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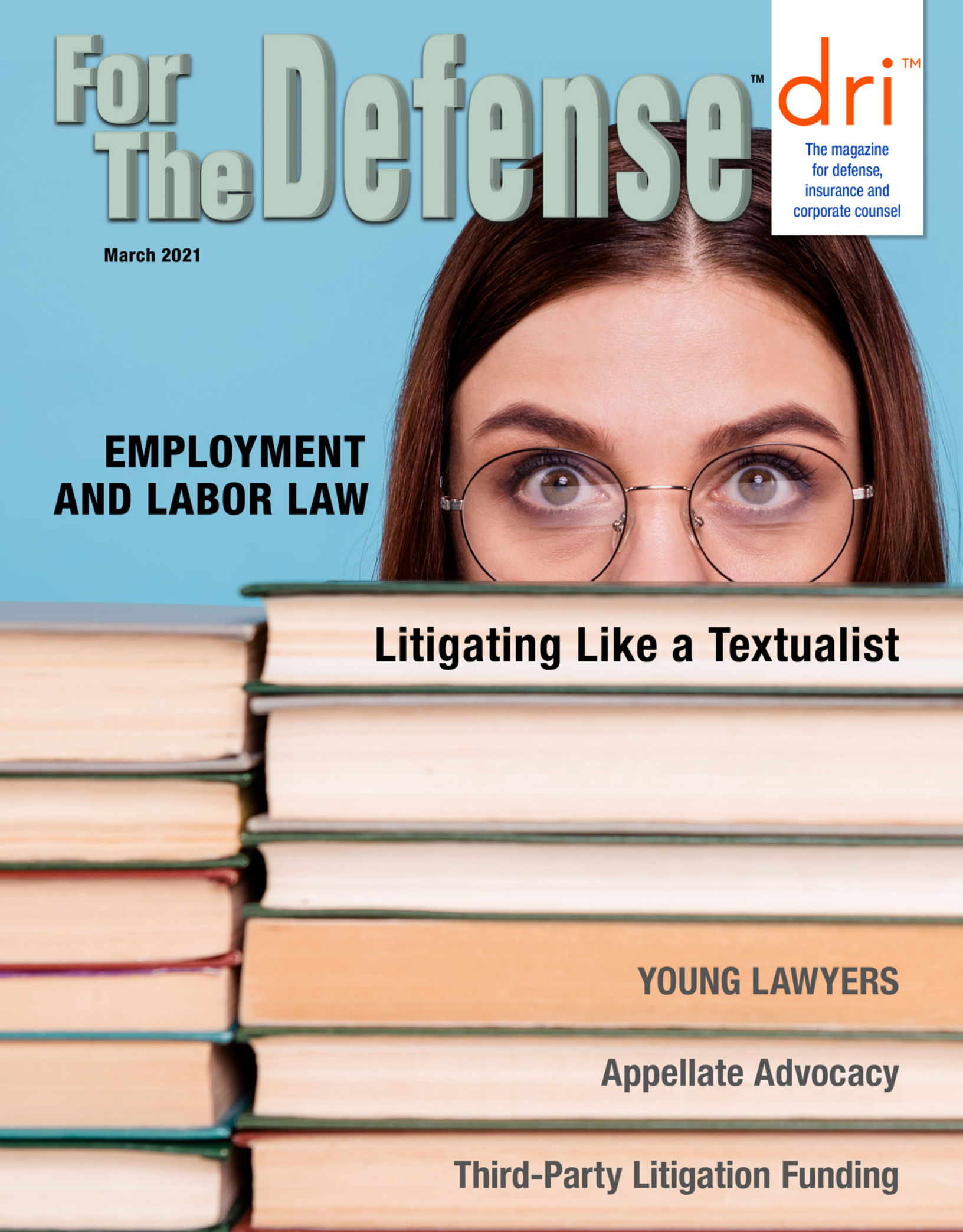

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COVID-19-related Whistleblower and Retaliation Claims

By Durga Bharam and Matthew O'Malley

Reduce employer liability and keep the workforce safe by understanding the regulations, both old and new, that shape pandemic-related employment claims.

The past year has been unprecedented for employers and employees alike. Every industry and individual has been affected by the COVID-19 pandemic, which has forced lawyers, employers, and employees to adapt quickly to the changing workplace and to new practices and procedures. These adaptions included addressing greater risks to the health and safety of employees. They also included addressing the significant financial challenges that have been caused by government-imposed lockdowns and closing of businesses. Due to the unanticipated economic hardship of the pandemic, many employers had to take drastic measures, including, but not limited to: laying off employees, reducing pay, reducing work hours, and/or reducing benefits. It is, therefore, not surprising that the timing of these adjustments has coincided with a rise in the number of retaliation claims filed by employees. Notably, employees have begun to raise concerns about their workplace in the COVID-19 pandemic and subsequently found that they were affected by the employer's business decisions to reduce staff, pay, and/or hours.

