

Barnes & Thornburg

How To...Not "Retaliate" Against Leave-Taking Employees

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Presented by:

Bill Nolan, Partner, Barnes & Thornburg

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William A. Nolan

Partner

Columbus

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William Nolan brings clarity and closure to employment, contract and business disputes. Passionate about helping employers build strong teams, policies and processes, Bill's proactive advice minimizes the frequency, cost and severity of employment disputes. Bill also works with clients to design systems and practices to manage the many challenges of complex employer-employee relationships.

An experienced trial lawyer, Bill handles covenant not-to-compete and trade secret cases in many states. He also regularly defends employers in discrimination and discharge cases, administrative claims, arbitrations and mediations. Bill helps clients

maneuver shifting legal mandates and has distinct experience handling complicated employee health and leave issues. Admired for his calm and thoughtful approach to resolving disputes, Bill also acts as a neutral.

In his role as employment counselor, Bill advises clients on a range of workplace issues. He is called upon to conduct manager and workplace trainings that ensure legal compliance on the front lines. He was an early leader in tracking how employers and legislatures respond to discrimination in the workplace, advocating for changes in training models to better address persistent workplace behaviors.

Bill is not one to back down from a challenge. Opening the firm's Columbus office in 2009 during the Great Recession, he built and ran a notable team for over 15 years. Also, as a former two-term councilman and Powell, Ohio, mayor, Bill brings contagious energy to community affairs, focusing on furthering inclusion in the legal profession.

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Areas of Focus



Arbitration and Grievances

Associations and Nonprofits

Benefits and Compensation

Business Tort Litigation (Tortious Interference)

Collective Bargaining

Commercial Litigation

Construction

Corporate

Data Security and Privacy

Disability, Leave and Medical Issues

Discipline and Termination

Discrimination Defense

Downsizing and WARN Act

eDiscovery and Knowledge Management

Education

Emerging Companies and Venture Capital

Employment

- Employment Litigation
- Executive Level (or C-Suite) Internal Investigations
- Fraternities and Sororities
- Higher Education
- Human Resource Audits
- Japanese Services
- Labor and Employment
- Litigation
- Mergers and Acquisitions Labor Issues
- Non-Compete and Trade Secrets
- Non-Compete Litigation
- Primary and Secondary Schools

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Notable Media Mentions

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- Quoted in Law360: "Circuits Aligning To Protect Window For Federal Bias Claims," March 6, 2026

Honors

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Ohio Women's Bar Association, Diversity and Inclusion Sponsor Award, 2019

Smart Business Magazine, Smart Women Awards Advocate for Advancement Award, 2017

Chambers USA, 2009-2025

The Best Lawyers in America, 2006-2026; Lawyer of the Year, 2015, 2020, 2024, 2026

Ohio Super Lawyers, 2005-2025; Ohio Super Lawyers Top 50 Lawyers in Columbus, 2010-2021; Top 100 in Ohio, 2009, 2012-2016, 2021

Professional and Community Involvement

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Member and chair, Ohio State Bar Association Labor & Employment Section Council

Fellow, College of Labor and Employment Lawyers

Board member, secretary, and DEIA committee member, Columbus Chamber of Commerce

Advisory committee member and immediate past chair, Columbus Bar Association Managing Partners' Diversity Initiative

Member, charter member and past chair, Ohio Management Lawyers Association

Member and past chair, Columbus Bar Association Labor and Employment Law Committee

Former board chair, United Way of Delaware County (OH)

Former board treasurer, Delaware County Foundation

Advisory Council member, LIFESports at The Ohio State University

Former board member, Small Biz Cares

Former board member, Employers Resource Association

“

Launching our office in 2009 wasn't just bold - it was strategic. That's the mindset I bring to my clients' businesses every day."

Credentials

Education

- Harvard Law School, J.D., 1989, cum laude
- Cornell University, B.A., 1984, magna cum laude

Bar Admissions

- Ohio

Court Admissions

- U.S. Court of Appeals for the Seventh Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Southern District of Ohio



Anthony Molina

Associate

Chicago

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Anthony Molina brings a balanced perspective to labor and employment law, shaped by his experiences in government, the judiciary, and private practice. He is committed to helping employers navigate complex workplace issues with pragmatic strategies and clear, persuasive advocacy.

