

Retaliation: 2012 and Beyond

By [Martha Zackin](#) on January 26, 2012

Retaliation claims are here to stay. According to [charge statistics](#) recently released by the EEOC, retaliation claims rose to an all-time high of 37,344 in fiscal year 2011, and were included in 37.4% of all charges filed with the agency. Recent developments lead us to conclude that this trend will continue, in 2012 and beyond.

In December 2011, the U.S. Department of Labor (“DOL”), Wage and Hour Division (“WHD”), released guidance pertaining to prohibitions against retaliation under the Fair Labor Standards Act (“FLSA”) and the Family and Medical Leave Act (“FMLA”).

The WHD FLSA guidance, set forth in [Fact Sheet #77a](#), incorporates the holding from the United States Supreme Court’s decision in *Kasten v. Saint-Gobain*, where the Court expanded the FLSA’s anti-retaliation provision to include an internal, verbal complaint made by an employee about possible FLSA violations. Specifically, Fact Sheet #77a states the WHD’s position that:

- Employees are protected regardless of whether the complaint is made orally or in writing.
- Because the FLSA prohibits “any person” from retaliating against “any employee,” the protection against retaliation applies to all employees of an employer even in those instances in which the employee’s work and the employer are not covered by the FLSA.
- Prohibitions against retaliation also apply in situations where there is no current employment relationship between the parties. For example, an individual is protected from retaliation by a former employer.

For more information about *Kasten v. Saint-Gobain*, click [here](#).

As to the FMLA, [Fact Sheet #77b](#) gives specific examples of prohibited conduct, including:

- Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee’s work hours to avoid responsibilities under the FMLA,
- Using an employee’s request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or,
- Counting FMLA leave under “no fault” attendance policies.

For more information about recent developments pertaining to the anti-retaliation provisions of the FMLA, click [here](#) and [here](#).

With new statutory prohibitions against retaliation, such as the prohibitions set forth within the Dodd–Frank Wall Street Reform and Consumer Protection Act, and the recent developments described above and elsewhere (read more [here](#) and [here](#)), it does not take a crystal ball to predict that retaliation claims will continue to rise.