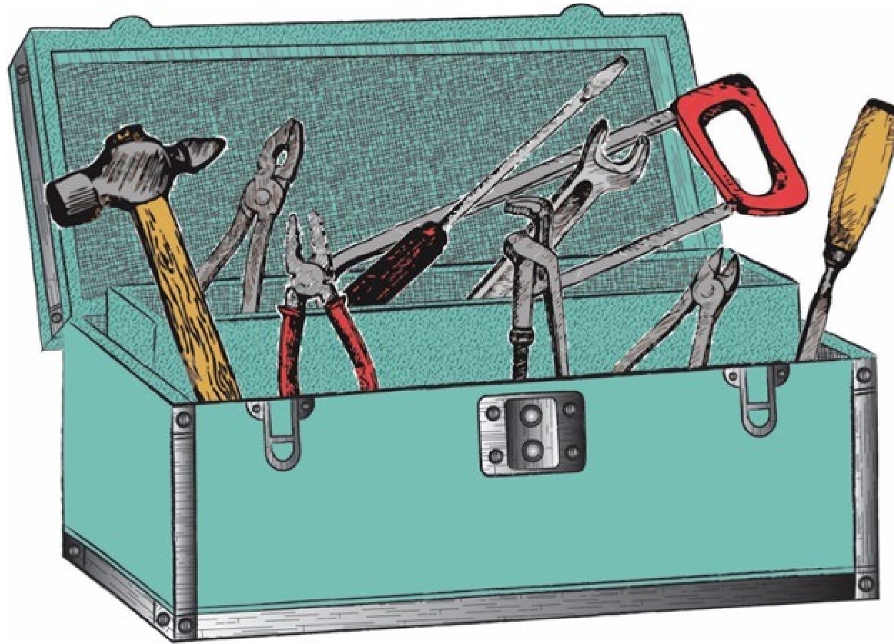
The Labor Standards Enforcement Toolbox



Tool 11: The Nuts and Bolts of a Retaliation Investigation: Part I

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INTRODUCTION

It bears repeating over and over again that, to be effective, any worker protection enforcement program needs to vigorously address the problem of employer retaliation against workers. Studies have shown that when workers raise issues about their wages, or the safety of their workplace, or if they wish to organize to form a union, employer retaliation is unfortunately rampant – particularly in low-wage industries, where workers of color and immigrants predominate.[1] Moreover, the impact of retaliation, and the threat of retaliation, on worker protection agencies' ability to enforce the law can't be overstated. When workers experience retaliation for asserting their rights, when they're threatened with retaliation, or when they observe retaliation against their co-workers, many will understandably go silent. They need to pay the rent, they need to feed their families, they may fear a call to U.S. Immigration and Customs Enforcement (ICE). And with their coerced silence, workers endure violations and abuse that go unreported to the worker protection agencies whose job it is to protect their rights.

It's critical to recognize that a retaliation investigation is in many respects unlike an investigation into other kinds of labor law violations, like failures to comply with wage and hour or safety and health laws. Many of these latter violations—like a failure, on the books, to pay time and a half for overtime or an unguarded saw—are readily observable. Building these cases may or may not require extensive interviews and credibility determinations. Retaliation investigations, in contrast, very much involve proving intent and motivation, since determining ***why*** an employer took the action they did is crucially important in proving the violation itself. Hence, these investigations demand a different, or at least enhanced, set of skills and techniques.

The express protections afforded by law to workers who experience retaliation on the job vary widely from jurisdiction to jurisdiction.[2] This paper is not designed to provide a state-by-state discussion of the tools available—or not available—to each agency to combat workplace retaliation. Rather, the purpose of **The Nuts and Bolts of a Retaliation Investigation: Part I** is to provide an overall legal and practical framework for anti-retaliation cases; it will draw from various federal and state sources[3] in setting out an essential roadmap for intaking, evaluating,

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[1] "Exposing Wage Theft Without Fear: States Much Protect Workers from Retaliation," National Employment Law Project (June 2019), available at https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf.

[2] *Id*. One of the sobering findings in that report is that "[t]he vast majority of workers around the country live in states that fail to provide the most essential mechanisms for legal protection when it comes to retaliation in the wage and hour context."

[3] See, e.g., "OSHA Instruction: Whistleblower Investigations Manual," U.S. Department of Labor's Occupational Safety and Health Administration (April 2022), available at lhttps://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf. OSHA includes a Directorate of Whistleblower Protection Programs that is responsible for the enforcement of the whistleblower (anti-retaliation) provisions of twenty-five federal laws. "Whistleblower Statutes Summary Chart," U.S. Department of Labor's Occupational Safety and Health Administration (June 2021), available at: https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf. See also "Enforcement Guidance on Retaliation and Related Issues," U.S. Equal Employment Opportunity Commission (Aug. 2016), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#a._But-For; "Anti-Retaliation Protections Under the Massachusetts Wage and Hour Laws,"

and investigating retaliation claims.[4]

> ***"Anti-retaliation protections safeguard the basic rights afforded to workers in the United States. These protections hold the promise that workers can complain to the government or make inquiries to their employers about violations of the law without fear that they will be terminated or subject to other adverse actions as a result. Too often, retaliation, or the fear of it, prevents the most vulnerable workers including those making the lowest wages, immigrant workers, workers of color, and women from exercising their workplace rights and ensuring they are paid the wages they are owed and afforded other protections under the law. Accordingly, it continues to be of paramount importance that WHD fully enforce the anti-retaliation provisions of the laws it administers to prevent and stop retaliation as early as possible."***
>
> **- Jessica Looman, Acting Administrator, U.S. Department of Labor, Wage and Hour Division, FIELD ASSISTANCE BULLETIN No. 2022-02 (March 20, 2022)**

THE LEGAL FUNDAMENTALS

What Is Retaliation?

