OUTLINE ON STATE AND FEDERAL EMPLOYMENT-RELATED RETALIATION STATUTES

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WAGE & HOUR STATUTES

I. New York Labor Law / Wage Theft Prevention Act (WTPA)

a. Statutory text

N.Y. Lab. Law § 215

1. (a): No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, or to the attorney general or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner (ii) because such employer or person believes that such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, or to the attorney general, or to any other person that the employer has violated any provision of this chapter, or any order issued by the commissioner (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter, or (iv) because such employee has provided information to the commissioner or his or her authorized representative or the attorney general, or (v) because such employee has testified or is about to testify in an investigation or proceeding under this chapter, or (vi) because such employee has otherwise exercised rights protected under this chapter, or (vii) because the employer has received an adverse determination from the commissioner involving the employee.

An employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section.

(b) If after investigation the commissioner finds that an employer or person has violated any provision of this section, the commissioner may, by an order which shall describe particularly the nature of the violation, assess the employer or person a civil penalty of not less than one thousand nor more than ten thousand dollars. The commissioner may also order all appropriate relief including enjoining the conduct of any person or employer; ordering payment of liquidated damages to the employee by the person or entity in violation; and, where the person or entity in violation is an employer ordering rehiring or reinstatement of the employee to his or her former position or an equivalent position, and an award of lost compensation or an award of front pay in lieu of reinstatement and an award of lost compensation. Liquidated damages shall be calculated as an amount not more than ten thousand dollars. The commissioner may assess liquidated damages on behalf of every employee aggrieved under this section, in addition to any other remedies permitted by this section.

(c) This section shall not apply to employees of the state or any municipal subdivisions or departments thereof.

2. (a) An employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction to restrain violations of this section, within two years after such violation, regardless of the dates of employment of the employee, and to order all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of liquidated damages, costs and reasonable attorneys' fees to the employee by the person or entity in violation; and, where the person or entity in violation is an employer, ordering rehiring or reinstatement of the employee to his or her former position with restoration of seniority or an award of front pay in lieu of reinstatement, and an award of lost compensation and damages, costs and reasonable attorneys' fees. Liquidated damages shall be calculated as an amount not more than ten thousand dollars. The court shall award liquidated damages to every employee aggrieved under this section, in addition to any other remedies permitted by this section. The statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier, until an order to comply issued by the commissioner becomes final, or where the commissioner does not issue an order, until the date on which the commissioner notifies the complainant that the investigation has concluded. Investigation by the commissioner shall not be a prerequisite to nor a bar against a person bringing a civil action under this section.

(b) At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee.

3. Any employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person who violates subdivision one of this section shall be guilty of a class B misdemeanor.

b. **Protected activity**
    i. Complain to who? The statute explicitly includes complaints to the following:
        1. Employer;
        2. Commissioner of Labor (DOL);
        3. Attorney General;
        4. "Any other person."
    ii. Informal and verbal complaints are protected
        1. The statutory text only requires that the employee has "made a complaint." Prior to the passage of the WTPA, verbal and informal complaints were also sufficient to trigger these provisions.
            a. *Barturen v. Wild Edibles, Inc.*, No. 07-cv-8127 (LLS), 2007 WL 4468656, 2007 U.S. Dist. LEXIS 93025, at *17 (S.D.N.Y. Dec. 18, 2007) (Stanton, J.) (holding that complaining to employer at union-organized demonstration

about lack of overtime wages counts as informal complaint).

b. *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 162 (E.D.N.Y. 2002) ("an informal complaint to the employer that the employer has violated any provision of the Labor Law" is protected activity; employee had complained about violations of NYLL § 299 requiring sufficient ventilation in factories and NYLL § 350 establishing standards for industrial homework).

c. "An informal complaint to an employer that the employer is violating a provision of the Labor Law suffices." *Ting Yao Lin v. Hayashi Ya II, Inc.*, No. 08–6071, 2009 WL 289653, at *7 (S.D.N.Y. Jan. 30, 2009) (plaintiffs made verbal complaint to employer about, "among other things, the failure to pay for hours worked over 40 hours per week").

d. *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 263 (S.D.N.Y. Oct. 21, 2008) (§ 215 "covers complaints by employees to their employer and not merely the institution of formal proceedings").

iii. Does complaint need to be meritorious/correct?

1. The WTPA specifically sought to overturn the *Epifani* decision's requirement that a plaintiff must show that she "complained about a specific violation of the Labor Law." *Epifani v. Johnson*, 65 A.D.3d 224, 236, 882 N.Y.S.2d 234, 244 (2d Dep't 2009).
2. The statute now reads: "An employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section." N.Y. Lab. Law § 215(1)(a). Thus, the employee need only have a "good faith belief" that the employer has violated the NYLL.

c. **Retaliatory acts / adverse action**

i. Who can take retaliatory action?

1. The WTPA now includes as retaliation actions by the "employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or *any other person.*" N.Y. Lab. Law § 215(1)(a) (emphasis added).
2. Former or future employer? (see appendix on adverse actions)

ii. Actions within the employment relationship

1. *Statute:* The statute prohibits any form of discrimination or retaliation and explicitly prohibits actions to "discharge, threaten [or] penalize" employees. N.Y. Lab. Law § 215(1)(a).
2. *Standard:* Case law calls for "using an objective standard" in which "the total circumstances of [a plaintiff's] working environment [must have] changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." *Castagna v. Luceno*, No. 09 Civ. 9332, 2011

WL 1584593 (S.D.N.Y. April 26, 2011) (*citing Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002)).

3. <u>*Actions not constituting retaliation (cases are pre-WTPA):*</u>
    a. *Shaw v. Baldowski*, 192 Misc.2d 635, 747 N.Y.S.2d 136, 144 (Sup. Ct. Albany Cnty. 2002) (allegations that employee was forbidden to speak to coworkers about her workplace conditions and that she was embarrassed and humiliated by being moved to separate office are insufficient to constitute actionable retaliation) (Note: pre-*Burlington Northern*).
    b. *Hai Ming Lu v. Jing Fong Restaurant*, 503 F. Supp. 2d 706, 713 (S.D.N.Y. 2007) (waiter's assignment to most difficult section of restaurant for two consecutive nights after initiating employment discrimination action "too trivial" to qualify as adverse employment action).
    c. *Castagna v. Luceno*, No. 09 Civ. 9332, 2011 WL 1584593 (S.D.N.Y. April 26, 2011) (finding "mock[ery] and ridicule" by employer to be insufficient grounds for retaliation).

d. **Statute of limitations / continuing violations**
    i. Two years for civil suit, but is tolled pending a NYSDOL investigation. N.Y. Lab. Law § 215(2)(a).

e. **Administrative agency**
    i. NYSDOL and Attorney General can enforce, but not required to file there before filing in court. N.Y. Lab. Law § 215(2)(a).
    ii. However, under 215(2)(b), "at or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee." N.Y. Lab. Law § 215(2)(b).

f. **Remedies**
    i. Under the statute, courts may "order all appropriate relief," N.Y. Lab. Law § 215(2)(a), and that section explicitly lists:
        1. Equitable or injunctive relief, including enjoining the ER's conduct, reinstatement and restoration of seniority;
        2. Frontpay;
        3. Backpay ("lost compensation and damages");
        4. Liquidated damages, not to exceed $10,000;
        5. Costs and reasonable attorneys' fees.
    ii. Punitive damages were awarded by some courts prior to the passage of the WTPA. *See, e.g.*, *Perez v. Jasper Trading*, No. 05 Civ. 1725, 2007 WL 4441062 (E.D.N.Y. Dec. 17, 2007) (awarding compensatory and punitive damages).

g. **Special notes**
    i. *Criminal Penalties:* Violation of Section 215 is a class B misdemeanor. N.Y. Lab. Law § 215(3).

ii. Unclear whether FLSA includes complaints to the employer, *see Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (discussed below), but NYLL does include complaints to the employer.

