

INTRODUCTION

Preventing and immediately addressing retaliation is critical to protecting the rule of law and workers' rights. Some employers silence victims and witnesses by strategically retaliating, which undermines law enforcement and obstructs justice. When employers operate with a culture and expectation of retaliation, workers are reluctant to speak up and workplace violations go unreported and unaddressed.

Employers commonly violate basic labor standards, including failing to pay workers the minimum wage and overtime. According to a study of 10 states by the Economic Policy Institute (EPI), 2.4 million workers every year report being paid less than the minimum wage. EPI estimates the workers in just these 10 states were collectively underpaid by more than \$8 billion annually.ⁱ The prevalence of wage theft in the country indicates how widespread the culture is that allows labor law violations to flourish.

When employees complain about their working conditions, employers often retaliate.ⁱⁱ According to a 2009 national survey, 43 percent of workers who complained to their employers about pay and working conditions were victims of illegal retaliation.ⁱⁱⁱ Fear of retaliation is a significant factor keeping workers silent.^{iv} Among surveyed workers experiencing a workplace violation and not complaining, the top two reasons were their fear of being fired and belief that the claim wouldn't make a difference. They also feared reduced wages or hours or simply didn't complain because they knew of other workers who had experienced retaliation for asserting workplace rights.^v Authors analyzing the study data found that workers who did not complain were "less powerful and economically stable workers."^{vi}

Threats of retaliation "disproportionately chill[] complaints by persons with relatively lower social and institutional power."^{vii} "Because [such] persons are particularly susceptible to retaliation, the fear of retaliation is especially chilling and all the more effective in silencing their opposition."^{viii} Immigrants—particularly undocumented immigrants—earning low wages often work in the shadow economy or industries with significant labor standards violations. Their employers can exploit fears of deportation to discourage them from reporting legal violations and protesting substandard conditions. This exploitation gives such employers an unfair competitive advantage and "drives down wages and working conditions for *all* workers."^{ix} As workers consider the costs and benefits^x of reporting workplace violations, the actual and perceived costs may be very high, which underscores the importance of strong retaliation protections and enforcement efforts aimed specifically at these workers.

Even when retaliation is addressed, the damage has likely already been done by creating a chilling effect that discourages workers from speaking up and reporting violations.^{xi} That’s why combatting retaliation in a timely manner is fundamental to protecting labor and employment standards, the rule of law, and worker power.

THE MANY FACES OF RETALIATION

Retaliation generally means subjecting employees to an adverse action or otherwise discriminating against them for engaging in protected activity, such as reporting or objecting to a workplace violation.^{xii} Statutory language and case law may vary by jurisdiction, but adverse employment actions can include *any* change in the terms and conditions of employment, such as:

- Taking away pay or hours
- Firing a worker or other disciplinary actions^{xiii}
- Harassment
- Intimidation and threats made to workers or their family members
- Immigration-related threats, including threats to report workers or their family members to immigration authorities^{xivxv}
- Intimidation or threats related to an investigation, such as telling workers not to speak with investigators, to lie to investigators, or not to cooperate “for the sake of their family”^{xvi}
- Demotion to a lesser position
- Giving undesirable assignments or shifts (e.g., being put on the night shift when you previously had daytime hours)^{xvii}
- Denying breaks or meals
- Taking away benefits
- Assaulting an employee
- Falsely imprisoning an employee
- Blacklisting or otherwise interfering with new employment, such as with a negative reference for future employment^{xviii}
- Making false criminal reports to authorities about the employee or having the employee arrested^{xix}
- Taking any other adverse action

Retaliation is not limited to discrete events, such as being fired, but can include any change or alteration in conditions to make workers' lives worse, if it is done in connection with protected activity. Many statutes on retaliation have broad language that allows an enforcement agency to consider threats (which often lead to termination). Retaliation can also include harassment and physical abuse.^{xx} Sexual assault, for example, has been and continues to be used as retaliation, particularly in the garment, agriculture,^{xxi} and janitorial industries.^{xxii} Retaliation can happen at any stage of a worker asserting a workplace right. For instance, retaliation may include efforts to deter complaints before they happen; adverse actions following a formal or informal complaint to an employer, third party, or government agency; during an investigation; or after a resolution.

The specific language of the statute determines the scope of protections and prohibitions. Some statutes prohibit retaliation by the "employer," but some say it is unlawful if done by "any person," providing additional flexibility to enforcement agencies. The federal Fair Labor Standards Act (FLSA), for example, says "it shall be unlawful for *any person* . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . ."^{xxiii} Courts^{xxiv} and the U.S. Department of Labor interpret this to prohibit retaliation even where the employer is not covered by the FLSA or the employment relationship is not covered by the FLSA's enterprise coverage standard:^{xxv}

Because section 15(a)(3) prohibits "any person" from retaliating against "any employee," the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA.^{xxvi}

Therefore, should an employer admit to making a threat but deny the employment relationship—such as by arguing that the employee is an independent contractor—this broad language allows the agency to investigate without having to finalize an analysis of the employment relationship. The FLSA also applies if an agent of the employer, such as the employer's sibling or spouse, engages in the retaliatory act.^{xxvii}

Other laws beyond the FLSA protect not just "employees," but "any person" who has engaged in a protected activity. Seattle's Wage Theft Ordinance, for example, prohibits retaliation by an employer "or any other person."^{xxviii} This language precludes the employer from arguing there is no employment relationship, which is often a labor-intensive investigation that can detract from the merits of the claim.

