Fundamentals of Sarbanes-Oxley Whistleblower and Other Retaliation Claims

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Why Important for Employers to be Aware of Retaliation Protections:

- Among most difficult category of employment cases to defend
  - Often creates greater exposure than underlying claims of discrimination, harassment, etc.
  - Timing issues often create uphill battle
  - Employee does not need to prove underlying complaint was valid
- Standard of what constitutes “retaliatory” conduct often counter-intuitive
  - Legal standards getting easier
- Employees becoming more sophisticated
Why Important for Employers to be Aware of Retaliation Protections:

- "Whistleblower Awarded $104 million by I.R.S." – New York Times (9/11/12)
  - Employee was convicted and sentenced to 2.5 years in federal prison, but still walked away with $104 million
- T-Mobile whistleblower awarded $346,000 under SOX after he claimed he was discharged in retaliation for complaining about fraudulent billing of roaming charges
- Employee who was accused of gaming company awarded $2.2 million after being discharged in retaliation for reporting issues with a patent
- **Potential Jackpot:** Dodd-Frank Whistleblower provision requires a 10 percent to 30 percent payout to the whistleblower of collected sanctions of more than $1 million
The Growing Landscape of Anti-Retaliation Laws

- Title VII of the Civil Rights Act of 1964 ("Title VII"); 42 U.S.C. § 2000e-3(a)
- Age Discrimination in Employment Act ("ADEA"); 29 U.S.C. § 623(d)
- Americans with Disabilities Act of 1990 ("ADA"); 42 U.S.C. § 12203(a)
- Genetic Information Non-Discrimination Act ("GINA"); 42 U.S.C. § 2000ff-6(f)
The Growing Landscape of Anti-Retaliation Laws

- **Employee Protections Enforced by OSHA:**
  - Sarbanes-Oxley Act (“SOX”) 18 U.S.C.A. §1514A
  - Affordable Care Act (“ACA”) Section 1558; 29 U.S.C. § 218C
  - Occupational Safety and Health Act, Section 11(c) (“OSHA”) 29 U.S.C. § 660
Additional Anti-Retaliation Provisions Enforced by OSHA:

- Clean Air Act, 42 U.S.C. § 7622
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); 42 U.S.C. § 9610
- Solid Waste Disposal Act; 42 U.S.C. § 6971
- FDA Food Safety Modernization Act; 21 U.S.C. § 399d
- International Safe Container Act; 46 U.S.C. § 80507
- Surface Transportation Assistance Act (“STAA”); 49 U.S.C. § 31105
Additional Anti-Retaliation Provisions Enforced by OSHA (cont.)

- Energy Reorganization Act; 42 U.S.C. § 5851
- Federal Water Pollution Control Act; 33 U.S.C. § 1367
- Safe Drinking Water Act; 42 U.S.C. § 300j-9(i)
- Seaman’s Protection Act; 46 U.S.C. § 2114
- Pipeline Safety Improvement Act (“PSIA”); 49 U.S.C. § 60129
Anti-Retaliation Provisions Enforced by the Department of Labor, Wage & Hour Division

- Family and Medical Leave Act ("FMLA"); 29 U.S.C. § 2615
Focus For Our Session:

- Review of SOX Whistleblower and Retaliation Provisions and Recent Changes Resulting from Dodd-Frank Act
- SOX Complaint Process, and How it Differs from EEOC Charge Process
- Recent Developments in the Legislature and the Courts Concerning Retaliation Claims
- Best Practices on How to Avoid and Handle Whistleblower/Retaliation Claims
Sarbanes-Oxley Act
Whistleblower Protections
Overview
Sarbanes-Oxley Act (“SOX”)

- The anti-retaliation provision of SOX covers employees of companies:
  - With a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934, including any subsidiaries or affiliates whose financial information is included in the consolidated financial statements of such company; and
  - Employees of nationally recognized statistical ratings organizations

18 U.S.C. § 1514A
SOX (cont.)

- SOX prohibits employers from retaliating against employee whistleblowers who report improper conduct, and provides protection to those who participate in related proceedings. Such employees are protected from discharge, demotion, suspension, or being threatened or harassed or discriminated against for engaging in such protected activity.

