

HR Weekly Podcast
March 11, 2015

Today is March 11, 2015, and welcome to the HR Weekly Podcast from the State Human Resources Division. Today's topic deals with avoiding liability due to retaliation claims.

According to the Equal Employment Opportunity Commission, or EEOC, retaliation claims were made in 41% of all charges submitted to the EEOC in 2013, which is greater than the amount of claims for discrimination based on race and on disability. Retaliation claims have increased in number every year since 1997.

While these claims may seem easy to avoid, liability for retaliation usually does not arise in an intentional or straightforward manner. Employers must be able to recognize when a particular set of facts poses a high risk of a retaliation claim prior to taking an adverse action against an employee. The potential for retaliation arises when an employer takes an "adverse" action against an employee after the employee has participated in an activity that is "legally" protected.

Retaliation is taking adverse action against an employee in direct response to something he or she did or did not do. Employers cannot fire, demote, harass, or otherwise "retaliate" against employees or applicants because they filed a charge of discrimination, complained to their employer or other covered entity about discrimination on the job, or because they participated in a discrimination proceeding, such as an investigation or a lawsuit. Also, an employer cannot discriminate against an employee because he or she filed a wage/hour complaint or caused to be instituted any proceeding under the Fair Labor Standards Act.

Adverse actions can include any action detrimental to an employee's terms and conditions of employment. While it is a common misconception that adverse action is solely limited to termination, it also includes demotions, transfers, pay reductions, and harassment. Additional "protected activities" include, but are not limited to, taking a medical leave of absence, complaining about unlawful discrimination, or complaining about unlawful pay practices.

There are steps that employers can take to prevent a retaliation claim from being made by its employees:

- Write up employees immediately and completely for infractions violating company policy. If the employee is counseled for more than one infraction, document both infractions. Without written justification for an adverse action, it could make the employer look as if it is trying to hide something and can make a retaliation claim harder to defend.
- Be consistent with disciplinary actions. If discipline is inconsistently applied, an employer can give the impression that it is singling out one employee, especially if this employer has to defend a retaliation claim from this employee.
- Investigate all complaints fully and do not disregard complaints, especially those regarding wages or discrimination. Notify the employee in writing that the complaint

was investigated and resolved. This step closes the "timeline" on the employee's complaint and indicates the disposition of the complaint.

- Ensure all relevant decision makers are included prior to any adverse employment decision being determined so an informed decision can be made. If the decision makers have all the facts, they may choose a lesser adverse action if the employee has made a complaint which was investigated and resolved, is open and not resolved, or has not been investigated and resolved in an appropriate manner.
- Document adverse employment decisions immediately to establish a timeline. Retaliation claims are about timing. An employer's defense to a retaliation claim is strengthened if the documented timeline indicates the decision to take an adverse action against the employee was made prior to the employee's complaint being made.

It is always recommended for an employer to seek legal advice prior to taking any adverse action against an employee. By seeking the advice of an attorney proactively, it is possible to save the employer money in defending a poor decision regarding an adverse action. Thank you.