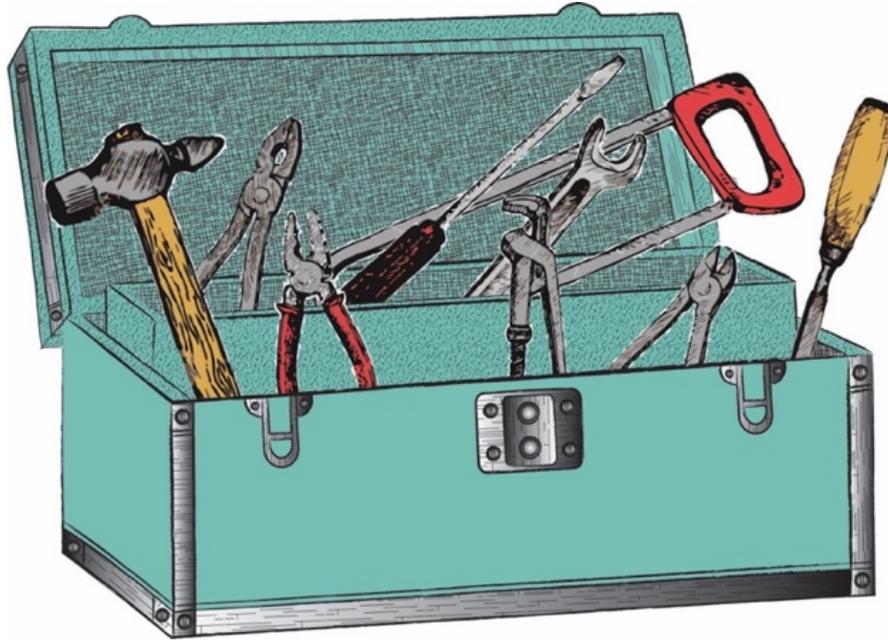


The Labor Standards Enforcement Toolbox



Tool 13: The Nuts and Bolts of a Retaliation Investigation: Part 2

by **Michael Felsen**
edited by Jenn Round
June 2023

TABLE OF CONTENTS

Introduction	3
Getting to Resolution	3
<i>What Remedies Are Appropriate?</i>	4
(1) Determining Monetary Remedies	4
(2) Determining Non-Monetary Remedies	12
Settlement	14
<i>Alternative Dispute Resolution</i>	15
Summary of Principles	16
Pre-investigation Resolution	18
During the Investigation	18
Once the Investigation Has Concluded	19
When Post-Investigation Negotiations Are Unsuccessful	21
<i>Closing the deal</i>	23
<i>Enforcement of the Agreement</i>	26
Conclusion	26
Addendum	27
<i>A New Anti-Retaliation Tool for Cases involving Immigrant (“Undocumented”) Workers</i>	27
Appendix	29
<i>Sample Standard OSHA Settlement Agreement</i>	29
<i>EEOC Model Release Language</i>	32

INTRODUCTION

In [Part I](#), we recognized how critically important the effective handling of workers' retaliation complaints is to labor agencies' efforts to strategically enforce the worker protection laws under their charge. A vigorous commitment to proactively combating retaliation is important because it provides redress and justice for individual workers, while deterring employers who might otherwise be inclined to retaliate, or threaten to retaliate, as a means to silence workers and deprive them of the rights they have under law. In [Part I](#) we examined what unlawful workplace retaliation is—and isn't—under various legal tests created by statutes and by the courts interpreting those statutes. We also reviewed how to decide when a retaliation investigation is warranted, and, if it is, offered suggestions on how to structure, conduct, and document it. [Part I](#) concluded at the end of the investigative phase.

We now pick up the thread, and look at the means by which affirmative findings of retaliation can be resolved. Can the case be settled without litigation? If so, what would that entail? If the case is litigated, what are some of the challenges that option presents? And how does the agency determine what's an appropriate resolution, taking into account the individual interests of the aggrieved worker, and also the agency's public interest mission?

In this paper we'll look at these questions, and also at the unique challenges involved in seeking redress for the group of workers perhaps most frequently targeted by retaliation—those who lack authorization to work in this country. On a positive note, we'll review a new tool designed to mitigate some of these challenges, thereby enhancing labor agencies' ability to fulfill their enforcement mission.

GETTING TO RESOLUTION

Determining what constitutes an appropriate resolution of a given enforcement action is an essential task for any labor agency. Sometimes, the answer is relatively straightforward. If a wage violation is apparent from undisputed records, and the law makes clear that in such circumstances the affected workers are entitled to double back wages, and the employer must also pay a fine of \$1000, the calculation is uncomplicated. To facilitate settlement, the agency, if it has the flexibility, might shave a few dollars off the penalty, but the acceptable settlement amount is relatively easily arrived at. If the employer refuses to pay—depending on the jurisdiction's laws and procedures—the agency may issue a citation or initiate litigation, and, on these facts,

we can expect the company will be ordered to pay the amount the agency originally presented, plus attorneys' fees, when applicable.

Most cases, though, aren't quite so black and white. Retaliation cases will almost invariably fall into this latter category. With these cases, even assuming a strong case for liability, what constitutes an appropriate resolution presents a complex question. For each state and municipal entity, this inquiry always begins with the authorizing statute and regulations.¹ What remedies, monetary and otherwise, is the complainant entitled to under the applicable law? How are monetary remedies calculated? What non-monetary remedies are warranted, for the complainant and for the agency? What other settlement terms need to be negotiated? What if post-investigation settlement can't be reached? In the discussion below, we'll consider these topics.

What Remedies Are Appropriate?

We begin by considering the broad range of potential remedies, some, all, or none of which may be available under the laws of a particular state or municipality.

(1) Determining Monetary Remedies

A quick scan of the internet, looking for information on monetary awards in workplace retaliation cases, reveals a significant range of recoveries, as reported by the law firms that represented the plaintiffs. Law firms tout resolutions in the hundreds of thousands,² or even millions of dollars.³ Most retaliation claims, however, are

¹ In 2019, the National Employment Law Project published a study that examined this very question. It concludes, generally, that the right to remedies for workplace retaliation varies widely from state to state. A few states have what the study considers to be barely adequate provisions, and a much larger grouping has none. Since the report was published four years ago, some of its information might be out of date. "Exposing Wage Theft Without Fear: States Much Protect Workers from Retaliation," National Employment Law Project (June 2019), available at <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>.

² See e.g. "\$587,500 settlement, medical leave, disability and retaliation claims. Employee who was injured at work required a medical leave and temporary light duty reassignment during recovery. Employer failed to provide light duty, refused to permit employee to take medical leave and retaliated against employee for filing a workers' compensation claim by terminating employment. Names confidential as condition of settlement." <https://dolanlawfirm.com/about-us/successes/wrongful-termination/>. See also, two sales employees who claimed they complained to their employer about wage and hour practices but were fired for speaking up, were awarded more than \$800,000 by a jury verdict. <https://www.kingsleykingsley.com/retaliation-claim-worth>.

³ See e.g. "Obtained a historic \$25,142,000 jury verdict on behalf of a 56-year old medical device sales manager who was retaliated against and terminated following his reports of possible violations of the Anti-Kickback Law, Sunshine Act, FDA regulations as well as possible Sarbanes-Oxley Act violations to the company's head legal counsel. Jury was unanimous on findings of liability for Whistleblower

concluded with monetary results that are less than six figures, many considerably less. The agency's task is to determine a reasonable range, that properly compensates the complainant, and also advances the agency's enforcement interest in deterring future unlawful conduct. What does that entail?⁴

Multiple factors need to be considered. First and foremost is the question of whether the applicable anti-retaliation statute addresses the issue of what relief is available. If so, the statute and/or its regulations will provide at least some necessary guidance, including in some cases dollar limits. In other states or municipalities, back pay might be available, but not compensatory or punitive damages. Reference to the applicable statute, and any case law interpreting it, is essential.

