

At Issue

A RISK MANAGEMENT NEWSLETTER FOR
COLLEGES AND UNIVERSITIES



EEOC Retaliation

Equal Employment Opportunity Commission Issues Its Final Enforcement Guidance on Retaliation and Related Issues

By: **Robert Bambino**, CPCU, ARM Wright Specialty Insurance

On August 29, the Equal Employment Opportunity Commission (EEOC) issued its final document on retaliation. It supersedes the 1998 Compliance Manual section on retaliation. The guidance document was issued, in part, because of Supreme Court and lower court decisions concerning retaliation. The guidance document can be found at: <https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm>. The EEOC also published a question and answer guide and a Small Business Fact Sheet on retaliation.

It is illegal to fire, demote, harass, or otherwise “retaliate” against people (applicants or employees) because they filed a charge of discrimination, complained to their employer or other covered entity about discrimination on the job, or participated in an employment discrimination proceeding (such as an investigation or lawsuit), under all the laws enforced by the Commission (*Laws Enforced by the EEOC – Retaliation*). Retaliation is alleged in nearly 45 percent of all charges according to the EEOC. Additionally, it is the most frequently alleged basis of discrimination. Not

surprisingly, it is alleged in many employment liability claims made against Wright Specialty policyholders.

Generally, retaliation takes place when there is a materially adverse action by an employer against an applicant or employee because they asserted rights protected by the EEOC laws, such as complaining about illegal discrimination based on race, gender, age or disability or assisting someone else who has made a complaint. This is considered a protected activity. Examples of materially adverse activity include demotion, termination, suspension, and disciplinary actions, detrimental changes in work schedules, and lost overtime or benefits. Retaliation can be a separate action in litigation. Juries have awarded damages for retaliation and not for the companion cause of action for discrimination or harassment.

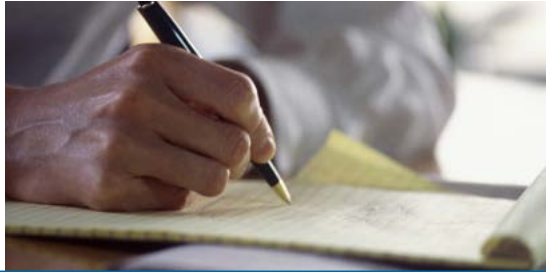
The EEOC guidance document applies to all laws enforced by the EEOC. It has five sections which cover the following topics: elements of a retaliation claim; Americans with Disabilities Act (ADA); remedies and

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a section listing practices to avoid retaliation claims. Retaliating against or interfering with an employee for asserting his or her rights under the ADA is prohibited. There are also a number of examples illustrating different aspects of the guidance.

Section Five contains practices that the EEOC believes can minimize the likelihood of incidents of retaliation. The major points for each practice are outlined below.



PRACTICE	SUGGESTION
Written Employer Policies	A written, clear anti-retaliation policy with examples of what is and is not retaliation. Procedures for reporting mechanisms and when applicable, employee discipline.
Training	Training for <u>all</u> employees on the anti-retaliation policy; complaint reporting and handling procedures; address any deficits in the equal employment opportunity (EEO) process; special training for management and HR staff for complaint handling and investigation.
Anti-Retaliation Advice and Individualized Support for Employees, Managers and Supervisors	Suggestions for the employer when responding and investigating an EEO allegation.
Proactive Follow-Up	Meeting with all parties during an EEO matter; verifying that retaliation is not taking place and correcting it if it is and providing guidance.
Review of Employment Actions to Ensure EEO Compliance	Having a qualified person review proposed employment actions of consequence to ensure they are based on legitimate nondiscriminatory, non-retaliatory reasons.

PREVENTING RETALIATION

The Small Business Fact Sheet provides three suggestions for employers to reduce the likelihood of retaliation:

1. Education, essentially making sure that supervisors and managers know what constitutes retaliation so they are not carrying out retaliatory or interfering actions. Instruction and a clearly written policy are worthwhile tools.
2. Documentation and review of employment actions is especially important. The Fact Sheet suggests having managers and supervisors put employment actions in writing. This should help them identify and become aware of actions that can be viewed as retaliatory. Review by other supervisors is also recommended.
3. Supporting the accused employee throughout the process and providing tips to avoid actual or perceived retaliation.

Other ways to control retaliation in the workplace include: having clearly written EEO policies that are distributed to all employees; a prompt, thorough response and investigation; taking steps to prevent retaliation during the investigation; remaining in touch with all parties; keeping matters as confidential as possible and

following your institution's discipline procedures, collective bargaining agreements or employment contracts.

