation, the infringer many be liable for three times the trademark owner’s damages, as well paying the other side’s attorney fees and costs.
Startups should reduce the likelihood of any infringement issues by having a clearance search performed before using a mark.

**Mistake #5 – Losing the ‘secret’ in ‘trade secret’: loose lips sink ships.**

A “trade secret” can be any information that is valuable and confidential.

Among the things that the law recognizes as trade secrets are formulae, compositions, patterns, compilations, programs, devices, methods, techniques, processes, blueprints, stock-picking formulae, customer lists, pricing information, and non-public financial data.

Virtually anything that a third party can or will leverage to your company’s detriment should be held close to the vest (unless you think it’s more valuable to get patent protection).

New customers, prices being offered, margins, potential deals, new hires — all may be valuable trade secrets. Here are some examples of how not protecting trade secrets can hurt a business:

- **Price leaks** can undermine your profits. Competitors may learn exactly how to undercut you. Prices offered to one customer might make another angry or provide them with a stronger negotiation position.
- **New hire leaks** can make recruiting even more expensive. The former employer may make counter offers or take other actions.
- **Describing a new product before launch** can put you at a competitive disadvantage. A competitor may beat you to market or innovate in front of you. That is, they may think of patentable improvements to your product before you do.
- **A premature public disclosure of a new product** can also be detrimental to procuring IP rights. You could forfeit foreign patent rights if publicly disclosed or offered for sale before filing a patent application.

Leaks can occur by leaving documents at unsecured locations, displaying documents on your laptop in public locations such as a coffee shop or on a commercial flight, using a cellphone in public, etc.

**Conclusion**

There are many things a startup can do to optimize its intellectual property assets and manage them strategically and cost effectively.

It helps to work with a lawyer who wants you to succeed and looks out for your interests. Whenever hiring a law firm, be sure to confirm which attorney(s) will be doing your work. The
ones doing the pitch are not always the ones that will be helping you.

Finally, in the end, if it sounds too good to be true, it likely is. Advertisements for inexpensive patents are often referring to design patents, which are different from (and usually a lot simpler than) utility patents. Moreover, patent application quality is important since the principal reason to spend the resources to prepare, file, and prosecute is to secure an enforceable patent.

There are many great patent attorneys and patent agents to work with. Be sure to find the right fit for your company.

Tags: Authors, Copyright, design patent, intellectual property, ip, john boyd, patent, start-up, technology, trade dress, trade secret, trademark

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There are currently 7 Comments comments.

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Mark Nowotarski May 21, 2011 10:00 pm

John,

Great article.

I would add the point that startups need to take into account timing in their patent strategies. On the one hand, some startups need that first patent as soon as possible in order to get initial funding. On the other hand, the more you can delay costs, the better. How you balance the two can have a big impact on your ultimate success.

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Christopher Hofman, European Domain Centre May 22, 2011 3:41 pm

Mistake #6 Not securing IP rights online. Essential domain names and social media domains should be secured as well, and before any TM application is published. So get your .com and facebook.com/trademark, twitter.com/trademark and youtube.com/trademark.

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TM Guy May 23, 2011 3:20 am

#3, failing to have employees and independent contractors sign invention assignments and non-disclosure agreements is by far the most common mistake I’ve seen.
David Boundy May 23, 2011 8:36 am

This is an interesting list — note how today’s patent law provides “bungee cords” that give a startup some opportunity to recover from many of these errors. However, most of these recovery opportunities depend on the existence of today’s 35 U.S.C. § 102(a), the prong of the grace period that lets a company develop and test an invention, and bring in investors and strategic partners. However, the America Invents Act totally repeals today’s § 102(a). It’s GONE under the new legislation.

Startups will be forced into trap #2, “Spending too much money on patent filings” because the new America Invents Act takes away time to “1. Identify which innovations should be protected” and “3. Prioritize the extent of the company’s investment” — the new America Invents Act puts small companies in a “use it or lose it” box, in which “file first, think later, and put your solvency at risk” (and put your patent attorney at risk of not getting paid) and “go patent naked” are the only alternatives.

“America Invents” is bad. Call your congressional representative, and have your clients call as well.

Gene Quinn May 23, 2011 12:17 pm

David-

What is your position on prior user rights? As you know, I am less concerned about first to file than you. I wonder whether first to file changes have simply been a Trojan Horse all along, with the intent always to seek prior user rights.

Cheers.

-Gene

patent enforcement May 23, 2011 7:08 pm

Lately some have come to view trade secrets as a viable alternative to expensive patent prosecution. But with trade secrets, as with everything else in life, you get what you pay for.

http://smallbusiness.aol.com/2010/05/10/how-to-file-a-patent/
Agreement Regarding Confidential Information, Intellectual Property, and Other Matters

In consideration of my employment or my continued employment by International Business Machines Corporation or one of its subsidiaries or affiliates (collectively, "IBM"), which I acknowledge is employment at will, and the payment to me of a salary or other compensation during my employment, I agree as follows:

1. I will not, without IBM's prior written permission, disclose to anyone outside of IBM or use in other than IBM's business, either during or after my employment, any confidential information or material of IBM, or any information or material received by IBM in confidence from third parties, such as suppliers or customers. If I leave the employ of IBM or at the request of IBM, I will return to IBM all property in my possession belonging to IBM or received by IBM from any third party, whether or not containing confidential information and whether stored on an IBM owned asset or a personally owned asset, including, but not limited to, electronic data, electronic files, diskettes and other storage media, drawings, notebooks, reports, and any other hard copy or electronic documents or records.

Confidential information or material of IBM is any information or material: (a) generated or collected by or utilized in the operations of IBM; received from any third party; obtained from an entity IBM acquired or in which IBM purchased a controlling interest (including information or material received by that entity from a third party); or suggested by or resulting from any task assigned to me or work performed by me for or on behalf of IBM; and (b) which has not been made available generally to the public, whether or not expressed in a document or other medium and whether or not marked "IBM Confidential" or with any similar legend of IBM or any third party. Confidential information or material may include, but is not limited to, information and material related to past, present and future development, manufacturing activities, or personnel matters; marketing and business plans; pricing information; customer lists; technical specifications, drawings, and designs; prototypes; computer programs; and databases.

2. (a) During my employment with IBM and for two years following the termination of my employment from IBM for any reason, I will not directly or indirectly within the Restricted Area solicit, or attempt to or participate or assist in any effort to solicit, any employee of IBM to be employed or perform services outside of IBM. For purposes of this Paragraph 2(a), “Restricted Area” shall mean any geographic area in the world in which I worked or for which I had job responsibilities, including supervisory responsibilities, during the last twelve (12) months of my employment with IBM. Also, for purposes of this Paragraph 2(a), “employee of IBM” shall mean any employee of IBM who worked within the Restricted Area at any time in the 12-month period immediately preceding any actual or attempted solicitation.

