

Feds Continue to Prioritize Retaliation Claims – Is Your Organization Protected?

Labor & Employment Law Update

on March 15, 2022



Retaliation remains a top enforcement priority of the federal government. Last week the U.S. Department of Labor (DOL) announced a new field assistance bulletin entitled “Protecting Workers from Retaliation” and pledged to “use every tool available” to “uphold the rights of workers to identify violations of the law without

fear of termination or other threats to their reputation, safety or livelihood.”

Making good on its pledge, this week the DOL ordered an Arizona manufacturer to pay nearly \$600,000 and reinstate a former employee who claimed retaliation under the Sarbanes-Oxley whistleblower provisions after raising concerns about the legality of stock transactions.

Late last year the DOL, EEOC and NLRB announced a joint initiative to combat retaliation. Virtually all federal (and state and local) laws aimed at protecting employee rights contain anti-retaliation provisions. As a percentage of total EEOC charges filed nationally, charges alleging retaliation have increased *every year* since 1992. *More than half* of all EEOC charges in recent years contained allegations of retaliation.

What steps can you take now to prevent retaliation and best position your organization to defend against such claims when they do arise?

- **Implement** policies that are clear, fair, and tailored to their particular purpose. One-size-fits-all does *not* work for employee handbooks, work rules, or job descriptions. Revisit policies regularly and update them often to ensure they meet your organization's unique needs and accurately reflect your actual practices.
- **Consistently enforce** your policies. Retaliation is often proved through evidence that employees were treated differently from one another under

similar circumstances. In today's tight job market, it can be tempting to relax enforcement to avoid further exasperating labor shortages. But by giving an employee a pass, an employer may inadvertently create evidence of disparate treatment. It is better to revisit the rule than to permit lax enforcement.

- **Document** *performance and behavioral problems and discuss them with the offending employee.* In general, employees should not be surprised when formal discipline is issued.
- **Educate and Train** *employees, including those in management roles.* Employees should know what is expected of them, and how to report problems. Supervisors and managers are your organization's eyes and ears. Make sure they consistently enforce your policies and train them to spot potential violations of law and to promptly alert HR so that issues can be addressed effectively.
- **Encourage** *employees to report problems.* Allow employees to fully voice their concerns and to share supporting facts and witnesses. Encourage (but do not require) employees to put their complaints in writing.
- **Protect** *employees who raise complaints.*
- **Investigate** *complaints promptly, fairly and thoroughly.* Speak with witnesses. Document all steps in the investigative process. Focus on the facts rather than conclusory statements.
- **Circle back** *with the employee who complained.* Don't leave them wondering! Let them know you will investigate, and when you expect to report back to them. Update them if the investigation takes longer than expected. Communicate the findings of your investigation.
- **Remedy** *problematic behavior and document the action that you have taken.*

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