

# Avoiding Retaliation Claims in the Age of Covid



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## Retaliation Statistics

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- According to EEOC data, retaliation claims are by far the **most frequently filed** claims and are on the rise
- The number of charges alleging retaliation has more than **doubled** in the past two decades
- In FY 2021 alone, 34,332 charges alleging retaliation were filed, comprising **56%** of charges

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## Impact of Covid-19

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- Renewed focus on whistleblower laws
  - E.g., Expansion of New York's whistleblower law
- Employees feeling empowered
  - Labor shortages
- New situations for employees to assert their rights
- Greater employee awareness of legal rights
- Newly enacted laws
  - E.g., New York Health and Essential Rights Act (HERO Act)
- Remote work
  - Work relationships may not be as strong

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## Federal Laws that Protect Against Retaliation

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- Title VII of the Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Americans With Disabilities Act (ADA)
- Employee Retirement Income Security Act (ERISA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Immigration Reform and Control Act (IRCA)
- National Labor Relations Act (NLRA)
- Occupational Safety and Health Act (OSH Act)
- Sarbanes-Oxley Act (SOX)
- And so on...

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## State and Local Laws that Protect Against Retaliation

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- Generally:
  - Anti-discrimination and civil rights laws
  - Wage and hour laws
  - Whistleblower laws
  - Leave/paid time off laws
  - Workplace health and safety laws
  - Workers' compensation laws

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## Retaliation Claims Generally

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- Retaliation – taking an adverse action against an employee (or other covered person) for engaging in protected activity
  - Mixed motive (?)
- Protected activity
  - Lodging an internal complaint, whether formal or informal
    - Employee does not need to be correct
  - Filing an administrative complaint with a governmental agency
  - Commencing a lawsuit
  - Participating in an internal or external investigation
  - Requesting a reasonable accommodation
  - Requesting or taking certain types of leave (e.g., FMLA leave)
  - Refusing to comply with a directive that violates applicable law
  - Filing a workers' compensation claim

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## Retaliation Claims Generally

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- Adverse employment actions
  - Reduction of work hours
  - Reassignment to a less desirable position
  - Less access to opportunities
  - Relocation to a less desirable workplace
  - Written warnings/targeting
  - Poor performance evaluations
  - Failing to promote
  - Reduction in pay
  - Demotion
  - Suspension
  - Termination

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## Considerations Before Taking Adverse Actions

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- Has the employee engaged in protected activity?
- What is the temporal proximity between the complaint and adverse action?
- Are other employees who did not engage in protected activity treated more favorably/is the employee who engaged in protected activity being singled out for disciplinary action?
- Has there been a thorough investigation, as applicable?
- Is there a legitimate, non-retaliatory (well-documented or well-established) reason for the adverse action?

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## Considerations Before Taking Adverse Actions

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- Staffing firms should not be overly risk averse
  - Not all oppositional activity is protected
  - Can back fire
- Engaging in protected activity ≠ life tenure

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## Additional Considerations for Temporary Employees

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- Does the client want to suddenly end an employee's assignment after they engaged in protected activity?
- Cooperation between the staffing firm and client to conduct a thorough investigation, as applicable
- Obtaining further information from client, to the extent appropriate
- Ensuring client's compliance with applicable laws
- Joint employment issues
- Indemnification
- Contractual provisions in staffing services agreement addressing the above

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## Best Practices

- Thank employee for coming forward
- Remind employees of anti-retaliation policy
- Conduct a prompt and thorough investigation, as applicable
- Train employees how to deal with complaints and not to retaliate, particularly mid-level managers
- For temporary employees, obtain relevant information from, and cooperate with, client before acting after receiving notice of temporary employee engaging in protected activity
- Review personnel decisions involving an employee who engaged in protected activity
- Anticipate issues before they arise

\*\*\*Employees who are most likely to file a retaliation claim are not necessarily those with the best claim, but those that are the most angry

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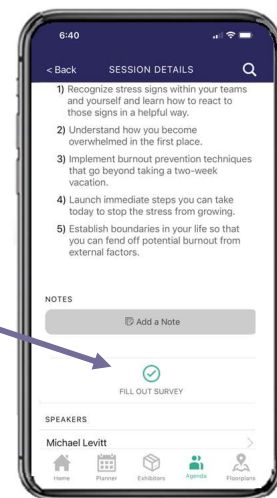
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# QUESTIONS?

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