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FIELD ASSISTANCE BULLETIN No. 2022-02

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Jessica Looman
Acting Administrator

SUBJECT: Protecting Workers from Retaliation

This Field Assistance Bulletin (FAB) provides information about worker protections from retaliation under the laws that the U.S. Department of Labor Wage and Hour Division (WHD) enforces.

Background

WHD is responsible for enforcing some of the nation's most comprehensive federal worker-protection laws, including protections related to the federal minimum wage, overtime pay, recordkeeping, and child labor requirements, family and medical leave, migrant and seasonal worker protections, lie detector tests, worker protections in certain nonimmigrant visa programs, and the prevailing wages for government-funded service and construction contracts. Collectively, these laws cover most private, state, and local government employment, and protect over 148 million workers in more than 10 million establishments nationwide.

Anti-retaliation protections safeguard the basic rights afforded to workers in the United States. These protections hold the promise that workers can complain to the government or make inquiries to their employers about violations of the law without fear that they will be terminated or subject to other adverse actions as a result. Too often, retaliation, or the fear of it, prevents the most vulnerable workers including those making the lowest wages, immigrant workers, workers of color, and women from exercising their workplace rights and ensuring they are paid the wages they are owed and afforded other protections under the law. Accordingly, it continues to be of paramount importance that WHD fully enforce the anti-retaliation provisions of the laws it administers to prevent and stop retaliation as early as possible.

WHD investigates employers to determine compliance with anti-retaliation provisions under several laws, including the Fair Labor Standards Act (FLSA); the Family and Medical Leave Act (FMLA); the Migrant and Seasonal Agricultural Worker Protection Act (MSPA); the H-1B,

H-1B1, E-3, H-2A, and H-2B provisions of the Immigration and Nationality Act (INA); the United States-Mexico-Canada Agreement (USMCA); Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors; EO 13658, Establishing a Minimum Wage for Contractors; EO 14026, Increasing the Minimum Wage for Federal Contractors; the Consumer Credit Protection Act (CCPA); and the Employee Polygraph Protection Act (EPPA). Upon finding a violation, WHD may pursue administrative or legal remedies, including the recovery of lost wages; reinstatement or front pay; assessment of liquidated damages and civil money penalties; and additional remedies, such as compensatory and punitive damages, dependent on the statute at issue and the facts of the particular case.

Retaliation threatens the WHD mission to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. WHD will use every enforcement tool available to address retaliation. WHD is also informing stakeholders, including workers, advocates, and employers, about our efforts to combat retaliation in the workplace. By addressing allegations of retaliation, remedying violations, and making employees whole, WHD helps ensure the success of its mission.

Prohibited Retaliation

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 WHD; cooperating with a WHD investigation; requesting payment of wages; refusing to return back wages to the employer; complaints by a third party on behalf of an employee; consulting with WHD staff; exercising rights or attempting to exercise rights, such as requesting certain types of leave; and testifying at trial.

Under many of the statutes enforced by WHD, an employee can be protected from retaliation even if the employee's complaint to the employer or WHD is based on a mistaken belief that the employee's rights have been violated. For example, if a worker believes, and so tells an employer, that he is owed overtime pay for the hours he worked, the worker has engaged in a protected activity, even if the worker's belief that he is due overtime turns out to be mistaken because he has been correctly paid.

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. An adverse action taken by an employer can take many forms, including termination; confiscating a worker's passport or other immigration documents; disciplinary actions; threats to employees, their families or co-workers; reduction of work hours or rate of pay; shift changes or elimination of premium pay; blacklisting; and demotion. *See* <https://www.dol.gov/general/topics/whistleblower>. Adverse actions can be subtle, such as excluding an employee from a regularly scheduled meeting, or overt, such as intimidating employees to return back wages found due ("kickbacks"), threatening an employee with deportation, or terminating an employee.

A finding of retaliation also requires a causal connection between the protected activity and the adverse action. An employer's actions may constitute retaliation under a law that WHD enforces even if the employer takes action based on a mistaken belief that the worker participated in a protected activity. For instance, if an employer suspects that a worker filed a complaint with WHD and terminates the worker's employment, the employer engaged in retaliation even if the worker never actually filed a complaint. Here, the adverse action is caused by the employer's belief, even if mistaken, that the worker engaged in a protected activity.

Prohibited Retaliation under the Fair Labor Standards Act (FLSA)

The FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and non-profit sector and in federal, state, and local governments. The FLSA also requires that employers provide "reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk" and provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(r). Section 215(a)(3) of the FLSA states that it is a violation for *any person* "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." See also <https://www.dol.gov/agencies/whd/fact-sheets/77a-flsa-prohibiting-retaliation>.