(b) I agree that during my employment with IBM and for one year following the termination of my employment for any reason, I will not directly or indirectly solicit for competitive business purposes any customer with which I was directly or indirectly involved as part of my job responsibilities during the twelve (12) months prior to the termination of my employment with IBM. This paragraph (2)(b) does not apply to any IBM employee whose work location as reflected in IBM records is within the state of California.

I acknowledge that IBM would suffer irreparable harm if I fail to comply with Paragraph 2(a) or (b), and that IBM would be entitled to any appropriate relief, including money damages, equitable relief and attorneys' fees.

3. I will not disclose to IBM, use in its business, or cause it to use, any information or material which is confidential to any third party unless authorized by IBM. In addition, I will not incorporate into any product used and/or sold by IBM, any copyrighted materials or patented inventions of any third party, unless authorized by IBM.

4. I will comply, and do all things necessary for IBM to comply, with (a) the laws and regulations of all governments under which IBM does business, (b) the provisions of contracts between any such government or its contractors and IBM that relate to intellectual property or to the safeguarding of information, and (c) IBM's corporate directives, including, without limitation, policies and information technology security standards issued from time to time as well as the IBM Business Conduct Guidelines as amended from time to time.

5. I hereby assign to IBM my entire right, title, and interest in any idea, concept, technique, invention, design (whether the design is ornamental or otherwise), computer programs and related documentation, other works of authorship, mask works, and the like (all hereinafter called "Developments"), hereafter made, conceived, written, or otherwise created solely or jointly by me, whether or not such Developments are patentable, subject to copyright or trademark protection or susceptible to any other form of protection which: (a) relate to the actual or anticipated business or research or development of IBM or its subsidiaries or (b) are suggested by or result from any task assigned to me or work performed by me for or on behalf of IBM or its subsidiaries. Also, I hereby assign to IBM my entire right, title and interest in any such Developments that were suggested by or resulted from any task assigned to me or work performed by me for or on behalf of any entity that IBM acquired or in which IBM purchased a controlling interest.

In the case of any "other works of authorship", such assignment shall be limited to those works of authorship which meet both conditions (a) and (b) above.

California Notice: For Developments subject to California law, notwithstanding anything above to the contrary, I understand that this assignment does not apply to a Development which qualifies fully under the provisions of Section 2870 of the California Labor Code.

The above provisions concerning assignment of Developments apply to Developments created while employed by IBM in an executive, managerial, professional, product or technical planning, technical, research, programming, or engineering capacity (including development, product, manufacturing, systems, applied science, and field engineering) or otherwise.

Excluded are any Developments that I cannot assign to IBM because of prior agreement with

which is effective until ________________ (Give name and date or write "none").

I acknowledge that the copyright and any other intellectual property right in designs, computer programs and related documentation, and other works of authorship, created within the scope of my employment with IBM or any entity that IBM acquired or in which IBM purchased a controlling interest, belong to IBM by operation of law.

6. In connection with any of the Developments assigned by Paragraph 5: (a) I will promptly disclose them in writing to the IBM Intellectual Property Law Department; and (b) I will, on IBM's request, promptly execute a specific assignment of title to IBM or its designee, and do anything else reasonably necessary to enable IBM or such designee to secure a patent, copyright or other form of protection therefor in the United States and in other countries. In addition, I agree to promptly notify the IBM Intellectual Property Law Department in writing of any patent or patent application in which I am an inventor but which is not assigned by Paragraph 5 and which discloses or claims any Development made, conceived, or written while I am employed by IBM. I also agree to promptly notify the IBM Intellectual Property Law Department if, after I leave the employ of IBM, I am contacted by anyone or any entity outside of IBM regarding any transaction, legal or governmental proceeding, litigation or other legal dispute concerning or relating to any of the Developments assigned by Paragraph 5.

Updated October 2013
7. IBM and its licensees, successors, or assigns (direct or indirect) are not required to designate me as an author of any Development which is subject to Paragraph 5, when it is distributed, publicly or otherwise, or to secure my permission to change or otherwise alter its integrity. I hereby waive and release, to the extent permitted by law, all rights in and to such designation and any rights I may have concerning modifications of such Developments.

I understand that any rights, waivers, releases, and assignments herein granted and made by me are freely assignable by IBM and are for the benefit of IBM and its subsidiaries, licensees, successors, and assigns.

8. I have identified all Developments not assigned by Paragraph 5 in which I have any right, title, or interest, and which were previously made or conceived solely or jointly by me, or written wholly or in part by me, but neither published nor filed in any patent office.

If I do not have any to identify, I have written "none" on this line: ____________________________________________________________

9. I consent to IBM (or authorized services providers on IBM’s behalf) collecting, using, storing, transferring, and making available information about me, such as my name, photo, contact information, career development and skills, in internal and external IBM databases or websites (including, without limitation, its online directories) anywhere in the world for legitimate business purposes.

IBM provides numerous opportunities for social computing through blogs, wikis, social networks, virtual worlds and other social media. I agree to comply with all IBM policies and practices regarding use of social computing tools and I understand that I am personally responsible for the content I post on any social computing tools (whether on IBM’s internal platforms or on third party sites) and that any information I post, including any of my personal information, may be made broadly available to others, potentially inside or outside IBM, who have access to these tools.

10. The term "subsidiaries", as used in this Agreement, includes any entity owned or controlled, directly or indirectly, by International Business Machines Corporation.

11. The term "employment at will", as used in this Agreement, means the employment at the mutual consent of both me and IBM. Accordingly, either IBM or I can terminate the employment relationship at will, at any time, with or without cause or advance notice.

12. This Agreement supersedes all previous oral or written communications, representations, understandings, undertakings, or agreements relating to the subject matter hereof, except as expressly agreed otherwise by IBM in writing upon my hire or transfer of employment to IBM. Any waiver of a term in this Agreement and any amendment to this Agreement may only be made in a writing signed by the Senior Vice President of Human Resources for International Business Machines Corporation and myself.

13. This Agreement shall be governed by the laws of the State of New York, as if it had been executed and fully performed within such state, without regard to choice of law principles of New York or any other state. If any provision of this Agreement is unenforceable at law, the remainder shall remain in effect.

14. I recognize that any violation of my obligations described herein would cause IBM to suffer irreparable harm and can result in disciplinary action, including dismissal from IBM, and any other appropriate relief for IBM including money damages, equitable relief and attorneys fees.

My agreement, and my acknowledgment of receipt of a copy of this Agreement, are indicated by my signature below.

Employee’s Full Name (please print)       Employee’s Signature       Employee Serial       Date

(If you have entered “none” in Paragraph 8, do not fill in this section.)

