



Unlawful Retaliation under the Laws Enforced by WHD



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/agencies/whd
1-866-4-US-WAGE

Presentation Outline

- WHD Retaliation Protections
- What is Retaliation?
 - What is a Protected Activity?
 - What is an Adverse Action?
- Available Remedies
- Retaliation by Act
- Resources
- How to File a Complaint

Statutes Prohibiting Retaliation

Your employer is prohibited from retaliating against you or threatening to retaliate against you for exercising or attempting to exercise your workplace rights under these laws and programs:

- The Fair Labor Standards Act (FLSA)
- The Family and Medical Leave Act (FMLA)
- The H-2A Visa program (H-2A)
- The H-2B Visa program (H-2B)
- The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- Executive Order Establishing a Minimum Wage for Contractors (E.O. 13658)
- Executive Order Establishing Paid Sick Leave for Federal Contractors (E.O.13706)
- Executive Order Increasing the Minimum Wage for Federal Contractors (E.O. 14026)

What is Retaliation?

**Your employer cannot punish you
for exercising your rights under the law.**

You are fired because you complained to your employer about not receiving your correct pay

You are given worse working assignments because you told the truth to Wage and Hour investigators

Your paycheck is withheld because you filed a complaint with the Wage and Hour Division

What is Retaliation?

Protected Activity

Causal
Connection

Adverse Action

What Are Examples of Protected Activity?

Asserting your rights under the law:

Filing a complaint with WHD

Complaints made to a manager or employer

Testifying at trial

Cooperating during a WHD investigation

Requesting payment of wages

Refusing to “kick 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 (e.g., requesting FMLA leave)

Belief that Rights Are Owed or Have Been Violated

Person believes that rights are owed or have been violated



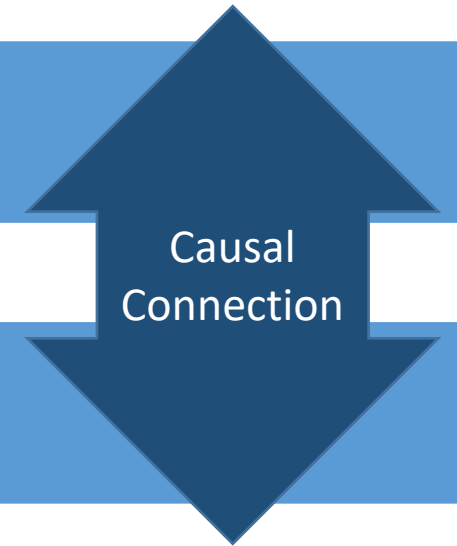
Person engages in protected activity



Employer engages in adverse action



RETALIATION



What if the Employer Is Mistaken about the Person's Involvement in a Protected Activity?



What are Examples of Adverse Action?

**Penalty,
punishment,
sanction, or
discrimination**

Termination

Disciplinary actions, such as write-ups

Threatening employees

Reducing work hours or rate of pay

Demotion

Change in shift and/or eliminating premium pay

Examples of Adverse Action

A worker contacted WHD stating that his employer failed to pay his last paycheck for \$915. In response, the employer dumped approximately 91,500 oily pennies in the worker's driveway, along with a paystub marked with an expletive. The pennies blocked and stained the worker's driveway, and took nearly 7 hours to remove.

[US Department of Labor sues Georgia auto repair shop owner who paid former worker final wages in oily pennies | U.S. Department of Labor \(dol.gov\)](#)

Examples of Adverse Action

**Penalty,
punishment,
sanction, or
discrimination**

Transfer and/or reassignment

Less favorable working conditions

Making working conditions so intolerable that a reasonable person would quit

Blacklisting former employees

Coercing employees to return back wages

Examples of Adverse Action

After a WHD investigation found significant back wages owed to employees, an employer demanded that the workers “kick back” a portion of the back wages. Specifically, the employer drove some workers to a bank to cash their checks and demanded payment in the parking lot. The employer threatened to report other employees to immigration and law enforcement agencies if they failed to “kick back” the wages to which they were entitled.

[US Department of Labor obtains court order prohibiting Connecticut restaurants, owners from employee retaliation | U.S. Department of Labor \(dol.gov\)](#)

What about Threats?

Threats can be an adverse action, and may occur BEFORE the protected activity

Before a WHD investigation, the employer meets with all employees and tells them that he will fire each of them if they tell the truth to WHD about the pay and working conditions.

