

2024 Employment, OSHA, and MSHA Webinar Series

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Addressing Employee Complaints: Retaliation and Whistleblower Claims

OCTOBER 1, 2024

Presented by the Attorneys in **Conn Maciel Carey LLP's**
Labor • Employment and OSHA/MSHA • Workplace Safety Groups

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- Review and revise employee handbooks and workplace policies
- Represents employers during inspections and investigations conducted by the federal and state OSHA
- Advises and counsels employers in responding to notices of employee safety complaints and OSHA citations
- Helps develop and audit safety and health programs



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- Advises clients in all phases of involvement with MSHA, particularly guiding companies through contest proceedings before the Federal Mine Safety and Health Review Commission.
- Prepares clients for and manages incidents, fatality, and special investigations conducted by MSHA, defends company representatives in section 110 proceedings, and represents companies in discrimination and interference investigations and proceedings.



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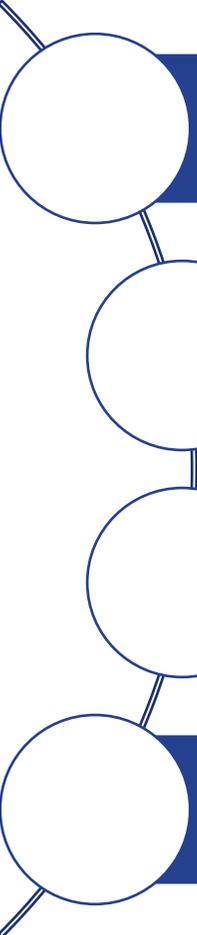
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- Represents and counsels employers in all aspects of the employer-employment relationship.

Agenda



Major Anti-Retaliation & Whistleblower Protections

Review of Charges and Burdens of Proof/Enforcement

Responding to Retaliation Complaints

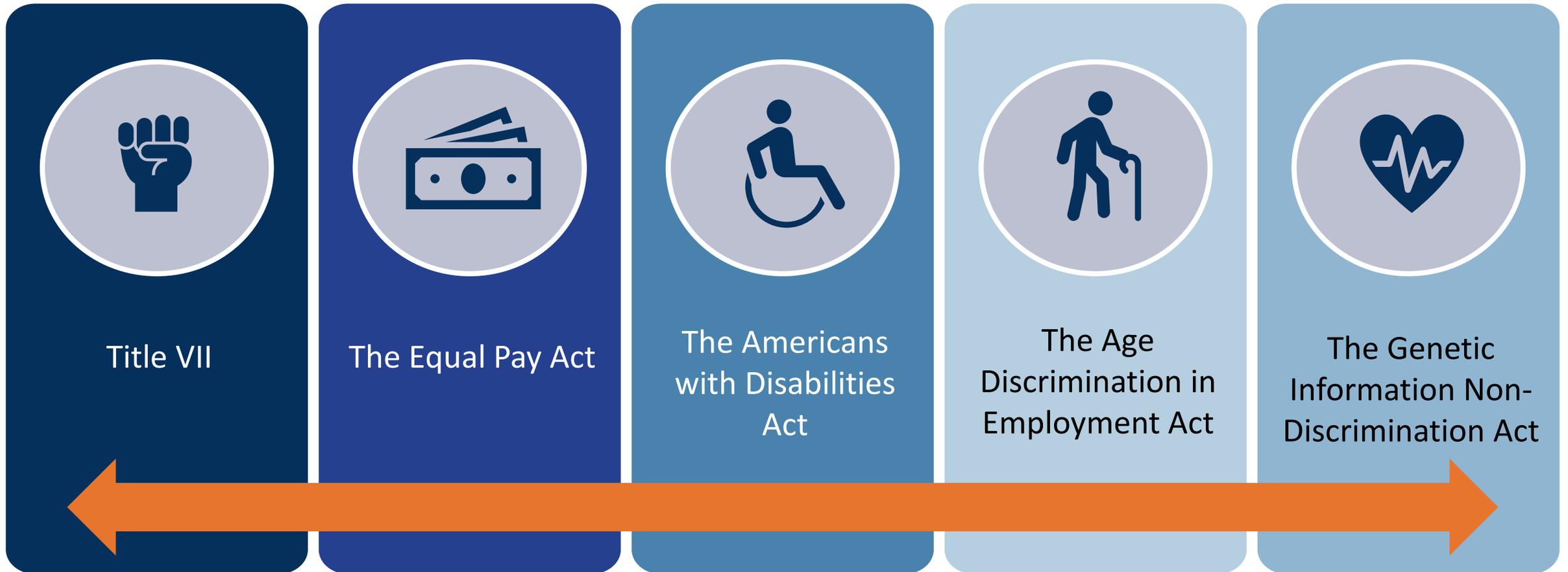
Recommendations to Avoid a Whistleblower Claim

A person wearing a blue suit jacket is shown from the chest down. Their hands are resting on a wooden surface. In the center, there is a small, white, stylized wooden figure of a person. On either side of this figure are several vertical wooden blocks of varying heights, arranged in a row. The background is a blurred, light-colored wall.