II. The Fair Labor Standards Act (FLSA)

a. **Statutory text**

29 U.S.C. § 215(3)

(a) . . . [I]t shall be unlawful for any person . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding . . . ."

b. **Protected activity**

i. Complain to who?

1. Statute explicitly includes governmental agencies and courts
    a. Filing private lawsuit against employer. *See Soto v. Adams Elevator Co.*, 941 F.2d 543 (7th Cir. 1991).
    b. Filing complaint with the USDOL. *See Reich v. Davis*, 50 F.3d 962 (11th Cir. 1995).
    c. Cooperating with USDOL investigator. *See Avitia v. Metro Club of Chicago, Inc.*, 49 F.3d 1219 (7th Cir. 1995).
2. Unclear whether complaints to employer are covered
    a. Dicta in a recent SCOTUS decision suggests that complaints directed to employers would suffice. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-36 (2011) (declining to decide whether oral complaints to private employers, rather than to government, should be protected because question was not adequately raised in certiorari briefs, but holding that complaint is "filed" when "a reasonable, objective person would have understood the employee" to have "put the employer on notice that [the] employee is asserting statutory rights under the [Act].").
    b. But, Justices Scalia and Thomas dissented on the ground that the FLSA "does not cover complaints to the employer at all." *Id.* at 1337.
    c. The Fourth Circuit also seems to reject coverage of complaints to employers. *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 363-64 (4th Cir. 2000) (holding that second clause of FLSA's anti-retaliation provision does not protect intra-company complaints, and that "complaint clause" does not protect employee's communication of another employee's complaint to employer).
    d. In the Second Circuit, trial court decisions have suggested that complaints to employers, unlike under the NYLL, are not protected activity under FLSA. *See Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 263-64 (S.D.N.Y. 2008)

(where employees told employer of their intention to sue if they did not receive raise, court notes that "N.Y. Labor Law § 215(1) . . . unlike the federal provision, covers complaints by employees to their employer and not merely the institution of formal proceedings").

ii. Informal or verbal complaints are protected. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) ("To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.").

iii. Does complaint need to be meritorious/correct?

1. Several cases suggest that the employee need only have a good faith belief that the law is being violated.
    a. *Burnette v. Northside Hosp.*, 342 F. Supp. 2d 1128, 1133-35 (N.D. Ga. 2004) (discussing and applying both subjective and objective standard of good faith).
    b. *Malone v. Signal Processing Technologies, Inc.*, 826 F. Supp. 370, 376 (D. Colo. 1993) ("The FLSA's anti-retaliation provision protects conduct based on a good faith, although mistaken, belief that an employer's conduct is illegal.").
    c. *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) ("[Section 215(a)(3)] protects conduct based on a good faith, although unproven, belief that the employer's conduct is illegal.").
    d. *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (finding that when the "immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under § 215(a)(3) whether or not other grounds for discharge exist").

iv. Complaints on behalf of others

1. The FLSA's anti-retaliation provisions are "sufficiently broad to encompass conduct taken on behalf of others." *Reed v. Monahan's Landscape Co.*, No. 03-C-7081, 2004 WL 422686, at *2 (N.D. Ill. Mar. 4, 2004) (citing *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996)).

c. **Retaliatory acts / adverse action**

i. Who can take retaliatory action besides the ER?

1. "Any person" is broad enough to include a labor union, its officers, or members. *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943).

ii. Types of adverse action: see appendix

d. **Statute of limitations**

i. The statute of limitations is two years, unless plaintiff can prove this is "a cause of action arising out of a willful violation," in which case the statute of limitations is three years. 29 U.S.C. § 255(a).
ii. The violation is "willful" where the employer knew or showed reckless disregard as to whether its conduct violated the FLSA. *McLaughlin v. Richland Shoe*, 486 U.S. 128, 108 S. Ct. 1677, 100 L.E.2d 115 (1988).

e. **Administrative agency**
i. Enforced by the U.S. Department of Labor, but filing with the agency is not a prerequisite to filing in court.
ii. However, if the Secretary of Labor files a retaliation claim on behalf of an employee, the employee is barred from bringing a private action. 29 U.S.C.A. § 216(b).

f. **Remedies**
i. Statutory text

29 U.S.C.A. § 216

(b) Damages; right of action; attorney's fees and costs; termination of right of action. [. . .] Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

ii. The statute explicitly provides for the following relief:
1. Equitable or injunctive relief, including reinstatement and promotion. *See Brock v. Casey Truck Sales, Inc.*, 839 F. 2d 872,

881, 28 WH Cases 697, 704 (2d Cir. 1988) (ordering reinstatement pursuant to FLSA § 217).

2. Backpay ("payment of wages lost"). *Sines v. Serv. Corp. Int'l*, No. 03 Civ. 5465, 2006 WL 3247663 (S.D.N.Y. Nov. 8, 2006) (Conti, J.) (awarding plaintiffs $32,510.25 in back pay for FLSA retaliation claims related to retaliatory suspension).
3. Liquidated damages equivalent to the wages lost.
    a. But, the Portal-to-Portal Act (29 U.S.C.A. § 260) provides employers with a good faith defense:

        In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

    b. The Circuit courts are mixed as to whether liquidated damages are discretionary or mandatory in the absence of an employer's showing of good faith.
        i. The Fifth, Sixth, and Seventh Circuits have held that liquidated damages are mandatory unless the employer can show good faith. *See Lowe. v. Southmart Corp.*, 998 F.2d 333 (5th Cir. 1993); *see also Heidtman v. County of El Paso*, 5 Wage & Hour Cas. 2d 385 (5th Cir. 1999); *Shea v. Galaxie Lumber & Constr. Co., Inc.*, 152 F.3d 729 (7th Cir. 1998); *Blanton v. City of Murfreesboro*, 856 F.2d 731 (6th Cir. 1988) (liquidated damages are mandatory for violations of §215(a)(3) but discretionary for other affected sections).
        ii. The Eighth Circuit treats them as discretionary. *Braswell v. City of El Dorado*, 187 F.3d 954 (8th Cir. 1999) (holding that liquidated damages are mandatory only for violations of minimum wage and overtime provisions of FLSA).
    c. The Second Circuit does not appear to have clearly decided this issue, but lower courts seem to have followed the mandatory approach.

i. In *Sines v. Serv. Corp. Int'l*, No. 03 Civ. 5465, 2006 WL 3247663, at *2 (S.D.N.Y. Nov. 8, 2006), the court awarded plaintiffs liquidated damages after a retaliatory suspension. The decision stated that "[u]nder FLSA, in order to avoid paying liquidated damages after being found to have wrongly retaliated against a defendant, an employer must 'show . . . to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [FLSA].' 29 U.S.C. § 260. The jury's verdict finding that Defendants were liable for punitive damages constitutes a finding that the 2002 suspension was not done in good faith or upon reasonable grounds. The Court declines the invitation by Defendants to reach a different conclusion, and so find that the award of liquidated damages is proper in this case under the FLSA."