Generally, in the workplace context, retaliation occurs when an employer, through a manager, supervisor, administrator, or other agent, takes any type of adverse action against an employee because they engaged in a protected activity.[5]

The Basic Elements

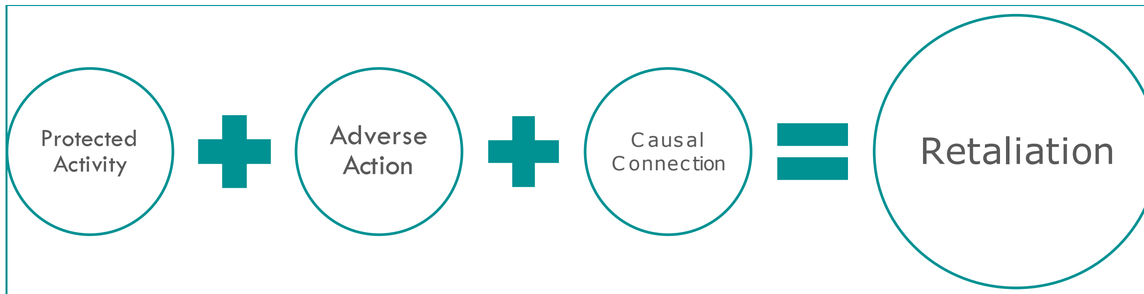
The basic elements of a legal claim of unlawful retaliation are:

- Employee engaged in protected activity;
- Employee suffered an adverse action; and
- There was a causal connection, or "nexus," between the protected activity and the adverse action.

Massachusetts Office of Attorney General, available at https://www.mass.gov/doc/anti-retaliation-fact-sheet/download.

[4] A forthcoming toolkit paper (Part II) will cover such topics as settling and litigating retaliation claims, damages and other available remedies, and special issues involving undocumented workers.

[5] The laws or ordinances in some jurisdictions include, within the ambit of prohibited workplace retaliation, adverse actions taken not only by employers or their agents, but also by "any person." See, e.g., Arizona Sec. 26-364: "No employer or other person shall…"; Seattle Municipal Code Sec. 14.20.035: "No employer or any other person shall…."



(1) Protected Activity

The scope of protected activity is determined by the language of the anti-retaliation provisions of the statute at issue. Generally, protected activity involves a worker inquiring or complaining about, or taking other action regarding, their legal rights (such as their right to minimum wage or overtime, sick leave, a safe workplace, or to be treated without discrimination based on race or sex), as well as cooperating with a labor agency's enforcement activity regarding the employer.

Examples of protected activity, depending on the scope of the statute or ordinance at issue, may include:

- Making a complaint to a manager, employer, or the labor enforcement agency, about the employee's rights, or another employee's rights under the law;
- Taking any action to initiate a labor agency investigation;
- Participating or assisting in a labor agency investigation;
- Requesting payment of wages;
- Refusing to return back wages to the employer;
- Complaints by a third party on behalf of an employee;
- Consulting with labor agency staff;
- Informing others about their rights;
- Informing a union, similar organization, or any other person about an alleged violation;
- Opposing any policy, practice or act that is unlawful;
- Refusing to participate in any activity that would result in a violation of a law;
- Exercising rights or attempting to exercise rights, such as requesting certain types of leave;
- Filing a lawsuit against the employer; or
- Preparing to testify, and testifying at trial.

Generally, an employee can be protected from retaliation even if the employee's complaint to the employer or the labor agency is based on a mistaken but good faith belief that the employee's rights have been violated. For example, if a worker believes that they are owed overtime pay for the hours they worked, and so states to their employer, the worker has engaged in a protected activity, even if the belief that they are due overtime turns out to be mistaken because they have been correctly paid.

(2) Adverse Action

An adverse action is one which would dissuade a reasonable person from engaging in protected activity. It includes harming or penalizing, or threatening to harm or penalize, an employee because that employee has exercised rights under the law. Because an adverse action can be subtle, such as excluding employees from important meetings, it may not always be easy to recognize.

Adverse actions against an employee may include:

- Firing, laying off, or demoting;
- Failing to rehire after a seasonal interruption of work;
- Denying overtime, promotion, or benefits;
- Disciplining;
- Intimidation, threats, or harassment of the employee or their family;
- Reassignment, or threat of reassignment, to a less desirable assignment, position, shift, or location;
- Exclusion from meetings or trainings;
- Reducing or changing pay or hours;
- Elimination of supervisory responsibilities;
- Coercing employees to return back wages paid;
- Isolating, ostracizing, mocking, or falsely accusing the employee of poor performance;
- Intentionally interfering with an employee's ability to obtain future employment;
- Moving an employee who has a straight schedule to "on-call" scheduling, or revoking a previously-approved flexible schedule;
- Taking actions leading to constructive discharge (actions which create intolerable working conditions, causing the employee to quit);
- Scrutinizing an employee's work or attendance more closely than that of other employees, without justification; or
- Requiring re-verification of work status, making threats of deportation, or initiating other action with immigration or police authorities.

Examples of actions that would likely not rise to the level of "adverse actions" are:

- A temporary transfer from an office to a cubicle consistent with office policy; or
- Occasional brief delays by an employer in issuing refund checks to an employee that involved small amounts of money

As the Supreme Court put it in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006): "A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."

(3) Causal Connection

Unlawful retaliation requires a causal connection between the adverse action and the individual's protected activity.

As a threshold matter, causation can only be shown if there was some degree of employer knowledge. Hence, this is a critical element of proof.

What constitutes employer knowledge of the worker's engagement in protected activity?

In order to prove unlawful retaliation, a person involved in or influencing the decision to take the adverse action must have been aware, or at least suspected,[6] that the employee, or someone closely associated with the employee, like a spouse or coworker, engaged in protected activity.

Inferred knowledge: If the employer doesn't have actual knowledge, but could reasonably deduce that the worker engaged in protected activity, it is called ***inferred knowledge.***

Example: One of the employer's managers does not need to *know* that the employee contacted the labor agency if that employee's previous internal complaints would cause the employer to *suspect* the employee initiated the labor agency's action.[7]

Similarly, an employer's actions can constitute retaliation even if the employer bases its action on a mistaken belief that the worker participated in a protected activity. For example, an employer who suspects that a worker filed a complaint with the labor agency and fires the worker has engaged in retaliation even if the worker never actually filed a complaint.

Further, if the employer's decision-maker acts based on the recommendation of a lower-level supervisor who knew of and was motivated by the protected activity to recommend action against the employee, employer knowledge and motive are imputed to the decision-maker. This is known as the **cat's paw theory**. Under this theory, which has been legally recognized,[8] an employer can be liable for unlawful retaliation or discrimination even when the

[6] *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (an employer's mere suspicion or belief that an employee had engaged in protected activity was sufficient to sustain an action alleging a violation of the OSH Act's anti-retaliation provision)

[7] In the safety and health context, for example, an inference of employer knowledge of the complainant's identity could arise when a complaint is about unguarded machinery and the complainant was recently injured on an unguarded machine.

