

February 24, 2016

Public Input
U.S. Equal Employment Opportunity Commission
Executive Officer
131 M Street, N.E.
Washington, D.C. 20507

RE: Proposed Enforcement Guidance on Retaliation and Related Issues; EEOC-2016-0001-0001

Thank you for the opportunity to provide comments on the U.S. Equal Employment Opportunity Commission's ("EEOC" or "the Commission") Proposed Enforcement Guidance on Retaliation and Related Issues ("Proposed Enforcement Guidance"). National Women's Law Center has worked for over 40 years to advance and protect women's equality and opportunity and has long worked to remove barriers to equal treatment of women in the workplace. Protecting against retaliation for asserting workplace rights is key to achieving this equal treatment. National Women's Law Center and the undersigned organizations committed to workplace equality have joined to express their support for the Proposed Enforcement Guidance and believe it will promote the reduction of sex-based discrimination and retaliation in the workforce. The EEOC last issued policy guidance on retaliation in 1998; since then, the law has evolved significantly and retaliation has become the most frequently alleged basis of discrimination in EEOC claims.¹ We write to offer suggestions for further clarifying and strengthening the Proposed Enforcement Guidance.

I. The Proposed Enforcement Guidance's Important Discussion of Pay Secrecy Addresses Critical Protections and Should Be Further Strengthened.

Women working full-time, year-round continue to confront a stark wage gap, typically making only 79 percent of the wages made by men working full-time, year-round.² This wage gap has remained stagnant for ten years.³ Moreover, women are still paid less than men in nearly every occupation, and controlling for education, experience, occupation, industry and job title leaves as much as 38 percent of the pay gap unexplained.⁴ Yet pay discrimination remains difficult to detect in the first instance. Because pay is typically cloaked in secrecy, when a discriminatory

¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS FY 1997 THROUGH FY 2015, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited February 17, 2016).

² NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT FOR NEARLY A DECADE (2015), available at http://nwlc.org/wp-content/uploads/2015/08/wage_gap_is_stagnant_9.23.15.pdf.

³ *Id.*

⁴ See Hegewisch, A. & Matite, M., *The Gender Wage Gap by Occupation*, INST. FOR WOMEN'S POLICY RESEARCH (2013), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2>; COUNCIL OF ECONOMIC ADVISORS, ISSUE BRIEF: THE GENDER PAY GAP ON THE ANNIVERSARY OF THE LILLY LEDBETTER FAIR PAY ACT (2016), available at https://www.whitehouse.gov/sites/default/files/docs/20160201_cea_gender_pay_gap_issue_brief_final.pdf.

salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion.⁵ Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized.

We commend the Proposed Enforcement Guidance's recognition that inquiries about wages and other discussions related to compensation can constitute protected activity, and that enforcement or threatened enforcement of punitive pay secrecy policies can constitute retaliation.⁶ As the Proposed Enforcement Guidance properly recognizes, employer prohibitions on discussion of pay have "the likely effect of restraining . . . employees in their exercise of protected activities."⁷ This protection for discussions of pay that constitute protected activity is timely and crucial given employers' widespread reliance on formal or informal policies prohibiting such discussions.⁸ In these workplaces, merely making inquiries of colleagues regarding wages, collecting salary information or learning (even inadvertently) of potentially discriminatory disparities invites retaliation by the employer in the form of discipline or termination. These widespread punitive employer pay secrecy policies and practices actively undermine enforcement of Title VII and the Equal Pay Act by making pay discrimination difficult to discover or to challenge in the face of workers' very real fear of adverse actions, including termination. For these reasons, clarity in the final Guidance regarding when employee communications regarding pay are protected and when punitive pay secrecy rules constitute retaliation is especially important.

A. Inquiries That Reveal Apparently Discriminatory Pay Disparities Constitute Protected Activity.

The Proposed Enforcement Guidance's recognition that "opposition" to discrimination can include inquiries and other discussions related to compensation is critical to ensuring that pay secrecy policies do not effectively block enforcement of pay discrimination laws. To engage in opposition that is protected under the law, an employee must discover a pay disparity, and "explicitly or implicitly communicate[] a belief that the employer may be engaging in employment discrimination."⁹ The Proposed Enforcement Guidance also appropriately

⁵ As Justice Ginsburg has noted:

Pay disparities often occur, as they did in *Ledbetter's* case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (Ginsburg, J. dissenting).