Major Anti-Retaliation and Whistleblower Protections

EEOC's Anti-Retaliation Provisions

- The EEOC enforces numerous laws with anti-retaliation provisions, including:



Proceeding of EEOC Retaliation Claim

- Charge must generally be filed w/in 180 days from day retaliatory act took place
 - 300 days if state/locality has law prohibiting discrimination on same basis
- No specific time constraints on determination on Charge
- After 180 days, employee can file suit in Court
 - Must file within 90 days of receiving right-to-sue letter



Prevalence of EEOC Retaliation Claims

- About 57% of Charges filed with the EEOC contain allegations of retaliation based on FY 23 data

	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
Total Charges	88,778	89,385	91,503	84,254	76,418	72,675	67,448	61,331	73,485	81,055
Race	31,073	31,027	32,309	28,528	24,600	23,976	22,064	20,908	20,992	27,505
	35.00%	34.70%	35.30%	33.90%	32.20%	33.00%	32.70%	34.10%	28.60%	33.90%
Sex	26,027	26,396	26,934	25,605	24,655	23,532	21,398	18,762	19,805	25,473
	29.30%	29.50%	29.40%	30.40%	32.30%	32.40%	31.70%	30.60%	27.00%	31.40%
National Origin	9,579	9,438	9,840	8,299	7,106	7,009	6,377	6,213	5,500	6,963
	10.80%	10.60%	10.80%	9.80%	9.30%	9.60%	9.50%	10.10%	7.50%	8.60%
Religion	3,549	3,502	3,825	3,436	2,859	2,725	2,404	2,111	13,814	4,341
	4.00%	3.90%	4.20%	4.10%	3.70%	3.70%	3.60%	3.40%	18.80%	5.40%
Color	2,756	2,833	3,102	3,240	3,166	3,415	3,562	3,516	4,088	5,819
	3.10%	3.20%	3.40%	3.80%	4.10%	4.70%	5.30%	5.70%	5.60%	7.20%
Retaliation - All Statutes	37,955	39,757	42,018	41,097	39,469	39,110	37,632	34,332	37,898	46,047
	42.80%	44.50%	45.90%	48.80%	51.60%	53.80%	55.80%	56.00%	51.60%	56.80%
Retaliation - Title VII only	30,771	31,893	33,082	32,023	30,556	30,117	27,997	25,121	28,462	31,972
	34.70%	35.70%	36.20%	38.00%	40.00%	41.40%	41.50%	41.00%	38.70%	39.40%

OSHA Whistleblower Role

- OSHA enforces whistleblower standards under 22 different statutes, i.e., the environmental statutes (CAA, CWA, etc.), the Sarbanes-Oxley Act (SOX), the Affordable Care Act (ACA), etc.
- Most retaliation claims are brought under Section 11(c) of the OSH Act itself



Prevalence of Whistleblower Complaints by Statute

- OSH Act is about 71% of all Whistleblower claims enforced by OSHA

Statute	FY2018	FY2019	FY2020	FY2021	FY2022	FY2023
ACA	15	13	8	6	5	6
AHERA	3	1	1	2	0	0
AIR21	88	80	67	57	61	64
AMLA	N/A	N/A	N/A	6	10	9
CAARA	N/A	N/A	N/A	5	5	5
CFPA	45	37	27	14	10	36
CPSIA	7	4	4	2	3	2
EPA ¹	54	50	39	28	26	41
ERA	31	25	16	12	9	13
FRSA	336	215	154	168	116	134
FSMA	50	67	63	45	61	86
ISCA	0	0	0	0	0	0
MAP21	3	5	7	0	5	1
NTSSA	14	24	21	12	10	15
OSHA	1870	2084	2539	1891	2148	2309
PSIA	4	7	9	1	7	7
SOX	155	125	143	69	85	106
SPA	10	9	13	10	9	10
STAA	322	341	308	202	221	361
TFA	N/A	4	29	26	24	38
Total	3007	3091	3448	2556	2815	3243

Whistleblower Complaint Statute of Limitations

- Whistleblower complaints must be filed within specified statutory time frames which generally begin when the adverse action takes place
 - The first day of the time period is the day after the alleged retaliatory decision is both made and communicated to the complainant.