Employees are protected from retaliation regardless of whether the complaint is made orally or in writing. Complaints made to WHD are protected and internal complaints to an employer are also protected. Because section 15(a)(3) prohibits "any person" from retaliating "against any employee" it follows that a "person" or an entity does not need to be an employer in order to violate section 15(a)(3), and that the employee who filed a complaint or engaged in any other protected activity does not need to be an employee of that "person." For example, courts have found an employer's agent, such as an employer's outside counsel, to be liable for retaliation under section 15(a)(3).¹ Section 215(a)(3) may also apply in situations where there is no current employment relationship between the parties, for example, protecting an employee from retaliation by a former employer. Any employee who is "discharged or in any other manner discriminated against" because, for instance, she filed a complaint or cooperated in an investigation, may file a retaliation complaint with WHD or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, injunctive relief, lost wages and an additional equal amount as liquidated damages. Generally, a two-year statute of limitations applies to the recovery of back wages and liquidated damages. A three-year statute of limitations applies in cases involving willful violations.

Further, employers who willfully violate the FLSA may be prosecuted criminally and fined, imprisoned for not more than six months, or both. See 29 U.S.C. §§ 215(a)(3) and 216.

¹ See *Arias v. Raimondo*, 860 F.3d 1185, 1187–88, 1192 (9th Cir. 2017).

Example 1: Employee calls WHD about overtime.

Nelson works as a cook at a restaurant and contacts WHD confidentially to inquire about overtime pay. Nelson tells another cook what he learned from WHD and his co-worker tells someone on the wait staff. Later that day their manager overhears two wait staff talking about the call and terminates Nelson's employment.

In this scenario, terminating Nelson's employment because he contacted WHD (or was suspected of contacting WHD) would be prohibited. WHD may investigate or Nelson may file a private cause of action seeking appropriate remedies, including, but not limited to, reinstatement, lost wages, and liquidated damages.

Example 2: Employee asks for additional break time to express breast milk.

Aisha is a new mother who works for a call center. She uses her lunch break to express breast milk and needs additional time to finish pumping before she is able to return calls at her work station. Her boss complains when she is late returning from lunch and tells her she cannot use any time beyond her meal break for "personal stuff." When Aisha asks if she has a right to take another break for pumping later in the day, her boss sends her home for the rest of her shift without pay.

In this scenario, Aisha was sent home for attempting to exercise her rights under the FLSA. After investigating, WHD, in addition to requiring the employer to provide the requisite time and space for nursing mothers in compliance with the law, determines Aisha may also be entitled to back pay and liquidated damages for wages she lost when her boss sent her home in retaliation for requesting a break.

Prohibited Retaliation under the Family and Medical Leave Act (FMLA)

The FMLA provides eligible employees of covered employers with job-protected leave (which may be unpaid or used concurrently with accrued paid leave) for specified family and medical reasons. In addition to providing job-protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. Once the leave period is concluded, the 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. *See* 29 U.S.C. § 2615(a)(1); 29 CFR § 825.220(a)(1). The law also prohibits employers from discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA. *See* 29 U.S.C. § 2615(a)(2); 29 CFR § 825.220(a)(2). All persons, whether or not an employer, are prohibited from discharging or in any other way discriminating against any person for filing a charge or instituting a proceeding under the FMLA, giving or being about to give information related to an FMLA proceeding or inquiry, or testifying or being about to testify

in an FMLA proceeding or inquiry. *See* 29 U.S.C. § 2615(b); 29 CFR § 825.220(a)(3). Unlawful discharge under the FMLA includes constructive discharge. Constructive discharge occurs where an employer's actions in response to an employee exercising his or her FMLA rights makes the employee's work situation so intolerable that a reasonable person would quit or resign. *See generally* WHD Field Operations Handbook (FOH) at 39o00 and 39o01, and <https://www.dol.gov/agencies/whd/fact-sheets/77b-fmla-protections>.

Interfering with the exercise of an employee's rights includes an employer's refusal to grant FMLA leave, discouraging an employee from taking FMLA leave, or manipulation by an employer to avoid its FMLA responsibilities (*e.g.*, changing essential functions of the job in order to preclude the taking of leave). *See* 29 CFR § 825.220(b). The FMLA also prohibits an employer from discriminating or retaliating against employees or prospective employees who have used or have attempted to use FMLA leave. *See* 29 CFR § 825.220(c). Further, an employer may not use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, and cannot count FMLA leave under no fault attendance policies. *Id.* Any violation of the FMLA or the DOL's FMLA regulations constitutes interfering with, restraining, or denying the exercise of rights provided by the FMLA. *See* 29 CFR § 825.220(b). For example, if an employer's failure to timely designate FMLA leave as required by the regulations causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. *See* 29 CFR § 825.301.

An employee who believes his or her rights under the FMLA have been violated may file a complaint with the Secretary of Labor or file a private lawsuit. The FMLA provides a two-year statute of limitations or three years in the case of a willful violation. *See* 29 U.S.C. § 2617(c). An employee is not required to file a complaint with WHD prior to bringing an action in court. FOH 39o02.² Available remedies include, but are not limited to, compensation and benefits lost by reason of the violation, other actual monetary losses sustained as a direct result of the violation, and appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 29 U.S.C. § 2617; 29 CFR § 825.400. Additionally, WHD may, in some circumstances, assess liquidated damages. *Id.*; *see* 29 U.S.C. § 2617; 29 CFR §§ 825.400 – .401, and FOH 39o02.