Considerations for Protecting Immigrant Workers

Climate of Fear Enables Retaliation

Because of the current political climate and actions of the Trump Administration, immigrant workers are experiencing unprecedented levels of targeting and fear.^{xxxix} Immigration and Customs Enforcement (ICE) are increasing their worksite immigration raids.^{xxx} ICE's presence can be felt at courthouses, schools, child care centers, and even at some enforcement agencies. As a result, some employers are more emboldened to silence workers by making and carrying out immigration-based threats.^{xxxi} Employers have even tried intimidating labor enforcement agency staff by asking about their ethnicity and threatening to report them to ICE.^{xxxii}

An estimated 11 million undocumented people work in the United States^{xxxiii}, many in low-wage, high-risk industries where wage and hour violations are rampant. California has the largest undocumented immigrant population,^{xxxiv} and the California Labor Commissioner's Office has seen over a three-fold rise in reporting of immigration-based threats as retaliation in the past year alone.^{xxxv}

"We're seeing . . . growing . . . retaliation against immigrant workers . . . [and] an emboldening of employers who are [blatantly] making these kinds of threats," said Julie Su, California's labor commissioner. "Increasingly, employers are so emboldened that [they are] call[ing] my office to say, 'Do you know that this worker who filed a complaint is illegally in the country and if you pursue me I'm going to have ICE come and get her?'"^{xxxvi}

Forms of Retaliation

Immigration-related threats are a common form of retaliation. In fact, the state of California has specifically codified such threats as retaliatory.^{xxxvii} Case law also establishes that immigration-related threats are adverse employment actions.^{xxxviii} These threats might include contacting ICE or saying "ICE will find you" or "ICE has your address."^{xxxix} Employers have instructed other employees to anonymously report an employee to ICE. One employer sent this text message to an employee trying to collect wages he was owed, even saying he was an ex-sheriff and had family in the police department:

"You want to come to my job & create a issue, I will handcuff you take you into custody, & wait for I.C.E to come take you in for felony threats."^{xl}

Employers have also retaliated by going directly to enforcement agency personnel to undermine workers' credibility, saying that if the complainant didn't withdraw their case, the employer would contact ICE.^{xli} Employers are increasingly referring to President Donald Trump, whose administration has issued numerous anti-immigrant policies. For instance, an employer threatened an employee over the phone and later sent a text that said "VIVA DONALD TRUMP."^{xlii} Employers may also make threats to co-workers or family members, such as a worker's spouse or child, or implicate other family or community members.

Re-Verification of Documents as Pretext for Retaliation

Employers may argue that they are engaged in lawful, required immigration-related verification procedures. As courts have recognized, when such actions are taken because the worker engaged in protected activity, even lawful procedures may be wielded in a pretextual manner to intimidate and/or retaliate or as an excuse to terminate workers and undermine their complaints.^{xliii} California prohibits employers from attempting to reinvestigate or reverify a current employee's authorization to work using an unfair immigration practice. This includes requesting more or different documents than are required under federal law or refusing to honor documents that, on their face, reasonably appear to be genuine, when such practices are undertaken for retaliatory purposes.^{xliv}

Immigration Status, Protections, and Remedies

In general, immigration status is irrelevant to enforcing labor and employment laws and finding liability. Agencies should make this explicit, and many jurisdictions do. U.S. DOL enforces the FLSA "without regard to whether an employee is documented or undocumented."^{xlv} California,^{xlvi} Massachusetts,^{xlvii} New Jersey,^{xlviii} and Seattle^{xlix} have issued statements that their labor enforcement agencies are there for all workers, regardless of immigration status. California's Wage Theft public awareness campaign has explicit language notifying immigrant workers that they are protected by state labor laws!

In California, all workers are protected by labor laws.

- » It does not matter where you were born or whether you have papers to work.
- » The Labor Commissioner's Office will not ask about your immigration status or report your immigration status to other government agencies.
- » You do not need a social security number or photo identification to file a claim or report a violation.

New Jersey similarly assures workers in English and Spanish brochures that the state's labor laws apply regardless of a worker's legal status, emphasizing that "We do not share information with "Immigration.""ⁱ

Workers' status can, however, affect their remedies. Investigators should keep in mind the following principles in resolving complaints:

- An hour worked must be an hour paid, regardless of the immigration status of the person at the time she was performing that work;ⁱⁱ
- Administrative agencies cannot order an employer to reinstate an employee whom they know to lack current work authorization; and
- Other kinds of monetary awards such as front pay may not be available to undocumented workers, check with your agency's counsel.ⁱⁱⁱ

U and T Visas

In some retaliation cases immigrant workers may be eligible to apply for U or T nonimmigrant visas, which are available to immigrant victims of crime who help law enforcement. U visas may be certified for victims of qualifying criminal activities who are willing to assist law enforcement or other government officials in the investigation or prosecution of these crimes. Labor law enforcement agencies, such as the U.S. DOL, California Labor Commissioner, and others can sign U visa certifications attesting that a worker has been helpful, is being helpful, or will likely be helpful in the investigation and/or prosecution of the crime. Victims of severe forms of trafficking may qualify for T visas. In some cases, U and T visas can be useful tools to incentivize workers to come forward to report employment violations and obtain protections.^{iv}

In general, however, it is best practice for investigators to neither inquire into a worker's immigration status nor accept any information offered by the employer or the employee regarding a worker's status.

