

Proactive Measures

Helping your company avoid retaliation claims

A RETALIATION CLAIM MAY LURK WHERE you least expect it. Consider these scenarios: An employee complains he is experiencing unlawful harassment on his regular visits to one of the company's biggest clients. To help him, you transfer him to another client account. Another employee refuses to comply with a supervisor's orders, will not say why, and is disciplined for insubordination. Or a manager who was falsely accused of harassment begins avoiding the complaining employee in an attempt to steer clear of further trouble. Any of these scenarios can make your company liable for retaliation if the employee claims he received unfavorable treatment for engaging in legally protected activity.

Retaliation claims are particularly tricky for employers for several reasons. First, they can arise from acts an employer takes without intending to harm the affected employee.

EXECUTIVE SUMMARY

Retaliation claims can arise whenever an employer transfers, disciplines, or terminates an employee, if the employee previously protested unlawful workplace conduct, policies, or practices. Because an employer can be held liable even if it did not intend harm, companies derive significant benefit from creating policies, trainings, and procedures that help prevent retaliation and respond to retaliation complaints promptly and effectively.

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Second, the range of employer conduct that may be considered retaliatory is broader than what can constitute unlawful discrimination or harassment. And juries tend to be more sympathetic to retaliation claims than to other employment claims. The bottom line is clear: Companies ignore retaliation issues at their peril. With the number of these claims and the size of multimillion-dollar jury verdicts rising, now is a critical time for employers to take proactive measures to minimize the likelihood of retaliatory conduct and resulting legal claims. The key? Establishing appropriate policies, training programs, and internal procedures to identify potential complaints and handle them promptly and effectively.

Many federal and state statutes contain anti-retaliation provisions protecting employees who seek redress or protest unlawful corporate practices. Anti-retaliation provisions are contained in federal and state laws prohibiting discrimination and harassment, those barring certain corporate accounting practices, and in those setting forth wage protections, health and safety standards, employee leaves, workers' compensation, and disability benefits. In addition, a few states—including California, Ohio, and Oregon—also provide common law remedies for workplace retaliation. In some jurisdictions, an employee does not have to prove he or she was retaliated against for challenging conduct that actually violated the law, as long as the employee proves he or she had a reasonable, good faith belief the conduct challenged was illegal.

Employers found guilty of retaliation face significant penalties, including having to reinstate the complaining employee, pay awards of compensatory and punitive damages, and pay the prevailing employee's attorneys fees.

EVALUATING POTENTIAL CLAIMS

If an employee has previously complained about an employer's conduct, policies, or practices, an employer contemplating any employment action that may adversely affect the employee should consider whether the employee's complaint or protest could qualify as a "protected activity," whether the employer's actions could constitute an "adverse employment action," and whether circumstances create a sufficient link between the

protected activity and the adverse employment action that the law might deem the action retaliatory.

Conduct is deemed protected activity if it opposes or protests unlawful employer conduct, or conduct that an employee believes, reasonably and in good faith, to be unlawful. The range of conduct that has been deemed protected activity is so broad that employers should ordinarily assume an employee's opposition to policies, practices, or orders that could possibly be deemed unlawful is protected. Potentially protected employee activities include filing, or threatening to file, a claim with human resources, an administrative agency, or a court; participating as a witness in the investigation of such a complaint; and refusing to implement an

employer's orders, if the refusal is based on a belief the orders are unlawful.

The scope of what qualifies as an adverse employment action is also broad enough that employers had best err on the side of caution. Employers should recognize that if an employee recently engaged in a protected activity, any significant negative changes in job duties, disadvantageous new assignments, severe harassment that goes unchecked by management, unfounded accusations of wrongdoing, or negative job references could subject the company to liability.

Finally, in evaluating whether there is a legally sufficient link between an employee's protected activity and a subsequent adverse employment action, employers must remember that causation is all that is required. The

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EXPERT ADVICE

CRITICAL STEPS

To help prevent unlawful retaliation and minimize the impact of retaliation claims, employers should take proactive measures, including the following:

1. POLICIES: Have written policies prohibiting unlawful retaliation and stating that substantiated complaints of retaliation will lead to discipline up to and including termination. Consider having a policy restricting employee job references to verification of dates of employment and job titles.