4. Costs and reasonable attorneys' fees.

iii. Other damages not explicitly discussed in the statutory text

1. Frontpay is available. *See Avitia v. Metropolitan Club of Chicago*, 49 F.3d 1219 (7th Cir. 1995) (but maybe not available where liquidated damages are awarded).
2. Punitive damages have been awarded in the Second Circuit.
   a. *See Sines v. Serv. Corp. Int'l*, No. 03 Civ. 5465, 2006 WL 3247663 (S.D.N.Y. Nov. 8, 2006) (holding that punitive damages are available under FLSA § 216(b) and affirming jury's verdict of $130,000 in punitive damages).
   b. <u>*But see*</u> *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000) (holding that punitive damages are not available as legal relief).
3. Emotional distress damages may also be available.
   a. *See, e.g., Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (upholding award of "$35,000 is compensation for emotional distress attributable to the discharge and revocation of health insurance"); *see also Bogacki v. Buccaneers Ltd. P'ship*, 370 F. Supp. 2d 1201 (M.D. Fla. 2005) (emotional distress damages may be available in FLSA retaliation claims on case-by-case basis).

g. **Special note:** 29 U.S.C.A. § 216(b): "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

DISCRIMINATION STATUTES

III. Title VII

a. **Statutory text**

42 U.S.C. § 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

b. **Jurisdictional requirement**
   i. Title VII only applies to employers with at least 15 employees. 42 U.S.C. § 2000e(b).

c. **Who can take retaliatory action?**
   i. The EEOC's position is that it is illegal for a current employer to retaliate against an employee for pursuing an EEO charge against a former employer. U.S. Equal Employment Opportunity Commission, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).
   ii. See II(d)(i)(2)(b) below and the Appendix on Adverse Actions.

d. **Who is protected?**
      i. Covered individuals:
         1. "[P]eople who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability." U.S. Equal Employment Opportunity Commission, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).
         2. Third parties who have a "close association" with someone who has engaged in such protected activity also are covered individuals. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011) (employer illegally retaliated against employee by firing him after his fiancé filed an EEOC charge against employer).
            a. In *Thompson*, the Court refused to identify a fixed class of relationships for which third-party reprisals are unlawful. Instead, the Court noted that firing a close family member will almost always rise to that level, while "a milder reprisal on a mere acquaintance will almost never do so." *Id.* at 868.

b. Former employees are covered by the anti-retaliation provision of Title VII. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In *Robinson*, a former employee claimed he was fired by Shell on the basis of race. While his discrimination suit was pending against Shell, Robinson applied for a new job. The new employer contacted Shell seeking a reference. Shell gave Robinson an unfavorable reference. The Court held that, even as a former employee, Robinson had a cause of action against Shell for unlawful retaliation.

ii. Individuals not covered include those who have brought attention to violations of law other than employment discrimination (e.g., whistleblowers). U.S. Equal Employment Opportunity Commission, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).

e. **Protected activity**

i. The statutory text has an "opposition clause" and a "participation clause."

". . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

ii. Opposition to an unlawful employment practice

1. What constitutes "opposition"?
    a. Complaints to the employer are sufficient.
    b. "Unwilling" opposition is covered: Being forced to reveal information regarding past discriminatory treatment during an employer's internal investigation is sufficient. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009) (employee who discloses, for the first time, prior harassment during an employer's internal investigation of alleged harassment by another employee has effectively "opposed" discriminatory practice and thus may be covered under anti-retaliation provision).
2. Does the practice need to actually be unlawful?
    a. Opposition need only be based on a reasonable, good-faith belief that the practice complained of violates anti-discrimination law. *Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984).
    b. For the belief to be reasonable, plaintiff must present at least some evidence of conduct, discrimination, animus, or bias existing *at the time he made the complaint* and pointing towards illegality. *Spadola v. New York City Transit Auth.*, 242 F. Supp. 2d 284, 291 (S.D.N.Y. 2003).

i. *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 93 (2d Cir. 2010) (good faith existed when plaintiff complained to supervisors about younger employees going undisciplined while older employees faced discipline for similar conduct, and about general "unequal enforcement of the rules . . . with respect to older employees versus younger employees").

ii. *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 210 (2d Cir. 2006) (good faith existed when plaintiff filed official complaint with NYS Division of Human Rights alleging that defendants had denied him promotion on basis of age, race, sex, and creed).

iii. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 89 (2d Cir. 2001) (good faith existed when plaintiff had filed EEOC complaint alleging age discrimination and citing statements referring to age and youth).

iv. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (good faith existed when plaintiff complained of coworker's comment indicative of sexual harassment).

3. Verbal or informal complaints are sufficient.
    a. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) ("[T]he law is clear that opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive statutory protection . . . ."); *Summer v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (holding that protected activities include "making complaints to management").
4. Examples of other forms of "opposition": complaining to anyone about alleged discrimination against oneself or others, threatening to file a charge of discrimination, picketing in opposition to discrimination, refusing to obey an order reasonably believed to be discriminatory. U.S. Equal Employment Opportunity Commission, *Facts About Retaliation*, http://www1.eeoc.gov//laws/types/facts-retal.cfm (last visited Sept. 13, 2011).
5. Actions that are not covered as "opposition" include: actions that interfere with job performance so as to render the employee ineffective, unlawful activities such as acts or threats of violence. *Id.*

iii. "Participation" in an employment discrimination proceeding.
1. "Participation means taking part in an employment discrimination proceeding." U.S. Equal Employment Opportunity Commission, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).

2. Examples of protected participation include filing a charge of employment discrimination, cooperating with an internal investigation of alleged discriminatory practices, serving as a witness in an EEO investigation or litigation. EEOC, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).
3. "Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid." EEOC, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011); *see also Dee v. Colt Constr. & Delivery Co.*, 28 F.3d 1446 (7th Cir. 1994).

f. **Adverse action**
   i. An "adverse action" is determined using an objective standard (whether a reasonable employee would have found the employer's action materially adverse, i.e., whether the challenged action could dissuade a reasonable employee from engaging in protected conduct). *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).
   ii. Not limited to employment-related or workplace actions (and thus is broader than the scope of adverse actions covered by Title VII's discrimination provisions).
   iii. Examples of adverse actions include:
      1. Reassignment of employee's duties, even without demotion. *Id.*
      2. Increased surveillance or investigation of wrongdoing. *Id.* (37-day unpaid investigatory suspension of employee, even though later rescinded with back pay, could still constitute a materially adverse action).
      3. Termination, refusal to hire, denial of promotion, threats. EEOC, *Facts About Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited Sept. 6, 2011).
      4. Unjustified negative evaluations, unjustified negative references. *Id.*
      5. Assault. *Id.*
      6. Unfounded civil/criminal charges. *Id.*
   iv. Examples of actions not covered under the statute:
      1. Petty slights and annoyances (i.e., stray negative comments in an otherwise positive or neutral evaluation). *Id.*
      2. "Snubbing" a colleague. *Id.*
      3. Negative comments that are justified by an employee's poor work performance or history. *Id.*

g. **Causal connection**
   i. A prima facie case of retaliation also requires a "causal connection" between the protected activity and the adverse action. This connection may be shown through direct or circumstantial evidence that retaliation was a motive for the adverse action. EEOC, *EEOC Compliance Manual § 8-II-E*, *available at* http://www.eeoc.gov/policy/docs/retal.html.
      1. Examples of direct evidence: the employer admits that it undertook the adverse action because of the protected activity, the employer expresses bias against the employee based on the protected activity. *Id.*
      2. Examples of circumstantial evidence the adverse action took place shortly after the protected activity and if the decision-maker was aware of the protected activity before undertaking the adverse action. *Id.*

h. **Procedure/Statute of Limitations**
    i. An employee must submit a charge of discrimination to the EEOC within 180 days of the allegedly unlawful incident or within 300 days if the EEOC has a working agreement with a deferral-state agency, such as in New York. 42 U.S.C. § 2000e-5(e)(1); *see also EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 644-45 (S.D.N.Y. 2010).
    ii. Once the Right to Sue Letter arrives in the mail, the employee has 90 days to bring a lawsuit. 29 C.F.R. § 1601.28.
    iii. The continuing violation doctrine does not apply to retaliation claims. As such, each retaliatory act is a discrete act. A court cannot consider retaliatory acts that fall outside the statutory filing period. *Nat'l R.R. Passenger Corp. (Amtrak) v. Morgan*, 122 S. Ct. 2061, 2073 (2002). In *Morgan*, a former employee brought a Title VII action against his former employer. The complaint alleged, *inter alia*, unlawful retaliation. The Court held that retaliatory actions were discrete acts and, accordingly, only those retaliatory acts occurring within 300 days of the date that the employee filed his charge with EEOC were actionable under Title VII.