[8] For example, in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the U.S. Supreme Court upheld the validity of the "cat's paw" theory, holding that "if a supervisor performs an act motivated by...animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate (i.e., immediately responsible) cause of the ultimate employment action, then the employer is liable." (parenthetical added).

decisionmaker didn't act with a discriminatory or retaliatory motive, if they were influenced by another employee who did have a discriminatory or retaliatory motive.

What causation test applies?

The degree of causal connection needed to prove an unlawful retaliation will vary, depending on the language of the anti-retaliation provision in the statute being enforced, and the views of the courts interpreting that language. Generally, the causal link required to be shown will be one of the following:

(1) **"But for"** causation (**the toughest standard**)

The Supreme Court has in recent years interpreted statutes that prohibit an adverse action that occurs "because" of an employee's protected activity to require *but for* causation to prove a violation. This means the plaintiff must show by a preponderance of the evidence (that is, that it is more likely than not) that the employer would not have taken the adverse action if the worker had not engaged in the protected activity. The test doesn't require that the protected activity be the sole or even the primary reason for the adverse action. It does, however, require proving that the adverse action wouldn't have been taken absent a retaliatory motive. Here's an example of this principle, cited by the U.S. Supreme Court in a 2014 case:[9]

> **…if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.**

Examples of statutes to which the "but-for" test has been applied by courts include the anti-retaliation provisions of the Fair Labor Standards Act, the Occupational Safety and Health Act, and Title VII of the Civil Rights Act of 1964.

(2) **"Motivating factor"** causation (**the intermediate standard**)

Some anti-retaliation provisions—contained, for example, in Seattle and Minneapolis wage theft laws,[10] federal environmental protection statutes, and in Title VII and Age Discrimination in Employment Act claims against federal entities—include language resulting in the application of the "motivating factor" test, requiring a lower burden to prove unlawful retaliation than the "but-for" test.

A *motivating factor* is a *substantial factor* in causing an adverse action. If the complainant shows that the protected activity was a *motivating factor* in the adverse action, the burden shifts to the employer. Generally, if the employer proves by a *preponderance of the evidence* ("more likely than not") that it would have taken the same action in the absence of the protected activity, the claim for unlawful retaliation fails.

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[9] *Burrage v. United States*, 571 U.S. 204, 210-211 (2014).

[10] Seattle Municipal Code Sec. 14.20.035 and Minneapolis Code of Ordinances Sec. 40.590.

(3) **"Contributing factor"** causation (**the least onerous standard**)

Under a number of federal statutes, including the Affordable Care Act, the Sarbanes-Oxley Act, and the Federal Railroad Safety Act, the least-burdensome-to-prove "contributing factor" test applies. A *contributing factor* is any factor, which alone or in connection with other factors, affected the employer's decision to take the adverse action.

Under the *contributing factor* standard, the plaintiff need only demonstrate that their protected activity contributed *in any way* to the adverse action, with no requirement that it be the sole or even predominant cause of the adverse action.

Under this test, once the plaintiff has established that the protected activity *contributed* to the adverse action, the burden again shifts to the employer/defendant. It can escape liability only if it can provide *clear and convincing evidence* ("far more likely to be true than false"[11]) that it would have taken the same action absent the protected activity. The clear and convincing evidence standard requires that, based on the evidence gathered in the investigation, it is highly probable or reasonably certain that the employer would have taken the same action if the protected activity had not occurred.

Rebuttable Presumption

Some anti-retaliation statutes provide that if the adverse action happened within 90 days of the protected activity, a presumption of retaliation arises. Under these statutes, close proximity in time creates a presumption of a causal connection, which then shifts the burden to the employer to prove by "clear and convincing evidence" ("far more likely to be true than false") that the employer's adverse action was taken for a legitimate, non-retaliatory reason.

Addressing Pretext

In most cases, employers will offer one or more non-retaliatory reasons for the adverse action they've taken. Examples of non-retaliatory reasons include:

- Poor performance;
- Inadequate qualifications for the position sought;

[11] The "clear and convincing evidence" standard is higher than the "preponderance of the evidence" standard but lower than "beyond a reasonable doubt" as required in criminal cases.

- Qualifications, application, or interview performance was inferior to the person selected instead of the employee who engaged in protected activity;
- Negative job references;
- Misconduct (e.g., threats, insubordination, employee dishonesty, abusive or threatening conduct, violation of safety rules, or theft);
- Violations of company policies (e.g. unexcused absences or excessive lateness); and
- Reduction in workforce or other business-dictated downsizing.

Any such reason needs to be carefully examined to determine whether it's **pretextual**; that is, whether or not it's been put forward to hide a true purpose of the adverse action.

Facts indicating a pretextual reason may include:

- An employer's shifting explanations for its actions; for example, one reason given to the employee, another to the labor agency;
- Closeness in time between the protected activity and the adverse action; (but note that while closeness in time may be evidence of retaliation, it is *not required* for there to be a finding of retaliation);
- Inconsistent application of an employer's policies against the employee compared with others who are similarly situated and who didn't engage in protected activity;
- A change in the employer's behavior toward the employee after they engaged, or were suspected of engaging, in protected activity; and
- Other demonstrations of hostility toward protected activity generally, or this protected activity specifically.

Example: If the employer claims the worker's misconduct or poor performance was the reason for the adverse action, the investigator should assess:

- Whether the worker did in fact engage in misconduct or perform unsatisfactorily as alleged by the employer;
- And, if so:
  - How the employer's rules deal with this type of misconduct or performance issue; and
  - How the employer treated other employees who engaged in similar misconduct or had similar performance issues.

Additionally, even if the employer's legitimate non-retaliatory reason is found to be valid, unlawful retaliation may still be established when the relevant causation test is applied. For example, under the "contributing cause" standard, a claim of retaliation can only be defeated *if the employer proves*, by **clear and convincing evidence** ("far more likely to be true than false") that the adverse action would have been taken even if the protected activity had not occurred. On the other end of the causation test spectrum, under the "but-for" causation standard, the *plaintiff must prove* by a **preponderance of the evidence** ("more likely than not") that the

adverse action would not have been taken if the employee had not engaged in the protected activity.

