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Integrating Interference Theory

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INTEGRATING INTERFERENCE THEORY

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ABSTRACT

Robust retaliation protections are an essential component of any effective enforcement regime. Recognizing this, Congress has included a provision prohibiting retaliation in nearly every workplace statute passed in the past century. In statutes more than a century old, like the Civil Rights Act of 1866, where Congress neglected to include an explicit anti-retaliation provision in the statutory language, the Supreme Court has found an implied proscription against retributory behavior. Anti-retaliation protections are undoubtedly integral to effective enforcement. However, they have an equally important counterpart that is often overlooked in compliance discussions—interference protections.

Several workplace statutes contain interference provisions—statutory language that makes it unlawful for employers to interfere with the substantive rights created by the statute. However, interference clauses are much less common than retaliation clauses. Compared to retaliation clauses, interference clauses appear to be a stronger mechanism for enforcing the regulatory scheme Congress has created for labor and employment laws. They enjoy broader judicial interpretation and have an analytical framework that makes it easier for employees to successfully prove employer misconduct given the information asymmetries that exist between companies and their employees.

This Article explores the origins of interference theory and investigates the presence of interference clauses in some statutes and their absence in others. It argues that, like they have interpreted retaliation proscriptions, the courts should interpret workplace statutes as containing implied interference prohibitions, as protections against interference with workplace rights is an essential component of compliance with any regulatory intervention. The Article further argues that Congress can broaden protections for employees, strengthen

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enforcement, and better support the goal of the statutory regimes by expressly including interference clauses in all workplace statutes.

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INTRODUCTION

Workers are experiencing astounding levels of exploitation, discrimination, and subordination. Despite a substantial body of labor and employment law jurisprudence, noncompliance with workplace regulations persists. Despite having a federal minimum wage law for almost a century, minimum wage violations deprive America's workers of an estimated $15 billion annually.[1] Though we have laws that pertain to child labor, the number of minors who are employed in violation of these child labor laws increased 283% from 2015 to 2022.[2] Notwithstanding the fact that a landmark employment discrimination statute was passed over half a century ago, more than half of African Americans, one-third of Native Americans, a quarter of Asian Americans, and more than one-fifth of Latinx individuals report experiencing racial discrimination in employment.[3]

One need look no further than the #MeToo Movement[4] to see the results of the underenforcement of laws prohibiting sexual harassment. While we have federal laws that provide for minimum labor standards and prohibit employment discrimination on the basis of protected characteristics, lackluster enforcement dilutes the efficacy of these regulations. Each workplace law statute comes with a built-in enforcement tool—an anti-retaliation provision. These anti-retaliation provisions prohibit employers from taking retributory actions against employees because the employees have either reported suspected employer misconduct or have participated in an investigation or other proceeding regarding allegations of employer misconduct.

The importance of anti-retaliation provisions to the regulatory scheme Congress has created for American workplaces cannot be overstated. The Supreme Court has long recognized the salience of anti-retaliation provisions to effective enforcement.[5] For over fifty years, the Supreme Court's retaliation jurisprudence

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[1] DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 2 (2017).

[2] JENNIFER SHERER & NINA MAST, ECON. POL'Y INST., CHILD LABOR LAWS ARE UNDER ATTACK IN STATES ACROSS THE COUNTRY 4 (2023).

[3] DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, CTR. FOR AM. PROGRESS, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY 10-11 (2019).

[4] Founded by Tarana Burke in 2007, the #MeToo Movement went viral in 2017 when actress Alyssa Milano encouraged her followers on social media to respond with the hashtag "#metoo" if they had been a victim of sexual harassment or assault. Cassandra Santiago & Doug Criss, *An Activist, a Little Girl and the Heartbreaking Origin of 'Me Too,'* CNN (Oct. 17, 2017, 3:36 PM), https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html [https://perma.cc/K3RB-NMDE]; Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN (Oct. 16, 2017, 7:12 PM), https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html [https://perma.cc/BD88-NRFD].

[5] *See* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("Plainly, effective enforcement [of the Fair Labor Standards Act] could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.").

reflected the value placed on strong retaliation protections to undergird workplace statutes.[6] The Court has treated anti-retaliation clauses in statutes as enforcement tools, which benefits society as a whole, rather than solely benefitting employees.[7] The Court consistently issued broad interpretations of workplace laws. Examples include the Court holding that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 ("Title VII")[8] applied to former employees despite the statute's language providing that it applied to "employees,"[9] extending retaliation protections to third parties,[10] holding that adverse actions not related to employment and those occurring outside of the workplace can constitute retaliation,[11] and going so far as to read an implied anti-retaliation provision into 42 U.S.C. § 1981,[12] a statute whose text does not actually contain an anti-retaliation clause.[13]

However, the interpretive tide has started to turn. The Court has issued restrictive interpretations of anti-retaliation provisions in workplace statutes, in some instances making the standards for the retaliation claim more stringent than the standards for the underlying statutory claim.[14] The scholarship critiquing the judiciary's restrictive interpretations of anti-retaliation provisions in workplace statutes is plentiful.[15] What abounds much more than scholarly critiques are the

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[6] Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RSRV. L. REV. 375, 379 (2011).

[7] *Id.* at 380.

[8] 42 U.S.C. § 2000e-2.

[9] Robinson v. Shell Oil Co., 519 U.S. 337, 341-46 (1997).

[10] Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 173 (2011) (finding Title VII retaliation violation where employer subjected employee's fiancé to adverse employment action after employee filed sexual harassment complaint).

[11] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

[12] 42 U.S.C. § 1981 states, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." Section 1981 has been applied to employment contracts, including where employment is at-will. *See* Joanna L. Grossman, *Are At-Will Employees Protected Against Race Discrimination Under Section 1981, a Federal Antidiscrimination Law? A Growing Majority of Courts Say Yes*, FINDLAW (Oct. 22, 2002), https://supreme.findlaw.com/legal-commentary/are-at-will-employees-protected-against-race-discrimination-under-section-1981-a-federal-antidiscrimination-law.html.

