

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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USDOL'S Wage and Hour Division Announces Priority of Protecting Workers from Retaliation

On March 10, 2022, the U.S. Department of Labor's Wage and Hour Division (which enforces the Fair Labor Standards Act, the Family and Medical Leave Act and other federal wage and hour laws) announced that one of its top enforcement priorities is to protect workers from retaliation for exercising their rights. The USDOL launched an [anti-retaliation page](#) on its web site and published a [Field Assistance Bulletin](#) on the subject of retaliation.

In the Field Assistance Bulletin, the USDOL reiterated that both internal complaints to an employer as well as external complaints to the Wage and Hour Division or to a court are protected activities. An employee is protected from retaliation even if the employee's internal or external complaint is determined to be without merit. The penalties for unlawful retaliation can include reinstatement (if the employee was discharged), injunctive relief (such as removal of a disciplinary memo from the employee's file), back pay and an amount equal to the back pay owed as liquidated damages.

If an employee files an internal or external complaint or otherwise exercises rights under the federal wage and hour laws, an employer should consider taking the following precautions to avoid the risk of liability for retaliation:

- The employer should only share the fact that an employee filed a complaint with individuals within the organization who need to know in order to investigate or address the complaint. If the employee's direct supervisor is not aware of the complaint and takes an adverse employment action against the employee based on the employee's poor performance or misconduct, the supervisor's lack of knowledge of the complaint could provide a defense to a retaliation claim.
- If it is necessary to inform the employee's supervisor of the complaint in order to investigate the employee's claim, the supervisor should be directed to obtain approval from higher level management and human resources before proceeding with any disciplinary action against the employee for poor performance or misconduct.
- Before approving disciplinary action against an employee who has filed a complaint, the evidence of the employee's poor performance or misconduct should be thoroughly reviewed to make sure it is sufficient to support the disciplinary action. The filing of a complaint does not shield the employee from the consequences of his poor performance or misconduct, but the employer must make sure that it can prove the legitimate, non-retaliatory reasons for the disciplinary action.
- Any disciplinary action taken against an employee who has filed a complaint must be no harsher than the disciplinary action taken against other employees for similar types of performance deficiencies or misconduct.

- Everyone within the organization who is informed of the complaint should be advised that retaliation against the employee is strictly prohibited.

For any questions, please contact [Subhash Viswanathan](#), any attorney in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