Table II-1: Specific Statutes and their Filing Deadlines

Statute	Filing Deadline
OSHA	30 days
MSHA	60 days
CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA	30 days
ISCA	60 days
AHERA, AIR21	90 days
STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA FSMA	180 days

11(c) Process Whistleblower Complaints

- Investigator will review documentary evidence presented by parties, and will likely interview parties and request information and documents
- Per the Manual, the current standard for evaluating 11(c) Whistleblower complaints is whether there is reasonable cause to believe that retaliation in violation of the standard occurred.
 - I.e., the evidence gathered in the investigation would lead OSHA to believe that unlawful retaliation occurred
 - Evidence lower than what is required at trial
- There is no private cause of action under 11(c)
 - OSHA is required to bring a lawsuit in district court on the worker's behalf or attempt to settle the matter informally



MSHA Complaints Under Section 105(c)



Section 105(c) of the Mine Act

Under 30 U.S.C. §815(c), Title VII states:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act...

Section 105(c) of the Mine Act

- *Under provisions of Section 105(c) of the Mine Act, miners, representatives of miners, and applicants for mine employment are protected from retaliation for engaging in safety or health-related activities, such as identifying hazards, asking for MSHA inspections, or refusing to engage in an unsafe act.*
- *In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, the investigator must gather evidence indicating that (1) the complainant participated in a protected activity, (2) that an adverse action was taken against the complainant, and (3) that the adverse action was motivated in any part by that protected activity.*
- *Section 105(c) complaints are given priority over all other SI cases.*

Section 105(c) of the Mine Act

Two areas covered by the whistleblower protections

1. *Discrimination*

- Discriminating against miners, applicants for employment and miners' representatives; and

2. *Interference*

- Interfering with the exercise of miners' rights in the future.

- Program managed by the Technical Compliance and Investigation Division (TCID)
- Oversight on District/Regional level involves Regional Administrators and District Managers
- Districts also have Supervisory Special Investigator and Special Investigator team

Investigations Under 105(c)

Timeframes:

- Complainant has 60 days from the date of adverse action to file of complaint with MSHA
 - If received after 60 days, complainant is giving the opportunity to explain why the delay took place and MSHA may still investigate the allegations.

Once complaint is filed:	Application for TR:
<ul style="list-style-type: none">• 15 days to initiate investigation• 45 day to submit report to TCID• 60 days for TCID to complete review• 90 days for SOL to file a complaint with FMSHRC	<ul style="list-style-type: none">• 7 days to notify TCID and SOL or miner request• 15 days for district to investigate and submit findings to TCID• 20 days for MSHA to refer to SOL or decline• 30 days for SOL to file application or decline

Claims of Interference

- What is Interference?
 - There does NOT need to be the exercise of protected activity
 - There does NOT need to be an adverse action taken against the complaint(s)
 - MSHA does not believe it needs to prove operator motive or intent was to interfere with exercise of miners' rights
- Currently, there are two legal standards of review under FMSHRC
 - *Franks & Hoy Test* – Does not require there was intent of interference by “interfering party”
 - *Pepin Test* – Actions were motivated by the exercise of protected activities

MSHA Evaluation: Temporary Reinstatement

Temporary Reinstatement:

- Complainants can request temporary reinstatement during the investigation and subsequent litigation.
 - Reinstatement can be:
 - **Actual** (i.e. returning to job duties) at judges order;
 - **Economic** (i.e. return of complainants pay and benefits until completion of investigation and/or litigation) if agreed to by both parties.