RESOURCES THROUGH WRIGHT SPECIALTY

Wright Specialty's e-Training Center contains courses on employment-related issues, such as EEO laws and discrimination; EEO laws for supervisors; retaliation awareness; preventing discrimination and unlawful harassment prevention. We also have an Employment Practices Hotline for our policyholders at 866-758-6874. These services are available to our members at no cost.



Preventing On and Off-Campus Fires

According to the National Fire Protection Association (NFPA), from 2009-2013, U.S. fire departments responded to an estimated 3,970 structure fires in dormitories, fraternities, sororities, and barracks, up somewhat from earlier periods. Eighty-six percent of reported structural fires involved cooking equipment and six percent were intentional. Center for Campus Fire Safety provides information about the 89 fires that occurred from January 2000 through October 2014 that caused 126 fatalities:

<ul style="list-style-type: none"> • 76 occurred off campus • 7 occurred on campus • 6 occurred in Greek housing 	<ul style="list-style-type: none"> • 14 were intentional • 38 were accidental (cooking, candles, smoking or electronic) • The cause was undetermined in 37 of the fires
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The American Society of Safety Engineers (ASSE) indicates that the majority of fires that affect college students took place off-campus. However, all students — regardless of housing — must be aware of the dangers related to fire and perhaps more importantly, what to do in the event of a fire.

- There is a connection between alcohol consumption and fire-related deaths. Drinking alcohol impairs judgment and motor skills, and can hinder efforts by students and first responders to evacuate during a fire.
- Most victims die from smoke or toxic gas inhalation and not burns. Smoke, heat and carbon monoxide detectors should be used.

- January, May, September and October are the peak months for fires in Greek houses, due in part to graduation parties and rush events.
- To reduce the risk of injury and death, enforce rules prohibiting the use of candles, space heaters and unapproved heating equipment.
- Regularly inspect heating and ventilation systems, fire alarm and suppression systems. Deficiencies must be repaired as quickly as possible.
- Students, living in on-campus and off-campus housing, must be familiar with fire escape and emergency evacuation procedures. Compliance with mandatory participation in fire drills is essential.



There are many steps college administrators can take to prevent fires. Correcting common residential hazards, such as overloaded extension cords, power strips or outlets significantly reduces risk. Eliminating cooking equipment in dorm rooms is very difficult, but prohibiting open flames and other cooking devices will reduce the risk of fire. Resident advisors and house managers should know how to operate a fire extinguisher, respond to fire alarms and maintain smoke detectors. Carbon monoxide detectors are required in some jurisdictions.

ASSE provides free fire safety tips on statistics, prevention, fire escape planning, fire safety equipment for off-campus and Greek housing, information on recent incidents, a parent guide to fire safety, what you need to know when your child leaves home for college, a list of key resources and an on/off campus fire safety flyer. This article was based, in part, on information from the ASSE. Fire safety tips are available at www.asse.org/newsroom/safetytips under on/off campus fire safety tips.

Community Use of Pools and Fitness Rooms

By: **Robert Bambino**, CPCU, ARM Wright Specialty Insurance

The start of the fall semester is a good time to check signage in pools and fitness areas that are used by students and the community. Signs can communicate prohibited activities, provide instruction and warn of inherent dangers. The value of a sign is determined by how well it is understood and if it influences the reader's behavior. Standardized signage, using universal pictorial symbols, lettering and design, is helpful. In many communities, more than one language is needed. Here are examples of different signs to use in pools and fitness rooms:



POOLS	FITNESS ROOMS
<p>General Signage</p> <ul style="list-style-type: none"> • Hours of operation • Minimum age • Adults or responsible adult supervisors must accompany children or non-swimmers • No glass, smoking, food or drink in pool area • No cellphones in pool area • No animals — except for service animals • No running, pushing or horseplay • Maximum capacity • Proper attire • Patrons must shower before entering the pool • Use pictorial signs • Report broken equipment to staff • Secure valuables — college is not responsible for lost or stolen property <p>Specific Signage</p> <ul style="list-style-type: none"> • Diving: either "No Diving Allowed" or "Dive in Designated Areas Only" • Pool depth markings • Supervision: If pool is not supervised: "Use Pool at Your Own Risk. No Lifeguard on Duty." If there is supervision: "Do Not Use Pool Without Lifeguard on Duty" • Closures and opening: Locking the pool area with a "Pool Open" or "Pool Closed" sign • Post emergency contact information 	<p>General Signage</p> <ul style="list-style-type: none"> • Hours of operation • Minimum age • Proper attire (such as athletic shoes and workout clothing) • No cellphone use • No food, smoking, gum or glass containers • Report broken equipment to staff • Use pictorial signs • Use at Your Own Risk • Know Your Own Limitations • Secure valuables – college is not responsible for lost or stolen property • Wipe off equipment after use • Time limits per station (if applicable) <p>Specific Signage</p> <ul style="list-style-type: none"> • Weights or Weight Room: "Use a Spotter," "Rack Weights After Use," "No Jewelry," "Use Collars with Free Weights" • Machines must have manufacturers' warning signs attached • Closures and opening: Locking the fitness area with a "Fitness Room Open" or "Fitness Room Closed" sign • Post emergency contact information

