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SUMMARY KEYWORDS

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All right. Welcome to this LexVid presentation using existing causes of action to represent COVID-19 pandemic whistleblowers. My name is Max Berek. I am one of the partners at the Garfinkel Group. We are a small, one year old labor and employment firm who represents workers plaintiffs side in the Chicagoland area. I've been practicing since 2013. Almost all of it in the labor and employment field. I've spent most of that time in my career litigating, even for those years I, I was in the wilderness not doing any work. And so this is a this is an issue that I've run into quite a bit whistleblower litigation. In several contexts, I'm going to try to pepper in some of those war stories, if you will, throughout the presentation, just to kind of keep it interesting, and give some real life examples of what these different laws, common law causes of action and statutes look like in practice and how this stuff works in reality, so it's not just theory. And so it's more useful to everybody. I do want to give a couple disclaimers as this is a legal presentation. So wouldn't wouldn't be one of these presentations without it. This is just a brief overview of this topic. Labor and Employment, it's one of the things I like about this field is your sort of like practicing in this area is almost like being a legal Swiss Army knife. There are a lot of different causes of action, overlapping and at times somewhat conflicting laws. It covers and encompasses really anything that happens in the workplace. So what I'm talking about today is not going to cover everything, or even I think we're really I think the fairest way to say this is we're really just going to be scratching the surface, we're not going to be talking about all the different odds and ends and interweaving other statutes like employee benefits that will factor into this. So this is all a long way of saying just understand that there's a lot more to this, this is just one element of one element. We don't have time to cover everything. So just also keep in mind, this is not exhaustive. I like to throw this out there as well as part of the disclaimer that there are a lot of free resources on a lot of the different topics that I'm going to cover. For example, and I know this is an Illinois centric presentation, but the United States and Illinois, respective departments of labor, the National Labor Relations Board and the EEOC, the Equal Employment Opportunity Commission,

OSHA, and the CDC and the Illinois Department of Public Health all have guidelines, both on COVID-19 on some of the interweaving labor and employment issues, and the like. And I certainly encourage you to check there because a lot of those resources are not even meant for lawyers necessarily. It's almost written to the public. So it's very accessible, much easier to understand and can provide some helpful clarity to some of the things that I'm going to talk about today. So what are we going to talk about today, what I want to talk talk about and go over is really just one way you can help represent workers in a plaintiff side context, during this covid 19 pandemic. It's a law, it's a cause of action whistleblower retaliation, retaliatory discharge, that obviously transcends the pandemic, it's been around for a while. It's not new, it will be available, hopefully after the pandemic. But it's one tool that plaintiff's lawyers have available to them right now that you can employ when people are wrongfully fired. under the right circumstances, obviously,

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presentation is only intended, however, to be a framework for what you can consider. I like talking about this stuff, I guess I'm a bit of a nerd. So always feel free to follow up with questions about any of the topics here. So what I am going to do to back up to the overview, I'm going to start by giving a very, very general overview of employment law at the 10,000 foot view about well employment, because I think it's a helpful baseline to remember the the general baseline starting point for when people when and for what reason people can be fired, so that we have some context to why this cause of action, excuse me exists. Okay. And I'm also going to mention a few different other laws that are relevant here. I'm not going to go into detail about them. But just I want you to keep in mind that they're out there as well as other exceptions to at will employment, and for representing people when it applies. So let's get started at will employment. The general rule in Illinois and I at last check, I think it was 49 out of 50 states but I could be off on that number is that you are at will that is the baseline if you are hired you work for somebody at their pleasure. What that means is that an employer can terminate your employment as an employee at any time they don't need a reason with or without cause. The exception to that would be illegal reasons for doing it which we're going to get into but the the general baseline is you can be fired because they don't like you without incurring any legal liability. However, the corollary to that is as an employee employees have the right to leave at their at their desk. Tire without any consequence. So what what my partner and I like to say when employees come and tell us well, I had a contract write an employment agreement saying I work for them will say, Yeah, but does it say anything about at will. And we asked that because usually an offer letter or an employment agreement, which sets forth the terms of your compensation and the rules for your employment, you know, and the compensation part is actually required by law in Illinois, they have to give you under the wage payment collection act, some document basically setting forth how you're going to be paid, one of the first paragraphs in that agreement will inevitably or towards the end will say, this agreement in no way should be understood as having any impact on the at will employment doctrine, this is still an at will position. So we like to say that's an empty employment

agreement. And they're pretty common. So yes, you have a contract, but it doesn't protect you or guarantee you protection of your job.

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minor nuance to this employee's ability to move on is that they're one of the things we'll see and I'm on slide six, I've moved on to now is that there are some restrictions on work movement and on access to legal action. So what do we mean by that? Well, let's start with the first part work movement. So you might sometimes see something called a restrictive covenant, like a covenant not to compete a covenant not to solicit your co workers or, or customers, saying, in essence, that you will not eat a restrictive covenant not to compete in general is something saying you will not work in this industry within a certain geographical area for a certain period of time. So what's common is something like you will not work in this industry, within this many miles of the factory, or of the building or the business for this many years, usually no more than one or two. I'm not getting into the enforceability of those or what makes one enforceable or not just know that they exist. And those are one of the exceptions to the freedom of movement. In terms of access to legal action, we're talking about parts of an employment agreement that limit your ability to go after the employer in a legal context after your firing. So what we're talking about is something like a mandatory arbitration agreement. Normally, the baseline is you have access to the courts and a right to pursue your claims in whatever legal venue is available to us state court, federal court, whatever, whatever the law or the the common law cause of action appropriately calls for. But a mandatory arbitration agreement is an agreement that says by virtue of me signing this employment agreement, I am agreeing that if something goes sideways, if I get fired, or if I, for some reason decided not to sue my employer, I'm going to do it in arbitration, not an open civil court. This tends to be favorable to employers, it takes away the threat of a bad jury verdict. It keeps the issue confidential, as opposed to in the public realm. And it typically we'll also remove a plaintiff's ability to pursue a case as part of a class action or collective action, basically, as part of a group of people pursuing claims collectively. One other type of restriction that we see now and just one note on those, they tend to be upheld in Illinois, we and other firms have had some success getting around them in state court for actually, oddly enough whistleblower cases. But unless there's a defect in the agreement, or the arbitration, provision, limits rights, that can't be limited to limited by law, it can be difficult to overcome them. One of the other areas that we see restrictions on your legal rights related to your employment is a jury waiver, basically, another type of agreement saying if you, if you do proceed and take action against this case, you can go to court, but you can't have a jury. That's not something I'm quite as familiar with. I don't, I haven't had reason to litigate it yet. I've seen case law going both directions about how enforceable those

can be.