The following are Developments not covered by Paragraph 5, in which I have any right, title, or interest, and which were previously conceived or written either wholly or in part by me, but neither published nor filed in any Patent Office:

Description of Documents (if applicable):

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Signed: _______________________________
Employee’s Full Name
Date: _______________________________

(If you wish to have any of the above made, conceived, or written before your employment by IBM. You should not disclose them in detail, but identify them only by the titles and dates of documents describing them. If you wish to interest IBM in any of them, you may contact the Intellectual Property and Licensing Department at Corporate Headquarters, which will provide you with instructions for submitting them to IBM.)

Updated October 2013
In consideration of my employment or my continued employment by International Business Machines Corporation or one of its subsidiaries or affiliates (collectively, "IBM"), which I acknowledge is employment at will, and the payment to me of a salary or other compensation during my employment, I agree as follows:

1. I will not, without IBM's prior written permission, disclose to anyone outside of IBM or use in other than IBM's business, either during or after my employment, any confidential information or material of IBM, or any information or material received by IBM in confidence from third parties, such as suppliers or customers. If I leave the employ of IBM or at the request of IBM, I will return to IBM all property in my possession belonging to IBM or received by IBM from any third party, whether or not containing confidential information and whether stored on an IBM owned asset or a personally owned asset, including, but not limited to, electronic data, electronic files, diskettes and other storage media, drawings, notebooks, reports, and any other hard copy or electronic documents or records.

2. (a) During my employment with IBM and for two years following the termination of my employment from IBM for any reason, I will not directly or indirectly within the Restricted Area solicit, or attempt to or participate or assist in any effort to solicit, any employee of IBM to be employed or perform services outside of IBM. For purposes of this Paragraph 2(a), "Restricted Area" shall mean any geographic area in the world in which I worked or for which I had job responsibilities, including supervisory responsibilities, during the last twelve (12) months of my employment with IBM. Also, for purposes of this Paragraph 2(a), "employee of IBM" shall mean any employee of IBM who worked within the Restricted Area at any time in the 12-month period immediately preceding any actual or attempted solicitation.

(b) I agree that during my employment with IBM and for one year following the termination of my employment for any reason, I will not directly or indirectly solicit for competitive business purposes any customer with which I was directly or indirectly involved as part of my job responsibilities during the twelve (12) months prior to the termination of my employment with IBM. This paragraph 2(b) does not apply to any IBM employee whose work location as reflected in IBM records is within the state of California.

I acknowledge that IBM would suffer irreparable harm if I fail to comply with Paragraph 2(a) or (b), and that IBM would be entitled to any appropriate relief, including money damages, equitable relief and attorneys' fees.

3. I will not disclose to IBM, use in its business, or cause it to use, any information or material which is confidential to any third party unless authorized by IBM. In addition, I will not incorporate into any product used and/or sold by IBM, any copyrighted materials or patented inventions of any third party, unless authorized by IBM.

4. I will comply, and do all things necessary for IBM to comply, with (a) the laws and regulations of all governments under which IBM does business, (b) the provisions of contracts between any such government or its contractors and IBM that relate to intellectual property or to the safeguarding of information, and (c) IBM's corporate directives, including, without limitation, policies and information technology security standards issued from time to time as well as the IBM Business Conduct Guidelines as amended from time to time.

5. I hereby assign to IBM my entire right, title, and interest in any idea, concept, technique, invention, design (whether the design is ornamental or otherwise), computer programs and related documentation, other works of authorship, mask works, and the like (all hereinafter called "Developments"), hereafter made, conceived, written, or otherwise created solely or jointly by me, whether or not such Developments are patentable, subject to copyright or trademark protection or susceptible to any other form of protection which (a) relate to the actual or anticipated business or research or development of IBM or its subsidiaries or (b) are suggested by or resulting from any task assigned to me or work performed by me for or on behalf of IBM or its subsidiaries. Also, I hereby assign to IBM my entire right, title and interest in any such Developments that were suggested by or resulted from any task assigned to me or work performed by me for or on behalf of any entity that IBM acquired or in which IBM purchased a controlling interest.

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7. IBM and its licensees, successors, or assigns (direct or indirect) are not required to designate me as an author of any Development which is subject to Paragraph 5, when it is distributed, publicly or otherwise, or to secure my permission to change or otherwise alter its integrity. I hereby waive and release, to the extent permitted by law, all rights in and to such designation and any rights I may have concerning modifications of such Developments.

I understand that any rights, waivers, releases, and assignments herein granted and made by me are freely assignable by IBM and are for the benefit of IBM and its subsidiaries, licensees, successors, and assigns.

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If I do not have any to identify, I have written "none" on this line: ______________________________

9. I consent to IBM (or authorized services providers on IBM’s behalf) collecting, using, storing, transferring, and making available information about me, such as my name, photo, contact information, career development and skills, in internal and external IBM databases or websites (including, without limitation, its online directories) anywhere in the world for legitimate business purposes.

IBM provides numerous opportunities for social computing through blogs, wikis, social networks, virtual worlds and other social media. I agree to comply with all IBM policies and practices regarding use of social computing tools and I understand that I am personally responsible for the content I post on any social computing tools (whether on IBM’s internal platforms or on third party sites) and that any information I post, including any of my personal information, may be made broadly available to others, potentially inside or outside IBM, who have access to these tools.

10. The term "subsidiaries", as used in this Agreement, includes any entity owned or controlled, directly or indirectly, by International Business Machines Corporation.

11. The term "employment at will", as used in this Agreement, means the employment at the mutual consent of both me and IBM. Accordingly, either IBM or I can terminate the employment relationship at will, at any time, with or without cause or advance notice.

12. This Agreement supersedes all previous oral or written communications, representations, understandings, undertakings, or agreements relating to the subject matter hereof, except as expressly agreed otherwise by IBM in writing upon my hire or transfer of employment to IBM. Any waiver of a term in this Agreement and any amendment to this Agreement may only be made in a writing signed by the Senior Vice President of Human Resources for International Business Machines Corporation and myself.

13. This Agreement shall be governed by the laws of the State of New York, as if it had been executed and fully performed within such state, without regard to choice of law principles of New York or any other state. If any provision of this Agreement is unenforceable at law, the remainder shall remain in effect.

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Signed: ____________________________

Employee’s Full Name

Date: ____________________________

(It is in your interest to establish that any of the above were made, conceived, or written before your employment by IBM. You should not disclose them in detail, but identify them only by the titles and dates of documents describing them. If you wish to interest IBM in any of them, you may contact the Intellectual Property and Licensing Department at Corporate Headquarters, which will provide you with instructions for submitting them to IBM.)

Updated October 2013
Successful high technology companies recognize that a comprehensive intellectual property portfolio can be of substantial value. One key component of the intellectual property portfolio is patents. A patent is a right granted by the government that allows a patent holder to exclude others from making, using, selling, offering to sell, or importing that which is claimed in the patent, for a limited period of time.