[13] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 446 (2008).

[14] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) (holding causation standard in Title VII discrimination claims is motivating factor, while causation standard in Title VII retaliation claims is but-for causation).

[15] *See, e.g.*, William R. Corbett, *Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419, 420 (2021) (criticizing asymmetry of causation standards across employment discrimination laws); Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1921-22 (2020) (critiquing judicial application of but-for causation standard in retaliation cases by explaining inconsistent outcomes that may result for similarly situated plaintiffs); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041 (2015) (describing

countless numbers of America's workers that anemic enforcement of retaliation protections leave vulnerable.

Fear of retaliation is the primary reason employees do not report suspected wrongdoing.[16] This nonreporting has the potential to affect numerous stakeholders—including individual aggrieved employees; groups of employees; the employer's customers, clients, and business partners; the employer's competitors who are in compliance with workplace regulations; and the general public.

In the wake of such rampant noncompliance with workplace laws, Congress must act to strengthen the efficacy of workplace statutes. One way to do this is ensuring each workplace statute contains an interference clause.[17] Interference clauses in workplace statutes make it unlawful for employers to interfere with rights created by the statute.[18] Several workplace statutes contain interference clauses.[19] While the statutory text of these clauses varies from one statute to

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tendency of courts to routinely dismiss cases in which worker suffered retribution for engaging in protected activity by finding that employer's conduct did not constitute adverse action); Matthew A. Krimski, University of Texas Southwestern Medical Center v. Nassar*: Undermining the National Policy Against Discrimination*, 73 MD. L. REV. ENDNOTES 132, 132 (2014) (arguing Court's adoption of narrow causation standard in *Nassar* inhibits ability of aggrieved employees to prove retaliation claims).

[16] Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 675 (2021) (concluding after empirical study that narrowing of anti-retaliation laws has led to inadequate deterrence of employer retaliation); Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 436 (2020) (noting retaliation by perpetrator is a reason workers do not report employer misconduct); *Why Workers Don't Report Misconduct in the Workplace*, VAULT (Feb. 17, 2020), https://vaultplatform.com/blog/why-workers-dont-report-misconduct-in-the-workplace/ [https://perma.cc/97X3-UXS2] (stating most employees cite fear of retaliation as the reason they do not report unethical, illegal, or inappropriate conduct in workplace); Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (citing survey of over 4,300 low-wage workers in three largest U.S. cities that showed "fear of retaliation was the most common reason that workers did not [report misconduct in workplace]"); ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 3 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf [https://perma.cc/M3TH-GD66] (finding among workers who witnessed workplace violations and did not complain, half did so because they feared losing their jobs); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 465 (2008) ("Fear of retaliation is the most common explanation reported by employees for their failure to report perceived discrimination."); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 37 (2005) ("Fear of provoking retaliation, in particular, drives many persons to choose not to report or challenge discrimination.").

[17] *See infra* Part III.

[18] Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 350 (2003).

[19] *See infra* Part II.

another, they all function to prohibit an employer from interfering with the exercise of rights contained in the statute.[20]

The most crucial difference between retaliation claims and interference claims is that retaliation claims require that the plaintiff engaged in protected activity, while interference claims do not. Because interference provides broader protections for employees[21] and undergirds the regulatory interventions at issue, this Article argues that interference clauses should be included in all workplace statutes. It asserts the importance of having interference clauses work in tandem with retaliation protections in workplace statutes and how interference clauses can often be interpreted as providing broader protections than retaliation provisions alone.

The Article proceeds in five parts. Part I explains the similarities and differences between retaliation theory and interference theory. It describes their respective legal analytical frameworks, and traces interference theory from its common law origins. Part II discusses the presence of interference clauses in some statutes and the absence of such provisions in others, as well as some possible explanations for why this is. It examines labor and employment statutes from 1926 to 2022 and concludes there is no logical explanation or detectable formula for the inclusion or noninclusion of interference provisions. Part III addresses the need to interpret all workplace statutes as containing an implied interference prohibition even where no express provision exists. It examines the Supreme Court cases that led to anti-retaliation protections being interpreted as implied in workplace and nonworkplace statutes. This Part also explains that a correct and comprehensive reading of prior Court precedent shows the Court has already interpreted statutes as containing interference provisions. Part IV argues that Congress should explicitly include interference provisions in all workplace statutes and explains why common law is insufficient to fill in the statutory gaps left by Congress. It then explains why the analytical framework for interference theory provides broader protections than the framework for retaliation theory, using examples of prevalent types of employer misconduct to illustrate the differences. Finally, Part V describes a comprehensive legislative intervention, detailing the structure and characteristics needed in interference clauses to adequately protect the rights Congress has conveyed to workers through workplace legislation.

I. DISTINGUISHING RETALIATION AND INTERFERENCE

A threshold matter in a discussion of retaliation theory and interference theory is whether there is a difference between the two, and, if so, the nature of the distinction. Some courts treat interference claims as part of retaliation claims,

[20] *See infra* Part II.

[21] Malin, *supra* note 18, at 333.

while others treat interference as a distinct cause of action.[22] While retaliation and interference are distinct legal theories, they share a uniform purpose—to undergird the protections and entitlements that Congress provided in the statute. Both these theories can be regarded as separate theories used to prove a denial of access to statutory rights, similar to the way different treatment and disparate impact are two distinct theories,[23] but either can be used to prove a statutory[24] discrimination claim. Employment retaliation is employer behavior aimed at penalizing an employee for engaging in protected activity. Interference is behavior aimed at preventing an employee from engaging in protected activity. The activity that is protected by law could be the exercise of a substantive right under the statute (e.g., the right to form a union), the reporting of suspected noncompliance with the law (e.g., filing a complaint about an unfair labor practice), or the participation in an adjudicatory or investigatory proceeding involving an allegation (e.g., serving as a witness in the investigation of an unfair labor practice complaint). This Part discusses the similarities and differences between retaliation theory and interference theory while exploring the legal analytical framework for both.

