

Whistleblowers and Retaliation: How to Prevent Getting Sued

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What is the Difference?

Often discussed interchangeably but slightly different

- Retaliation—something that happens *to* an employee *because* the employee engages in “protected activity” (i.e. asserts personal legal rights)
- Whistleblowing—an act an employee *engages in* (i.e. reports acts by others) that constitutes “protected activity”



RETALIATION

- Usually arises after employee has
 - Filed a claim; or
 - Spoken out on a matter of public concern
- Most reported cases → retaliation in context of discrimination
 - i.e. filing of EEOC charge or complained to company of discrimination by supervisor
- Also arises in connection with statutorily protected activity
 - i.e. filing of worker's compensation claim



WHISTLEBLOWING

- Covers an extensive array of matters
- Reports made in good faith that show any of the following is occurring, has occurred or is likely to occur:
 - *Criminal offense*
 - *Failure to comply with legal obligation*
 - *Miscarriage of justice*
 - *Risk to safety and health*
 - *Concealment*



Retaliation Claims on the Rise

EEOC CHARGE STATISTICS—

- In FY 2017, 84,254 workplace discrimination charges filed
 - **RETALIATION = MOST FREQUENTLY FILED CHARGE**
 - 41,097 charges (48.8% of all charges filed)
 - 45.9% of charges filed in 2016
 - 44.5% of charges filed in 2015
- Secured almost \$400 million through voluntary resolutions & litigation
- Handled over 540k calls to toll-free number
- Fielded more than 155k inquiries in field offices



Are you **troubled** about
wrongdoing at work?



Protections have Greatly
Increased



Who May Be Protected?

- Employees
- Job Applicants
- Former Employees
- Third Parties
 - To have standing, person must have participated in “some manner” in the protected conduct. *Holt v. JTM Indus., Inc.* 89 F.3d 1224, 1226-27 (5th Cir. 1996)
 - California Assembly Bill 1509: prohibits employers from retaliating against an employee who is a family member of a whistleblower



What Protections Exist?

Texas

- Blacklisting (Texas Labor Code § 52.031)
- Child Support Orders/Garnishments (Texas Family Code § 158.209)*
- Jury Duty Protection (Texas Civil Practice & Remedies Code § 122.001)*
- Retaliation against Voter (Texas Election Code § 276.001)
- Subpoenas (Texas Labor Code § 52.051)
- Texas Whistleblower Act (Texas Government Code § 554.002)
- Union Membership (Texas Labor Code § 101.052)
- Workers' Compensation Claims (Texas Labor Code § 451.001)



What Other Protections Exist?

Federal

- Title VII of the Civil Rights Act (42 U.S.C. § 2000e-3(a))
- Fair Labor Standards Act and Equal Pay Act (FLSA)(29 U.S.C. § 215(a)(3))
- Employee Retirement Income Security Act (ERISA)(29 U.S.C. § 1140)
- Age Discrimination in Employment Act (29 U.S.C. § 623(a) and (d))
- Americans with Disabilities Act (42 U.S.C. § 12101)
- Family and Medical Leave Act (29 U.S.C. § 261(a) & (b))
- National Labor Relations Act (29 U.S.C. § 158)



Whistleblower/Retaliation Protections

WHISTLEBLOWER REWARD OR BOUNTY PROGRAMS

- Federal programs offer bounties to private employee whistleblowers
 - SEC's Office of the Whistleblower
 - Similar programs at:
 - Internal Revenue Service (IRS)
 - Commodity Futures Trading Commission (CFTC)
 - Financial Industry Regulatory Authority (FINRA)
- Whistleblowers may receive 10-30% of recovered funds



OSHA'S Whistleblower Program—HEADLINES

U.S. Department of Labor Orders JetBlue to Reinstate and Pay Back Wages and Damages to Flight Attendant

John Deere agrees to settle whistleblower allegations, will pay former employee \$275K in back wages, damages

OSHA orders Wells Fargo to reinstate SoCal whistleblower; pay \$577K in back wages, damages, attorneys' fees

U.S. Department of Labor Orders California Company to Pay \$110,000 To Manager Who Reported Concerns Regarding E-Cigarette Ingredients

US Department of Labor sues two Houston companies that illegally fired employees who told OSHA of workplace safety concerns
Eustis Cable Enterprises, Continuum Integrated Health Services named in suits



EEOC—HEADLINES

Southeast Food Services / Wendy's Settles EEOC Retaliation Charge For \$20,000

Rite Way to Settle EEOC Retaliation Suit

Federal Agency Wins \$70,000 for Worker Who Was Fired for Helping With Sexual Harassment Investigation

Fifth Avenue Restaurant Group Settles EEOC Sexual Harassment & Retaliation Charge For \$50,000

Agreement Resolves Claims That a Female Worker Was Sexually Harassed and Then Fired for Reporting the Harassment, Federal Agency Says

Shipley's Do-Nuts Franchise Sued by EEOC for Pregnancy Discrimination and Retaliation

Company Forced Pregnant Employee To Take Unpaid Leave, Provide Medical Release, Then Fired Her When She Opposed The Demand, Federal Agency Says



WHAT IS AN EMPLOYER TO DO TO **PREVENT** GETTING SUED?



Adopt Best Practices

- Create Culture of Openness → establish a reporting culture
- Have Clear Anti-Retaliation Policies & Encourage Internal Reporting
 - Provide specific detail on who employees should report to
 - Include anonymous reporting
- Properly Train Employees
 - All Employees → reporting procedures, anti-retaliation policies, what is “protected activity” and different actions that are/are not retaliatory (provide examples)
 - HR and Management
 - Fundamentals of whistleblower & retaliation law
 - How to handle complaints



Adopt Best Practices

- **Establish Whistleblowing Policy & Procedures**

- May be part of Ethics Policy
- Use the word “whistleblowing” in title for easy identification by employee
- Outline aims and objectives
- Whistleblowing is valued
- Determine scope of protection (i.e. employees, independent contractors, suppliers)
- Explain what policy/procedures cover (provide concrete examples)
- State company expectations about when to raise a concern
- State safeguards provided for raising concern



Adopt Best Practices

- **Establish Whistleblowing Policy & Procedures**

- Outline procedures for raising concern (if desirable AND feasible, by particular type of concern)
 - Reporting of financial irregularities
 - Reporting of bribery or corruption
- Establish process for investigating a concern (stress company prohibits retaliation)
- Appeals-type process
- Keep central record of disclosures
- Confidentiality
- Monitoring and measurement of policy/procedures
- Independent auditing to determine if program is actually working



How do I Handle Employee Who Has Blown the Whistle?

Step 1: Assure Confidentiality to the Greatest Extent Possible

Step 2: Inform Whistleblower of Any Employer Reporting Obligation

Step 3: Request Confidentiality to the Extent Possible (of report, not investigation)

Step 4: Inquire Whether Whistleblower Has Shared Complaints with Others

Step 5: Discuss Policy of Nonretaliation

Step 6: Explain Investigatory Process

Step 7: Answer Whistleblower's Questions

Step 8: Establish Lines of Communication



How do I Handle Employee Who Has Blown the Whistle?

Step 9: Set Expectations

Step 10: Check in Regularly

Step 11: Document Thoroughly

Step 12: Address Co-Worker Retaliation

Step 13: Where Company's Alleged Conduct is Not Unlawful and Whistleblower Violates a Confidentiality Policy/Agreement, Consider Options

Step 14: Hold Poor Performer Whistleblowers Accountable (Carefully)



Questions?

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