Example: Worker penalized for using FMLA leave to care for child.

Jaime takes approved FMLA leave to care for his seven-year-old daughter when she is in the hospital overnight and recovering from surgery. Jaime returns to work as scheduled but receives three negative attendance points for the days he used FMLA leave. Under his employer'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 calendar year may be terminated.

² A state employee's private right of action may be limited by the sovereign immunity provision of the Eleventh Amendment. *Id.*

In this scenario, assigning attendance points to Jaime's FMLA-protected leave days would be prohibited. Under the FMLA's anti-retaliation provisions, 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. In an investigation, WHD would require that the employer remove the attendance points from Jaime's employment record for the days he used FMLA leave to care for his daughter.

Example: Employee returns to work and her hours are cut in half.

Deborah used FMLA leave from her job as a front desk clerk at a hotel when she suffered from migraine headaches that made it impossible for her to work. She was approved for FMLA leave and used it for three days in January and one day in February. In April, she had another episode, and used FMLA leave for two days. When she returned to work her new manager reduced her schedule from 40 hours to 20 hours a week saying they need workers who will show up every day.

WHD completes an investigation and requires the hotel to return Deborah to her previous schedule and pay her for an additional 20 hours a week in wages for the duration of the period she worked the reduced schedule. WHD also requires the employer to pay Deborah an amount equivalent to her lost wages in liquidated damages.

Prohibited Retaliation under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. MSPA also requires farm labor contractors and farm labor contractor employees to register with the U.S. Department of Labor and to obtain special authorization before housing, transporting, or driving migrant or seasonal agricultural workers.

The MSPA statute and regulations protect any migrant or seasonal agricultural worker against retaliation because such worker has, with just cause, filed any complaint or instituted or caused to be instituted any proceeding under or related to MSPA, or has testified or is about to testify in any such proceedings, or has exercised or asserted on behalf of themselves or others any right or protection afforded by MSPA. All persons, whether or not an employer, are prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating in any other manner against any migrant or seasonal agricultural worker. *See* 29 U.S.C. § 1855(a), 29 CFR § 500.9, and <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs77c.pdf>.

Any person aggrieved by any violation of MSPA committed by any person may file a complaint with WHD or file a civil suit in any U.S. district court having jurisdiction without regard to the amount in controversy or to the person's citizenship. MSPA requires the complaint to be filed within 180 days of an alleged, prohibited adverse action. The person is not required to file a complaint with WHD prior to bringing an action in court. Available remedies include, but are not limited to, injunctive relief, potential employment reinstatement (not limited to the current season), back pay, and damages due to a substantiated violation of the MSPA anti-retaliation

provisions. Additionally, WHD may assess civil money penalties against the employer for MSPA violations, as well as file a civil action in an appropriate federal district court.

Example: WHD investigates and employer fires crew of agricultural workers.

An employer houses 15 migrant agricultural workers in housing that is determined to be substandard. Workers sleep on the floor, have no electricity, use water from a garden hose, and have one hotplate for cooking that is shared among all of the workers. After a WHD investigator arrives at the location unannounced to inspect the housing conditions and interview workers, the employer fires all 15 workers because, “We don’t want any whiners on the team.” The employer does not pay the workers for their final week of work.

In this scenario, WHD may pursue back pay, and reinstatement of employment for every worker, and civil money penalty assessments against the employer.

Prohibited Retaliation under the H-1B, H-1B1, and E-3 Visa Programs

Under the Immigration and Nationality Act (INA), the H-1B visa program allows an employer to hire a nonimmigrant worker in a specialty occupation or as a fashion model of distinguished merit and ability. The H-1B1 program provides a similar framework applicable specifically to nonimmigrants in specialty occupations from Chile and Singapore, as does the E-3 program for nonimmigrants in specialty occupations from Australia. The regulations establish certain standards to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers, as well as to protect the workers with H-1B, H-1B1, and E-3 visas. The visa process begins with the employer’s filing of a Labor Condition Application (LCA) with the U.S. Department of Labor Employment and Training Administration (ETA). WHD enforces all elements of the LCA.

The H-1B, H-1B1, and E-3 statute and regulations safeguard both U.S. and nonimmigrant workers against retaliation (including current employees, former employees, or job applicants) for disclosing any information to the employer or any other person or entity that the worker reasonably believes shows that the employer failed to comply with any of the H-1B, H-1B1, or E-3 provisions or regulations, or because the employee has cooperated or sought to cooperate in an enforcement activity. Employers participating in these visa programs are prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating in any other manner against a worker who has engaged in a protected activity. *See* 8 U.S.C. § 1182(n)(2)(C)(iv); 8 U.S.C. § 1182(t)(3)(C)(iv); 20 CFR § 655.801(a)(1)-(2).