A. *Anatomy of a Retaliation Claim*

Every workplace statute contains either an express or implied[25] anti-retaliation provision. The language of these provisions can be markedly different from one statute to the next, but prohibiting adverse actions against employees for engaging in protected activity is the core protection these statutes provide.[26] Anti-retaliation provisions have been traditionally viewed as being comprised of an opposition clause, a participation clause, or both.[27] However, interference

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[22] *See* Colburn v. Parker Hannifin/ Nichols Portland Div., 429 F.3d 325, 331 (1st Cir. 2005) ("Specifically, courts have disagreed about whether 'interference' refers to a category of claims separate and distinct from those involving retaliation, or whether it describes a group of unlawful actions, of which retaliation is a part. The term 'interference' may, depending on the facts, cover both retaliation claims and non-retaliation claims." (citations omitted)).

[23] *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) ("This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.").

[24] *See* Washington v. Davis, 426 U.S. 229, 247-48 (1976) (holding disparate impact claims are not cognizable for constitutional equal protection claims).

[25] *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 446 (2008) (holding 42 U.S.C. § 1981 contains implied retaliation prohibition).

[26] *See Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [https://perma.cc/3H8H-8R9H] [hereinafter *EEOC Retaliation Guidance*] ("[Anti-retaliation] provisions prohibit government or private employers, employment agencies, and labor organizations from retaliating because an individual engaged in 'protected activity.'").

[27] *See* Dorothy E. Larkin, Note, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations?*, 33 GA. L. REV. 1181, 1182 (1999) (discussing differences between opposition and participation clause protection).

provisions are a third type of clause included in statutes to protect the exercise of the rights provided in the statute.

Opposition clauses prohibit adverse action against employees because they have opposed a practice made unlawful by the applicable statute.[28] Workplace anti-retaliation provisions protect opposition practices in filing a lawsuit, a complaint with a federal administrative agency, or an internal. Moreover, reports made to individuals or entities other than the federal government or the employer may also constitute protected opposition. These include coworkers,[29] union officials, a lawyer, local law enforcement,[30] or others outside the company. While the definition of opposition is expansive, it is not without limits. Unauthorized copying or misappropriation of documents is not protected activity.[31] Additionally, physical violence is not protected.[32]

Even once an employee-plaintiff clears the hurdle of getting activity categorized as protected opposition, the opposition must be of conduct made unlawful by the statute.[33] However, many workers are not well versed on precisely what conduct is and is not lawful under the statute. Consequently, the courts have developed the good faith belief doctrine. According to this doctrine, even in instances where reported conduct is not actually unlawful under the statute, the courts will treat is as though it were for the purposes of proving the plaintiff engaged in protected activity so long as the plaintiff had a good faith belief that the reported conduct was unlawful.[34] Additional conduct that has qualified as opposition and is thus eligible for protection includes inquiring of the employer whether race played a role in an employment decision,[35] requesting similar pay

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[28] *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 276 (2009).

[29] Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 76 (1st Cir. 2001) (holding complaining about sexual harassment to fellow employee who was general manager's son was protected).

[30] *See* Scarbrough v. Bd. of Trs. Fla. A&M Univ., 504 F.3d 1220, 1222-23 (11th Cir. 2007) (holding police reports can be protected activity when person reporting is sexually harassed and seeking relief from conduct related to harassment).

[31] *See, e.g.*, Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 727 (6th Cir. 2008) (declining to apply protections to employee who disclosed employer's confidential documents containing proprietary information to her attorney during discovery).

[32] *See, e.g.*, Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000) (deciding that slapping one's harasser was not protected activity), *superseded by statute on other grounds*, N.Y.C., N.Y., LOCAL LAW 85 (2005).

[33] *See EEOC Retaliation Guidance*, *supra* note 26.

[34] *See, e.g.*, Summa v. Hofstra Univ., 708 F.3d 115, 126-27 (2d Cir. 2013) (holding university football team manager's complaint of sexual harassment by football players was protected activity despite fact that players were students and Title VII covers employees); Magyar v. St. Joseph Reg'l Med. Ctr., 544 F.3d 766, 771-72 (7th Cir. 2008) (finding female employee whose male coworker sat on her lap and whispered "you're beautiful" had good faith belief conduct constituted sexual harassment).

[35] *See, e.g.*, Holsey v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984) (holding employee's asking whether reason for lack of work was her race or poor performance was protected activity).

to one's peers without explicitly noting that the peers were of the opposite sex,[36] and detailing personal experiences of workplace misconduct while being interviewed in connection with the investigation of another employee's complaint.[37]

Participation clauses prohibit an employer from taking adverse action against an employee because they participated in a proceeding under the statute at issue.[38] Courts have taken an expansive view of both what constitutes a proceeding and what constitutes participation. Submitting affidavits, letters, and participating in interviews with equal employment opportunity officials have all been held to be protected forms of participation.[39] Additionally, assisting coworkers in filing their complaints, refusing to deter others from filing complaints,[40] and serving as a representative of someone filing a complaint have all been held to be protected forms of participation.[41]

Both the opposition and participation clauses are broadly construed. However, of course, differences in statutory text can lead to varying interpretations. Proving eligible opposition or participation is the first step to successfully proving a retaliation claim.

If there is not direct evidence of retaliation, the analytical framework for a retaliation claim is a burden-shifting framework patterned after the *McDonnell Douglas*[42] burden-shifting test used in Title VII disparate treatment claims.[43] In

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[36] *See, e.g.*, Lenzi v. Systemax, Inc., 944 F.3d 97, 112-13 (2d Cir. 2019) (counting employee's comments that she was paid less than her peers as constituting protected activity because context showed she was referencing her male peers).

[37] Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279-80 (2009).

[38] *See EEOC Retaliation Guidance*, *supra* note 26.

[39] *E.g.*, Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (holding employee's visit to equal employment opportunity counselor was protected under Title VII's participation clause); Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) (noting filing race discrimination charge with Equal Employment Opportunity Commission constituted protected activity).