⁶ Proposed Enforcement Guidance at 31-33.

⁷ *Id.* at 31, quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67 (2006).

⁸ INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), available at http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that 60 percent of male employees and 62 percent of female employees report that their employers either prohibit or discourage the discussion of wages).

⁹ Proposed Enforcement Guidance at 11.

recognizes that opposition can be communicated to co-workers, union officials, or people outside the company, not just managers.¹⁰

Both employees and businesses would benefit from the inclusion in the Proposed Enforcement Guidance of a wider range of examples illustrating the forms that opposition may take in the context of pay discrimination. For instance, Example 14 in the Proposed Enforcement Guidance describes a situation in which an employee was disciplined because she discussed with her coworkers her belief that she was being paid less than a male colleague based on her sex.¹¹ Such conversations with her co-workers – sharing a reasonable suspicion of sex discrimination – are indisputably protected activity. But that example does not reach the reality of many workers’ circumstances when it comes to pay secrecy and pay discrimination. Many women have no idea that they are being paid less than male co-workers, and discover pay discrimination purely by happenstance.¹² For example, an employee may only become privy to wage-related data accidentally by seeing another worker’s paycheck¹³; when a new employee is hired¹⁴; or when an employee is promoted, demoted or changing positions.¹⁵ A worker is likely to discuss this new-found information with a colleague to confirm or deny suspicions of discriminatory practices. Similarly, an employee who feels she should be paid more for her work may ask co-workers about their compensation, and only then discover that a man in her position is being paid more than her. For these reasons, we urge the Commission to clarify that communications that include accidental discovery and identification of pay discrimination, as well as communications seeking to investigate or confirm potentially discriminatory pay disparities, should be considered opposition and protected against retaliation.

B. Punitive Pay Secrecy Policies That Make No Exception for Protected Activities Run Afoul of Retaliation Protections.

The Proposed Enforcement Guidance urges employers to “determine if they maintain any 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,” and notes that actions that deter employees’ pay inquiries may constitute retaliation. Yet this is set out only in the Best Practices section, thus suggesting that avoiding such policies is desirable, but perhaps not strictly necessary as a legal matter.¹⁶ Elsewhere, however, the Proposed Enforcement Guidance appropriately recognizes that adverse action includes “work-related threats” when they “might well deter a reasonable person from engaging in protected

¹⁰ *Id.*

¹¹ *Id.* at 32.

¹² *See, e.g.,* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (in which a female area manager discovered via an anonymous tip that she was earning significantly less money than her male coworkers).

¹³ *See* Morrow v. L & L Products, Inc., 945 F. Supp. 2d 835 (E.D. Mich. 2013) (in which female plaintiff saw male co-worker’s paycheck and noticed that he was paid more, even though he had worked fewer hours)

¹⁴ *See* Brinkley-Obu v. Hughes Training, 36 F.3d 336 (4th Cir. 1994) (in which the plaintiff was instructed to offer a new hire, her subordinate, a higher salary than she herself earned).

¹⁵ *See* Foco v. Freudenberg –Nok General Partnership, 892 F. Supp.2d 871 (E.D. Mich. 2012) (in which a worker discovered after she was promoted that she did not receive the salary increase, car benefits or phone allowance that others in her position were accorded).

¹⁶ Proposed Enforcement Guidance at 70.

activity,”¹⁷ and that this is the case whether or not the threats are ultimately successful in deterring the protected activity.¹⁸ Prohibiting discussion of pay on pain of discipline or termination constitutes just such a threat that would reasonably deter reasonable persons from engaging in protected communications or inquiries about potentially discriminatory pay disparities, unless the pay secrecy rule sets out an exception for such protected activity.¹⁹ At the very least, an individual who engages in protected communications with coworkers or others related to pay discrimination in violation of a punitive pay secrecy policy has experienced adverse action, in the form of the threat represented by that policy, whether or not the employer takes further action to enforce the policy. An employer seeking to avoid this result should ensure that any pay secrecy policy includes clear exceptions for communications and inquiries about potentially discriminatory pay disparities (though it is important to note that even with such exceptions the policy may violate other federal and state laws). The final Guidance should set this analysis out clearly.