Although the overall number of employment-related claims was down in 2020, certain pandemic-related claims were on the rise. Many employers have faced or may face a variety of COVID-19 employment claims. Such claims include those arising from mass layoffs under the Worker Adjustment and Retraining Notification

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Act of 1988, also known as the "WARN Act" (or similar state statutes known as mini-WARN Acts), and/or disparate impact claims under a federal discrimination statute such as Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act (ADEA). A disparate impact claim arises when a facially neutral employment practice has a disproportionate discriminatory effect or impact upon a protected group of employees. For example, let's say an employer decides to reduce the pay of all its highly paid workers due to the pandemic. If that neutral policy happens to have an effect of reducing the salary of mostly the employer's older workers, those older workers may be able to bring a disparate impact claim under the ADEA. Employers have also faced wage and hour claims under the Federal Labor Standards Act (FLSA), or similar state statutes, for unpaid hours worked, due to the difficulty of employers tracking time of a remote workforce or for lack of reimbursement for use of personal equipment for business purposes. Similarly, employers have had to address claims pertaining to pandemic-related leaves of absence. However, one of the most prevalent employment claims due to COVID-19 has focused on retaliation. Most of the retaliation claims arise in the context of an employee "whistleblower" who reports concerns over an employer's health and safety compliance. These claims may be asserted under federal or state statutes, or even under common law.

Since the onset of the pandemic, there have been numerous claims that allege retaliation for "blowing the whistle" and objecting to unsafe working conditions and exposure to individuals with COVID-19 symptoms in the workplace.

Generally, most state and federal laws contain provisions that make it unlawful for employers to retaliate against employees who exercise their protected legal rights or oppose unlawful employer actions. Most recently, in updated guidelines issued on January 29, 2021, OSHA reminded employers not to retaliate against employees who express COVID-19 related concerns in relation to the workplace. National News Release, OSHA, U.S. Dep't of Labor issues stronger workplace guidance on coronavirus (Jan. 29, 2021). Since the onset of the pandemic, there have been numerous claims that allege retaliation for "blowing the whistle" and objecting to unsafe working conditions and exposure to individuals with COVID-19 symptoms in the workplace. *See, e.g.*, *COVID-19 Response Summary*, U.S. Department of Labor (Nov. 26, 2020), **https://www.whistleblowers.gov/covid-19-data**. Moreover, the risks for other retaliation claims have increased, given this ever-evolving situation and the complex health and safety provisions of which employers need to be aware. This article will discuss these claims as well as provide guidance for prevention and defense of retaliation claims.

The Basics

Retaliation claims are often found to be fact intensive and include complex federal, state, and even local laws. However, the basic parameters for establishing retaliation are that an employee must demonstrate that: (1) he or she engaged in a protected activity, (2) his or her employer took an adverse action against him or her, and (3) a causal connection exists between the protected activity and the adverse action. *Sweeney v. City of Ladue*, 25 F.3d 702, 703 (8th Cir. 1994).

Courts have interpreted the term "protected activity" broadly. For instance, telling one's supervisor to stop discriminatory conduct is a basic form of protected activity. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000). Similarly, opposition to an employer's policies by formal or informal complaints also qualifies as a form of protected activity. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). The U.S. Supreme Court in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, held that informal complaints can constitute protected activity, stating "[w]hen an employee communicates to [their] employer a belief that the employer has engaged in a form of employment discrimination, that communication 'virtually always' constitutes the employee's opposition to the activity." 555 U.S. 271, 276 (2009). Clearly voicing a concern about the safety of the workplace to an employer would constitute protected activity under this analysis.

The second prong needed to assert a claim requires that the employee establish that the employer took an adverse action against the employee. The Supreme Court has found that an adverse action, in the context of a retaliation claim, is one that is "harmful to the point that [the employer's action] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). In other words, the action taken by the employer would make the employee think twice about bringing their discrimination claim. As opined by the Second Circuit, there are no bright-line rules with respect to what constitutes an adverse employment action. *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 721 (2d Cir. 2010). It is the court's duty to determine whether the challenged employment action reaches the level of adverse. *Id*. In determining whether conduct amounts to an adverse employment action, the court will consider the acts of retaliation separately; and, in the aggregate, even minor acts of retaliation can be sufficient to bring an action. *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010). An employee can arguably even claim that he or she was constructively discharged. In *Brooks v. Corecivic of Tennessee LLC*, 2020 U.S. Dist. LEXIS 162429, 85 Cal. Comp. Cases 843 (S.D. Cal. 2020), the district court applied California law to determine whether an employer wrongfully terminated an employee amid COVID-19 concerns. In the decision, the court explored whether the working conditions were so intolerable that a reasonable person in the plaintiff's position would have had no reasonable alternative except to resign. The court held this inquiry is inherently fact-bound. *Id*.

