



# COVID-19 and Retaliation Claims: What Employers Should Know to Minimize Risk

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# COVID-19 Wrongful Death Suit: *Evans v. Walmart*

- First known COVID-19 wrongful death suit - filed in Illinois
- Decedent contracted COVID-19 while working at a Walmart store
  - Another employee who worked at the store died of COVID-19 shortly after the decedent
- Complaint alleges:
  - Walmart failed to implement safety measures recommended by CDC/OSHA
  - Management did not clean and sterilize the store, provide employees with PPE, or implement social distancing
  - Walmart did not bar employees with symptoms of COVID-19
  - Walmart did not warn employees that other workers had COVID-19

# Amazon Under Scrutiny for Firing Warehouse Employee

- Workers at 50+ Amazon warehouses have contracted COVID-19
- Amazon allegedly fired an employee who worked at its Staten Island warehouse for protesting company's response to COVID-19
  - Company put employee in quarantine after he was in contact with another worker who contracted COVID-19
  - Employee then led protest calling for Amazon to close the warehouse temporarily and provide additional protections
  - Amazon fired employee after the protest, citing his failure to quarantine

# Retaliation Claims on the Rise

- Reports of employees alleging retaliation for reporting lack of safety measures and personal protective equipment (“PPE”)
  - Health care workers
  - Warehouse employees
- 1,000+ OSHA complaints regarding lack of COVID-19 protections
- OSHA Press Release “reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus”
- Wrongful termination and retaliation claims are starting to flood the courts (as are accommodation and disability claims)

# Topics To Cover

- Workplace Safety Issues
- Federal Anti-Retaliation Provisions
- California Retaliation Protections and Definitions
- Legal Disputes Arising
- Mitigating Against Risk
- What to Do?
- Resources



A silhouette of a person stands in the foreground, looking out a large window. The window reveals a city skyline at sunset, with the sun low on the horizon, creating a bright glow and lens flare. The city features various high-rise buildings and a body of water in the foreground. The overall mood is contemplative and professional.

# Difference between protections for whistleblowers and retaliation?

# Whistleblower Protection vs. Protection from Retaliation

- Whistleblower claims relate to conduct that may threaten public safety, waste tax dollars or violate public trust in government. Examples are dumping chemicals illegally, submitting fraudulent claims for expense reimbursement under a government contract and using a public office for personal gain.
- Retaliation complaints pertain to an employer's illegal interference with the rights of individual employees to enforce their personal legal rights under the law and to support others who enforce their personal legal rights under the law. Examples are an employer disciplining an employee for alleging workplace gender discrimination and an employer terminating an employee who reported the sexual harassment of a co-worker.

# Sources of Law: Federal

The major federal employment laws that provide for protection against retaliation are:

- Affordable Care Act (ACA)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Civil Rights Act of 1964 (Title VII)
- Equal Pay Act (EPA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)



# Sources of Law: California

The major California employment laws that provide for protection against retaliation are:

- California Family Rights Act (CFRA)
- Fair Employment and Housing Act (FEHA)
- California Labor Code
- California Health and Safety Code (Cal.-OSHA)



# Workplace Safety





# Federal Protections

# Relevant OSH Act Provisions and Regulations

- **General Duty Clause:** employers must furnish “a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- States can adopt OSHA-approved plans
- Instead of issuing virus-specific regulations, OSHA has relied upon existing rules, including:
  - **29 C.F.R. § 1910, Subpart I:** requires personal protective equipment (PPE)
- Recording and Reporting Requirements

# OSHA Investigation Process

- OSHA will not reveal the name of the complainant
- OSHA will only conduct an on-site inspection where certain criteria is met
- Off-site investigations are generally conducted via phone/fax
  - OSHA calls the employer, describes the alleged hazards, and follows up with a fax or letter
  - Employer must respond within five days, identifying in writing any problems found and noting corrective actions taken or planned
  - If response is adequate, OSHA will generally not conduct on-site inspection
  - OSHA will send letter to employee who filed the complaint, informing the employee of findings and any citations and proposed penalties

# OSHA Investigations During COVID-19

- Interim Enforcement Response Plan for Coronavirus Disease 2019
  - Complaints from non-healthcare and non-emergency response establishments to be processed via phone/fax
  - COVID-related fatalities and imminent danger exposures are prioritized for inspection “with particular attention given to healthcare organizations and first responders”
  - If an on-site inspection is warranted, compliance officers are directed to (among other things) examine whether employer has a **written pandemic plan** as recommended by the CDC.