In view of this right many companies recognize that a well-crafted patent portfolio may be used for a variety of business objectives, such as bolstering market position, protecting research and development efforts, generating revenue, and encouraging favorable cross-licensing or settlement agreements. For companies that have developed original technology, a patent provides a barrier against a competitor’s entry into valued technologies or markets. Thus, many start-up companies that have developed pioneering technology are eager to obtain patent protection. However, to develop an effective patent portfolio, a start-up company should first devise a patent portfolio strategy that is aligned with the company’s business objectives.

A patent portfolio strategy may vary from company to company. Large companies that have significant financial resources often pursue a strategy of procuring and maintaining a large quantity of patents. These companies often use their patent portfolios for offensive purposes, e.g., generating large licensing revenues for the company. For example, IBM generates close to $1 billion dollars a year from licensing its patent portfolio.

In contrast, for most start-up companies, developing and building a comprehensive patent portfolio can be prohibitively expensive. However, with an understanding of some basic principles of patent strategies and early planning, a start-up company can devise and execute a patent strategy to develop a cost-effective patent portfolio. For example, a start-up company can develop an effective patent portfolio by focusing on obtaining a few quality patents that cover key products and technologies, in alignment with their business objectives.

A patent strategy involves a development phase and a deployment phase. The development phase includes evaluation of patentable technologies and procurement of patents. A deployment phase includes the competitive analysis, licensing, and litigation of patents. For most start-ups the initial focus is on the development phase. Starting in the development phase, the patent strategy identifies the key business goals of the company. Clear business goals provide a long-term blueprint to guide the development of a valuable patent portfolio.

With the goals identified, the evaluation process begins by mining and analyzing intellectual assets within the company. In this process, a company organizes and evaluates all of its intellectual assets, such as its products, services, technologies, processes, and business practices. Organizing intellectual assets involves working with key company executives to ensure that the patent strategy closely links with the company’s business objectives. Often, these individuals assist with developing a budget for the patent strategy, as well as making arrangements to get access to resources for executing the patent strategy.

Organizing intellectual assets also involves gathering key company documented materials. Examples of documented materials include business plans, company procedures and policies, investor presentations, marketing presentations and publications, product specifications, technical schematics, and software programs. It may also include contractual agreements such as employment agreements, license agreements, non-disclosure and confidentiality agreements, investor agreements, and consulting agreements. Such materials provide information used to determine ownership issues and the scope of patent or other intellectual property rights that are available for the company.

Organizing intellectual assets also includes identifying and interviewing all individuals who are involved with creating or managing the company’s intellectual assets. These interviews uncover undocumented intellectual assets and may be used to evaluate patent and other intellectual property issues. For example, events and dates that may prevent patentability of some intellectual assets may be identified. Likewise, co-development efforts that may indicate joint ownership of intellectual assets may also be
identified. Identifying such issues early on helps prevent wasteful expenditures and allows for effective management of potentially difficult situations.

After organizing information about the intellectual assets, each asset should be evaluated to determine how best to protect it. This evaluation includes determining whether the intellectual asset is best suited for patent protection or trade secret protection, whether it should be made available to the public domain, or whether further development is necessary. It also involves determining whether a patent will be of value when it issues, which is typically approximately 18 to 36 months after it is filed, and whether infringement of that patent would be too difficult to detect.

The evaluation phase may also provide an opportunity to determine whether obtaining protection in jurisdictions outside of the United States is prudent. International patent treaties signed by the U.S. and other countries or regions allow for deferring actual filing of patent applications outside the U.S. for up to one year after the filing of a U.S. application. Thus, planning at this early stage may include identifying potential countries or regions to file in and then begin financially preparing for the large costs associated with such filings.

The evaluation phase also provides an opportunity to determine whether a patentability or patent clearance study is necessary. Such studies are used to determine the scope of potentially available protection or whether products or processes that include or use an intellectual asset potentially infringe third-party rights. This evaluation may also involve identifying company strengths with regard to its patent portfolio as well as potential vulnerable areas where competitors and other industry players have already established patent protection.

While the evaluation phase is in progress, the company can move into the procurement phase. In the procurement phase of the patent strategy, a start-up company builds its patent portfolio to protect core technologies, processes, and business practices uncovered during the audit phase. Typically, a patent portfolio is built with a combination of crown-jewel patents, fence patents, and design-around patents.

Crown-jewel patents are often blocking patents. One or more of these patents is used to block competitors from entering a technology or product market covered by the patent. Fence patents are used to fence in, or surround, core patents, especially those of a competitor, with all conceivable improvements so the competitor has an incentive to cross-license its patents. Design-around patents are based on innovations created to avoid infringement of a third-party patent and may themselves be patentable.

For most start-ups, costs for pursuing patent protection are a concern because financial resources are limited. Hence, most start-up companies begin the procurement phase by focusing on procuring one or more crown-jewel patents. To do this, the start-up company works with a patent attorney to review the key innovations of the company’s product or services as identified during the evaluation phase. The patent attorney and start-up company consider the market for the innovation in relation to the time in which the patent would typically issue. This analysis helps identify the subject matter for the crown-jewel patents.

Once the subject matter is identified, in some instances a prior art search prior to filing provisional or utility patent applications may be conducted to determine what breadth of claim coverage potentially may be available. However, a company that considers such prior art searches should first consult with the patent attorney to understand the risks associated with them so that appropriate business decisions can be made.

Next, a strategic business decision is made as to whether to file a provisional patent application or a full utility, or non provisional, patent application for the identified subject matter. A provisional patent application is ideally a robust description of the innovation, but lacks the formalities of a full utility patent application.

The provisional application is not examined by the U.S. Patent and Trademark Office (“USPTO”) and becomes abandoned 12 months after filing. Within the 12 months, an applicant may choose to file one or more utility applications based on the subject matter disclosed in the provisional application, and therefore, obtaining the benefit of the provisional application filing date. However, the later filed utility application must be fully supported by the disclosure of the provisional application in order to claim the benefit of its earlier filing date. Under U.S. patent law, this means the provisional application must satisfy the requirements of written description, enablement, and best mode, as is required for the utility application.

If the provisional application is filed with sufficient completeness to support the claims of subsequently filed utility applications, the provisional application provides a number of benefits. First, as previously discussed, one
or more utility applications may claim the benefit of the provisional patent application filing date. The early filing date may not only protect the crown jewel subject matter, but may also protect some critical surrounding subject matter, hence increasing the overall value of the patent portfolio. Second, the provisional application provides an earlier effective prior art date against others who may be filing patent applications on similar inventions.

Third, provisional patent application filings costs are currently $80 to $160 versus $370 to $740 for a full utility application. Fourth, inventors often take it upon themselves to draft the core of a provisional application with the guidance of a patent attorney and request that the patent attorney spend time simply to review the application to advise on the legal requirements and potential pitfalls. This means that the attorney fees for a provisional patent application may be substantially less than attorney fees associated with preparing a full utility application.