[40] *See, e.g.*, McDonnell v. Cisneros, 84 F.3d 256, 262-63 (7th Cir. 1996) (finding supervisor's refusal to prevent his employees from filing complaints of discrimination constituted protected activity).

[41] *See EEOC Retaliation Guidance*, *supra* note 26, § II(A) (describing protected activity).

[42] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

[43] *See, e.g.*, Carney v. Am. Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998); Smith v. CSRA, 12 F.4th 396, 416 (4th Cir. 2021) (allowing plaintiff to pursue her retaliation claim via application of *McDonnell Douglas* burden-shifting framework in absence of direct evidence of retaliation); Owens v. Circassia Pharms., Inc., 33 F.4th 814, 834-35 (5th Cir. 2022) (noting plaintiff's retaliation claims under both Title VII and § 1981 are "'subject to the *McDonnell Douglas* burden-shifting framework' because [plaintiff] seeks to prove retaliation by circumstantial evidence" (quoting Jones v. Gulf Coast Rest. Grp., 8 F.4th 363, 368 (5th Cir. 2021))); Imwalle v. Reliance Med. Prods., Inc., 515 F.3d 531, 544 (6th Cir. 2008) ("When a plaintiff presents only circumstantial evidence, [the court examines] Title VII, ADEA, and . . . state-law retaliation claims under the same *McDonnell Douglas/Burdine* evidentiary framework that is used to assess claims of discrimination."); Lewis v. Ind. Wesleyan Univ., 36 F.4th 755, 761 (7th Cir. 2022) ("Plaintiffs may also make use of the *McDonnell Douglas*

a retaliation case, the employee-plaintiff first has to prove a prima facie case of discrimination. To make out this prima facie case, the plaintiff must show that they engaged in protected activity of which the employer was aware, that they suffered a materially adverse action,[44] and that there was a causal connection between the protected activity and the adverse action. If the plaintiff successfully proves the prima facie case, the burden then shifts to the employer-defendant to articulate a legitimate, nonretaliatory reason for the adverse action.[45] Once the defendant has done so, the burden then shifts back to the plaintiff to prove that the proffered reason is a pretext for retaliation. This framework is fairly uniform across all workplace law statutes in all federal jurisdictions.[46]

B. *Anatomy of an Interference Claim*

Without anti-retaliation protections, the regulatory regime for workplace law could not function. No regulatory regime could. Nevertheless, as important as

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framework in the retaliation context."); EEOC v. Prod. Fabricators, Inc., 763 F.3d 963, 972 (8th Cir. 2014) (requiring either direct evidence of retaliation or inference of retaliation created under *McDonnell Douglas* burden-shifting framework to succeed on ADA retaliation claim); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124 (9th Cir. 2004) ("Like discrimination, retaliation may be shown using the *McDonnell Douglas* burden shifting framework."); Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1227 (10th Cir. 2008) (allowing plaintiff to prove her retaliation claim by invoking *McDonnell Douglas* framework); Tolar v. Bradley Arant Boult Commings, LLP, 997 F.3d 1280, 1289 (11th Cir. 2021) (noting Title VII retaliation claim based on circumstantial evidence is typically analyzed under *McDonnell Douglas* burden-shifting framework).

[44] To prove the adverse action element of the prima facie case, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker" from making or supporting a charge of discrimination.'" Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[45] *Green*, 411 U.S. at 802-04 (1973).

[46] *See, e.g.*, *Carney*, 151 F.3d at 1094 ("Like claims of discrimination, claims of retaliation are governed by the *McDonnell Douglas* burden-shifting scheme."); *CSRA*, 12 F.4th at 416 (noting plaintiff in retaliation case can use *McDonnell Douglas* burden-shifting framework in absence of direct evidence); *Owens*, 33 F.4th at 834-35 (analyzing Title VII retaliation claim using *McDonnell Douglas* burden-shifting framework because plaintiff sought to prove retaliation using circumstantial evidence); Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014) ("[A] Title VII retaliation claim can be established 'either by introducing direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation.' Here, Plaintiff has done the latter. Therefore, we analyze Plaintiff's retaliation claim under the burden-shifting framework of *McDonnell Douglas*." (citation omitted) (quoting *Imwalle*, 515 F.3d at 543)); *Lewis*, 36 F.4th at 761 ("Plaintiffs may also make use of the *McDonnell Douglas* framework in the retaliation context."); *Prod. Fabricators*, 763 F.3d at 972 ("In order to succeed on this retaliation claim, there must either be direct evidence of retaliation or an inference of retaliation must be created under the *McDonnell Douglas* burden-shifting framework."); *McGinest*, 360 F.3d at 1124 ("Like discrimination, retaliation may be shown using the *McDonnell Douglas* burden shifting framework."); Stover v. Martinez, 382 F.3d 1064, 1070 (10th Cir. 2004) ("Where there is no

anti-retaliation theory is to effective enforcement, the downside is that retaliation theory is reactive in nature.[47] It requires the employee-plaintiff to have already engaged in protected activity to recover. However, there are several instances in which the employer preempts the employee's ability to exercise a statutory right. For example, suppose an employee who was recently in an automobile accident plans to request a reasonable accommodation from their employer due to a disability that resulted from the accident. The employer discovers, or simply suspects, that the employer will request an accommodation. In an effort to prevent that from happening, the employer fires the employee before the employee has an opportunity to request an accommodation. The employer has engaged in wrongdoing. However, the employee cannot bring a successful retaliation claim because the termination occurred before the employee had an opportunity to engage in protected activity. Additionally, the employee may be hampered in their ability to bring a failure to accommodate claim under the Americans with Disabilities Act ("ADA")[48] because the employee did not request an accommodation. Here, the ADA's interference clause would provide a remedy, where the ADA retaliation clause may not.

Interference claims have long been a part of American jurisprudence, and a legal cause of action for interference originally developed as common law torts.[49] The common law causes of action grounded in interference have several different names, including tortious interference with business relations, interference with contractual relations, interference with prospective economic advantage, and tortious interference with an inheritance.[50] Despite the nomenclature differences, the crux of the claim is the same—that a party caused economic harm to another by interfering with that other party's current or future business relationship or contract.

