

MAY 13, 2022 | DISCRIMINATION, HARASSMENT & RETALIATION

DOL Guidance Further Underscores Agency's Focus on Retaliation

The Department of Labor ("DOL") has taken a number of actions during the Biden Administration to express and demonstrate that it is prioritizing protections against investigations of retaliation in the workplace. For example, in November 2021, the DOL, National Labor Relations Board ("NLRB"), and Equal Employment Opportunity Commission ("EEOC") announced a joint initiative to raise awareness about retaliation issues among workers and employers. As part of the initiative, the Agencies made clear that they would be working cooperatively and, per the current Solicitor of Labor, "use all tools available to protect workers from retaliation." More recently, in March 2022, the Wage and Hour Division ("WHD") issued a [Field Assistance Bulletin \("FAB"\)](#) specifically outlining the anti-retaliation provisions it is charged with enforcing and the elements of retaliation, as well as providing examples of what it would consider retaliation under the various laws and programs. 

This FAB is significant not because it kicks off any new or additional enforcement effort by the WHD, but because it clearly lays out how the WHD interprets and applies the relevant anti-retaliation laws, and signals a clear intent to prioritize enforcement of anti-retaliation provisions. Specifically, the WHD explains what constitutes prohibited retaliation generally and addresses it in the context of the specific laws and programs it enforces, including the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), various Visa programs, and several others. The FAB begins with a general review of prohibited retaliation. More specifically, the FAB covers elements of actionable retaliation which include:

1. Protected activity by the employee;
2. Adverse action by the employer; and
3. A causal connection between the protected activity and the adverse action.

In the FAB, the WHD provides some examples of what constitutes protected activity, noting that even a mistaken belief on the part of the employee that they have engaged in protected activity is sufficient to meet the first element of a retaliation claim; i.e., if an employee believes they should be paid overtime and reports this to the employer, this is protected activity even if they are not actually entitled to overtime and has been properly paid.

The WHD also lays out several types of adverse actions that are sufficient to meet the second element of a retaliation claim. In the context of retaliation, the standard for adverse action is whether it would dissuade a reasonable employee from engaging in protected activity – a broader standard than that set for Title VII discrimination claims. Thus, an adverse action sufficient to establish retaliation could be anything from the

employee's demotion or termination, a reduction of work hours, change in schedule, or excluding an employee from a regularly scheduled meeting. All of these are referenced by the WHD in its March 2022 FAB. And if those first two elements are established, the WHD notes that there must be a causal connection between them to demonstrate that the adverse action was taken based on the protected activity.

After its general review of prohibited retaliation, the WHD provides some specific and illustrative examples of what would constitute impermissible retaliation under the various laws it enforces. In the context of the FLSA, the WHD gave an example of an employee expressing breast milk during her meal break who needed time beyond her designated break for pumping. The WHD explains that if the employer sends the employee home without pay for the rest of the day following her request and denies additional time beyond her break is retaliation that could result in back pay and liquidated damages for the wages she lost that day. In the section on retaliation under the FLSA, the WHD also notes that the anti-retaliation provisions of the FLSA may apply in situations where there is no current employment relationship between the parties; i.e., it may have authority to protect a person from retaliation by a former employer.

Another scenario from the FAB provides an interesting example of retaliation in the context of the FMLA and illustrates the importance of ensuring that those enforcing an employer's policies – namely managers and supervisors – be effectively trained on how those policies should be implemented. The WHD describes a situation in which an employee takes FMLA leave to care for a child and upon their return receives negative attendance points under the employer's no fault attendance policy, which requires allocation of points for every absence from work regardless of the reason and could ultimately result in termination. This constitutes prohibited retaliation because the FMLA's anti-retaliation provisions prohibit an employer from using protected leave as a negative factor in an employment action, including counting those days in the no fault attendance policy.

In the FAB, the WHD also addresses actions related to an employee's immigration status and how these can serve as the basis for retaliation. For instance, the WHD describes a scenario in which it opens up an investigation where an employer tells its workers participating in the H-2B Visa program not to speak to the investigator and to destroy relevant records or it will not renew their visas. The WHD states that it may assess monetary penalties, among other potential ramifications, for these threats of retaliation and, should the employer follow through on the threat, assess back wages and other remedies for the affected employees.

The WHD concludes the March 2022 FAB by highlighting that in cases of retaliation the WHD intends to coordinate with federal and state partners to the extent that other laws and protections may be applicable. Specifically, it identifies the Occupational Safety and Health Administration, the EEOC and the NLRB, who all have authority to enforce certain anti-retaliation and whistleblower laws. As an example of where coordination may be appropriate, the WHD notes that an employee who complains of a suspected violation of the law may also be engaging in protected, concerted activity under the National Labor Relations Act and any retaliatory action could be violative of laws enforced by the WHD and NLRB. If that is the case, and per the [Memorandum of Understanding](#) between the two Agencies, the WHD could make a referral of the complaint to the relevant NLRB regional office.



In sum, the FAB signals the importance of putting your company in the best position possible to proactively avoid potential claims of retaliation and/or to effectively establish that retaliation has not occurred.

The steps employers should consider taking to avoid and effectively address issues of retaliation include:

1. Developing and implementing a written anti-retaliation policy on which all employees are trained;
2. Developing and implementing a written procedure through which employees can make internal complaints on which all employees are trained;
3. Providing training to managers/supervisors on how to implement policies, like a no fault attendance policy, and procedures in a way that complies with applicable federal and state law, as well as how to properly respond to an employee complaint and the types of conduct that are or could be perceived as retaliatory;
4. Providing training to managers/supervisors on how to properly document performance issues and disciplinary action to ensure there is a written record available to support an adverse employment action; and
5. Periodically reviewing relevant policies and procedures to ensure they are being implemented appropriately and consistently.