

## Question & Answer Summary

June 18, 2009 Webinar

### Public Policy, Wrongful Termination, and Retaliation Claims: Best Practices to Avoid Litigation

Last year, retaliation claims were the second-most common type of discrimination charge filed against private-sector employers with the U.S. Equal Employment Opportunity Commission, representing over 34 percent of all charges filed and an almost two-fold increase over the number of retaliation charges filed a decade ago. On June 18, 2009, Miller Law Group presented an in-depth webinar focusing on recent legal developments under California and federal law that are fueling this rise in retaliation complaints, as well as whistleblower and public policy lawsuits. The following are answers to questions asked by webinar attendees.

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**Miller Law Group is the leading women-owned employment law firm in California, specializing in representing management in all facets of employment litigation and strategic advice.** If you have questions about your workplace obligations, please contact Michele Ballard Miller ([mbm@millerlawgroup.com](mailto:mbm@millerlawgroup.com)) or Carolyn Rashby ([cr@millerlawgroup.com](mailto:cr@millerlawgroup.com)), or call 415-464-4300.

#### Q. WHAT ARE THE KEY PROVISIONS TO INCLUDE IN AN ANTI-RETALIATION POLICY?

A. Having a clear anti-retaliation policy can help deter improper conduct that could subject your organization to liability and it can encourage employees to come forward with complaints so you can address problems before they expand into lawsuits. The policy can be stand-alone or incorporated into your overall anti-discrimination and anti-harassment policy. Recommended provisions include: 1) a clear statement that, like discrimination and harassment, retaliation is prohibited by law and by company policy; 2) retaliatory conduct will result in disciplinary action up to and including termination; 3) a brief description and examples of the types of conduct that amount to protected activity and the types of conduct that may be viewed as retaliatory; 4) a description of the organization's complaint procedures, specifying how and where to file a

complaint; 5) a statement that complaints will be taken seriously, promptly investigated, and resolved as appropriate; and 6) a statement that complaints will be maintained as confidential to the extent possible. Make sure your policy is well-publicized and that you train managers and supervisors regularly about their obligations to avoid retaliation. In California, employers must address retaliation in their A.B. 1825 harassment training for managers.

**Q. WOULD A LOWER PERFORMANCE RATING BE CONSIDERED AN ADVERSE ACTION SUFFICIENT TO SUPPORT A RETALIATION CLAIM?**

A. In *Burlington N. & Santa Fe Ry. Co. v. White* (2006) 126 S. Ct. 2405, the U.S. Supreme Court ruled that Title VII's anti-retaliation provision prohibits employer actions that are *materially adverse to a reasonable employee* and are *harmful to the point that they could well dissuade or deter a reasonable worker from making or supporting a charge of discrimination*. The California Supreme Court, in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4<sup>th</sup> 1028, held that the employer's conduct *must materially affect the terms and conditions of employment and it is appropriate to consider the totality of the circumstances*. Under either the federal or California adverse action standards, a lower performance rating could amount to an adverse employment action, such as if the lower rating had a negative impact on an employee's pay or promotional opportunities.

**Q. WHAT IS THE DEFINITION OF A PROTECTED ACTIVITY FOR PURPOSES OF A RETALIATION CLAIM?**

A. Title VII, California's Fair Employment and Housing Act (FEHA), and a host of other state and federal employment laws prohibit employers from taking adverse action against an employee for engaging in a protected activity. Generally, protected activities include filing a discrimination charge under the relevant statute, assisting others in filing a claim, participating in proceedings under the statute (for example, being a witness in an agency investigation), opposing unlawful employment practices such as by voicing a complaint to management, or participating in an internal company investigation.

**Q. CAN MANAGERS BE HELD PERSONALLY LIABLE FOR RETALIATION CLAIMS UNDER TITLE VII OR CALIFORNIA'S FEHA?**

A. Last year, the California Supreme Court ruled in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4<sup>th</sup> 1158, that FEHA retaliation claims are proper against employers

only, and not against individual managers and supervisors. This decision brought California law into line with federal law which, similarly, does not impose individual liability for retaliation. We suspect, though, that California employers have not heard the last word on supervisor liability for retaliation, as language in the *Jones* decision leaves the door open for the California Supreme Court to find in a future case that supervisors are liable for retaliatory conduct that is harassment, as opposed to retaliatory personnel decisions.

**Q. WHAT WHISTLEBLOWER INFORMATION MUST BE POSTED UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) FOR EMPLOYERS THAT RECEIVE STIMULUS FUNDS?**

A. On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act to stimulate the economy. Section 1553 of the ARRA prohibits businesses that receive stimulus funds from retaliating against employees who blow the whistle on: 1) gross mismanagement of a contract related to covered funds; 2) gross waste of covered funds; 3) dangers to public health or safety related to the use of public funds; 4) an abuse of authority related to the use of covered funds; or 5) a violation of a law, rule, or regulation in connection with a contract or grant related to covered funds. In addition, the law requires businesses receiving stimulus funds to post notice of whistleblower rights and remedies under the ARRA. The law, however, does not specify where the notice must be posted or the specific language the notice must contain.

For employers that receive stimulus funds, the best practice is to prepare a notice that mirrors the provisions of section 1553 and post it in a location where the employer displays other employment notices. [Click here](#) for the text of the ARRA, including the whistleblower provisions of section 1553, which begin on p. 183 of the document.

**This webinar and Question and Answer Summary are presented by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the webinar, and should not be considered legal advice.**