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BOLI Annual Conference for Employers

November 15, 2016

Avoiding Employers' Number 1 Risk — Retaliation Claims

Presented by:
Caroline Guest

Today's agenda

- What is retaliation?
- Why do we care?
- What laws are implicated?
- Best practices to avoid them
- Best practices to manage them

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What exactly is "retaliation"?

- All retaliation cases have three elements:
  1. Protected activity;
  2. A materially adverse action taken by the employer; and
  3. A connection between the two.

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What is a "protected activity"?

- Protected activity includes:
  - Participation in certain activities or proceedings protected by law
  - Opposition to a practice believed to be unlawful discrimination

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Protected activity

- Participation examples:
  - Requesting an accommodation for a disability
  - "Invoking" the workers' compensation system
  - Hiring an attorney to advise on employment issues

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Protected activity

- Opposition examples:
  - Complaining that a poor review was discriminatorily motivated based on a protected class (gender, race, religion, etc.)
  - Complaining that the company engaged in conduct that violates the law – like an OSHA violation.

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What's a "materially adverse action"?

Examples:

- Disciplinary warning
- Demotion
- Termination

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What "connection" is required?

It's all about cause and effect:

Ex. - The reason I received the disciplinary warning is *because* I reported to OSHA that the company is engaged in unsafe practices.

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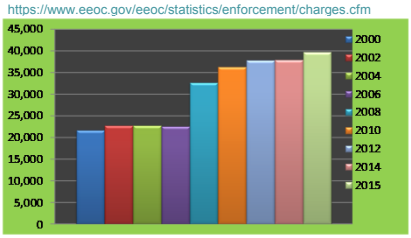
Why Do We Care?

- Because retaliation cases continue to grow, now about **44.5%** of all cases filed with the EEOC

https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm



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The other reason we care...

Because they are easier to prove

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What employment laws are at issue?

Virtually all of them....

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Employment Laws with Anti-Retaliation Provisions

- Title VII
- ADA
- FMLA
- ADEA
- FLSA
- SOX
- NLRA
- OSHA
- State laws
- Workers' Comp

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Legislative Updates

- New federal law
  (*took effect May11, 2016*)

  Defend Trade Secrets Act

  Provides the owners of trade secrets with a cause of action in federal court for misappropriation of their trade secrets (obtaining through improper means; disclosing through improper means, etc.)

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Legislative Updates

Defend Trade Secrets Act

- Also provides protection for whistleblowers who disclose trade secrets in confidence to a government official or attorney, **if it is made for the purpose of reporting a violation of the law.**

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Legislative Updates

Oregon state law *(took effect on January 1, 2016)*

- ORS 659A.355
  - Prevents discrimination and retaliation against employees:
    - Inquiring about, discussing or disclosing in any manner the wages of the employee or another employee; or
    - Making a charge, filing a complaint, or instituting a proceeding, investigation, etc., based on the disclosure of wage information by the employee.

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Legislative Updates

- ORS 659A.355

  Warning: BOLI is interpreting this law to require employers to disclose everyone's pay information upon request. Specifically, refusing to disclose isn't "discrimination" *per se* under the statute, but it could be evidence of a pattern of retaliatory behavior.

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Legislative Updates

Oregon state law amended:

– HB 4067

ORS 659A.200-224 currently relates to disclosures made by public employees, protecting them from adverse action for making certain kinds of whistleblower–type disclosures (violation of the law, gross mismanagement, etc.)

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Legislative Updates

Oregon state law revised:

– HB 4067

The amendments add non-profit employers* into the mix, and provide their employees with the same whistleblower protections as pubic sector employees.

** Defined as organizations that receive public funds by way of grant or contract AND are exempt from tax under 501(c)(3))*

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Legislative Updates

Oregon state law revised:

- HB 4067

The amendments provide whistleblowing employees with an affirmative defense to a civil or criminal charge related to the disclosure of **lawfully accessed information**, if they had a good faith, reasonable belief that they disclosed a violation of law **and** the disclosure was to an appropriate source: 1) a state or federal regulatory agency; 2) a law enforcement agency; a 3) manager of the company; 4) an attorney.

