OVERVIEW OF RETALIATION LAWS
BEYOND EEOC

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This paper provides a galactic-level overview of the retaliation laws enforced by the Equal Employment Opportunity Commission (“EEOC”), the False Claims Act (“FCA”) retaliation provisions, and the retaliation laws administered by the Department of Labor. At the conclusion of the paper there is a comparison of some of the provisions.

I. Retaliation Laws Enforced by EEOC

A. Elements of Retaliation Claim

The EEOC enforces Title VII of the Civil Rights Act of 1964, the Equal Pay Act (“EPA”), the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”). All of these laws make it illegal for an employer to fire, demote, harass or otherwise “retaliate” against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or opposing discrimination. Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because she engaged in a protected activity.

Retaliation claims, brought under Title VII and other similar statutes, generally follow the McDonnell Douglas framework for establishing a prima facie case.\(^1\) There are three essential elements of a retaliation claim: 1) opposition to discrimination or participation in covered proceedings; 2) adverse action; and 3) causal connection between the protected activity and the adverse action.\(^2\)

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice or from participating in an employment discrimination proceeding. Examples of adverse actions include: employment actions such as termination, refusal to hire, and denial of promotion, other actions affecting employment such as threats, unjustified negative evaluations, and unjustified negative references.

Protected activity includes: opposition\(^3\) to a practice believed to be unlawful discrimination or filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under one of the employment discrimination statutes.

B. Coverage

If the complaint is against a business or some other private employer, then employers with 15 or more employees are covered under Title VII and ADA. Employers with 20 or more employees are covered under ADEA. Virtually all employers are covered under the EPA.\(^4\)

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\(^1\) There are retaliation protections in other civil rights statutes, like Section 1981, which prohibits race or color discrimination. See CBOCS West, Inc. v. Humphries, 553 U.S. 442, 128 S.Ct. 1951 (2008). There is no administrative exhaustion requirement under Section 1981, which is the big difference between Section 1981 and Title VII.


\(^3\) Opposition is informing an employer that you believe that he is engaging in prohibited discrimination. It is protected if based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law and the manner of the opposition is reasonable.
Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. Additionally, it is unlawful for a worker’s current employer to retaliate against him for pursuing an EEO charge against a former employer.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else’s exercise of rights granted by the ADA.

**C. Statute of Limitations**

The general statute of limitations for retaliation claims is 180 days to file a charge. This time limit may be extended by state laws. Federal employees have 45 days to contact an EEO Counselor.

All of the laws enforced by EEOC, except for the Equal Pay Act, require the complainant to file a Charge of Discrimination with EEOC before the complainant can file a job discrimination lawsuit against her employer.

**D. Relief**

There are various forms of relief attainable, such as compensatory damages; reinstatement; back pay; attorneys’ fees; and injunctive relief. Title VII damages are capped at $300,000. State law civil rights claims often have no caps.

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5 http://www.eeoc.gov/laws/types/facts-retal.cfm
6 http://www.eeoc.gov/laws/types/retaliation.cfm
7 Drennon-Gala v. Department of Justice (Bureau of Prisons), EEOC Request No. 05A40941 (September 23, 2004).
8 Jackson v. Department of the Interior, EEOC Appeal No. 07A30126 (September 28, 2004).
9 Section 706(f)(2) of Title VII authorizes the EEOC to seek temporary injunctive relief before final disposition of a charge when a preliminary investigation indicates that prompt judicial action is necessary to carry out the purposes of Title VII. The ADA incorporates this provision in Section 107. Even though the ADEA and the EPA do not authorize interim relief pending resolution of an EEOC charge, the EEOC can seek such relief as part of a lawsuit for permanent relief, pursuant to Federal Rule of Civil Procedure 65.
Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h)(1). “A successful claim for retaliation under § 3730(h) requires that the plaintiff establish three basic elements: (1) he engaged in “protected activity” by acting in furtherance of a qui tam suit; (2) his employer knew of these acts; and (3) his employer took adverse action against him as a result of these acts.”10 The first and second prongs of this test were broadened by the passage of the Fraud Enforcement and Recovery Act (“FERA”) in 2009.

By its terms, Section 3730(h) not only protects employees from discharge, it also “prevents the harassment, retaliation, or threatening of employees who assist in or bring qui tam actions.” To establish a retaliation claim under the FCA, a plaintiff must demonstrate some causal connection between her alleged protected activity and her adverse employment action.

B. Coverage

Section 3730(h) itself is broadly worded, providing that “any employee” who is retaliated against because of his or her lawful acts as a whistleblower is entitled to maintain an action for retaliation. FERA amended the retaliation provision by adding “‘contractor’ and ‘agent’ to ‘employee’ in the list of potential FCA retaliation plaintiffs.”11 This expanded the scope of the anti-retaliation provision by excluding language that limited relief to retaliatory actions by an employer. Subcontractors may bring an FCA retaliation claim under the 2009 amendments to Section 3730(h).