As a general rule, though, the baseline goal is to place the complainant in the position they would have been in had the unlawful retaliation not occurred.⁵

Calculating what it would take to put the complainant in the position they would have been in but for the retaliation, that is, what it would take to "make them whole," will depend on a number of factors. In the case of an unlawful termination, the make-whole remedy would include some combination of the following:

Retaliation and Wrongful Termination. Compensatory damages award was unanimous at \$2.7M. The jury was also unanimous on a finding of malice and awarded \$22.4M in punitive damages by a 10-2 vote. The award is believed to be one of the largest single-plaintiff Whistleblower Retaliation verdicts in American History." <https://www.workplacejustice.com/verdicts-and-settlements.html#V6>.

⁴ Particularly when cases are tried before a jury, the size of recoveries will vary greatly, often driven by how sympathetic the victim of the retaliation is, and how egregious the perpetrator's behavior. For example, in 2017 an undocumented immigrant, who had lived and worked in this country since 2000 and was married with five children, fell from a ladder while taping sheetrock and badly broke his leg. His employer's workers' comp policy had lapsed, and his employer, having offered to pay him some money, set in motion the workers' apprehension by ICE, in the presence of his 2-year old son, when he came to pick up the envelope. The man spent two weeks in ICE detention as that agency prepared to deport him. The U.S. Labor Department learned of the case from media and other reports. It then intervened, arranged for his temporary release, and, following a thorough investigation, sued the employer under section 11(c) of the Occupational Safety and Health Act, charging it had retaliated against the worker for reporting his injury. Following a jury trial in June 2022, the worker was awarded \$50,000 in compensatory damages for emotional distress, and a total of \$600,000 in punitive damages. The employer has appealed. But this is a good example of the size of award an agency can achieve, when the employer's conduct is reasonably perceived as pernicious, and the employee's situation evokes both empathy and indignation. <https://www.bostonglobe.com/2022/06/21/metro/jury-orders-construction-company-pay-650000-immigrant-worker-retaliation-case/>.

⁵ Before even reaching the question of what money ought to be paid to the complainant, depending on the nature of the adverse action taken by the employer, this might include reinstatement in the case of a firing, or a promotion where one was denied in retaliation for complainant's protected activity. Discussion of non-monetary remedies is below.

Back Pay and Related Damages

- **Definition:** Back pay covers lost wages from the date of termination to the date of reinstatement or the date of settlement; this includes any raises, cost of living increases, bonuses, or overtime complainant would have received.⁶
- **Keep in mind:** Where complainant obtains other work before the case is resolved, the damages following the new employment include the difference in wages or income between their prior and their new employment (assuming the new employment pays less) from the time they secure the new job to the date of settlement or judgment.

Back Pay, Unemployment, and Workers Compensation

- Any state **unemployment benefit** received by the complainant is not credited against the back pay owed by the employer, since it came not from the employer but from a “collateral source.” Depending on state law, the complainant, on receipt of back pay from the employer, may be responsible to repay to the state the amount of unemployment compensation received.
- **Workers compensation** payments that replace a portion of the complainant’s lost wages may be deducted from the back wages owed. However, those comp payments that reimburse medical expenses or relate to reparation for physical injuries would not reduce the back wages owed.

Front Pay (“Economic Reinstatement”) In Lieu of Reinstatement

- **Definition:** Front pay is money awarded for lost wages after settlement, the order, or judgment where reinstatement going forward isn’t practicable (e.g., a comparable position no longer exists, or continued hostility between the employer and employee make reinstatement untenable).
- **Keep in mind:**
 - Where a “front pay” remedy is appropriate, it is calculated based on a reasonable period of expected future earnings had complainant not been unlawfully terminated.

⁶ These calculations will be inherently imperfect; the goal is to make the best and most reasonable estimate. For overtime that would have been worked, for example, it’s appropriate to look at the average overtime similarly situated employees worked during the period in question, or, if the position is unique, the actual amount of overtime the complainant worked on average.

- Courts have been given discretion in selecting a cut-off date for the front pay remedy, subject to the limitation that it be awarded "for a reasonable future period required for the victim to reestablish her rightful place in the job market."⁷
- Front pay is often calculated for one to two years.
- The amount of front pay awarded would be reduced by the amount of any compensation *actually received* by complainant in a new job during the period to be covered by front pay.

Relevant evidence

Pay stubs for any income-producing work taken on to mitigate damages.

Back Pay, Front Pay, and the Duty to Mitigate

To be eligible for back and front pay, complainants are obligated to attempt to mitigate the damages they have incurred as a result of being unlawfully terminated. This means they have a legal duty to make reasonably diligent, good faith efforts to find a substantially equivalent new job after being fired.

Factors indicating that an available position is "substantially equivalent" include:

- The nature of the work offered in the available position is similar to that of the complainant's prior employment with the former employer;
- Salary, benefits, and job hours are similar;
- The available position calls for skills, background, and experience similar to those needed to perform the previous job;
- Job responsibilities are similar; and
- The available position is in the same locality or commuting area.⁸

Notably, while the complainant has the duty to mitigate by seeking substantially equivalent work, for the employer to avoid its obligation to provide back and front

⁷ See, e.g., *Goss v. Exxon Office System Co.*, 747 F.2d 885, 890 (3d Cir. 1984)

⁸ The U.S. Supreme Court decision in *Ford v. EEOC*, 458 U.S. 219 (1982) made clear that, in satisfying the duty to mitigate, an employee "need not go into another line of work, accept a demotion, or take a demeaning position." At the same time, an employee "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."

pay, it must prove the complainant failed in that duty. This means the employer must show:

- The complainant failed to make reasonable efforts to seek and retain substantially equivalent employment, and
- Substantially equivalent employment was available.

Compensatory Damages: Out of Pocket Losses

- **Definition:** Compensatory damages for out of pocket losses is compensation for losses incurred due to the retaliation.
- **Examples** include:
 - Medical expenses resulting from the cancellation of a company health insurance policy;
 - Medical expenses for treatment of symptoms directly related to the unlawful retaliation (e.g., post-traumatic stress disorder, anxiety, etc.);
 - Credit card interest paid as a result of the unlawful retaliation;
 - Fees, penalties, lost-interest, or other losses related to withdrawals from savings or retirement accounts made as a result of the unlawful retaliation;
 - Costs incurred in job searches (e.g., mileage, employment agency fees, meals and lodging);
 - Moving expenses resulting from the retaliation; and
 - Additional interest paid due to lowering of credit rating.

Relevant evidence:

- Bills, invoices, and bank and credit card statements showing expenses incurred on account of the retaliation, including medical bills;
- Repossessed property costs; and
- Job search or relocation costs, including meals and accommodation costs uniform and training costs, and commuting expenses.

Compensatory Damages: Pain and Suffering

- **Definition:** Compensatory damages for pain and suffering include compensation for emotional distress, loss of reputation, personal humiliation, and mental anguish resulting from the employer's adverse action.⁹
- **Keep in mind:**
 - Compensatory damages for pain and suffering require objective evidence of harm, and a connection between the retaliation and the harm;
 - Objective manifestations of harm might include depression, anxiety disorder, and post-traumatic stress disorder;
 - Non-medical conditions, like sleeplessness, harm to relationships, and damaged self-esteem can be considered, too;
 - To prove a diagnosable condition, evidence from a health care provider is necessary; for non-medical conditions, the complainant's statement (and, if available, supportive statements from family and/or friends) can be relied on;¹⁰
 - The amount of damages should reflect the severity of the condition; and
 - "Garden variety" pain and suffering damages, without expert testimony, might range anywhere from \$5000-\$75,000,¹¹ but sometimes much

⁹ Examples of causes of severe emotional distress might be the trauma of house foreclosure or divorce following a retaliatory termination, or the humiliation resulting from needing to go on food stamps.

