

Employment Retaliation Desk Aid*

LAW • COVERED	ACTIVITY	ADVERSE ACTION	DEFENSES	DAMAGES	SOL • PROCEDURE
<p>Title VII, 42 U.S.C. §2000e-3(a)</p> <ul style="list-style-type: none"> • Title VII: Race, color, religion, sex, or national origin. • 15 or more employees. • “Person aggrieved.” • Former employees. • No individual liability. 	<ul style="list-style-type: none"> • Making a charge or participating in an investigation, proceeding, or hearing under Title VII. • Opposing a practice made an unlawful employment practice by Title VII. • No words necessary. • Perceived OK. 	<ul style="list-style-type: none"> • “Discriminate against” employee. • Materially adverse action. • “But for” causation. 	<ul style="list-style-type: none"> • No reasonable and good faith belief for opposition. • Conduct too ambiguous. • Opposition too unreasonable. • Job duties exception. 	<ul style="list-style-type: none"> • Caps on compensatory and punitive damages. • Standard for punitive damages is preponderance. • Compensatory and punitive damages only available if cannot recover under §1981. 	<ul style="list-style-type: none"> • 300 days to file with EEOC/MHRC. • 90 days to file suit after EEOC RTS letter. • Circuits are split on whether a separate EEOC charge of discrimination is necessary when retaliation grows out of prior EEOC charge. • Jury trial.
<p>ADA, 42 U.S.C. §12203</p> <ul style="list-style-type: none"> • ADA: Discrimination because of disability. • 15 or more employees. • Split on whether there is individual liability. • States have 11th Amendment immunity. 	<ul style="list-style-type: none"> • Participation and opposition similar to Title VII. • Also includes exercise of rights. • Request for accommodation. • Circuit split on “a motivating factor” versus “but for” causation. 	<ul style="list-style-type: none"> • “Materially adverse action.” • Also includes coercion, intimidation, threat, harassment, or interference with rights. 	<ul style="list-style-type: none"> • Title VII defenses for opposition and participation. 	<ul style="list-style-type: none"> • Probably no compensatory or punitive damages. 	<ul style="list-style-type: none"> • 300 days to file with EEOC/MHRC. • 90 days to file in court. • Probably no jury trial.

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<p>ADEA, 29 U.S.C. §623(d)</p> <ul style="list-style-type: none"> • ADEA: Age (40 and over) discrimination. • “Person aggrieved.” • States have 11th Amendment immunity • No individual liability. 	<ul style="list-style-type: none"> • Same as Title VII. 	<ul style="list-style-type: none"> • Same as Title VII. 	<ul style="list-style-type: none"> • Same as Title VII. 	<ul style="list-style-type: none"> • Emotional distress damages, without caps. • Circuit split on punitive damages. • Liquidated damages equal to lost wages. 	<ul style="list-style-type: none"> • 300 days to file with EEOC. • Jury trial. • Right to bring personal action extinguished if EEOC files suit.
<p>EPA, 29 U.S.C. § 215(a)(3)</p> <ul style="list-style-type: none"> • EPA: Unequal pay between sexes. • Nearly all employers regardless of size. • Individual liability. • Former employees. 	<ul style="list-style-type: none"> • Filed complaint, instituted proceeding, testified in proceeding under EPA, serve on industry committee. • Oral complaint sufficient. • Split in circuits on whether internal complaint to employer is covered (as opposed to an administrative or court complaint). 	<ul style="list-style-type: none"> • Same as Title VII. 	<ul style="list-style-type: none"> • Presumably the same as Title VII. 	<ul style="list-style-type: none"> • Emotional distress damages, without caps. • Circuit split on punitive damages. • Liquidated damages equal to lost wages. 	<ul style="list-style-type: none"> • No administrative exhaustion requirement. • Three-year SOL to file in court for willful violations; otherwise 2 years. • “Willful” means “employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” • Right to bring personal action extinguished if DOL

