Client Alert: U.S. Department of Labor Releases Guidance on Protecting Workers From Retaliation

BY TRACY THOMAS BOLAND AND RAYMOND M. RIPPLE • MARCH 28, 2022

The U.S. Department of Labor (DOL) recently released guidance addressing retaliation against employees who assert workplace rights under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), as well as other employment-related statutes that are enforced by the DOL's Wage and Hour Division (WHD). DOL Field Assistance Bulletin No. 2022-02 (FAB2022-02), issued on March 10, 2022, provides a comprehensive review of worker protections from retaliation under federal law, as well as specific examples of what constitutes retaliation under the FLSA, the FMLA, and other employment statutes.

PROHIBITED RETALIATION

FAB2022-02 provides a detailed summary of the legal standards for what constitutes prohibited retaliation under the FLSA, the FMLA, and other employment statutes enforced by the WHD. Retaliation occurs when an employer, including through a manager, supervisor, administrator or other agent, takes an adverse action against an employee because they engaged in a protected activity. Examples of protected activity include making a complaint to a manager, employer, or the WHD; cooperating with a WHD investigation; requesting payment of wages; complaints by a third party on behalf of an employee; consulting with WHD staff; testifying at trial; and exercising, or attempting to exercise, rights protected by statute such as requesting certain types of leave or entitlement to overtime.

FAB2022-02 makes clear that an employee can be protected from retaliation even if the employee's complaint to the employer or the WHD is based on a mistaken belief that the employee's rights have been violated.

According to the guidance, an adverse action is any action that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity, such as filing a complaint or cooperating in a WHD investigation. Examples of an adverse action taken by an employer include termination; confiscating a worker's passport or other immigration documents; disciplinary actions; reduction of work hours or rate of pay; shift changes or elimination of pay; and demotion. FAB2022-02 also makes clear that adverse actions can be subtle, such as excluding an employee from a regularly scheduled meeting.

THE FLSA

The FLSA establishes minimum wage, overtime pay, and recordkeeping standards affecting employees in both the public and private sector. The FLSA also provides that it is a violation for any person to discriminate against an employee for filing a complaint that initiates a proceeding related to the FLSA. In FAB2022-02, the DOL provided hypothetical situations to illustrate unlawful retaliation under the FLSA. The first example involved an employee who was terminated after contacting the WHD confidentially to inquire about overtime pay. The second example involved a

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new mother who was sent home for the day without pay after asking her supervisor for additional time to express breast milk. Under both hypotheticals, the DOL concluded that the employees suffered retaliation for exercising their rights under the FLSA.

THE FMLA

The FMLA provides eligible employees of covered employers with job-protected leave for specified family and medical reasons. At the conclusion of FMLA approved leave, an employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. The FMLA prohibits interfering with, restraining, or denying an employee's exercise of, or attempt to exercise, any FMLA right. The law also prohibits employers from discharging or in any other way discriminating against any person for opposing or complaining about any unlawful practice under the FMLA.

The DOL also provided hypothetical situations to illustrate unlawful retaliation under the FMLA. One notable hypothetical involved an employee penalized for using FMLA leave to care for a child. The employee took approved FMLA leave to care for his seven-year-old daughter when she was in the hospital overnight recovering from surgery. The employee returned to work as scheduled but received three negative attendance points for the days he used FMLA leave. Under the company'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 year may be terminated. Under this hypothetical, the DOL found that assigning attendance points to the employee for the FMLA-protected leave days would be prohibited. 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. The WHD stated it would require the employer to remove the attendance points from the employee's record for the days he used FMLA leave.

WHY IS FAB2022-02 SIGNIFICANT?

Field assistance bulletins such as FAB2022-02 provide the DOL's WHD investigators and staff with guidance on enforcement positions and clarification of policies or changes in the policy of the WHD. They typically provide positions that reflect changes or clarifications in the administration of law enforced by the WHD and related regulations based upon court decisions, legislative changes, and opinions of the WHD administrator. As a result, when attempting to comply with federal statutes subject to enforcement by the WHD, employers and their counsel can look to field assistance bulletins for guidance on how regulators might interpret certain workplace issues. Field assistance bulletins also signal an area of importance for regulators when it comes to future enforcement.

Employers with questions should consult with their Bowditch Employment & Labor attorneys.

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