i. **Remedies**
    i. Available remedies:
        1. Reinstatement and economic damages (front pay, back pay and benefits going back 2 years). 42 U.S.C. §§ 2000e-5(g)(1) (types of damages available), 2000e-5(g)(1) (back pay can go back as far as 2 years from the filing of the charge).
        2. Attorneys' fees and costs. 42 U.S.C. § 2000e-5(k).
        3. Punitive damages and/or pain and suffering
            a. Title VII limits the combined recovery for pain and suffering, emotional distress, inconvenience, mental anguish, "other nonpecuniary losses," and punitive damages for each plaintiff to between $50,000 and $300,000, depending on the number of employees the employer has. 42 U.S.C. § 1981a(b)(3).
                i. Up to 100 employees: $50,000
                ii. 101 – 200 employees: $100,000
                iii. 201 – 500 employees: $200,000
                iv. Over 500 employees: $300,000
            b. These limits apply discretely for each plaintiff. *EEOC v. Everdry Mktg. & Mgmt., Inc.*, No. 01-CV-6329P, 2008 WL 478411, at *1 (W.D.N.Y. Feb. 19, 2008). In other words, each plaintiff in a case may be awarded up to this limit.
            c. If a defendant commits both discrimination and retaliation in violation of 42 U.S.C. §§ 2000e-2 and 2000e-3, respectively, the prevailing plaintiff is nonetheless limited to a single monetary award limited by 42 U.S.C. § 1981a(b)(3). 42 U.S.C. § 1981a(a)(1).

IV. NYS Human Rights Law

a. **Statutory text**

N.Y. Exec. Law § 296(7)

It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

b. **Jurisdictional requirement**
   i. The NYSHRL only applies to employers with at least 4 employees. N.Y. Exec. Law § 292(5).

c. **Substantive analysis tracks Title VII**
   i. Questions such as what constitutes adverse action, who qualifies as a covered individual, what qualifies as protected activity, and what qualifies as a causal connection are the same under the NYSHRL as under Title VII. *Beckett v. Prudential Ins. Co. of Am.*, 893 F. Supp. 234, 240 (S.D.N.Y. 1995) ("Elements of successful employment discrimination claims are virtually identical under Title VII and § 296 of the NYHRL." (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 479 (1982))).

d. **Administrative agency/election of remedies**
   i. Plaintiffs may either file with the NYS Division of Human Rights or file a private lawsuit. The plaintiff may file the lawsuit in NYS Supreme Court or, alternatively, in federal court if jurisdiction exists.

e. **Statute of limitations**
   i. The statute of limitations for filing with the NYS Division of Human Rights is 1 year. N.Y. Exec. Law § 297(5).
   ii. The statute of limitations for filing in court is 3 years. N.Y. Exec. Law § 297(9).

f. **Remedies**
   i. The following are <u>available</u>: economic damages, pain and suffering (no cap). N.Y. Exec. Law § 297(9); *see also Townsend v. Exchange Ins. Co.*, 247 F. Supp. 2d 325, 333 (W.D.N.Y. 2003).
   ii. The following are <u>unavailable</u>: punitive damages, attorneys' fees and costs. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913-94 (2d Cir. 1997); *McCormick v. Chase*, No. 05 Civ. 10576, 2007 WL 2456444, at *3 (S.D.N.Y. Aug. 29, 2007).

V. NYC Human Rights Law

a. **Statutory text**

N.Y.C. Admin. Code § 8-107(7)

It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

b. **Jurisdictional requirement**
    i. The NYC HRL only applies to employers with at least 4 employees. N.Y.C. Admin. Code § 8-102(5).

c. **Tracks Title VII**
    i. The substantive analysis (i.e., what constitutes adverse action, who qualifies as a covered individual, what qualifies as protected activity, and what qualifies as a causal connection) is generally the same as under Title VII. *Rommage v. M.T.A. Long Island R.R.*, No. 08-cv-836, 2010 WL 4038754, at *16 (E.D.N.Y. Sept. 30, 2010).
    ii. However, the standard governing the proof of retaliation is more liberal than the standard under Title VII. For an activity to be protected by Title VII, a plaintiff must show that a reasonable employee would have found the challenged action "materially adverse." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006). In contrast, for an activity to be protected by the NYC HRL, a plaintiff need only show that the challenged action was "reasonably likely to deter" a person from engaging in protected activity. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 71 n.12 (N.Y. App. Div. 1st Dep't 2009).

d. **Administrative agency/forum**
    i. Plaintiffs may either file with the NYC Commission on Human Rights or file a lawsuit. The plaintiff may file the lawsuit in NYS Supreme Court or, alternatively, in federal court if jurisdiction exists.

e. **Statute of limitations**

i. The statute of limitations for filing with the NYC Commission on Human Rights is 1 year. N.Y.C. Admin. Code § 8-109(e).
ii. The statute of limitations for filing in court is 3 years. N.Y.C. Admin. Code § 8-502(d).

f. **Remedies**
   i. All of the following are available:
      1. Economic damages, pain and suffering (no cap), punitive damages. N.Y.C. Admin. Code § 8-502(a).
      2. Attorneys' fees and costs. N.Y.C. Admin. Code § 8-502(f).

VI. 42 U.S.C. § 1981

a. **Statutory text (Note: no explicit mention of retaliation)**

42 U.S.C. § 1981(a)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

b. **But, SCOTUS has recognized a cause of action for unlawful retaliation.** *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

c. **Jurisdictional requirement:** Applies to all employers regardless of size.
d. **Administrative remedies:** None.
e. **Procedure**
    i. The applicable statute of limitations turns on whether the cause of action for retaliation is seen as arising from the original text of this statute, in which case the statute of limitations for personal injury in the forum state applies (three years in New York), or instead "arise under" the amendments to the statute made by the Civil Rights Act of 1991, in which case the federal "catch-all" four-year statute of limitations will apply. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 124 S.Ct. 1836 (2004).
    ii. This issue appears to be unresolved in the Second Circuit. However, the Ninth Circuit has held that the four year statute of limitations applies. *Johnson v. Lucent Technologies Inc.*, 09 Civ. 55203, --- F.3d ----, 2011 WL 3332368, *3-6 (9th Cir. Aug. 19, 2011)
    iii. A plaintiff may file a lawsuit in court immediately; there is no prerequisite that the plaintiff exhaust any administrative remedy.
f. **Substantive Analysis**
    i. Claims under Section 1981 are analyzed under the same standard as claims under Title VII. *Vermette v. Verizon Wireless*, No. 09 Civ. 6085, 2011 WL 3902757, at *5 n.6 (W.D.N.Y. Sept. 6, 2011) (citing *Spiefel v. Schulmann*, 604 F.3d 72 (2d Cir. 2010)).
g. **Remedies**
    i. Compensatory damages for future loss, emotional distress, pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life (i.e., back pay). 42 U.S.C. §§ 1981a(b)(2), (b)(3); see *Bergerson v. New York State Office of Mental Health*, Nos. 10 Civ. 1040, 10 Civ. 1247, 2011 WL 2899237, at *6 (2d Cir. July 21, 2011). There is no cap on compensatory damages in a Section 1981 claim.
    ii. Punitive damages only where the "employer has engaged in intentional discrimination and has done so with malice or reckless indifference to the

federally protected rights of an aggrieved individual." *Kolstad v. Am. Dental Ass'n*, 119 S. Ct. 2118 (1999). There are no caps on punitive damages in a Section 1981 claim.

iii. Attorneys' fees are available. 42 U.S.C. § 1988(b); *see Okeke v. Aviator Sports and Recreation, Inc.*, No. 08 Civ. 2343, 2010 WL 3780383, at *2 (E.D.N.Y. Aug. 31, 2010).