More fundamentally, a promise to retaliate if an employee engages in protected activity should be considered a violation of law, even in the absence of protected activity. If an employer issued a policy stating that anyone complaining of sexual harassment would be immediately terminated, this policy should be subject to challenge as prohibited retaliation under Title VII, whether or not any employee was brave enough in the face of such a policy to complain of sexual harassment and thus engage in a protected communication. If such policies cannot be challenged as unlawful retaliation, the curious result is that those preemptive threats that are most effective in preventing employees from challenging discrimination are precisely the threats that antiretaliation protections do not reach. The final Guidance should be clear that policies threatening employees with discipline for engaging in protected activities constitute retaliation, even in the absence of a showing of protected activity, and that this includes pay secrecy policies that make no exception for protected activities.

II. The Guidance Should Make Clear That Imposing Nondisclosure Requirements on Employees Complaining of Discrimination Constitutes Adverse Action.

If an employee complains of discrimination to an employer, either informally or through an internal process, she may be ordered to maintain secrecy about the discrimination and the complaint, under threat of retaliatory discipline. For example, a recent administrative law judge decision found that T-Mobile responded to complaints of sexual harassment in a Maine call center by demanding the complainant sign an agreement requiring that she disclose information related to the investigation only to company representatives “unless permitted by law,” and instructed the employee that if she discussed the matter with coworkers, she would be subject to discipline up to and including termination.²⁰ Such broadly framed requirements forbidding the worker from discussing information relating to discrimination, or the internal investigation of a

¹⁷ *Id.* at 39-40.

¹⁸ *Id.* at 45 (“It is no defense that the employer’s actions fell short of their goal.”).

¹⁹ Of course, as noted in the Proposed Enforcement Guidance, even with such exceptions, punitive pay secrecy policies will often run afoul of other federal laws and regulations. *Id.* at 33-34.

²⁰ *Mobile USA, Inc. and Communication Workers of America, AFL-CIO*, No. 01-CA-142030, 2015 WL 4624356, at 5 (N.L.R.B. Div. of Judges, Aug. 3, 2015) (decision).

discrimination complaint, are often enforced by the threat of discipline or termination.²¹ These explicit threatened penalties constitute “adverse action” taken against the employee engaging in the protected activity of making a discrimination complaint, as they “might well deter a reasonable person” from further engagement in protected activity.²² The final Guidance should state as much.

First, through threat of discipline such nondisclosure requirements unlawfully deter workers from engaging in the protected activity of opposing discrimination via communications with coworkers. As noted above, for example, inquiries and discussions among co-workers related to compensation and pay discrimination can constitute opposition. In other contexts as well, speaking with co-workers to determine the scope of discrimination, or to confirm one’s perceptions of discrimination, to seek support in challenging discrimination, among other purposes, is properly considered opposition. Penalizing workers for such communications would constitute retaliatory conduct; moreover, the threat of such penalties also should be considered adverse action, as such threats might well deter a reasonable person from such protected activity.²³

Second, nondisclosure requirements prohibiting workers from discussing alleged discrimination with anyone except the employer impermissibly restrict an individual’s protected right to communicate with government agencies such as the EEOC or state and local Fair Employment Practices Agencies. Employment agreements that interfere with an employee’s right to file an EEOC charge or limit the right to testify, assist, or participate in an investigation, hearing, or proceeding of a Title VII claim are invalid for two reasons: they are contrary to public policy, and they threaten retaliation for the protected activity of participation.²⁴ A nondisclosure requirement that threatens discipline for disclosing information related to alleged discrimination to anyone other than the employer can also reasonably be expected to prevent or interfere with an individual’s right to file a claim with the EEOC, or to prevent an individual from cooperating with the EEOC, undermining the remedial purposes of Title VII and other EEO laws.²⁵ As the Commission has recognized in a relevant Guidance on non-waivable employee rights, an individual’s charge serves a dual purpose: it is the individual’s claim for potential relief from

