



## Avoiding Costly Whistleblower Claims for Alleged Retaliatory Conduct After An Employee’s Workplace Safety Complaint – Pointers Under Federal and Virginia Occupational Safety and Health Laws

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A federal court recently awarded an employee \$9.8 million in a safety retaliation case. See *Sanders v. BNSF Ry. Co.*, 2022 BL 432941, No. 0:17-cv-05106 (D. Minn. Dec. 5, 2022). A jury found that the railway employer terminated a track inspector in retaliation for opposing safety issues. The damages were reduced to \$2.3 million because the Federal Railway Safety Act (“FRSA”) caps punitive damages at \$250,000. The jury found the evidence supported an inference that the employee’s protected actions at least contributed to the decision to fire him. The FRSA is one of more than 20 federal laws protecting employees from retaliation enforced by OSHA’s Whistleblower Protection Program. As discussed in this article, it is important for employers to be mindful of possible protected activity with so many Federal and State laws containing whistleblower and anti-retaliation provisions.

### Anti-Retaliation Provisions in Occupational Safety and Health Laws

The federal Occupational Safety and Health Act (“OSH Act”) was enacted in 1970 to protect workers by requiring employers and workplaces to adhere to certain safety standards. The OSH Act created the Occupational Safety and Health Administration (“OSHA”) and all the OSHA safety regulations. The OSH Act applies to private-sector employees in the 50 states and certain territories and jurisdictions under federal authority (District of Columbia, Puerto Rico, U.S. Virgin Islands, and others).

The OSH Act encourages states to develop and operate their own job safety and health programs and precludes state enforcement of OSHA standards unless the state has an OSHA-approved State Plan. Currently, 22 states or territories have OSHA-approved State Plans that cover both private and state and local government workers, including Virginia. Five additional states and one U.S. territory (U.S. Virgin Islands) have OSHA-approved State Plans that cover state and local government workers only. In Virginia, the Virginia Department of Labor and Industry (“DOLI”) enforces safety and health regulations through the [Virginia Occupational Safety and Health \(“VOSH”\)](#). Virginia state law incorporates the federal law by reference and provides additional protection for employees. Virginia’s State Plan, like all OSHA-approved State Plans, must be at least as effective as federal OSHA in protecting workers and in preventing related injuries, illnesses, and death. The Virginia State Plan’s unique standards and regulations are described by DOLI [here](#).

In addition to setting standards in the workplace, both federal and Virginia laws have anti-retaliation provisions that prohibit employers from terminating, discriminating against, or taking other adverse actions toward an employee for any of the following reasons:

- Employee participation in safety and health activities
- Complaining to OSHA/VOSH or seeking an OSHA/VOSH inspection
- Participating in an OSHA/VOSH inspection

- Participating or testifying in any proceeding related to an OSHA/VOSH inspection
- Reporting a work-related injury, illness, or fatality
- Reviewing records of work-related injuries and illnesses
- Receiving information and training about hazards, methods to prevent harms, and the OSHA/VOSH standards that apply to the employee's workplace

OSHA's [Whistleblower Protection Program](#) enforces the provisions of more than 20 federal laws protecting employees from retaliation for, among other things, raising or reporting concerns about hazards or violations of various workplace safety and health, aviation safety, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear pipeline, public transportation agency, railroad, maritime, securities, tax, antitrust, and anti-money laundering laws. Employees who believe that they have experienced retaliation in violation of one of these laws may file a complaint with OSHA. OSHA provides a [Whistleblower Statutes Summary Chart](#) with the time period to file a claim, respondents covered, allowable remedies, and further information on each federal whistleblower statute that OSHA enforces.

Under federal law, private-sector employees who suffer retaliation because of OSHA activity are covered by section 11(c) of the OSH Act. If OSHA determines that retaliation in violation of the OSH Act has occurred, the Secretary of Labor may sue in federal district court to obtain relief. If OSHA determines that no retaliation has occurred, it will dismiss the complaint. Under the other whistleblower laws, if the evidence supports an employee's complaint of retaliation, OSHA will issue an order requiring the employer, as appropriate, to put the employee back to work, pay lost wages, and provide other possible relief. If the evidence does not support the employee's complaint, OSHA will dismiss the complaint. After OSHA issues a

decision, the employer and/or the employee may request a full hearing before a Department of Labor administrative law judge. The administrative law judge's decision may be appealed to the Department's Administrative Review Board (ARB), and in significant cases, the Secretary of Labor may review the ARB decision. Aggrieved parties may seek review of final DOL decisions by the courts of appeals. There is no private cause of action under the OSH Act. However, under other federal laws, an employee may file the retaliation complaint in federal district court if the Department has not issued a final decision within a specified number of days (180, 210, or 365, depending on the law).