¹⁰ In a 2018 Ohio case, *Kassay v. Niederst Mgmt., Ltd.*, 113 N.E.3d 1038, a state appeals court affirmed the jury's award of "pain and suffering" damages following the employer's firing of employee John Kassay, apparently because he needed to wear a brace on his left wrist due to a chronic issue. The applicable Ohio statute, R.C. 2315.18(A)(4), defines "noneconomic damages" as including "pain and suffering, loss of society, consortium, companionship, care, [or] assistance, * * * mental anguish, and any other intangible loss." Here, the trial court instructed the jury to "consider nature, character, seriousness and duration of any emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life Kassay may have experienced." The appeals court made clear that a plaintiff's own testimony, combined with the facts of the particular case, can sustain an award of compensatory damages based on emotional distress. Kassay testified that after losing his job, he felt like "[l]ess of a man" and that he was letting his family down, and that the loss of his job and income "caused a lot of arguments * * * because of [the lack of] money[.]" He told the jury that his family's credit was severely impacted, he rarely slept, and his relationships with his daughters suffered because of the time he spent trying to find another job. The jury awarded \$248,900 in "pain and suffering" damages.

¹¹ Look, for example, at a number of cases brought under section 15(a)(3) – the anti-retaliation provision – of the federal Fair Labor Standards Act ("FLSA"). See *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999)(affirming \$75,000 in emotional distress damages awarded to each employee for FLSA retaliation); *Moore v. Freeman*, 355 F.3d 558, 564 (6th Cir. 2004)(affirming \$40,000 in emotional distress damages awarded to employee for FLSA retaliation); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990); (affirming \$35,000 in emotional distress damages awarded to employee for FLSA retaliation).

higher (see footnote 10); diagnosable conditions, supported by medical testimony, and severe non-medical suffering, often justify higher numbers.

Relevant evidence: Testimonial evidence regarding emotional distress (depression, anxiety, insomnia, feelings of humiliation/worthlessness, etc.) from complainant, family and friends, and, as applicable, physician and/or mental health care providers.

Punitive Damages

- **Definition:** Punitive damages are damages awarded in addition to actual damages as punishment for acts that were particularly malicious or reckless, and that serve as a deterrent against similar behavior by the responsible employer and others.
- **Keep in mind:**
 - These damages may or may not be available under the applicable anti-retaliation statute, or they may be subject to a cap.¹² As with all of the above remedies, check with your laws or with your attorneys to learn what remedies are available.¹³
 - Factors relevant to whether punitive damages should be assessed might include:
 - The extent to which the employer was aware that its conduct was illegal;
 - Whether the employer was uncooperative during the investigation, withheld or falsified evidence, or otherwise misled the investigator;
 - Whether the employer tolerated or fostered a workplace culture that discouraged or punished whistleblowing, deterring whistleblowers from engaging in protected activity;

¹² For example, while the Federal Railway Safety Act's anti-retaliation provision caps punitive damages at \$250,000, OSHA's has no such limit.

¹³ Not all statutes are clear on the question of whether punitive damages are available. For example, the courts are split as to whether punitive damages are available under the FLSA's anti-retaliation provision's inclusion of "legal and equitable relief." "Legal relief" is generally understood to include damages, and many courts have found, as a result, that unlawful retaliation can result in the award of punitive damages. See, e.g., *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111–12 (7th Cir. 1990), and its progeny. In *Travis*, the 7th Circuit affirmed a \$45,500 punitive damage award for retaliation where the employer fired a supervisor who testified in an employee's FLSA case.

- Whether a manager has committed, or has threatened to commit, violence against complainant; and
- Whether the adverse action included public humiliation, threats of violence, or other retribution against complainant or their family, coworkers, or friends.
- The ratio of punitive to compensatory damages should be considered, and generally won't exceed 10 to 1, except in exceptional cases of highly egregious behavior and relatively low compensatory damages. Punitive damages may also be appropriate when there are no other monetary damages.

Relevant evidence: Testimonial and documentary evidence that address the employer's awareness of and hostility toward worker protections and worker protection enforcement, and the degree to which the retaliation was extreme and malicious.

Liquidated Damages and/or Interest

- **Definition:** Liquidated damages are a statutory remedy for persons who experience violations.
- **Keep in mind:**
 - Some anti-retaliation statutes will, as among the available remedies, provide for payment of back wages and an equal amount in liquidated damages,¹⁴ while other laws allow for twice the amount of back wages as liquidated damages.¹⁵
 - In such circumstances, interest awarded on the back wages owed, in addition to the liquidated damages, may or may not be permitted, depending on the applicable law, as interpreted by the courts.¹⁶
 - If the law doesn't provide for liquidated damages, interest on the unpaid

¹⁴ For example, the FLSA's anti-retaliation provision calls for "payment of wages lost and an additional equal amount as liquidated damages." See also state statutes allowing payment of liquidated damages cited in the NELP study noted at fn.1

¹⁵ See e.g. [Seattle Municipal Code 14.19.080\(C\)](#).

¹⁶ In an interesting 2017 decision, *George, et al. v. National Water Main Cleaning Company, et al.*, 477 Mass. 371, the Massachusetts Supreme Judicial Court held that under the state's wage laws – which provide for treble damages on any unpaid wages – interest should be computed on the back wages owed, but not on the additional treble damages. Meanwhile, the California Court of Appeal recently interpreted Labor Code Section 1194.2(a), which allows an employee deprived of the minimum wage to recover liquidated damages "in an amount equal to the wages unlawfully unpaid and interest thereon." The court held that because the liquidated damages provision is intended to be punitive, liquidated

- back wages should be computed.
- Interest is generally not payable on "pain and suffering" damages or punitive damages.

Fines

While fines levied by the agency for unlawful retaliation aren't among the remedies the complainant obtains, when authorized by law, they play an important additional deterrence role.

Taxability of Damages Payments

- As per the IRS: Damages received to compensate for economic loss—for example lost wages, business income and benefits—are not excludable from gross income unless a personal physical injury caused such loss. Hence, taxes and the employee's share of Social Security and Medicare contributions (and other mandatory deductions on wages) should be withheld on amounts allocated to back pay and front pay.
- Other forms of monetary relief, including punitive damages, are also taxable, but withholding is not required; the employer should determine in what circumstances it is required to provide a Form 1099 when it pays such relief.
- Compensatory damages for personal physical injuries or physical sickness are not taxable.
- Emotional distress can't be treated as a physical injury or physical sickness for IRS purposes, but damages paid for medical care attributable to emotional distress are not taxable.
- Avoiding a resolution that calls for payment of one lump sum is recommended; it's in the complainant's interest that each component of the monetary award is described as either back pay or emotional distress damages or punitive damages, for clarity at tax time.

