

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

MARCH 4, 2022

Employers Take Notice: The NLRB, the DOL and the EEOC Are Working Together to Combat Employer Retaliation

The National Labor Relations Board (NLRB), the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL), three federal agencies that enforce major federal labor and employment laws, are joining forces to combat employer retaliation. Employers must be aware that these federal agencies are moving forward with concrete steps to coordinate efforts to take action and litigate against workplace violations and are incentivizing workers to come forward with their concerns.

What's Happening?

Last November, the agencies launched a joint initiative to raise awareness about unlawful retaliatory conduct, as well as collaborate and coordinate with each other and civil law enforcement agencies to protect worker rights. The joint initiative builds on memoranda of understanding (MOUs) entered into by these federal agencies, including a recent [January 2022 MOU](#) entered into between the DOL's Wage and Hour Division and the NLRB. During the launch of the joint initiative, EEOC Chair Charlotte Burrows stated that, "charges alleging retaliation have increased as a percentage of the total number of charges filed with the EEOC every year for the last 20 years." Chair Burrows reasoned that this emphasized the urgent need for federal labor agencies to form a "bulwark against unlawful retaliation."

During a Feb. 24, 2022 webinar, the agencies provided insight into the strategies that the NLRB, EEOC and DOL anticipate employing in their joint effort to combat retaliation. Framing the concept of workplace retaliation as one involving racial and economic justice, the agencies acknowledged that the enforcement regime of laws pertinent to retaliation "can be imperfect," but that they were committed to a strategy of intervening "early and often." The agencies plan to coordinate their efforts in various ways including actively engaging in cross-training to understand each agency's mission, referring cases to each other to better enforce anti-retaliation efforts, coordinating joint investigations and joint settlements when multiple agencies have related cases with different potential remedies, sharing case and investigative files and providing technical assistance to each other on related claims. As an example, Seema Nanda, U.S. Solicitor for the DOL, stated that the DOL had recently provided technical assistance to the NLRB on calculating back pay in a workplace subject to a prevailing wage order.

Takeaways

- ***Swift action will be taken to stop retaliation***

Maia Fisher, DOL Regional Solicitor, stated that employers are becoming "increasingly brazen in their threats against workers who seek to assert their rights," requiring the agency to "act with urgency." She provided examples of such threats where an employer retaliates against workers by threatening to call immigration authorities or law enforcement, by threatening workers and their families via text messages, letter or in person, or by blacklisting employees with future employers. Solicitor Fisher stated that her office has been successful in seeking swift relief in the form of temporary restraining orders and

preliminary injunctions to stop retaliation early. Employers should anticipate that there is a growing willingness amongst the agencies to seek these types of relief in response to a worker's complaint of retaliation.

While the agencies are focused on enforcing federal labor and employment laws across all industries, employers in the agricultural, garment manufacturing, meat packing, hospitality, casino and care facility industries should note that their workers' claims may be subject to close scrutiny by the DOL and other federal agencies. Workers in isolated communities are also under the DOL and other federal agencies' radar.

- ***Support for vulnerable workers to file complaints and participate in agency investigations***

EEOC Chair Burrows stated that workers of color were more likely than others to be fired, and thus fear the risk of retaliation for asserting their rights or complaining about their workplace concerns. The agencies agreed that this issue is amplified in immigrant workers who have temporary work authorizations tied to their place of employment, thus deterring reports of retaliation or participation in investigations implicating their employers. The agencies are cognizant of these barriers and are working to encourage workers to come forward with their concerns and build trust. Mary J. O'Neill, EEOC Regional Attorney provided an example of these efforts where the EEOC recently obtained a [\\$5.5 million settlement for 300 Somali workers](#) at a meat processing plant in Colorado. Here, the workers had been subjected to harassment because of their race, national origin and religion. The EEOC shared that supervisors had explicitly informed these workers that if they complained about their treatment that they would lose their jobs. The workers were afraid that they would be fired and their immigration status compromised and thus were reluctant to report harassment and participate in the EEOC's investigation into these concerns. In this case, the EEOC employed various tools to build trust and support these workers.