Fifth, the provisional patent application precludes loss of patent rights resulting from activity and public disclosures related to the target inventions. For example, almost every country except the U.S. has an absolute novelty requirement with regard to patent rights. That is, in these countries, any public disclosure of the target invention prior to filing a patent application results in a loss of patent rights. For many start-ups this can be somewhat disconcerting. On the one hand, the start-up may want to preserve the right to pursue patent protection outside of the U.S. On the other hand, immediate business opportunities and time demands often conflict with the timely preparation and filing of a utility patent application. However, through international treaties, most countries will recognize a filing date of a provisional application filed in the U.S. Thus, the applicant may be able to file for a provisional application and convert it to a utility application that can be filed in the U.S. and other treaty countries within 12 months.

Although the provisional application provides a cost-effective tool for creating a patent portfolio, filing a provisional application does not end the portfolio development process. Once the provisional application is filed, and when finances and time permit, the company should be diligent in filing utility applications that may claim the benefit of the provisional application filing date. This is true for a number of reasons.

First, the provisional application is not examined and will go abandoned 12 months after it is filed. Therefore, the filing of the provisional application provides no more than a filing date placeholder for the subject matter it discloses. Second, the utility application costs more than the provisional applications to prepare and file. Thus, a company must adequately budget and plan for this expense. Third, as time passes the time available for patent matters may become more difficult in view of product cycles, marketing launches, and sales events. Hence, budgeting time for planning and reviewing filings of subsequent utility applications based on a provisional application becomes important. Fourth, products and technologies continually evolve and change, often soon after the filing of a provisional application. Therefore, a company must continually revisit their patent portfolio and strategy to reassess whether the provisional application can provide sufficient protection in view of further development.

Over time, companies that value their intellectual assets set aside time, money and resources to further enhance their patent portfolio. To do this a company may move to the deployment phase. In the deployment phase, the company begins the competitive analysis process to study industry trends and technology directions, especially those of present and potential competitors. The company may also evaluate patent portfolios of competitors and other industry players.

Also in the deployment phase, the company may incorporate the licensing process. Here, the company determines whether to license or acquire patents from others, particularly where the patent portfolio is lacking protection and is vulnerable to a third-party patent portfolio. Alternatively, in the licensing process the company determines whether to license or cross-license its patent portfolio to third parties. The deployment phase may also include the litigation process. Here, the company determines whether to assert patents in a lawsuit against third party infringers.

In summary, for most start-up companies, devising a patent portfolio development strategy early on can be a wise investment to help the company develop and build a strong foundational asset on which to grow. This investment will likely reward the company with positive returns for years to come.

Rajiv Patel (rpatel@fenwick.com) is a partner in the intellectual property group of Fenwick & West LLP. His practice includes helping companies develop, manage, and deploy patent portfolios. He is registered to practice before the U.S. Patent and Trademark Office. Fenwick & West LLP has offices in Mountain View and San Francisco, California.

It is on the web at www.fenwick.com.
Preparing for and Ordering a Trademark Clearance Search Report

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June, 2011
Preparing for and Ordering a Trademark Clearance Search Report

Perhaps one of the most important tasks for the trademark lawyer occurs prior to filing a trademark application. The background research that goes into assisting clients with the evaluation of proposed trademarks and in developing a description of goods and services cannot be overstated.

Initial Questions

In this paper we will deal with the ordering, analysis and opining on a full trademark clearance search. However, screening searches can be equally as important. Arguably, doing adequate screening searching before asking your client to invest in a full search might be more important than simply ordering a full search for every mark that your client proposes. In a few minutes on the PTO website, for example, you could be able to determine that a trademark that your client wants to use is simply not available because it is registered for the same goods and services by another party. That very small investment of time will have saved your client significant dollars in more extensive research that would have yielded the same result. So the first step in any clearance searching process is to verify, at least for domestic trademarks, that the trademark is not already registered to another party, or claimed in another party's application.

Identify the Trademark

Next, it is important to identify the trademark. This sounds simple, but there are a number of issues to consider. Make sure that you know how the trademark is supposed to be pronounced, if it has any meanings in the English language other than any meaning apparent from the word itself, if any translations are known (and you might even wish to translate the mark yourself into relevant languages). It is also important to know if the word is spelled correctly or if it is an intentional misspelling. Further, you should understand whether the trademark is being used as a word mark or as part of a word and design mark.

(Note – there are unusual trademarks that might not be good candidates for currently available searching techniques, such as sound marks. Marketing professionals may be of assistance in this type of situation. Further, if a trademark contains movement, consider whether you need to search variations of the mark to cover all of the visual impressions imparted by the trademark. Finally, if the mark itself is trade dress (i.e., a drawing of a shape), you will want to work with the search company to determine your searching options.)

If the mark is already in use or if marketing materials have been prepared, you should review those materials as you identify the mark(s) at issue. (This may also be an opportunity to consider whether these materials will serve as suitable specimens later if your client decides to file an application to register the trademark. You can also review how your client is using the mark so that you can advise the client on whether the use is proper.)

You should ask your client if it has registered or would like to register a domain associated with the proposed trademark. The full search will contain data on domains as well as web content, so competitors should be easy to identify.
Identify the Goods and Services

Once you have identified the trademark, you must identify the corresponding goods and services. There are two different descriptions that you will need to create: one for the search report and one for the federal trademark application if you file one. The description for the search report can, and in most instances should, be much broader than the description that you might use for an application. The reason for this is to ensure that you are instructing the search vendor to look for marks in the industry or more general marketplace surrounding your client's proposed trademark use. If you are too narrow in your description of goods and services at the searching level, there is a risk that the searching vendor will not uncover relevant trademark or trade name use that your client should be aware of as you work on this due diligence. Furthermore, there are certain industries in which various searching vendors have created searching products that allow you to search a general industry for trademark use without having to identify a specific description of goods and services at all. Examples include insurance and financial services and pharmaceuticals.

If your client has plans to expand its business under the mark through licensing or otherwise, you should include those goods and services in the search as well. This will help to avoid a blocking reference later, after the new brand is launched.

Geographic Scope of Use

The next important issue to consider is your client's proposed scope of geographic use. The search we will analyze in the boot camp will be a domestic trademark search. However, many searching vendors offer regional or global trademark search reports at various levels. You might also need to contact a local agent in a particular country if detailed searching is desired. Some countries have on-line trademark databases available for searching, as does the Office for Harmonization in the Internal Market (this is the agency that registers European or Community Trademarks).

Special Concerns

There also may be some special considerations you will want to review. You may, for example, want to let the searching vendor know about a particular focus you would like the search to take, if the mark has a special meaning in the industry, if there is a concern about a particular third party, or about other details that may be relevant to the searching process.

