

# Frequently Asked Questions About Workplace Retaliation Against Transgender and Non-Binary Employees

## What Is Workplace Retaliation?

Workplace retaliation is when an employer punishes an employee for doing something to assert their legal rights, such as filing a discrimination or harassment complaint. Examples of retaliation include:

- Termination of employment
- Pay or hours reduction
- Demotion or reassignment
- Disciplinary action
- Harassment

Retaliation in the workplace is a form of employment discrimination and is illegal.

## Are Transgender/Non-Binary Employees Protected From Workplace Retaliation?

Yes, trans/non-binary<sup>1</sup> employees are protected from workplace retaliation, just like all other employees. Workplace retaliation often occurs when employees report discrimination or harassment, and given the fact that trans/non-binary employees are at high risk of discrimination and harassment in the workplace, it's important to know that you are protected from retaliation if you report such behavior.

Your employer cannot retaliate against you for any of the following actions:

- Reporting discrimination or harassing behavior
- Assisting someone else in filing a discrimination or harassment complaint
- Testifying or participating in any way in an investigation, proceeding, or lawsuit
- Opposing employment practices that you reasonably believe are discriminatory or harassing

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<sup>1</sup> FORGE honors and recognizes the complexity and multiplicity of gender identities and expressions, as well as acknowledging the diverse language used by people whose gender, or lack thereof, does not align with societal norms. This resource uses the words *transgender*, *trans*, and *non-binary* in their broadest meanings, inclusive of those whose identities lie outside of these often-limiting terms.

## **Should My Employer Protect Me From Workplace Retaliation?**

Yes, workplace retaliation is illegal. Your employer should not engage in retaliation, nor should your employer allow your supervisor or coworkers to retaliate against you.

Under the law, your employer is liable for retaliation if:

1. You opposed, complained about, or participated in a process in opposition to workplace discrimination or harassment;
2. Your employer took a negative employment-based action against you; **and**
3. You can show some connection between your activity and the employer's action.

A negative job action (such as being fired) is only considered workplace retaliation if you are able to show that your employer was motivated by you reporting harassment or doing another legally protected activity.

Retaliation does not have to occur immediately to be illegal. An employer's action can be retaliatory even if it occurs weeks, months, or possibly even years later, so long as the employer took the action because the employee opposed or complained about discrimination or harassment.

## **What Can I Do About Retaliation?**

### **1. Do Not Participate.**

While it can be tempting to fight fire with fire, avoid participating in discrimination, harassment, or retaliation toward anyone at work, even if they are targeting you. If you take such action against another employee, there could be serious consequences for you, including losing your job. And, it may affect the success of any legal claims you make.

### **2. Tell Them to Stop.**

Although it can be challenging to confront someone who is treating you unfairly or harassing you, try to resolve the problem, if you are able, by telling the person to stop the retaliatory behavior. You will have to decide whether you think they will be open to hearing your request and whether your request will be effective. You can do this by talking with them in person, over the phone, or through an email or instant message. Consider what method you are most comfortable using and what will best ensure your sense of security and safety.

### **3. Write It Down.**

Even if this is the only action that you take, it is a very important one. You may think that you will later remember everything that has happened to you, but memories fade quickly. Keep

notes in a dedicated notebook at home that you don't use for anything else (because you might have to share it if you take legal action later).

When you experience an instance of retaliation, make a note at home at the end of the day. Include as much information as you can, such as the date, approximate time, names of individuals involved, names of witnesses, what happened, and who said what.

You should also save any items and any copies of documents, like email messages, notes, photos, or drawings, that help show that retaliation is happening.

#### **4. Make a Report.**

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If you are unable to resolve the retaliatory conduct, it may be time to report the behavior to your supervisor or human resources office. If your supervisor is the person retaliating against you, you may report instead to your supervisor's boss or to human resources.

Check your employee handbook or learn about your employer's policy against discrimination, harassment, and retaliation. That policy should instruct you on how to make a report and it should also explain your employer's complaint and investigation procedures.