The origins of legal liability for interference can generally be traced back to 1621, when the Court of King's Bench heard *Garret v. Taylor*,[51] a case in which an entrepreneur filed an action against an individual who the entrepreneur claimed threatened his customers and employees in an attempt to get them to

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direct evidence of retaliation, we analyze a retaliation claim under the *McDonnell Douglas* burden-shifting framework."); Johnson v. Miami-Dade County, 948 F.3d 1318, 1325 (11th Cir. 2020) ("When a Title VII retaliation claim . . . is based on circumstantial evidence, this Circuit utilizes the three-part *McDonnell Douglas* burden-shifting framework." (footnote omitted)).

[47] *See* Alexander, *supra* note 16, at 786.

[48] 42 U.S.C. §§ 12101-12213.

[49] Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491, 494-95 (2001).

[50] Sarah L. Swan, *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. LAND USE & ENV'T L. 57, 59 n.7 (2020).

[51] (1621) 79 Eng. Rep. 485; Cro. Jac. 567.

stop doing business with the entrepreneur.[52] Many scholars trace tortious interference[53] back to an English case decided in the mid-1800s. In *Lumley v. Gye*,[54] an opera singer with a contractual obligation to sing exclusively at one theater was enticed by another theater owner to break her current contract and sing at his theater.[55] The court held that the aggrieved theater owner could recover damages from the owner that enticed the opera singer away.[56] From there, a large body of jurisprudence developed that held third parties liable for interfering with the business relationships of others. While the elements of the offense vary from one jurisdiction to another, most jurisdictions require (1) the existence of a contract between the plaintiff and another person; (2) the defendant's knowledge of the contract's existence; (3) the intentional[57] inducement of a breach of the contract; (4) a causal connection between the defendant's wrongful conduct and the breach; and (5) damages.[58]

Because tortious interference claims require the action of a third party, modern tortious interference claims in an employment context often involve

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[52] *Id.* at 485, Cro. Jac. at 568 (awarding damages against defendant who threatened plaintiff's workers and customers with meritless lawsuits).

[53] For a discussion of the origins of tortious interference claims, see Jesse Max Creed, Note, *Integrating Preliminary Agreements into the Interference Torts*, 110 COLUM. L. REV. 1253, 1256-58 (2010); Deepa Varadarajan, Note, *Tortious Interference and the Law of Contract:* The Case for Specific Performance *Revisited*, 111 YALE L.J. 735, 743-46 (2001); Alex B. Long, *Tortious Interference with Business Relations: "The Other White Meat" of Employment Law*, 84 MINN. L. REV. 863, 865 (2000) (stating *Lumley* was first case to recognize tortious interference); and John Danforth, Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1493-94 (1981) (discussing origin of interference in *Lumley* and other cases).

[54] (1853) 118 Eng. Rep. 749; 2 El. & Bl. 216 (QB).

[55] *Id.* at 750, 2 El. & Bl. at 217.

[56] *Id.*

[57] While most jurisdictions require a showing of intent to recover for interference under common law, some jurisdictions recognize the tort of negligent interference with actual or prospective business relations. Of the jurisdictions that do recognize negligent interference, some recognize the cause of action in relation to actual and prospective business relations, while others limit the tort to prospective business relations. For example, California recognizes negligent interference with prospective economic advantage as a valid cause of action. *See* J'Aire Corp. v. Gregory, 598 P.2d 60, 61-62 (Cal. 1979). The typical elements of negligent interference with contract or prospective economic advantage are: (1) the existence of a contractual relationship or other economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's actual or constructive knowledge of the relationship; (3) the defendant's actual or constructive knowledge that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) a failure by the defendant to act with reasonable care; (5) actual disruption of the relationship; and (6) resulting economic harm. *See* Venhaus v. Shultz, 66 Cal. Rptr. 3d 432, 435-36 (Cal. Ct. App. 2007). The elements required for negligent interference claims closely mirror those of general negligence claims, typically requiring some showing that reasonable care was not exercised.

[58] *See* Long, *supra* note 53, at 867-68.

scenarios where an employee's former employer interferes with the employee's relationship with a new employer. However, these claims can also arise where an officer or supervisor of an employer has taken some adverse action against the employee.[59] In these instances, the crucial determinant is whether the corporate officer was acting within the scope of their employment.[60] If the officer or supervisor was acting within the course of their employment, they are considered the employer. Consequently, there is no third party, and the aggrieved employee cannot recover.

1. From Common Law to Statutory Interference

Although interference claims developed at common law, statutory interference claims have been used in American labor and employment law since the beginning of the twentieth century in labor statutes.[61] Labor unrest became more

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[59] *See* Long, *supra* note 49, at 502.

[60] *See, e.g.*, Gruhlke v. Sioux Empire Fed. Credit Union, Inc., 756 N.W.2d 399, 408 (S.D. 2008) ("[W]hen corporate officers act within the scope of employment, even if those actions are only partially motivated to serve their employer's interests, the officers are not third parties to a contract between the corporate employer and another in compliance with the requirements for the tort of intentional interference with contractual relations."); Cobbs, Allen & Hall, Inc. v. EPIC Holdings, Inc., 335 So. 3d 1115, 1138 (Ala. 2021) ("The employer is vicariously liable for acts of its employee that were done for the employer's benefit, i.e., acts done in the line and scope of employment or . . . done for the furtherance of the employer's interest. The employer is directly liable for its own conduct if it authorizes or participates in the employee's acts or ratifies the employee's conduct after it learns of the action." (quoting Potts v. BE & K Constr. Co., 604 So. 2d 398, 400 (Ala. 1992))).