(2) Determining Non-Monetary Remedies

Like the monetary remedies discussed above, the non-monetary-remedies component of any retaliation case should be crafted to effectively serve the dual goals of making the complainant whole and serving the strategic compliance/deterrence mission of the investigating agency. Hence, the intended remedies should be tailored to address the

damages amounts based on the back wages owed plus pre-judgment interest are to be awarded. *Seviour-iloff v. Lapaille*, [80 Cal.App.5th 427](#).

nature and effect of the adverse action taken by the employer/respondent in response to the complainant's engaging in the protected activity. Such remedies could include:

- Where the adverse action was termination of complainant's employment, reinstatement with restoration of all benefits and promotions the employee would have had but for the adverse action (unless, as mentioned above, reinstatement is impracticable, in which case front pay may be awarded);
- Cancellation of any other unwarranted personnel action resulting from complainant's protected activity, and restoration to the status the employee would have been in but for the adverse action;
- An agreement or order requiring the employer to refrain from taking any adverse action against employees engaging in protected activity;
- Expungement of any warnings, reprimands, or derogatory comments that had been placed in complainant's personnel file in connection with their protected activity;
- Providing complainant with a neutral (or better) reference for prospective employers;
- Training of managers and employees on what constitutes protected activity, and on workers' right to engage in protected activity free from retaliation or the threat of retaliation;
- Posting of the settlement or order resolving the claim of retaliation in a prominent space accessible to employees;
- In egregious cases, a reading of the terms of the settlement or order to the workforce by company management or by agency representatives, with management present; and
- Where company manager(s) engaged in the adverse action, assessment by the company of what discipline is appropriate.

Example: Tailoring a non-monetary remedy for a violation of the anti-retaliation provisions of the federal Family and Medical Leave Act (FMLA)

Background: The FMLA provides eligible employees of covered employers with job-protected leave (which may be unpaid or used concurrently with accrued paid leave) for specified family and medical reasons. Among other things, the FMLA prohibits interfering with, restraining, or denying an employee's exercise of or attempt to exercise any FMLA right.

Similar to many state and local paid sick leave laws, the FMLA prohibits an employer from: 1) discriminating or retaliating against employees or prospective employees who have used or have attempted to use FMLA leave; and 2) counting the taking of

FMLA leave as a negative factor in employment actions—like hiring, promotions, or disciplinary actions—or under “no fault” attendance policies.

Case example: Jaime takes approved FMLA leave to care for his seven-year-old daughter when she is in the hospital overnight and recovering from surgery. Jaime returns to work as scheduled but receives three negative attendance points for the days he used FMLA leave. Under his employer’s no fault attendance plan, employees are allocated points for every absence from work, regardless of the reason for the absence. Employees are disciplined when they accrue a set number of points, and employees who accrue more than ten points in a calendar year may be terminated.

In this scenario, assigning attendance points to Jaime’s FMLA-protected leave days would be prohibited. Under the FMLA’s anti-retaliation provisions, an employer may not use the taking of FMLA leave as a negative factor in employment actions and may not count FMLA leave days under no fault attendance policies. In an investigation, WHD would require that the employer remove the attendance points from Jaime’s employment record for the days he used FMLA leave to care for his daughter.¹⁷

SETTLEMENT

The vast majority of most agencies’ cases will resolve without going to hearing or trial. They may settle at any point in the process: following receipt of the complaint by the agency, but before investigation begins; while the investigation is ongoing, but not yet concluded; after the investigation concludes with a finding of violation, but before the order, hearing, or trial begins; during the hearing or trial, but before judgment or verdict; and even after judgment, but before or during the appeals process.

In the sections above, we’ve examined the substantive terms that a resolution of a retaliation complaint—whether consensual or adversarial—might include. In this section, we’ll look briefly at alternate dispute resolution (ADR), an important and often successful tool for resolving retaliation complaints even before an investigation is begun. We’ll also consider some common settlement terms that address the scope of release, confidentiality, and non-disparagement.

¹⁷ This example is drawn from U.S.D.O.L Wage and Hour Division Field Assistance Bulletin 2022-22, *Protecting Workers from Retaliation* <https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf>.

Alternative Dispute Resolution

As discussed in detail in [Part I](#), retaliation investigations can be complex, time-consuming, and labor-intensive. Hence, if early and appropriate resolution of a retaliation complaint can be achieved, even before an investigation begins, valuable agency resources can be freed up. Since worker protection agencies often face a significant backlog of retaliation matters, effective tools for case resolution are critical.

ADR is one such tool. ADR refers to any means of settling a dispute outside the courtroom, and typically includes practices like early neutral evaluation, negotiation, conciliation, mediation, and arbitration. Some state agencies have formal ADR programs, but many don't. In those states or municipalities that don't formally deploy some form of ADR, the principles set forth below will apply nonetheless.

ADR techniques and practices can be used at any stage after the agency determines that the elements of a retaliation claim have been made out, but agency efficiency is best served if some form of ADR succeeds in resolving the matter even before the investigation has begun.¹⁸

Example: OSHA's Adopts ADR to Resolve Retaliation Claims

After piloting ADR programs in its Chicago and San Francisco regions about ten years ago, federal OSHA formally adopted ADR as a non-litigation means to resolve retaliation claims under the many federal statutes' whistleblower provisions it enforces. In 2015, OSHA published a directive setting forth the policies and procedures to be followed in its now nationwide ADR program; that directive was amended in 2019,¹⁹ and is operative today.²⁰ It's worth reviewing in its entirety, but the following are some key elements:

¹⁸ In the federal government, ADR is expressly authorized by the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. § 571 et seq. It says that an agency can use alternative dispute resolution to resolve a controversy that relates to an administrative program, if the parties agree, 5 § U.S.C. 572(a). Federal and state court systems throughout the U.S. have adopted ADR programs as a means to avoid costly and time-consuming litigation. States too have adopted it, in the effort to efficiently resolve claims in a number of different contexts. For example, in New Jersey, to resolve issues with the Department of Environmental Protection: <https://www.nj.gov/dep/odr/>; in New Mexico, to resolve state employee personnel issues: <https://www.spo.state.nm.us/adjudication/alternative-dispute-resolution-voluntary-program/>; in Virginia, to resolve fair housing complaints: <https://www.dpor.virginia.gov/ADR>.

¹⁹ https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-008.pdf

²⁰ It describes its rationale thus: "The whistleblower protection laws enforced by OSHA cover millions of employees in healthcare, food, finance, air travel, pipeline, transit, rail, and other industries. Each year, OSHA receives and docketed several thousand whistleblower complaints for investigation. OSHA's ADR

- The ADR Program provides parties with the opportunity to resolve their dispute with the assistance of a neutral, confidential OSHA representative (the Neutral) who has subject-matter expertise in whistleblower investigations.²¹
- ADR can take place once a case has been docketed but before an investigation begins, or at any point while an investigation is ongoing.
- ADR's purpose is to achieve a quick and voluntary resolution of the whistleblower complaint instead of an investigation to determine the validity of the charge and potential statutory violations.
- If the parties engaging in ADR fail to reach agreement within a reasonable time frame, the case will be transferred to an Investigator to start or resume investigation of the complaint.
- The Neutral, the agency employee whose job is to facilitate ADR, will not be involved in any way in the investigation that might follow a failed attempt at ADR.
- During ADR, the Neutral may provide general information about the whistleblower law and procedures to the parties, and may give the parties an impartial perspective on the strengths and weaknesses of their respective positions; the Neutral will not offer judgment on the merits of the complaint.
- Because ADR is a voluntary process, the process terminates if one or both of the parties decide to end it for any reason.
- If the process ends without an agreement, and the case is transferred for investigation, the Neutral will not comment on the positions of the parties or the communications that occurred during ADR.

Summary of Principles

ADR is:

- A fully voluntary process, that can be terminated by either party at any time;
- Only effective when the parties participate in good faith; if the Neutral determines that one or more parties are not acting in good faith, they can decide to end the process, and return the matter to investigation;

Program can assist complainants and respondents to resolve their whistleblower complaints in a cooperative and voluntary manner. When ADR is successful, it can provide timely relief and finality to both parties." Id.