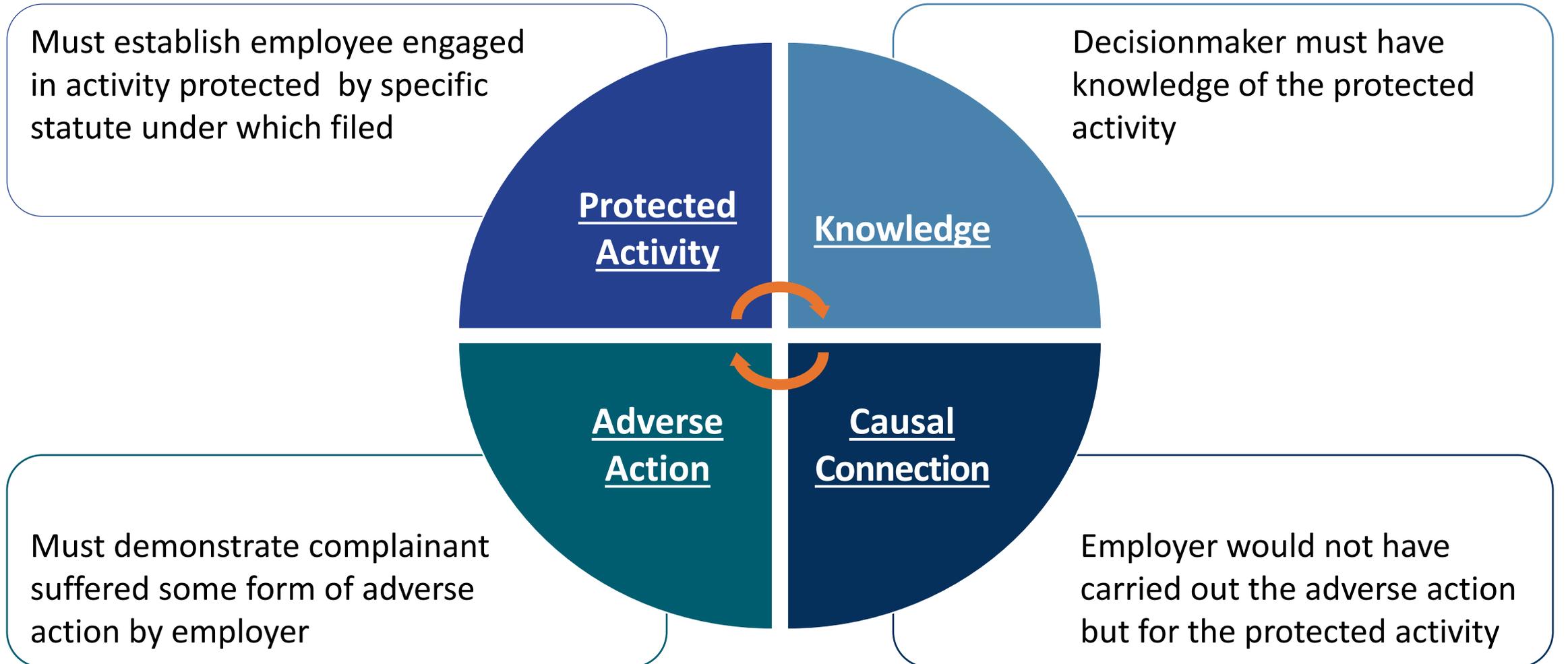
*If the complainant requests TR, the SI must conduct a preliminary investigation and determine whether the evidence alleged by the **complainant provides a reasonable cause to believe that discrimination may have occurred. Where reasonable cause exists, the request for TR is considered not frivolously brought.***

MSHA Special Investigation Procedures Handbook

A stack of several books is shown against a blue background. The top book is open, with its pages fanned out. A wooden gavel with a gold band is resting on the stack. The text "Reviewing Charges and Burdens of Proof" is overlaid in the center of the image.

Reviewing Charges and Burdens of Proof

Elements of Retaliation/Whistleblower Claim



What is “Protected Activity”?

Examples of activity generally considered protected:

- Making a workplace safety/EEO complaint
- Participating in a DOL inspection or EEOC investigation onsite
- Complaining to employer of workplace concerns/issues
- Participating in DOL/EEO enforcement action against employer
- Refusing to perform a dangerous assigned task under certain circumstances

Employer Knowledge

- **Employer Knowledge:** must show person involved in the decision to take adverse action was aware or suspected protected activity
 - EEOC/DOL considers Employer Knowledge as its own, separate element in its assessment of the complaint
 - If decision-maker not aware of protected activity, then causal connection cannot be established

What is “Adverse Action”?

- **Standard:** Employee must show that the action “could dissuade a reasonable employee from engaging in protected activity”
- Two elements of this assessment:
 1. Materially adverse; AND
 2. To a reasonable employee or applicant (*objective standard*)
- Adverse action does not necessarily need to be related to employment



What is “Causal Connection?”