INVESTIGATION NUTS AND BOLTS

To Open a Case or Not?

When an employer retaliates against a worker or group of workers who have engaged in protected activity, the impact reverberates across the workplace. Other workers observe what can happen if they assert their rights, which can chill them into silence. If the unscrupulous employer sees that they have "gotten away with it," they'll be emboldened to use this means of evading compliance again. Which is why, in addition to promptly obtaining the appropriate remedy for the harmed worker(s), ***the agency should do its best to both prioritize and expeditiously handle any retaliation complaint it receives***. Agency personnel who are assigned to handle retaliation complaints need to be specially trained to conduct this type of investigation. Where the numbers of retaliation complaints received justify it, agencies should consider hiring or assigning personnel whose sole or primary responsibility is handling retaliation matters.

Not every retaliation complaint will be found to be valid. But every retaliation complaint needs to be treated seriously, and handled appropriately. The proper handling of complaints begins with an effective screening process for determining whether or not an investigation is warranted. The following are suggested components of such a process:

Complaint Filing Process

- The anti-retaliation provision of the relevant statute may define whether filed complaints must be in writing or can be made orally. The agency may, in any event, convert an oral complaint into a written one by transcribing it. Additionally, the agency should strive to ensure complaints can be filed in simple and user-friendly ways, including online, with online forms available in multiple languages.

- An intake form should be used to obtain as much of the following information as is available:
  - Date of initial contact/complaint
  - For both complainant (e.g., employee) and respondent (e.g., employer): full name, mailing address, email address, and phone number;
  - Date and nature of the protected activity and the alleged adverse action.

- Materials (like date-stamped written complaints) indicating the date the complaint was received should be retained.

- All contact with the complainant should be documented and included in the case activity log.

Screening Interview

Receipt of the initial complaint (written or oral) should be followed by a ***screening interview*** with the complainant. Screening interviews must be assigned to agency personnel trained to conduct retaliation investigations. Investigators should always be mindful that victims of workplace retaliation may have experienced the employer's action as a traumatic event, so the screening interview needs to be sensitively, and patiently, undertaken. (See Interviewing Essentials.)

The screening interview should elicit information in addition to that collected from the initial complaint, related to the following issues:

- Was the complaint timely under the relevant statute?
- Does the agency have jurisdiction?
- Are the basic prima facie elements of a retaliation claim there? Specifically:
  - What activities did the complainant engage in that could constitute protected activity under the relevant statute;
  - What suggests or demonstrates that an adverse action(s) occurred, and the date(s) of the action(s); and
  - What indicates that the adverse action was taken by the respondent at least in part because of the complainant's protected activity (including what indicates that the employer knew or suspected that complainant engaged in protected activity).

Document the Screening Interview

The screening interview should be properly documented by, for example, a memorandum of interview, a signed statement, an agency screening worksheet, or a recording. Agency personnel should be aware that recording the interview might be particularly intimidating to some complainants, in which cases other means of documenting the screening should be employed. If the complainant consents to recording of the screening interview, their acknowledgement and consent should be documented.

The investigator should advise the complainant that if the agency opens an investigation into the claim, it will need as much relevant documentation related to the alleged retaliation that is in complainant's possession, including such items as:

- Job descriptions;
- Company employee handbooks;
- Performance appraisals;
- Copies of any written personnel actions, including termination notices, reprimands, and warnings;
- Earnings and benefits statements, especially where they are evidence of the adverse action (e.g. paystubs demonstrating reduced hours or pay);

- Grievances filed;
- Copies of any charges or claims filed with other agencies, to show history;
- Emails, voicemails, phone records, texts, and other relevant correspondence related to the protected activity, adverse action, or the causal connection; and
- Relevant social media posts.

The complainant should also be advised to document and provide to the investigator evidence of claimed losses resulting from the adverse action, such as medical bills, repossessed property, and moving or job search expenses.

Additionally, if the complainant was terminated and seeks **back pay** (pay lost following termination to the date of settlement or judgment) and reinstatement or **front pa**y (an amount of pay in lieu of reinstatement), and other damages, they should be advised that they have an obligation to try to mitigate the damages caused by the adverse action, such as loss of wages and benefits. This means:

- They need to actively look for comparable work during the period after their termination, and they need to keep records of such efforts; and
- If they obtained work post-termination, they need to keep their pay stubs and employment records, to demonstrate the differential between what they earned post-termination and pre-termination.

Finally, the complainant should be advised that any future emails they send, and texts or social media posts that are in any way related to their work or their retaliation claim, will be subject to being turned over to the employer during discovery, if the matter goes to litigation.

Is the Complaint Timely?

Generally speaking, retaliation complaints need to be filed within a time frame specified by the relevant statute, known as the **statute of limitations**. The clock begins running when the adverse action takes place, which usually means that the first day of the running time period is the day after the adverse action occurs.

Timeliness issues to consider:

- The date of filing the complaint can be, depending on the laws and regulations in the jurisdiction, the date of the postmark, fax transmittal, email communication, online complaint, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing.
- If the filing is late, the following factors could **toll** the statute of limitations (stop the running of the clock), thus keeping the claim alive:
  - The employer actively concealed the adverse action; e.g. advising the personnel office to never promote the worker, and not notifying the complainant;
  - The complainant suffered a debilitating injury or illness during the filing period;
  - A major natural or man-made disaster happened such that a reasonable person similarly situated wouldn't have been able to communicate with the agency;
  - The employer repeatedly gave the worker false information about their rights; or

- The employer lulled the employee into deferring filing a complaint, repeatedly assuring the employee that the adverse action would be reversed or mitigated.

- On the other hand, factors like the following generally wouldn't justify extending the filing period:
  - A worker's unawareness of the right to file a complaint;
  - Filing other claims, such as for workers' compensation or unemployment, or by means of a private lawsuit; or
  - The fact that the worker and employer discussed the worker's claim of retaliation, and negotiated toward, but failed to reach, a settlement, absent the employer's repeatedly assuring the worker that the adverse action would be corrected.

Consider: How to Include Worker Representatives

Workers who have experienced retaliation may be traumatized, and in any event should always be treated with sensitivity and respect. Some may also have past histories that have made them distrustful of, or intimidated by, approaching a government agency. For others, language and cultural differences may present barriers.

