



Avoiding Employee Retaliation Claims 101

One of the most common lawsuits a staffing firm may encounter are those triggering coverage under Employment Practices Liability Insurance (EPLI). There is exposure with internal office staff, as well as temporary associate or contract staff. Discrimination can occur either on the premises of the staffing company's office location and/or at the client worksite. Discrimination can be based on sex, race, color, age, religion, disability, wages, national origin and sexual orientation.

To take it one step further, employees and applicants are also protected from retaliation by an employer under several employment laws enforced by the Equal Employment Opportunity Commission (EEOC). Retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEOC's laws. Specific to employees, an employer cannot retaliate if someone:

- Reports discrimination/harassment to a supervisor
- Answers questions during an investigation of discrimination/harassment
- Refuses orders that would result in discrimination
- Resists sexual advances
- Requests accommodation for a disability or religious practice

Adverse employment actions can take many forms beyond disciplining or terminating employees, including transferring an employee to a less desirable position or shift, threatening to report immigration status, verbally or physically abusing an employee, and giving an employee a lower performance evaluation than deserved.

Minimizing the Risk of Retaliation Claims

According to EEOC statistical data, retaliation claims have risen from approximately 18,000 in 1997 to over 41,000 in 2017¹. Given the rise in claims, how can a staffing company protect itself?

1. Documentation – A staffing firm should be documenting any incidents that lead to an employee's termination. Whether discrimination occurred before or after termination, it's imperative the staffing firm is conscious of the timing of the termination as it relates to the claim, as well as providing a clear reason why termination was warranted. When in doubt, document, document, document!

2. Client Education – Client companies must be taught how to deal with a temp employee who's underperforming and at-risk of reassignment, replacement or termination. There's a shared responsibility of obtaining feedback from the client company on performance of the temp employees at the worksite. The client company should be open to disclosing this feedback, but the staffing firm should continually be asking for it as well. If problems with specific employees are noticed, it should be discussed, documented and a plan of action should be created.
3. Third Party Communication – When in doubt, it's always best to alert your EPLI carrier and/or consult an employment attorney. The rate at which retaliation claims are occurring is consistently growing and something every staffing firm should always have top-of-mind.

The EEOC has detailed an entire Q&A regarding retaliation [here](#). As stated in question 14 of the Q&A, the burden of proof is on the employee, rather than the employer having to disprove the claim.

¹ Source: <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>



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