²¹ The form OSHA uses by which parties formally request ADR is available for review as Exhibit A of the directive.

- Confidential, to the extent permitted by law: Communications among the parties that occur within the ADR process, and any case file the Neutral creates, containing such communications, documents submitted, settlement offers made, and the like, may not be shared or made accessible to agency officials involved in investigating or deciding the merits of the complaint.²²
 - Important note: If settlement is not reached, the parties may share any of their own communications made during ADR with the agency Investigator.

Your labor enforcement agency may already make use of the ADR process to facilitate the relatively quick and non-adversarial resolution of claims. If the agency doesn't have such a process, it's worth considering. Setting up such a program would involve designating one or more employees as Neutrals or mediators, and, if they don't already have mediation skills, providing them with appropriate training.²³ If the office has a high volume of retaliation cases, or other matters for which ADR is suitable, having a dedicated ADR staff member can pay significant dividends in investigation and litigation resource savings.²⁴

COMPLAINT RESOLUTION: AMICABLE OR ADVERSARIAL?

As has been discussed, under the laws of most jurisdictions, retaliation complaints can be resolved at any point in the process. Here we will examine at least some of the issues that may arise at each stage.

²² Such materials may, however, be shared with other agency officials when necessary for administrative and supervisory purposes, or to seek legal or policy guidance on novel or complex questions that arise during the ADR proceeding.

²³ As we know, there is usually a significant power disparity between employers and individual employees. Sometimes, employees will be represented by counsel, and this will help alleviate the disparity. Even for employees without counsel, though, the ADR process, facilitated by a Neutral who is also an expert in retaliation matters, can have a leveling-the-playing-field effect. While the Neutral will not issue a "decision," they can give an objective assessment of the strengths and weaknesses of the parties' respective positions, and can offer suggested resolutions. This way, the Neutral helps the employee understand the strength of their case and what it might be "worth," which helps advise them as to what they should consider to be acceptable. The Neutral will also help assess whether further discussion is likely to be fruitful, or whether the ADR process has run its course. The worker can always reject a final settlement offer, in which case the matter will proceed to agency investigation, and potential further enforcement action against the employer.

²⁴ The California Labor Commissioner has created a separate Retaliation Complaint Investigations Unit <https://www.dir.ca.gov/dlse/dlseRetaliation.html>.

Pre-investigation Resolution

It's clear that achieving a case resolution through ADR or other less formal means, after obtaining the complainant's and respondent's positions but before conducting an investigation, involves a different approach than one that applies once as many facts as practicable have been unearthed in a thorough investigation. The pre-investigation resolution is usually reached without the collection of documents, witnesses, and other sources of relevant evidence provided by both sides, and the testing of the strength of that evidence through what are essentially examinations and cross-examinations. Hence, the assessment of what is the most legally justified resolution of the case is inevitably limited.

Nonetheless, given the realities of agency staffing constraints, and the undeniable benefits of quick and early resolution—when the alternative would be a lengthy, life-or-business disrupting investigation, and might be, literally, years of stressful battle, with an unknown result at the end—a settlement at this stage could be a preferable option for both parties.²⁵ While the Neutral, in the ADR context—or the investigator assigned to the case, where ADR is not available—will not have learned all the relevant facts, they should have gotten a basic sense of the strengths and weaknesses of the parties' positions, and can propose what could be an appropriate way to reach common ground.

During the Investigation

In the heat of the investigation, one or both parties might approach the investigator and request possible settlement of the complaint. As noted above, ADR can be made available at that time. Considerations similar to those noted immediately above will still apply, although, depending on the stage of the investigation, the agency may have already devoted substantial resources to the matter, and have learned enough to have found a compelling agency interest in achieving a particular outcome. In this latter situation, the agency may enter into settlement negotiations but only agree to settle for terms it believes are appropriate in light of its findings.

²⁵ There may, of course, be cases in which the claim of retaliation suggests a systemic, rather than an individual problem, or for other strategic reasons a full investigation is deemed warranted. The agency, for example, might view the allegations of wrongdoing as potentially justifying an injunction or other order prohibiting any such conduct in the future. In such cases, an investigation sufficient to find a violation likely to be provable at hearing or trial should be conducted.

Once the Investigation Has Concluded

Once the analysis of the facts as applied to the law has been done, a new stage has been reached. The agency investigator (with supervisor involvement), has obtained and evaluated all the documents, interviews, and other evidence that they believe is appropriate to reach a responsible assessment of the case. They will have determined whether or not the preponderance of evidence favors the complainant, that is, whether the agency will be able to prove it's more likely than not that complainant was unlawfully retaliated against. If that determination is "no," the parties will be notified, and the case will be closed in a manner suggested in [Part I](#).

If the answer is "yes," the agency will want to resolve the matter in a way that most efficiently delivers the package of remedies and other terms that properly redress the violation, consistent with the applicable law, and in service of the interests of the complainant and the agency's enforcement mission. That package may include, among others, any of the kinds of remedies discussed above, e.g.: reinstatement; back pay and/or front pay; compensatory damages, including out-of-pocket and "pain and suffering"; punitive damages; training requirements; posting of rights poster; reading of rights in employees' presence; injunctions prohibiting unlawful retaliation and related unlawful activity.

The appropriate amount of monetary remedy will be gleaned from the documents and testimony obtained in the investigation, and calculated along the lines discussed in the [Remedies](#) section. Likewise for the non-monetary remedies: which ones are particularly apt, or even needed, to address the nature and effect of the employer's unlawful behavior? It's also crucial to decide what non-remedial settlement terms should, or even must, be included—and which are undesirable or even unacceptable. Consultation at this stage with agency attorneys, or with the office that will handle the case if litigation ultimately proves necessary, is strongly recommended, to get validation of the agency's assessment.

At this point, after consulting with the complainant, the agency will present the list of remedies and terms that will acceptably resolve the case for both the complainant and the agency. As with any negotiation, the likelihood the employer will agree to each term in this opening demand is quite low.

Going into the negotiation, it's important to have evaluated each listed term separately. For each, the agency should consider:

- To what extent is this term a priority/necessity?
- How strong is the evidence supporting it? Have all reasonably anticipated defenses related to this remedy been unearthed?

- How strong is the law supporting it? Is it based on a novel theory for a test case, and if so, how likely is it that the term will be upheld?

The agency might wish to make clear early in the negotiation which terms it considers to be non-negotiable or “deal-breakers”—absent the introduction of unexpected but material new evidence that bears on the demand. The agency will also, of course, consider what monetary demands are or not ironclad, based on the evidence supporting them individually. While the evidence for some back wages and out-of-pocket compensatory damages might be solid and worth insisting upon, difficult-to-quantify “pain and suffering” damages are intrinsically imprecise. Likewise, punitive damages have a wide range, and, when a case is litigated, an award can fall anywhere within it, depending on what’s been granted in other similar cases, or on the particular inclinations of a particular judge or jury. Unpredictability in this arena is high.

The agency (and its lawyers), in each case, will make its own determination about what is an acceptable settlement and what isn’t. That determination will be driven by an assessment of the litigation risks the case presents—including as to each of the elements of proof of the underlying violation; the egregiousness of the claimed violation and the strength of respondent’s defenses; the apparent credibility or non-credibility of each of the key witnesses, including especially the complainant and respondent, and the degree to which they are likely to come across as sympathetic to the judge or jury.

