



✓ EMPLOYER CHECKLIST

Tips to Avoid Retaliation Claims

Retaliation claims are the most common claims levied against employers. The U.S. Equal Employment Opportunity Commission (EEOC) recently released its breakdown of charges received in fiscal year 2018 (FY18). Once again, retaliation claims top the list. 51.6% of all charges filed (39,469 of 76,418) alleged retaliation. Let's face it: it's easy for management to get frustrated by an employee who has complained about something, whether it be unfair treatment, discrimination, lack of accommodations, or simply supporting another employee who has made a similar complaint. Such frustration, if acted on, exposes employers to potential liability. Here are some tips for how employers can avoid costly retaliation claims:

❑ EDUCATE YOUR MANAGERS

Arm management with knowledge about what constitutes engaging in protected activity and ask managers to evaluate the following before taking an adverse employment action against an employee. Has the employee:

- ❑ Complained by participating in an EEO process?
- ❑ Opposed discrimination?
- ❑ Taken part in internal or external investigation of discrimination/ harassment?
- ❑ Filed or been a witness in a charge, complaint, or lawsuit alleging discrimination?
- ❑ Communicated with supervisor or manager about employment discrimination/ harassment?
- ❑ Answered questions during employer investigation of alleged harassment?
- ❑ Refused to follow orders that would result in discrimination?
- ❑ Resisted sexual advances or intervened to protect others?
- ❑ Reported an instance of harassment to supervisor?
- ❑ Requested accommodation of disability or religious practice?
- ❑ Asked managers or co-workers about salary information to uncover potentially discriminatory wages?
- ❑ Reported a violation of a safety hazard?

❑ TRAIN YOUR MANAGERS

Train your managers to ask, "Why now?" Consider whether the employee may be able to establish causation between any protected activity and the adverse employment action. To that end, evaluate the following:

- ❑ Is there suspicious timing?
- ❑ Are there incriminating oral or written statements?
- ❑ Is there evidence of comparable individuals being treated differently?
- ❑ Are there inconsistent or shifting explanations of why the adverse action should be taken?

❑ ARTICULATE THE REASONS

Make your managers articulate why.

- ❑ What are the legitimate business reasons for the desire to take adverse employment action?

❑ DOCUMENT, DOCUMENT, DOCUMENT

Managers should be vigilant about documenting all aspects of performance management, i.e., hiring, evaluations, warnings, reprimands, promotions, compensation, terminations, etc. This documentation is often proof of the company's legitimate business reasons.

❑ VET THE DECISION

Review and vet the proposed actions of consequence through human resources and/or employment law counsel to ensure action is, in fact, based on legitimate business reasons and not "tainted" by unlawful discrimination or retaliation.

If you have any questions or would like guidance or training regarding discrimination or retaliation issues, or other general employment law matters, contact our [Employment Law Practice Group](#):

