

WORKPLACE RETALIATION

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I. DEFINING PROTECTED ACTIVITY THAT RETALIATION COVERS

A. What is retaliation?

1. Retaliation happens when an employer takes adverse action against an employee because they engaged in a protected activity or threatens to report a violation, like reporting discrimination, harassment, or safety concerns, essentially punishing them for exercising their right to speak up against wrongdoing within the company.
 - a. Just needs to be a “good faith” belief that the activity is protected, even if the alleged behavior is not unlawful or protected.
2. Can have “retaliation” even before the materially adverse action. Example: if employment handbook or policy discourages exercise of EEO rights or other protected activity.
3. Agency Guidance.
 - a. Agency guidance defining retaliation including: Wage and Hour Division of the US Department of Labor and EEOC.
 - b. US Department of Labor Field Assistance Bulletin No. 2022-22 addressing how Wage and Hour Division engages to protect employees from retaliation. Specifically addressed are the FLSA, FMLA, MSPA and EEPA.
4. “Protected Activity” – Worker’s Compensation, Protected Leave (FMLA/ADA/Pregnancy), Discrimination/Harassment charges, MIOSHA or DOL complaints or investigations.
 - a. This can include actions such as being a witness in an EEOC charge, investigation or lawsuit.
 - b. Refusing to engage in orders that would result in discrimination.
 - c. Intervening to protect others from discriminatory actions such as sexual advances,
 - d. Asking management about employee wages.

II. TYPES OF RETALIATION AND TEMPORAL RETALIATION

- A. Discipline,
- B. Actions to “dissuade” employee from raising a concern relating to possible violations,

- C. Taking passports/immigration documents being held by employer and/or threatening to call immigration,
- D. Making employee's work-life more difficult,
- E. Threatening employee's family members,
- F. Demotion,
- G. Changing schedule, verbal abuse, altering job responsibilities,
- H. Threatening transfer,
- I. Intentionally giving lower performance evaluations,
- J. Threatening to call police authorities on employee,
- K. Coercing an individual to forgo an accommodation or leave,
- L. Termination, and/or
- M. Constructive discharge.

III. WHO DOES THIS APPLY TO?

- A. Family members can be included.
- B. Under FLSA, "it is a violation for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA."
 - 1. This prohibits retaliation "by any person" and is not limited to the employer. Could be employer's agent – such as employer's outside counsel being liable for retaliation.
 - 2. Employers who willfully violate FLSA can be prosecuted criminally and fined, and/or imprisoned for 6 months. 29 USC 215(a)(3).

IV. WHAT IS NOT RETALIATION

- A. Discipline or termination due to performance issues.
- B. Fabrication of performance issues to support termination or discipline of employee is considered retaliatory and will result in penalties by the DOL Wage and Hour and EEOC.
- C. Reduction in Force.

- D. Misconduct. Employee is not protected or shielded from their own consequences of misconduct or bad behavior.
- E. Theft, falsification of records or dishonesty.
- F. Document all discipline or termination of any employee who may have engaged in any protected activity.
- G. Defense for any further claims.

V. DAMAGES AWARDED FROM RETALIATION

- A. Front Pay,
- B. Back Pay,
- C. Attorney Fees,
- D. Reinstatement of employment,
- E. Damages arising from alleged violation of FLSA, MSPA (protects seasonal workers), Title VII, FMLA, and/or
- F. Possible civil penalties.

VI. TIME LIMITATIONS

- A. Gentle reminder – 180-day limit to file a charge with the EEOC.