Sample Retaliation Claim Related to Immigration Status

To determine whether or not a statement is retaliatory generally requires identifying three elements: (1) participation in protected activity known to the defendant; (2) an adverse action; (3) a causal connection between the protected activity and adverse action.

Protected Activity: Julia files a complaint with her state labor commissioner alleging her employer owes her unpaid wages and overtime. Filing a complaint and instituting proceedings under or related to the FLSA are forms of protected activity. If Julia had complained directly to her employer, many jurisdictions would also conclude that her internal complaint was protected activity.

Adverse Employment Action: After learning about her claim, Julia's employer sends her a text message telling her to withdraw her claim or he'll contact ICE. He then calls ICE to report that Julia is undocumented and calls the Social Security Administration (SSA) to report she is using a fraudulent social security number. Because all these actions interfere with Julia's ability to maintain employment and the employer did them to discourage Julia from pursuing her rights, they constitute adverse actions.

Causal Connection: The timing and nature of the adverse action are relevant to this determination. Though not necessary for a retaliation claim, when the adverse employment action follows shortly after the protected activity, it suggests the actions are retaliatory. In some jurisdictions, close temporal proximity creates a rebuttable presumption of a causal connection.

Pretext: Julia's employer claims that he was merely re-verifying employee social security numbers. When he realized Julia was undocumented, he was obligated to contact the relevant federal agencies because he wants to comply with the law. The agency determines this justification is pretext, or an excuse, for the adverse actions. The agency has multiple reasons to suspect these justifications. First, testimony confirms that the employer knew Julia was undocumented throughout her employment. The close timing between the protected activity and adverse action increases the likelihood the employer reported it because of her wage claims, not her immigration status. Employers are not required to report workers to ICE or SSA, and doing so is retaliatory. The agency also determines that the employer did not re-verify the status of any other employees. If the employer truly wished to comply with the law, the employer could take other measures, such as amending tax returns that underreported wages. The employer's justifications are unpersuasive.

RECOGNIZE ENFORCEMENT CHALLENGES

Retaliation investigations, which differ from typical wage and hour audits, are challenging. They are usually not as document-driven as wage and hour cases, but rather may require interviews and credibility assessments of witnesses. Complainants and witnesses may be afraid to cooperate for fear of losing their job, being reported to ICE, and/or endangering their family. Even if documented, some immigrant workers may have concerns about jeopardizing any pending or future immigration applications. Workers may hesitate to name witnesses to protect them from retaliation. Witnesses are often fearful of coming forward and providing corroborating evidence out of concern for being retaliated against themselves. With the changing nature of work, some workers who are willing to cooperate may lack information about their employers' identities, particularly if they are temporary or subcontracted workers.^{lv}

Retaliation investigations can take some time. While employers may provide alternative reasons for adverse actions, don't accept their stated explanation at face value. Examine the employer's stated reason for pretext and compare the treatment of the complainant to other employees. Consider gathering the following evidence that might help determine whether a protected activity occurred, an adverse action occurred, there's a causal relationship between the two, and there is any evidence of pretext:

- Any texts, e-mails, or other communications between the employer and complainant
- Internal communications, including texts and e-mails, between the employer and management or Human Resources (HR) regarding the complainant
- Any HR/management notes from meetings with or about the complainant
- Disciplinary records for the complainant and other employees
- Interviews of the complainant, any witnesses, managers, supervisors, and HR
- Records of schedules, paystubs, and other employment documents both before and after the protected activity

Given the difference between retaliation investigations and wage and hour audits, investigating retaliation can slow down the investigation and feel like a distraction from the underlying violations. Your agency's metrics may not incentivize investigators to focus on retaliation, despite its importance. For an agency that prioritizes back wage collections, for example, a retaliation claim resolved by immediate reinstatement may not be reflected favorably in performance metrics, even if it was the best outcome for the worker. Given the damaging and chilling effect of retaliation, it's

important for agencies to use metrics systems that measure and value this work. It's also important not to give retaliation investigations short shrift because they may not always bring in back wages.

STRATEGIES AND PRACTICES TO PREVENT RETALIATION

The best way to deal with retaliation, of course, is to prevent it from happening in the first place. Agencies can take these steps to prevent retaliation:

- Limit employers' access to complainant's and witnesses' identifying information.
- Make sure all workers are informed of their rights.
- Work with community partners, including community-based organizations, worker centers, unions, and advocacy groups. Because workers may call them first, these organizations should also be informed about retaliation and empowered to report it.
- Repeatedly remind employers that retaliation is unlawful.

Don't allow employers to have access to workers' identifying information:

- Maintain the confidentiality of workers' names as much and as long as possible.
- Don't disclose the source of complaints if not statutorily required to do so. If your agency engages in targeted or proactive investigations, it is harder for an employer to retaliate against specific workers for filing a complaint.
- Consider conducting offsite interviews of workers before an onsite investigation.
- During onsite investigations, try to interview all workers at a workplace when you have sufficient staff to do so, as this makes it harder for the employer to target any individual as the source of information.
- Accept third-party complaints without requiring a specific worker's name and allow the filing of anonymous complaints when feasible and sufficiently detailed to allow prioritization.^{lvi}
- When filing a lawsuit, consider using pseudonyms in place of workers' names and protect information about workers' immigration status.^{lvii}
- Do not request or maintain information about immigration status or social security numbers in your agency's files if possible. Consider using alternatives, such as employee identification numbers, for the investigation.