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<p>FMLA, 29 U.S.C. §2615</p> <ul style="list-style-type: none"> • FMLA: 12 weeks of leave for childbirth, adoption, serious health condition. • 50 or more employees. 	<ul style="list-style-type: none"> • Exercise of or the attempt to exercise, any right provided under FMLA. • Opposing any practice made unlawful by FMLA. • Filed any charge, or has instituted or caused to be instituted any proceeding, under or related to FMLA. • Given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under FMLA. • Testified, or is about to testify, in any inquiry or proceeding relating to any right provided under 	<ul style="list-style-type: none"> • Interfere with, restrain, or deny exercise or attempted exercise of rights. • Discharge or in any other manner discriminate against any individual for opposition. • Discharge or in any other manner discriminate against any individual because such individual is involved in proceedings, gave information, or testified in proceedings or inquiries. 	<ul style="list-style-type: none"> • Coverage, activity, adverse action. 	<ul style="list-style-type: none"> • Lost wages or actual money losses up to 12 weeks. • Liquidated damages equal to lost wages or money losses, unless good faith shown. 	<p>files complaint.</p> <ul style="list-style-type: none"> • Jury trial. <ul style="list-style-type: none"> • No administrative exhaustion. • 3-yr SOL for willful violation; otherwise 2 yrs. • Jury trial.

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	FMLA.				
<p>NLRA, 29 U.S.C. §158(a)</p> <ul style="list-style-type: none"> • NLRA: Right to collective bargaining. • Most private employers (not government). • Third-party standing. 	<ul style="list-style-type: none"> • Concerted activity for the purpose of mutual aid or protection. • Group action or seek to initiate or to induce or to prepare for group action; not solely by and on behalf of the employee himself. 	<ul style="list-style-type: none"> • Interfere with, restrain, or coerce employees in exercise of rights. 	<ul style="list-style-type: none"> • Lack of protected activity or adverse action. 	<ul style="list-style-type: none"> • NLRB ordered remedies including reinstatement and back pay. 	<ul style="list-style-type: none"> • Six months to file with NLRB.
<p>Title IX, 20 U.S.C. §1681(a)</p> <ul style="list-style-type: none"> • Title IX: Sex discrimination in education program or activity receiving Federal financial assistance. • Program specific. 	<ul style="list-style-type: none"> • Complaint of sex discrimination. • See “Adverse Action.” 	<ul style="list-style-type: none"> • “No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title IX], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart.” 	<ul style="list-style-type: none"> • Courts differ on whether there is a Title IX claim for money damages for complaint about sex discrimination against employees (as opposed to students). 	<ul style="list-style-type: none"> • Private suit for money damages authorized with intentional discrimination. • No caps. 	<ul style="list-style-type: none"> • No administrative exhaustion requirement. • Six-year SOL.

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<p>Rehab Act §504, 29 U.S.C. § 794(a)</p> <ul style="list-style-type: none"> • §504: Qualified individual with a disability denied the benefits of, or be subjected to discrimination under covered program. • Recipients of federal financial assistance, Executive Agency, Postal Service. • Program specificity defined in §504. 	<ul style="list-style-type: none"> • Same as ADA. 	<ul style="list-style-type: none"> • Same as ADA. 	<ul style="list-style-type: none"> • Same as ADA. 	<ul style="list-style-type: none"> • Emotional distress damages available. • No caps on compensatory damages. • No punitive damages. 	<ul style="list-style-type: none"> • No administrative exhaustion. • Six-year SOL.
<p>Title VI, 42 U.S.C. § 2000d</p> <ul style="list-style-type: none"> • Title VI: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination 	<ul style="list-style-type: none"> • See “Adverse Action.” 	<ul style="list-style-type: none"> • “No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this subpart, or because he has made a complaint, testified, 	<ul style="list-style-type: none"> • See DOJ Title VI Legal Manual. 	<ul style="list-style-type: none"> • Compensatory damages for intentional discrimination. • No caps. • No punitive damages. 	<ul style="list-style-type: none"> • No administrative exhaustion. • Six-year SOL for court actions.