“[T]he congressional intent for the amendment was to ‘correct[] loophole[s]’ and ‘assist individuals who are not technically employees . . . , but nonetheless have a contractual or agent relationship with an employer.’”12 Section 3730(h) also provides that an action may be brought against an “employer” who retaliates against a whistleblower.

C. Statute of Limitations

Prior to FERA, the Supreme Court decision held that the Act lacked an applicable statute of limitations provision and that therefore the courts must apply the limitations period from the “most analogous” state statute.13 The FERA amendments add an explicit three-year statute of limitations period for all FCA anti-retaliation actions.14

10 Glynn v. EDO Corp., 710 F.3d 209, 214 (4th Cir. 2013).
14 31 U.S. Code § 3730(h)(3).
IV. Relief

Relief includes reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination; 2 times the amount of back pay; interest on the back pay; and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.15

III. Department of Labor Administered Retaliation Laws

The Department of Labor, Occupational Safety & Health Administration’s (“OSHA”) Whistleblower Protection Program enforces the whistleblower provisions of twenty-two whistleblower statutes.16

A. Elements of Retaliation Claim

The OSHA investigation must reveal that: 1) the employee engaged in protected activity; 2) the employer knew about or suspected the protected activity; 3) the employer took an adverse action; and 4) the protected activity motivated or contributed to the adverse action.

B. Coverage

Coverage under the statutes administered by OSHA varies by statute.

C. Statute of Limitations

Complaints must be reported to OSHA within set, and often short, timeframes following the discriminatory action, as prescribed by each law. For example, if you have been punished or retaliated against for exercising your rights under the OSH Act, you must file a complaint with OSHA within 30 days of the alleged reprisal, while an employee has 180 days to file under the Consumer Financial Protection Act.

D. Relief

Potential remedies, depending on the statute the claim is brought under, include backpay, compensatory damages, and sometimes punitive damages. Some of the whistleblower statutes allow for preliminary reinstatement.

IV. **Sarbanes Oxley Act**

A. **Elements of Retaliation Claim**

The Sarbanes-Oxley Act (“SOX”) of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. SOX claims are initially administered by the DOL.

Employees are protected from discharge, demotion, suspension, or being threatened or harassed or discriminated against for engaging in such protected activity. An employee can make a prima facie by showing: 1) the employee engaged in a protected activity; 2) the respondent knew or suspected that the employee engaged in the protected activity; 3) the employee suffered an adverse action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

B. **Coverage**

The anti-retaliation provision of SOX covers employees of companies: with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or that are required to file reports under Section 15(d) of the Securities Exchange Act, including any subsidiaries or affiliates whose financial information is included in the consolidated financial statements of such company; and Employees of nationally recognized statistical ratings organizations.

The Administrative Review Board has expanded coverage of the SOX provisions to apply to employees of private businesses that contract with publicly traded companies.

C. **Statute of Limitations**

Under SOX, the employee must report a complaint to the Secretary of Labor within 180 days (i) of the alleged violation or (ii) after the employee became aware of the violation. If the Department of Labor does not issue a final decision within 180 days after the employee files a complaint, the employee may file an action in federal court for de novo review and is entitled to a trial by jury.

D. **Relief**

17 Public Law No. 111-203, 18 U.S.C. § 1514A.
18 18 U.S.C. § 1514A.
Potential remedies include backpay, preliminary reinstatement, and compensatory but no punitive damages. The preliminary order should include all relief necessary to make the employee whole, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney’s fees.

E. Procedures

Workers can file a complaint with OSHA if they believe that their employer has retaliated against them for exercising their rights under SOX.

A SEC Commission rule adopted in 2011 under the Dodd-Frank Act authorized the SEC to bring enforcement actions based on retaliation against whistleblowers who report potential securities law violations to the agency. Another protection codified in the SEC whistleblower laws is the creation of a private cause of action against the corporation if it retaliates against an employee whistleblower.

A whistleblower has up to six years after the retaliatory conduct, or three years after the whistleblower learns of the retaliatory conduct, to file a lawsuit against its employer under the SEC Whistleblower Protection Program. For comparison, a whistleblower has a 180-day statute of limitations for filing a SOX whistleblower claims.

The potential relief if a person brings a SEC whistleblower protection claim includes reinstatement, double back pay with interest, and compensation for litigation costs, expert witness fees and reasonable attorneys’ fees. 