VII. The Age Discrimination in Employment Act (ADEA)

a. **Statutory text**
   i. Federal Employees
      1. "All personnel actions affecting [federal] employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).
      2. Although the text of the ADEA does not provide an aggrieved federal employee with a cause of action against his employer for unlawful retaliation, the U.S. Supreme Court has held that the ADEA nonetheless provides such a cause of action. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).
   ii. Private Employees
      1. "It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d).
      2. The U.S. Supreme Court has not yet extended the holding of *Gomez-Perez* to private employees. However, such an extension seems logical.

b. **Jurisdictional requirement**
   i. The ADEA applies only to employers with at least 20 employees. 29 U.S.C. § 630(b).

c. **Procedure**
   i. An employee must submit a charge of discrimination to the EEOC within 180 days of the allegedly unlawful incident or within 300 days if the EEOC has a working agreement with a deferral-state agency, such as in New York. 29 U.S.C. § 626(d)(1); *see also Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 324-328 (2d. Cir. 1999) (discussing an ADEA claim).
      1. Once the Right to Sue Letter arrives in the mail, the employee has 90 days to bring a lawsuit. *Price v. Bernanke*, 470 F.3d 384, 389 (D.C. Cir. 2006) (citing 29 C.F.R. § 1614.407(c)).

d. **Substantive Analysis**
   i. The same standards and burdens apply to retaliation claims under both Title VII and the ADEA, with one exception. *Nieves v. Angelo, Gordon & Co.*, 341 Fed. Appx. 676, 679 (2d Cir. 2009). On the last prong, where the employee is required to demonstrate that the employer's asserted reason for taking the challenged adverse action was pretextual, the employee "must prove, by a preponderance of the evidence, that age was the 'but-

for' cause of the challenged adverse employment action," not merely a contributing or motivating factor. *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2352 (2009). Since *Gross*, at least one court has indicated that this heightened "but for" standard also applies to retaliation claims under the ADEA. *See, e.g., Benn v. City of New York*, 07-CV-326, 2011 WL 839495, *7 (E.D.N.Y. March 4, 2011).

e. **Remedies**
   i. Available remedies
      1. Equitable relief (i.e., reinstatement), actual damages (i.e., back pay). 29 U.S.C. § 626(b); *see Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984).
      2. Attorneys' fees. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).
      3. Liquidated damages (100%) only if employer's violation is intentional. *Trans World Airlines Inc. v. Thurston*, 469 U.S. 111 (1985).
   ii. Unavailable remedies
      1. Emotional distress, pain and suffering, punitive damages. *Townsend v. Exchange Ins. Co.*, 196 F. Supp. 2d 300, 306 (W.D.N.Y. 2002) (citing *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 148 (2d Cir. 1984)).

VIII. Americans with Disabilities Act (ADA)

a. **Statutory text**
   i. The ADA explicitly prohibits (i) retaliation and (ii) interference, coercion, or intimidation.
      1. Retaliation: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).
      2. Interference, coercion, or intimidation: "It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." 42 U.S.C. § 12203(b).

b. **Jurisdictional requirement:** The ADA only applies to employers with at least 15 employees. 42 U.S.C. § 12111(2).

c. **Covered individuals**
   i. Third-party retaliation claims are permissible. *Fogleman v. Mercy Hosp. Inc.*, 283 F.3d 561 (3d Cir. 2002). In *Fogleman*, a former employee brought a retaliation claim under the ADA alleging that he was terminated because his father brought a discrimination suit against the employer. The court held that such a claim was cognizable under 42 U.S.C. § 12203(b) but not under 42 U.S.C. § 12203(a).

d. **Procedure/statute of limitations**
   i. An employee must submit a charge of discrimination to the EEOC within 180 days of the allegedly unlawful incident or within 300 days of the incident if the employee first presented the charge to a state or local equal opportunity agency. U.S. Equal Employment Opportunity Commission, *The ADA: Your Employment Rights as an Individual With a Disability*, http://www.eeoc.gov/facts/ada18.html (last visited Sept. 9, 2011).
   ii. Once the Right to Sue Letter arrives in the mail, the employee has 90 days to bring a lawsuit.

e. **The substantive analysis tracks Title VII.** *Mueller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999).

f. **Remedies**
   i. 42 U.S.C.A. § 12117(a): "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment."

ii. Equitable relief, such as reinstatement and back pay, is available. *Mueller v. Costello*, 187 F.3d 298, 314-15 (2d Cir. 1999).
iii. Injunctive relief is also available. *Id.*
iv. Compensatory and punitive damages
    1. There is a split amongst the Circuits regarding whether compensatory and punitive damages are available to a plaintiff who brings an ADA retaliation claim. For a discussion of the issue, *see* Howard S. Lavin and Elizabeth E. DiMichele, *Are Compensatory Damages Available for ADA Retaliation Claims?*, EMPLOYEE RELATIONS LAW J., Vol. 35(4) (Spring 2010), *available at* http://www.stroock.com/SiteFiles/Pub1012.pdf. Some circuits hold that neither compensatory nor punitive damages are available. *See, e.g.*, *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961 (7th Cir. 2004). Others hold that these remedies are both available. *Baker v. Windsor Republic Doors*, No. 06 Civ. 01137, 2009 WL 2064584, at *4 (W.D. Tenn. July 10, 2009).
    2. In the Second Circuit, *Mueller v. Costello*, 187 F.3d 298, 314-15 (2d Cir. 1999), which was decided before *Kramer*, affirmed an award of such damages without discussing the statutory interpretation issue. Since then, some district courts have also found such damages to be available. *See Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005); *see also Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003). However, since then, another district court has agreed with *Kramer* that these damages are not available. *Infantolino v. Joint Indus. Bd. of the Elec. Indus.*, 582 F. Supp. 2d 351, 362 (E.D.N.Y. 2008).
v. Attorneys' fees are available. 42 U.S.C. § 12205.

OTHER COMMON EMPLOYMENT STATUTES

IX. Family and Medical Leave Act (FMLA)

a. **Statutory text**
   i. The FMLA has both an "opposition" and "participation" clause.
      1. Opposition: "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2).
      2. Participation: "It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual— (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter." 29 U.S.C. § 2615(b).

b. **Other protected activity**
   i. Requesting FMLA leave time has also been treated as a protected activity under the FMLA. *See* 29 C.F.R. § 825.220(c) ("employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies"); *see also Bryant v. Dollar Gen. Corp.*, 538 F.3d 394 (6th Cir. 2008); *Housholder v. Hastings Mut. Ins. Co.*, No. 08 Civ. 937, 2009 WL 4885226, at *7 (W.D. Mich. Dec. 15, 2009).

c. **Jurisdictional requirement:**
   i. Only covers employers with at least 50 employees. 29 U.S.C. § 2611(4)(A)(i).
   ii. To be protected by the FMLA, an employee must have been working for the employer for at least 12 months and have completed at least 1,250 hours of work for the employer within the past 12 months. 29 U.S.C. § 2711(1)(A).

d. **Substantive analysis tracks Title VII.** *Potenza v. City of New York*, 365 F.3d 165, 167-68 (2d Cir. 2004).

e. **No administrative remedies need to be exhausted before filing in court.**

f. **Statute of limitations:** The statute of limitations for non-willful violations of the FMLA is 2 years. 29 U.S.C. § 2617(c)(1). The statute of limitations for willful violations of the FMLA is 3 years. 29 U.S.C. § 2617(c)(2).

g. **Remedies**
   i. Available:
      1. Equitable relief (i.e., employment, reinstatement, promotion). 29 U.S.C. § 2617(a)(1)(B).