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<p>under any program or activity receiving Federal financial assistance.</p> <ul style="list-style-type: none"> • Only applies to employment when primary objective of funding is to promote employment or practices negatively affect the delivery of services to ultimate beneficiaries. 		<p>assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart.”</p>			
<p>42 U.S.C. §1983</p> <ul style="list-style-type: none"> • State and local governmental officials individually. • Municipalities and cities when decision is made pursuant to official policy or custom. • Private employers acting under color of state or local law. 	<ul style="list-style-type: none"> • 1st Amend: Speech on matter of public concern weighed against employer’s interest in controlling personnel and internal affairs. • Discrimination committed by public officials may be a matter of public concern, but it depends on the 	<ul style="list-style-type: none"> • No “adverse job action” necessary—retaliation is severe enough if it “would deter a reasonably hardy individual from exercising his constitutional rights.” • Plaintiff burden to show “substantial” or “motivating” factor; then employer must show “but for.” • Supervisors are liable 	<ul style="list-style-type: none"> • Qualified immunity for government officials when conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. • Speech pursuant to 	<ul style="list-style-type: none"> • Compensatory and punitive damages. • No caps. 	<ul style="list-style-type: none"> • No administrative exhaustion. • Six-year SOL. • Jury trial.

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	circumstances. • No words necessary.	for subordinates' retaliation if they know about it and fail to respond to it, both of which may be inferred.	official duties, not as citizen. • Balancing under <i>Connick v. Myers</i> , 461 U.S. 138, 151 (1983). (See "Activity") • Job duties exception.		
42 U.S.C. §1981 • §1981: Race or color discrimination (includes ancestry or ethnicity, e.g., Arab, Jewish). • Private entities. • State and local government officials. • Municipalities and cities when decision is made pursuant to official policy or custom. • Individual liability. • Independent contractors.	• Same types as Title VII.	• Retaliation. • Materially adverse action. • "But for" causation.	• Same governmental immunity as §1983. • Title VII defenses.	• Compensatory or punitive damages without caps. • Punitive damages proof same as Title VII.	• No administrative exhaustion. • Four-year SOL for court actions. • Jury trial.

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<p>MHRA I (employment), 5 M.R.S. §4572(1)(E)</p> <ul style="list-style-type: none"> • MHRA: Discriminate because of race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin, WPA, prior Workers' Comp. • Nearly all "employers." • Persons "subject to" unlawful employment discrimination may bring claim. • No individual liability. 	<ul style="list-style-type: none"> • Make a charge, testify, or assist in any investigation, proceeding or hearing under the MHRA. • Oppose a practice that would be violation of MHRA. • No "exercise" of rights protection. 	<ul style="list-style-type: none"> • Employer may not "discriminate in any manner against" individuals. • Probably only need "materially adverse action" because similar language to Title VII. • Probably "but for" causation. 	<ul style="list-style-type: none"> • Probably same defenses as Title VII because same language. 	<ul style="list-style-type: none"> • Compensatory and punitive damages (with caps) if 15 or more employees. • Standard for punitive damages is clear and convincing evidence. • Compensatory and punitive damages only available if cannot recover under §1981. • Civil penal damages if under 15 employees. 	<ul style="list-style-type: none"> • 300 days to file with MHRC/EEOC. • SOL in court is the later of 2 yrs from date of discrimination or 90 days after (1) MHRC dismissal or (2) 90 days after RG finding. • Jury trial if 15 or more employees and claim for compensatory or punitive damages.
<p>MHRA II (WPA), 5 M.R.S. §4572(1)(A)</p> <ul style="list-style-type: none"> • WPA-protected activity. • Same coverage as MHRA I. 	<ul style="list-style-type: none"> • Report to employer or "public body" what reasonably believe is violation of state or federal law. • Report must be by 	<ul style="list-style-type: none"> • "Adverse job action." • Probably "but for" causation. 	<ul style="list-style-type: none"> • No objectively reasonable belief employer was acting unlawfully. • No report to employer before report to public 	<ul style="list-style-type: none"> • Same as MHRA I. 	<ul style="list-style-type: none"> • Same as MHRA I.