²¹ See, e.g., *Bojorquez v. ABM Indus., Inc.*, Charge No. 370-2005-01887 (E.E.O.C. Apr. 23, 2009) (determination) (employee who complained of sexual harassment was made to sign a Confidentiality Agreement that instructed her not to discuss the information provided or the investigation with anyone other than the company’s management employees conducting the investigation, and explicitly stated that the employee would be subject to discipline, including termination, if she violated the agreement).

²² *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

²³ In *Mobile USA, Inc. and Communication Workers of America*, AFL-CIO, the ALJ found that the threat of discipline for violating the agreement constituted an unfair labor practice, *ie*, “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the[ir] rights” guaranteed by the National Labor Relations Act (NLRA).

²⁴ *EEOC v. Cosmair, Inc., L’Oreal Hair Care Div.*, 821 F.2d 1085, 1089–90 (5th Cir. 1987); see *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542–43 (9th Cir. 1987). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EEOC ENFORCED STATUTES, EEOC Notice No. 915.002 (Apr. 10, 1997), available at <http://www.eeoc.gov/policy/docs/waiver.html> (“NON-WAIVABLE EMPLOYEE RIGHTS GUIDANCE”). While courts have permitted employees to waive or release Title VII claims in an agreement, individuals cannot waive the right to bring an EEOC charge, or to participate, assist or testify in an EEOC investigation, hearing or proceeding.

²⁵ *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980).

discrimination, and also the vehicle by which the EEOC can vindicate the public interest in eradicating discrimination.²⁶ That dual purpose is frustrated by a nondisclosure requirement that an employee would reasonably understand as prohibiting her from filing a charge of discrimination in the first place. Agreements that prevent employees from cooperating with the EEOC during enforcement proceedings prevent the EEOC from accessing information or evidence relevant to a charge of discrimination and from performing its enforcement function. Permitting agreements that effectively insulate an employer from liability for discriminatory conduct undermines the preventive purpose of Title VII and other EEOC laws. By threatening discipline for those who share information about discrimination, such nondisclosure requirements are retaliatory “because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission.”²⁷ Indeed, the Commission has already determined that an employer’s “Confidentiality Agreement” that prohibited an employee from discussing the investigation into her sexual harassment complaint with anyone was a *per se* violation of Title VII because it deterred individuals from filing charges of discrimination.²⁸

In light of the above, we urge the Commission to make clear in the final Guidance that nondisclosure requirements related to discrimination constitute adverse action, especially as the Commission’s current Guidance on non-waivable employee rights fails to address this particular issue.²⁹

III. The Final Guidance Must Address Requests for Pregnancy-Related Accommodations.

The Pregnancy Discrimination Act of 1978³⁰ (“PDA”) guarantees two substantive rights: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right to be treated the same as other employees “not so affected but similar in their ability or inability to work” with respect to all aspects of employment, including benefits, insurance, and leave policies.³¹ Through these guarantees, the PDA has been tremendously successful in ensuring that pregnancy does not force women out of work. Today, more women continue to work while they are pregnant, through later stages of pregnancy. For example, two-thirds of women who had their first child between 2006 and 2008 (the most recent data available) worked during pregnancy, compared to a little more than half of women who had their first child between 1971 and 1975. Eighty-eight percent of these first-time mothers worked into their last trimester, compared to 64 percent of working first-time mothers between 1971 and 1975.³²

²⁶ NON-WAIVABLE EMPLOYEE RIGHTS GUIDANCE at §III.A.

²⁷ *Id.* at §III.B.

²⁸ *Bojorquez v. ABM Indus., Inc.*, Charge No. 370-2005-01887 (EEOC Apr. 23, 2009) (determination) (on file with National Women’s Law Center, provided by the chagrining party’s counsel, Equal Rights Advocates).