Any U.S. or nonimmigrant worker (current employee, former employee, or job applicant) may file a complaint with WHD within 12 months of an alleged, prohibited, adverse action. WHD may impose administrative remedies as appropriate, including, but not limited to, reinstatement of workers who were discriminated against, reinstatement of displaced U.S. workers, back wages to workers who have been displaced or whose employment has been terminated in violation of these provisions, or other appropriate legal or equitable remedies such as civil money penalties and disqualification from filing subsequent immigrant or nonimmigrant petitions for at least two

years. *See* 20 CFR § 655.801(b). Additionally, an H-1B, H-1B1, or E-3 worker who has filed an anti-retaliation complaint may be allowed to seek other appropriate employment in the United States, provided the employee is otherwise eligible to remain and work in the United States. *See id.* § 655.801(c).

Example: Worker threatened with deportation.

An employer participating in the H-1B visa program hired seven workers with H-1B visas to provide occupational, physical, and speech therapy services to patients in their homes. The employer deducted a monthly sponsorship fee from the pay of each worker with an H-1B visa. The employer required the workers to sign a form declaring that the deductions were for recouping personal loans it purportedly gave to the workers. When one worker refused to sign the document, the employer threatened him with deportation, criminal perjury, and threats of physical violence against his family in his home country.

In this scenario, WHD may pursue back wages for the illegal deduction, civil money penalties against the employer for the retaliation, debarment from the H-1B program for two years, and other appropriate legal or equitable remedies. WHD also may, potentially, make a referral to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.³

Prohibited Retaliation under the H-2A Visa Program

The INA also authorizes the admission into the U.S. of temporary, nonimmigrant workers to perform agricultural labor or services that are temporary or seasonal in nature (workers with an H-2A visa). Employers participating in the H-2A visa program must have initially attempted to find U.S. workers to fill these jobs. Such employers are obligated to comply with the terms and conditions specified in the job order or contract, including paying special rates of pay that vary by locality, providing housing and transportation from that housing to the job site if the employment requires the worker to be away from their residence overnight, and guaranteeing an offer of employment for a total number of hours equal to at least 75 percent of the work period specified in the contract. Employers must comply with all applicable statutory and regulatory requirements, including the prohibition against retaliation. These requirements extend to the workers with an H-2A visa and workers in corresponding employment (non-H-2A workers employed by an employer participating in the H-2A visa program who, during the job order period, perform work listed in the job order or the same work as the workers with H-2A visas).

The H-2A visa program regulations safeguard any person (including a current employee, former employee, or job applicant, whether a worker with an H-2A visa or a worker in corresponding employment) who has filed a complaint under or related to the H-2A program; instituted or caused to be instituted any proceeding related to the H-2A program; testified or is about to testify in any such proceedings; consulted with an attorney or legal assistance program; or, exercised or

³ The Immigrant and Employee Rights section (IER) enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. Regulations for this law are found at 28 CFR § 44.

asserted, on behalf of themselves or others, any right or protection under the H-2A program. All persons (including agricultural associations, fixed-site employers, agents, recruiters, and H-2A labor contractors) are prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating in any other manner against a person who has engaged in any of these protected activities. *See* 29 CFR § 501.4(b), 20 CFR § 655.135(h), and <https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation>.

Under the H-2A program, as with other WHD enforcement programs, any person may file a complaint with WHD of an alleged prohibited adverse action. WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the person whole (e.g., back wage recovery) as a result of the retaliation, as appropriate. *See* 29 CFR § 501.16. WHD may also initiate debarment proceedings against the employer, successor in interest, agent or attorney to prevent them from receiving or participating in the filing of future labor certifications, and recommend to the ETA Office of Foreign Labor Certification (OFLC) revocation of any such violator's current labor certification. *See* 29 CFR § 501.20. WHD may initiate debarment proceedings no later than two years after the occurrence of the violation, and for debarment of a period of no more than three years from the date of the final agency decision. *See* 29 CFR § 501.20. Additionally, WHD may forward complaints alleging discrimination based on citizenship or immigration status to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section. *See* 29 CFR § 501.4(b).

Example: Workers intimidated after seeking help.

At a farm participating in the H-2A visa program, workers with H-2A visas ask the employer for food and water and the employer flies into a rage and threatens the workers with physical harm.

In this scenario, WHD may pursue injunctive relief, assess civil money penalties, and initiate debarment proceedings. WHD may also refer the employer to OFLC for consideration of revocation of the employer's current labor certification.

Prohibited Retaliation under the H-2B Visa Program

The H-2B visa program under the INA permits employers to hire temporary nonimmigrant workers to perform nonagricultural labor or services in the U.S. The H-2B visa program requires the employer participating in the H-2B visa program to attest to the U.S. Department of Labor that it will offer a wage that equals or exceeds the highest of the prevailing wage, applicable federal minimum wage, the state minimum wage, or local minimum wage to the worker with an H-2B visa for the occupation in the area of intended employment during the entire period of the approved H-2B visa program labor certification. Employers seeking participation in the H-2B visa program must also attest that they will abide by the terms and conditions set by the H-2B regulations and the obligations of the H-2B program. The H-2B visa program also establishes certain recruitment and displacement standards in order to protect similarly employed U.S. workers.