2. TRAINING: To encourage internal resolution of complaints, teach all employees how to use the company's

internal complaint procedures. Train managers and supervisors to recognize when action against an employee could lead to a retaliation claim and to seek guidance from human resources and/or legal counsel before taking action.

3. CONSISTENT ENFORCEMENT: Enforce workplace rules consistently, and document significant infractions. Accurately document employee performance based on essential job-related criteria. Well-documented performance deficiencies and disciplinary history can demonstrate a legitimate basis for subsequent action against an employee and help rebut retaliation claims.

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employer need not intend to cause the employee harm. Nor need there be any direct evidence that the employee's protected conduct caused the employer to take action. Managers or supervisors rarely state outright that they are taking action because of an employee's protest or complaint. More commonly, courts find sufficient indirect, or "circumstantial," evidence to create an inference that an employer took some adverse employment action because of an employee's protected activity. This can occur when an adverse action is taken a few days, months, or even longer after the employee engaged in the protected activity, or when a previously lauded employee begins receiving unjustified criticism, reprimands, or negative performance evaluations after engaging in protected activity.

Employers remain free to discipline or terminate employees who perform poorly or violate major workplace rules. But to minimize potential retaliation claims, employers considering action against an employee who has made a protected protest or complaint should seek guidance from human resources or legal counsel. And, working with counsel, employers should proactively establish and follow anti-retaliation policies, training, and investigation procedures, including those suggested below and in the Expert Advice sidebar. These suggestions are not exhaustive. Companies should consult counsel for advice best tailored to meet their needs.

TRAINING AND INVESTIGATIONS

All employees should receive training on the company's anti-retaliation policy, the procedures for raising retaliation complaints internally, and the policy on providing references. In addition, supervisors and managers should be trained to ensure that performance reviews are accurate, not inflated, and that employees' disciplinary histories are documented in writing. This allows employers to prove that any seemingly negative employment actions were justified based on employees' performance and disciplinary histories, and were not the result of employees' protected opposition to company practices. Similarly, supervisors and managers should be trained to enforce workplace rules and policies fairly and consistently and to base

disciplinary action on specific written rules and policies whenever possible. Finally, supervisors and managers should understand that failing to address complaints of a hostile work environment or of favoritism based on gender or other protected categories can lead to liability. A sufficiently hostile work environment, or one permeated with sexual favoritism, can constitute unlawful harassment and discrimination as well as the "adverse employment action" necessary for a retaliation claim.

Employers should involve legal counsel early and often in determining the appropriate scope of an investigation, its findings, and any resulting disciplinary action. In some instances, to help ensure impartiality, companies should consider hiring an outside service to field complaints or conduct a particularly difficult investigation. Every stage should be carefully documented.

The investigator should explain to the complaining employee that the company will—to the extent possible while still allowing an appropriate investigation—preserve confidentiality. Witnesses interviewed should be reminded that they have a duty to keep the investigation confidential. And the accused manager or supervisor should be warned that it is illegal to retaliate against the complaining employee.

The accused employee should be given a full chance to respond to the allegations, and the employer should take both sides of the story—along with reasonable conclusions regarding the parties' credibility—into account in arriving at its findings.

In determining what corrective action to take, an employer should be careful about transferring the complaining employee to a different job, supervisor, shift, or location. If the transfer seems disadvantageous to the employee, it could create the appearance of

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retaliation. It is far better to address the underlying problem. If the employee still requests a transfer, the employer should attempt to identify an equivalent opportunity and ask the employee to sign a statement saying the transfer is being made at his or her request.

THE BOTTOM LINE

There are many measures companies can take to minimize the impact of retaliation claims. At a time when these claims are proliferating and juries are awarding ever-increasing verdicts, companies that implement effective policies and procedures will likely find the investment pays off many times over.