For any or all of these reasons, the worker might need someone to assist and advocate for them as they navigate the complaint, intake, and investigation process. Such an individual may come from a worker center, a community organization, a place of worship, or be a family member. What's important to recognize is that such an advocate or representative, while helping the worker, will in many cases also provide an invaluable service to the investigative agency, facilitating interactions, interpreting difficult communications, and supporting the worker in conveying critical and sometimes uncomfortable facts.

To enable participation of such advocates/representatives, the agency should work with its attorneys to develop ways to formalize these relationships,[12] with an eye toward preserving the necessary confidentiality and integrity of the investigation. If the representative of the worker is a community organization or worker center, such confidentiality is best protected when the organization/advocate is represented by an attorney. In such cases, "common interest" agreements can be effective in shielding communications among the worker, the advocate, and the agency from disclosure to the employer, should the matter go to litigation. For a comprehensive discussion on this topic, see *Tool 7: Sharing Information with Community Organizations*

[12] For example, by means of a consent form in which the complainant designates an individual or organizations as its representative. See, e.g., https://wagesla.lacity.org/sites/g/files/wph1941/files/2021-08/Third-Party-Representative-Form-EN.pdf.

Making the Determination to Open a Case

If, following the screening interview, agency personnel determine that the complaint is covered by the relevant statute, is timely, and satisfies the prima facie elements of unlawful retaliation, the matter should be docketed for case opening and further investigation.

If, on the other hand, the complaint is either not covered by the statute in question, is untimely (and, after inquiry, there are no apparent grounds for extending the filing period), or one or more elements of the prima facie case is lacking, complainant should be notified of the agency's determination to close the matter.

- Oral, rather than written, notification to complainant from the investigator is recommended.
- The investigator should briefly describe the reason(s) the agency has determined to not accept the matter for investigation, and should offer an opportunity for complainant to provide further information that might address any such reasons.
- The investigator should notify complainant that the respondent (employer) will not be contacted by the agency regarding the complaint.
- If the applicable statute and/or agency protocol give complainant a right to appeal the decision to close the case at this stage (either to a higher-up within the office or to an outside entity), complainant should be advised of that right, and of the process for accessing that right.[13]

Referrals to Other Government Agencies

If a retaliation complaint is untimely under the relevant state statute (or if for other reasons the agency is unable to handle the matter), referral to one or more other government agencies—that enforce laws similarly prohibiting retaliation for the asserted protected activity but have longer filing periods under which the complained-of retaliation is still actionable—is encouraged.

Referral to the U.S. Department of Labor: Section 15(a)(3) of the Fair Labor Standards Act (FLSA), the federal wage and hour law, provides that it's a violation for any person to:

> ***[D]ischarge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.***[14]

[13] Any such appeal should then be handled as per statutory/regulatory requirement and/or agency protocol, and a final decision made and documented, with reasons, followed by written notification to the complainant.

[14] Since section 15(a)(3) prohibits "any person" from retaliating against "any employee", the protection applies to all employees of an employer even if the employee's work and the employer are not covered by the FLSA.

Employees are protected regardless of whether the complaint is made *orally* or *in writing*. Complaints made to the U.S. DOL's Wage and Hour Division (WHD) are protected, and most courts have ruled that internal complaints to an employer are also protected.

Generally, a complaint alleging violation of the FLSA must be filed in court within two years of the violation, or within three years if the violation is "willful." While WHD, on receiving a complaint, needs enough time to conduct an investigation and, on finding actionable retaliation, to sue within the applicable statute of limitations period, there is no specific time by which an employee must file a complaint with the Division.[15]

The Wage and Hour Division's toll-free number is **1-866-4USWAGE (1-866-487-9243)**.

Referral to the National Labor Relations Board: The National Labor Relations Act (NLRA) protects "concerted activity," which refers to an employee's right to address work-related issues—like wages, benefits and working conditions—with co-workers, including by openly talking about these issues, and joining with co-workers to discuss problems in the workplace with the employer, a government agency, or the media. A single employee may also engage in protected concerted activity if they are acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

An employer is prohibited from discharging, disciplining, threatening, or coercively questioning an employee about any such activity.

A worker must file their complaint ("unfair labor practice charge") with the National Labor Relations Board within six months of the adverse action.[16]

The NLRB's toll-free number is **1-844- 762-NLRB (1-844-762-6572)**.

Notification Letters upon Case Opening

Complainant: Once the agency has decided that the retaliation complaint is appropriate for case opening and investigation, complainant should be formally notified. A notification letter to complainant—translated, if possible, into the language best understood by complainant—could contain the following:

- The name and contact information for the agent assigned to investigate the case;
- A copy of the original complaint, as supplemented by a summary of the information provided during the screening interview;
- A form for designating an attorney or other representative (e.g., a worker center staff person), at the option of complainant;

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[15] "Fact Sheet #77A: Prohibiting Retaliation Under the Fair Labor Standards Act," U.S. DOL's Wage and Hour Division (Dec. 2011), available at: https://www.dol.gov/agencies/whd/fact-sheets/77a-flsa-prohibiting-retaliation.

[16] "Protecting Employee Rights," National Labor Relations Board, available at: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/protecting_employee_rights.pdf.

- Notice that complainant should *collect and preserve* all documents and other evidence relevant to the complaint (including, e.g., emails, text messages, phone messages, etc.); and
- Information about the availability of alternate dispute resolution, if the agency offers it.

Respondent: The letter to respondent should state that a complaint charging unlawful retaliation has been filed against it, and that respondent is asked to file a response. It should include the following:

- Notification that respondent must retain all records or other evidence of whatever kind relating to the retaliation claim, including, e.g., all employee personnel records, emails, voicemails, and text messages, etc., to and from complainant, or regarding complainant, or regarding the protected activity complainant engaged in;
- A summary of the factual basis for complainant's allegation of unlawful retaliation;
- A request that the response include, as to any fact contained in the summary that Respondent believes or claims is false, the factual basis for that belief or claim;
- A form for designating an attorney or other representative; and
- Information on alternative dispute resolution options, if offered by the agency.

The Investigation: Principles and Practicalities

The purpose of the investigation is to collect and analyze all information relevant to the retaliation claim, and the defenses to it, with the goal of determining whether unlawful retaliation occurred. If it did, the complainant is entitled to the remedies provided by the applicable law.[17] Once, following investigation, a finding of retaliation has been made, the agency will need to determine how it will attempt to obtain those remedies for the complainant.

