

AT A GLANCE:

ANTI-RETALIATION LEGISLATION TO PROTECT WORKERS AND THE RULE OF LAW

Introduction

States across the U.S. have enacted innovative laws to address rising levels of economic inequality by going beyond the minimum protections offered at the federal level. However, enacting a higher state minimum wage or paid sick leave laws is not enough. [Effective enforcement is crucial](#) to ensuring that workers—particularly [women, immigrants, and BIPOC workers](#)—benefit from legislation that is intended to raise labor standards. Lawmakers must ensure that state labor agencies have the tools and resources that they need to successfully enforce worker protection laws.

Policy Option: Rebuttable Presumption of Retaliation

The challenge for labor standards enforcement agencies and workers is that retaliation, though [pervasive](#), is notoriously [difficult to prove](#). In recent years, actions have been taken in several states to address this challenge and strengthen retaliation protections by including a [rebuttable presumption](#) that an adverse action taken soon after a protected activity is retaliatory. In effect, this flips the burden onto the employer—the party that holds the evidence as to why it took the adverse action—to prove that the adverse action was taken for a non-retaliatory reason.

“The successful enforcement of worker protection law depends on workers being empowered to and feeling safe enough to speak out for themselves and their fellow workers.”

Maia Fisher

Regional Solicitor for the U.S. Department

State Legislative Examples of Rebuttable Presumption of Retaliation

Rebuttable presumption of retaliation has been included in minimum wage and paid sick leave laws in [Arizona](#); [California](#); [New Jersey](#); and [Washington, D.C.](#) Other states have passed laws that apply to certain industries. For example, [Pennsylvania's Construction Workplace Misclassification Act](#) includes a rebuttable presumption of retaliation, and in 2021, [Colorado](#) and [Nevada](#) enacted this protection for agricultural and hospitality workers, respectively. In 2022, lawmakers across the U.S., including in [Connecticut](#), [Florida](#), [Massachusetts](#), [New Hampshire](#), and [West Virginia](#), introduced bills to include a rebuttable presumption of retaliation when an adverse action is taken within 90 days of a protected activity.

Policy Option: Comprehensive Definitions

Where the definitions of “protected activity” or “adverse action” are too narrow, an enforcement agency’s ability to find and remedy retaliation is curtailed. Strong retaliation protections require comprehensive definitions of these elements. For example, “protected activity” should include the exercise of any right guaranteed by the law (e.g., use of sick leave), filing a complaint, participating in an enforcement action, making inquiries about a protected right, and informing any person of an alleged violation of a right guaranteed by the law. Similarly, “adverse action” should be defined broadly enough to account for the many different forms of retaliation.

Policy Option: Increased Damages

Too often, even when the elements of a retaliation are established, the damages the aggrieved person can recover are too low to fully remedy the direct and collateral harm. Likewise, the penalties available for retaliation violations are commonly too small to deter additional acts of retaliation. Strong retaliation protections must include sufficient damages to fully rectify retaliation—including backpay, front pay, and reinstatement—and civil penalties and/or fines that are high enough to serve as a deterrent.

Policy Option: Injunctive Relief

While it is imperative to remedy retaliation for the aggrieved persons, such remedies come at the conclusion of the investigation. In the meantime, those who suffered retaliation still bear the consequences. Additionally, the chilling effect of ongoing retaliation during an investigation can limit worker cooperation such that investigators cannot establish the true extent or nature of the violations. To mitigate the impact of retaliation and preserve the integrity of the investigation, agencies need the ability to immediately intervene and obtain a temporary or preliminary [injunction](#). Such injunctions help to maintain the status quo pending a final judgment.

Additional Resources

- [Addressing and Preventing Retaliation and Immigration-Based Threats to Workers](#) by Tanya Goldman
- [Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation](#) by Laura Huizar
- [Essential Labor Standards Enforcement Powers](#) by Jenn Round

Frequently Asked Questions

1. Why is illegal retaliation so hard to prove under the Fair Labor Standards Act (FLSA)?

To determine retaliation has occurred, enforcement generally must find that three elements have been established: 1) a worker engaged in a protected activity; 2) an employer took an adverse action; and 3) there is a causal connection between the adverse action and protected activity. Under the [FLSA](#) and many state laws, the initial burden is on the worker to prove these three elements. Most often, it is the causal connection that is the hardest to substantiate because the worker rarely has access to any evidence documenting the employer’s true motives, and employers in most states have full discretion to take adverse employment actions against workers for almost any reason, or no reason at all.

2. Is retaliation widespread?

Retaliation is alarmingly common. A national survey found that [43% of workers](#) who complained to their employers about pay and working conditions were subjected to illegal retaliation.

3. What is the impact of retaliation?

For the individual worker, retaliation often results in lost wages, collateral losses (e.g. eviction), and emotional distress. Retaliation also causes a chilling effect that impacts the entire workforce. An adverse action against one worker sends a message about the ramifications of reporting a violation or cooperating in an investigation. The [fear of retaliation](#) is especially effective at silencing many of the same workers who are most likely to experience wage theft and other workplace violations. Retaliation often renders agencies’ enforcement efforts [less effective](#), especially against the worst violators.