Lastly, the third prong requires an employee to show that a causal connection exists between the protected activity and the adverse action. Here, the timeline of when the protected activity was engaged in and the subsequent adverse action may be instructive. *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 915 (8th Cir. 2006). In other words, a causal connection between the protected activity and the employer's adverse employment action can be established by showing that the employer's action followed the protected activity closely in time. *Davis-Garett v. Urban Outfitters, Inc*., 921 F.3d 30, 44 (2d Cir. 2019).

If an employee can establish all three prongs of the claim, the burden shifts to the employer to advance a legitimate, nonretaliatory reason for its adverse employment action. *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500–01 (3d Cir. 1997). This burden is easily fulfilled if the employer articulates any legitimate reason for the adverse employment action. *Id.* When the employer satisfies its burden, the employee must then convince the court that the employer's proffered explanation was false, or a pretext, and that retaliation was the real reason for the adverse employment action. *Id*.

It should be further noted that the law protects a whistleblower against retaliation, regardless of the merits of the claim. An employee who, under a mistake of fact or law, raises concerns that are not merited and faces retaliation may still assert a retaliation claim. In fact, these claims are taken very seriously by government agencies such as the Equal Employment Opportunity Commission (EEOC) and, as a result, may be more likely to be pursued by the agency. This simply proves the extent government agencies and legislatures will go to protect whistleblowers and discourage employers from breaking laws.

Federal and State Laws

There are various federal laws at play when it comes to retaliation claims. The Federal Whistleblower Protection Act is outlined in 42 U.S.C.S. §2000e-3(a). It states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Under this statute, an employee who raises concerns to a government agency or even just to the employer about the safety of the workplace has engaged in "protected activity."

The Occupational Safety and Health Act (OSHA) states that employers have a "general duty" to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [the employer's] employees." 29 U.S.C. §654(a)(1). Section 11(c) of OSHA prohibits employers from retaliating against employees for exercising their rights under the Act, including raising a health or safety complaint with OSHA. 29 U.S.C. §660(c). Although OSHA does not provide for a private cause of action against an employer, an OSHA or internal safety violation complaint could be used as a basis for a whistleblower claim under state law.

The Americans with Disabilities Act (ADA) restricts when and how much medical information an employer may obtain from an employee or applicant. Inappropriate medical inquiries or disclosure of the information may violate the ADA. The ADA may provide a basis for those individuals with underlying conditions to be designated as high-risk for exposure, and so are provided protection under the Act as well as a right to reasonable accommodation. The ADA provides that "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by" the ADA. 42 U.S.C. §12203(a). Should an employee who raised an ADA violation or sought an accommodation, such as being allowed to work at home, then be subject to some adverse employment action, he or she may file a retaliation claim under the ADA.

The Families First Coronavirus Response Act (FFCRA) was enacted on March 18, 2020, to assist certain employers to provide employees with paid sick leave, and expanded family and medical leave regarding reasons related to COVID-19. Employers are prohibited from discharging, disciplining, or otherwise discriminating or retaliating in any manner against an employee who takes paid sick leave or expanded FMLA leave under the FFCRA, files a complaint or institutes a proceeding under or related to the FFCRA, or testifies in such a proceeding. 116 P.L. 127, enacted H.R. 6201 (2020). The legislature contemplated that whistleblower activity would increase given the challenges employees and employers face during the COVID-19 pandemic and enacted this legislation in an effort to offer further protection to employees.

It should be further noted that the law protects a whistleblower against retaliation, regardless of the merits of the claim.

There are also a multitude of state laws that prohibit retaliation. The California Labor Code states in §1102.5(b) that

> [a]n employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with

> a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." The California Labor Code even prohibits retaliation "because the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

Cal. Lab. Code §1102.5(h).

Since the pandemic, a number of states have issued Executive Orders or enacted new laws that provide even greater protection to those who want to exercise their rights in light of the pandemic and to whistleblowers.

The New York legislature has also enacted its own whistleblower laws. Under New York law, an employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

> (a) discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy, or practice of the employer that is in violation of law, rule, or regulation, which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud; (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule, or regulation by such employer; or (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule, or regulation.

NY CLS Labor §740 2.

Illinois also has laws on the books that protect against whistleblower retaliation. An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a state or federal law, rule, or regulation, including, but not limited to, violations of the Freedom of Information Act. 740 ILCS 174/20.

Since the pandemic, a number of states have issued Executive Orders or enacted new laws that provide even greater protection to those who want to exercise their rights in light of the pandemic and to whistleblowers. For instance, in July 2020, Colorado enacted a new Public Health Emergency Whistleblower (PHEW) law that provides protection for safety-related workplace speech, which includes not only comments on workplace violations of government health and safety rules, but also comments on any perceived threats to health and safety, and even comments made to co-workers or in public, such as on social media. C.R.S. 8-14.4-102.Moreover, the protection applies to independent contractors. The law even prohibits retaliation against employees who choose to wear their own personal protective equipment.