# OSHA's COVID-19 Guidance

- OSHA has released approximately 15 directives and guides related to COVID-19, including:
  - “Guidance on Preparing Workplaces for COVID-19”
  - Interim guidance for specific worker groups and their employers
  - Safety tips for restaurant, and food and beverage businesses

# Section 11(c) of the OSH Act

- **Section 11(c):** “[N]o person shall discharge or in any manner discriminate against any employee because the employee has . . . [f]iled any complaint under or related to the [OSH Act].”
- Protects employees who make reasonable, good faith complaints
- Relief may include reinstatement, back pay with interest, compensatory damages, and punitive damages
- Secretary of Labor has filed at least 10 lawsuits under Section 11(c) during the Trump era

## Section 11(c) of the OSH Act (*cont'd*)

- Johnson v. Interstate Mgmt. Co., LLC, 849 F.3d 1093 (D.C. Cir. 2017)
  - Held: Section 11(c) does not provide for a private cause of action
  - Employees may submit complaint to Secretary of Labor
  - Secretary of Labor may sue in federal court on behalf of employee

# Section 11(c) of the OSH Act (*cont'd*)

- *Acosta v. Champagne Demolition, LLC*, (N.D.N.Y. 2017)
  - Held: There is a right to a jury trial on a Section 11(c) claim
- *Perez v. Lloyd Indus., Inc.* (E.D. Pa. 2019)
  - Whistleblowers awarded over \$900,000 (\$400,000 in back/front pay and
  - \$500,000 in punitive damages) after March 2019 jury trial

# National Labor Relations Act (“NRLA”)

- **Section 8(a)(1) and 8(a)(3):** Employers prohibited from retaliating against an employee for participating in “concerted activity”
- ***Maine Coast Regional Health Facilities***, NLRB, 01-CA-209105, 01-CA- 212276 (March 30, 2020)
  - Hospital employee terminated for “discussing staffing shortages” and “expressing support for . . . [local] nurses union” in violation of media policy
    - Policy restricted right to publicly complaint about workplace issues of common concern
  - Termination violated Section 8(a)(1) and 8(a)(3)

# Families First Coronavirus Response Act (“FFCRA”) Retaliation Claims

- Employers prohibited from firing, disciplining, or otherwise discriminating against employees because employees take leave under the FFCRA, file a proceeding related to the FFCRA, or testify (or intend to testify) in any such proceeding.
  - Relief available under the FFCRA includes lost wages, liquidated damages, reinstatement, and attorneys’ fees



# Families First Coronavirus Response Act (“FFCRA”) Retaliation Claims – Cases Filed

- ***Jones v. Eastern Airlines, LLC***: plaintiff filed complaint in federal court in PA alleging that she was fired in violation of the FFCRA’s anti-retaliation provision after requesting leave under the FFCRA to care for her son while his school was closed
- ***Robtoy v. The Kroger Co.***: plaintiff filed a complaint in federal court in Indiana alleging that she was terminated in violation of the FFCRA for taking leave after experiencing COVID-19-like symptoms and being ordered by a doctor to self-isolate for two weeks
- ***Massey et al. v. McDonald's Corp.***: workers at several McDonald’s corporate-owned locations in Chicago accuse the Company of forcing them to serve customers and assemble meals in cramped quarters, making them reuse dirty masks and gloves and otherwise exposing them to COVID-19. (Similar case filed by Amazon workers.)



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# Retaliation in California

# Understand Cal-OSHA Provisions

- Investigates claims alleged pursuant to California Labor Code sections 6300, et seq.
- Prosecutes some claims:
  - Cal-OSHA's Bureau of Investigations is responsible under Labor Code section 6315 for:
    - Investigating employee fatality and serious injury cases
    - Preparing and referring cases to local and state prosecutors for criminal prosecution
    - District attorneys can prosecute employers under Labor Code section 6423 or 6425 for knowingly, negligently, or willfully violating an occupational safety or health standard. Criminal sanctions can include monetary fines and imprisonment in a county jail or state prison.