ASSUMPTION OF RISK, WAIVER AND RELEASE LANGUAGE

A waiver is a voluntary surrender of a participant's right to sue for injury or damage. A release is a voluntary release of the college or university from liability for injuries that may occur. The effectiveness of waivers and releases varies by state. Make sure to speak to your legal counsel before drafting or using these documents.

Waivers and releases usually have assumption of risk language — language outlining the risks particular to the activity or program. This is a good way of letting participants know the risks

of physical injury that exist when participating. These forms often contain a statement regarding medical conditions, in effect an affirmation from the participant acknowledging that they are medically and physically able to swim, dive, exercise or use athletic equipment. Waiver and release language can be a separate document or incorporated in the registration material.

Although the effectiveness of waivers and release forms are often debated, they should be obtained from participants. Waiver and release forms have the greatest likelihood of passing legal muster if they are specific and related to the events and activities at hand.

The “Art” of Making a Left Turn

Left-turn accidents are a leading cause of loss for all insurance programs, and Wright Specialty is no exception. Left-turn accidents result in a substantial number of claims and lawsuits against Wright Specialty policyholders. Left turns are also a significant driving issue for older drivers, according to the National Highway Traffic Safety Administration (NHTSA). In states with comparative negligence laws — a mechanism where damages are allocated between negligent parties based on their proportionate degree of fault — the bulk of the liability is usually assessed against the left-turning vehicle.

Vehicle and traffic laws differ from state-to-state, but generally, the driver approaching an intersection has to give way to traffic that is in the intersection, and drivers who want to make a left turn must wait for approaching traffic to pass through the intersection before making the turn. Here are several suggestions taken from different state Department of Motor Vehicle manuals (e.g., California, Georgia, Illinois, Missouri and New York) to make a left turn safely. We suggest you share this article with your drivers and use it as training material.

One: Approaching the Intersection

- Make full stops for traffic signals and stop signs.
- Begin signaling about 100' before entering the intersection.
- Reduce your speed.
- Look for traffic in the intersection and around your vehicle.
- You may enter the intersection on a green light to prepare for the turn with no other vehicle(s) ahead of you.
- Keep the front wheels straight while waiting.
- Rear wheels will be inside the path of front wheels and nearer to traffic heading toward you.
- When traffic is clear, begin the turn.
- Do not cut the corner.

Two: Making the Turn

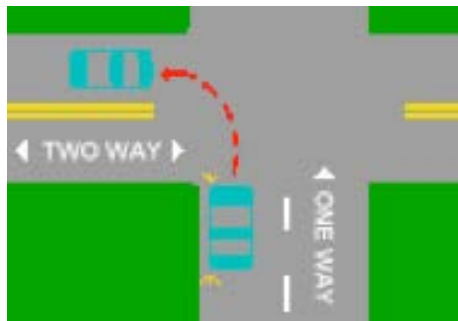
From One-Way to One-Way Road

- Enter from the left lane, or to the left side of a single lane road.
- If the road has more than one lane, turn into the left lane.



From One-Way to Two-Way Road

- Enter from the left lane, or to the left side of a single lane road.
- Enter the two-lane road as close as possible to the right on the center line.
- Watch for other traffic in the intersection.



From Two-Way Road to Two-Way Road

- Approach with your wheels as close as possible to the center line.
- Try to use the left side of the intersection — reduces interference with approaching traffic that wants to turn left.
- Be alert for traffic heading toward you from the left and from the lane you are going to cross.



From a Two-Way Road to a One-Way Road

- Approach with your wheels as close as possible to the center line.
- Make the turn before reaching the center of the intersection and turn into the left lane of the road you will enter.