18 U.S.C. § 1514A
SOX (cont.)

- Employee must report complaint to the Secretary of Labor within 180 days (i) of the alleged SOX violation or (ii) after the employee became aware of the violation

- If the DOL does not issue a final decision within 180 days after the employee files a complaint, the employee may file an action in federal court for de novo review and is entitled to a trial by jury

18 U.S.C. §1514A
SOX (cont.)—No Waiver, No Arbitration

Dodd-Frank also reversed existing law and amended SOX by declaring void any agreement, policy form, or condition of employment, including a predispute arbitration agreement that waives an employee’s rights and remedies against retaliation in connection with a whistleblowing event.

18 U.S.C. § 1514A(e)
Sarbanes-Oxley Act
Complaint Process
Responding to a SOX Complaint to OSHA

- Complaint filed (within 180 days of violation/employee became aware of violation)

- Within **20 days** of receipt of the notice of the complaint, the respondent must submit its position statement to OSHA and any attendant documents

- NOT CONFIDENTIAL: OSHA will provide copies of all of respondent’s submissions to the complainant
SOX Complaint Process (cont.)

- The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a *prima facie* showing as follows:
  - The employee engaged in a protected activity
  - The respondent knew or suspected that the employee engaged in the protected activity
  - The employee suffered an adverse action
  - The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action
SOX Complaint Process (cont.)

- **Respondent’s Burden:**
  - Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint shall not be conducted or will be discontinued if the respondent demonstrates by CLEAR AND CONVINCING EVIDENCE that it would have taken the same adverse action in the absence of the complainant’s protected activity.
  - If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.
SOX Complaint Process (cont.)

- Prior to the issuance of findings and a preliminary order, if the Assistant Secretary has reasonable cause to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation.

- The respondent will be given the opportunity to:
  - submit a written response
  - meet with the investigators
  - present statements from witnesses in support of its position
  - present legal and factual arguments
The respondent will present this evidence within **10 business days** of the Assistant Secretary's notification, or as soon afterwards as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

After considering all the relevant information collected during the investigation, the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of the Act.

If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a **preliminary order** providing relief to the complainant.
SOX Complaint Process (cont.)

- The preliminary order will include all relief necessary to make the employee whole, including **REINSTATEMENT; back pay with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.**

- The findings, and where appropriate, the preliminary order, will inform the parties of the right to object to the findings and/or order, and to request a hearing, and of the right of the respondent to request an award of attorney's fees not exceeding $1,000 from the administrative law judge (ALJ), regardless of whether the respondent has filed objections, if the complaint was frivolous or brought in bad faith.
SOX Complaint Process (cont.)

- The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and/or a request for hearing has been filed within 30 days of receipt of the findings and preliminary order.

- However, the portion of any preliminary order requiring reinstatement will be effective IMMEDIATELY upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.
SOX Complaint Process: Appeal to ALJ

- Procedure
  - 30 Days to File Request for ALJ Hearing (Trial)
  - De-Novo: ALJ will make own determination, not bound by OSHA
  - Pre-Hearing Discovery Permitted
    - Depositions
    - Written interrogatories/document requests
SOX Complaint Process: Appeal to ALJ (cont.)

- Hearing
  - Formal rules of evidence may – but will not necessarily – apply
  - ALJ has substantial discretion
SOX Complaint Process: Appeal to ALJ (cont.)

- Legal Standard:
  - A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.
  - If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.
SOX Complaint Process:
Appeal to ALJ (cont.)

- **Determination:**
  - If the ALJ concludes that the respondent has violated the law, will order all relief necessary to make the employee whole
    - Reinstatement, back pay with interest, other damages, litigation costs, attorney fees
  - If the ALJ determines that the respondent has not violated the law, complaint will be dismissed
  - Reinstatement order effective immediately
Sox Complaint Process: Appeal to Administrative Review Board

- Appeal from ALJ decision to DOL’s Administrative Review Board (ARB) must be filed within **10 business days**
  - If no appeal, ALJ decision becomes final, not subject to judicial review
- NO HEARING ON APPEAL TO ARB: The ARB will review the factual determinations of the ALJ under the **substantial evidence standard**
- ARB decision should be issued within 120 days from conclusion of ALJ hearing, but almost never does
SOX Complaint Process: Appeal to Circuit Court of Appeals

- Within 60 days after the issuance of a final order by ARB petition for review may be filed in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

- A final order of the ARB is not subject to judicial review in any criminal or other civil proceeding.