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moving on to slide seven, what are the exceptions to at will so now we know you can be fired with or without cause because they don't like the color of your shoes that day. They just don't think it's working out obviously, would be a more common exception, or even stuff necessarily that you don't agree with or think is true. It's not necessarily wrong, just because you don't like it or agree with it. So what are some of the exceptions? So there are common law exceptions, one of which we're going to talk about today, retaliatory discharge. And there are statutory exceptions that I'm going to run through relatively quickly in a moment. Just I want to mention them because I think they make sense. These exceptions can come from state, federal or municipal law, depending on depending on where you live. What are some of the statutory exceptions, and what I'm going to do now is run through just some of the illegal reasons for firing someone. Again, I feel compelled to say this is not exhaustive. There are other reasons that might you know, if you say you don't need a good reason to fire somebody, there are bad reasons. That might make it illegal. This is not all of them. I mentioning some of the statutes just so you are aware, they're out there to remind you that they're out there. And that just because somebody may be getting fired for being a whistleblower doesn't necessarily mean it's the only legal violation out there. And I mentioned a Swiss Army Knife earlier, one of the things I like about employment law is it does employ one of the skills they teach in law school. For me anyway, I remember being in torts or criminal law about issue spotting. So when a client comes in, they may have lots of problems, there may be things they think are very relevant. I always kind of joke that, you know, the thing that you as a potential client think it's going to matter may not be the thing that I'm most concerned about. You know, and the details that I think are crucial may not may not end up being the thing that really moves the needle in your case. So let's just talk about a couple of these statutes that protect employment, if there's title seven of the Civil Rights Act, so this would be if you were fired, based on what we call protected characteristics. Title seven protects people from employment discrimination on the basis of their race, their color, their religion, their sex and their national origin. One practice note on that, again, this is not about discrimination law. But sex does not cover gender identity and sexual orientation based on Supreme Court decisions that came down in 2020. So that's, that's a good thing before it was not quite settled law. There were ways to go after claims like that, under those laws, but it was not necessarily a guarantee that you were going to be able to prevail for that. And those laws also protect other against other forms of discrimination, not just your firing. So just something to keep in mind. I'm continuing on to the next slide nine. We also have state law here we had the Illinois Human Rights Act, which is much

broader than title seven and federal law. So the HRA protects against discrimination based on race, color, religion, sex, national origin, citizenship status, in the case of employment, ancestry age, so if you're 40, or over not, not, if you're under 40, order, protection status, marital status, familial status with regard to housing, so physical or mental disability, arrest, record, military status, sexual orientation, or if you've been discharged unfavorably from the military, when other semi recent, so it's a couple years ago now. It used to be 15, employees had to work for a company for it to be an employer. Now it's one. Continuing on with this line of reasoning, we also have the age discrimination and Employment Act, the ADA at federal law, that's also for age. So a lot of the categories covered by the Human Rights Act and one law at state level are covered by, you know, a web of laws and federal.

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And then the ADA, the Americans with Disabilities Act, you can't fire somebody because of their disability because they've asked for a disability accommodation or the like, again, all of these laws protect against more conduct than just somebody being fired. But for our purposes, today, we're talking about people who've been discharged for the most part. So moving on to what I actually do want to talk about today, retaliatory discharge. This is a common law tort that is available in Illinois and has been for a little over 40 years now. It does not have an impact on at will on every decision you will read on retaliatory discharge issued whether by a federal judge in Illinois or by a state court judge is likely to include in the recitation of the analysis, that at will employment remains the general rule, but that this is the common law exception to that. So the tort was first recognized in Illinois in Kelsey vs. Motorola in 1978. That was in the context of workers compensation, retaliatory discharge. So when we say retaliatory discharge moving to slide 13, what are we talking about? So a retaliatory discharge is where somebody is fired in this context, if you are fired, for engaging in what we would call in the civil rights cases protected activity in this case, you are engaging in behavior that we as a state feel it should be as a matter of public policy protected. So you've been fired for basically reporting something complaining about something refusing to do something. So to sustain a cause of action for retaliatory discharge, based on a workers compensation claim, the plaintiff would have to prove a that you were an employee, which seems obvious, but you have to mention that be that you exercise the right granted by the Workers Compensation Act and see that that you were discharged and that the discharge was causally related to this to the filing of the claim under the Act. That is really key number three, and that's almost like two points there to break that into two probably a that you're fired and be that the firing was because you filed the worker's compensation claim. Practically speaking, from my perspective, that's usually the only issue you're really living If somebody wasn't an employee, the I don't see how you're going to get past the pleading stages in these cases. That's that's pretty standard. And point number two actually does sometimes get litigated that you exercise the right granted by the act. We'll get into that in a moment. I'm going to tell a few different stories about causation and how that can appear and how that plays itself

out. Because I think the examples can be useful, but just know, I'll probably sound like a broken record today. But I'm going to be talking about how you're usually fighting it out over what was the real reason somebody was fired. Because employers are savvy, they've gotten smarter over the years, companies understand what gets them into trouble now, and they know enough to know you just don't say the bad thing you're going to do out loud 99% of the time. So the Kelsey decision, that's that makes this available under Kelsey, the court is very clear, you can't force a worker to choose between their job and pursuing their competence, workers compensation rights. So the Illinois Supreme Court in that decision for the first time recognizes this cause of action and is viable. A couple of notes about what happened in that decision, it affirmed that there were compensatory damages, lost wages, what have you at that were awarded that those were appropriate. in that specific case, it did reverse the award of punitive damages, simply because this cause of action had not been recognized previously. So to apply punitive damages felt it I think, to the court, the way they wrote was that it wouldn't be appropriate there. But that they should know that moving forward, that's a one off removal that punitive damages are very much available in retaliatory discharge cases, which makes sense from a line of reasoning. If you think about it, you know, you're talking about they've taken away right that we as a society have decided, as a matter of public policy, as a worker, we want our workers to be able to report injuries not get hurt on the job, or if they do get hurt, have the protection that the Workers Compensation Act, workers compensation insurance for the employer and the like, afford them. So post Kelsey, moving on to slide 15, we were just on 14 as I explained that moving on to 15. Workers Compensation retaliatory discharge very much remains a viable cause of action. It has since been codified under the Workers Compensation Act, that's 820 iocs 305. And this is provision for so four H, it shall be unlawful for any employer insurance company or service adjustment company to interfere with restrain or coerce an employee in any manner whatsoever in the exercise of the rights of remedies granted to them, him or her by this Act, or to discriminate attempt to discriminate or threatened to discriminate against an employee in any way because of his rights, his or her exercise of rights,

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of the rights or remedies granted to him or her by this act, struggling to read that my apologies. So to that end, what we're looking at most of the time here is you've been fired, and that is key, you have to be fired for this to be a viable cause of action, it can be closer to what we will call in under the civil rights statutes of constructive discharge. I'll get to that later. In other words, they tell you basically, look for another job, you're basically fired. They don't say it but they're they make it seem like the employer makes it seem like they're doing a favor, like we won't say you're fired, but you should just start looking for work. So it doesn't need to be a firing. So I want to give a couple other notes about this cause of action before we move on to the how it connects to COVID and how the tort expands. So some notes about this cause of action, you can only bring it against the employer, not against another employee or an agent in this worker's compensation,

retaliatory discharge context. And on slide 16, I give you as an example that the buchner decision will explain on will expound on that. So you're not suing the supervisor who headed out for you that sort of thing. You're suing the company for firing you. Now, let's let's give one, let me go through a couple other notes. And I'll give a couple examples of how this plays out and how it is an issue typically of causation. So you do need to be fired on slide 17, I'm getting into this, you have to be fired or forced to resign. There is no cause of action for discrimination or demotion. So in other words, if you have a client who files a workers compensation claim, and they're demoted, or they have job duties stripped for them, it's not right. And there may be something else illegal going on. But for our purposes for what we're talking about today, that in and of itself, that demotion, that reassignment that would have you will not sustain a cause of action for retaliatory discharge. That said, if the employee is fired, it's obvious. That's what we've been saying if they are forced to resign. So the heartline decision gives. It's a few years old, it's from 1982 The citation is laid out here on slide 17, where there was an employee who was on disability based on the injury and was collecting comp benefits, the employer told them, you might as well start looking for a job since there are no light duty positions for you to come back to.

