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# How & Why to Avoid Walking Into a Retaliation Claim

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# Key Takeaways

- Recognize what **retaliation** is.
- Learn from **examples** of retaliation.
- **Develop strategies** to minimize the risk of retaliatory actions against employees (by HR, managers, executives).

# Strategic HR Plan

**What should be in my strategic HR Plan to prevent retaliation? (and a retaliation claim)?**

- Anti-retaliation policy.
- Culture of communication and review.
- Process for formal adverse actions.
- Training.

# Retaliation

- California law: It is **unlawful** for an employer to retaliate against an employee who reports or otherwise opposes prohibited discrimination or harassment. Cal. Gov. Code § 12940(h)
  - “Any person” is protected – applicants, employees, partners.
- Federal law: prohibits retaliation against “employees or applicants for employment” who **engage in protected activities**. 42 USC § 2000e-3(a)

# Who is liable?

- **Employer alone is liable** for retaliating against an employee.
- Supervisors and coworkers are **not** personally liable for their roles in the retaliation.

# How does employee prove retaliation?

- Plaintiff must prove a *prima facie* case:
  - Protected activity
  - Adverse employment action
  - Causal connection
- Then: Employer must articulate a **legitimate, nonretaliatory reason.**
- And then: Plaintiff must prove the employer's reason is a pretext.

# “Protected Activity”

Known . . . Or (Kind of)  
Unknown!

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# Protected Activity

- **Participate:** Make a charge, testify, assist, or participate in any manner in proceedings
- **Oppose:** Oppose acts that are unlawful

# Protected Activity

**“Participate” is broadly interpreted**

- Formal or informal complaints about unlawful discrimination are protected activities.
- Complaints need not be well-founded.
- Threatening to file a charge is protected activity.

# Protected Activity

## Participate

- Man's admission in deposition for another case that he sexually harassed a colleague was protected participation.
- Derogatory comments about another employee unrelated to that claim is protected.

# Protected Activity

## Participate

- Adverse action against employees who are **prospective** complainants or witnesses for complainants is retaliation.

# Protected Activity

## For “Opposition” activity:

- The illegal activity that is the subject of the opposition must be directed toward those covered by FEHA (not just discrimination against general public)

# Protected Activity

**For “Opposition” activity:  
Protected act as long as  
employee had a  
reasonable and good  
faith belief it was  
unlawful.**

- Not need to know the practice is unlawful.
- Enough that the employee complained regarding its discriminatory impact.
- Not need to prove the practice was in fact discriminatory.

# Protected Activity

For “Opposition” activity:

- An unarticulated belief that the employer’s conduct is unlawful does not establish opposition.

# Protected Activity

For “Opposition” activity:

- Employee cannot unreasonably interfere with operations while “opposing”



# Adverse Action

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# Adverse Action

- Terminations and demotions.
- Spectrum of actions reasonably likely to adversely and materially affect job performance or opportunity for advancement.

# Adverse Action

- **Temporal Proximity** - Adverse action must be at the same time or after the employee exercises the protected right.
- “Just” temporal proximity not enough if employer offers a legitimate, nondiscriminatory, reason for the adverse action.

# Adverse Action

- Materially affects the terms, conditions or privileges of employment.
- Reasonably likely to impair a reasonable employee's job performance.

# Adverse Action

- Reasonably likely to impair prospects for advancement or promotion”
- “Likely to deter” a reasonable worker from complaining
- Series of acts

# Adverse Action

- Reassignment of job duties
- Suspension without pay despite full reinstatement
- Demotion and isolation
- Co-worker retaliation

# Adverse Action

- Unnecessary and burdensome job duties
- Obstacles
- Setting up to fail
- Post-separation bad reference

# Causal Connection

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# Causal Connection

**Must be based on relevant evidence (!)**

- Suspicious timing
- Inconsistent or shifting explanations
- Treating employees differently
- Justification for action is not believable, was pre-determined, or is hiding a retaliatory reason

# What about “At-Will”!?!

Can we never fire anyone?

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# Is *everything* retaliation?

Nah. Come on.

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# Got an LBR?

## (or an "LNRR")?

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**I don't care – we have  
to fire them!**

# If you must

- Follow your process!
- Step back and review: has the person has opposed discriminatory behavior or participated in a claim?
- Weigh the retaliation risk carefully.
- Follow your policies.
- Precedent.
- [Can you get a release agreement?]

# Document the LBR

(Legitimate non-retaliatory reason)

- Legitimate, non-retaliatory reasons for taking adverse action
- That you reminded everyone of the “no retaliation” policy

# Document

- Preserves information
- Serves as evidence
- Drives fairness!



# “You did what?!?”

## When you learn of termination AFTER

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# Correct the problem?

- Is the action final?
- Can you offer position back?
- Can you offer compensation in exchange for a release? (Or should you let sleeping dogs lie)?

# Strategic HR Plan

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# CLEAR YOUR MIND, LUKE

- Temptation: get rid of a “complainer.”
- Don’t harbor a grudge.
- Keep emotions and personal feelings out of all employment decisions.

# Strategic HR Plan

**What should be in my strategic HR Plan to prevent retaliation? (and a retaliation claim)?**

- Anti-Retaliation Policy.
- Culture of communication and review.
- Process for formal adverse actions.
- Training.

# Anti-Retaliation Policy

- Clearly define retaliation.
- Make clear that you **will not tolerate retaliation** from managers or other employees.
- Describe complaint process.

# Anti-Retaliation Policy

- No tolerance means no tolerance!
- Your execs, managers (and you) must walk the walk!

# Culture

- Communication to staff and managers.
- Encourage complaints.
- Don't see review as a terrible thing.
- We protect “whistle-blowers.”



# Process

- Response to complaints
- Formal adverse actions – HR involved.
- Educate re “informal” actions

# Circle Back with Employees

- Check back
- Confirm they are not experiencing retaliation
- Be proactive!

# Who needs to know?

**Usually, not many!**

- Keep confidential any complaints that you receive.
- The fewer people who know about a complaint, the smaller the chances are that someone will retaliate against the complainer.

# Train! Train! Train!

- Managers and Yourself!
- Use specific examples.
- Give “do’s and don’ts”
- Continue your own education!

# Questions?

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**Thank you!**

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# Thank You