²⁹ Like the pay secrecy policies discussed above, nondisclosure requirements of this sort preemptively threaten employees with punishment for protected activity and thus should also be considered *per se* violations of retaliation protections.

³⁰ Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

³¹ 42 U.S.C. § 2000e(k).

³² U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 4, 6 (2011).

Nevertheless, pregnant women still face challenges on the job. Some women— especially those in physically demanding jobs—will have a medical need for a temporary job-related accommodation at some point during pregnancy. Yet, too often, instead of providing a pregnant worker with an accommodation, her employer will fire her or push her onto unpaid leave, depriving her of a paycheck and health insurance at a time when she needs them most—even when such accommodations are routinely given to other workers.³³ Indeed, approximately a quarter of a million pregnant women in the U.S. each year either ask for an accommodation and are denied or are deterred from asking for a needed accommodation at all.³⁴ For workers who are unable to continue in their position without some adjustment, however minor, the denial of an accommodation or retaliation for requesting one can have dire consequences. Low-wage workers in physically rigorous jobs are hit particularly hard, as they often experience a need for accommodations and suffer the most if they are forced to give up their jobs and income.

In *Young v. United Parcel Service*, the Supreme Court recently made clear that a failure to make accommodations for pregnant workers with medical needs can violate the PDA, when it imposes a significant burden on pregnant workers that outweighs any justification the employer provides for its failure to make accommodations.³⁵ Moreover, as recognized by the Commission in recent Guidance, pregnancy-related impairments such as pregnancy-related anemia or sciatica, gestational diabetes, and pelvic inflammation and complications related to a breech pregnancy³⁶ can constitute disabilities that must be accommodated pursuant to the Americans with Disabilities Act (“ADA”).³⁷

The Proposed Enforcement Guidance helpfully specifies that a request for reasonable accommodation of a disability constitutes protected activity under the ADA, as does a request for accommodation of religion under Title VII; employer retaliation based on such requests is therefore unlawful.³⁸ As the Proposed Enforcement Guidance states, even if a worker does not literally “oppose” discrimination or “participate” in a complaint process when she or he requests an accommodation for disability or religion, the request must nevertheless be considered protected activity, given that otherwise, a worker could be granted an accommodation, and then terminated for requesting it, without legal recourse.³⁹

³³ See generally NATIONAL WOMEN’S LAW CENTER & A BETTER BALANCE, *IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS* (2013), available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.

³⁴ CHILDBIRTH CONNECTION & NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE* (Jan. 2014), available at <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>.

³⁵ 135 S. Ct. 1338 (2015); see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES*, EEOC Notice No. 915.003 (June 25, 2015), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (“PREGNANCY DISCRIMINATION GUIDANCE”).

³⁶ PREGNANCY DISCRIMINATION GUIDANCE at §II.A.

³⁷ *Id.* at §II.B.

³⁸ Proposed Enforcement Guidance at 29-30.

³⁹ *Id.* at 30.

Workers requesting a reasonable accommodation for pregnancy-related conditions are entitled to the same protection, and the final Guidance must state as much. As the Supreme Court and the Commission have recently emphasized, in many circumstances an employer must provide accommodations such as modified tasks or alternative assignments to a worker with a pregnancy-related condition because it provides such accommodations to other workers similar in ability or inability to work.⁴⁰ When an employee requests an accommodation for limitations arising out of pregnancy, childbirth, or related medical conditions, she is exercising rights protected by the PDA, and Title VII thus does not permit retaliation on the basis of such a request. In addition, sometimes a pregnancy-related limitation will qualify as a disability (or will be reasonably believed to be a disability by the employee⁴¹); in such circumstances, the ADA prohibits retaliation based on the request for accommodation.

For these reasons, the Commission must clarify that just as requests for reasonable accommodation for disability or religion are protected activity, so is a request for reasonable accommodation based on medical need arising out of pregnancy. Such a request cannot lawfully be the basis for retaliation.