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That might be different.

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So so you need to read that decision to see how that that applies. So in that case, it was not a public policy violation. So let's go back to the elements to this cause of action that I laid out on slides through slide 13. Because before I move on to the connection to COVID, and to how the torque expands to what we want to talk about more today, I want to go back to the elements. So we've talked about that you were an employee, before the issue, we talk I want to talk about point two, and slide 13, that you exercise a right granted by the act. One of the things that I've I've come to understand about this, this cause of action that I've seen play out in the decisions is you don't have there aren't magic words there that you don't have to have an employee's who will who you know, has the I'm going to make a really dated reference to like Looney Tunes has like the anvil fall on their foot is there at the factory, walk up or limp up to the supervisor and say, like the enville fell on my foot, I am reporting an injury and filing for workers compensation benefits. And the employer says no, you're not you're fired. That's not what we're talking about here. It doesn't need to be that specific. What it does need to be is you have to be showing that that is the direction this was going that you're exercising a right granted by the act. So there are decisions upholding a cause of action for workers comp retaliatory discharge, where the employee never got to that point. So think an employee goes and reports Hey, I just hurt myself in this workplace incident. That's the precursor everybody understands. The next thing that comes is reporting the injury to the comp adjuster to the workers compensation benefits provider. They get fired before

that the employer is not saved by sort of racing to fire them before they can file the paperwork or use the magic words workers compensation. If you report an injury, if you start talking to them about the availability of workers compensation benefits, if the employee is taking steps to report the injury,

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and

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and obtain their benefits afforded by public policy, and by statute, they've satisfied prong two.

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let's go back to two prong three one more time. The and I always pronounce this decision wrong. I think it's sia carica versus united steel Deck, the case that I cited there from 2007 and the Illinois appellate court, that's a good example of how this can often play out because in that decision, you have somebody who was fired, the Court upheld the decision, the ruling or that it could have been for workers compensation retaliation, but the employers explanation in that case was that it was related to violation of an attendance policy. So one of the things that you will find in pursuing these claims is, like I said, employers are sophisticated. Or sometimes there's gray area, and it can be both things at once. But basically, very few people are going to be sloppy enough to say out loud, I'm firing you, because you filed the comp claim, you're almost always as a practice note, you're almost always going to have an excuse or what we would call a pretext for why they were fired. And so our job as plaintiffs lawyers is to overcome that pretext and prove it. The only time in my close to eight years of practice that I've had anything close to somebody say it out loud was at my last firm, we had a case where someone was a driver, they delivered wholesale food deliveries to restaurants for for a delivery company. And he bends over one day's he's making a delivery and feel something pop in his shoulder when he's picking up the boxes. And it doesn't feel good. But he's able to keep working that day finishes the day goes back to the office and reports the injury to management and says I need to go to the doctor and they say can you just keep working, we'll get your helper goes on about a week. And at some point, he can't move his arm anymore. And he goes, Yeah, I gotta go to the doctor, this ain't gonna work anymore. So he goes to the doctor and he gets a note. We need a week off we need to see if this heals on its own. And he goes back to his boss and says boss, like I'm sorry, I couldn't do it. Like, I got a I got to report

this and, and the owner says, Well, I tell you what, I just sold the company. Don't report it today. Let's hold off. I'm staying on as a manager. Next week, let's work all week. And on Friday, I'll back you up. We'll go to new management and say like, hey, he fell or he hurt himself or whatever. We'll go in line together and like my then client goes on. I'm not going to do that. Like there's a medical record now. And anyway, I can't work anymore. Like I asked you for help or it's not going to work. So and I'm going to clean up what the guy said to him because because it was fall but the guy goes and in essence what he said to him was you do not you do not mess with My, with my insurance rates. So the guy knew he was about to sell the company that his this was going to be hit on his insurance before the transferring in want to pay for it. So what ends up happening is the guy had been prompt, my client had been promised a job, you know, shows up after the two weeks and finds out what he he needed surgery. So it went on for a while. But essentially, he shows up after the injury, and there's no longer a job waiting for him. We ended up suing both employers. Because obviously, no one ever admitted to that conversation, and they will give an excuse. So that that's how it can play out their version was he was fired because he refused to take a drug test. Um, we had evidence to show that was not the case, and that he tried to come back and they, you know, throw away his paperwork. And, and there were other things happening in that case, but it gives you an example, even when they tell your client, your client alleges, at least that they tell your client that the comp issue is the reason they're firing you. And when push comes to shove, and you end up in court, chances are no one's going to admit that out loud. And that that is a common issue. So the challenge in these cases, and what makes them difficult is that the employer doesn't have to be right about the reason they're firing them. You know, it can be based on bad information. Remember, you're at will. So as long as they can show credibly that

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Yeah, we fired him because of attendance. Because the manager told me he'd been late three times, maybe the manager was lying. But as long as management knew that it was based on what the manager was reporting to them, it may not matter in that point, or you're going to have difficulty overcoming it. One of the other causation elements you need to the element or elements of one of the other aspects of this that you need to pay attention to, in terms of establishing causation is how are you going to overcome this? How are you going to prove that the reason they're giving you is false. So that's something else to consider as you bring these cases? So moving forward, again, now runs. So we were done with slide 13, I'm going to move back on track to slide 18. Um, how does this tie into COVID-19? Specifically, okay, so and and I want to, since you'll see the caveats. I put them in everywhere. I'm not a workers compensation attorney, I don't do workers compensation, I don't claim to do it. I don't claim to know much about it. I know enough to be dangerous, I guess, as you might say, and I know enough to connect it to employment law. In Illinois, last year, in 2020, there was a rebuttable presumption put in place in the Workers Compensation Act for workers who believed or allege they contracted COVID-19 at work. And this rebuttable presumption was in place between March 9 and December 31 of 2020,

that if you contracted COVID-19, and you believed it was at work, there was a rebuttable presumption that the employer could revive the allegation that you had contracted it there. I obviously have never had to litigate that. So I can't tell you what that looks like in practice. But the upshot being if you contracted COVID-19 at work, um, so during that period of time, I guess the point would be it was easier to prove. Now I my understanding would be you would be back to having to prove that the injury happened there. So that you contracted it there. But you should consult a workers compensation attorney in Illinois to confirm that. So if you're fired for contracting COVID-19 network, and you file the comp claim, in theory, there is that protected common law retaliatory discharge claim available to you. So that's, that's the first tie in to COVID-19.