[61] The advent of the common law theory of interference was not without its objectors. These objections included claims that allowing legal liability for interference imposes duties upon a party that should not have to bear those duties and provides at-will employees with rights for which the employees did not contract. However, many of the objections raised to the tort of interference with contractual relations are inapplicable to statutory interference, arguably making the case for statutory interference claims more persuasive than the case for common law interference. One of the critiques leveled against interference torts is that they create duties for parties that should not have to bear those duties. *See generally* Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980). Specifically, they impose on an individual the duty to refrain from interfering, even if that interference would normally constitute an honest representation or legitimate business competition, because of the existence of a contract to which that individual is not a party. The argument suggests that if A has a contract with B, then C should bear no duty with respect to that contract because C took no part in that contract. This includes the duty to refrain from interfering. With respect to statutory interference, the argument that there is no privity of contract in existence is inapplicable. The duty imposed on the employer (i.e., the duty not to interfere) comes from the legislature, and it is well-settled that legislatures impose duties upon individuals and entities. Another criticism of tortious interference is that such a cause of action creates rights for at-will employees for which they did not contract. *Id.* at 371. As a threshold matter, all workplace statutes create rights and responsibilities for employers and employees for which they did not contract. Many statutes create rights that are unwaivable, and the employee and employer could not contract those rights away even if both parties

rampant at the end of the 19th century and beginning of the 20th century, and employers and workers were left to battle out the issues on their own, with only common law causes of action available in the civil context to help settle disputes in court.[62] However, this heightened and prolonged unrest prompted regulatory intervention by Congress. As a result, numerous labor law statutes were enacted, though several of them would eventually be declared unconstitutional.[63] Two of the earliest statutes to contain interference clauses that were not declared unconstitutional were the Railway Labor Act of 1926 ("RLA")[64] and the National Labor Relations Act of 1935 ("NLRA").[65] Both of these were labor statutes that gave workers the right to organize and form unions. Interference provisions were included in these statutes to prevent employers from interfering with these newly

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desired to do so. For instance, an employer cannot agree to pay, and an employee cannot agree to accept, less than minimum wage. *See* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 167 (1945) (holding employment agreement cannot be utilized to deprive employees of their statutory FLSA rights). Additionally, workplace statutes create rights for both at-will and non-at-will employees. There is no windfall here for employees, regardless of whether they are at-will; hence, this critique of interference causes of action is inapplicable.

[62] Interestingly, prior to the inclusion of interference clauses in statutes, common law interference causes of action were often used against labor unions. *See* John T. Nockleby, Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1529-34 (1980). For instance, in *Temperton v. Russell*, a labor union sought to maximize its bargaining power against an employer by threatening to pull union members from the employ of any supplier who continued to supply the employer. (1893) 1 Q.B. 715 at 716-17 (CA). While this frightened away most of the employer's suppliers, one supplier, Joseph Temperton, continued doing business with the employer. As a result, the union threatened Temperton's suppliers. Temperton sued the union, and the court found in his favor. *Id.* The court noted that the union's actions constituted unlawful interference with the employer's property right to form future contracts. *Id.* at 725-27. The court found that the union had unlawfully interfered with the supplier's contractual rights, even though no contract was in existence. *Id.* In *Vegelahn v. Guntner*, another court ruled against a union in an action to enjoin a two-person peaceful picket as part of a labor strike. 44 N.E. 1077, 1077-78 (Mass. 1896). The court declared the picket an unlawful interference with the rights of the employer and the nonstriking employees. *Id.*

[63] Several years after the passage of the RLA, the National Industrial Recovery Act of 1933 ("NIRA") was passed. Pub. L. No. 73-67, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). NIRA, which was later declared unconstitutional, also contained a provision requiring that employees "be free from the interference, restraint or coercion of employers of labor." *Id.* § 7(a).

[64] 45 U.S.C. §§ 151-188. In 1936, the RLA was expanded to cover airlines. Ch. 347, 49 Stat. 1189 (1936) (codified at 45 U.S.C. § 181). Today it covers railroads, airlines, and companies controlled by railway carriers. 45 U.S.C. §§ 151, 181.

[65] 29 U.S.C. §§ 151-169.

created statutory labor rights. Interference clauses eventually became part of several, but not all, workplace statutes.

2. Interference Analytical Framework

Retaliation claims and interference claims have different analytical frameworks. As described above, retaliation claims employ a burden-shifting framework. To prevail on a retaliation claim, the plaintiff must first prove a prima facie case of retaliation, which requires a showing that (1) the plaintiff engaged in protected activity of which the employer was aware, (2) the plaintiff suffered an adverse action, and (3) there was a causal connection between the protected activity and the adverse action.[66] Once the plaintiff has proven a prima facie case of retaliation, the burden shifts to the employer, who must articulate a legitimate nonretaliatory reason for the adverse action.[67] After the employer has done so, the burden shifts back to the plaintiff to show that the proffered reason is pretext for retaliation.[68] This framework is fairly uniform across all workplace law statutes in all federal jurisdictions.

The analytical framework for interference claims is not uniform, and the elements required to prove interference vary among statutes and circuits. Despite the variation, proving an interference claim requires a showing that the plaintiff was eligible for the rights and/or protections provided by the statute and that the employer interfered with the exercise of those rights. Showing that the employee previously engaged in protected activity is not required.

C. *Judicial Interpretation*

In interpreting interference clauses, courts have little to work with outside of the statutory text. Interestingly, neither interference clauses nor anti-retaliation provisions in workplace statutes garner much attention in the legislative process. They are rarely a topic of debate. Even some of the most vigorously debated workplace regulation bills see little change with regard to interference or anti-retaliation provisions. For example, the Family and Medical Leave Act of 1993 ("FMLA")[69] was debated in Congress for eight years across three presidential administrations.[70] It was also vetoed twice before ultimately being signed into law. Though there were numerous substantive changes to the bill since its

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[66] *EEOC Retaliation Guidance*, *supra* note 26, § II.

[67] *Id.*

[68] *Id.*

[69] 29 U.S.C. §§ 2601-2654.