The mark may also include a design element. If so, your client may wish to order a design mark search. Best practices for analyzing design search reports are beyond the scope of this paper. You should, however, consider a separate design mark search (or a combined word mark/design mark search) if the design elements will be used or registered as a stand-alone trademark.

Note: ownership of the artwork that is a part of a design mark is also crucial to determine. Your client may be able to register a trademark in a particular design and not actually own the underlying artwork. This stage is a good time to verify that your client owns the artwork, either because it was created in house or the appropriate rights were assigned or licensed to the client.
You also should address ethical concerns before undertaking to order and analyze a trademark search for a client. While your legal malpractice carrier may have specific guidelines it wants you to follow, as a general matter, you should evaluate whether you have any clients in the same or similar industry with trademarks that might bump up against the trademark being proposed in the new engagement. For example, even without an identified adverse party, it is important to run a conflicts check that includes the client's proposed mark.

**Reviewing Options**

Finally, you will want to select a form of delivery of the search report. The traditional method is to obtain paper-bound copies these voluminous search reports which, while useful in some ways, may not be the best use of natural resources at the high volume your firm might use them. Different practitioners are more and less comfortable with replacing paper reports with technology. Depending on your own work style, you may want to consider obtaining electronic versions of the search report either in addition to or in lieu of the paper version. Many search vendors have software that allows you to review search reports online and to collaborate regarding your review, both internally and with your client. These types of software programs also make creating charts and other formatting considerations very simple (whereas in years past, our assistants had to manually create tables of cited trademarks in search reports so that we could evaluate them, we now can create those tables with a few clicks of the mouse).

In assisting clients with the clearance process, communicate the value of allowing enough lead time. Without sufficient time to do the desired research, the client will be stuck with either insufficient information or additional fees to expedite delivery of the search report.
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Legal Considerations

**Duty to Conduct a Trademark Search**

There is no *absolute* duty to conduct a trademark search. However, the failure to conduct a search may be considered evidence of bad faith if other facts suggest willful ignorance or substantial indifference on the part of the party adopting and using the trademark. See, e.g., *Tamko Roofing Prods. v. Ideal Roofing*, 282 F.3d 23 (1st Cir. 2002) (failure to search in combination with other facts warrant conclusion that defendant’s infringement was deliberate and willful, entitling plaintiff to attorney’s fees); *Star Indus. v. Bacardi & Co.*, 412 F.3d 373 (2d Cir. 2005) (failure to search, or reliance on inadequate search, is not evidence of bad faith unless motivated by intent to cause confusion or exploit senior user’s good will or reputation); *SecuraComm Consulting v. Securacom*, 166 F.3d 182 (3d Cir. 1999) (failure to search, without more, does not establish “willful ignorance akin to willful infringement”).

**Reliance on Opinion of Counsel as a Defense to Willfulness or Bad Faith**

If a party is accused of willfully infringing another’s mark or acting in bad faith, it may decide to defend itself on the ground that it relied on advice of counsel in selecting and adopting the trademark at issue. Should it so do, the issue will likely turn on what counsel advised and whether the defendant’s reliance on the advice was reasonable. For example, did the defendant give its legal counsel all of the pertinent information necessary to ensure a complete and comprehensive search and opinion? How reasonable was the legal advice given by counsel, and how reasonable was defendant’s reliance on it?

Of course, the defendant will need to waive attorney-client privilege in order to use the opinion of counsel as a defense in the litigation, and its adversary will be entitled to take discovery on the opinion. Otherwise, opinions of counsel are protected by the attorney-client privilege. However, search reports are generally discoverable in TTAB and federal court litigation.

It is also important to keep in mind that, even if a defendant is able to successfully show that it did not act in bad faith, the other likelihood-of-confusion factors may still lead to a finding of trademark infringement.

Finally, it should be noted that acting against the legal advice of counsel may also have consequences, if the attorney-client privilege is waived. For example, it could provide a basis for finding bad-faith intent and for imposing liability, could be a basis for finding willful infringement, and could lead to increased exposure to additional remedies such as treble damages, disgorgement of profits, attorney’s fees and costs, and possibly even punitive damages on state law claims. See *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger USA, Inc.*, 80 F.3d 749 (2d Cir. 1996) (defendant disregarded its counsel’s advice to obtain a full trademark search before adopting and using the mark; court held that defendant’s failure to follow advice may constitute bad-faith intent justifying an award of profits).

**Drafting the Opinion**

**Preliminary Points**
You should clearly convey the scope of the client’s instructions, including the nature of the proposed use (i.e., what are the goods/services searched?). Also note if the client indicated that there will be any limitations on the proposed use.

Identify any other relevant facts that affect the opinion, such as if the client has had some prior use of the same or a similar mark, or if there is any information on the channels of trade for the proposed goods and services.

Identify the sources that were searched and explain the scope and limitations of the sources. For example, regarding the federal search, you should note the date of the latest filed applications as indicated in the search report, and point out that third-party applications may have been filed between that date and the date of the opinion. Also note that similar or identical third party marks could be given earlier effective filing dates than the date of the client’s eventual use and/or filing dates, but yet not show up in the search report as a result of having been filed using the Paris Convention (up to 6 months) and the Madrid Protocol (potential lag time for inbound applications to be transmitted from the International Bureau). Finally, note that abandoned marks can be revived for up to a year and therefore marks identified in the search as abandoned could subsequently be revived. You should also discuss any applicable limitations to the state, common law, and domain name searches as provided by the search vendor.

The Mechanics of the Opinion

Use Clear and Careful Language

It is important to clearly convey to the client whether the mark is available for use and for registration, and to discuss the risks. You should not predict the risk of receiving an objection, but rather the chances that the client will ultimately prevail if its use and/or registration is challenged by a third party. That said, you should note trends or patterns of third-party enforcement, which can be obtained from the search and your own follow-up investigations. For example, you might note if the owner of a particular mark of interest has been involved in numerous TTAB proceedings or has otherwise been litigious with respect to its mark.

Clearly state your summary and conclusion on the availability of the proposed mark for use and registration, and consider doing so up front in the opinion, so that it is easy for the client to locate and know where you are ultimately going.

Discuss any limitations, restrictions, or conditions that apply to the opinion. For example, you may determine that the mark is clear for use and/or registration only with certain conditions in place that will help avoid a likelihood of confusion, such as combining the proposed mark with a house mark or with a distinctive design element. You may advise the client, if they seek registration, to limit the description of goods in a certain manner or to keep the description very narrow. You may alternatively advise the client that the mark is clear to use, but not to register. Or you may advise the client to use the proposed term descriptively, and not as a trademark (see further discussion below).