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On that,

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on that issue. So pushing past calci, and workers comp, retaliation. Where are we? So the tort expands, it's still viable, it's still available, even though as we'll get to there are statutory options now. Um, so it's expanded. So in 1981, in the palmateer, versus the international harvest company decision, the Illinois Supreme Court expanded the tort to protect whistleblowers, or those that report some illegal or improper conduct. The general elements of the claim remain the same. So we're on slide to 19. Now, we're moving on to slide 20. So what are the elements? We're still talking about the same general elements you got to show you still have to show that the worker was discharged, that they were that this discharge was in retaliation for their activities, and that that activity or that discharge violates a mandate of public policy? So the same general idea phrased a little bit differently you still tend to run into the same issue, however, causation that is always sort of my my challenge. Um, there is another aspect as I'll get to, the mandate of public policy is also frequently something that you're going to fight about which we'll get to so in for a common law whistleblower retaliatory discharge slide 21. Now, you can sue the employer if the retaliation was if the firing was in retaliation for certain actions that you took that are protected by public policy. So what what the Brandon versus anestesia decision and payment intrument Associates it's the seventh circuit's with the federal decision, but interpreting Illinois law, what that means and how it ties back to slide 20. And what we're talking about is that the the public policy protection is reporting unethical or illegal, or what you believe to be illegal conduct conduct that you think is a problem, and that we as a society have decided there's a public policy interest, and people reporting, or refusing to engage in this sort of conduct. The general example that I like to give to clients or potential clients to explain what I have to prove to show that they're firing violated public policy, is think of, and now I think this is a dated movie, but think Erin Brockovich, not Aaron, not Julia Roberts character necessarily, but if you work for the company that's

poisoning the water supply, and giving everybody in the town cancer, if the employer goes to you and says, Hey, we're the chemical company, we'd like you to dump the chemicals in, in the lake where the kids play, or where everybody gets their drinking water. And you say, I'm not going to do that, or no, that's illegal I and you reported up the chain of command, or you go to the government, then we're talking and then they fire you for that. That's what we're talking about.

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So

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I get to this on slide 22, let's talk about the types of protected activity that are recognized that the, the, the actions you took, what sorts of actions are protected here. So reporting conduct to a government body or an agency. So that that seems standard. If you report something that you think is illegal to a government entity that is protected, they cannot fire you for that. What people don't know is that internal reporting at common law is still protected. So the landing decision that I cited to on slide 20, I say two, again, here on 22, you can make the report internally that will still be protected, you may get in a motion to dismiss an argument that it's not, but it is, the refusal is the other thing I just mentioned. So the Wheeler versus Caterpillar decision, which I'm going to expand on a little bit later.

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It

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doesn't just have to be reporting to your boss, going over the head of whoever told you to do the bad thing, or going into government. You can also just say, I'm not doing that. I refuse to do this. And I'll give some examples of what that looks like in practice. So that's, that's the refusal, that's the activity you've got to do you got to refuse you got to report internally or you got to report externally. That is what's required. Okay, so just to review, here on slide 22, what do you have to do the types of protected activity that are recognized, you can report internally, you can report to a government agency you can refuse. That's the type of protected activity. So let's talk about what is public policy? What kinds of conduct Can you report that or can an employee report rather, that is going to be protected in some way, shape or form? So where does that term come from? So as the Dow's decision, it's again, a district court case, but it's somewhat recent. And I like the way it explains it. public policy is found really anywhere that somebody is going to record laws or policy statements, you can look so there is some freedom there. You can find it in Illinois

constitution, various statutes, and when they're silent judicial decisions. This is a law question, not a question of law, not a question of fact. What the cases are going to tell you is that there is no precise definition of what constitutes a clearly mandated public policy. Sometimes it will be obvious, don't dump chemicals in the lake, okay. You may not need to know what OSHA or environmental regulations are being violated. But most people know if my company produces toxic waste, I probably shouldn't go dump that in Lake Michigan. That's an obvious one. Um, it's not necessary when you're pleading it or when the employee is complaining about it, to cite the statute. So again, think back to what we were talking about with workers comp retaliation. One of the gotcha ways that I've seen this issue defended is to say, well, the complaint didn't actually complain about what they said they didn't use the words I'm violating and complaining about violating public policy. I'm complaining about this statute that says this is illegal. At common law that is not required. The stabbings decision, which I mentioned earlier in the Beeline, or felony versus Kmart decision, that's a good one. The Kmart case is a good one. It's an employee's a co worker, I believe, taking money out of the cash register, which if memory serves was was part of Kmart, or that Kmart stores agreement with some local charity, but the employee in question didn't know that and called the police and was pretty unequivocally fired for it. And the law said you don't have to necessarily cite to the statute that that comes from but you know, enough to know it's not legal, if somebody is messing with with the register or reporting a crime, I guess is maybe the better way. I think that that case said it may not have been the cash register. So public policy, the Stebbings decision gives a nice recitation of it. I am going to paraphrase what the decision says there is no precise definition in general, it can be said that it concerns what is right and just and what affects the citizens of the state collectively. You can find it, like I said, the constitutions, the statutes, and when those are silent in prior judicial decisions, one of the nice things about the analysis portion of a lot of these decisions is that it will run through different examples of what has been upheld as viable public policy reasons for reporting complaining, refusing objecting, what have you. Um, this other part, though, is a good nuance and a good point for us to talk more stories, because here we go. So although there is no precise line of demarcation, dividing matters that are the subject of public policies for matters purely personal. A survey of cases in other states involving retaliatory discharge shows that a matter must strike at the heart of the citizen social rights duties and responsibilities before the tort will be allowed. So that's the stabbings decision citing to palmateer that expanded the tort. So let's let's focus on that one part of this for a moment of what's public, what's a public policy concern that affects everybody versus a private concern, or purely personal concern? purely personal concerns, or like personal grievances or gripes you might have at work that relate to you and you alone, and the public just doesn't care. This is a really silly one. But you think the movie office space and maybe that reference dates me of,

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of the guy who had the red stapler who was allowed to play his radio, like you can't complain

about that guy is playing his radio too loud, it's annoying, they can fire you for that, I suppose. Although that might be a silly reason to fire somebody. But we're talking about stuff that affects the public at large. Let me give an example of how this can play out. So we represented a woman one time who was fired for, quite frankly, a lot of illegal reasons. But one of them besides the sexual harassment case was that she felt a co worker had committed a battery or assaulted her and had hit her bumped her heart, and she called the police. Setting aside for a moment of whether the violent act was sufficiently violent, you have a right to call the police if you feel like you're the victim of a crime. Now, the argument that was posited at the motion to dismiss stage was that this was not a public policy issue, because this crime that she was reporting concern her and her alone. So they weren't argued that she engaged in the act that was required. She called the police, she complained, and it had been to a government body. But that the right that was being asserted the claim that was being reported only affected her. The Northern District of Illinois where this case was being heard rejected that argument and we won the motion to dismiss on that issue, because there is an absolute right to report crimes if you believe they've happened. And that we as you know, the decision cited in a lot of decisions have cited that there is no just because the crime only impacts you. We still as a society, want people to report crimes, assist law enforcement, and have the right to do that.

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So

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there's another decision that I cited to on slide 23 dowse first Abbott Laboratories, I believe that decision also discusses that issue. And we had an issue incident of workplace violence against one person. And the court upholds that right to report that even though it only affects the plaintiff, because we want people to report crimes and feel like they have the freedom to do that. So that that other than causation, you know that the firing was because you've engaged in that behavior is another way that you may get attacked, or your your pleadings or your case may get attacked, just know that there are decisions out there addressing that issue. And just because the crime or the unethical conduct only involves that person does not necessarily mean that it's not a public policy concern. Okay, so let's expand a little bit on public policy to tie it back to more of the covid 19 pandemic. So the Wheeler versus Caterpillar Tractor company case that I mentioned a little bit earlier, involved in employee or the plaintiff reporting public health concerns, and specifically refusing to work in unsafe conditions as opposed to reporting them. So remember, Wheeler is the case, we cited earlier about what sorts of conduct is protected, refusing to engage in a certain behavior, in this case, working in unsafe conditions. So you probably can already see where we're going with this for COVID reasons. So that's that decisions a little older happened in 1985. But they're the Illinois Supreme Court held that the employee in question the plaintiff could

bring a cause of action for retaliatory discharge where they'd been fired for refusing to work in that case, in conditions that you would argue contravene clearly mandated public policy.