The H-2B visa program regulations safeguard any person against retaliation for filing a complaint under or related to the H-2B program (which includes actions a person may take to participate in or cooperate with a WHD investigation, such as speaking to a WHD investigator), instituting or causing to be instituted any proceeding under or related to the H-2B program; testifying or being about to testify in any such proceedings; consulting with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to the H-2B program; or, exercising or asserting, on behalf of themselves or others, any right or protection afforded by the INA or H-2B regulations. An employer participating in the H-2B visa program is prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating in any other manner against a worker who has exercised a protected activity. See 29 CFR § 503.16(n) and <https://www.dol.gov/agencies/whd/factsheets/78h-h2b-retaliation-prohibited>.

If, upon investigation, WHD determines that retaliation in violation of H-2B regulations occurred, WHD may seek appropriate remedies from the employer, its successor in interest, or the employer's agent or attorney, as appropriate, including (but not limited to) civil money penalties or make whole remedies (e.g., back wages) for any person who has been retaliated against. See 29 CFR § 503.20. WHD may also seek debarment of the employer, successor in interest, attorney, or agent, from filing any labor certifications with the Department of Labor, for the H-2B program and all of the temporary labor certifications that must be filed with the Department, for anywhere from one to five years, and may recommend revocation of the current labor certification to OFLC where appropriate. See 29 CFR §§ 503.24, 503.25.

Example: Employer participating in the H-2B visa program attempts to interfere with WHD investigation.

An employer participating in the H-2B visa program learns that WHD will investigate the firm. The employer calls a meeting and instructs the workers not to talk to the WHD investigator and to destroy records of their time and locations of work or their visas will not be renewed.

In this scenario, the employer has threatened to take adverse action against employees in retaliation for cooperating in WHD's investigation and has interfered with WHD's investigation. WHD may assess civil money penalties for threats made against the workers, seek debarment, and/or refer the employer to OFLC for consideration of revocation of the employer's current labor certification. If the employer acts on its threat, WHD may assess back wages and make whole remedies, such as compensatory damages.

Prohibited Retaliation under the United States-Mexico-Canada Agreement (USMCA)

The USMCA requires that for a passenger vehicle, light truck, or heavy truck to be eligible for preferential tariff treatment under U.S. Customs and Border Protection (CBP) guidelines, a minimum percentage of the cost of the vehicle must involve certain high-wage expenditures, known as Labor Value Content (LVC). That is, a minimum percentage of the vehicle parts or assembly labor must come from facilities that pay an average hourly base rate of at least \$16.00

per hour to workers engaged in direct production work. WHD supports CBP by verifying that the required LVC components have been properly calculated and are met.

USMCA protects all persons against retaliation for disclosing any information to a federal agency or any other person relating to a verification of the producer's compliance with the LVC requirements, or because the person has cooperated or sought to cooperate in a verification concerning the producer's compliance with the LVC requirements. All persons are prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or discriminating in any other manner against a person who has exercised a protected activity. *See* 19 U.S.C. § 4532(e)(5); 29 CFR § 810.800.

Any person may file a complaint with WHD within 12 months of an alleged prohibited adverse action. Additionally, a third party may file a complaint on behalf of the person who believes he or she has been adversely affected. WHD may prescribe any remedies, including monetary relief, injunctive relief, civil money penalties, or any other remedies assessed in the case of a finding of violation(s). *See* 29 CFR § 810.800(c)(3)(i).

Example: Supervisor lies about employee's performance history because of WHD interview.

Charlotte is an employee at a vehicle assembly plant where WHD conducts an LVC compliance verification under the USMCA. She was instructed by her immediate supervisor to tell WHD representatives that she earns \$16 an hour despite the fact that she actually earns \$13.50 an hour. After the WHD representatives leave the worksite, Charlotte's supervisor asks her what she said to WHD representatives. When Charlotte states that she told the truth, the supervisor fabricates a story of insubordination that results in the termination of Charlotte's employment. Charlotte had no prior occurrences of corrective action and was otherwise in good standing with her employer.

In this scenario, after investigating and verifying that Charlotte was retaliated against for cooperating with a WHD investigation, WHD may pursue lost wages, reinstatement, and the assessment of a civil money penalty.

Prohibited Retaliation under Executive Orders ("EO") 13706, Establishing Paid Sick Leave for Federal Contractors; 13658, Establishing a Minimum Wage for Federal Contractors; and 14026, Increasing the Minimum Wage for Federal Contractors

EO 13706 requires federal contractors to provide covered employees with up to 56 hours of paid sick leave annually, including paid leave allowing for family care. Under 29 CFR § 13.6, a contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by the EO or its implementing regulations. A contractor also may not discharge or in any other manner discriminate against an employee for using, or attempting to use, paid sick leave as provided for under the EO or its regulations; filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under the EO or its regulations; cooperating in any investigation or testifying in any proceeding under the EO or its regulations; or informing any other person about his or her rights under the EO or its regulations. Interference includes

discouraging an employee from using paid sick leave and reducing an employee's accrued paid sick leave by more than the amount of such leave used. Discriminatory actions may include demotion and disciplinary actions, harassment, creation of intolerable conditions, and detrimental changes to work hours, pay, or job duties.