Standard: Employee must show that “but-for” the protected activity, the adverse employment action would not have occurred

- The protected activity was a necessary antecedent of the adverse action

However, at DOL/EEOC level, the burden to establish causation is lower because only evaluating evidence based on reasonable cause vs. by a preponderance of the evidence.

Causal Connection - Proximity

- Employee commonly establishes a **causal connection** by showing employer took action shortly after protected activity
- Conversely, a lengthy time lapse between the protected activity and adverse action negates an inference of a nexus between them.
 - The time frame must be “very close”
 - U.S. Supreme Court has held that a 3-4 month period between protected activity and adverse action insufficient to establish causal link

Legitimate, Non-Discriminatory Reason

Even if employee can establish *prima facie* elements, employer can negate by providing **legitimate, non-discriminatory reason** for adverse action

Employer must simply meet burden of production

Burden of proof always remains with employee



Examples:

insubordination

absences

poor performance

financial hardship

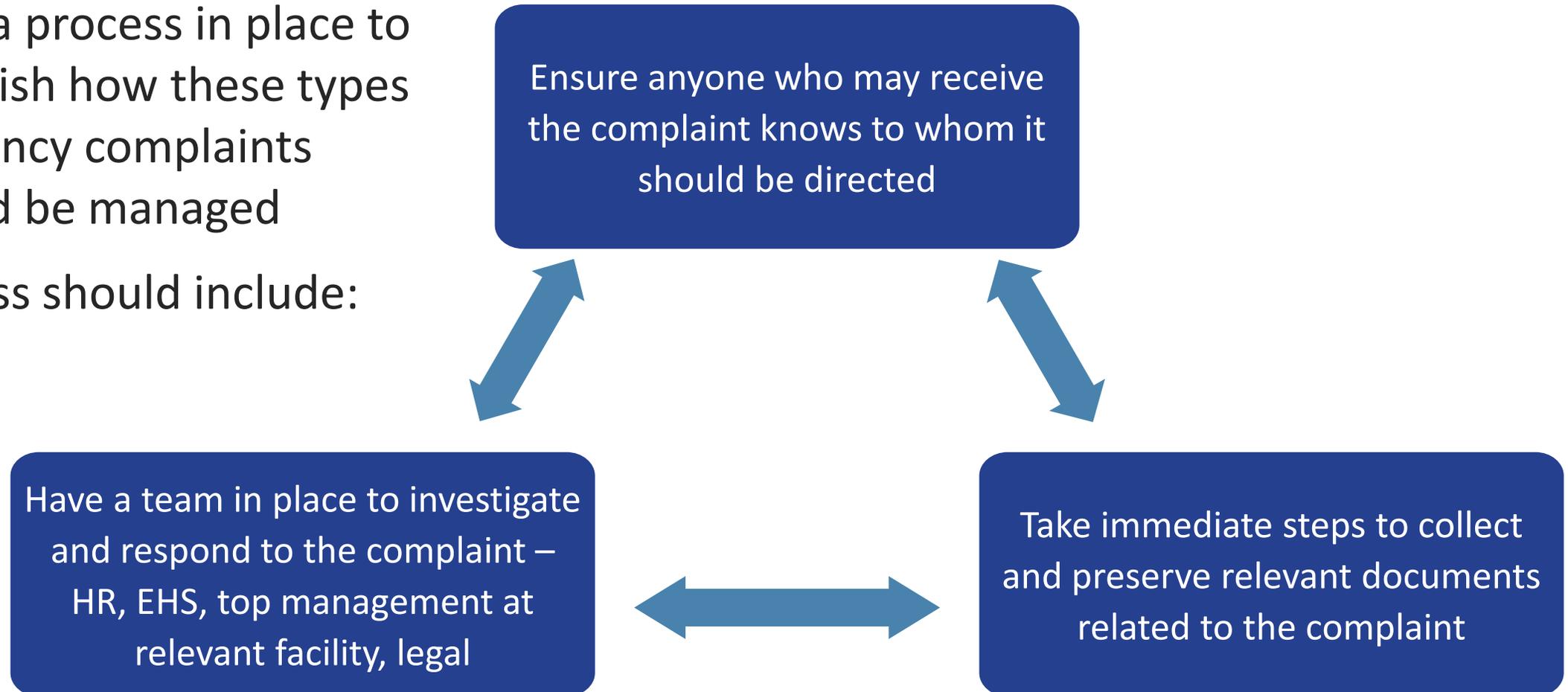
violations of
company
policies/rules, etc.



Responding to Whistleblower Complaints

Before a Complaint is Received...