Anthony advises and supports clients on a wide spectrum of labor and employment matters. His work ranges from drafting motions and developing litigation strategies for class and collective actions, handling traditional labor matters for both union and non-union employers, and conducting legal research for the day-to-day operations of managing a workforce. He approaches each matter with a focus on both the legal and

human aspects of workplace disputes, ensuring clients receive solutions that are not only effective but also sustainable.

Before joining Barnes & Thornburg full time, Anthony built a strong foundation through diverse legal experiences. He served as a summer associate at the firm, a law clerk in the Office of the Wisconsin Governor, and a judicial intern through the Wisconsin Supreme Court program.

He has held multiple research positions, seeking answers for clients and stakeholders amid crises and pivotal transitions. Through these roles, he developed a deep understanding of the intersection between corporate governance, policy, and the law. His experience equips him to adeptly navigate the interpersonal dynamics that drive employers' success.

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Areas of Focus



Labor and Employment

Professional and Community Involvement



- Chicago Committee Member, The Legal Mentor Network
- Member, State Bar of Wisconsin

Credentials

Education

- University of Wisconsin Law School, J.D., Wisconsin Law Review

- University of Iowa, B.A., Ethics & Public Policy

Bar Admissions

- Wisconsin
- Illinois

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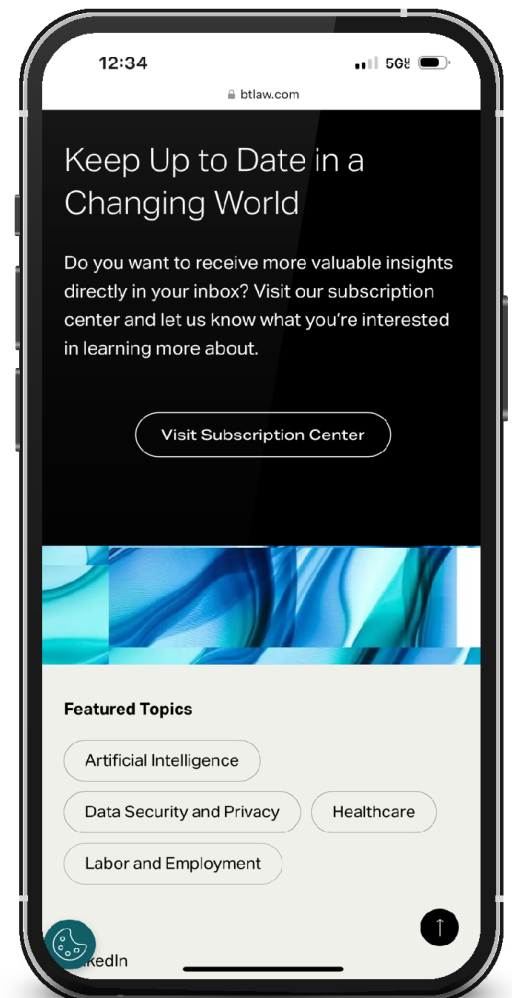


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“How To”

- 33rd in a series ... less legal update, more nuts and bolts and strategy on a narrower issue
 - If you want more legal details on something we say, e-mail us
- TODAY: How do we effectively manage the challenges that can come with an employee returning from leave?
 - A timeless challenge – you can’t solve human behavior puzzles with a policy, agreement, etc.

Game Plan

- Start with a common, simple scenario
- Add and consider layers
 - You’re going to help! (polls)
- Consider retaliation claim trends and distinctive characteristics
- Wrap up with practical takeaways
- *QUESTIONS WELCOME THROUGHOUT* (and afterwards)

Scenario

- Employer: A&B's Widget Company manufactures and sells widgets for automobiles
- 50 employees all located in a single location
- Devin is a 12-year employee in a 7-person customer support department
 - Has good relationships with a couple key accounts
 - Not the favorite of colleagues, kind of bossy
 - Department manager gives Devin mostly “Exceeds” and a few “Meets” in annual evaluations

Scenario (cont.)