= Retaliation

Immigration-based threats can be adverse action for purposes of retaliation

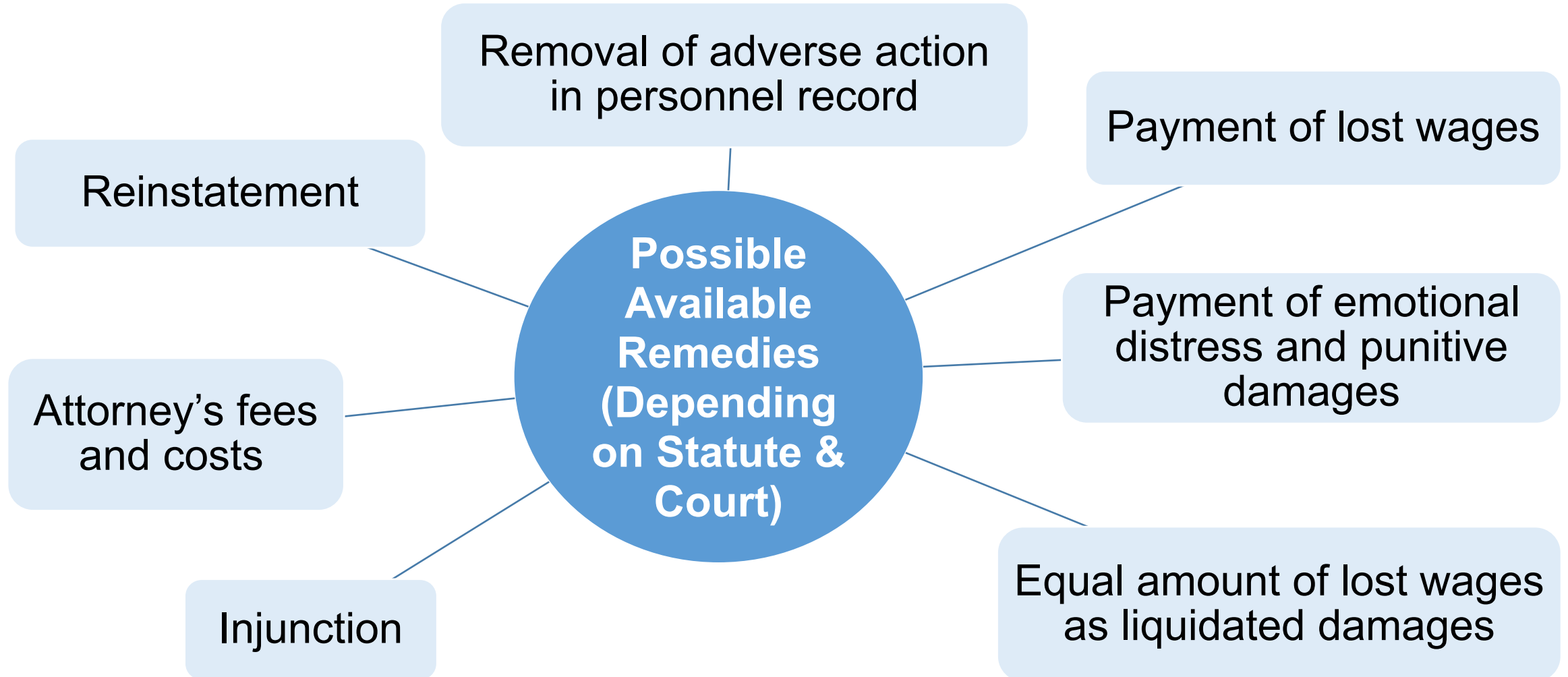
Abuse of the immigration system, whether actual, attempted, or threatened, may constitute adverse action.

Example 1: An employer threatens to call immigration authorities if workers talk to WHD investigators about their hours and working conditions.

Example 2: An employer informs a worker that his H-2B visa is based on his job with the employer, so he can't complain about his wages or he will lose his job and never get an H-2B visa again.

 **Retaliation**

Available Remedies





Retaliation under the Fair Labor Standards Act (FLSA)

Retaliation and the FLSA

Section 15(a)(3) prohibits "any person" from retaliating "against any employee." That means that the person or entity who has retaliated does not need to be an employer in order to violate section 15(a)(3). It also means that the employee who filed a complaint or engaged in any other protected activity does not need to be an employee of that "person."

Real Retaliation Example: Working Overtime

An employee contacts WHD to ask about overtime pay. The employer finds out about the contact and fires the employee.



Real Retaliation Example: Remedy

WHD's investigation determined that the employee's termination was retaliation.

The employer agreed to:

- conduct retaliation training with supervisors;
- post the anti-retaliation fact sheet, so all workers would be aware of their rights under the law;
- provide a neutral job reference for the employee; and
- pay for lost wages for the time the employee was unemployed.

Retaliation Example: Nursing Mother

A new mother returns to work and uses her lunch break to pump breastmilk. Her break takes longer than her usual lunch break and her boss tells her she cannot use her meal break for "personal stuff." When she 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.

Retaliation Example: Farmworker

A farmworker was terminated because he asked to be paid for all the hours he worked.





Retaliation under the Family and Medical Leave Act (FMLA)

Retaliation and the FMLA

Section 105 of the FMLA prohibits retaliation.

- Employers cannot interfere with, restrain, or deny a person the right to exercise or attempt to exercise any FMLA right.
- Employers cannot discharge or discriminate against any person for opposing or complaining about an unlawful practice under the FMLA.