Available remedies include, but are not limited to, employment, reinstatement, promotion, restoration of leave, lost pay or benefits, or liquidated damages. *See* 29 CFR § 13.44(b).

Example: Federal contract worker's promotion denied after they inquire about sick leave.

Bernard works on a federal contract covered by EO 13706. He is a supervisor of maintenance services at a national park and is about to be promoted. When Bernard emails his employer, the contractor, asking about the availability of paid sick leave to attend his spouse's upcoming medical appointments, his planned promotion is cancelled and he is rescheduled from working weekdays only to weekdays and weekend shifts. When Bernard asks about the changes, his manager states the changes were made so that he would have fewer responsibilities at work and more time available to help with his wife's health care. A representative for the national park (the contracting agency) who communicates with Bernard about work orders during the week, contacts WHD on Bernard's behalf.

In this scenario, WHD may investigate to determine whether the maintenance contractor has violated the anti-retaliation provisions of the EO and its regulations. The employer may be required to grant Bernard the promotion and return him to his previous work schedule and duties. He may also receive back wages to compensate for any difference in wages received compared to the wages he would have received if the retaliatory actions had not occurred.

EO 13658 generally requires contractors to pay the applicable minimum wage rate, currently \$11.25 per hour, to workers performing work on or in connection with covered contracts. Covered contracts that are entered into on or after January 30, 2022, or that are renewed or extended (pursuant to an option or otherwise) on or after January 30, 2022, will generally be subject to a higher \$15.00 minimum wage rate established by EO 14026.

EO 13658 and EO 14026 incorporate the same broad prohibition against retaliation that exists to protect workers under the FLSA. Pursuant to the regulation, it is unlawful for any person to discharge, retaliate, or in any other manner discriminate against any worker because such worker filed a complaint, instituted any proceeding, or testified in any proceeding relating to the Executive Orders. *See* 29 CFR § 10.6; 29 CFR § 23.60. Available remedies include, but are not limited to, employment, reinstatement, promotion, and the payment of lost wages. *See* 29 CFR § 10.44; 29 CFR § 23.440(b).

Example: Contract worker asks about deductions from pay and is denied bonus.

Geri is a crewmember working on the construction of a new post office building for a federal contractor covered by EO 14026. Geri asks her company payroll department about deductions from her paycheck that may bring her earnings below \$15.00 per hour. The payroll department refers her question to a corporate officer of the company who directs the payroll department to cancel Geri's quarterly performance bonus.

In this scenario, a retaliatory denial of the bonus would be prohibited by EO 14026. WHD may investigate, determine the employer violated the EO, and require payment of the bonus and other wages that may be due if the deductions were improperly made.

Prohibited Retaliation under the Consumer Credit Protection Act (CCPA)

The CCPA limits the amount of an individual's earnings that may be garnished in any workweek or pay period, regardless of the number of garnishment orders received by the employer. A wage garnishment is any legal or equitable procedure through which some portion of a person's earnings is required to be withheld for the payment of a debt. Most garnishments are made by court order. Other types of legal or equitable procedures for garnishment include IRS or state tax collection agency levies for unpaid taxes and federal agency administrative garnishment for non-tax debts owed to the federal government. The limitations on the amount of earnings that may be garnished do not apply to certain bankruptcy court orders, or to debts due for federal or state taxes. *See* 15 U.S.C. §§ 1671 – 1677 and 29 CFR Part 870.

The CCPA also prohibits an employer from discharging an employee because the employee's wages have been garnished. 15 U.S.C. § 1674. This protection against termination applies to all types of garnishments, even when the garnishment is not subject to any of the CCPA's limits on the amount of earnings that may be garnished. For example, if a tax debt results in the garnishment of earnings and there are no previous garnishments, discharging the employee for the garnishment would violate the CCPA—even though no garnishment limit applies to the recovery of state or federal taxes. Additionally, the CCPA's protection against termination may be violated even if garnishment for a single debt is not the only factor in an employee's discharge. *See id.*; FOH 16c01 and 16c07.

The CCPA's protection against discharge includes protection against adverse actions that interrupt employment to the degree that a prudent employee would look for another job. A long suspension is equivalent to a termination of employment. For example, an employer might violate the CCPA, if, following subsequent garnishments on the same indebtedness, it disciplines an employee through a series of gradually increased suspensions of several days' duration. A demotion or transfer based on a single garnishment, whether wholly or in part, is a constructive discharge that violates the CCPA. A reasonable interpretation of the effect of transferring a person to a position paying less money is that of a termination. *See* 15 U.S.C. §1674, and FOH 16c04(c).

Remedies for an unlawful discharge include, but are not limited to, reinstatement, promotion, and payment of lost wages and benefits. Employers who willfully violate the law's prohibition against termination may be prosecuted criminally and fined, or imprisoned for not more than one year, or both. *See* 15 U.S.C. §§ 1674 and 1676.