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So

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that case is a good example. And we're on slide 25. Now, and by the way, moving on to 26. So it's a good example of a discharge that violates public policy, your reporting public health concern, saying I'm not going to work under those conditions. In that case, the Supreme Court applied the tort of retaliatory discharge where the worker was fired for, for that reason. In that case, the public policy issue where the unsafe condition was the plaintiff did not want to use a machine that was exposed to radioactive materials. I don't know why he felt that way. He alleged that the unit or the machine in question was dangerous, was in a dangerous condition that violated federal safety regulations that have been put out by the Nuclear Regulatory condition commission. And the Supreme Court held that even though it applied to him specifically, you're talking about an issue exposing people improperly to nuclear energy or nuclear waste. That involves policies touching on protecting the lives and property of citizens from hazardous radioactive materials. That seems obvious. Apparently, it needed to be litigated. So a couple other examples of that, I'm going to run through the stabbings case, which I've mentioned a few other times, a little bit more recent from 2000. There, the plaintiffs retaliatory discharge claim was upheld. In that case, the plaintiff insisted he was fired for insisting that radon exposure that participants in a study at university of chicago needed to be told that they'd been exposed to radon. Or it needed to be done sorry, that it needed to be reported to the institution funding the project. And the court held that the tort protect the whistleblower who report the improper or illegal conduct. This is a good one to go into a little bit deeper, because it touches on how you use the policies or laws that are being referenced. And this is key. You're not necessarily saying that they've broken that law. When you report it like oh, though you have violated the Nuclear Regulatory Commission's regulations by doing x. You're saying that the public policy that underlies that statute or that that law in question is what is driving this. So there, the plaintiff argued that by firing him for reporting or insisting that the radon exposure be reported that it violated the public policy statements set forth in that Wheeler decision 15 years earlier, as well as one of the sections of the energy Reorganization Act, which has a stated goal of protecting the lives and property of citizens from hazardous radioactive materials. And he also the plaintiff net case also pointed to the personnel radiation monitoring at the radiation installation Act, the radon mitigation Act and the radiation protection act of 1990.

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So the defendant in that case, argued that the statutes in question did not apply to the work of the laboratory in question. In other words, this lab is not covered by these statutes. How possibly can that be a public policy issue that applies here, and the courts thought through that argument, and I'm going to read the quote, specifically the test for determining and we're on slide 31, that I've been failing to mention as we go along. So we're at 31. Now. So the test for determining if the complaint states a valid cause of action, is whether the public policy that is clearly mandated by the cited provisions is violated by the plaintiffs discharge. So it's not necessarily that the statute itself applies. It's that whatever public policy statement that exists at the beginning of the law, you know, we want our citizens to be free from radon exposure, nuclear exposure, COVID-19, whatever it ends up being, if, by virtue of firing somebody for reporting that type of behavior, you are violating that policy, then you've got the violation you need there, and the application of that test. In that decision, the court also holds that the application of this test necessarily involves determining what the public policy is behind the enactment or adoption of the particular provision. So you may be required to do some statutory research and to really look into what are the public policy issues underlying this issue? You know, we'll see issues all the time that come across in our bar, where it's like, hey, this person is reporting this sort of conduct. Is there a law that helps us here to support this cause of action. So another good example comes from the Seventh Circuit, Frederick vs. Simmons airlines, there was an airline pilot as a plaintiff. And he wanted to warn people about an unsafe model of an airplane that his employer was going to use, and he was fired for that he alleged, and he alleges that firing was contrary to the state public policy of providing safe air travel under the Illinois aeronautics Act, which that public policy statement said that the general public interest and safety of persons to operating using or traveling and aircraft and of persons and property on the ground and the interest of aeronautical progress require that aircraft operated within the state, be air worthy, should be air worthy. Basically, as a public policy as a state, we think if you're going to fly in a plane or you're going to put a plane in the air, it should actually be like it's the aeronautical equivalent of C where the the defense in that case, just like in the Wheeler case, and in the steppings case, argued You could not as the plaintiff invoked that policy, because it didn't apply to the aircraft that engaged in interstate or international commercial flights like what he flew. In other words, he's the defendant in that case, the airline is saying, yeah, that may all be true. But that public policy doesn't apply here. We're not talking about these airlines. Seventh Circuit said no dice. They rejected that argument. And that the general public policy declared by that statute was not just limited to the planes in question. We're saying, as a public policy, this is what we want as a matter of course. So how does this tie to Stebbings and Wheeler in the same way, and so I'm quoting now from Stebbings, in the same way we learned the statute cited in Stebbings declare a general policy of protecting Illinois citizens from the hazards of radioactive material, this policy is not limited to the particular people who work in the environments regulated by the laws. So that's just a more eloquent way of saying what I've been pointing to here, which is, you don't have to cite to a law that necessarily applies to that person or situation specifically, you don't have to know okay,

you're embezzling money under this code of that violates certain sec regulations, you just know, are things insider trading, I guess is a better example there. You just know, we, as a policy, don't want people engaging in this behavior. We don't want people dumping toxic waste, doesn't matter that the toxic waste in question here is not covered by the environmental law that I say gives us this public policy takeaway. So that is the takeaway, as I say, on slide 36, here, the statute does not have to apply to the firing, but the firing must violate the public policy articulated by the statute. So a long way of saying that basically, it doesn't have to apply to it. But you do need to be able to tie it to it in a credible way. One of the one of the ways I've seen this play out go the other direction was I represented one, somebody who worked for a pharmaceutical company. And there were certain guidelines about when you had to notify doctors of certain scientific developments, they call it noise, I think. And in that case, the guidelines that our client asserted he'd been fired, or all but fired for refusing to violate were a couple of different packets he was able to provide that were put out by the FDA, it did cite two regulations. The problem was that we had for him was that the regulations that he was pointing to? Were the the policies, I think would be the better way to put it. There were policies specifically said in like block bold

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letters, non binding guidance, and authority. So it was pretty clear, like, yes, these are recommendations, but it's not necessarily required. And we were not able to help him for that reason we tried, but we were not successful. So you do need to be careful about the public policy, remember, doesn't have to apply to everybody. It can just apply to you in that case, if it's a crime we're talking about, but it's got to touch on the heart of what the public at large needs. So what so we're on slide 37. So what so this is an option to protect workers fired for complaints or refusals, complaints internally or externally or internal refusals that relate to COVID-19? So how do we establish that Well, think Wheeler, think Frederick think Stebbings, if there are public health guidelines saying in a work setting, you need everybody to wear masks. And we have a client right now who was fired when he and a co worker went to management and said, Yeah, so these guidelines have been out for a while. And they keep saying employers need to give us these kinds of notice and put up these kinds of warnings and enforce this sort of behavior. And this person works at a at a hardware store worked, I should say, at a hardware store. You know, management's not wearing masks, they're not telling us when coworkers get sick, they're not letting us quarantine, you're telling us to, you know, you're sort of just treating this as a big joke. And he was fired for that. Um, that is an example. It's not necessarily that the Department of Public Health guidelines that we would be citing to apply to him specifically. But you're talking about there's a policy statement out there saying, whether by the Department of Public Health, the governor's office, the mayor's office, whoever, we want people to be safe here, we want people to wear masks, we want them to social distance, we want them to be clean. We want them to take certain safety precautions. Yeah, maybe those precautions don't specifically apply here. But there's the policy statement underlying those precautions does. And so we want workers to be