2. Actual damages (wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation). 29 U.S.C. § 2617(a)(1)(A).
3. Liquidated damages (may be reduced in the court's discretion if the employer acted in good faith). 29 U.S.C. § 2617(a)(1)(A).
4. A successful plaintiff is entitled to a "reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant." *Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc.*, No. 00 Civ. 5207, 2002 WL 1059117, at *13 (S.D.N.Y. May 28, 2002) (citing 29 U.S.C. § 2617(a)(3)).

ii. Not available:

1. Nominal and consequential damages (including emotional distress). *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1277-78 (10th Cir. 2001); *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999).

X. Occupational Safety and Health Act

a. **Statutory text**

29 U.S.C. § 660(c)

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

b. **Jurisdiction**
   i. Applies to all employers "engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5).
   ii. But does not apply to "the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5).

c. **Adverse action**
   i. Substantive analysis tracks Title VII. *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993).

d. **Covered individuals**
   i. 29 C.F.R. § 1977.5(a): "All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as 'an employee of an employer who is employed in a business of his employer which affects commerce.' The Act does not define the term 'employ.' However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. *See U.S. v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)."
   ii. Examples of covered individuals:
      1. Applicants for employment. 29 C.F.R. § 1977.5(b).

2. Employees who are not employed by the discriminator. 29 C.F.R. § 1977.5(b).

iii. Examples of individuals not covered:

1. Most employees of a state or state's political subdivision. 29 C.F.R. § 1977.5(c).

e. **Protected activity**

i. Examples of protected activity:

1. Filing a complaint about health or safety with the employer, the Occupational Safety and Health Administration, or other federal, state, or local agencies with the authority to investigate occupational safety and health issues. 29 C.F.R. § 1977.9; *Marshall v. Intermountain Elec. Co., Inc.*, 614 F.2d 260 (10th Cir. 1980); *Donovan v. George Lai Contracting, Ltd.*, 629 F. Supp. 121 (W.D. Mo. 1985).
2. Causing the initiation of worksite inspections or other proceedings related to OSHA. 29 C.F.R. § 1977.10.
3. Testifying in proceedings under or related to OSHA. 29 C.F.R. § 1977.11.
4. Participation as a party in enforcement proceedings. 29 C.F.R. § 1977.12.
5. Requesting information from the Occupational Safety and Health Administration. 29 C.F.R. § 1977.12.
6. Cooperation with the Secretary of Labor's inspection or investigations. 29 C.F.R. § 1977.12.
7. Participation in OSHA inspections. *Donovan v. Freeway Const. Co.*, 551 F. Supp. 869 (D.R.I. 1982).
8. Refusal to work under hazardous conditions. *Marshall v. S. K. Williams Co.*, 462 F. Supp. 722 (E.D. Wis. 1978).

ii. Not protected activity:

1. Refusing to perform normal job activities because of alleged safety or health hazards, unless there's a reasonable danger of death or serious injury and insufficient time to eliminate the danger through normal statutory enforcement channels. 29 C.F.R. § 1977.12.

f. **Procedure**

i. An employee can file an administrative complaint with the Secretary of Labor alleging discrimination. 29 U.S.C. § 660(c)(2). The complaint may be filed orally or in writing, in any language. 29 C.F.R. § 24.103(b). The Secretary may investigate the allegation and may subsequently bring an action in U.S. District Court. 29 U.S.C. § 660(c)(2).

ii. There is no private cause of action under the Act. *Donovan v. Occupational Safety and Health Review Comm'n*, 713 F.2d 918 (2d Cir. 1983).

g. **Statute of limitations:** The employee's complaint is to be filed within thirty days of the alleged violation. 29 U.S.C. § 660(c)(2). However, the thirty-day period may be tolled in certain circumstances, such as "where the employer has concealed, or misled the employee regarding the grounds for discharge or other

adverse action; or where the discrimination is in the nature of a continuing violation." 29 C.F.R. § 1977.15; *see also Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984) (tolling statute of limitations because employer had misled employee regarding nature of his termination); *Donovan v. Peter Zimmer Am., Inc.*, 557 F. Supp. 642 (D.S.C. 1982) (tolling statute of limitations because complainant had filed complaint at state Department of Labor within thirty days).

h. **Remedies**
    i. Available remedies:
        1. Injunction prohibiting employer's illegal behavior. *See, e.g.*, *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548, 556 (D. Conn. 1982).
        2. Rehiring or reinstatement. 29 U.S.C. § 660(c)(2).
        3. Backpay. 29 U.S.C. § 660(c)(2).
        4. Prejudgment interest. *Martin v. H.M.S. Direct Mail Serv., Inc.*, 936 F.2d 108 (2d Cir. 1991).
        5. Exemplary damages. *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) (awarding double backpay).
    ii. The employee has the right to bring a writ of mandamus to compel the Secretary of Labor to seek relief when the Secretary has arbitrarily and capriciously failed to seek relief. 29 U.S.C. § 662(d).

XI. New York Workers' Compensation Law

a. **Statutory text**

i. N.Y. Workers' Comp. Law § 120 (employees who *claim* benefits):

> It shall be unlawful for any employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer, or because he or she has testified or is about to testify in a proceeding under this chapter and no other valid reason is shown to exist for such action by the employer.
>
> Any complaint alleging such an unlawful discriminatory practice must be filed within two years of the commission of such practice. Upon finding that an employer has violated this section, the board shall make an order that any employee so discriminated against shall be restored to employment or otherwise restored to the position or privileges he or she would have had but for the discrimination and shall be compensated by his or her employer for any loss of compensation arising out of such discrimination together with such fees or allowances for services rendered by an attorney or licensed representative as fixed by the board. Any employer who violates this section shall be liable to a penalty of not less than one hundred dollars or more than five hundred dollars, as may be determined by the board. All such penalties shall be paid into the state treasury. All penalties, compensation and fees or allowances shall be paid solely by the employer. The employer alone and not his or her carrier shall be liable for such penalties and payments. Any provision in an insurance policy undertaking to relieve the employer from liability for such penalties and payments shall be void.
>
> An employer found to be in violation of this section and the aggrieved employee must report to the board as to the manner of the employer's compliance within thirty days of receipt of a final determination. In case of failure to report on compliance, or failure to comply with an order or penalty of the board within thirty days after the order or notice of penalty is served, except where timely application to the board for a modification, rescission or review of such order or penalty has been filed under section twenty-three of this chapter, the chair in any such case or, on the chair's consent, any party may enforce the order or penalty in a like manner as an award of compensation.

ii. N.Y. Workers' Comp. Law § 125 (employees who *received* benefits):

> It shall be unlawful for any employer to inquire into, or to consider for the purpose of assessing fitness or capability for employment, whether a job applicant has filed for or received benefits under this chapter, or to

discriminate against a job applicant with regard to employment on the basis of that claimant having filed for or received benefits under this chapter, or because the claimant is an injured veteran. An individual aggrieved under this subdivision may initiate proceedings in a court of competent jurisdiction seeking damages, including reasonable attorney fees, for violation of this subdivision.

b. **Procedure**
    i. Employees who are discriminated against for claiming benefits may complain to the Commissioner. N.Y. Workers' Comp. Law § 120.
    ii. Employees who are discriminated against for receiving benefits can bring a private action. N.Y. Workers' Comp. Law § 125.
c. **Statute of limitations**
    i. Those who claimed benefits have two years from the discriminatory practice. N.Y. Workers' Comp. Law § 120.
d. **Remedies**
    i. Equitable relief (restoration of employment/position), actual damages, attorney's fees/costs. N.Y. Workers' Comp. Law §§ 120, 125.
e. **Special notes**
    i. "An employer who violates the provisions of [N.Y. Workers' Comp. Law § 125(1) (employees who receive benefits)] shall be guilty of a misdemeanor, and upon conviction shall be punished, except as in this chapter or in the penal law otherwise provided, by a fine of not more than one thousand dollars, and subject to the debarment provisions of section one hundred forty-one-b of this chapter." N.Y. Workers' Comp. Law § 125(2).

