

NOVEMBER 28, 2016 | WORKPLACE SAFETY & HEALTH

Whistleblower Retaliation Article Published in BLR's HR Daily Advisor and Upcoming Webinar

✖ BLR recently published a two piece article in the HR Daily Advisor by [Kara Maciel](#) and [Daniel Deacon](#), of Conn Maciel Carey's national [Labor & Employment Law Practice Group](#), regarding government agencies increased focus on whistleblowers and retaliation, and how employers can avoid whistleblower and retaliation complaints from their employees.

Over the past year, there have been significant changes in both the Equal Employment Opportunity Commission ("EEOC") and Occupational Safety and Health Administration ("OSHA") that make it easier for employees to demonstrate that an employer acted with retaliatory intent. Given this increased focus on retaliation, it is prudent for employers to take steps to avoid whistleblower and retaliation complaints from their employees, and ensure that they have adequate workplace policies and complaint systems to address retaliation complaints before an employee complaint lands before the EEOC or OSHA.

Part 1 of the article, titled "[Preventing Whistleblowers in the Workplace: EEOC Expands the Rights of Whistleblowers](#)," focuses on how the EEOC has modified the standard it uses to evaluate retaliation claims, and has become more aggressive in its whistleblower enforcement efforts. Specifically, the EEOC revised its Enforcement Guidance on Retaliation and Related Issues in August 2016, significantly decreasing an employee's burden of proof to demonstrate that an employer acted with retaliatory intent. The EEOC's revisions significantly broaden the definitions of protected activity, adverse employment action, and causal connection – the three elements that a plaintiff must prove to make a claim for retaliation. Due to the EEOC's broadening of the retaliation standard, an employer facing a retaliation claim before the EEOC will now be scrutinized much closer than before, and EEOC inquiries into an employer's actions and employment policies will likely increase.

Part 2 of the article, titled "[Preventing Whistleblower in the Workplace: OSHA Expands the Rights of Whistleblowers](#)," discusses OSHA's increased efforts to bolster its whistleblower protection program and retaliation enforcement efforts. Within the past year, OSHA has revamped its rules that protect whistleblowers through updated guidelines in its field enforcement manual, additional guidance documents and interpretation letters, and the anti-retaliation provisions embedded in the new electronic recordkeeping rule. Similar to the EEOC, OSHA made it much easier for claimants to make out a claim for retaliation before the agency. The new enforcement manual eliminates the *prima facie* standard for determining whether a merit finding should be made, and therefore reduces the possibility that a complaint will be dismissed prior to a hearing before an administrative law judge. The new standard that investigators apply is whether "OSHA has reasonable cause to

believe a violation occurred.”

Additionally, the Preamble of the OSHA electronic recordkeeping rule included new obligations requiring employers to implement “reasonable reporting” procedures for employees to report to their employers work-related injuries, and a broad and vague new set of provisions that expand OSHA’s enforcement authority to prevent employer retaliation against employees who report injuries and illnesses. Specifically, OSHA discussed reporting procedures and policies that may violate the new anti-retaliation provisions, and retaliatory issues related to safety incentive programs, post-injury drug testing, and management compensation or bonuses tied to injury rates. It also provides OSHA a new enforcement mechanism that allows them to issue regulatory citations for retaliatory conduct. While it is not certain that the anti-retaliation provision will go into effect in light of an industry challenge and the change in the Administration, these provisions will have a significant impact on workplace policies and practices.

Finally, OSHA also published a Final Rule prohibiting retaliation against employees that exercise rights under the Affordable Care Act (“ACA”), and established procedures for the filing, evaluation, and litigation of whistleblower complaints under the ACA. Given this flurry of activity by OSHA over the past year to increase whistleblower protections, employers will likely see more retaliation claims brought against them and make it to the hearing stage before an Administrative Law Judge.

For further information on these important topics and how they will affect your workplace, please join Kara Maciel on November 30th at 1:30pm EST for an in-depth [webinar](#) on “OSHA’s New Whistleblowing Requirements: How to Steer Clear of Legal Missteps Amid Increased Employee Protection.”