protected for reporting that. So that is how it might play out in that setting. So that covers retaliatory discharge, I want to move on now to the Illinois Whistleblower Act, because that's the statutory provision in question and sort of the written and written equivalent to the retaliatory discharge tort. But there are some important distinctions. So that's 740 ALCS 174, and it prohibits a wide, wide array of conduct and the tort does. So it's not just firing. So you should note that however, the types of reporting are going to be different that's required. So who's covered? So this, the nice thing about the statute is it lays out the definition of employer nicely so that can be an individual, a sole proprietorship, partnership firm Corporation Association. Any business or business type entity that has one or more employees in the state, and that includes government bodies, local government, school districts, what have you, section five of the statute sets that out, I'm not going to read it to everybody. But just know there are some nice neat definitions contained in the statute that protect you here. So who's covered. So an employee means anybody who works for an employer is that means the definition on a full time part time or even a contract basis by the employer. It also includes somebody who's a licensed physician who practices their profession, in part or in whole at a hospital, nursing home clinic or any medical facility, that is considered a health care facility funded, at least in part by the state. So what is this statute prohibit and protect against? Okay, so the statute is nice because it actually lays out policies that are prohibited. So as an example, an employer cannot and this is in Section 10 of the Act. We're now at slide 41. We were in terms of the definitions just to let everybody know where we are. Slide 38 is the statute itself. Slide 39 is who's covered. Slide 40 is a continuation of who's covered in slide 41 is where we are now talking about the policies that the statute prohibits. So an employer cannot make adopt or enforce any rule regulation or policy, preventing an employee from disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information disclosed is a violation of state or federal law, rule or regulation. So basically, an employer cannot. I mean, I don't know any player would be crazy enough to do this. But you can't have a rule that says you're not allowed to talk about this to the government, you're going to see, and we do see quite a bit in the employment law field, a lot of different confidentiality provisions, very strict, and

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provisions of different contracts with or employment handbooks with really draconian penalties for what an employee gets for, for talking about what happens at work or trade secrets or what have you. But remember, if that written policy in and of itself says you can't report to the government, it's going to just be per se illegal under the Illinois Whistleblower Act, I will be candid, I've never seen that. I think what's more likely going to be the case that you'll come across in this context, is an unwritten rule that, hey, we don't talk about this out loud, or that's not how it's done here. We just keep these things quiet. Section 15 of it prohibits retaliation for making certain disclosures. So this is key, it's retaliation, not just firing here. So section 15. You can't retell an employer, I say you cannot retaliate against an employee who discloses information in a court in

an administrative hearing, or a legislative commission or committee, or in any other proceeding where the employee is reasonable believe, has reasonable cause to believe that the information discloses a violation of state or federal law, rule or regulation. Likewise, they can't retaliate against an employee for disclosing information to the government or law enforcement, excuse me, where the employee has reasonable cause to believe that the information discloses a state or federal law rule or like regulations. So what might that look like? Well, they can't fire somebody for testifying truthfully in court. So in a hypothetical, think of a pharmaceutical company, who's got a scientist who knows that the drug that they just market it to the world can cause heart attacks, because that sort of thing has happened before and the company says, You're not going to talk about that you're going to keep that quiet, or they're subpoenaed, let's say grand juries and panel there, there's a government investigation. You can't fire that person for disclosing it in court, or in the grand jury, or if you're hauled before Congress, or your state legislature, whatever, you can't fire somebody for that. And you can't fire them for disclosing it to the agency, if they believe it's, it's wrong. And this part that I'm about to mention applies to retaliatory discharge. And it's probably something I should have mentioned sooner. You don't as the employee who's blowing the whistle, you don't actually have to be right. It doesn't have to be correct. Sometimes you're going to see something that looks ugly, looks just looks wrong, feels long, wrong, whatever. Maybe it's legal, maybe there's a compelling reason or a legitimate excuse or reason why that thing is happening. Why the why the coworker is pulling money out of the register, why the why the chemicals are being put in this thing. Why are you telling somebody not to do something as an employer is okay. But if the employee reasonably and legitimately believes that this thing that they're reporting is illegal, you can't fire them for that. They don't have to be correct. It does have to be reasonable. So the refusals part. So moving on to slide 43, we were just at 42. Moving to 43. retaliation for certain refusals prohibited, the employer can't retaliate against the employee for refusing to participate in the activity. So we talked earlier about Wheeler, we talked about the cases of insisting on doing something and refusing to do it. You can't find Somebody for that you can't fire them for refusing to participate in an activity that would result in a violation of state or federal law, or a rule or regulation, including but not limited to the Freedom of Information Act. So if the employer tells you, we just got a Freedom of Information Act request, it's from a journalist, they can't find out about this, burn the records, and you say, I'm not doing that. Because you know, it's illegal, they can't fire you for it. So that's just like retaliatory discharge. So far, we're on the same page. But there are some nuances. So here's one nuance that we need to talk about 20.1. Other retaliation, any other act or omission not otherwise specifically set forth in this act, whether within or without the workplace also constitutes retaliation by an employer, under this act, if the act or omission would be materially adverse to a reasonable employee, and is, and is because of the employee disclosing or attempting disclose public corruption or wrongdoing. So this is an example of other retaliation. So I think I suspect, I'm not positive, I suspect this, this is something you get, because we're in Chicago, or Illinois, and we have such a wonderful record of corruption, that you can't have employers doing other forms of retaliation, maybe they're smart enough not to fire you. But if you're going to report public corruption in

some kind, they can't do other stuff to shut you

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up, as well, as punishment for doing it. 20.2 threatening retaliation is also covered in this statute, which is nice, um, you can't threaten an employee with any act or omission. If that would constitute retaliation against the employee under the Act. So you can't threaten them say if you really go forward with this, you know, nice job, you got their shame, if something happened to it, if you if you felt like you needed to report it, this conduct is somebody. Let's talk about damages for a moment. If an employer takes any action, and this is slide 46, section 30 of the statute, if an employer takes any action against an employee in violation of Section 15, or 20. So the prohibited conduct we talked about, the employee may bring a civil action against the employer for all relief necessary to make the employee whole, including but not limited to the following as appropriate, reinstatement with the same seniority status that the employee would have had, but for the violation, back pay with interest and compensation for any damage sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorneys fees. So these are the specifically enumerated damages available, there are obviously when they say to make the employee hold that allows for more. But that's what's theoretically available. Now as to point one, just sort of a practice note, I think, once in my entire career, have I ever had an employee get reinstated in any sense after being fired, it was this last summer 2020. And the attorney on the other side, who's been practicing much, much longer than I have probably about 30 years. It was a worker's comp retaliation case, the employee probably violated may have violated a rule when he got injured. And so we think probably that's how there was a disconnect, the employees fired for not not being responsive to attendance request, we think, you know, we don't know why it happened. But it may have had something to do with the policy violation company, actually, I represented the worker, we agreed that it made sense for him to come in and give a safety report. And in that case, he was reinstated. The employer and I both the employers attorney and I both thought we we probably will never see that again in our career, just because once an employee has taken action with an attorney companies tend to operate with the belief that if it's happened once it can happen again, and that, you know, anytime somebody looks at you sideways, you're just gonna go run and call your lawyer and say I'm being retaliated against. So I don't think you'll see that very often, but we're talking monetary damages.