Retaliation Example: Time Off for Dad

A worker takes a few days of approved FMLA leave when his child is in the hospital overnight and recovering from surgery. When he gets back to work, he finds out his corporate human resources office charged him with four points for the days he missed work. Under his employer's attendance plan, he could be fired if he receives one more point for missing work.



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

Retaliation and the MSPA

Section 505(a) states that it is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has:

- Filed a complaint;
- Instituted or testified in a proceeding; or
- Exercised on behalf of himself or others any right or protection afforded by the Act.

Any retaliation complaint under MSPA must be filed within 180 days of the alleged discriminatory action.

Retaliation Example: Poor Housing

An employer houses 15 migrant agricultural workers in substandard housing. Workers sleep on the floor, have no electricity, use water from a garden hose, and have one hotplate for cooking among all workers. A worker files a complaint with WHD. When WHD shows up on the worksite, the employer fires all 15 workers because “he doesn’t want any whiners on the team.” The employer does not pay workers for their last week of work.



Retaliation in the H-2A and H-2B Programs

H-2A and H-2B Prohibitions on Retaliation

The employer may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

- Filed an H-2A or H-2B complaint;
- Instituted or participated/will participate in any H-2A or H-2B proceedings;
- Consulted with an attorney or legal assistance program on H-2A or H-2B matters;
- Consulted with a worker's center, community organization, or labor union on H-2B matters;
- Exercised or asserted, on behalf of himself or others, any H-2A and H-2B rights or protections.

Real Retaliation Example: H-2A Program

H-2A workers were subjected to retaliatory actions by their employer when they asked for water and food. The farm owner shouted obscenities, and intimidated and threatened the workers by firing his gun in the air and near the workers.

Real Retaliation Example: H-2A Remedy

WHD obtained a Temporary Restraining Order and Preliminary Injunction against the employer. The Court enjoined the employer from:

- violating the anti-retaliation provisions of the H-2A program;
- communicating with any of the company's current, former, or prospective workers;
- being within 1,500 feet of any workers;
- carrying any firearm within 1,500 feet of any worker; and
- entering into the worker housing and the fields where employees work.

A close-up photograph of a woman with voluminous, curly brown hair. She is looking downwards with a thoughtful or concerned expression. The background is softly blurred, showing a green plant and a window with light coming through. The overall tone is professional and focused.

Executive Orders Establishing Paid Sick Leave (E.O. 13706), Establishing a Minimum Wage (E.O. 13658), and Increasing the Minimum Wage (E.O. 14026) for Federal Contractors

Executive Order Establishing Paid Sick Leave for Federal Contractors (E.O. 13706)

A federal contractor may not discriminate against an employee for activities related to paid sick leave for:

- using, or attempting to use, paid sick leave as provided for under the EO;
- filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under the EO;
- cooperating in any investigation or testifying in any proceeding under the EO; or
- informing any other person about his or her rights under the EO.

Executive Orders Establishing a Federal Minimum Wage for Contractors and Increasing the Minimum Wage for Federal Contractors (E.O.s 13658 & 14026)

Prohibited Acts under these Executive Orders include:

- **Kickbacks:** A kickback is when an employer requires the worker to pay the employer back all or some of the wages earned.
- **Retaliation:** Federal contractors may not discharge or discriminate in any way against a worker because that worker has filed a complaint, testified, or participated in any proceeding under or related to Executive Orders 13658 and 14026.
- **Waiver of rights:** Workers cannot waive, nor may federal contractors induce workers to waive, their rights under Executive Orders 13658 and 14026, or their implementing regulations.



How We Can Help

Resources

- Fact Sheet 73: [Break Time for Nursing Mothers under the FLSA](#)
- Fact Sheet 77A: [Prohibiting Retaliation Under the FLSA](#)
- Fact Sheet 77B: [Protection for Individuals under the FMLA](#)
- Fact Sheet 77C: [Prohibiting Retaliation under MSPA](#)
- Fact Sheet 77D: [Retaliation Prohibited under the H-2A Temporary Visa Program](#)
- Fact Sheet 78H: [Retaliation Prohibited under the H-2B Temporary Visa Program](#)
- [How to File a Complaint](#)

How to File a Complaint

- Complaints can be submitted by phone.
- Complaints can come from third parties.
- Complaints are confidential.
- WHD does not ask workers about their immigration status.
- No fee or charge to file a complaint.

Who May File a Complaint

- Employees—former or present, regardless of immigration status
- Parent/Guardian
- School Officials
- Other Employers
- Advocacy Groups
- Other Agencies



Complaint Intake Information

Employee's name

- Contact information
- Address and phone number
- Employee's duties/work
- Circumstances or actions that caused potential violation of the law
- Copies of pay stubs or personal hours worked records if available

Employer's name

- Point of contact
- Address and phone number

This information is not required, but helps develop the case.

Contact Us

Visit www.dol.gov/agencies/whd

Call our toll-free information and helpline at:
1-866-4US-WAGE (1-866-487-9243)

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