Throughout the webinar, the agencies emphasized that worker protection laws apply to workers regardless of immigration status and that their goal was to provide support. For example, where employers threaten workers with immigration-related consequences when asserting their workplace rights, the DOL's standard practice is to seek immediate injunctive relief from the courts. The DOL also works with the Department of Homeland Security (DHS) to support workers by providing them with temporary immigration relief so they can participate in agency investigations. DOL Solicitor Nanda referenced a long-standing MOU between DHS, DOL, EEOC and NLRB that specifies that agency enforcement activities must not conflict with each other. Thus, DHS is compelled to stand down during the pendency of an enforcement effort by the EEOC, NLRB or the DOL. The agencies reiterated their commitment to pursuing protections for immigrant workers who file charges or participate in agency investigations.

- ***Workers do not lead "single issue lives," thus the agencies cannot work in silos***

DOL Wage and Hour Division Acting Administrator Jessica Looman explained that because workers do not lead "single issue" lives, joint collaboration efforts by the NLRB, DOL and EEOC will assist workers in navigating the web of labor and employment statutes so they can identify all of the violations of law that they may have been subjected to in their workplace. NLRB Regional Director Lisa Henderson echoed these sentiments. Director Henderson stated that though the NLRB has a specific mandate, unfair labor practices "don't arise in a vacuum," and must be looked at from the larger context of employees and their work environment. She believes that partnering with the DOL and the EEOC will expand the remedies available to vulnerable workers beyond what the NLRB can offer as a single agency.

The agencies will employ a variety of strategies to achieve this goal. For instance, when investigating a charge, if the lead agency believes that there may be unlawful conduct that also falls within the jurisdiction of another agency, the lead agency will advise the worker about potentially filing a complaint with the relevant agency and provide the agency's contact information and informational materials about statutory rights and remedies available to the worker. In certain cases, the agencies will conduct coordinated investigations for overlapping statutory violations. This could entail one agency taking the lead in investigating, settling or litigating the case while the other agencies hold their case in abeyance, or the agencies could choose to engage in joint investigations resulting in joint settlements or joint litigation. The agencies plan to share information from their investigation and complaint files on related issues such as unlawful compensation practices, retaliatory discipline or discharge, discriminatory hiring practices or other unlawful employment practices. They also plan to engage in joint public education and outreach activities to increase the public's understanding of the labor and employment laws within their purview.

In their closing remarks agency leadership spoke directly to workers, emphasizing their commitment to combatting retaliation. Solicitor Nanda stated, "we are ready for you to come forward, we are ready to intervene early and even consider [these retaliation claims] when there is just a threat or a reason to feel like there would be a threat." NLRB General Counsel Jennifer Abruzzo, concurred by stating that the agencies are "striving for the strongest collaboration possible in order to protect workers who raise their collective voices to combat all forms of mistreatment and hold accountable those who try to silence them or quash their efforts to improve their circumstances in the workplace."

What Now?

There is a lot to unpack here, but employers should be aware that the NLRB, EEOC and the DOL are now viewing worker complaints from not only the perspective of how it implicates their agency's authority, but also their sister agencies, in an effort to seek optimal remedies for workers. Employers should expect increased litigation as the agencies perfect their coordination of enforcement efforts. This means that employers must take proactive action to view internal worker complaints or issues from the perspective of various possible labor and employment law violations. Thus, employers must train decision makers and supervisors within the organization to recognize and address these possible violations; implement policies addressing the employer's prohibition of unlawful employment practices; educate workers on how they can report and seek recourse for retaliation and other unlawful employment practices; train individuals investigating internal worker complaints to hone in on the issues and concerns voiced by the worker and identify potential legal violations; and take swift action to investigate and remedy valid employee complaints.

For recommendations on preventing and addressing workplace misconduct, please contact [Nihla F. Sikkander](#), [Sarah Zucco](#), any attorney in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