Example: Constructive discharge in violation of the CCPA's garnishment provisions.

Sam's employer, an urgent care clinic, receives a court order to garnish a portion of Sam's earnings for the repayment of a federal student loan. The clinic office manager learns about the wage garnishment and reassigns Sam from a senior level medical records position to a lower paying administrative position with less flexible hours. The manager e-mails Sam and lies to him that the reassignment is due to questions about his reliability arising from misfiling records as well as the court order the company received.

In this scenario, Sam's demotion would be prohibited. A demotion based on a single debt, whether wholly or in part, is a constructive discharge that violates the CCPA.

WHD may require the employer to restore Sam to his former position, including all pay and benefits, and pay lost wages for the period of his demotion.

Prohibited Retaliation under the Employee Polygraph Protection Act (EPPA)

The EPPA provides that employees have a right to employment opportunities without being subject to lie detector tests, unless a specific exemption applies. Subject to restrictions, the EPPA permits polygraph tests (a type of lie detector test) to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors, and dispensers. The EPPA also permits, with limitations, polygraph testing of certain employees of private employers who the employer reasonably suspects have involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer. The law does not cover federal, state, and local government agencies. Where polygraph examinations are allowed, they must be administered by qualified examiners and are subject to strict standards at the pre-test, testing, and post-testing stages. *See* 29 U.S.C. §§ 2001 – 2002 and 29 CFR §§ 801.2 – 801.4.

Under the EPPA, covered employers generally may not directly or indirectly require, request, suggest, or cause an employee or prospective employee (such as a job applicant) to take a lie detector test. Employers may not use, accept, refer to, or inquire about the results of a lie detector test of any employee or prospective employee. Employers may not discharge, discipline, or discriminate in any manner, deny employment or promotion, or threaten such action, against any employee or prospective employee on the basis of the results of any lie detector test, for refusing or declining to take a lie detector test, or for filing a complaint or instituting a proceeding under or related to the EPPA, testifying in any proceeding, or exercising any right afforded by the EPPA. *See* 29 U.S.C. § 2002 and 29 CFR § 801.4.

Employers who violate any EPPA provisions may be assessed civil money penalties. Available remedies for retaliation in violation of EPPA include, but are not limited to, legal or equitable relief, such as employment, reinstatement, promotion, and payment of lost wages and benefits. The Secretary of Labor is authorized to file suit to enforce the EPPA, and individuals may file their own private suits. Civil actions may be brought by an employee or prospective employee in Federal or State court against employers who violate the Act for legal or equitable relief, such as employment, reinstatement, promotion, and payment of lost wages and benefits. The action

must be brought within three years of the date of the alleged violation. *See* 29 U.S.C. §§ 2004 – 2005; 29 CFR § 801.40; and www.dol.gov/agencies/whd/resources/penalties.

Example: Prospective employee not hired for declining to take polygraph test.

Martina is applying for an information technology position with a software development firm. After she completes an interview with the owners of the company, the firm’s security director meets with her and asks her if she is willing to take a polygraph exam. The security director tells Martina that the lie detector test is not required but if she takes the test and does well her chances of being hired will improve. Martina is confident she is well-qualified for the job and knows that her previous employers will vouch for her integrity. She declines to take the test.

Martina learns she is not selected for the position. She calls to speak with the owners for feedback from her interview. The owners tell Martina they went with someone they felt would be a better fit in the long run, and add that, while they recognized Martina’s experience, they did not like that she declined to take the polygraph exam.

The EPPA prohibits most private employers from discriminating against or denying employment to a prospective employee for refusing or declining to take a lie detector test. In this scenario, WHD may request that the employer offer Martina the position. Where placement is not feasible, WHD may determine whether alternative, comparable employment, or other relief, would be appropriate. Further, WHD may assess civil money penalties for the EPPA violation.

Constructive Discharge

Constructive discharge occurs when a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker’s position would not continue the employment.⁴ Termination by the employer is not required to demonstrate an adverse action, and the fact that a worker resigned is not conclusive evidence that the departure was voluntary. A constructive discharge occurs when an employee quits because, in response to protected activity, the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign. WHD investigators should assess whether workers who have resigned their employment following the filing of a complaint or engaging in another form of protected activity have been subject to a constructive discharge.

Constructive discharge is another type of adverse action. Workers who have been constructively discharged may be entitled to lost wages or other forms of make-whole relief, including, for example, the cost of housing for H-2A workers. WHD will vigorously investigate all facts

⁴ *See, e.g.*, Field Assistance Bulletin 2012-1, H-2A “Abandonment or Termination for Cause” Enforcement of 20 CFR § 655.122(n), February 28, 2012 (https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/fab2012_1.pdf).

surrounding constructive discharge and will seek all appropriate remedies on behalf of those affected.

Immigration-based Threats

WHD is committed to protecting all workers in the U.S., including low-wage and immigrant workers who are among the most at risk for violations. These workers are particularly vulnerable to workplace abuse because they are often reluctant to speak out about violations of the law for fear of reprisal. Workers' ongoing fear of adverse immigration consequences threatens WHD's ability to protect workers, remedy violations, and conduct effective investigations.