From a Two-Way Road to a Four-Lane Highway

- Approach with your wheels as close as possible to the center line.
- Enter the left lane, to the right of the center line.



When planning bus routes, minimize routes with a large number of left turns or difficult left turns, if possible. This applies not only to busy intersections, but intersections with temporary conditions, such as construction, road repairs, snow banks that obstruct visibility, or unrepaired roadways.

Images from the NYS Department of Motor Vehicles Driver's Manual, Chapter 5: Intersection and Turns.

Zika Virus for Educational Institutions

In July, the Centers for Disease Control and Prevention (CDC) issued an interim guidance document for school administrators. Although addressed for schools, it includes information for colleges and universities. The document can be found at the CDC website at: <http://www.cdc.gov/zika/schools.html>

The document contains information about the implementation of mosquito control measures, response procedures for a Zika virus infection, OSHA safety recommendations for staff working outdoors and planning for activities. It also addresses the need to work and coordinate with local public health departments.

The mosquito season is linked to temperature. Generally, mosquitos start swarming when the temperature reaches 50° F. Colleges in the south and southwest experience a longer season; in some areas, the mosquito season continues throughout the entire year.

Different state departments of health have also issued guidance documents on the Zika virus. Here are links to several departments:



STATE	LINKS
Arizona	http://www.azdhs.gov/preparedness/epidemiology-disease-control/mosquito-borne/index.php#zika-home
California	http://www.cdph.ca.gov/HealthInfo/discond/Pages/Zika.aspx
Colorado	https://www.colorado.gov/pacific/cdphe/zika
Delaware	http://dhss.delaware.gov/dhss/dph/zika.html
Georgia	http://dph.georgia.gov/zika-virus-faq
Indiana	http://in.gov/isdh/26910.htm
Illinois	http://www.dph.illinois.gov/
Kansas	http://www.kdheks.gov/zika/index.htm
Minnesota	http://www.health.state.mn.us/divs/idepc/diseases/zika/index.html
New York	https://www.health.ny.gov/diseases/zika_virus/additional_information.htm
Ohio	http://www.odh.ohio.gov/odhprograms/bid/zdp/diseases/zika.aspx

The CDC issued a travel advisory for persons traveling to foreign countries and U.S. territories. It can be found at: <http://wwwnc.cdc.gov/travel/page/zika-information>

News&Views

Stronger Hurricane Season? The Tropical Meteorology team at Colorado State University predicted 13 named storms in their April forecast, but has now updated it to 15 storms in their latest July revision. Six of those storms will become hurricanes and two could be major ones. Higher sea surface temperatures in the Atlantic Ocean are to blame. (Source: The Weather Network. August 12, 2016)

Louisiana Flooding

With over 40,000 homes damaged, the economic cost of the flooding in Louisiana could be \$1.5 billion according to a preliminary report issued by Aon Benfield. (Source: Yahoo! Finance. August 19, 2016)



EEOC Guidance

The U.S. Equal Opportunity Commission (EEOC) issued its final Enforcement Guidance on Retaliation and Related Issues on August 29, 2016. Retaliation is asserted in almost 45% of all charges made to the EEOC, and it is the most frequently alleged basis of discrimination, according to the EEOC. The document can be accessed on the EEOC website at: <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

Student Alcohol Use

Binge alcohol use is down among full-time college students, with 44% of students reporting use during the past month in 2002 to 39% in 2011, according to the National Institute on Alcohol Abuse and Alcoholism, Alcohol Research: Current Reviews, Volume 35, Issue Number 2. It's also down for male high school seniors (36% in 1992 to 27% in 2012), but the same (20%) for females.

ResourceCenter

Training or information about today's risk management-related subjects can be found in the Wright Specialty E-Learning or Title IX Learning Centers online.

Wright Specialty is host to a number of online risk management resources. Take advantage of the free safety education courses available on Wright's 24/7 web-based training center. Visit our Title IX Resource Center to keep up with changing developments or browse our seasonal Risk Alerts to stay up-to-date on college-based risk management and safety issues. With years of experience insuring academic risks, Wright Specialty Insurance provides valuable guidance for administrators to help reduce injuries to students, staff and visitors, and to prevent damage to property. You can access our national Employment Liability Hotline for help with every day employment-related issues. The Hotline is available Monday - Friday from 8:30 a.m. to 6:00 p.m. eastern time. Call 866-758-6874.

For easy registration for our e-Training Center and for access to the Resource Center, contact Erica Gotay, your Wright Specialty representative, to receive your access code at: 516-750-3902 or EGOTAY@wrightinsurance.com



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