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	<p>employee and employer must be able to correct violation.</p> <ul style="list-style-type: none"> • Be requested to participate in an investigation, hearing or inquiry held by that public body, or in a court action. • Other WPA-protected activity. 		<p>body.</p> <ul style="list-style-type: none"> • No good faith. • Job duties exception. 		
<p>MHRA III (general retaliation and interference), 5 M.R.S. §4633</p> <ul style="list-style-type: none"> • Any “person.” • May include individual liability because “person” is defined to include individuals. • Persons “subject to” unlawful employment discrimination may bring claim. 	<ul style="list-style-type: none"> • Opposed any act or practice that is unlawful under the MHRA. • Made a charge, testified, assisted or participated in MHRA investigation, proceeding, or hearing. • Exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of 	<ul style="list-style-type: none"> • “Discriminate against any individual” for opposition or participation. • Opposition and participation probably interpreted same as Title VII because language similar. • Also coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted by 	<ul style="list-style-type: none"> • Probably same defenses as Title VII for opposition and participation because same language. 	<ul style="list-style-type: none"> • Civil penalties, but maybe no compensatory or punitive damages because not “employment discrimination.” 	<ul style="list-style-type: none"> • Same as MHRA I, except no jury trial if no claim for compensatory or punitive damages.

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	MHRA rights.	MHRA.			
MHRA IV (“interference” as “unlawful discrimination”) , 5 M.R.S. §4553(10)(D) <ul style="list-style-type: none"> • Defendant undefined. • May include individuals. • Persons “subject to” unlawful employment discrimination may bring claim. 	<ul style="list-style-type: none"> • Seeking to exercise any of the rights under the MHRA. • Complaining of a violation of the MHRA. • Testifying in any “unlawful discrimination” proceeding. 	<ul style="list-style-type: none"> • Punish or penalize. • Attempting to punish or penalize. 	<ul style="list-style-type: none"> • Unclear. 	<ul style="list-style-type: none"> • Civil penalties, but maybe no compensatory or punitive damages because not “employment discrimination.” 	<ul style="list-style-type: none"> • Same as MHRA I, except no jury trial if no claim for compensatory or punitive damages.
MHRA V (“aid and abet” as “unlawful discrimination”) , 5 M.R.S. §4553(10)(D) <ul style="list-style-type: none"> • Same as MHRA IV. 	<ul style="list-style-type: none"> • Anything protected by MHRA I through IV. 	<ul style="list-style-type: none"> • Aid, abet, incite, compel, coerce person who is retaliating. 	<ul style="list-style-type: none"> • Unclear. 	<ul style="list-style-type: none"> • Same as MHRA IV. 	<ul style="list-style-type: none"> • Same as MHRA IV.
Maine Medical Leave , 26 M.R.S. §847 <ul style="list-style-type: none"> • MML: 10 weeks of leave per 2 years if employed for 12 	<ul style="list-style-type: none"> • See adverse action. 	<ul style="list-style-type: none"> • Employer may not interfere with, restrain or deny the exercise of or the attempt to exercise any right provided by 	<ul style="list-style-type: none"> • Probably follow analogous provisions in other laws. 	<ul style="list-style-type: none"> • Lost wages or \$100 per day as liquidated damages. • Equal amount for willful violation. 	<ul style="list-style-type: none"> • No express SOL, so probably six years.

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<p>consecutive months, unless fewer than 15 employees at job site.</p>		<p>MML.</p> <ul style="list-style-type: none"> • Employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for exercising any right provided by MML. • Employer may not discharge, fine, suspend, expel, discipline or in any other manner discriminate against any employee for opposing any practice made unlawful by MML. 			
<p>Maine Workers' Compensation Act, 39-A M.R.S. §353</p> <ul style="list-style-type: none"> • Covered "employee" and "employer." 	<ul style="list-style-type: none"> • See "Adverse Action." 	<ul style="list-style-type: none"> • An employee may not be discriminated against by any employer in any way for testifying or asserting any claim under Comp Act. 	<ul style="list-style-type: none"> • Unclear. 	<ul style="list-style-type: none"> • Reinstatement to previous job, back wages, reestablishment of employee benefits. 	<ul style="list-style-type: none"> • 2 yrs to file petition with Workers' Comp Board.

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