



By Todd A. Leeson

Five Steps Virginia Employers Should Take to Help Avoid Whistleblower or Retaliation Claims

Employees are filing record numbers of retaliation and whistleblower claims. Here are some facts:

- For the fourth consecutive year, retaliation claims are the leading category of charges filed with the Equal Employment Opportunity Commission (EEOC). In 2012 alone, retaliation claims comprised more than 38% of all charges filed with the EEOC.
- Dozens of additional federal laws also protect workers against retaliation for complaining about alleged unlawful practices or conduct. The Department of Labor, primarily through OSHA, has helpful guidance on its website as to the various laws and rights: www.whistleblowers.gov.
- Recently enacted federal laws such as Sarbanes-Oxley, as well as the Affordable Care Act, also contain whistleblower protections. So what should employers do to minimize their legal risks? Here are five suggestions.

1) Publish a Robust Retaliation Policy. I recommend that you have a separate, stand-alone policy that sets forth the company's commitment that it will not take any adverse action against any person because that person engaged in conduct protected under the law.

Any employee who believes he/she has experienced retaliation must promptly inform management or human resources of the concern so that the company can investigate it. The company will take corrective action if it determines that there has been a violation of company policy.

- 2) Train Management.** Having a solid policy and complaint process is not enough. You must train management to understand the policy and to comply with it.
- 3) Don't Retaliate!** How would one of your managers react if he or she was accused of violating the law? Moreover, what if the employee who lodged the complaint had performance problems and the manager denied any improper conduct? Companies can and should take appropriate corrective action against persons who violate company policy, even if the person previously engaged in protected activity. Make sure, however, the company can justify its decision for a legitimate, non-retaliatory reason. Ask yourself: Why is the manager asking HR to terminate this employee today?
- 4) Insulate the Decision Maker.** Assume that an employee who had previously engaged

in protected activity is subsequently alleged to have engaged in conduct in violation of company policy. If possible, empower the person who will investigate and/or decide whether to take adverse action against the employee to make an independent investigation. Similarly, if feasible, insulate the decision maker from knowledge that the employee had previously engaged in protected activity.

- 5) Follow Up.** If an employee has engaged in protected activity (i.e., lodged a complaint about purported unlawful conduct), human resources should regularly follow up with that employee, and then memorialize the facts.

Want additional advice? I will be presenting a strategic session on this topic at the 2014 Virginia State SHRM Conference at The Homestead. I hope to see you there. ■

Todd A. Leeson is an employment law partner with the law firm of Gentry Locke in Roanoke. Todd also serves as the Legislative Director for the Virginia State SHRM Council and has been active in SHRM for more than 20 years. He is a regular presenter at various SHRM conferences. His contact information can be found at www.gentrylocke.com/leeson.