In negotiations, the agency will no doubt strive to obtain as close as it can to its original demand. But, if a solid effort to settle for each of the terms the agency deemed appropriate is unsuccessful, in most cases agreeing to a settlement the agency and complainant find “acceptable,” based on a fair assessment of the facts and the law, should be viewed as a faithful discharge of the agency’s enforcement obligations.²⁶ Indeed, most retaliation cases settle, not for 100% of what was originally demanded, but somewhere between that demand and an agreement whose terms are “acceptable.”

²⁶ There may be times when the complainant simply refuses to agree to what the agency views as an “acceptable” settlement. In such a case, depending on the applicable law regarding the complainant’s rights and agency protocols, the agency may appropriately enter into the settlement with the employer, and close complainant’s case. Any monetary award would be sent to the complainant; if rejected, the monetary amount could be returned to the respondent.

When Post-Investigation Negotiations Are Unsuccessful

It's the agency's job to effectively enforce the law, and to do it strategically so as to deliver the greatest compliance impact on employers most likely to engage in violations. When an acceptable, amicable resolution of a meritorious claim can't be reached, the agency needs to evaluate what its next steps will be. There may be circumstances where the agency decides it simply can't, or won't, expend the resources required to properly litigate the matter.²⁷ Declining to proceed to litigation following a full investigation that revealed a significant violation represents, in essence, an enforcement failure, and should be a rare event.

Having decided to move forward, the agency may issue a citation or order, or the agency's attorneys may file a complaint with the adjudicatory body responsible for hearing these claims, seeking all monetary and non-monetary relief that the agency believes is warranted under the law, and can be substantiated at trial.

This paper is not intended to be a litigation primer. But if the agency pursues litigation, here are a few issues to be aware of in retaliation cases:

- Especially where documentary evidence showing retaliation, and witnesses supporting the claimant's version of the facts, are scarce, complainant's credibility is extremely important. During discovery in the case, complainant will likely be deposed. Complainant needs to be thoroughly prepared for the questions the employer's counsel may, ask. Following the deposition, an assessment should be made: How did the complainant do? Did they come across as credible? Were they convincing? If not, discuss the issue(s) with them. Their primary job is to tell the truth. If there's a reason that makes them uncomfortable when testifying, the agency needs to do its best to address the issue.

²⁷ This might be because the agency has adopted a critical new priority, to which it's rapidly redirecting most of its available resources in an attempt to address a pressing problem. Or it might be that other strategic priorities are simply viewed as more important when the moment of decision comes. An example of the kind of issue that might trigger an agency to sharply re-prioritize how its resources will be focused is the crisis in child labor violations, driven in significant part by the massive influx across the southern border of minors seeking refuge from violence and extreme poverty. To the extent it's possible to anticipate this priority- and resource-related conflict in advance, the agency should let the complainant know that it won't be accepting the case for investigation. Under many federal and state laws, in such cases, the complainant can file their own private action seeking relief. See, e.g., FLSA section 15(a)(3); see chart in NELP study cited in fn.1, <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>.

- As noted earlier in this paper, complainant will need to keep and produce to the other side any and all documents they have that support either the underlying retaliation claim or the demand for damages and other relief. This includes complainant's work history, evaluations, records of raises and bonus, and the like, visits to health professionals (if remedies for pain and suffering are demanded), as well as full documentation of all efforts to mitigate the damages caused by the retaliation.²⁸
- The agency will also need to obtain and produce all preserved written or oral messages (paper documents, texts, voicemails, social media posts, emails, etc.) that in any way relate to complainant's work, the protected activity, retaliation, and post-retaliation communications. As noted earlier, complainant should be advised during the initial screening that if the case proceeds, such communications will need to be divulged.
- If complainant is an immigrant worker who lacks work authorization, employer's counsel may attempt to interject into the proceeding not only their status, but also details about how they entered the country, how they obtained their identification papers, and so forth. All such efforts should be resisted, because whether the complainant is "documented" or not, they are entitled to the same protections against retaliation as authorized workers, and their immigration status and circumstances are almost wholly irrelevant. Immigration/work authorization status is only potentially germane to whether reinstatement and back and front pay are remedies available to these workers.²⁹

²⁸ See, for example, this guidance provided by an employer-side law firm: "Because of the potential for substantial back pay awards in employment termination cases, employers should take thorough discovery, such as interrogatories, document requests, requests for admission, or deposition testimony, to determine the nature of efforts taken by a terminated employee to find new employment. Discovery requests, for example, which ask the plaintiff to identify every job opportunity applied for and all sources of income received since the plaintiff's employment was terminated, can help demonstrate that the plaintiff failed to undertake a good faith job search and thereby eliminate the employer's burden of also having to show the availability of comparable work. Where possible, employers should also consider engaging an appropriate expert witness to address whether suitable alternative employment existed. This may include engagement of vocational rehabilitation professors or counselors, Human Resources consultants, labor economists or even headhunters." <https://www.mintz.com/insights-center/viewpoints/2016-03-24-dc-district-court-examines-employers-burden-prove-failure>.

²⁹ In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), the Supreme Court considered the case of a worker who had used false identity papers to get the job, and was illegally fired for engaging in union organizing activity. The Board ordered the employer to pay the wages he lost after having been laid off in violation of the protections of the National Labor Relations Act, 29 U.S.C. §151 et seq. The Supreme Court, in a 5-4 decision, determined that even though the

- If an undocumented worker has sought the assistance of a worker center or community organization in pursuing their retaliation claim, respondent's attorney may, in discovery and at trial seek disclosure of any communications between the worker and the organization, as well as any communications between the organization and the investigative agency or its attorneys. The agency should consider attempting to insulate itself, the organization, and the complainant from this type of inquiry by executing a "common interest agreement" with the organization. Such an agreement, ideally between counsel for the agency, and an attorney representing the organization, is intended to enable sharing of information that the agency or the complainant would seek to protect as privileged. For more information on common interest agreements, see [Tool 7: Sharing Information with Community Organizations](#).

The outcome of litigation is never entirely predictable. When the agency decides to file its complaint, it should have strong grounds for believing that it will, more likely than not, prevail on its underlying claim of unlawful retaliation. But even if the court or jury rules in its favor on the claim of retaliation, it may or may not award the various forms of relief sought, and in the amounts demanded.

All of these issues are then grounds for potential appeal by either side, again with uncertain outcome. Another assessment at the post-trial stage must be made as to what now would constitute an "acceptable" resolution of the case, finally allowing closure for all parties. At this stage, as at the earlier stages, the agency—in consultation with the complainant to the extent possible and consistent with the governing statute—will consider what action is most likely to effectively advance the agency's, and the complainant's interests. Once again, the case will either settle, or continue on its litigation path, now at the appellate level.

CLOSING THE DEAL

As noted above, the vast majority of viable retaliation claims result in settlement. We've already discussed the various substantive remedies a settlement might include. What remain to be covered are provisions that attorneys for employers/respondents often seek, some of which may be acceptable, and some not. The following are examples of some of the issues that may need to be addressed:

worker was protected by the law against the employer's retaliatory action, the Board's "back pay" remedy could not stand, since it intruded on key provisions of IRCA (federal immigration law) which requires that workers have legal authorization to work. The [Hoffman](#) case remains good law, although generally temporary reinstatement can be ordered to provide some time for the worker to produce evidence of work authorization.