Where an employer makes immigration-based threats or takes actions to intimidate or prevent workers from exercising their workplace rights based on their immigration status, this constitutes an adverse action under the anti-retaliation laws that WHD enforces.⁵ In order for all workers to be able to exercise their rights, WHD will vigorously enforce retaliation protections to preserve the rights of immigrant workers and temporary nonimmigrant workers participating in the H-1B, H-2A, and H-2B programs to be free of immigration-related intimidation and coercion that seeks to keep employees from exercising their rights and affects their willingness to report violations and cooperate with WHD enforcement actions. WHD will investigate and seek to remedy to the maximum extent allowed under the law instances of immigration-based threats and retaliation, including by working in conjunction with the relevant Regional Solicitor to seek immediate injunctive relief.

Remedies and Sanctions

As illustrated in the examples contained in this bulletin, each Act provides for protected activity and the type of remedies that may be pursued where violations of anti-retaliation protections exist. WHD will consider all remedies and sanctions available to protect workers and change behavior, including injunctive relief, compensatory damages and make-whole relief, such as lost wages and all economic losses that resulted from the retaliatory conduct, and punitive damages where appropriate.

⁵ See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (in enacting the FLSA, Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances."); *Perez v. Jasper Trading, Inc.*, No. 05CV1725 (ILG) (VVP), 2007 WL 4441062, at *3 (E.D.N.Y. Dec. 17, 2007) (employer threatened to contact governmental and immigration authorities if workers continued to demand proper compensation).

Interagency Collaboration

Workers who are retaliated against may not be aware of their rights or may suspect that the adverse action they have suffered was caused by an activity, status, or characteristic that is protected under a law enforced by another federal or state agency. For that reason, coordination with federal and state partners is crucial to protecting workers' rights under the laws that WHD enforces. WHD leverages established relationships with federal and state partners (<https://www.dol.gov/agencies/whd/state/contacts>) to protect workers from unlawful retaliation. Below is a summary of some of the other federal agencies that enforce legal protections against retaliation:

- The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) enforces whistleblower protection provisions provided in more than 20 federal laws that protect employees from retaliation for, among other circumstances, raising or reporting concerns about hazards or violations of a number of workplace safety and health and other laws. See www.dol.gov/agencies/osha and www.whistleblowers.gov.
- The Equal Employment Opportunity Commission (EEOC) enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information. See www.eeoc.gov.
- The National Labor Relations Board (NLRB) is an independent federal agency that investigates and remedies unfair labor practices by unions and employers. See www.nlr.gov for more information.

In many cases, employees who have complained about a suspected violation of their rights under the laws that WHD enforces may have also engaged in protected, concerted activity under the National Labor Relations Act (NLRA). Such protected, concerted activity includes instances in which an employee brings a group complaint to the attention of management. Under the NLRA, it is unlawful for an employer to interfere, coerce, or restrain an employee from engaging in protected, concerted activity. WHD announced a Memorandum of Understanding (MOU) with the National Labor Relations Board on January 6, 2022. The MOU encourages enhanced law enforcement and greater coordination between the agencies through information sharing, joint investigations and enforcement activity, training, education, and outreach. If WHD investigators suspect that employers have interfered, coerced, or restrained an employee from engaging in protected, concerted activity, they should discuss and take appropriate next steps with WHD District Office and Regional Office leadership, including making referrals to the relevant NLRB regional office.

Conclusion

WHD is committed to protecting workers who assert their rights and will pursue all available remedies when it determines that retaliation has occurred. Depending on the relevant statute and court, an employer found to have retaliated against an employee may be required to reinstate or

return the employee to a prior position; remove any disciplinary action in the employee's personnel record, including "letters of reprimand;" pay back wages to the employee, including the same amount as liquidated damages; pay additional "compensatory" damages, including for emotional distress, or punitive damages; pay attorney fees and court costs; or be subject to court injunctions prohibiting future retaliation against any employees.

WHD investigates through complaint-based and directed investigation programs, accepting complaints from a variety of sources in order to ensure compliance with the federal laws it enforces. Complaints may be received from current or former employees, parents or guardians, school officials, employers, advocacy groups, or other agencies.

There are over 200 WHD offices throughout the country with trained professionals to help. All services are free to individuals seeking assistance regardless of immigration status. Except to the extent necessary to enforce the protections available under certain temporary labor certification programs, WHD does not ask about the immigration status of employees. All complaints are confidential to the extent permitted under the law. WHD may disclose the name of a worker who complains of retaliation if WHD has the permission of the employee. WHD does not share information that could identify complainants or workers involved in its investigations that could subject those workers to adverse actions by other government agencies.

Visit <https://www.dol.gov/agencies/whd/contact/local-offices> to find the nearest WHD district office. For more information, please visit: <https://www.dol.gov/agencies/whd>.

Questions

Please address any questions regarding this FAB to the WHD National Office, Office of Policy, through appropriate channels.