# California Retaliation Protections

## Examples:

- **California Health and Safety Code § 1278.5:** protects employees of health care facilities who complain about “quality of care, services, or conditions at the facility.”
- **California Labor Code**
  - **§ 232.5:** Prohibits an employer from requiring that an employee refrain from disclosing or discussing information about the employer’s working conditions, and from requiring an employee to sign a waiver or other document that restricts or denies the employee the right to disclose or discuss information on that subject.
  - **§ 1102.5:** prohibits employers from retaliating against employees for “refusing to participate in an activity that would result in a violation of or noncompliance with a local, state, or federal rule or regulation.”
  - **§ 6310:** prohibits employers from retaliating against employees for complaining about employee safety or health
  - **§ 6311:** protects employees who refuse to perform work that would result in a violation of any occupational safety or health law **and** “create a real and apparent hazard to the employee or his or her fellow employees.”

# California Retaliation Protections

- **California Common Law** (*Tameny* claims)
  - wrongful termination
  - conduct must implicate a fundamental policy embodied in constitutional or statutory provisions.
- **Industry-Specific Regulations**
- **Arguably, California Wage Orders**

# Importance of Compliance with Laws Against Retaliation

- These laws encourage employees to come forward, without risk of adverse action such as termination, to report unlawful actions. Stopping unlawful employment actions helps make the workplace and our society safer, more enjoyable and rewarding for everyone.
- Employees are becoming more aware of anti-retaliation protection. Consequently, charges of retaliation are increasing.





# Mitigating Against Retaliation Claims

# Retaliation

- It is essential for all supervisors, in addition to the human resource staff, to know how to recognize retaliation and to avoid and prevent it.
- Retaliation is defined as action taken in return for an offense or injury.
  - In the employment context, retaliation occurs when an employer takes an adverse action against a covered individual because the employee engaged in a protected activity. To determine retaliation, you must understand the definitions of the following terms:
    - Adverse action
    - Covered individual
    - Protected activity

# Adverse Employment Action

- Examples include termination, refusal to hire, denial of promotion, threats, negative performance appraisals and increased monitoring.
- Even if the alleged wrongdoing was allegedly committed by a different employer, the current employer cannot take retaliatory adverse action. For example, it is unlawful for the current employer to retaliate against an employee for pursuing an equal employment opportunity (EEO) charge against a former employer.

# Covered Individual

- Includes anyone who engaged in “protected activity” including:
  - Complaining about working conditions, including health and safety;
  - Resisting or refusing to engage in conduct the employee believes in good faith is unlawful or unsafe;
    - This includes when work would violate the Labor Code, any occupational safety or health standard, or any safety order, and that violation would create a real and apparent hazard to the employee or co-workers.
  - Participating in an investigation as a witness (or complainant);
  - Instituting a proceeding involving working conditions;
  - Testifying as a witness;
  - Reporting a workplace injury to the employer or workers’ compensation carrier;
  - Taking leave or requesting a reasonable accommodation.

# Burden of Proof

To demonstrate retaliation, the employee must prove that:

- He or she engaged in protected activity such as reporting unlawful discrimination.
- The employer knew or believed the employee engaged in the protected activity.
- He or she suffered an adverse employment action based on engaging in the protected activity.



# Legal Disputes Arising

Relating to COVID-19 and accompanying changes to the workplace



# Legal Disputes Arising: Overview

- Disability and Leave

- Claims on an individual basis, which risk class litigation, alleging employers have failed to engage in the interactive process, accommodate disabilities or medical conditions, and grant or properly pay compensation during leaves of absence. Other claims accuse employers as “regarding” someone having COVID-19 as having a disability or having recovered from COVID-19 as unfit to return to work.

- Americans with Disabilities Act
    - California’s Fair Employment and Housing Act

- Compensation

- Claims include failure to pay reporting time (employees sent home fewer than two hours after arriving to work); forced use of paid time off/vacation when leave rights exist; pay during forced quarantine; failure to track hours worked or pay full salary to exempt employees working any amount during a given week.