XII. ERISA

a. **Statutory text**

29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1141

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.]. Any person who willfully violates this section shall be fined $100,000 or imprisoned for not more than 10 years, or both.

b. **Jurisdiction:** Applies to "any employer engaged in commerce or in any industry or activity affecting commerce" or "any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C.A. § 1003(a).
c. **Adverse action**
    i. 29 U.S.C. § 1140 explicitly lists: "Discharge, fines, suspension, expulsion, discipline, or discrimination . . . ."
    ii. Other examples of adverse actions:
        1. Discrimination necessitates "a showing of economic injury, actual or constructive loss of employment, or threat of violence." *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1135 (N.D. Ind. 1991); *see also West v. Butler*, 621 F.2d 240, 245-46 (6th Cir. 1980) ("[D]iscrimination, to violate [§ 1140] must affect the individual's employment relationship in some substantial way.").
        2. Demotion and making job environment degrading to coerce a pre-vesting resignation. *Jess v. Pandick, Inc.*, 699 F. Supp. 698, 699-700 (N.D. Ill. 1988).
        3. Reclassification of employees as independent contractors, *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554 (11th Cir. 1997),

or as rehires, *Ensley v. Ford Motor Co.*, No. 06 Civ. 12845, 2007 WL 2029638 (E.D. Mich. July 10, 2007).

iii. Not adverse actions:

1. Modification of benefits plan. *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993); *Aronson v. Servus Rubber*, 730 F.2d 12 (1st Cir. 1984); *McGann v. H&H Music Co.*, 742 F. Supp. 392 (S.D. Tex. 1990), *aff'd*, 946 F.2d 401 (5th Cir. 1991).
2. Refusal to hire. *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200 (W.D. Pa. 1992), *aff'd*, 989 F.2d 652 (3d Cir. 1993).
3. Removal of an employee from an appointed position, where removal does not cause economic injury. *Newton v. Van Otterloo*, 756 F. Supp. 1121 (N.D. Ind. 1991).

d. **Covered individuals**

i. 29 U.S.C. § 1002(7)-(8): "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. . . . The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

ii. Examples of covered individuals:

1. Employees whose pension rights have not yet vested. *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982).
2. Employees whose pension rights have vested where the employer acted to prevent accrual of additional benefits. *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991).
3. Employees newly eligible to participate in benefit plan. *Garratt v. Walker*, 164 F.3d 1249 (10th Cir. 1998).
4. Employees deprived of welfare plan benefits. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997).

e. **Protected activity**

i. 29 U.S.C. § 1140: "Exercising a right under an employee benefit plan; interfering with the attainment of any right to which a participant may become entitled under the plan; giving information, testifying, or being about to testify in any inquiry or proceeding relating to ERISA."

ii. Example of protected activity:

1. Employees who report problems with a benefit plan to supervisors or company attorneys. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005).

f. **Procedure**

i. A participant or beneficiary may bring a civil action under 29 U.S.C. § 1140. 29 U.S.C. § 1132. Civil actions may not be brought under 29 U.S.C. § 1141. *West v. Butler*, 621 F.2d 240, 243 (6th Cir. 1980).

ii. Federal courts have exclusive jurisdiction over § 1140 claims. 29 U.S.C. § 1132; *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Nishimoto v. Federman-Bachrach & Associates*, 903 F.2d 709 (9th Cir. 1990).

iii. "As ERISA does not prescribe a limitations period for actions under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute." *Miles v. N.Y. State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan,* 698 F.2d 593, 598 (2d Cir. 1983). In New York, the most nearly analogous state limitations statute is N.Y. C.P.L.R. § 213. *Carey v. Int'l Bhd. of Elec. Workers*, 201 F.3d 44, 46-47 (2d Cir. 1999); *Miles*, 698 F.2d at 598.

g. **Remedies (in the Second Circuit)**

i. Available remedies:

1. Equitable remedies. 29 U.S.C. § 1132(a)(3).
2. Reinstatement. *De Pace v. Matsushita Elec. Corp. of Am.*, 257 F. Supp. 2d 543 (E.D.N.Y. 2003).
3. Frontpay. *Id.*
4. Reformation. *Id.* (reforming written contract is tenable remedy for claims of fraudulent inducement under ERISA).
5. Attorney's fees and costs. 29 U.S.C. § 1132(g)(1).

ii. Unavailable remedies:

1. Punitive damages. *Mertens v. Hewitt Associates,* 508 U.S. 248, 255-58 (1993); *De Pace v. Matsushita Elec. Corp. of Am.*, 257 F. Supp. 2d 543 (E.D.N.Y. 2003).
2. Compensatory damages. *De Pace v. Matsushita Elec. Corp. of Am.*, 257 F. Supp. 2d 543 (E.D.N.Y. 2003).
3. Backpay. *Pelosi v. Schwab Capital Markets, L.P.*, 462 F. Supp. 2d 503 (S.D.N.Y. 2006).

XIII. National Labor Relations Act (NLRA)

a. **Statutory text**
   i. "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(a)(1).
   ii. "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3).
   iii. "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . ." 29 U.S.C. § 158(a)(4).

b. **Jurisdiction**
   i. Applies to employers and "any person acting as an agent of an employer, directly or indirectly," but does not apply to "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2).
   ii. The NLRB may chose to exercise its jurisdiction when evidence clearly shows that the company's operations affect interstate commerce within the meaning of §§ 2(6) and (7) of the NRLA. *See, e.g.*, *N.L.R.B. v. City and County Elec. Sanitary Sewer Service, Inc.*, 467 F.2d 209, 209 (8th Cir. 1972).

c. **Adverse action**
   i. Examples of adverse action: 29 U.S.C. § 158(a)(1), (3).
      1. Discharge. *N.L.R.B. v Lloyd Wood Coal Co.*, 585 F.2d 752 (5th Cir. 1978).
      2. Reassignment to a job that is not substantially equivalent to the striker's old job where there was no legitimate business reason for the reassignment. *Laidlaw Corp. v. N.L.R.B.*, 414 F.2d 99 (7th Cir. 1969).
      3. Refusal to reinstate where striker's job is not occupied by worker hired as permanent replacement during strike. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).
      4. Refusal to reinstate when a job for which the striker is qualified becomes available. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).
      5. Threatening to close a facility. *N.L.R.B. v Lloyd Wood Coal Co.*, 585 F.2d 752 (5th Cir. 1978).
      6. Imposing more severe sanctions on union officials than on other employees for participating in an unlawful work stoppage, absent

explicit contractual duty to do so. *Metropolitan Edison Co. v N.L.R.B.*, 460 U.S. 693 (1983).

7. Refusal to hire job applicants because of their history of union membership or union activity. *Phelps Dodge Corp. v N.L.R.B.*, 313 U.S. 177 (1941); *Sw. Merchandising Corp. v N.L.R.B.*, 943 F.2d 1354 (D.C. Cir. 1991).

ii. Examples of adverse action: 29 U.S.C. § 158(a)(4).

1. Refusal to hire. *Wyman-Gordon Co. v N.L.R.B.*, 654 F.2d 134 (1st Cir. 1981).
2. Wage discrimination. *Thurston Motor Lines, Inc.*, 180 N.L.R.B. 944 (1970), *enforced as modified on other grounds*, 439 F.2d 1202 (6th Cir. 1971) (denying vacation pay constituted adverse action).
3. Hours discrimination. *N.L.R.B. v Jack La Lanne Mgmt. Corp.*, 539 F.2d 292 (2d Cir. 1976).
4. Reprimands. *N.L.R.B. v Lifetime Door Co.*, 390 F.2d 272 (4th Cir. 1968).
5. Harassment. *Ripley Mfg. Co.*, 144 N.L.R.B. 1132 (1963), *supp. decision*, 150 N.L.R.B. 1696 (1965).
6. Transfer or reassignment. *Occidental Paper Corp.*, 227 N.L.R.B. 106 (1976).
7. Demotion. *J.P. Stevens & Co.*, 167 N.L.R.B. 266 (1967), *motion to intervene granted and motion for transfer and petition for review denied*, 388 F.2d 892 (4th Cir. 1967), *enforced in part and denied in part*, 406 F.2d 1017 (4th Cir. 1968).
8. Discharge. *Progress-Index*, 212 N.L.R.B. 808 (1974).
9. Refusal to reinstate. *McNally Bros., Inc.*, 167 N.L.R.B. 819 (1967), *enforced*, 417 F.2d 1029 (2d Cir. 1969).

iii. Not adverse action: 29 U.S.C. § 158(a)(1), (3).