In Virginia, VOSH compliance inspectors conduct investigations of employee complaints of discrimination pursuant to Virginia Code §§ [40.1-51.2](#) and [40.1-51.2:2](#). See generally [VOSH Whistleblower Investigation Manual](#) (containing information on what VOSH compliance inspectors can and cannot do with regards to whistleblower investigations). Whistleblower complaints must be filed within 60 days from the date when the alleged adverse action took place. If the alleged discrimination is continuing in nature, the time period begins when the last act of alleged discrimination occurred. If, upon such investigation, VOSH determines actionable discrimination has occurred, VOSH will attempt to reach a settlement with the employer to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, VOSH shall bring an action in a circuit court having jurisdiction over the employer charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum.

## **Employee's Civil Lawsuits for Retaliatory Conduct Related to Occupational Safety and Health Laws**

There is no private cause of action under the federal OSHA Act for an employee to sue their employer directly for retaliatory conduct because the employee filed a safety or health complaint or testified or otherwise acted to exercise right under the safety and health standards. However, other federal laws protecting employees from retaliation enforced by OSHA's Whistleblower Protection Program, such as the FRSA, provide employees a private cause of action for violations against employers. In addition, OSHA-approved State Plans and other State statutes may provide a private cause of action for employees to pursue retaliatory claims. For example, in Virginia, if VOSH refuses to issue a charge against the employer, the employee may bring a private cause of action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief. See [Virginia Code § 40.1-51.2:2](#).

In addition, in July 2020, Virginia enacted the [Virginia Whistleblower Protection Law](#), which provides that a private employer cannot "discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment" because the employee engaged in certain types of protected conduct. See [Virginia Code § 40.1-27.3](#). The new Virginia Whistleblower Protection Law identifies the following protected conduct:

1. Reporting a violation of federal or state law or regulation to a supervisor, governmental body, or law-enforcement official;
2. Participating in a governmental or law-enforcement investigation;
3. Refusing to engage in a criminal act;
4. Refusing an employer's order to violate any federal or state law or regulation and the

employee informs the employer that the order is being refused for that reason; and

5. Providing information or testimony before a governmental body or law enforcement official conducting an investigation into an alleged violation by the employer.

Va. Code § 40.1-27.3(A). On the other hand, the law specifically does not:

1. Authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;
2. Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or
3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

Va. Code § 40.1-27.3(B). Under Virginia's new law, an employee may bring a private cause of action within one year of the employer's prohibited retaliatory action. The court may order as a remedy to the employee (i) an injunction to restrain continued violation of this section, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs. Va. Code § 40.1-27.3(C).

Virginia has a separate law related to government agencies and independent contractors of government agencies. [The Fraud and Abuse Whistle Blower Protection Act](#) allows employees to make good faith reports of instances of wrongdoing or abuse committed by government agencies or independent contractors of government agencies. Wrongdoing is defined, by statute, as "a violation, which is not of a merely technical or minimal nature, of a federal

or state law or regulation, local ordinance, or a formally adopted code of conduct or ethics of professional organization designed to protect the interest of the public or employee.” Va. Code § 2.2-3010. The Act provides for a private cause of action brought by the employee within three years after the date of the unlawful discharge, discrimination, or retaliation occurs, and does not require the employee to exhaust existing internal procedures or other administrative remedies. Va. Code § 2.2-3011.

### **Recommended Practices for Anti-Retaliation Programs**

“The best offense is a good defense” – a sports adage that equally applies to an employer’s response to an employee’s workplace safety and health complaint. Employers should regularly review their anti-retaliation policies and programs – or draft and implement such policies and programs. Employers should also regularly train managers and supervisors thoroughly on their obligation to avoid retaliation against employees that make complaints. Along these lines, OSHA recommends employers implement the following [“Five Key Elements to an Effective Anti-Retaliation Program”](#):

1. Management leadership, commitment, and accountability
2. System for listening to and resolving employees’ safety and compliance concerns
3. System for receiving and responding to reports of retaliation
4. Anti-retaliation training for employees and managers
5. Program oversight

It is important that employers also create a process for staying up to date on changes to anti-retaliation laws and regulations and update their policies and training accordingly.

By undertaking these proactive practices, employers reduce the risk of a whistleblower retaliation complaint, as well as increase the opportunity for a good defense should one materialize from an actual or perceived violation of laws. It is highly recommended that employers engage counsel if an OSHA/VOSH compliance inspector opens an investigation into an employee’s workplace safety and health complaint. Further, employers should consult legal counsel prior to disciplining any employee who they believe has engaged in any protected whistleblowing activity. In doing so, employers can avoid a costly and time-consuming retaliatory whistleblower claim with potentially significant monetary consequences for the employer.

For more information, please download a complimentary copy of Willcox & Savage, P.C.’s “Virginia Employer’s Guide to OSHA/VOSH” (<https://www.willcoxsavage.com/practice-areas/osh-vosh-defense/>), or contact attorney Joseph P. Moriarty.

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