

UNITED STATES DEPARTMENT OF LABOR ISSUES FACT SHEETS ON RETALIATION

By: Peg O'Brien, Esq.
Email: maobrien@devinemillimet.com
Phone: 603.695.8631

JANUARY 20, 2012

"Retaliation" is a word that appears frequently in our newsletters. Virtually every state and federal law addressing issues in the workplace contains an "anti-retaliation" provision. In fact – and to the surprise of most employers -- retaliation claims are now the most frequently filed type of complaint filed with the Equal Employment Opportunity Commission. Surpassing claims of discrimination based on race, sex, religion, disability and age, retaliation claims now represent more than one quarter of all claims filed.

The most likely reason for this trend is that the standard for retaliation claims has been lowered to the point where all sorts of workplace interactions can be viewed as "retaliatory." In 2006, the United States Supreme Court's decision in *Burlington Northern v. White* significantly broadened the types of employer actions that can be viewed as actionable retaliation. This ongoing rise in retaliation claims is likely to continue.

Recently, the United States Department of Labor (DOL) issued three new fact sheets offering employers guidance on the topic of retaliation under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Each of these statutes contain specific anti-retaliation provisions prohibiting employers from taking adverse employment actions against employees for asserting rights covered by these laws.

[Fact Sheet #77A: Prohibiting Retaliation Under the FLSA.](#) This fact sheet reiterates that employers may not retaliate against any employee who has "filed any complaint" or cooperated in an investigation under the FLSA. Further, the fact sheet repeats the holding of last year's United States Supreme Court decision in *Kasten v. Saint-Gobain* that employees are protected from retaliation under the FLSA whether they make their wage and hour complaint *orally or in writing*. In addition, the fact sheet clarifies that an employee's complaint may be made to the DOL Wage and Hour Division or, as most courts have found, filed as an internal complaint with his/her employer.

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

Fact Sheet #77B: Protection for Individuals under the FMLA. This fact sheet emphasizes that employers may not retaliate against an employee who exercises his/her rights under the FMLA. In addition, the fact sheet provides specific examples of prohibited retaliatory conduct under the FMLA including: an employer's refusal to authorize FMLA leave for an eligible employee; discouraging an employee from using FMLA leave; manipulating an employee's work hours to avoid responsibilities under the FMLA; using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; and counting FMLA leave under "no fault" attendance policies.

Fact Sheet #77C: Prohibiting Retaliation Under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). This fact sheet articulates that certain agricultural employers may not "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker" who files a complaint under the MSPA, participates in any proceeding under the MSPA, or exercises any MSPA right. This fact sheet also clarifies which employers are subject to the statute, and clarifies the enforcement mechanism of the statute.

DOL fact sheets and other useful wage and hour information can be found here: <http://www.dol.gov/WHD/fact-sheets-index.htm>.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001