- **Scope of release:** As a general rule, government agency settlements should resolve the agency's claims brought under the statute(s) under which the claims arose—nothing more and nothing less. Employers, not surprisingly, will often want a much broader release of claims. In the retaliation context, they might seek a release of claims the agency might have made but didn't, under the statutes it enforces. They also might seek extremely broad releases of any other possible claims against them by the complainant. While there may be circumstances where some flexibility is warranted, as determined by the agency and its attorney, the default position should be that the settlement resolves the claims that the agency made.
- **Confidentiality:** Employers will often request that a retaliation case settlement be kept confidential. While each jurisdiction may have its own laws governing confidentiality or non-confidentiality of records of its activities, the default position here should be towards non-confidentiality of the settlement agreement. The agency's enforcement activity is in the public interest, and sharing the results of a retaliation investigation makes clear that the agency takes such violations of workers' rights seriously, and that unlawful employer behavior has consequences. Publicizing such results also, importantly, deters comparable bad behavior by others. Hence, the agency should always retain its authority to issue a press release or engage in other types of publicity regarding the investigation and its outcome.
- **Non-waiver of rights:** The employer might seek in the agreement, or in a side agreement it attempts to negotiate with the complainant, terms limiting the complainant's rights to engage in future protected activity, like providing evidence to a government agency, or requiring the complainant to give the employer notice before they complain to the government. All such efforts should be rejected.

OSHA, for example, includes a provision like the following in settlement agreements:³⁰

Nothing in this Agreement is intended to or shall prevent, impede or interfere with Complainant's non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA...

- Non-disparagement: Similarly, the employer might demand a provision barring the complainant from “disparaging” it in the future, with “liquidated” damages to be owed by the complainant if they transgress. Such provisions are highly problematic. What can be viewed as disparagement by one side is simply truth-telling in the eyes of the other side.

The National Labor Relations Board recently ruled that a number of provisions often included by employers in employment severance agreements run counter to the protections afforded workers under the National Labor Relations Act, including broad non-disparagement clauses, and thus are prohibited.³¹

³⁰ Whistleblower Investigations Manual, p. 119

³¹ Most employers who are respondents in retaliation claims are subject to the NLRA; hence, a retaliation claim settlement agreement that includes terms prohibited by the NLRA, might itself constitute a violation of the NLRA by the employer. In *McLaren Macomb*, 372 NLRB No 58, the Board found the following severance agreement provisions to violate the NLRA: (a) a non-disparagement clause that advised the signing employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives, and (b) a confidentiality clause that advised employees they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. Breach of either clause carried monetary sanctions. In a Guidance Memo issued in March 2023, setting forth the enforcement effect of *McLaren MacComb*, NLRB General Counsel explained that clauses like these chill both signing employees and other employees in the exercise of their rights to engage in concerted action and to bring their concerns to the government. She noted, though, that a non-disparagement clause, limited to barring employee statements about the employer that meet the definition of defamation as being maliciously untrue—that is, are made with knowledge of their falsity or with reckless disregard for their truth or falsity—may be found lawful. Also, confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered

ENFORCEMENT OF THE AGREEMENT

Once the remedial and non-remedial terms of settlement have been nailed down, the matter can finally be concluded. Hopefully, compliance with the settlement won't need to be enforced. But in the event the employer breaches the agreement, where and how it's enforced will depend, for example, on whether or not it's been filed in court.

If filed in court as a consent decree—an agreed-upon order with terms enforceable by the court—the employer's failure to comply with a term could result in an order finding the employer in civil contempt, requiring compliance, or even criminal contempt, which could result in punishment like fines or incarceration.

If the agreement hasn't been filed, enforcement might require filing in court for breach of contract, seeking specific performance. Alternatively, in this latter situation, the agency might determine that the best course of action under the circumstances would be to reopen the whole matter and file an adversarial action in court. In anticipation of each of these possibilities, it's wise to include in any non-filed settlement agreement a provision that makes clear that violation of any of the agreement's terms can result in the agency's either taking legal action to enforce the agreement, or filing a new action addressing the underlying violation. Regarding this latter option, the agreement should include a provision whereby the employer agrees not to assert a statute of limitations defense based on the time that elapsed from the date of the agreement.

CONCLUSION

This concludes the discussion of a sampling of the broad range of issues that arise in resolving a retaliation complaint, once the agency has found the complaint asserts a violation on its face. How germane any of these issues is to each agency's anti-retaliation enforcement work will depend on the statutes, regulations, and case law, and the institutional protocols, under which the agency operates. Given the plethora of thorny questions these cases often present, a close working relationship between the agency and its lawyers is essential. But the fact that these cases are sometimes demanding doesn't diminish their importance: it's indisputable that if workers experience or fear retaliation for exercising their rights, they're unlikely to speak up. Unscrupulous employers will continue to violate the law, in the shadows. It's that challenge the agency must meet, as strategically and impactfully as possible.

lawful, but "clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful."

ADDENDUM

A NEW ANTI-RETALIATION TOOL FOR CASES INVOLVING IMMIGRANT (“UNDOCUMENTED”) WORKERS

Immigrant workers who lack work authorization—about 8 million in the U.S.—are among those workers most likely to suffer abuse on the job, including retaliation for speaking up. As noted in the text above, they have the same protected rights as other workers on the job, including the right to be free from retaliation. But for them, engaging in a protected activity might result not only in their being fired, but, if the employer is so inclined, a visit from ICE (Immigration and Customs Enforcement), and possible deportation. Hence, immigrant workers have historically been most likely to suffer labor abuse in silence. For years, the Department of Homeland Security (DHS) has understood that its presence anywhere near a Labor Department workplace investigation (and, more recently, investigations by the NLRB and the EEOC) has a chilling effect on immigrant workers’ willingness to come forward and blow the whistle on wage theft, or safety violations, or discrimination, or anti-union activity. Hence, DHS has agreed to avoid investigating workplaces until the labor investigation and any subsequent enforcement action is concluded.³² This has had some positive impact on worker protection enforcement, but not enough.

Recognizing this, the current leadership of DHS has pledged its strong support for the worker protection mission of the labor agencies—including protection of undocumented workers.³³ The concrete result is a new protocol under which workers without employment authorization can request that a labor agency with an open investigation at their worksite assist them in getting temporary immigration relief, called “deferred action.”³⁴ This is done by requesting the agency provide a “statement of interest” that makes clear it has an enforcement interest in, and a need for, workers

³² https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum_4.19.18.pdf

³³ https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf

³⁴ Deferred action is a determination to defer removal of an individual as an act of prosecutorial discretion. An individual is not considered to be unlawfully present during the period when deferred action is in effect – in these cases, generally for two years -- since the individual has been authorized by DHS to be in the United States for the deferred action period. Deferred action recipients are also considered to be “lawfully present” for purposes of eligibility for certain public benefits (like certain Social Security benefits) during the period of deferred action. Work authorization can also be obtained. <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#general>

at the investigated workplace to assist in the investigation, without fear of adverse immigration consequences if they cooperate.³⁵ When the agency provides the statement of interest, the worker (usually with the assistance of an immigration attorney), prepares an application package, and sends it to a DHS office specifically created to promptly process such requests.³⁶

This process has already produced results in the form of grants of deferred action for immigrant workers at worksites where enforcement activity is ongoing, enabling these workers to come forward and cooperate without fear of adverse immigration consequences, for at least a few years.³⁷ It has also enabled cooperating individuals to obtain work authorization, allowing workers, who now have legal permission to work, to come out of the shadows. And where an undocumented worker has been fired after engaging in protected activity, work authorization provides the labor agency the ability to demand reinstatement, without running afoul of IRCA and the Hoffman Plastic decision described in fn.29.