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Legislative Updates

Oregon state law revised:

- HB 4067

Finally: Public employers and non-profits must **implement a policy** that spells out the rights and remedies of employees under these provisions, and then deliver a written or electronic copy of the policy to every employee.

Amendments take effect January 1, 2017

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Avoiding Retaliation Claims

What can you do on the front end to avoid retaliation claims?

Get your house in order

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Getting Your House in Order

1. Manage employee performance
2. Encourage a positive compliance culture
3. Establish and enforce strong written policies
4. Train and communicate regarding culture and policies

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1. Manage employee performance

This is every company's first line of defense.

Train your managers to deal with performance issues *timely*, fairly, and in writing.

No surprises is the key!

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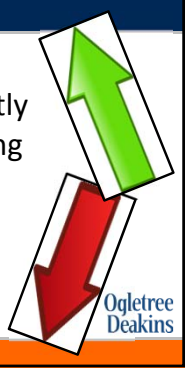
2. Encourage a Positive Compliance Culture

Critical to create a culture encouraging reports, promptly investigating them, and taking prompt remedial action.

Downside: This is a potential issue if adverse action is taken against reporting employee close in time to report.



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2. Encourage a Positive Compliance Culture

- Consider an internal "bounty" program
  - Pros:
    - Encourages internal report of issues
    - Enforces company's compliance commitment
  - Cons:
    - Potential for false/exaggerated reports
    - Increased human and economic resources in investigations
    - Monetary cost in the "bounty"— other rewards could include praise in newsletter or broadcast email, personal telephone call from the CEO

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3. Establish Written Policies

- Expressly require compliance with the law
- Explain in detail how, to whom, and when to report a violation or suspected violation
- Include a strong anti-retaliation policy with consequences
- Distribute policies multiple ways
- Review and update policies

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4. Train and Communicate

- Communicate your commitment, and employee obligations, to all levels
- Policies and procedures work only if they are known and followed
- Include as part of employee and supervisor training
- Periodic reminders
- Make compliance is everyone's responsibility

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5. Methods of Training, Communication, and Enforcement of Code of Conduct

- New hire orientation
- Posters, brochures, wallet cards
- Company intranet
- Compliance hotline/ethics help line
- Training modules
- Corrective/remedial action

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Managing a retaliation claim

What steps can you take to minimize liability once a complaint is made?

1. Assess situation ✓
2. Control damage ✓
3. Follow up ✓

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Step 1: Assess the Situation

- Control communications
  - Evaluate your documentation
  - Everything you and your managers say can and will be used against you
- Clearly identify and communicate performance issues
  - Where possible, focus on objective criteria
  - Any record of performance issues before complaints?

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Step 1: Assess the Situation

- Review whether criteria is fairly and consistently applied
  - Did employee have a fair opportunity to correct performance issues?
  - Any biased or problematic decision makers?
  - Identify potential comparators
- Can evaluators articulate criticisms?
  - If not, require more detailed explanations

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Step 2: Control the Damage

1. Acknowledge receipt of the various complaints according to company policy.
2. Promise they will be investigated and resolved according to company policy.
3. Promise no retaliation for making the complaints, telling him/her how to file a complaint if the employee feels retaliated against in the future.

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Step 2: Control the Damage

4. Remind the employee that, notwithstanding the pending complaints, s/he must adhere to all company policies (including attendance), and satisfactorily perform the functions of the position.
5. Advise the employee that if s/he is unable to perform the essential functions, s/he should provide medical documentation to HR, which will initiate the interactive process to determine what, if any, reasonable accommodations are available and appropriate.
6. Advise the employee that s/he will receive a follow-up memo confirming the substance of the meeting.

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Step 3: Follow-Up

- Coaching/discipline for supervisor
- Supervisor communication
- Employee communication

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Step 3: Follow-Up

- Follow up with employee on complaints
- Follow up with next level manager
- Continue to monitor the situation
- Document follow-up efforts!

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Questions & Answers

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Thank You

Caroline R. Guest
503-552-2170
caroline.guest@ogletreedeakins.com

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