

# Legitimately Disciplining Employees Without Committing Reprisals – Game Plan



Employees who engage in protected activity on Monday aren't exempt from discipline for infractions they commit on Tuesday.

“Reprisal” is a fancy word for revenge. It's a nasty action that you take to get back at your enemy for doing something bad to you. In the context of HR law, reprisals refer to an abuse of employer power to punish employees for engaging in activities that, while legally protected go against the company's interests, such as complaining to government authorities or blowing the whistle on internal wrongdoing. Such reprisals, sometimes referred to as “discriminatory actions,” violates criminal, OHS, human rights, labour relations, employment standards and other laws.

While protection against reprisals serves the public interest, employees who engage in a protected activity may also deserve to be disciplined, not for engaging in the protected activity but for other legitimate and unrelated reasons. An employee who shows up for work drunk on Tuesday and verbally abuses her supervisor on Wednesday shouldn't be exempt from discipline just because she also happened to have reported a workplace harassment issue to OHS authorities on Monday. The problem is that if you try to impose discipline, the employee or union might play the reprisal card and challenge the action as illegal.

As HR director, you need to understand that engaging in a protected activity doesn't give employees license to do whatever they want while still being sensitive to the legal risks that arise when you invoke the disciplinary process. Here's a compliance game plan for avoiding reprisals liability.

## **The 4 Elements of a Reprisal Case**

There are generally 4 things that must be proven to make out a legally valid reprisal case.

### **1. Employee Engaged in Protected Activity**

First, employees must show that they engaged in some form of activity protected by the OHS, human rights, labour relations, employment standards or other applicable law. [Protected activities](#) typically include:

- Filing a complaint under the law;

- Reporting company wrongdoing or suspected wrongdoing either internally or to government officials;
- Providing information, testifying or otherwise participating in an investigation or proceeding involving alleged wrongdoing by the company;
- Asking the employer to comply with the law; and
- Exercising rights under the law, such as refusing dangerous work, serving on a safety committee (OHS laws), joining a union (labour laws) or taking entitled leave (employment standards laws).

## 2. Company Knew about Protected Activity

A company can be liable only if it knew that the employee engaged in the protected activity. A company is considered to have knowledge if an officer, employee, contractor, subcontractor or other agent knew of the activity.

## 3. Company Took Adverse Action against Employee

Employees must next show that the company took or threatened to take some kind of adverse action against them for engaging in the protected activity. Examples:

- Termination and other forms of discipline;
- Demotion;
- Transfer or reassignment to less favorable duties or work conditions;
- Harassment; and/or
- Any other discrimination regarding compensation, terms, conditions or privileges of employment, such as taking back an employee's preferred parking space.

## 4. Adverse Action Was *Because* Employee Engaged in Protected Activity

The mere fact that employees who engaged in protected activities were targeted for adverse action isn't enough. For the adverse action to be considered reprisal, there must be a causal link between the 2. This is usually the hardest element to prove and where burden of proof becomes crucial. While employees have the burden of proving the first 3 elements, burden of proving—or disproving—element 4 varies by province. In most jurisdictions (FED, AB, BC, MB, NL, NS, ON, SK), the burden falls to the employer.

**Explanation:** Once the employee proves the first 3 elements, the adverse action is presumed to be reprisal unless the employer can rebut the presumption by showing that it was taken **solely** for a non-related, legitimate reason. Note that reprisal doesn't have to be an employer's **only** motive for taking adverse action against the employee; it need only be one of factor in the decision.

## Two Strategies for Preventing Reprisals Liability

There are 2 things you can do to protect your company against risk of illegal reprisals:

### Strategy 1: Implement a Non-Retaliation Policy

Create a clearly worded [policy](#) reassuring employees that you won't retaliate against them for reporting violations, exercising legal rights and engaging in other forms of protected activity. **Caveat:** Talk is cheap. A nonretaliation policy, no matter how eloquently worded, won't do much good if nobody believes it. There needs to be trust and a recognized commitment to compliance on the part of management. A non-retaliation policy can't create this by itself; but it can contribute to its creation.

## **Strategy 2: Be Prepared to Respond to Employee Reprisal Complaints**

If an employee does charge you with reprisal, you must investigate the situation and explain why you took the adverse action. This is your chance to knock out any of the 4 required elements from the employee's case; it's also a chance to shoot yourself in the foot. Misstating or omitting facts can arouse suspicions and hurt your chances of getting the case dropped. Use the [Questionnaire](#) on HR Insider to manage the process.