- Court of Appeals review limited – not “de novo” review
SOX Complaint Process: Settlement

- **Before OSHA Preliminary Order:**
  - At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal.
  - The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal.
  - If the complaint is withdrawn because of settlement, the settlement must be submitted for approval. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.
SOX Complaint Process: Settlement

- **After a Determination by the Assistant Secretary (ALJ or ARB):**
  - If the case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB.

- The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings or order, and there are no other pending objections, the Assistant Secretary's findings and order will become the final order of the Secretary.

- If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval.
SOX Complaint Process: Filing Suit in Federal Court

- If DOL has not issued “final decision” within 180 days of filing of complaint – which almost never happens – employee may “pull the plug” on OSHA/DOL process and file federal court lawsuit

- Significant Strategic Advantage to Plaintiffs
  - Can wait to see outcome of initial OSHA investigation
  - Can wait to see what develops in pre-ALJ hearing discovery
  - Can even wait for ALJ ruling and filing of ARB appeal
  - THEN – case starts all over in federal court
Recent SOX Cases of Note:

- ARB recently expanded coverage of the SOX whistleblower provisions to apply to employees of private businesses that contract with publicly traded companies. *Spinner v. David Landau & Assocs.* LLC, No. 10-111 (ARB May 31, 2012).

- ARB expanded definition of protected activity to include complaints unrelated to alleged fraud against shareholders. *Brown v. Lockheed Martin* (appeal pending in 10th Circuit)

Recent SOX Cases of Note (cont.):

- The ARB recently found that “adverse employment actions” under SOX need not be “tangible employment actions”
- Employee claimed that the company retaliated against him by violating his expectations of confidentiality by outing him as a whistleblower
- ARB overturned the ALJ’s decision, finding that the company breached the employee’s right to confidentiality under Section 301 of SOX is a “term and condition of employment” within the meaning of SOX’s whistleblower protections. *Menendez v. Halliburton, Inc.*, No. 09-002, ARB Sep. 13, 2011.
Recent Sox Cases of Note (cont.):


- Decision adopted heightened standard for protected activity (conduct on which employee blew the whistle must “definitely and specifically” relate to the laws enumerated in SOX), instead of the more lenient review standard adopted by the ARB (SOX protects employees who provided information regarding conduct they “reasonably believe” violates laws covered by SOX).

- Court refused to adopt ARB decision in *Sylvester v. Parexel Int’l LLC*, No. 07-123, 2011 WL 2165854.

- Appeal pending in Third Circuit
Overview of Retaliation Claims Under Title VII & Similar Laws
EEOC Retaliation* Claims by the Numbers:

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<td>33,613</td>
<td>36,258</td>
<td>37,334</td>
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- Retaliation claims represent the largest category of claims filed with the EEOC.

*Represents all retaliation charges filed with the EEOC under statutes enforced by the EEOC.
### EEOC Retaliation Claims by the Numbers:

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<tr>
<th>Category</th>
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Title VII Anti-Retaliation

Title VII makes it illegal for an employer to “discriminate against any of his employees ... 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. . . .”

42 USC § 2000e-3(a)
Elements of a Retaliation Claim

- In order to sustain a claim of retaliation, individual must show that:
  - They engaged in a protected activity
  - They were subject to an adverse employment action
  - There is a causal link between their protected activity and the employer’s adverse employment action
“Protected Activity” explained:

“Protected Activity” encompasses both (1) opposition to discrimination made unlawful by Title VII and (2) participation in certain Title VII proceedings. An employer must be aware that the employee engaged in the protected activity in order for the plaintiff to state an actionable retaliation claim. Moore v. City of Philadelphia, 461 F.3d 331, 351 (3d Cir. 2006); See also, Buttner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 715 (8th Cir. 2000) (“A plaintiff must show the employer had actual or constructive knowledge”).
“Protected Activity” explained:

A MERITLESS COMPLAINT **MAY** STILL BE PROTECTED ACTIVITY

--Employee only needs to hold an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title VII. *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006).
Examples of Adverse Action