In addition to state and federal protection, some cities have enacted anti-retaliation ordinances during COVID-19. For instance, in Philadelphia, the Employee Protections in Connection with COVID-19 Emergency Health Order protects from retaliation employees who (1) disclose information related to employer non-compliance with COVID-19 public-health orders, or (2) refuse to work in unsafe conditions related to COVID-19. In Chicago, the Anti-Retaliation Ordinance prohibits employers from retaliating against employees for obeying an order issued by the mayor, governor, Chicago Department of Public Health, or healthcare provider having to do with COVID-19. Similarly, Los Angeles has passed city ordinances no. 186602 and 186603, which provide similar protections.

Employers and the defense attorneys that advocate on their behalf need to be cognizant of all the state and local laws where they have operations as the basis for possible whistleblower claims. These parties should also be mindful that even in states that do not have a specific statute like those summarized above, almost all jurisdictions recognize a common law wrongful discharge claim. A well-known public policy exception to the general rule that an at-will employee can be terminated with or without cause occurs where an employee is terminated for exercising his or her statutory rights. Moreover, as stated above, the law protects a whistleblower against retaliation regardless of the merits of the underlying claim.

Prevention and Defense

While the law affords protection to the whistleblower, there are many tools that will serve an employer or counsel advising an employer, as well. These parties should stay abreast of the ever-changing laws and regulations and take prophylactic measures to guard against retaliation claims. The best practices employers can undertake to insulate themselves from exposure are to implement and/or update proper policies and procedures and documentation. It is essential that legal counsel and the human resources department of employers work together on these issues.

Employers should have in place appropriate health and safety procedures and regularly review those procedures so that they follow the most recent recommendations from the Centers of Disease Control (CDC), OSHA, and local health authorities. Legal counsel should assist employers in the review and updating of their policies and procedures to provide employees with appropriate channels to express health and safety concerns, possibly even anonymously. While it is important that these policies and procedures are in place, they are not effective if they are also not clearly communicated and known to employees. This will hopefully provide employers and their defense counsel an opportunity to rectify an unsafe condition before an employee files a complaint with OSHA or any other authority.

A policy is effective only if it ensures that the process is transparent and that all COVID-19 related health and safety complaints are taken seriously. This includes a line of succession, so that any complaint or concern is immediately directed to the appropriate department or individuals for further handling. Above all else, the policy should contain an anti-retaliation provision that ensures employees will not be disciplined or terminated because they raised or addressed complaints about a potential violation of health and safety laws or procedures. It is also important that manag-

ers and supervisors be trained regarding the policy and serve to make this policy known to all employees. Legal counsel and the human resources department should regularly remind those to report a complaint or concern immediately to the appropriate department or individual and not to retaliate against an employee even if the claim is without merit. Once a safety or health concern is raised, it should be documented, thoroughly investigated, and, where needed, the compliance issue should be quickly resolved.

Where adverse employment action needs to be taken against an employee who has previously complained or even just raised health and safety concerns, it is important to ensure that there are well-documented, independent, non-retaliatory reasons for taking the adverse action. Obviously, the health or safety complaint should neither be a factor in making an adverse action, nor should the employer be at all influenced by the complaint. In addition, as a court will look for a causal connection between the alleged termination and the employee's complaint, the greater the time period between the time the employee raised a concern and the adverse action, the greater the likelihood that a determination of no causal connection will be made.

If an employer finds itself in a position where a retaliation claim has been filed, defense counsel should note that evidence preservation is paramount. This is because these matters involve great factual complexity. An employer should maintain emails, disciplinary records, personnel files, or anything that can provide context into the termination. Legal counsel should help employers maintain regular and legal document preservation procedures. If an employee was not terminated but makes a claim of constructive discharge, any documented measures taken by the employer to provide a safe and clean work environment, such as a log of cleaning schedules, may also be helpful. Taking the proactive steps listed above, documenting measures, and being able to show proof of a safe working environment will help the reduce an employer's exposure to any of these claims.

Laws that protect whistleblowers from retaliation and the claims themselves have grown as this pandemic has continued into 2021. Defense counsel serves a critical position to stay abreast of these ever-changing developments in an effort to ensure that employers follow all applicable health and safety guidelines. By doing so, defense counsel is able to help reduce liability and help employers keep their employees safe. Those parties who implement proactive procedures, as well as comprehensive document preservation and documentation, will greatly limit any risks in the ever-evolving pandemic workplace.

This article is for general information only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or fact situation. The reader is advised to consult with an attorney to address any particular circumstance or fact situation.