And, quite significantly for our purposes, this new protocol for making deferred action available to victims or witnesses in labor enforcement actions applies not only to federal agencies like USDOL, the NLRB, or the EEOC, but also to any state or local labor agency. Some state agencies have already begun to make use of this very important new tool in their worker protection and anti-retaliation toolbox. While this tool is available, any agency committed to strategic enforcement is strongly urged to use it. Agencies are also urged to develop a user-friendly and well-communicated method by which—when the agency is engaged in an investigation or other enforcement activity, and some of the affected workers have cause to be reluctant to come forward because of their immigration status—workers and worker advocates can

³⁵ USDOL devised a user-friendly method to request a “Statement of Interest” from the agency in July 2022. <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>.

³⁶ <https://www.dhs.gov/enforcement-labor-and-employment-laws>.

³⁷ Other longer-duration immigration relief can be obtained too, where applicable, in the form of what are known as U or T visas. U nonimmigrant status, also known as the U visa, is for victims of certain qualifying criminal activities, including domestic violence, sexual assault, hate crimes, human trafficking, involuntary servitude, and certain other serious offenses. T nonimmigrant status, also known as the T visa, is for victims of a severe form of trafficking in persons. Victims who obtain either status can remain and work in the United States for up to four years once granted such nonimmigrant status. Extensions beyond four years may be granted, and victims can apply for a Green Card -- lawful permanent residency -- if they meet certain requirements. Eligibility for both U and T visas generally requires the victim to assist or cooperate with law enforcement in the detection, investigation, or prosecution of human trafficking or qualifying criminal activity. <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes>.

request statements of interest.³⁸ Agencies that deploy this process will undoubtedly see it pay dividends in their ability to unearth and redress the kinds of violations that so often remain out of view.

APPENDIX

SAMPLE STANDARD OSHA SETTLEMENT AGREEMENT

In the matter of: *Complainant v. Respondent*³⁹

Case No. 1-2345-08-001

SETTLEMENT AGREEMENT

The undersigned Respondent and the undersigned Complainant, in the settlement of the above-captioned matter and subject to the approval of the Occupational Safety and Health Administration ("OSHA"), hereby agree as follows:

Compliance with Acts. Respondent will not discharge or in any other manner discriminate against Complainant or any other employee because of activity protected by the whistleblower provision of the [insert name of statute], [insert statutory cite].

Posting of Notice. Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, including electronic posting, where the employer communicates with its employees electronically, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice attached hereto and made a part hereof, said Notice to be signed by a responsible official of Respondent organization and the date of actual posting to be shown thereon. [For employers who communicate with their employees electronically, Respondent shall e-mail this notice to all employees at [insert establishment] or post this notice on its intranet].

Compliance with Notice. Respondent will comply with all of the terms and provisions of said Notice.

³⁸ See e.g. California Labor Commissioner FAQs available at https://www.dir.ca.gov/dlse/dhs_deferred_action_FAQ.htm; IL DOL FAQs available at <https://labor.illinois.gov/laws-rules/legal/deferredaction.html>.

³⁹ Standard (template) settlement agreement used in OSHA's Whistleblower Program, available at: <https://www.whistleblowers.gov/memo/2016-12-23>.

General Posting. Respondent will permanently post in a conspicuous place in or about its premises, including all places where posters for employees are customarily posted, including electronic posting, where the employer communicates with its employees electronically. [select appropriate poster [OSHA 3165-12-06R ("Job Safety and Health: It's the Law!"); OSHA 3113 ("Attention Drivers"); FAA-WBPP-OI ("Whistleblower Protection Program"); 29 CFR Part 24, Appendix A ("Your Rights Under the Energy Reorganization Act"); OR the applicable OSHA Whistleblower Rights Fact Sheet(s)]]].

Reinstatement. Respondent has offered [or shall offer as soon as possible] reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have earned but for the alleged retaliation. Complainant has [declined/accepted] reinstatement. [OR Reinstatement is not an issue in this case. Respondent is not offering, and Complainant is not seeking, reinstatement.]

Monies. Respondent agrees to make the Complainant whole by payment of \$_____in back pay (less normal payroll deductions). Respondent shall submit appropriate documentation to the Social Security Administration allocating back pay to the appropriate calendar quarters [OR to the Railroad Retirement Board allocating back pay to the appropriate months]. [OR Respondent agrees to pay Complainant a lump sum of \$ _____.] Complainant and Respondent agree to comply with applicable tax laws. Any check shall be made payable to the Complainant and mailed to the OSHA [Area/Regional] Office [give address].

Personnel Record. Respondent shall expunge any references from Complainant's personnel records relating to the adverse action and shall not make any references relating to the adverse action in any future requests for employment references.

Inquiries Concerning Complainant. Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to any third party that could be construed as damaging the name, character, or employment of Complainant. If a third party submits a Freedom of Information Act ("FOIA") request, OSHA will disclose settlement agreements in accordance with the FOIA, unless one of the FOIA exemptions applies.

Performance. Performance by both parties of the terms and provisions of this Agreement shall commence immediately after the Agreement is approved.

Enforcement of Settlement. [For all cases other than Section 11(c) of the OSH Act, AHERA, or ISCA] This settlement constitutes the Secretary’s findings and preliminary order under [insert name of statute and cite to provision on issuance of findings and preliminary order]. The parties’ signatures constitute a failure to object to the findings and order under that statute. Therefore, this settlement is a final order under that statute and is enforceable in an appropriate United States district court. [For Section 11(c) of the OSH Act, AHERA, and ISCA cases] Failure to comply with this settlement may constitute a violation of the whistleblower provision of [insert statute], [insert cite] for which the Secretary of Labor may seek redress by filing a civil action in an appropriate United States district court under [insert cite for whistleblower provision]. A violation of this settlement agreement is also a breach of contract for which Complainant may seek redress in an appropriate court.

Non-Admission. Respondent’s signing of this Agreement in no way constitutes an admission of a violation of any law, standard, or regulation enforced by OSHA. Nothing in this Agreement may be used against either party except for the enforcement of this Agreement’s terms and provisions.⁴⁰

Notification of Compliance. Respondent agrees that within ten (10) days of receiving a fully executed and approved copy of this Agreement, Respondent will notify the OSHA Regional Administrator in writing of the steps it has taken to comply with the terms and conditions of this Agreement.

Closure of Complaint. Complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against respondent arising out of Complainant’s complaint filed with OSHA on [insert date] and will cause the complaint to be closed.

This Agreement has been obtained and entered into without duress and in the best interests of all parties.

⁴⁰ While OSHA includes non-admission language in its boilerplate agreement, and respondents will usually demand language like it, we recommend against agreeing to such a term where the agency has determined that a violation has been committed. The respondent can be told that the agency is not demanding that respondent expressly agree that it violated, even though the agency has determined that it has. Options the agency can offer, which have been successful in other agencies’ negotiations, could include silence on the issue, or a neutral non-admission term that states “Respondent neither admits nor denies that it committed any violation.” It’s worth also noting that in some jurisdictions an actual admission of liability is a predicate for obtaining higher penalties for subsequent violations of the same kind. In those jurisdictions, the agency should follow its policies on including admission language in settlements.

RESPONDENT:

(Signature/title/date)

RECOMMENDED BY:

(Signature/title/date)

Investigator

COMPLAINANT:

(Signature/title/date)

APPROVED BY:

(Signature/title/date)

Regional Supervisory Investigator

EEOC MODEL RELEASE LANGUAGE

In consideration for \$ _____ paid to me by _____, in connection with the resolution of EEOC v. _____, I waive my right to recover for any claims of [bases and issues] arising under [statute] that I had against _____ prior to the date of this release and that were included in the claims alleged in EEOC's complaint in EEOC v. _____ .

Date: _____

Signature: _____