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Trends in the Law of Employment Retaliation and Whistleblowing

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According to the U.S. Equal Employment Opportunity Commission, retaliation is the most common allegation made by employees against employers in both the private and public sectors. In the private sector, 36,258 retaliation charges were filed with the EEOC in the agency's last fiscal year. This represents 36.3% of the total number of charges the EEOC received for all discrimination laws. This trend is not likely to slow. The list of laws prohibiting retaliation is lengthy and the U.S. Supreme Court in *Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863 (2011), expanded Title VII of the Civil Rights Act of 1964 employment retaliation protection to include an employee's close associates.

Every significant federal employment law — Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Equal Pay Act, the Family and Medical Leave Act, the National Labor Relations Act, and the Occupational Health and Safety Act — contains an anti-retaliation provision. Generally, these laws prohibit employers from taking an “adverse action” against “aggrieved persons” for engaging in activities protected by these laws. An “adverse action” includes firing an employee who has complained about discrimination, harassment, or an unsafe workplace, or demoting an employee who helps a co-worker file a complaint about her wages, among other things. Moreover, ever since 2006, when the U.S. Supreme Court ruled in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, that Title VII's anti-retaliation provision broadly covers actions that “could well dissuade a reasonable worker from making or supporting a charge of discrimination,” the EEOC has received a record number of charges from individuals accusing private-sector employers of retaliation each and every year. The EEOC observes, “There is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment.” Provisions against retaliation in employment exist in state and municipal laws, as well — providing disgruntled workers even more avenues to sue their employers.

In addition to traditional employment law retaliation claims, employers also have increased exposure to retaliation and whistleblowing claims arising out of laws regulating public companies and the financial services industries, such as the Sarbanes-Oxley Act of 2002 (“SOX”) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”). SOX established a regulatory framework for employee whistleblower retaliation claims that are adjudicated by the Department of Labor's Occupational Safety and Health Administration.

Like SOX, the DFA establishes a framework for direct employee whistleblower reports to the Securities and Exchange Commission (“SEC”) and provides protection for those who claim to have suffered employment retaliation. The DFA also protects from retaliation employees of financial services companies who report on

consumer fraud to the newly established Bureau of Consumer Financial Protection, expands SOX whistleblower protections, and amends the False Claims Act to further protect those who engage in protected activity.

Most significantly, the DFA authorizes a monetary incentive for individuals to make whistleblower reports to the SEC. Specifically, the DFA *requires* the SEC to pay significant awards to whistleblowers who voluntarily provide the SEC with original information about a securities law violation that leads to a successful enforcement action resulting in monetary sanctions exceeding \$1 million. The incentive may be as much as 10% to 30% of the monetary sanctions imposed on an offending organization. The DFA authorizes a direct action in federal court for whistleblowers who claim retaliation. The statute of limitations is six years after the date on which the retaliation occurred or three years after the date on which the facts material to the right of action are known or reasonably should be known to the whistleblower. Remedies include reinstatement, double back pay with interest, litigation costs, expert witness fees, and reasonable attorneys' fees.

The potential to obtain bounty payments, together with the enhanced protections against retaliation, likely will trigger a new wave of employment law claims as opportunistic litigants allege whistleblower status to assert retaliation and discrimination complaints against their employers.

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