

# Avoiding Worker's Compensation Retaliation Claims in the Construction Industry

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Even with the strictest compliance with Occupational Safety and Health Administration (OSHA) regulations and best workplace safety practices, on-the-job injuries from time to time are inevitable in the construction industry. Many states have enacted powerful protections for workers filing worker's compensation claims, or exercising related rights, to guard against retaliation by employers. These anti-retaliation protections may include both civil and criminal liabilities and strong remedial schemes.

Texas, for example, makes it unlawful for employers to discharge or in any other manner discriminate against an employee because the employee has:

1. Filed a workers' compensation claim in good faith;
2. Hired a lawyer to represent the employee in a claim;
3. Instituted or caused to be instituted in good faith a proceeding under the Texas Workers' Compensation Act; or
4. Testified or is about to testify in a proceeding under the Act.

Texas Labor Code § 451.001.

A worker whose rights have been violated can file a civil lawsuit for reinstatement, lost wages and benefits, mental anguish, and even punitive damages. The worker also has the right to a jury trial. Other states, such as Florida, Illinois, and New Jersey, similarly permit a claimant to file a lawsuit for retaliation.

Certain states, instead, allow claims to be made to their administrative agencies. California Labor Code Section 132a provides that an employee subjected to worker's compensation retaliation is entitled to have their compensation increased by half (up to \$10,000) and to seek reinstatement, back pay, and benefits from the Workers Compensation Appeals Board. Further, the employer may be held liable for a misdemeanor by referral to the Division of Labor Standards Enforcement. Similarly, New York permits an administrative complaint of retaliation with the New York Worker's Compensation Board, which may order a worker's reinstatement and order "make whole" remedies to the employee under New York Workers' Compensation Law § 120.

Whatever remedial scheme exists in a particular state, the consequences can be costly to an employer found in violation. For instance, an Illinois jury awarded \$2.6 million to a worker where the employer was found to have changed excused absences to "no-call, no-show" after the employee filed for worker's compensation.

Significantly, federal statutes that permit parties who have been sued to remove (transfer) certain cases or claims from state court to federal court specifically except claims arising under state worker's compensation laws. Thus, where a private right of action exists, an employer might be forced to defend a non-removable retaliation case in state court, which, in many instances, a less favorable forum.

The worker claiming retaliation bears the burden of proof to establish retaliatory intent. Nevertheless, fighting worker's compensation retaliation claims can be risky. The worker may be seen sympathetically, having sustained a work-related injury only to be followed (causally or not) by some adverse employment action. Additionally, with a finding of retaliatory intent, it is often not too far a stretch to find a basis for awarding punitive damages.

Claimants can rely on direct and circumstantial evidence. Sometimes an employer might have to walk a fine line — questioning whether an injury or need for treatment is legitimate, while respecting the injury reporting and claims processes and administering them even-handedly.

Best practices to minimize risk include ensuring that there is an available and reliable protocol for reporting on-the-job injuries for workers instituting claims and ensuring that human resources personnel have appropriate training.

As specific state laws govern potential claims for worker's compensation retaliation, employers should consult and seek advice related to specific states where you have employees. Jackson Lewis attorneys have a wealth of experience across the country handling retaliation claims and providing guidance regarding best practices.

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