- If you cannot finalize an investigation without some of this information, consider at what point in the investigation you need it.

Repeatedly inform workers and witnesses of their rights, regardless of their immigration status:

- Tell workers and witnesses about their rights in their native language, both verbally and in writing.
- Listen to workers' concerns and make yourself available.
- Remind workers that they're standing up for other workers as well.
- Provide workers with resources they can turn to for additional help, especially immigration legal resources.
- Assure workers whenever possible that your agency will not report them to ICE.
- Inform all complainants and witnesses that they are protected from retaliation.
- Tell employees to notify the agency immediately if they experience any change in their employment conditions and to keep all communications and other evidence that could be evidence of retaliation.
- If workers are hesitant to participate in an investigation, consider whether you can build your case on information provided by or subpoenaed from the employer, if you have that authority.

Systematically remind employers in all communications that retaliation is illegal and will be taken seriously.

- Address retaliation in your routine communications with employers.
- Provide clear language and examples as well as legal citations and authority. You want employers to understand their responsibilities in clear language, along with the seriousness and authority for these provisions.
- Beginning with the first communication, inform employers and their attorneys or representatives in writing and through a phone call that it is unlawful to discharge or penalize workers for making a complaint or participating in an investigation. This type of proactive and explicit language may help prevent retaliation.

Example from the Massachusetts Attorney General’s website on protections against retaliation:^{lviii}

Employers may not punish workers for exercising their rights under wage and hour laws.

It is against the law for an employer to punish, discriminate against, or harm a worker in any way for trying to enforce their wage and hour rights. For example, an employer may not retaliate against a worker because the worker complained to Attorney General’s Office or any other person about violation of the worker’s rights (or a co-worker’s rights).

Examples of retaliation

Retaliation includes:

- firing a worker
- taking away pay or hours
- giving the worker undesirable assignments or shifts
- reporting the worker or the worker's family to immigration authorities
- threatening to punish the worker
- taking any other adverse action

Prioritize retaliation prevention internally and externally. Address retaliation in investigator training. Reiterate the message that retaliation is unlawful and is an agency priority in public presentations, media interviews, and other outreach. For larger agencies, consider creating a retaliation unit or designating specific individuals to investigate retaliation.^{lix} This approach allows your agency to build a wealth of knowledge and experience and concentrate that in individuals who are accustomed to working quickly on these investigations. Doing so may also facilitate the collecting of data on retaliation complaints, and allows investigators handling the wage and hour portion of the case to move forward. Agencies can also learn about what’s happening on the ground by working with community-based organizations and advocacy groups.

STRATEGIES AND PRACTICES TO REMEDY RETALIATION

Speed, Reinstatement and Informal Resolutions

After learning about retaliation, immediately calling the employer can sometimes lead to a quick and easy resolution. Consider training investigators or providing them with tools like sample scripts for conversations with the employer explaining the law, penalties, and process of investigation. Despite the trade-offs in forgoing potential

back wages and penalties, an informal resolution that gets people back to work quickly may be the best outcome for those workers.

Awareness

Keep in touch with complainants and witnesses so you can learn right away if retaliation happens. Employers often retaliate after key events in an investigation, such as issuing a subpoena or providing the employer an estimate for owed back wages.

Legal Remedies

Be as creative as possible within statutory bounds. Consider seeking an early injunction, while the investigation is pending and as soon as the agency learns of retaliation. The U.S. Department of Labor Solicitor's office has successfully obtained dozens of quick court rulings prohibiting employers from terminating workers, changing their hours, and otherwise retaliating.^{ix} These injunctions have also resulted in public notices and other terms that re-establish worker trust, confidence, and cooperation with investigations. While swiftly filing a temporary restraining order or motion for a preliminary injunction is resource-intensive, winning a good outcome can benefit not just that case, but also negotiations and outcomes in future cases.

Be creative with remedies, looking to penalties, liquidated damages, back pay, front pay, and reinstatement—along with compensatory and punitive damages, as available in your jurisdiction. Consider the remedies a worker wants, which might be reinstatement or front pay. Consider what will contribute to a culture of compliance. Should you seek a suspension of business licenses or injunctive relief? When considering injunctive relief, potential settlement terms might include requiring:

- Management anti-retaliation training;
- The employer to provide written notification to all management regarding the definition of and prohibition against retaliation, that the employer violated the retaliation prohibition, and an explanation of the employer's acts that constituted retaliation in the case at issue; and
- Retaliation compliance monitoring, such as employer submission of all terminations or discipline records (or schedule changes, depending on the form of retaliation) since the case closed and contact information for relevant employees so the agency can follow up to determine if these actions were retaliatory.