# Legal Disputes Arising: Overview

- Insurance Coverage
  - A California federal judge ruled the Travelers Indemnity Co. need not cover a downtown Los Angeles restaurant's claims stemming from the COVID-19 pandemic. The court found the Mediterranean eatery had not shown that it is entitled to coverage under the policy as it has suffered no "direct physical loss or damage."
- Negligent Exposure
  - a proposed class asked a California federal judge for certification of its suit alleging that the company allowed class members to board the Grand Princess ship despite knowing passengers from a previous voyage showed COVID-19 symptoms, therefore negligently exposing more than 2,400 passengers to the novel coronavirus on its Grand Princess vessel traveling from San Francisco to Hawaii.

# Legal Disputes Arising: Issues for Employers

- Health and Safety
  - Statutory claims;
  - Negligence
  - UNRUH Act
- Is COVID-19 a disability?
  - “Regarded as disabled”?
- Requests not to return to work
  - Engaging in the interactive process
- Requests not to use Personal Protective Equipment (PPE), or complaints PPE is insufficient
- FFCRA leave issues
  - Emergency paid sick leave versus FMLA expansion to include COVID-related conditions and caretaking obligations

# Legal Disputes Arising: Issues for Employers

- Discrimination in:
  - Layoffs and furloughs;
  - Recalls;
  - Schedule, shift, and location selection

# Legal Disputes Arising: Issues for Employers

- Wage and hour concerns:
  - Reduction in pay;
  - Misclassification (i.e. salary basis test, excessive nonexempt work);
  - Outside salesperson inability to travel;
  - Tracking time and off-the-clock work;
    - Includes donning, doffing, and temperature checking
  - Meal periods and rest breaks for nonexempt employees;
  - Expense reimbursements;
    - What is reasonable and necessary?
  - Privacy and data security
  - Final pay;
  - Whether WARN (or Cal-WARN) was practicable
  - COBRA and Cal-COBRA compliance



# What to Do?

Photo Credit: ColourBox

# Best Practices and Practical Considerations

- Ensure anti-retaliation policies are maintained and updated to include all relevant protections
- Consider conducting additional anti-retaliation training or reminding employees of the company's anti-retaliation policy
- Maintain a mechanism by which employees can anonymously or confidentially report allegations of suspected or actual misconduct and health and safety concerns
- Encourage employees to report health and safety concerns and remind them of reporting systems in place
- Remind supervisors of the importance of taking employee complaints seriously and the process for reviewing and escalating complaints

# Best Practices and Practical Considerations

- Use objective, job-related criteria for decision-making
- Continue to treat the whistleblower the same as other employees
- Be discrete. Only share information with necessary parties.
- Document employee complaint and the specifics of the concerns raised by the employee
- Consult Human Resources and employment counsel before taking any adverse employment action with respect to the employee
- Document the non-retaliatory reasons for adverse employment action





# Resources

# Additional Resources

- Wilson Turner Kosmo's Employer Playbook for Safe Reopening
  - <https://www.wilsonturnerkosmo.com/tasks/sites/wtk/assets/image/employer-playbook-for-safe-reopening--en.pdf>
- Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidancebusiness-response.html>
- Coronavirus 2019 (COVID-19) Resources for Employers and Workers
  - <https://www.labor.ca.gov/coronavirus2019/>
- Benefits for Workers Impacted by COVID-19
  - <https://www.labor.ca.gov/coronavirus2019/#chart>
- Guidance for family friendly practices for employers
  - <https://files.covid19.ca.gov/pdf/guidancefamilyfriendlypracticesemployers.pdf>

# Resources

- Agency Materials



[Centers for Disease  
Control \(CDC\)  
Community Guidance  
for Employers/  
Businesses](#)



[California's  
Employment  
Development  
Department \(EDD\)](#)



[Occupational Safety  
and Health  
Administration](#)



[Equal Employment  
Opportunity  
Commission](#)



[Department of Labor  
Standards  
Enforcement](#)

# Additional Resources

- Centers for Disease Control and Prevention
  - <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>
  - <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.htm>
  - <https://www.cdc.gov/coronavirus/2019-ncov/communication/index.html>
- Occupational Safety and Health Administration
  - [https://www.osha.gov/SLTC/novel\\_coronavirus/standards.html](https://www.osha.gov/SLTC/novel_coronavirus/standards.html)
  - <https://www.osha.gov/Publications/OSHA3990.pdf>
  - <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>
- Equal Employment Opportunity Commission
  - [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
  - [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitation\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm)



# QUESTIONS?

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# THANK YOU

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