[70] *See* Steele, *supra* note 15, at 1906-07.

original introduction in 1985,[71] the retaliation and interference provisions remained unchanged from a 1986 version of the bill to its passage in 1993.[72]

When interference clauses and/or retaliation provisions do come up during consideration of a bill, the conversation typically surrounds strengthening protections. For instance, the legislative history of the Employee Retirement Income Security Act of 1974 ("ERISA") shows that the language that eventually became the ERISA interference clause was added specifically as an additional safeguard for the rights created by ERISA.[73] Likewise, the legislative history of the Occupational Safety and Health Act of 1970 ("OSHA") shows that changes to the anti-retaliation provision were made to strengthen employee protections and encourage reporting.[74]

Despite the differences in the theories, some courts view interference clauses as a component of anti-retaliation provisions. Others treat them as a separate mechanism independent of anti-retaliation provisions.[75] This is not surprising given that in some statutes, interference clauses are clearly part of the anti-retaliation provision, while in others, interference clauses are located in a separate section of the statute. Retaliatory actions have been found to be prohibited under both theories.[76] Courts have posited that the central inquiry in an interference claim is whether the employer interfered with an employee's statutory right, while the primary inquiry in a retaliation claim is whether the employer took an adverse action against the employee because the employee engaged in statutorily protected activity.[77]

At its core, employment retaliation is retributory behavior for engaging in protected activity. Interference can be described as behavior aimed at preventing the exercise of a statutory right, and such exercise is itself protected activity. Hence, interference can be viewed as employer misconduct aimed at preventing protected activity, while retaliation can be viewed as employer misconduct aimed at punishing employees for engaging in protected activity. The primary

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[71] The draft legislation that ultimately became the FMLA was introduced as the Parental and Disability Leave Act of 1985. H.R. 2020, 99th Cong. (1985).

[72] *See* Steele, *supra* note 15, at 1907-08 n.109 (discussing legislative history of FMLA retaliation and interference provisions).

[73] The Senate Report on the ERISA interference provision states, "These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation." S. REP. NO. 93-127, at 36 (1973), *reprinted in* LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 622 (1976).

[74] *See* Taylor v. Brighton Corp., 616 F.2d 256, 260 (6th Cir. 1980).

[75] *See supra* note 22 and accompanying text.

[76] *See* Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 282 (6th Cir. 2012) (stating claim of retaliatory discharge is cognizable under either interference theory or retaliation theory under FMLA).

[77] Edgar v. JAC Prods., Inc., 443 F.3d 501, 507-08 (6th Cir. 2006).

difference is one of timing, with interference typically, but not always, occurring before the protected activity, and retaliation usually, but not always, occurring after the protected activity.

The differences in timing do have some exceptions. For instance, retaliatory discharge, something that would occur after an employee has engaged in protected activity, has been found to be actionable under interference theory.[78] In those cases, the interference occurred after the protected activity. Similarly, anticipatory retaliation has been found to be actionable under retaliation theory.[79] Anticipatory retaliation, sometimes referred to as preemptive retaliation,[80] refers to instances in which an employer's adverse action happens before the protected activity.[81] For instance, if an employer believes an employee will file a complaint, the employer may fire the employee preemptively. Hence, both interference and retaliation have exceptions to their general timing conventions.

Despite the general differences in the timing of the employer's misconduct, both interference theory and retaliation theory share a common purpose—to promote effective enforcement of the law. They are two theories with a shared purpose. Discrimination provides an analogy. There are two primary[82] theories of

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[78] *See Seeger*, 681 F.3d at 282.

[79] *See* Uronis v. Cabot Oil & Gas Corp., 49 F.4th 263, 272-73 (3d Cir. 2022) (holding FLSA's retaliation provision protects employees from discrimination because of employer's anticipation that employee will soon file a consent to join a collective action); Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 624 (7th Cir. 2002) (stating anticipatory retaliation is actionable as retaliation under Title VII); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (concluding reassignment of plaintiff in anticipation of her filing sexual harassment complaint was "no less retaliatory than action taken after the fact"). *But see* Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 365 (4th Cir. 2000) (deciding although FLSA's retaliation clause protects impending or anticipated testimony in existing proceeding, it does not protect impending or anticipated proceedings).

[80] *See, e.g.*, Pittman v. Am. Airlines, Inc., 692 F. App'x. 549, 555 (10th Cir. 2017) (referring to action taken in anticipation of that person engaging in protected opposition to discrimination as "preemptive retaliation" (quoting *Sauers*, 1 F.3d at 1128)).

[81] *See* Alexander, *supra* note 16, at 786; Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 561-63 (2011) (discussing anticipatory retaliation in context of Title VII discrimination claims); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 983-84 (2007) (urging courts to adopt anticipatory retaliation protections, nothwithstanding fact that statutory language permits retaliation claim only after worker has engaged in protected activity).

[82] The term "primary" is used here because there are some scholars and jurists who believe harassment and accommodation are distinct theories of discrimination, while others would categorize them as components of disparate treatment. *See generally* William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683 (2010) (analyzing disparate impact and treatment); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (distinguishing harassment from disparate impact and treatment); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055 (2017) (analyzing discrimination under four theories of disparate impact, disparate treatment, harassment, and failure to accommodate).

discrimination. The first is disparate treatment, which refers to the intentional differentiation in treatment of employees or applicants based on a protected class. The second theory of discrimination is disparate impact, which refers to instances in which employer policies or procedures are facially neutral, but disproportionately harm individuals in a particular protected class.[83] Disparate treatment and disparate impact are separate theories with separate proof requirements, but they have the same purpose: to prohibit discrimination. Likewise, interference and retaliation are distinct theories, both aimed at prohibiting employer-erected impediments to effective enforcement of workplace statutes.

II. VARIATION IN STATUTORY INCLUSION

Interference theory plays just as important a role as retaliation theory in ensuring access to statutory workplace rights. However, inclusion of interference provisions in workplace statutes is not nearly as universal as incorporation of anti-retaliation provisions. This Part discusses the inclusion of interference clauses in some workplace statutes and the absence of such clauses in the explicit language of others.