V. Comparing the Civil Rights Retaliation Provisions to Other Retaliation Laws

A. Coverage

Depending on the statute which provides the retaliation provisions, some employees may not be covered. Some of the retaliation laws cover parties other than just the employee. Other retaliation laws cover employees no matter the size of the employer.

B. Procedure

Each of the different statutes have different procedures. The civil rights laws generally mandate exhaustion prior to litigation. The DOL-administered laws generally only provide an administrative process. Exhaustion is not required under the SEC Whistleblower Program or under the FCA prior to litigation.

C. Causation

The Supreme Court in University of Texas Southwestern Medical Center v. Nassar held that retaliation claims under Title VII are required to be decided by what is known as the “but-for” causation standard.

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21 https://www.sec.gov/about/offices/owb/owb-faq.shtml#P2_764
In a direct claim for discrimination or harassment under Title VII, courts have held that a plaintiff need only prove that illegal discrimination or harassment was a “motivating factor” for an adverse action against the employee, which is known as the “mixed motive” causation standard. Post Nassar, at least one court has held that the “but-for” standard applies to retaliation claims under the False Claims Act because the causation language in § 3730(h) of the FCA is very similar to that used in Title VII.

The language of the retaliation provision in the FCA resembles the language of the retaliation provision in Title VII. Both the Title VII retaliation provisions and the FCA retaliation provision arguably should be interpreted to use the same standard because both provide that the employer cannot retaliate against the employee “because of” engaging in protected activity.

Under the statutes administered by DOL, the protected activity only has to be a contributing or motivating factor in the adverse action. For example, under the Federal Rail Safety Act (“FRSA”), the plaintiff-employee need only show that his protected activity was a “contributing factor” in the retaliatory discharge or discrimination, not the sole or even predominant cause.

D. Damages

Title VII allows for the recovery of noneconomic damages. Title VII limits compensatory and punitive damages for intentional discrimination to a maximum of $300,000 for large employers (with more than 500 employees) and less for smaller employers.

Both the FCA and Sarbanes Oxley allow for the recovery of noneconomic or emotional distress damages. Analogizing the SOX retaliation statute to the FCA retaliation provision, a court held that emotional distress damages are available for retaliatory discharge under SOX, which, like Sec. 3730(h), the FCA retaliation provision, entitles a prevailing plaintiff to “all relief necessary to make the employee whole.” In addition to reinstatement, the FCA allows for

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24 Even though the D.C. Circuit has applied the mixed-motive standard to retaliation claims, it is unclear whether that standard would still be used after the Supreme Court decided Nassar. In United States ex rel. Schweizer, the court opined that the D.C. Circuit, faced with the same question now, would apply the “but for standard” to retaliation claims under the FCA. U.S. ex rel. Schweizer v. Oce N. Am., 956 F. Supp. 2d 1, 13 (D.D.C. 2013).
25 Id.
27 See 49 U.S.C. § 42121(b)(2)(B)(ii); Arujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013). The language of the FRSA provides that a railroad carrier may not “discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done . . . to assist in any investigation.” 49 U.S.C. § 20109.
28 “The language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination” and that “[t]he EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).
30 See Jones v. Southpeak Interactive Corp. of Delaware, 777 F.3d 658, 672 (4th Cir. 2015) (noting that “[e]very federal circuit court to have addressed the issue has concluded that the False Claims Act affords noneconomic compensatory damages” (internal quotation marks omitted)).
double back pay, interest on backpay and “compensation for special damages” including legal fees.31

Often, the retaliation damages available under the FCA (and the SEC) are more robust than those of the civil rights laws.

E. Protection for Employee Disclosure of Documents

The FCA generally protects employees who have come into possession of an employer’s confidential documents.32 In contrast, some courts who have addressed this issue in non-FCA cases have employed a balancing test approach, with the majority finding that the improper taking of confidential documents from the workplace is generally not protected activity.33 Therefore, there seems to be broader protection under the FCA for employees collecting information.

32 See generally United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 740 (D.C. Cir. 1998) (stating that § 3730(h) “manifests Congress’ intent to protect employees while they are collecting information about a possible fraud.”).
33 See, for example, Niswander v. Cincinnati Ins. Co., 529 F.3d 174 (6th Cir. 2008) (employing a balancing test to hold that plaintiff who copied and gave documents to her attorney in furtherance of pending class action lawsuit had not engaged in protected activity); Argyropoulous v. City of Alton, 539 F.3d 724, 733-34 (7th Cir. 2008) (holding that employer’s admission that plaintiff employee’s surreptitious recording was a significant factor in her dismissal did not amount to direct evidence of retaliation because Title VII “does not grant the aggrieved employee a license to engage in dubious self help tactics or workplace espionage in order to gather evidence of discrimination.”).