Regulatory and Legislative Tools

Several jurisdictions, including Seattle,^{lxi} Los Angeles,^{lxii} and San Francisco,^{lxiii} have strengthened their retaliation protections by creating rebuttable presumptions that adverse actions taking place within 90 days of the protected activity were retaliatory. Seattle's ordinance states:

It shall be considered a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

In addition to creating a rebuttable presumption when employers engage in unfair immigration-related practices against a person exercising certain rights,^{lxiv} California has enacted other anti-retaliation laws. These include enhancing penalties in retaliation and whistleblower statutes, codifying that reporting a worker or making a threat is an adverse act, and establishing strict liability for unfair immigration-related practices, such as filing false police reports, using e-verify inappropriately, and threatening to contact or contacting ICE.^{lxv} California law also specifies that immigration status is irrelevant when enforcing the state's employment laws.^{lxvi}

CONCLUSION

Employers are more emboldened than ever to retaliate because the rule of law and protections for immigrants are under attack. Agencies need to be vigilant, prioritize resources on deterring and resolving retaliation claims, and experiment with techniques that work. We cannot root out underlying workplace violations without addressing retaliation and its chilling effect on the rule of law.

ACKNOWLEDGEMENTS

Many thanks to Terri Gerstein, Jessie Hahn, Yungsohn Park, and Daniela Conde for their helpful input on earlier drafts of this brief.

ⁱ If these findings are nationally representative, total wages stolen from workers due to minimum wage violations alone could exceed \$15 billion each year. As EPI notes, this is more than the total value of property crimes, such as burglaries and robberies, in the United States each year. While underpayment is a problem for any worker, wage theft affects 17 percent of low-wage workers. David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute, 2017,

<https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>.

ⁱⁱ Annette Bernhardt, Ruth Milkman, Nik Theodore et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, National Employment Law Project, 2009, <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

ⁱⁱⁱ "Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States," National Employment Law Project, 2013, <http://www.nelp.org/content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (citing Bernhardt et al., *Broken Laws*).

^{iv} Charlotte S. Alexander and Arthi Prasad, *Bottom Up Workplace Law Enforcement: An Empirical Analysis*, 89 Ind. L.J. 1069, 1089 (2014).

^v *Id.* at 1089.

^{vi} *Id.* at 1090; see also *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (noting that in enacting the antiretaliation provisions in the FLSA, Congress understood that "effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances.").

^{vii} *Id.* at 39.

^{viii} *Id.* at 39-40.

^{ix} Raja Raghunath, *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. REV. 47, 62 n. 71; 91 (2014) (internal citation omitted); see also Rebecca Smith and Eunice Hyunhye Cho, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*, National Employment Law Project, 2013, <https://s27147.pcdn.co/wp-content/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report.pdf> (quoting President Obama).

^x See, e.g., *Brake*, *supra* note 7, at 37.

^{xi} Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (noting that in a 2013 report on Alabama's poultry processing industry, almost 100 percent of the workers who had previously witnessed employer retaliation were uncomfortable asking their employers about problems with workplace safety, discrimination, and wages) (citing Tom Fritzsche, *Unsafe at These Speeds*, Southern Poverty Law Center and Alabama Appleseed Center for Law & Justice, 2013, <https://www.splcenter.org/20130228/unsafe-these-speeds>).

^{xii} See, e.g., 29 U.S.C. § 215, which states that under the Fair Labor Standards Act (FLSA) it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

^{xiii} *Hernandez v. City Wide Insulation of Madison, Inc.*, 508 F. Supp. 2d 682, 694 (E.D. Wis. 2007).

^{xiv} See, e.g., *Perez v. Jasper Trading, Inc.*, 2007 WL 4441062, *3 (E.D.N.Y. 2007) (holding that threatening to contact governmental and immigration authorities in response to demands for

unpaid wages and to discourage plaintiffs from pursuing their rights was retaliatory under New York labor law); *Bartolon-Perez v. Island Granite & Stone, Inc.*, 108 F. Supp. 3d 1335, 1338 (S.D. Fla. 2015) (adverse actions in response to plaintiff’s overtime claims included encouraging plaintiff to settle his FLSA lawsuit, which settlement would include “a one-way ticket” to Mexico, and warning plaintiff that defendants could call immigration and have him deported); *Aponte v. Modern Furniture Manufacturing Company, LLC*, 2016 WL 5372799, at *18 (E.D.N.Y. 2016) (“threats to report [plaintiff] and his son to the immigration authorities would, by themselves, dissuade a reasonable employee from participating in this lawsuit”).

^{xv} *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 902 (M.D. Tenn. 2009).

^{xvi} *Perez v. ACME Universal, Inc.*, 2014 WL 1378241, at *6 (D. Guam 2014).

^{xvii} In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), the Supreme Court set out in a Title VII case the standard for materially adverse actions as one that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” In doing so, it noted that “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. *A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.*” *Id.* at 69 (emphasis added, internal quotations excluded).

^{xviii} See, e.g., U.S. Department of Labor Wage and Hour Division Fact Sheet #77A, Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs77a.pdf> (“Section 15(a)(3) also applies in situations where there is no current employment relationship between the parties; for example, it protects an employee from retaliation by a former employer.”); *Perez v. Jasper Trading, Inc.*, 2007 WL 4441062 at *10; *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977) (holding that a former employee “is as much in need of the § 15 shield from retaliation as workers still on the job or workers who have been discharged for their protected activities”); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1185 (N.D. Cal. 2000).