- Devin takes FMLA leave for a surgical procedure
 - doctor says 5 weeks recovery, then will need intermittent leave
- Quinn is covering one of Devin's big accounts and finds that 2026 price increases were not passed on to that customer – could be intentional, could be inadvertent
- Management decides that it will eat the difference for customer relation purposes, but needs to address the situation with Devin

POLL: When are you going to talk to Devin about this situation?

Retaliation 101

- Almost every employment statute has a no retaliation provision
- Therefore, if somebody exercises a right under one of those statutes, they are now in a protected class
 - The protected class of *somebody who is protected by an anti-retaliation provision* (i.e. exercised a right under that statute)

Retaliation 101 (cont.)

- Big long-term trend towards more retaliation claims
 - E.g. less than ¼ of EEOC charges were retaliation charges in 1998, now it's more than ½
 - Also a lower standard than it used to be – “might have dissuaded” (Supreme Court’s *Burlington Northern* case in 2006)
 - And maybe some of the “plaintiffs’ lawyer convention” effect
- Often harder to disprove than core claim (e.g. discrimination) – no amount of prevention can undo time proximity
- People on both sides of the equation may in fact act differently after a legal right has been exercised, even if trying not to
 - Maybe *especially* if they are trying not to
 - Consider the example of a harassment complaint

Recent example #1

- *Mirkovic v. Tenasys Corp.* (Ore. App. 2026)
 - Employee alleged termination due to trying to negotiate a raise
 - Claimed termination violated state statute protecting discussion of wages
 - Employer argued statute it only applied to discussions among employees
 - Court of Appeals held plaintiff could go forward with retaliation claim
 - An interpretation of a state statute and not our fact pattern, but a good example of types of protections

Recent example #2

- *Gray v. State Farm* (6th Cir. 2026)
 - Plaintiff had helped her colleague advocate for an accommodation under the ADA
 - Plaintiff was fired for timecard falsification
 - Claimed she was single out due to her advocacy for colleague, for a practice that was widespread at the company
 - Appeals court agreed claim could go forward
 - It's often not just the employee covered by the law who is protected

So back to our poll question ...

- Protected class doesn't mean the rules and standards are different ...
- ... just need to be in a position to *prove* that you are not doing things for unlawful reasons.
 - In this case, the unlawful reason would be because Devin took FMLA leave.
- On this one, should be easy enough to separate the leave and the reason to look into the pricing issue
- Probably best to wait until Devin is back if you can, but no reason to wait too much after that.

Let's modify our scenario

- You manage the department and you realize ... things actually run better when Devin is out
 - An employee you trust casually mentions this
 - A couple of junior employees seem to really shine filling in some of the duties and seem more confident
 - Some of Devin's past comments to other employees seem more significant to you as you consider everything

Also known as:

Addition by subtraction

POLL: You realize you would actually be better off without Devin. What do you do?

Things to think about

- You probably are not ready to make the business decision you want to make at a risk level most employers would except.
 - Historic evaluations do not support it.
 - Worst possible timing with FMLA leave.
- So let's start the process now.
- Consider combining but still separating the communications – harder to say retaliation is the hidden reason if you are not hiding
 - “There are 2 things we want to talk about ...”

6 months later ...

- Upon Devin's return, you started some coaching for Devin on interacting with teammates.
- Devin really has not improved in interactions with colleagues, and the manager has been keeping good notes.
- Also, Devin's team is frustrated with the intermittent leave that followed the surgery. They think Devin is not doing a fair share.

**POLL: Is there still risk of a
retaliation claim 6 months down
the road?**

POLL: What is the legal significance of Devin's co-workers' frustration with the intermittent leave?

Some takeaways

- Recognize: Both sides often do behave differently after exercise of a legal right – recognize and manage it
- Treat separate issues separately ... but also together (i.e. don't hide from possible basis of retaliation)
- Try not to change your communication patterns with the returning employee
- Coworker frustrations are not a reason for an adverse action
 - Though actual disruption causing the frustration might be

More takeaways

- There is no substitute for good management
 - Accurate feedback
 - Address small issues before they are big issues
 - Consistency
 - 3 Ps: Proactive · Patient · Persistent
 - » And if you weren't proactive, well let's get started
- There is no formula for how long the retaliation risk lasts
- While there is legal risk in moving too fast, there is also risk in waiting too long



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THANK YOU

April 14, 2026

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