In addition, pregnant workers with pregnancy-related disabilities, or those who reasonably believe that their pregnancy-related limitations constitute disabilities, are protected under the ADA's interference provision, and the Commission should make this explicit. As the Proposed Enforcement Guidance explains in Section III, in addition to prohibiting retaliation, the ADA prohibits "interference" with an individual's exercise of ADA rights or her attempt to exercise ADA rights, or with another person's assistance in the exercise or enjoyment of ADA rights.⁴² The final Guidance's discussion of ADA interference should note, through an example or otherwise, that the ADA prohibits interference with exercise of ADA rights as to pregnancy-related disabilities.

IV. The Proposed Enforcement Guidance Correctly Recognizes That an Employer Can Retaliate Through Work Schedules and Should Affirm This Categorically.

Punitive scheduling actions—changing an employee to a less favorable shift, cutting an employee's hours, requiring an employee to work a split-shift or a call-in shift, or providing an employee with shorter notice of her or his schedule—are in some instances retaliatory. The threat or action of having one's hours cut or schedule changed for engaging in protected activity is particularly coercive for workers balancing the dual demands of work and family and for low-income workers, because the impact of volatile work schedules can be especially severe for these workers.⁴³ In a recent survey, 26 percent of workers on irregular or on-call schedules reported often experiencing work-family conflict, compared to less than 11 percent of workers on more

⁴⁰ PREGNANCY DISCRIMINATION GUIDANCE at §I.C.1.

⁴¹ See Proposed Enforcement Guidance at 19 (noting that opposition activity is protected when based on "reasonable belief").

⁴² *Id.* at 59-61.

⁴³ Ben-Ishai, L., Matthews, H., & Levin-Epstein, J., *Scrambling for Stability: The Challenges of Job Schedule Volatility and Child Care*, CTR. FOR LAW AND SOCIAL POLICY (Mar. 2014), available at <http://www.clasp.org/resources-and-publications/publication-1/2014-03-27-Scrambling-for-Stability-The-Challenges-of-Job-Schedule-Volat-.pdf>.

regular schedules.⁴⁴ And variable work schedules can make it difficult for low-wage workers to access child care, arrange for transportation or pursue education and workforce training.⁴⁵ We commend the recognition that retaliation can take many forms, including employer actions that occur outside of the workplace, like harassment or threats, even if they have no concrete effect on employment; actions against an employee’s family member; and the exploitation of immigration status.⁴⁶ In particular, we commend the Proposed Enforcement Guidance’s recognition that scheduling practices can be a form of retaliation, in that the Proposed Enforcement Guidance identifies “changing the work schedule of a mother with school-age children”⁴⁷ and shortening a worker’s off-duty time between workdays as forms of adverse action.⁴⁸ We urge the final Guidance to categorically recognize that schedule changes can constitute adverse action, to avoid any implication that the particular examples featured are the only contexts in which schedule changes should be considered retaliatory.

V. The Proposed Enforcement Guidance Correctly Emphasizes That a Retaliation Claim Does Not Turn on the Merits of the Underlying Complaint.

We are gratified that the Proposed Enforcement Guidance recognizes that employees are protected from retaliation for participating in any discrimination claim, whether or not the claim is determined to be meritorious or even reasonable, and for opposing activity that the employee has a reasonable, good faith belief constitutes discrimination.⁴⁹ As the Proposed Enforcement Guidance recognizes, the courts generally have taken a broad view of opposition, finding that the expression of belief that the employer may be engaging in discrimination can be informal and need not use legal terms to convey resistance to the employer’s activity, for example.⁵⁰

The final Guidance should also recognize that particularly in circumstances where the relevant law is complicated (as is the case, for example, with regard to pay discrimination given the web of intersecting and overlapping legal protections created by Title VII, the Equal Pay Act, Executive Order 11246, and the National Labor Relations Act), the determination of the “reasonableness” of the employee’s belief that conduct constitutes unlawful discrimination does not depend on the acuity of the employee’s legal analysis.⁵¹ Accordingly, we urge that the final Guidance explicitly affirm that the failure to understand or be aware the precise scope of relevant law and protections does not foreclose potential claimants from having a “reasonable belief” of discrimination.