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Okay,

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so let's circle back to the common law stuff or the common law, aspects of retaliatory

whistleblower retaliation, versus the Western Illinois Whistleblower Act and talk about what are the nuances and distinctions here? We're on slide 47, by the way, so what are some of these? So internal and external reporting a common law you can do either, if you call the police, you call the FDA, you call whatever government body you think needs to be called protected by statute and common law. However, under the statute, internal reporting is not protected, just external. So if you've got a case, you may have both common law and whistleblower claims. You can bring them both. And if you can, you might as well because the damages are slightly nuanced. The statute for example, doesn't specifically enumerate punitive damages. So if the behavior in question covers both, you might as well bring both if they're both viable because again, they protect both against different types of behavior. So different conduct that your, your clients may have engaged in, may be protected that ultimately all led to inspire his or her their firing may be protected and worth pleading. If you think you can support Just know, if the only reporting that was done was internal, the Illinois Whistleblower Act will not protect that. But if it's based on a refusal, you have both available to you. Slide 48, there are specific guidelines. So when you're talking, this is also very important. Perhaps the most important nuance or distinction, if you are going to cite to the Illinois Whistleblower Act and use that as the vehicle for bringing the cause of action. This is where something that was not an issue earlier, you don't have to know what you know, when we talked earlier under Wheeler understandings. And I think, Frederick, you know, the law in question doesn't have to apply or, or what I said, I think was that you don't necessarily have to know why it's illegal, you just got to know something about this is not right. Um, if you aren't going to plead under the Illinois Whistleblower Act, you as the attorney, not the worker won't need to cite it, but you, the lawyer, as you plead this, you are going to need to find something in writing that exists that you can cite to. So there was an Illinois Supreme Court decision from I guess two years ago now we're in 2021. Now 2019 Roberts versus the Board of Trustees, the Community College District number 508. And that is cited to the citation is here on slide 48. That case, upheld what had been litigated prior to that, which was the if you're going to use the Illinois Whistleblower Act to plead you have to cite to a specific statute guideline or policy, it must be cited in a pleading you have to be able to point to something concrete to support a cause action, cause of action under the Illinois Whistleblower Act. So the quote here is similarly, plaintiffs fraud allegation cannot serve as the predicate for his claim under the Whistleblower Act because he fails to cite any state or federal law rule or regulation, that defendant violated in resulting in fraud on the students enrolled in I guess a class at this at the school. Therefore, irrespective of whether plaintiff refused to participate in his Whistleblower Act action must nevertheless failed, because plaintiff did not sufficiently plead that the appointment of the instructors violated a statute rule or regulation, as required by section 20 of the Whistleblower Act. And so as the court goes on to explain that, that counter the complaint was dismissed. So that gets us to the end of the statute, the owner Whistleblower Act versus just the common law cause of action. There are some other nuances but just remember to research the research the issues of public policy before you do this, and do look into whatever law your client or would be client is saying is violated Just so you know, whether or not it actually applies, that the public policy provisions in question are going to be applicable.

Whether or not the law itself applies, like we talked about and that you're on solid footing there. I'm going to make a brief. Moving on to slide 49. I'm going to make a brief but relevant detour into OSHA. So the Occupational Safety and Health Act or OSHA is the main federal law that regulates and protects workplace safety. It gives workers the rights to safe and hazard free workplaces are right to things like random workplace inspections, to have people go to the field and investigate come to field or receive and investigate complaints. And there are state level OSHA laws that do offer some protections. Moving on to 50. It does not cover everybody in the entire workforce, but it covers almost all private sector employees. The only obvious ones I know about that are not covered by OSHA are independent contractors, state and local government employees in the public sector there who, by way of example, Illinois has a state level OSHA statute that does protect folks like that. And one nice group family

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farm workers, federal employees are also protected. OSHA does provide some other guidelines and duties to employers, things they have to do. I'm not going to go through all of them on slide 51. I enumerate what what are the typically most common ones that people know about. The one key that I am in, it's highlighted and bolded. on that slide is you do need to inform employees about potential hazards. So the key key and operative word, part of that is you need to inform them about known potential hazards. So you also need to train employees to deal with hazards report fatal or serious injuries to OSHA within eight hours of them happening. And provide employees with reasonable procedures for reporting work related injuries or illnesses and keep records of those injuries and illnesses and make them available to employees upon request and former employees. So think about how that may play you have a series of obligations set forth by OSHA. And for employers, and included in those are a series of rights for employees and on 53. I do explain some of those. The Bold one that I'm going to write is or that I'm going to speak about is you can file a complaint with OSHA within 30 days of discrimination by your employer for making safety and health complaints or for exercising your rights under the Occupational Safety and Health Act. Oh sh act. So the There's two different things happening here. Let's talk about that last one first that I just discussed, making an OSHA complaint. So if you're in if your would be client is fired for reporting to OSHA, first of all, think back to causation that we talked about earlier, you still got to show that they knew that he made he or she or they made the OSHA complaints. So I've represented folks before, who would make anonymous complaints, not because they were trying to tee up a whistleblower case, but because they just wanted a safety hazard in the workplace fixed. And they were fired later. We aid more than 30 days have passed. So there was nothing we could do about that part of it the be this person hadn't told anybody that he was reporting to OSHA, he did it anonymously, which was his right. But the outcome was, then there was no way to tie that reporting to to OSHA specifically, however, in backing up to these obligations by employers, and you think about COVID. Um, you can see how even if the OSHA regulations in question are not necessarily being violated or it's not an OSHA retaliation

case, specifically, because maybe the the the employee isn't reporting to OSHA, but is citing to OSHA and saying the employer, you know, goes to the employer, think about that retail employee I described earlier. You're not telling us about other workplace injuries or illnesses think people catching COVID at work, you are not reporting known hazards to us COVID-19 related stuff, and you are not reporting illnesses to OSHA are injuries to OSHA, and the employee is fired from reporting that we're objecting to that to the employer. Even if it's not an OSHA retaliation case, OSHA is available to you, you have it as the basis for that whistleblower claim. And as this goes on, and 53 and into 54, you have these other employer obligations, correcting workplace hazards by the date that it's indicated by an OSHA citation, get copies of medical records or exposures to toxic and harmful substances and conditions, and notifying all employees of these rights. So this can be satisfying by posting and most people will have seen these OSHA posters. So think, again, COVID-19 in for infections and exposures or risks in the workplace. These are, these are bases that are provided in the OSHA regulations that you can take, and theoretically use to support a pleading. If it's a retaliatory discharge or whistleblower cause of action that you think your employee would be employed plaintiff was fired for engaging in, but remember, you're still gonna have to be able to show that the employer not only knew it was them, but that that's the reason they were fired. So like I said, at the beginning, and I'll sound like a broken record on that's always the that's always the issue. So on slide 55, that's what I'm covering here. Even if 30 days passes, after the firing, OSHA can still be that tool for you. The guidelines, even if it's not an OSHA driven claim, think back to Stebbings Wheeler and fredriksson. That is an option for you to use to work on this. And what I said on that slide was thing spirit versus letter of the law as far as the policy is concerned. This and OSHA can be useful for establishing that claim under the Whistleblower Act, if you know, the safety tools and safety issues, that question would have violated OSHA regulations. Employee doesn't necessarily say the term OSHA when they record it, but you know, that regulation was violated. That's what they were talking about, we can support the Whistleblower Act cause of action for it. I'm going to mention a couple other minor tools that we have here.