If, on consideration of all the evidence found during the investigation, it's determined that retaliation can't be proven under the applicable legal standard, the case should be closed, and complainant and respondent so notified. If complainant has appeal rights under the relevant statute, they should be notified how those rights can be accessed.

Investigative Resource Allocation

Since generally an agency's retaliation investigators will have more than one matter in their current inventory, decisions need to be made on an ongoing basis as to how the investigator's time should be allocated, and which case(s) should receive priority. Among the many criteria for decision-making are:

- Whether the relevant statute imposes a court complaint filing deadline, such that the investigation ***must*** be completed sooner rather than later;
- Anticipated future unavailability of key witnesses; and
- Potential significance of the case from a strategic enforcement perspective, e.g.,:
  - Did the case arise in an industry selected as a priority focus for enforcement?
  - Is the case likely to generate interest/awareness in the regulated community?

[17] Part II of this paper will discuss the types of potential available remedies in detail.

- Is this a priority matter for strategic partners (like worker centers, community organizations, unions)?

The investigator's allocation of time among their retaliation cases should reflect the degree of priority accorded to each, considering all applicable factors. For investigators whose caseloads include both retaliation and other types of matters (e.g., wage and hour), the above prioritization and resource allocation factors will apply as well, always with the recognition of the chilling effects unchallenged retaliation can have on the workforce and on the agency's enforcement mission.

Deciding When the Investigation Is Complete

It's the investigator's job to follow as many leads and to develop as much evidence as practicable, in the effort to reach a proper fact-based conclusion as to whether unlawful retaliation occurred. Once those facts have been gathered, they should be presented to the complainant and respondent, both of whom should be asked whether they have any additional evidence to counter the facts presented by the other side. If they suggest additional avenues of inquiry, it's the investigator's task to determine whether following any of those paths is reasonably likely to affect the outcome.

In any given case, it's always possible that taking one or two additional interviews, or examining one more box of documents, might make a difference. Hence, an analysis that considers whether the additional time and resource commitment is likely or unlikely to be worth it is always a good practice. For example, tracking down and questioning an additional witness who is the only person the complainant believes overheard the respondent make a hostile comment indicating retaliatory intent (e.g., "I'll show him!") is clearly worth the effort. In contrast, interviewing a fifth such witness when four other credible witnesses have solidly corroborated one another is not necessarily justified. The investigator's analysis and conclusions along these lines should be documented in the file.

Being an Advocate for the Law

A worker protection agency's mission is, by definition, to enforce laws protecting workers, which means, first and foremost, vindicating workers' rights under the applicable laws. Taking this responsibility seriously, as a government agent, means objectively determining whether violations have, or have not, occurred. That also means seeking out the crucial evidence, assessing witness credibility as objectively as possible, and finding facts and drawing legal conclusions based on rigorous investigations.

Documenting the Investigation

All activities associated with the investigation of the case should be documented, and arranged methodically so as to be easily accessible—as a general rule, in chronological order. A ***case activity log*** should be kept, providing a record of all interviews taken, documents received, phone calls (in summary form), text messages, voicemails, emails, and other correspondence in whatever form, and so forth.

Interviews

Protocols should be established for conducting retaliation investigation interviews. They may include, among others, the following components:

- At the **opening of the interview**, the investigator should introduce themselves, explain the purpose of the interview and the investigation, and professionally advise the interviewee that intentionally making a false statement to a government representative in connection with an investigation is against the law.
- If respondent (employer) has designated an attorney or other representative, that representative should generally be allowed to be present at the interviews of any currently-employed management employees. (*See exception below*, when a management employee requests the opportunity to speak privately with the investigator.)
- Non-management employee interviews should be conducted in private. If management insists on being present at such interviews, follow established protocols for such situations, such as contacting the attorneys who represent the agency to enlist their assistance. If management doesn't relent in its insistence on being present, a court order may be sought, or the interview should be rescheduled and held at an off-site location.
- If a non-management employee states that they want to have a management representative or management attorney present, the investigator may decide to proceed with the interview with management present, or choose not to do the interview. Either way, the investigator should try to determine whether the employee was coerced into taking that position, by speaking with them privately (for example, by calling them at home). If the employee declines to speak with the investigator when asked privately, or states that they wished to have management present as their choice, the information conveyed by the employee during the management-attended interview should be viewed with an appropriate degree of caution. If the employee is considered a key witness, such that their testimony could determine the outcome of the investigation, taking their testimony under oath, or by deposition if available, should be considered.
- If the interview is recorded electronically, the interviewee should acknowledge at the beginning of the recording that they consent and understand they are being recorded.

Confidentiality

The common law doctrine of ***informer's privilege***, incorporated in the evidence codes of several states and widely recognized, allows the government to withhold the identity of an individual who provides information about violations of laws, including about retaliation. Check with your agency attorneys to find out whether the doctrine applies to the investigations your agency conducts. Your agency should also get legal advice regarding the impact any public disclosure laws have on the operation of the privilege, or on the confidentiality of witness statements in general, in your jurisdiction.

If informer's privilege applies to your agency's investigations:

- It also protects information in witness statements that would tend to reveal the witness' identity.
- The privilege generally will not apply to the complainant/employee (whose identity has presumably been made known to the respondent/employer) or to representatives of the respondent (except if a management employee wishes to provide information to the agency confidentially).
- At the outset of the interview, witnesses should be asked whether they wish their identity to be held confidentially, and their response should be noted in the interview record. They should also be advised that if they wish their identity to be kept confidential, the agency will comply with that wish to the extent permitted by law, and this notification should be noted in the record of the interview.
- Witnesses should also be advised that if the case proceeds to trial and their testimony is required, the contents of their interview statement, and their identity, will likely have to be disclosed shortly before trial. In addition, the interviewee should be notified that retaliation against them for providing information during the investigation, or for testifying at trial, is against the law, and that the investigator should be advised of any adverse action taken by respondent following their speaking with the investigator.

In all cases, the agency should aggressively oppose any actions by the respondent to silence or retaliate against any individual who cooperates with the investigation, including by taking preemptive legal action, if necessary, to protect them against any adverse action.

Respondent Interviews and Evidence

As described above, respondent will have been provided a copy of the complainant's statement, and will have been offered the opportunity to present a written response, along with any other documents in support of that response.

