# CLIENT ALERT

## How Asking Better Questions *Before Taking Adverse Action* Can Help Employers Prevent and Defend Employee Retaliation Claims

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Many, if not most, employers and their business advisors have a general understanding and working knowledge of employment anti-discrimination laws. The equal employment opportunity (EEO) laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans With Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, Title II of the Genetic Information Nondiscrimination Act (GINA), not only prohibit discrimination based upon the underlying protected activity, but also prohibit retaliation. Specifically, these statutory provisions prohibit government or private employers, employment agencies, and labor organizations from retaliating because an individual engaged in what is known as "protected activity". Ordinarily, protected activity consists of either participating in an EEO process or opposing conduct made unlawful by EEO and other laws governing employees and the workplace.

However, what a number of employers fail to fully grasp is *why* retaliation claims are filed in the first instance, and second, strategies for preventing such claims and defending them, if a lawsuit is filed. In our experience, employment claims, whether filed administratively or judicially, typically include at least two counts. The first count is often an allegation that the employer engaged in some type of discriminatory conduct which is protected under the EEO laws (e.g., race, religion, gender, disability, etc.). The second count is a claim for retaliation alleging that the employee suffered a materially adverse employment action when they engaged in protected activity. A materially adverse employment action can include termination, demotion, reduction in compensation and benefits, and even a lateral transfer as the Supreme Court recently made clear when it significantly lowered the bar for employees to succeed on retaliation claims. The Supreme Court's decision places an even higher premium on avoiding retaliation claims by employees.

We often tell our clients, don't win the battle but lose the war. What do we mean by that? We mean that most of the time employers have a legitimate non-discriminatory and lawful reason for their actions when accused of engaging in some type of discriminatory conduct or other allegedly wrongful conduct (i.e., the "first count" described above). At this juncture, they are in a good position to win the case, having done nothing wrong. However, if they end up botching the response to the employee's protected activity or not thoroughly vetting the decision-making process as set forth below, they may nonetheless find themselves liable in the case (i.e., for the "second count" described above). So, how do employers avoid providing an opening to their employees who engage in protected activity, such as lodging an internal discrimination complaint?

In our experience, it is generally the case that there is *not* an intentional decision by employers to exact retribution upon employees who engage in protected activity (although, to be sure, this certainly occurs from time to time, particularly where the employer has a knee-jerk or emotional reaction to an employee complaint). Rather, retaliation claims more frequently result from a lack of communication in the sense that one department or division is unaware of the actions of another department. A typical example might be an employee who complains to a supervisor about harassing conduct by another supervisor or co-worker. However, that supervisor does not share that information with human resources or senior management. Management then decides, for example, for financial reasons to reduce staff and lays off the employee who complained about the misconduct, unaware of the complaint made by that individual to a supervisor two months earlier. This lack of communication is ordinarily the genesis for many retaliation claims. Stated more colloquially, retaliation claims are often a product of the fact that the left hand does not know what the right is doing. To address this circumstance, employers are well served to create processes which:

A. ensure that decisions regarding the possibility of any adverse employment action taken against employees are centralized; and

B. most importantly, ensure that a series of important questions are addressed before any adverse employment action is taken against any employee to reduce the likelihood that the decision could be regarded as retaliatory.

A list of questions which employers should consider *before* taking an adverse employment action include the following:

1. Has the employee alerted the employer about, or is the employer aware of, a medical or health related condition, including pregnancy? Has the employee requested an accommodation under the Pregnant Workers Fairness Act (or analogous state or local law)?

2. In the last year, has the employee indicated that they are disabled and/or requested an accommodation under the ADA (or analogous state or local law)?

3. Is the employee currently on, or recently taken or requested, family and medical leave or some other form of protected leave, such as a local or state sick and safe leave or military leave?

4. Has the employee filed a worker's compensation claim in the past year? If so, is the workers' compensation claim pending?

5. Has the employee complained in the last year about sexual harassment or any other type of unlawful harassment?

6. Has the employee complained in the last year about any type of unlawful discrimination?

7. Has the employee complained in the last year about any type of unlawful retaliation?

8. Has the employee made a complaint in the last year that is whistle blowing in nature in that it regards the company's business practices, accounting practices, etc.?

9. In the past year, has the employee filed a complaint with a local, state or federal agency, such as the EEOC, SEC, DOL or NLRB?

10. Has the employee complained in the last year that they were not properly compensated, including complaining about overtime, commissions, wage deductions or minimum wage?

11. In the past year, has the employee complained about an alleged violation of the company's retirement policies, or any other type of complaint which implicates ERISA?

12. With respect to any of the matters referenced in the previous questions, has the employee been transferred, demoted, or suffered a reduction in pay?

13. Are all of the employees subject to the personnel decision employed on at-will basis? Has any manager promised an employee (explicitly or implicitly) employment for a specific period of time? If so, for how long?

14. Has the employee been properly classified under federal or state law as exempt or non-exempt from overtime?

15. Is the employee owed a commission or a bonus? If so, how much? Is the employee being paid the commission or bonus? If not, why not?

16. Is the employee owed any accrued unused vacation, sick or any other form of paid time off? Is the employee being paid the paid time off? If not, why not?

17. Does the employee owe the company any monies (if so, will those monies be forgiven as part of the separation arrangement)?

18. Is the employee a witness or participant in a currently pending lawsuit or proceeding which the company is involved?

19. Is the employee likely to be a witness or participant in an anticipated or imminent lawsuit or proceeding which the company is likely to be involved?

20. In the last year, has the employee engaged in any union organizing efforts, or even complained about any terms or conditions of employment or the workplace on behalf of themselves and other co-workers?

At the end of the day, we believe that preventing discrimination and retaliation claims involves a coordinated process consisting of the following: (i) establishing sound employment policies and procedures; (ii) a commitment to applying and enforcing the employment policies in a consistent manner; (iii) promoting a culture where supervisors feel free to promptly come forward to human resources and senior management with concerns and, especially, with information about complaints raised by employees; and (iv) asking better questions before adverse employment actions are taken.

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