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Because I think they bear mentioned and they're things that will, we have been seeing, and we'll see, continue to see I think during the pandemic, for whistleblower, like, if you will, complaints, you do have the option of filing a charge with the National Labor Relations Board the NLRB, we're on slide 56. Now, this is even for non union union employees, and it's for really silencing or threatening to silence if you will, employees, among other issues. So think, again, back to that retail employee I described he and another worker were reporting and complaining about not only you're not telling us about injuries, you're not telling us about you're not wearing masks. They also said we represent everybody here. And we feel that you are not taking safety precautions. My co workers have selected me to make this report. So there's no union at the shop. They're not saying we're union organizers, but they're engaging in what the nlra. And now, the National Labor

Relations Act would define as and one of the NLRB would refer to as concerted concerted acts or concerted activity. They're speaking on behalf of the collective about workplace conditions so you can file that charge. It's not going to take you to civil court, but you can get reinstatement and back pay for the employee.

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if the NLRB investigates enrolls in your clients favor, just keep in mind I'm under the last administration without making this a political statement. Under the last administration, OSHA and the NLRB were not terribly good in the pandemic in 2020, about investigating and finding employers who violated various regulations or committed these acts, we have good reason to believe that's going to change. President Biden has issued Executive orders, requiring these agencies to be more aggressive. So these may be more viable options for representing folks where their claims don't neatly fit into the oni Whistleblower Act, or don't necessarily constitute a retaliatory discharge, you don't think you can plead those, you do have some other options available to you there. So the other thing I want to mention that's on slide 56, I'm filing a charge of discrimination, the EEOC regulations that I mentioned in the disclaimer, and the various discrimination statutes that I mentioned earlier, and then said, we're not going to talk about that. Here's the only other place we're going to talk about it. Maybe the discharge of the discrimination or what's happening doesn't neatly fit into a Whistleblower Act claim, or common law retaliatory discharge. But under the right circumstances, it may be Americans with Disabilities Act regulation, or there may be some form of retaliation. The EEOC has some really nice user friendly guidelines. And I will say the federal government in general, Federal Department of Labor, and the EEOC have some really useful guidelines, fact sheets, and just sort of policy documents that exists that give examples of the types of retaliation discrimination or conduct that is protected, that it's not protected, and groups that are protected them the like, the same goes excuse me, at the state level with the Illinois Department of Labor. I am going to briefly mention one other issue that we're seeing a bit of because it does fall under the realm of retaliatory discharge. And this is on slide 57. One other thing that we're seeing a lot of and it doesn't fit neatly with the rest of this, but I think it should be mentioned is wage base retaliatory discharge. So during the covid, 19 pandemic, especially early on, we saw I mean, we continue to see the economy not in great shape, and we see employers having to cut corners, save money where they can, and sometimes don't make it you know, sometimes it's not malicious, and it's just an employer scrambling and they're sloppy, or they make a mistake, or they don't know something's illegal, sometimes they do know exactly what they're doing, and they're just taking advantage. But you're gonna see employers, let's say playing around with people's earnings. So the Illinois wage payment and

collection act, and I'm smiling, because I always tell clients with wage claims about this law and like literally none of them ever hear of it, because they just, it's not people know about minimum wage, but they don't know about this law. And I always joke, it's my favorite law in Illinois that nobody knows about. What the wage act is, I call it typically protects is the general right and policy enumerated is that it defends employees rights to receive their final compensation, their final wages or final paychecks. It's a much broader statute, and it's something you know, you get in an argument with the employer, he fight, they fire you or you walk out and they say, Well, you know, can't believe you did that I'm not paying your last paycheck. Well, if you earn that, if you work the week or the two weeks, they still got to pay it just because they're mad at you is not a basis for stiffing him. It covers a lot of other kinds of wages. So it's earned compensation is what's protected there. So think earned bonuses, and that's a key term earned, not discretionary earned commissions, paid vacation days paid days off accrued, PTO that is paid and there's no use it or lose it policy. It's like I said, it's my favorite law because it protects your in compensation, but it doesn't. It doesn't matter that you were fired. It's a very useful law. And again, the idea well, the owner Department of Labor has some really useful regulations. One note on that law I want to make a change of is they can change your terms of compensation. So the law both requires them to put in writing that how you'll be paid when you're hired. And if they're going to change the terms of your pay. They can, they should do it in writing, if they can. There are some guidelines about that. But it's not retroactive. And that's key. If you work that two weeks, they can't come back and say, Oh, we decided to change your wages after you work that so you're making 10 bucks an hour less. It's not how it goes. I bring all that up. And there's also rules about secret pay deductions, and what needs to be done to deduct from somebody whose wages and and my favorite part of the law is that it protects wages or compensation earned pursuant to an agreement doesn't need to be a written contract. Just you hire me to mow your lawn for 50 bucks. That's what that costs. I haven't done that in a long time.

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or whatever, and then you decide and want to pay anymore and it's not in writing. So good luck to you. Um, we had an agreement and I did the work you have to pay me. Here's why I bring this law. As I set forth on slide 58, the next slide under Section 14, there's a retaliatory discharge provision in that loss. So if your employer or your clients employer fires your client after your client objects, because they're not getting paid, they haven't been paid something they earned. They had an agreement and the employer is not sticking to it. There's a retaliatory discharge action available. And that's important, because this statute provides for individual liability, meaning, you know, we talked before common law retaliatory discharge can't go after an employee or agent under the wage act if the retaliatory discharge is related to wages. And the general manager not the owner is the one who does it and knows he's not going to pay you because he stands to gain if he cuts costs, guess what, he's on the hook individually. Now, then, practically speaking, it's not the owner, the company, maybe that person's not, you know, recoverable. But it's something to

keep in mind, and is a useful tool when not only pursuing the wage claims, but the retaliatory discharge claims. The wage act also provides for attorneys fees and for unpaid wages every month that goes by that the wages remain unpaid. There's a 2% interest penalty that attaches though it is not compound. Um, I'm not going to read the retaliatory discharge of the retaliation that is protected in the law, just know that it's enumerated in Section 14 of the law on slide 58. Okay, so we're finally coming towards the end here. So what does all this matter? Where, where are we here? This is just the tip of the iceberg. Like I said, I love employment law, because it allows you so many different tools. But the the I guess downside to it is that means this is only some of what we need. There's a lot more to this towards this cause of action in general whistleblower retaliation claims. I've included on the next couple slides, some free and useful resources that you can consult for employment law, generally, not just this, um, and if there are any takeaways that I want you to have from this, just know there are options to protect workers and get around at will employment, they are there. But they're very limited and specific, you need to be very specific. When you plead one of the complaints I get from my opponent says that my complaints are way too detailed and long. And I always joke, I'm sorry, it was too long for you to read. But you know, there are benefits to being specific about that. And especially when you're going to use the Illinois Whistleblower Act, or you're basing a retaliatory discharge claim on a general public policy, you really want to be very careful about how you plead it and make sure that you are taking care to draw the ties that you're going to need to prove in the case to whatever public policy is being violated. And for advising employees who are blowing the whistle, they need to be specific, you need to be clear about what you're complaining about. It can't just be I am complaining, things are not good here. It's not going to do it. You got to show that they're complaining about the issue in question. Um, the free resources that I lay out here are on slide 61. And people should always feel free to reach out to me with any questions about this employment law. Generally, like I said, I'm an employment law nerd. I always like talking out cases, addressing this issue and anything else that comes out of it. It's fun for me and it keeps me sharp and forces me to think outside the box sometimes. My contact information is on slide 62. I appreciate everybody taking the time to listen to me today. And thank you for having