Respondent's assertions, like the complainant's, need to be tested for their accuracy, veracity, and persuasiveness. This includes interviewing respondent, as well as any of respondent's agents, regarding their description of what complainant asserts was the protected activity, and the basis and extent of their knowledge about it.

As noted above, respondent's position as to why the adverse action was taken needs to be tested for pretext. That testing will include reviewing and copying relevant portions of respondent's employee handbook, other pertinent written personnel rules, and complainant's personnel files, supervisory reviews, and disciplinary records as maintained by respondent. It will also include interviewing witnesses who are likely to have knowledge about whether complainant received the same treatment as other similarly-situated employees who did not engage in protected activity. Any hostility by respondent or its managers against complainant following complainant's engagement in the protected activity should be explored by

interviewing any individuals who would be in a position to be aware of or witness evidence of such animus.

Uncooperative respondent: If a respondent fails to provide a response to the complaint, or otherwise fails to respond to the investigator's efforts to contact it, it should be notified that the agency may (to the extent authorized by the applicable law) seek legal means to compel a response. This could include issuing subpoenas to compel production of records and/or to compel testimony, or assessing penalties for impeding the investigation. Alternatively, the agency might communicate to respondent that without its position on the complaint's allegations, negative inferences may be drawn against it, and the agency may reach a decision on the complaint without its input.

Rebuttal positions: Once respondent provides its response to the complaint, in writing and/or by interview(s), complainant should be contacted, advised of respondent's position, and offered the opportunity to respond with further information, evidence, or witnesses. Upon complainant's offering of their rebuttal, respondent should be provided with a further opportunity to respond.

Interviewing Essentials

It's the investigator's job to find the facts that will determine whether an unlawful violation did or didn't occur. That requires both ***fairness*** and an ***open mind***. Different versions of the story are likely, and the investigator's challenge is to do their best to determine, among the competing narratives, what actually happened and how it all relates to the legal test for retaliation.

One key interview strategy is to build rapport with the witness. This will help the investigator to gain the witness' trust, which can encourage answers that are both responsive and truthful. Opening banter or chitchat about the weather or some other neutral topic can help establish a less anxiety-provoking atmosphere, which will be helpful in many cases. The interview also should begin with simple, non-threatening background questions. In all cases, the witness should be treated respectfully.

Trauma-Informed Interviewing

Because, as noted above, victims of workplace retaliation may experience it as a traumatic event—or as a trigger for re-living previous trauma—retaliation investigators should be trained in trauma-informed interviewing. The following are some key take-aways:[18]

The Effects of Trauma

Trauma causes people to relive a traumatic event over and over again, each time they describe or remember it. Trauma may be exhibited as extreme emotions, like flat affect or an unemotional response, or as an over-emotional, hysterical response.

Other common **trauma symptoms** include:

- Trouble remembering events;
- Non-linear stories;
- Focusing on "less important" details;
- Re-experiencing traumatic event(s); and
- Freezing up.

Possible Challenges for the Interviewer

Trauma symptoms may render interviews and credibility assessments more challenging. An interviewer who is not trained on trauma may interpret such symptoms to mean the worker lacks credibility. Additionally, trauma may increase the difficulty of reliving and reporting the story of retaliation. Accordingly, the interviewer may get an incomplete, inconsistent, or confusing sense of the incident(s) at issue.

Helpful Interviewer Responses to the Trauma-Impacted Interviewee

- Acknowledge expressions of trauma, pain, and/or fear;
- Communicate with language the worker understands and is comfortable with;
- Be sure to respect the worker's identity (e.g., confirm and use gender affirming name and pronouns); and
- Express patience, empathy, and understanding throughout the interview.

Specific Trauma-informed Interviewing Techniques

- Mirror worker's word choice and avoid jargon;
- Encourage narrative responses: "Tell me more about that.";
- Leave room for pauses and avoid interruptions;
- If a worker is uncomfortable discussing something, try moving on and then circling back;
- Help guide the worker through the chronology of events;

[18] This section is based on a presentation entitled, "Trauma-Informed Interview Principles and Techniques: Best Practices for Interviewing Workers," Kel O'Hara to WJL@RU's Strategic Enforcement Community of Learning and Practice (July 2022).

- Don’t require answers to be in a linear or ”logical” sequence;
- If a worker is struggling with recall, try asking questions that focus on their emotional and sensory experience; and
- Instruct worker to not guess, and to answer “I don’t know”, as needed.

While these understandings and techniques apply especially to complainants for whom trauma is apparent, the principles are useful to keep in mind for all investigative interviews.

In any fact-finding interview, there will likely be a list of points or issues that the investigator has prepared and wishes to cover with the witness. That’s entirely appropriate. But for any such list, the goal is not to get a quick answer and then move on to the next bullet point. It’s the investigator’s job to listen very carefully to the answer, and, most critically, to ***ask follow-up questions*** that are triggered by the answer given—questions that drill down into the details that the initial response didn’t provide.

It’s often the details elicited by ***open-ended*** follow-up questions that can make or break a case. Questions like **“How do you know that’s what happened?”** can provide leads to further evidence, including others who may turn out to be key witnesses.

Follow-up questions also will help the investigator assess the strength and credibility of the witness’ assertions. Is the assertion based on what the witness saw or heard? If so, how close was the witness when observing the act? Were any other witnesses present? Who were they? Why does the witness recall the incident so vividly? Did the witness tell anyone else about the incident soon after it happened? Who, and why?

By the time of any given interview, the investigator might have begun to draw conclusions about which version of the story is more likely to be true. Those opinions shouldn’t be shared with the witness being interviewed. The witness’ statements should be tested, impartially, with follow-up questions. But the tone of questioning shouldn’t suggest that the investigator is pre-disposed one way or the other.

The key point is to follow the answers to where they lead, always with the goal of finding, as accurately as possible, what actually happened, and how it fits into the examination of whether illegal retaliation occurred.

Assessing the Witness' Credibility

Assessing the credibility of each witness is, of course, necessary when assigning weight, if any, to statements they make. The witness' ***body language*** can give hints that aren't dispositive but may give clues about the accuracy of the testimony. Fidgeting, sweating, eyes darting, and hunching over, all may be indications of discomfort, possibly caused by previous trauma, as discussed above, by fear of government, or by other psychological issues. It can also be an indication of intentionally avoiding telling the truth.