⁴⁴ ECONOMIC POLICY INSTITUTE, IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES (Apr. 2015), *available at* <http://www.epi.org/files/pdf/82524.pdf>.

⁴⁵ Watson, L., Frohlich, L., & Johnston, E., *Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences*, NAT’L WOMEN’S LAW CTR. (Apr. 2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/collateral_damage_scheduling_fact_sheet.pdf.

⁴⁶ Proposed Enforcement Guidance at 41-45.

⁴⁷ *Id.* at 44.

⁴⁸ *Id.* at 47.

⁴⁹ *Id.* at 6-7, 19-20.

⁵⁰ *Id.* at 12.

⁵¹ The Proposed Enforcement Guidance states that “individuals often may not know the specific requirements of the anti-discrimination laws enforced by the EEOC, [and] may make broad or ambiguous complaints of unfair treatment. Such communication is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.” *Id.* at 23-24.

VI. The Final Guidance Should Recognize That Opposition to Discrimination Voiced in the Press or Through Social Media Campaigns Can Constitute Protected Activity.

The Proposed Enforcement Guidance notes that “calling public attention to alleged discrimination may constitute reasonable opposition, provided it is connected to an alleged violation of the EEO laws.”⁵² Given the increasing importance of social media as a forum for worker communication and organizing around abusive or discriminatory working conditions, the final Guidance should expressly recognize that opposition undertaken through social media efforts can constitute protected activity. Nor should employees be subject to retaliation for sharing reasonable, good faith concerns about discrimination in the press, particularly given that public attention to such matters may be necessary to motivate employers to address discrimination. The final Guidance should affirm that such public statements may be protected.

VII. The Final Guidance Should Clarify the Required Showing for Causation.

The discussion in section II(C) of Proposed Enforcement Guidance creates confusion about the causation standard and heightens a complainant’s burden for demonstrating pretext beyond the requirements of the law. We agree with the Commission that the “but for” causation standard does not require a demonstration that retaliation was the sole cause of the employer’s adverse action.⁵³ An employer’s adverse action could be motivated by legitimate as well as unlawful reasons. A complainant need only show that the proffered legitimate, nondiscriminatory reason was not sufficient in itself to produce the adverse action, and that the retaliatory reason was determinative or necessary to the outcome.

However, the subsequent statement in the Proposed Enforcement Guidance that a complainant must “discredit the employer’s explanation and prove the real reason was retaliation” seems to imply that there can only be one reason for the adverse action, and that a complainant must discredit the employer’s proffered legitimate, nondiscriminatory reason, which is not required. We urge the Commission to clarify this important point and confirm that a complainant can present a “convincing mosaic”⁵⁴ of circumstantial evidence to support an inference of retaliatory intent.

Thank you for the opportunity to submit comments on the Proposed Enforcement Guidance. Please do not hesitate to contact Emily J. Martin (emartin@nwlc.org) or Maya Raghu (mraghu@nwlc.org) if we can provide further information.

⁵² *Id.* at 18.

⁵³ As the Proposed Enforcement Guidance acknowledges, the “but for” causation standard for retaliation claims adopted in *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), was subsequently recognized to be “a but for” standard that does not require the discriminatory motive to be the sole motive for the adverse action. *Burrage v. United States*, 134 S. Ct. 881, 885 (2014).

⁵⁴ Proposed Enforcement Guidance at 52-53.

Sincerely,

The National Women's Law Center

9to5, National Association of Working Women

A Better Balance

American Association of University Women (AAUW)

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

Anti-Defamation League

Center for Popular Democracy Fair Workweek Initiative

Coalition of Labor Union Women

Equal Rights Advocates

Family Values @ Work

First Shift Justice Project

Gender Justice

Indiana Institute for Working Families

The Leadership Conference on Civil and Human Rights

Legal Voice

National Advocacy Center of the Sisters of the Good Shepherd

National Committee on Pay Equity

National Council of Jewish Women

National Employment Lawyers Association

National Latina Institute for Reproductive Health

National LGBTQ Task Force

National Organization for Women

Sargent Shriver National Center on Poverty Law

Southwest Women's Law Center

Women Employed