- Termination
- Denial of a promotion
- Denial of a pay raise
- Reduction in pay
- Selection for layoff
- Change in work schedules to a less desirable shift
- Denial of time-off requests that were previously approved
- Transfer to a more difficult job
- Change in job duties
- Relocation
- Exclusion from meetings, trainings, seminars, etc.
- Demotion
- Denial of or reduction in job benefits
- Negative performance evaluations
- Restrictive directives
- Verbal or written warnings
- Suspension
- Extension of probationary period
- Severe and pervasive harassment by supervisors or coworkers
Causal Nexus: How Employees Attempt to Establish

- Circumstantial Evidence
  - Employer’s knowledge that the employee engaged in protected activity
    - Knowledge can be found where decision maker did not have knowledge if the decision was acting on information provided by a supervisor or other individual who had knowledge
  - Proximity in time between the protected action and allegedly retaliatory employment decision
    - Time period can vary greatly
      - Nine months can be found to be sufficient to destroy nexus; however, three years has been found sufficient to establish a nexus
  - If employee meets prima facie case, *McDonnell Douglas/Burdine* burden shifting applies
Retaliation Protections in Other Civil Rights Statutes

  - Race/color discrimination
  - No administrative exhaustion requirement
    (big difference between Section 1981 and Title VII)
“Traditional” *Prima Facie* Case of Retaliation

- Retaliation claims (brought under Title VII and other statutes that follow its format) generally follow the *McDonnell Douglas* framework for establishing a *prima facie* case.

- A plaintiff must establish that:
  - she engaged in protected activity,
  - the defendant took adverse employment action against him after or contemporaneous with the protected activity; and
  - a causal link exists between the adverse action and the protected activity.

*Seeney v. Elwyn, Inc.*, No. 10-2707 (3d Cir. 2/1/11)
Recent Expansion of Whistleblower & Retaliation Claims
Growth in retaliation claims linked to Supreme Court decisions expanding who can sue and what employer actions can be challenged
Plaintiff-Friendly Supreme Court Decisions:


- Employers can be liable for acts of retaliation against former employees under Title VII
  - Plaintiff filed EEOC charge challenging termination from employment
  - Former employer then provides poor recommendation when plaintiff applies for new job
  - Plaintiff files second EEOC charge alleging retaliation
  - Supreme Court rules that Title VII encompasses such claims
Expansion of Employment Practices that can be Challenged: *Burlington Northern*

- What is “adverse action” under Title VII?
- Supreme Court provides broad definition
  - not confined to the actions and harms to those that are related to employment or occur at the workplace
  - includes actions that would have been materially adverse to a reasonable employee or job applicant
  - actions must be harmful to the point that they could dissuade a reasonable worker from making or supporting a charge of discrimination
- Case-by-Case Analysis Required
  - Court held determination will depend on circumstances of the case and individual employee involved
    - E.g., a schedule change may be insignificant for one employee, but have a material detrimental effect on another
EXAMPLES OF ADVERSE ACTION POST-*BURLINGTON*

- Moving the complaining employee to a “less desirable” office location or environment
- Depriving the complaining employee of previously available “support services”
- Depriving the complaining employee of challenging work assignments
- Excluding the complaining employee from a regularly scheduled work group lunch invitation (!!!)

- Protected activity by plaintiff not necessarily required
- Supreme Court holds Title VII anti-retaliation provisions cover employees “so closely related to an employee who has opposed illicit action that retaliation against the third party would dissuade the employee from engaging in protected activity…”
- Who is covered? No clear standard.
  - “We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so…”
2011 Expansion: *Thompson* (cont.)

- Employer defense after *Thompson*:
  - Employer may have a good faith argument that it was unaware of the relationship between the other employee and the individual who actually engaged in the protected activity.
Retaliation Under the FLSA

- For now at least, breadth of the anti-retaliation provision under the FLSA may be somewhat narrower than under Title VII
- In *Kasten v. Saint-Gobain Performance Plastics Co.*, No. 09-834 (U.S. Mar. 22, 2011), Supreme Court held that oral, as well as written, complaints constituted protected activity under the FLSA
- Supreme Court refused to unequivocally rule that internal complaints (as opposed to complaints made to the government) are entitled to protection under the FLSA
  - Issue being considered in lower courts
Retaliation Under the FMLA

- To state a claim for *interference*, a plaintiff must establish by a preponderance of the evidence that he was entitled to the benefit denied. See *Gonzalez-Rodriguez v. Potter*, 605 F.Supp.2d 349, 370 (D.P.R. 2009)

- Further, “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.” *Id.* (citing 29 C.F.R. § 825.220(c)).

