

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
ATTORNEYS AT LAW

February 2023

### February Updates

[Yeah, That Non-Compete Rule Really Is a Big Deal](#)

[How to Replace Non-Competes and Better Protect Your Business](#)

[Questions to Ask Before Downsizing](#)

[The Next Wave: Pay Transparency](#)

### Employment Law Corner: The Overly-Protected Employee Under OSHA . . .

COVID-19 changed the workplace as we knew it. One of the fastest growing claims during the pandemic were employee retaliation cases brought before the Occupational Safety and Health Administration (“OSHA”). These cases are still playing out in court and costing employers thousands in penalties and legal fees, even as the workplace begins to resume some normalcy.

Many employers hear the term OSHA, and they think of the agency from years past — the one that protected miners and manufacturers. Based on this dated perception, we have found that many employers are unaware of the liability that can be imposed for violating the Occupational Safety and Health Act’s prohibition against employee *retaliation*. You have likely heard of retaliation charges when it comes to employment discrimination lawsuits, but OSHA has its own anti-retaliation provisions and the scope of protections is broad!

The OSHA Whistleblower Protection Program provides protection from retaliation for employees reporting a broad number of concerns regarding the health and safety of their workplace, or for engaging in other protected activities. In fact, OSHA enforces the whistleblower provisions of 22 distinct whistleblower statutes. (found here: [Occupational Safety and Health Administration \(whistleblowers.gov\)](https://www.osha-slc.gov/whistleblowers.gov)).

The scope of what OSHA may find to be “retaliation” is equally broad. An adverse action is defined as any action which would dissuade a reasonable employee from raising a concern about a possible violation or engaging in other related protected activity. Notice the key words...possible violation? The employee merely needs to show that they had a reasonable belief that the employer was engaging in a violation— even if the employer was not.

### What’s An Employer To Do?

*Sounds like a lot of liability— so what is an employer to do?*

The answer? Have a comprehensive Health & Safety Program that strives to create a safe workplace for all. Studies have shown that having such a Program in place can reduce workplace injury and illness and also provides a strong defense to any OSHA investigation.

OSHA recommends all employers have the following 5 core elements as part of a comprehensive Health & Safety Program: (1) Management Commitment, (2) Compliance Concern Response System, (3) Anti-Retaliation Response System, (4) Anti-Retaliation Training, and (5) Program Oversight.

**TOP OSHA CITATIONS/  
EMPLOYER VIOLATIONS  
2022**

- 1. Fall Protection- General Requirements  
(5,260 Violations)**
- 2. Hazard Communication  
(2,424 Violations)**
- 3. Respiratory Protection  
(2,185 Violations)**
- 4. Ladders  
(2,143 Violations)**
- 5. Scaffolding  
(2,058 Violations)**
- 6. Lockout/Tagout  
(1,977 Violations)**
- 7. Powered Industrial Trucks  
(1,749 Violations)**
- 8. Fall Protection – Training  
(1,556 Violations)**
- 9. Personal Protective & Lifesaving Equipment  
(1,556 Violations)**
- 10. Machine Guarding  
(1,370 Violations)**

**Contact Us**



**FOLEY & FOLEY**  
ATTORNEYS AT LAW

[www.foleylawpractice.com](http://www.foleylawpractice.com)

[info@foleylawpractice.com](mailto:info@foleylawpractice.com)

(844) 204-0505

A successful Program should provide employees with an open door to report concerns internally. While you cannot mandate that your employees file internally, this approach will encourage doing so. You also need to ensure your Program includes a strong anti-retaliation language and educate your managers!

We can help! We have helped employers nationally develop a comprehensive Health & Safety Program that satisfies OSHA's requirements specific to your industry. We also offer tailored training for your industry and company.

**IMPORTANT 2023 OSHA DEADLINES**

- Employers must post their 2022 Summary of Work-Related Injuries & Illnesses (FORM 300A) from February 1, and April 30, 2023.
- Specific employers must submit required 2022 injury & illness data to OSHA electronically by March 2, 2023. A specific employer has over 250 employees or more than 25 employees in a specific industry. Not sure? Check here: [ITA Coverage Application | Occupational Safety and Health Administration \(osha.gov\)](#)

***If you are contacted by an OSHA Investigator, don't speak up just yet! Talk to us, we can help and have assisted many employers with their OSHA investigations. Now is the perfect time, as OSHA just increased their penalties for 2023.***

**Who We Are**

We want to **introduce ourselves** to those we have not met:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That's easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specializes in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com)**