^{xix} *Montano-Perez*, 666 F. Supp. 2d at 902; *Beckham v. Grand Affair*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (holding in Title VII case that allegation that Defendant caused plaintiff to be arrested for filing a charge of discrimination stated a retaliation claim).

^{xx} In a survey of 275 low-wage workers in the Chicago area, 7% of the reported retaliation included physical abuse. NESRI and Raise the Floor Alliance, *Challenging the Business of Fear: Ending Workplace Retaliation, Enforcing Workers’ Rights*, 2016,

<https://www.nesri.org/resources/challenging-the-business-of-fear-ending-retaliation-enforcing-workers-rights>.

^{xxi} Human Rights Watch has catalogued the prevalence of sexual violence and harassment in agricultural workplaces, noting that the “severe imbalance of power between employers and supervisors and their low-wage, immigrant workers,” in addition to systemic issues, such as undocumented status, prevent workers from reporting or obtaining any justice following this type of egregious abuse. Workers who complain not only risk being terminated, but many

experience having all their family members terminated and losing their livelihoods. Workers in agriculture may also lose their shelter if they work in agriculture and are evicted from employer-provided housing. Grace Meng, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, Human Rights Watch, 2012, <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual>.

^{xxii} In response to prevalent sexual abuse of female janitors, some female janitors began teaching self-defense classes in 2017, noting that their immigration status “sometimes has felt like an invitation for men who expect that abuse won’t be reported.” Brittny Mejia, “Female janitors working the night shift take safety into their own hands,” *L.A. TIMES*, Sept. 4, 2018, available at <http://www.latimes.com/local/california/la-me-ln-janitor-self-defense-20180904-story.html>.

^{xxiii} 29 U.S.C. § 215(a) (emphasis added).

^{xxiv} See, e.g., *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) (“Thus, the anti-retaliation provision of the FLSA does not apply only to employers; it applies to “any person.”) (citing cases).

^{xxv} See, e.g., National Immigration Law Center Brief for the Plaintiff-Appellant as Amicus Curiae, pp. 6-7, *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017) (“Indeed, decisions finding that Section 215(a)(3) provides a cause of action even if the conditions for individual or enterprise coverage – an element typically required for a FLSA action – are not present further support the applicability of Section 215(a)(3) to non-employers in private actions. See *Wirtz v. Ross Packaging Co.*, 367 F.2d 549, 550-51 (5th Cir. 1966) (“The prohibitions of Section 15(a)(3) are . . . unlimited, for they are directed to ‘any person.’ Thus the clear and unambiguous language of the statute refutes the district court’s view that either the employee or his employer must be engaged in activities covered by the Act’s wage and hour provisions in order for the strictures against discriminatory discharge to be invoked.”); *Sapperstein v. Hager*, 188 F.3d 852, 857 (7th Cir. 1999) (allowing Section 215(a)(3) action to proceed where enterprise coverage was not present since “Congress instead wanted to encourage reporting of suspected violations by extending protection to employees who filed complaints, instituted proceedings, or indeed, testified in such proceedings, as long as these concerned the minimum wage or maximum hour laws”); *Obregon v. JEP Family Enters., Inc.*, 710 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010) (“The FLSA’s prohibition on retaliation is broader than its coverage of minimum wage or overtime wage violations and applies even if the employee cannot show “individual coverage” or “enterprise coverage.”) (citations omitted).”).

^{xxvi} U.S. Department of Labor Wage and Hour Division Fact Sheet # 77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs77a.pdf>.

^{xxvii} The FLSA defines “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). See also *Arias*, 860 F.3d at 1191–92 (“Congress clearly means to extend section 215(a)(3)’s reach beyond actual employers.”); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3rd Cir. 1943); *Sapperstein v. Hager*, 188 F.3d 852, 856–57 (7th Cir. 1999); *Centeno-Bernuy*, 302 F. Supp. 2d at 138;

Montano-Perez, 666 F. Supp. 2d at 902.

^{xxviii} Seattle Municipal Code [14.20.035\(b\)](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20_WATICORE_14.20.035REPR), available at https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20_WATICORE_14.20.035REPR.

^{xxix} See, e.g., Wendy Cervantes, Rebecca Ullrich, Hannah Matthews, *Our Children's Fear: Immigration Policy's Effects on Young Children*, CLASP, 2018, <https://www.clasp.org/publications/report/brief/our-childrens-fear-immigration-policys-effects-young-children>.

^{xxx} See, e.g., Colin Dwyer, "ICE Carries Out Its Largest Immigration Raid In Recent History, Arresting 146," NPR, June 20, 2018, <https://www.npr.org/2018/06/20/621810030/ice-carries-out-its-largest-immigration-raid-in-recent-history-arresting-146>; Massoud Hayoun, "ICE's 7-Eleven Raids Won't Get Rid of Undocumented Workers. They'll Only Make Them Less Visible," Pacific Standard, Jan. 17, 2018, <https://psmag.com/social-justice/ice-7-eleven-raids>; "US meatpacking workers face new hazard: threat of deportation by Ice," The Guardian, Jun. 29, 2018, <https://www.theguardian.com/environment/2018/jun/29/ohio-ice-meatpacking-industry-deportations>.

^{xxxi} See, e.g., Deepa Fernandes, "Undocumented workers fight for wages under the threat of deportation," PRI's TheWorld, Mar. 20, 2018, <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation>.