- Have a process in place to establish how these types of agency complaints should be managed
- Process should include:



Recommendations for Responding to Investigation

- If complaining worker still employed, ensure no retaliation
- Conduct your own investigation of the claim:
 - Determine whether it is timely;
 - Collect documents related to claim;
 - Interview employees with any knowledge of the claim; and
 - Record your investigation and findings
- Prepare position statement/response letter to respond to charge of retaliation



Position Statement – Primary Goals

- Give context to the Charging Party’s allegations from the employer’s point of view
 - Explains employer’s actions in the context of the relevant law
- Tell a story that is easy for the investigator to follow:
 1. Provide documentation/exhibits to support position statement and refute Charging Party’s “Facts”
 2. Demonstrate that the employer takes the allegations seriously
 3. Establish trust with Agency
 4. Persuade agency to dismiss the complaint

Position Statement – Statement of Facts

Provide background on the parties

- Type of business and details of relevant establishment
- Applicable policies and procedures (quote them)
- Job and Job duties of Charging Party

Describe context for basis of charge

- Introduce key players/decision makers involved
- Discuss issues with employee's performance
- Explain reasons for any disciplinary/adverse action
- Explain in a manner to show action was lawful

Position Statement – Legal Analysis

- This is the crux of the position statement because investigator will use to determine if charge should proceed
- Clearly lay out how charging party has failed to meet legal burden
- Examples:
 - Employer has established legitimate reason for adverse action and employee cannot show pretext
 - Employee cannot establish causal connection between protected action and adverse action
 - Employee’s activity was not protected by the applicable law

Position Statement – Supporting Documentation

- Employers should provide supporting documentation as attachments to the position statement as evidence of its contentions
- For Example:
 - Copies of policies/procedures
 - Write-ups and disciplinary notices
 - Employment evaluations
 - Affidavits of supervisors/employees
- **HOWEVER**, carefully consider what documentation to provide because may be disclosed to opposing party



Disclosure of Response to Opposing Party

- Be aware that EEOC will release position statement and non-confidential attachments to Charging Party
 - Charging Party then has “20 days” to respond
 - Charging Party’s response will not be provided to employer
- OSHA provides employee the employer’s response *unless* “inadvisable”
 - As example of “inadvisable” OSHA provides examples of concern regarding revealing identity of confidential witness or risking retaliation

Responding to Complaints under 105(c)

- **Prepare for witness interviews and MSHA requests for employee contact information**
 - MSHA’s investigation will largely be dependent upon witness interviews with management and non-management employees
 - MSHA will immediately request personal contact information for employees
 - We must provide to MSHA
- **Be prepared for MSHA document requests**
 - There is likely to be more than one request for documents through the investigation

A miniature figure of a man in a dark suit, white shirt, and blue tie, holding binoculars to his eyes. He is standing on a black telephone receiver. The background is white.

Recommendations to Avoid Retaliation/Whistleblower Claims

Maintain Clear Complaint Policy

- Establish complaint policy(ies) and disseminate to employees (handbook or stand alone).
- Policy should be written in clear, simple language so its easy to understand.
- Clarify what behaviors/issues should be reported, how complaint should be made, the investigation process.
- Makes clear investigations/follow up will be prompt – actions must reflect policy
- Includes clear protection from retaliation for reporting or participating investigation.

Train, Train, Train

- Employees should be trained on complaint procedure
- Direct supervisors and managers **must** be trained on retaliation and how to manage protected employees
- Specifically, management should receive instruction on:



Develop and Maintain Documentation

Prior to and at the time of adverse action, essential to document every step

- Maintain clear, written documentation of all disciplinary action
- Detail decision-making process for action in accordance with company policies/procedures
- Document all training and instruction provided on applicable policies and procedures

Conduct an investigation of any complaint of retaliation and document process

- Keep notes of employee interviews;
- Record reason(s) for determination of outcome;
- Provide written certification of any follow-up actions pursuant to outcome; and
- Apprise complainant of findings and resolution(s)

Be Consistent

- To support that a decision was legitimate and non-retaliatory, an employer must be consistent in the:
 - Implementation of hiring and promotion practices
 - Application of its policies and performance expectations
 - Issuance of discipline
 - Process for investigating complaints
- Clear policies and documentation is key
- Ultimately, an employer should be able to show that a similarly situated employee outside the complainant who did not engage in protected activity was treated in the same manner



“At least we are consistently inconsistent.”

Questions?



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the **Employer** Defense report



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