An investigation into your complaint should be conducted by your employer as soon as possible and with as much confidentiality as possible. Ask your supervisor or human resources director how they will protect your confidentiality during the investigation process. They will likely need to share your name with the person you are complaining about, in order to give that person an opportunity to respond to your claims. Other witnesses will likely also be told your name and information about your complaint, for the same reasons. Employees who are not involved should not be informed of your complaint or the investigation.

At the end of the investigation, your employer should inform you about any determination it is making, and about the actions that it will take to stop the retaliation. Don't expect your employer to share information with you about discipline or other consequences for the person you complained about—the person retaliating against you also has a right to confidentiality about their employment relationship.

#### **5. Take Legal Action.**

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Both federal and state law require you to file a charge of discrimination, harassment, or retaliation with a federal or state agency before you may file a lawsuit in court. Depending on the state in which you live, the deadline for filing a charge of discrimination is 180 days (around 6 months) or 300 days (around 10 months) after the workplace retaliation occurred.

The Equal Employment Opportunity Commission (EEOC) accepts complaints that federal discrimination, harassment, or retaliation laws are being violated. Contact your nearest EEOC field office to learn about deadlines for making a complaint and to learn whether you are protected by any state or local laws: <https://www.eeoc.gov/field/>.

Some forms of retaliation, such as physical and sexual assault, are criminal acts in and of themselves. Physical and sexual assaults are always crimes, even when they happen at work. The U.S. Transgender Survey, in 2015, found that of the 15% of trans or non-binary people who experienced sexual harassment, 1% of those were physically attacked and another 1% were sexually assaulted.<sup>2</sup>

Employees who experience assault should consider reporting the crime to local law enforcement as well. Many trans/non-binary people may not feel comfortable or safe working with local law enforcement as a result of the rocky and sometimes violent relationship between police and trans communities and individuals. We know that many trans or non-binary people continue to have negative experiences with police. The U.S. Transgender Survey (2015) also found that 20% of trans and non-binary people reported that they were verbally harassed by police, 4% were attacked physically, and 3% were sexually assaulted.

Trans/non-binary individuals can consider seeking support in working with police from an advocate, trusted friend or coworker, or lawyer (if they have one). Know that, in some states, survivors of sexual assault have a legal right to have an advocate with them at all times when working with the police or going to the hospital for an examination or treatment.

These resources may be useful to those who experience physical or sexual assault in the workplace:

- State laws and victims' rights: <https://apps.rainn.org/policy/>
- FORGE publications for survivors of sexual assault: <https://forge-forward.org/publications-resources/anti-violence-publications/>

## Who Can Help Me?

If you have reported workplace retaliation to your employer and it continues, or if you are unable to make a report at work for any reason, consider seeking assistance outside of your workplace. There are a number of sources of support for you:

### 1. FORGE

Advocates at FORGE are able to help you understand your rights, offer advice for dealing with retaliation, and provide referrals to trans-knowledgeable attorneys. Contact FORGE at <https://forge-forward.org/about/contact-us/>

### 2. TIME'S UP Legal Defense Fund™

TIME'S UP™ has a project to assist with sexual harassment, sex discrimination, and related retaliation. If they are able to help, they will provide names of attorneys for you to contact.

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<sup>2</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

(In some limited cases, they may be able to provide representation in harassment cases free of charge.) Fill out their online intake form at <https://nwlc.org/legal-Assistance>.

### **3. Free or Low-Cost Legal Services**

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There may be free or low-cost legal services available locally, depending on where you live and your income level. To learn about local legal services, check with your local bar association (association of lawyers): <http://StateBarAssociations.org>.

### **4. Private Attorneys**

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You may also seek assistance from a private attorney. Be prepared to pay a consultation fee and to discuss your ability to pay for their services over time. Many employment lawyers will work on a contingency-fee basis, meaning that they won't charge you up front, they will work without payment, and they will only get paid if you receive an award of money. Find an attorney by contacting your local bar association (association of lawyers): <http://StateBarAssociations.org>.

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