Always use careful language in your opinion. For example, if clearing the proposed mark, instead of referring to third-party marks that you identify and discuss in the opinion as “problematic” or “relevant,” say that they are “of interest.” Also, avoid stating that particular
third-party marks “should not pose an obstacle” or “should not be an impediment,” because those marks just might pose an obstacle or be an impediment, although the client may ultimately overcome those obstacles or impediments. It is better to say that the third-party marks “should not preclude” the client’s use or registration.

You should also avoid stating that the client’s mark “shouldn’t cause confusion” with another mark when the legal standard is likelihood of confusion. Instead, say that the proposed mark “should not create a likelihood of confusion” or that “confusion is unlikely.” Do not say that there is a “low likelihood of confusion,” which suggests that there still is some level of likelihood of confusion.

Avoid saying that a third-party mark is “not very strong,” which suggests that the mark still has some strength; instead refer to the mark’s “weakness.” At the same time, don’t attack the strength of your client’s own mark unless it is necessary (see discussion below regarding diluted marks and crowded field).

If there are particular third-party registrations that you believe the PTO is likely to cite against the client’s own application under Section 2(d), it is usually a good idea to condition the client to this possibility to set their expectations and avoid surprises.

**Distinguish Third-Party Marks on the Key Differences**

You should identify and discuss the third-party marks you deem “of interest” and, if you are clearing the proposed mark, discuss why the client’s mark is distinguishable. You will likely discuss the differences in the marks in terms of appearance, pronunciation, meaning, and overall commercial impression, as well as the differences in the goods and services. Other likelihood-of-confusion factors may also be applicable to your analysis and should be discussed such as the channels of trade, strength of the mark, and sophistication of consumers.

**Support the Opinion by Going Beyond the Search**

To the extent you went beyond the search report itself and conducted any investigations to determine if a particular third-party mark is in use and/or the nature of that use, explain what you did and provide the results of the investigation.

If you reviewed the file history for a particular third-party application or registration, such as to determine if the applicant/registrant made any arguments during prosecution that might be relevant to the clearance of your client’s mark (e.g., admission of a narrow scope of protection or arguments distinguishing it from other similar marks), then explain that research and how it is relevant.

**Convey Any Issues With Protectability and Condition the Client to the Possibility that an Application may be Refused Registration**

If you believe that the client’s mark may be deemed merely descriptive for the proposed goods or services, explain that it may be difficult to protect and enforce the mark unless and until it can establish secondary meaning, and note that the client may not be able to register the mark on the Principal Register. You should also explain the possibility of seeking registration on the
Supplemental Register, along with an explanation of the limitations of a Supplemental Registration and the requirement that the mark be in use before such application can be made.

If you believe that the client’s mark may be generic, or geographically descriptive or misdescriptive, discuss the issues and how they bear on the protectability and registrability of the proposed mark.

If you believe that the proposed mark could be deemed merely descriptive, you might advise the client not to use it as a trademark and instead to only use the term descriptively. If you do so, provide guidance. E.g., do not use any trademark symbols or notices, do not include the term in any trademark legends, do not file a trademark application or if an application is filed, disclaim the descriptive term, and use the term with text emphasizing the descriptive nature of the term.

**Convey the Scope of Protection the Mark Should be Afforded**

Discuss the scope of protection that the proposed mark should be afforded. Consider both the degree of inherent distinctiveness (where the mark falls on the arbitrary-fanciful-suggestive-descriptive spectrum) as well as the marketplace strength (whether the mark appears to be diluted or part of a crowded field of similar or identical marks). The scope of protection discussion will serve to both set the client’s expectations as to protectability, and also to distinguish the mark from other third-party marks.

**Setting Out the Relevant References**

The approach you take in terms of setting out third-party marks of interest will vary from search to search, and will ultimately depend on the nature of the proposed mark, the goods and services, and the number of references you determine are worth bringing to the client’s attention. That said, a few basic concepts may be helpful, subject to careful consideration in each case.

If the proposed mark is strong in terms of inherent distinctiveness, similar or identical third-party marks may worth discussing even if the goods/services covered by those marks are unrelated to the client’s proposed goods/services. On the other hand, if the proposed mark consists of a common term, then marks that are highly similar or even identical may not need to be mentioned unless the goods/services are more closely related. Also, if numerous relevant references show that the mark is diluted or is a common term, it may be most efficient to set out the relevant marks in a narrative form instead of providing detailed information regarding each one.
Key U.S. Supreme Court Decisions (Many of them Involving the U.S. EEOC) Regarding Claims of Discrimination, Retaliation & Hostile Work Environment

2017

Villarreal v. R.J. Reynolds Tobacco Co., 590 F.3d 1215 (11th Cir. 2009), cert. denied.
Denied a petition for a writ of certiorari from Villarreal, a job applicant, in his suit against R.J. Reynolds. Supreme Court declined to review the case from the 11th Circuit Court of Appeals in Atlanta, which ruled 6-5 that when it comes to systemic bias, the 50-year-old Age Discrimination in Employment Act only applies to people who already have jobs, not those seeking them. This decision leaves in place the 11th Circuit majority’s view that, for unsuccessful job applicants to stand any chance of making a case, they must “diligently” pursue why they weren’t offered a position, even if they weren’t aware at the time that age discrimination was involved. Although the lower-court ruling only holds formal legal sway in Alabama, Florida and Georgia, which are covered by the 11th Circuit, it already is being cited as precedent in cases across the country.

2016

Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016)
The plaintiff, a police officer, filed a claim pursuant to 42 U.S.C. § 1983 against the City and various officials, alleging that he was demoted in retaliation for exercising his First Amendment rights. The plaintiff was demoted the day after other police officers saw him obtain a local mayoral candidate’s campaign sign. The plaintiff had no actual involvement in the candidate’s campaign, and only picked up the sign for his mother, who could not get the sign herself. The district court awarded summary judgment to defendants, concluding that plaintiff had not been deprived of any constitutionally protected right because he did not actually engage in First Amendment conduct. The Third Circuit affirmed, concluding that the plaintiff would have an actionable claim only if his demotion was prompted by his actual, rather than perceived, exercise of free speech. Held: The Supreme Court reversed the grant of summary judgment in favor of the City. The Court held that where an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge this action under § 1983—even if the employer operated under a factual mistake about the employee’s behavior. The Court concluded that the City’s factual mistake made no legal difference. For the purposes of its decision, the Court assumed that the City demoted the plaintiff with a constitutionally improper motive. Prior precedent and the language of § 1983 do not address whether the protected “right” at issue primarily focuses on an employee’s actual activity or on the supervisor’s motive. The Court concluded that the government’s motive for demoting the plaintiff is what matters. The Court went on to say that the constitutional harm remains the same whether the employer relied on a factual mistake or not—discouragement of employees from engaging in protected speech or association. The Court remanded the matter for the lower courts to determine whether the City’s policy that led to the demotion violated the Constitution.
2015

8-1 decision in favor of the EEOC: it was a violation of the law to fail to accommodate an applicant who wore a hijab.