^{xxxii} Presentation by Janet Herold, Rene Tellez, and Daniela Conde, "Retaliation Protections, Immigration-Based Threats to Workers," Interstate Labor Standards Association Annual Meeting, Long Beach, California, August 2018.

^{xxxiii} Gustavo López, Kristen Bialik, and Jynnah Radford, *Key findings about U.S. immigrants*, Pew Research Center, 2018, <http://www.pewresearch.org/fact-tank/2018/09/14/key-findings-about-u-s-immigrants/> (citing 2015 data).

^{xxxiv} "U.S. unauthorized immigration population estimates," Pew Research Center, 2016, <http://www.pewhispanic.org/interactives/unauthorized-immigrants/>.

^{xxxv} Presentation by Janet Herold, Rene Tellez, and Daniela Conde, "Retaliation Protections, Immigration-Based Threats to Workers," Interstate Labor Standards Association Annual Meeting, Long Beach, California, August 2018; see also Andrew Khouri, "More workers say their bosses are threatening to have them deported," LA TIMES, Jan. 2, 2018, <http://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>.

^{xxxvi} Deepa Fernandes, "Undocumented workers fight for wages under the threat of deportation," PRI's TheWorld, Mar. 20, 2018, <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation>.

^{xxxvii} California has specifically codified that reporting a worker or making a threat is an adverse act. CAL. LAB. CODE § 244(b) ("Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes

of establishing a violation of an employee's, former employee's, or prospective employee's rights.").

^{xxxviii} See, e.g., *Perez v. ACME Universal, Inc.*, 2014 WL 1378241, at *6 (D. Guam 2014) (citing *Montano–Perez*, 666 F. Supp. 2d at 901–02; *Centeno–Burney*, 302 F. Supp. 2d at 136; *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1059 (N.D.Cal. 2002)); *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006) (issuing a protective order restraining employer from seeking information on employees' immigration status in Title VII case); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000) (holding that calls to immigration authorities were retaliation in a wage dispute).

^{xxxix} In an affidavit, one plaintiff noted that his supervisor told him "I should be afraid because . . . (one of the owners) had the ability to call immigration on me and have me deported." *Bartolon-Perez v. Island Granite & Stone, Inc.*, 108 F. Supp. 3d 1335, 1338 (S.D. Fla. 2015).

^{xl} Andrew Khouri, "More workers say their bosses are threatening to have them deported," *LA TIMES*, Jan. 2, 2018, <http://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>; Deepa Fernandes, "Undocumented workers fight for wages under the threat of deportation," *PRI's TheWorld*, Mar. 20, 2018, <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation>.

^{xli} Presentation by Janet Herold, Rene Tellez, and Daniela Conde, "Retaliation Protections, Immigration-Based Threats to Workers," Interstate Labor Standards Association Annual Meeting, Long Beach, California, August 2018.

^{xlii} Presentation by Janet Herold, Rene Tellez, and Daniela Conde, "Retaliation Protections, Immigration-Based Threats to Workers," Interstate Labor Standards Association Annual Meeting, Long Beach, California, August 2018; *Julie Su v. Esther Marisol Salazar dba Nutrition and More*, Case No. BC 701901, Los Angeles County Superior Court of the State of California.

^{xliii} See, e.g., *Contreras*, 103 F. Supp. 2d at 1186-87; *Bartolon-Perez*, 108 F. Supp. 3d at 1338 (holding plaintiff established defendants' proffered reason for requiring plaintiff to fill out an I-9 form was pretext by pointing to the behavior of his supervisor in offering to resolve his wage claim with a "one-way ticket to Mexico," threatening to report him to immigration, and because defendants knew of plaintiff's immigration status even before hiring him: "Taken in the light most favorable to Plaintiff, Defendants waited until shortly after Plaintiff pursued his FLSA action to hold Plaintiffs immigration status over his head—by threatening him directly at first, and then indirectly through demanding he fill out the I-9 a form.").

^{xliv} CAL. LAB. CODE § 1019.1(a)(4)

^{xlv} U.S. Dep't of Labor, Wage and Hour Div., "Fact Sheet # 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division" (rev. July 2008), available at <https://www.dol.gov/whd/regs/compliance/whdfs48.pdf>.

^{xlvi} See, e.g., California Labor Commissioner's Office, Wage Theft Public Awareness Campaign, <http://wagetheftisacrime.com/default.html>.

^{xlvii} Massachusetts has a webpage on protections against retaliation, which notes: "Wage and hour laws apply to all workers, regardless of immigration status, including undocumented workers. If an employer reports or threatens to report a worker to immigration authorities

because the worker complained about a violation of their rights, the employer can be prosecuted and/or subject to civil penalties.” <https://www.mass.gov/service-details/protections-against-retaliation>; see also “Attorney General Advisory: All Workers Are Entitled to Employment Protections Irrespective of Immigration Status,” 2017, <https://www.mass.gov/files/documents/2017/05/zu/AG%2520Advisory%2520Immigrant%2520Workers%2520Rights.pdf>.

^{xlviii} New Jersey Division of Wage & Hour Compliance, “How to File a Wage Claim,” https://www.nj.gov/labor/forms_pdfs/lse/mw-394.pdf; NJ Dept. of Labor & Workforce Development, Wage Claim form, https://www.nj.gov/labor/forms_pdfs/lse/mw-31a.pdf.