Because body language and eye-to-eye contact can provide useful clues when assessing the witness' truthfulness, in-person interviews are preferable to those done by telephone. If in-person isn't feasible, online video (e.g., Zoom) interviews will often be preferable to those done by phone.

Closing out the Interview

Once the fact-gathering by means of open-ended and follow-up questions is complete, at the end of the interview, some "yes" or "no" questions can be helpful to nail down specific information, like dates, times, and people present at a given event. Also, it never hurts to ask a final question: ***"Is there anything else I missed or that you would like to tell me before we close the interview?"*** Sometimes, the response will be surprising…and important.

Analysis

Once the investigator and supervisor have applied the test that balances thoroughness against efficiency, and conclude that it's appropriate to end the investigative phase, it's decision time. That is, it's time to distill all the complainant's and respondent's statements and rebuttals, all the interviews of other witnesses, and all the collected documents, and decide whether, on applying the facts obtained to the applicable law, illegal retaliation against the complainant occurred.

As discussed in detail above, this includes consideration of whether:

- The complaint is within the coverage scope of the relevant anti-retaliation statute;
- The complaint is timely;
- Complainant engaged in protected activity;
- Complainant suffered an adverse action from respondent; and
- There is a nexus, under the proper standard for causation, between the protected activity and the adverse action, including evidence that respondent knew of, or suspected, that complainant engaged in that activity.

Example: Retaliation found

Jane, a warehouse worker, has been employed by a distribution center for three years. Throughout that period, she has received excellent performance appraisals. She became quite annoyed recently about the time she and her co-workers have had to spend in a security line to check them for stolen items, after clocking out. The company learns that she is speaking with her co-workers about this, and has called the state labor agency to complain. The following week, she is out sick for three days, and doesn't produce a doctor's note as required by the company's employee handbook. (Here, Jane works in a jurisdiction that does not have a paid sick leave law.)

Two days after she returns to work, the company terminates her, citing her failure to provide the doctor's note. The anti-retaliation law in her state that applies to these circumstances requires that she prove she was fired "because of" her protected activity (the strict "but-for" causation test).

She files a complaint alleging retaliatory termination resulting from her previous complaint to the labor agency. The agency opens an investigation, and the investigator finds that the company's three-days-sick doctor's note policy has rarely, if ever, been enforced.

This evidence, in combination with the proximity in time of her discharge to the company's learning of her protected activity, supports the conclusion that the discharge was retaliatory (under any of the causation standards). The company's pretext, that she was fired for violating the doctor's note policy, is not believable, given the company's prior practice of non-enforcement of this policy. The agency determines it is more likely than not that but for her protected activity of complaining to the labor agency, she would not have been fired. **Unlawful retaliation found.**

Example: Retaliation Not Found

Bill, a sheet metal factory employee, had a history of violations of workplace safety rules and insubordination. He had been warned that his continued violation of the safety rules would result in his termination. Other employees had been terminated in the past for similar records of infractions. Shortly after his most recent safety warning, Bill complains to the shop floor manager that he's tired of having his 30-minute unpaid lunch break interrupted with tasks he's asked to handle during his break. A few days after he complained to the manager, he once again ignores an important safety rule, almost resulting in a serious injury to himself. He was terminated the next day.

He contacts the labor agency and claims his firing was in retaliation for his lunch break-related complaint. The state anti-retaliation law applicable to this situation uses the lenient "contributing factor" test.

In his interview with the investigator, the manager admitted to being "annoyed" at Bill for complaining about what the manager thought was a small issue. Bill, meanwhile, admitted to the investigator that he had indeed been warned about repeatedly violating the safety rules and was uncooperative with his supervisor. The investigator concluded that Bill had engaged in protected activity, and the manager had admitted to being annoyed about it. The manager's annoyance indicated that Bills' engagement in protected activity might have been a

"contributing factor" in his termination. However, the agency concluded that the employer would be able to demonstrate clearly and convincingly that Bill would have been fired, for again seriously violating an important safety rule, even without his having engaged in protected activity. **No unlawful retaliation found.**

Notification of Decision

Once the agency reaches a determination—that illegal retaliation did or did not occur under the applicable standard—complainant and respondent should be advised of the determination.

Where retaliation is not established, complainant should be offered a closing conference, at which the basis for the agency's findings should be summarized (without identifying any witnesses). Complainant should be advised of any appeal rights they might have, along with how those rights can be accessed.

If the investigation results in a finding that unlawful retaliation did occur, respondent should be invited to a closing conference. Again, the results should be summarized, and the remedies the agency seeks should be specified. At that time, the possibility of amicable settlement can also be explored. Absent a settlement, respondent should be notified of how the agency will effectuate its determination; for example, that the agency will be issuing a citation or order, or filing a civil action.

This concludes Part I of the Nuts and Bolts of a Retaliation Investigation. Part II will examine, among other issues, litigation and settlement considerations; remedies and damages calculations; immigration–based retaliation and recently-offered tools for mitigating it.

APPENDIX

Other Resources

National Employment Law Project's June, 2019 report, "Exposing Wage Theft Without Fear: States Must Protect Workers From Retaliation"

Labor Standards Enforcement Toolbox includes Tool 5: Addressing and Preventing Retaliation and Immigration-Based Threats to Workers, a comprehensive overview of the importance of, and challenges presented by employer retaliation.

Duties of an Investigator, as per OSHA's Whistleblower Manual (modified):

Under the direct guidance and ongoing supervision of the senior or managing investigator, the investigator conducts investigations, which include responsibilities such as:

1. Conducting complaint intake and documenting whether the allegations do or do not warrant field investigation.
2. Reviewing investigative and/or enforcement case files for background information concerning any other proceedings that relate to a specific complaint.
3. Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.
4. Following up on leads resulting from interviews and statements.
5. Interviewing and obtaining statements from respondent's officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.
6. Applying knowledge of the elements of a retaliation case when evaluating the gathered evidence, analyzing the evidence, drafting an investigative report, and recommending appropriate action to the supervisor.
7. Composing draft agency findings for supervisory review.
8. Negotiating with the parties to obtain a written settlement agreement that provides prompt resolution and satisfactory remedies to Complainant where appropriate.
9. Interacting with the general public to perform outreach activities as assigned.
10. Assisting in the litigation process, including preparation for trials and hearings and testifying in proceedings.
11. Organizing and maintaining investigation case files.