A pregnant worker wishing to show disparate treatment through indirect evidence may do so through the application of the McDonnell Douglas framework. In reaching this holding, the court reverses summary judgment in favor of UPS.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
A charging party can prove unlawful discrimination indirectly by showing, for example, in a hiring case that: (1) the charging party is a member of a Title VII protected group; (2) he or she applied and was qualified for the position sought; (3) the job was not offered to him or her; and (4) the employer continued to seek applicants with similar qualifications. If the plaintiff can prove these four elements, the employer must show a legitimate lawful reason why the individual was not hired. The employee still may prevail if he or she discredits the employer's asserted reason for not hiring him or her.

2013

Vance v. Ball State University, 133 S.Ct. 2434 (2013)
An employer may be held vicariously liable for a supervisor's unlawful harassment only when the employer has empowered that person to take tangible employment actions against the victim.

University of Texas Southwestern Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013)
The "but for" causation standard applies to Title VII's retaliation provision.

2011

Title VII provides a cause of action to an employee who was allegedly discharged in retaliation for his fiancée's protected activity against the same employer.

The anti-retaliation provision of the Fair Labor Standards Act covers oral as well as written complaints.
Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011)
the Supreme Court holds that a group of plaintiffs seeking injunctive and declaratory relief and back pay, on behalf of a nationwide class of 1.5 million female employees, cannot pursue a class action under Federal Rule of Civil Procedure 23(b)(2).

2010

An employee who does not challenge the adoption of an allegedly discriminatory practice - "here, an employer's decision to exclude employment applicants who did not achieve a certain score on an examination - may assert a disparate impact claim in a timely charge challenging the employer's later application of that practice." Thus, African-American firefighter applicants had cognizable disparate impact claims under Title VII each time the city hired from an eligibility list based on an allegedly discriminatory written exam.

2009

The opposition clause of Title VII's anti-retaliation provision protects individuals who provide information as part of an employer's investigation of alleged discrimination.

AT&T Corp. v. Hulteen, 556 U.S. 701 (2009)
The Supreme Court holds that an employer does not violate the Pregnancy Discrimination Act (PDA) by paying pension benefits pursuant to a bona fide seniority plan that provides less service credit for pregnancy leave taken before the enactment of the PDA than for other forms of short-term disability leave.

Plaintiffs must always show that age was the "but for" cause of discrimination to establish ADEA liability.

The Supreme Court holds that Title VII prohibits an employer from discarding the results of a promotion test that has a racially disparate impact unless the employer can demonstrate a strong basis in evidence to believe that relying on the results would subject the employer to disparate-impact liability.
2008

A filing with the EEOC constitutes an ADEA charge if it meets the charge-filing requirements of 29 CFR § 1626.6, which require it to: 1) be in writing, 2) include an allegation of discrimination, 3) name the charged respondent, and 4) be "reasonably construed as a request for the [EEOC] to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."

*Gomez-Perez v. Potter, 553 U.S. 474 (2008)*
Section 633(a) of the ADEA prohibits retaliation against federal employees who complain about age discrimination.

*Meacham v. Knolls Atomic Power Lab, 554 U.S. 84 (2008)*
An employer defending an ADEA disparate impact claim bears both the burden of production and the burden of persuasion on the reasonable factors other than age (RFOA) defense.

*Kentucky Retirement Systems v. EEOC, 554 U.S. 135 (2008)*
A disability retirement plan that discriminated on the basis of pension eligibility did not violate the ADEA, even though pension eligibility was based on age, because the employer was not "actually motivated" by age.

2007

The period for filing an EEOC charge challenging pay discrimination begins when the pay-setting decision is made and, therefore, that a Title VII charge ordinarily must be filed within 180/300 days of the time when that decision was originally made. (Superseded by the Lilly Ledbetter statute).

2006

*Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)*
The anti-retaliation provision of Title VII (Section 704(a)) is not limited to discriminatory actions affecting a term, condition, or privilege of employment, and thus is broader than Title VII's core anti-discrimination provision (Section 703(a)).

The question of whether a defendant meets the 15 employee requirement for employer status under Title VII does not affect the district court's jurisdiction, but rather goes to the merits of the plaintiff's claims. The Supreme Court reverses the appeals court and further holds that that the defendant's argument with respect to the number of employees was a defense to liability
which could be waived if not timely raised in the trial court. The EEOC joins the amicus brief filed by the Solicitor General and the Supreme Court agreed with the government's position.

2005

*Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005)*
The ADEA authorizes recovery in disparate impact cases and permits the employer defense that the challenged action was based on a "reasonable factor other than age."

2004

*General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004)*
The ADEA does not prevent an employer from favoring an older employee over a relatively younger one.

2003

The status of a particular individual as an "employee" under the ADA should be based on the common law definition of "employee," which focuses on the extent to which the individual is subject to the employer's control.

Under the ADA, a neutral no-rehire policy is a legitimate, non-discriminatory reason for refusing to rehire an employee who had a record of drug addiction.

2002

*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)*
A person is substantially limited in a major life activity, within the meaning of the ADA, if s/he has "an impairment that prevents or significantly restricts the individual from doing activities that are of central importance to most people's daily lives." (Superseded by the Americans with Disabilities Act Amendments Act (ADAAA)).

*EEOC v. Waffle House, 534 U.S. 279 (2002)*
An agreement to arbitrate between an employee and employer does not bar the EEOC from pursuing victim-specific relief on behalf of an employee who files a timely charge of discrimination.

The Immigration Reform and Control Act of 1986 forecloses the National Labor Relations Board (NLRB) from making a back pay award to an undocumented worker under the National Labor Relations Act.
Labor Relations Act, where the worker had never been legally authorized to work in the United States. The EEOC modeled its approach to Title VII back pay for workers without documentation on the NLRB's approach.

The EEOC's relation-back rule, 29 C.F.R. § 1601.12(b), is valid. This rule permits an otherwise timely-filed charge to be verified after the expiration of the filing period.

An employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to demonstrate, as a matter of law, that an accommodation is not "reasonable" under the ADA.

The EEOC's ADA regulation interpreting the statute to give employers an affirmative defense based on direct threat to self.

An employer may be liable for all acts contributing to a hostile work environment as long as one of the contributing acts occurred within the applicable 180/300-day filing period.

2001

*Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)*
State employees do not have the right to sue their employers for violations of the Americans with Disabilities Act (ADA). State employees may still file disability discrimination complaints with the Department of Justice (DOJ) or the EEOC, which can sue states on their behalf.

2000

*Kimel v. Florida Bd. of Regents, 528 U.S. 520 (2000)*
Older workers cannot sue state agencies for damages under the Age Discrimination in Employment Act (ADEA).