

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
ATTORNEYS AT LAW

March 2022 – Volume 17

March Updates

1. [The CDC \(Finally\) Updates Its Mask Guidance](#)
2. [Your Workplace and Ukraine, State of the Union](#)
3. [#metoo #itsback](#)
4. [Never Let a Crisis Go to Waste: Define Your Workplace Now](#)
5. [The Luck of the Irish and Unconscious Bias](#)

Retaliation: The Protections Are Everywhere.

Many employers know the various federal and state laws that protect employees and provide requirements that define the workplace. How these laws impact employers' decisions after an employee raises a claim is just as important as adherence to the underlying law. The same laws that prohibit discrimination (e.g., race, color, sex, religion, national origin, age, disability) also prohibit retaliation. Retaliation is also prohibited in the regulations which provide many of the wage and hour protections (e.g., minimum wage, overtime pay, recordkeeping, lie detector testing, youth employment). An employer's responsibilities often continue long after an employee requests an accommodation, notifies the employer of potential discrimination or harassment, or files a complaint.

Retaliation claims can survive even when the underlying violation does not. And they are expensive in terms of damages. So even if you did not violate the law as claimed, adverse actions in the wake of the claim can sting you. Find out more below!

So, what is the definition of "Retaliation?" In legal terms, retaliation is any adverse action an employer takes against an employee for engaging in protected activity.

Let's Dig Deeper.

Retaliation is when an employee asserts his or her rights under an applicable law. This can be done either explicitly or implicitly, and either personally or on behalf of another. In reaction, the employer engages in conduct against the employee which might have deterred a reasonable employee from asserting such rights. Protections against retaliation apply to all your employees who are covered by the applicable law. This includes all full-time, part-time, probationary, seasonal, and temporary employees. In some cases, the protections might extend to applicants and former employees.

What Employee Conduct is Protected Activity? Employees are protected from retaliation when they "participate" or "oppose" violations of certain laws. This protection applies when an employee actively challenges violations personally or through participation in proceedings for others

who challenge violations. Employees are also protected when they communicate a reasonable belief that activity is unlawful either directly or indirectly to you in a reasonable manner. Employees are still protected from retaliation even when the underlying conduct claimed by the employee is ultimately found not to have violated the law. For example, in a recent federal case, the court ruled the employee's claim of retaliation was still actionable despite the court dismissing her claims of harassment and discrimination.

For retaliation claims, protected activity comes in many forms including the following examples:

- Filing a charge;
- Testifying or Agreeing to Testify;
- Cooperating with an Internal Investigation;
- A Preliminary Visit to an EEOC Counselor;
- Picketing in Opposition to Discrimination;
- Requesting a Reasonable Accommodation;
- Intervening to Protect Others;
- Complaining About Violations;
- Threatening to File a Charge; and
- Advising an Employer on EEO Compliance.

What Employer Conduct is Adverse Action? Adverse action is conduct which might have dissuaded or deterred a reasonable worker from engaging in the protected activity. This conduct may be directed at the employee or indirectly affecting the employee. This leaves a wide range of conduct and employers need to be cautious in their actions when an employee raises a claim. Here are some examples of adverse action: Increased Scrutiny, Rumors, Verbal or Physical Abuse;

- Mandatory Unpaid Leave, Unpaid Suspension;
- Reassignment to a Less Desirable Position or Location;
- Demotion or Pay Reduction;
- Change in Schedule or Hours; or
- Discipline, Termination;

Employee Misconduct: Protections from retaliation do not protect employees from discipline or termination for other, wholly unrelated reasons. Be aware though that disciplining or discharging an employee who engages in some form of misconduct may come with risks if the employee engaged in protected activity. But it can be done and we can help.

Why Ensure Compliance?

The consequences of retaliating against an employee can result in extensive money damages. The court may even award punitive damages for pain and suffering against private employers. In some cases, employers are required to pay damages in the form of back pay, front pay, interest or to provide job reinstatement.

How to Ensure Compliance?

Updating policies, procedures, and handbooks. Stay up to date with training. Consulting counsel before making employment decisions. & Following your policies and procedures consistently. Training is one of the best practices for your workplace: It is essential to train all employees in a supervisory or managerial position to avoid retaliatory conduct.

We can help.

We have fixed fee services to audit your workplace culture, review and update your policies or handbook, and provide training. Contact us for additional information.

Contact Us



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