1. Reassignment, where the nature of the work assigned is comparable to work performed in the original job. *Lincoln Hills Nursing Home*, 257 N.L.R.B. 1145 (1981).
2. Refusal to reinstate where a permanent replacement took striker's job during the strike, and there are no other vacancies. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

d. **Covered individuals**

i. Defined:

1. "[A]ny employee . . . includ[ing] any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . [but excluding] any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor

Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3).

ii. Examples of covered individuals:
    1. Job applicants. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Pate Mfg. Co.*, 197 N.L.R.B. 793 (1972).
    2. Strikers. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

e. **Protected activity**

i. Examples of protected activity:
    1. Forming, joining, or assisting labor organizations. 29 U.S.C. § 157.
    2. Collective bargaining. 29 U.S.C. § 157.
    3. Engagement in other concerted activities for the purpose of collective bargaining or other mutual aid or protection of employees. 29 U.S.C. § 157.
    4. Peaceful striking. *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of Am. v. Missouri*, 374 U.S. 74 (1963).
    5. Filing unfair labor practice charges with the N.L.R.B. *Nash v Fla. Industrial Comm'n*, 389 U.S. 235 (1967); *Glenroy Constr. Co. v N.L.R.B.*, 527 F.2d 465 (7th Cir. 1975).
    6. Filing unfair labor practice charges with the N.L.R.B. even where the charges are meritless. *First Nat'l Bank & Trust Co.*, 209 N.L.R.B. 95 (1974), *enforced op. withheld*, 505 F.2d 729 (3d Cir. 1974); *Acme Paper Box Co.*, 201 N.L.R.B. 240 (1973).
    7. Having unfair labor practice charges filed on one's behalf by a union or another employee. *Zenith Plastics Co.*, 190 N.L.R.B. 735 (1971), *enforced*, 455 F.2d 520 (6th Cir. 1972); *Thomas Engine Corp.*, 179 N.L.R.B. 1029 (1970), *enforced*, 442 F.2d 1180 (9th Cir. 1971).
    8. Filing representation petition. *Jo-Jo Mgmt. Corp.*, 225 N.L.R.B. 156 (1976) (filing deauthorization petition was protected activity); *Aristocrat Inns of Am., Inc.*, 146 N.L.R.B. 1599 (1964) (filing decertification petition was protected activity).
    9. Participation in NLRB investigation. *N.L.R.B. v Scrivener*, 405 U.S. 117 (1972).
    10. Refusal to withdraw a charge or claim pending before the N.L.R.B. *Kent Corp.*, 212 N.L.R.B. 595 (1974), *enforced in pertinent part*, 530 F.2d 610 (5th Cir. 1976), *supp. op.*, 229 N.L.R.B. 29 (1977); *Brunswick-Balke-Collender Co.*, 135 N.L.R.B. 574 (1962), *enforced*, 318 F.2d 419 (3d Cir. 1963).
    11. Testifying at N.L.R.B. hearing. *Lincoln Hills Nursing Home*, 268 N.L.R.B. 150 (1984); *Dal-Tex Optical Co.*, 131 N.L.R.B. 715 (1961), *enforced*, 310 F.2d 58 (5th Cir. 1962).

ii. Examples of unprotected activity:
    1. Striking where strikes are prohibited by collective bargaining agreement. *Gould, Inc. v N.L.R.B.*, 612 F.2d 728 (3d Cir. 1979).

2. Attending but not testifying at N.L.R.B. hearing where no subpoena was issued. *English Mica Co.*, 92 N.L.R.B. 766 (1950), *enforced* 195 F.2d 986 (4th Cir. 1952).
3. Testifying voluntarily at N.L.R.B. hearing where employer's ability to maintain productivity and efficiency was hampered by absence. *Montgomery Ward & Co.*, 220 N.L.R.B. 373 (1975).

f. **Procedure**

i. The procedure for bringing a retaliation claim is the same as initiating any other unfair labor practice claim under the NLRA. Employees should file a signed charge with the N.L.R.B. Regional Director for the Region in which the alleged violations occurred. The charge should contain the name and address of the alleged violator and a statement of facts; the charge should either be notarized or contain a declaration of its veracity under the penalties of the Criminal Code. 29 C.F.R. § 101.2.

g. **Remedies**

i. Available remedies:

1. Reinstatement with backpay. *Polynesian Cultural Ctr., Inc. v. N.L.R.B.*, 582 F.2d 467 (9th Cir. 1978); *Nickey Chevrolet Sales, Inc.*, 199 N.L.R.B. 411 (1972); *Virginia-Carolina Freight Lines, Inc.*, 155 N.L.R.B. 447 (1965); *Red Wing Carriers, Inc.*, 132 N.L.R.B. 982 (1961).
    a. <u>*But see*</u> *Medallion Kitchens, Inc. v. N.L.R.B.*, 811 F.2d 456 (8th Cir. 1987) (denying reinstatement at new facility and backpay where both striking and non-striking employees had an equal opportunity to secure jobs at new facility).
    b. <u>*But see*</u> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (backpay unavailable to undocumented workers).
2. A cease and desist order, if the employee has not lost his/her job or pay. *Sanford Dress Corp.*, 123 N.L.R.B. 1106 (1959).
3. Removal of reprimands from the employee's file. *Gen. Elec. Co., Automatic Blanket Plant*, 155 N.L.R.B. 1365 (1965), *aff'd*, 367 F.2d 333 (D.C. Cir. 1966).
4. An order requiring the employer to inform employees that it does not object to their testifying pursuant to subpoenas in NLRA-related cases. *Duralite Co.*, 128 N.L.R.B. 648 (1960).
5. Requiring the employer to offer immediate employment and provide the wages lost due to the employer's discrimination. *Pascagoula Veneer Co.*, 149 N.L.R.B. 1136 (1964); *I.C. Sutton*, 125 N.L.R.B. 1094 (1959); *Alaska Salmon Industry, Inc.*, 119 N.L.R.B. 612 (1957).
6. If employer reduced employee's working hours, compensation for the loss in earnings. *N.L.R.B. v Jack La Lanne Mgmt. Corp.*, 539 F.2d 292 (2d Cir. 1976).

ii. Remedies not available

1. If the unfair labor practices are not "serious and extensive," a remedial order directing the employer to cease and desist from refusing to bargain collectively. *N.L.R.B. v Lloyd Wood Coal Co.*, 585 F.2d 752 (5th Cir. 1978).

XIV. Additional Federal Anti-Discrimination Statutes

a. Genetic Information Nondiscrimination Act
    i. "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection." 42 U.S.C. § 2000ff-6(f).
b. Employee Polygraph Protection Act
    i. "Except as provided in sections 2006 and 2007 of this title, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce . . . to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because – (A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, (B) such employee or prospective employee has testified or is about to testify in any such proceeding, or (C) of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this chapter." 29 U.S.C. § 2002(4).
c. Longshoremen's and Harbor Workers' Compensation Act
    i. "It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter." 33 U.S.C. § 948a.
d. Migrant and Seasonal Agricultural Worker Protection Act
    i. "No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter." 29 U.S.C. § 1855.
e. Uniformed Services Employment and Reemployment Rights Act (USSERA)
    i. "An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services." 38 U.S.C. § 4311(b).