^{xlix} Seattle’s Office of Labor Standards website includes a “Resources for Workers” page that states: “Seattle’s labor standards ordinances cover all employees working inside the city limits, regardless of employees’ immigration status or location of their employer.” See <https://www.seattle.gov/laborstandards/outreach/for-workers>.

^l California Labor Commissioner’s Office, Wage Theft Public Awareness Campaign, <http://wagetheftisacrime.com/default.html>.

^{li} New Jersey Division of Wage & Hour Compliance, “How to File a Wage Claim,” https://www.nj.gov/labor/forms_pdfs/lse/mw-394.pdf; NJ Dept. of Labor & Workforce Development, Wage Claim form, https://www.nj.gov/labor/forms_pdfs/lse/mw-31a.pdf.

^{lii} *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 243 (2d Cir. 2006).

^{liii} The landscape for remedies was complicated by the Supreme Court’s decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), where the Court held that an undocumented worker was not entitled to reinstatement or back wages for the period after he had been terminated for engaging in protected activities under the National Labor Relations Act. The Court’s ruling allows for “back pay” for work actually performed under the FLSA, but not for front pay, that is, wages the worker would have earned if she or he had continued working instead of being unlawfully terminated. See, e.g., *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 933 (8th Cir. 2013) (holding that undocumented immigrants “may recover unpaid and underpaid wages under the FLSA”). See also Rebecca Smith, Amy Sugimori, Ana Avendaño, and Marielena Hincapié, *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB*, National Employment Law Project and National Immigration Law Center, available at <https://www.nelp.org/wp-content/uploads/2015/03/wlghoff040303.pdf>. This makes preventing retaliation and responding immediately and hopefully before termination particularly critical for immigrant workers.

^{liv} For more information, see, e.g., U.S. Department of Labor Wage and Hour Division, “Department of Labor U and T Visa Process and Protocols,” <https://www.dol.gov/whd/immigration/utvisa-faq.htm#18>; Eunice Hyunhye Cho, *U Visas for Victims of Crime in the Workplace: A Practice Manual*, NELP, 2014, <https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf>.

^{lv} NESRI and Raise the Floor Alliance, *Challenging the Business of Fear*.

^{lvi} For more information on anonymous complaints, see “Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States,” National Employment Law

Project, July 2013, <https://nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf>.

^{lvii} See, e.g., *Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 11 (S.D.N.Y. 2015) (holding employees were not required to produce immigration documents when suing employers over wage and hour disputes).

^{lviii} "Protections against retaliation," Mass.gov, <https://www.mass.gov/service-details/protections-against-retaliation>.

^{lix} The California Labor Commissioner's Office has a Retaliation Complaint Investigation Unit. See State of California Department of Industrial Relations website, "Retaliation Complaint Investigation Unit (RCI)" webpage, available at <https://www.dir.ca.gov/dlse/dlseRetaliation.html>.

^{lx} See, e.g., *Acosta v. Austin Electric Services LLC*, 322 F. Supp. 3d 951 (D. Ariz. 2018) (granting injunction because employer's actions in obtaining employee declarations, under coercive circumstances and during a pending Department of Labor investigation, violated the FLSA's anti-retaliation provision); U.S. DOL News Release, "US Labor Department Alleges Medical Office Owners Retaliated Against Workers," July 20, 2017, <https://www.dol.gov/newsroom/releases/whd/whd20170720-0>; U.S. DOL News Release, "US Labor Department Seeks a Temporary Restraining Order to Protect Local Workers from Retaliation," March 20, 2014, <https://www.dol.gov/newsroom/releases/whd/whd20140320>.

^{lxi} Seattle Wage Theft Ordinance, SMC 14.20.035 ("It shall be considered a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 14.20.035. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position. The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose."), https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20WATICORE_14.20.035REPR.

^{lxii} Los Angeles Municipal Code Article 8 ("Taking adverse action against an Employee within 90 days of the Employee's exercise of rights protected under this article shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights."), <http://wagesla.lacity.org/sites/g/files/wph471/f/Los%20Angeles%20Office%20of%20Wage%20Standards%20Ordinance%20184319.pdf>.

^{lxiii} San Francisco Municipal Code Section 12R.6. ("Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under this Chapter shall raise a rebuttable presumption of having done so in retaliation for the exercise of such rights."), [http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter12rminim_umwage?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_12R.6](http://library.amlegal.com/nxt/gateway.dll/California/administrative/chapter12rminim_umwage?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_12R.6).

^{lxiv} CAL. LAB. CODE § 1019(b)(2)(c).

^{lxv} See, e.g., CAL. LAB. CODE §§ 98.6 (2016) (unpaid wages retaliation statute with penalties up to \$10,000); 244(b) (reporting or threatening to report a worker or their family member's suspected immigration status is an adverse act); 1019(a) (strict liability for unfair immigration-

related practices); 1171.5 (immigration status irrelevant for purposes of enforcement of the State’s employment laws); see also “California’s New Worker Protections Against Retaliation,” National Employment Law Project, 2013, <https://s27147.pcdn.co/wp-content/uploads/2015/03/ca-worker-protections-against-retaliation.pdf>.

^{lxvi} CAL. LAB. CODE § 1171.5.