- --NO RETALIATION
Retaliation Under ERISA

- A plaintiff in an ERISA retaliation case need only prove an attempt to interfere, not actual interference with ERISA rights. Therefore, receipt of ERISA benefits will not prevent a plaintiff from prevailing in an ERISA retaliation suit. See Kowalski v. L & F Prods., 82 F.3d 1283, 1287 (3d Cir. 1996).

- While ERISA claims generally follow the Title VII framework, retaliation claims under ERISA require a showing of specific intent on the part of the employer.
Individual Liability Under the FMLA

- Manager/supervisor may be held PERSONALLY LIABLE when he or she exercises “supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation” while acting in the employer's interest. *Haybarger v. Lawrence County Probation & Parole*, No. 10-3916; 2012 WL 265996 (3d Cir. Jan. 31, 2012)

- Fifth Circuit has adopted this same standard while the 6th & 11th Circuits held that there can be no individual liability for supervisors under the FMLA.
Individual Liability under FLSA

- Similar Standard to that under FMLA
  - 5th Circuit recently held that a person can be individually liable for FLSA violation, but only where the individual has operational control (i.e., power to hire/fire; supervisory duties; power to set wages, etc.).
Dodd-Frank Anti-Retaliation Provisions

- New Anti-Retaliation Protections for
  - Reports required/protected by SOX
  - Reports of violations of law under SEC jurisdiction
  - Reports to law enforcement officials of other violations of federal law
Dodd-Frank Anti-Retaliation Provisions (cont.)

- **Requires** SEC to pay a “bounty” to whistleblowers who voluntarily provide original information that results in successful prosecution, in which the SEC obtains monetary sanctions of more than $1 million
- Successful whistleblowers **must** receive a bounty of between 10 percent and 30 percent.
Affordable Care Act: Whistleblower Protections:

- Section 1558 of the ACA adds new whistleblower protections under FLSA (Section 18C)

- Provides that an employer cannot discriminate against any employee with respect to “compensation, terms, conditions, or other privileges of employment” because the employee:
  - Provided/caused to be provided/is about to cause or provide information relating to the violation of any provision of this title
  - Actually did or is about to assist, participate, or testify in a proceeding about such violation, or
  - Objected to or refused to participate in any activity or task that the employee “reasonably believed” to be in violation of the statute, rules or regulations.
Affordable Care Act
Whistleblower Protections (cont.):

- Section 1558 applies to
  - Employers
  - Health plans
  - Health insurance officers offering group or individual health insurance coverage

- Relief is sought pursuant to the complaint procedures for the Consumer Product Safety Improvement Act of 2008
  - DOL complaint, administrative determination, court action after administrative exhaustion
Best Practices for Avoiding and Responding to Whistleblower/Retaliation Claims
Policies

- Put in place, communicate, and enforce clear anti-retaliation policy
  - Including established procedure for communicating complaints
  - Secure written acknowledgments
- Emphasize anti-retaliation policy to every employee involved in complaint, investigation, etc.
Training/Education

- All employees should receive training on prevention, reporting, and response to retaliation and other EEO issues
  - Training should be documented
- Training for management should address additional responsibilities
  - e.g., requirement to immediately report any EEO complaints or issues to HR
Consistency

- Maintain consistent enforcement of all workplace policies
  - Helps defuse claims of disparate treatment
Documentation

- Promptly and thoroughly document events relating to “protected activity”
  - Complaints, investigations, etc.

- Carefully examine and document all potential adverse action after employee has made complaint or engaged in other protected activity
Monitor

- Following employee complaint, investigation, etc., stay vigilant

- Ensure that front-line management reviews proposed adverse action/discipline with HR/legal
  - Factually supported?
  - Conduct not previously ignored?
  - Others treated similarly?
  - Consistent with discipline policy?
Special Problems/Issues in Retaliation Claims

- Temporal proximity
- Progressive discipline and “pro-active employee”
- Employer knowledge of relationship between the “other employee” and the individual who engaged in protected activity
EEOC Settlement

- Need to be careful in settlement agreements
  - OK to bar employee recovery in his or her own suit and in EEOC enforcement action
  - NOT OK to bar employee from filing charge, or bar EEOC from proceeding
Questions?

Thank you for attending!

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www.employmentlawwatch.com