A. *Statutory Presence*

This Section explores the variation from one workplace statute to the next. It describes some of the primary labor and employment statutes that contain interference clauses and explores unique features of the Court's jurisprudence for each.

There are multiple workplace law statutes that already contain interference provisions. Notable examples of workplace statutes that contain interference clauses include the NLRA, ERISA,[84] FMLA, and the ADA.[85] All but one of these statutes can be categorized as minimum labor standards statutes that are "universalist"[86] in nature, as opposed to an employment discrimination statute.

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[83] Bornstein, *supra* note 82, at 1061.

[84] 29 U.S.C. §§ 1001-1461.

[85] 42 U.S.C. §§ 12101-12213.

[86] Scholars have put forth varying definitions of the term "universalist," but the common denominator that runs through each definition is that the laws are identity neutral and do not implicate protected characteristics. *See* Erika K. Wilson, *Charters, Markets, and Universalism*, 26 GEO. J. ON POVERTY L. & POL'Y 291, 296 (2019) (describing "universalism as the phenomenon of deemphasizing legal or policy approaches that specifically target race-based inequality and instead emphasizing a baseline of commonalities related to the human condition"); Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2842 (2014) (characterizing universalism in civil rights law as providing "a uniform floor of rights or benefits for all persons or, at least, guarantee[ing] a set of rights or benefits to a broad group of people not defined according to the identity axes . . . highlighted by our antidiscrimination laws"); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011) (explaining universalism changes the axis of protection from protected characteristics to traits with more commonality).

However, not all minimum labor standards statutes have interference clauses. For instance, the Fair Labor Standards Act of 1938,[87] which provides a federal minimum wage, overtime provisions, child labor protections, and other labor standards, does not contain an interference provision. The term "interfere" or "interference" as used in these clauses is not defined, which is not surprising given the fact that Supreme Court declared almost one hundred years ago that "'[i]nterference' with freedom of action and 'coercion' refer to well understood concepts of the law."[88] An examination of the text of each is warranted.[89]

Created in response to decades of labor unrest among railroad workers, the RLA was the first federal statute designed to give railroad workers the right to organize and collectively bargain free from employer interference. The RLA provides,

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . .[90]

The legislative history surrounding the interference language in the RLA is scant, and the language was inserted with the railroads' consent.[91] Courts have typically required a showing of intent for employees to prevail in RLA interference claims. In many cases, courts will find that a common law retaliatory discharge claim is preempted by the RLA.[92]

Two years after the National Industrial Recovery Act ("NIRA") was passed, Congress passed the NLRA, which gives workers the right to organize and collectively bargain.[93] The NLRA has three provisions that protect these rights. The first is Section 8(a)(1), which is the NLRA interference clause. NLRA Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [of the NLRA]."[94] The NLRA interference clause has been interpreted to allow employers to state their views on issues involving organizing, so long as these

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[87] 29 U.S.C. §§ 201-219.

[88] Tex. & New Orleans R.R. v. Brotherhood of Railway & Steamships Clerks, 281 U.S. 548, 568 (1930).

[89] For a discussion of the full retaliation provisions of these statutes, inclusive of any opposition and participation clauses, see Steele, *supra* note 15, 1898-1910.

[90] 45 U.S.C. § 152. The RLA also prohibits interference with the designation of representatives, stating, "Representatives, for the purposes of [the RLA], shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." *Id.*

[91] A. R. Ellingwood, *The Railway Labor Act of 1926*, 36 J. POL. ECON. 53, 65-66 (1928).

[92] *See, e.g.*, Steinaker v. Sw. Airlines, Co., 472 F. Supp. 3d 540, 555 (D. Ariz. 2020) (concluding former airline employee's claim that her employer breached covenant of good faith and fair dealing by terminating her was preempted by the RLA).

[93] 29 U.S.C. §§ 151-169.

[94] *Id.* § 158(a)(1).

statements are not coercive.[95] The next provision is Section 8(a)(3), which makes it unlawful to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[96] This too is, in essence, a retaliation provision, as it prevents employers from deciding to fire an employee or otherwise subject the employee to an adverse action because of organizing activity. Courts often hold that finding of a violation under Section 8(a)(3) triggers finding of a violation of Section 8(a)(1).[97] The final provision is NLRA Section 8(a)(4), which makes it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]."[98] This provision combines the opposition and participation clauses.

In addition to prohibiting employers from interfering with rights, the NLRA also proscribes union interference with rights. Section 8(b)(1) makes it unlawful "for a labor organization . . . to restrain or coerce (A) employees in the exercise of [their] rights . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."[99]

One major difference between the NLRA interference clause and the NLRA retaliation clause is that interference claims do not require a showing of intent. Interference claims only require a showing of interference. Courts have articulated the test as "whether, considering the entire factual context, the employer's conduct reasonably tends to interfere with the employees' exercise of their section 7 rights."[100]

After the passage of the NLRA, there was a long gap before an interference clause was inserted in another statute. Though the FLSA was passed just three years after the NLRA, it does not include an interference provision.[101] Likewise,

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[95] *See, e.g.*, Fort Dearborn Co. v. NLRB, 827 F.3d 1067, 1073-76 (D.C. Cir. 2016) (holding employer's statement to union that "we are watching you, we're going to catch you, we will fire you" supported finding of NLRA interference).

[96] 29 U.S.C. § 158(a)(3).

[97] *E.g.*, Constellium Rolled Prods. Ravenswood, LLC v. NLRB, 45 F.4th 234, 240-41 (D.C. Cir. 2022) ("The finding of a violation of Section 8(a)(3) would also trigger a violation of Section 8(a)(1)." (quoting Napleton 1050, Inc. v. NLRB, 976 F.3d 30, 39 (D.C. Cir. 2020))).

[98] 29 U.S.C. § 158(a)(4).

[99] *Id.* § 158(b)(1).

[100] S. Bakeries, LLC v. NLRB, 937 F.3d 1154, 1161 (8th Cir. 2019) (quoting MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 828 (8th Cir. 2017)); *see also* NLRB v. Grand Canyon Mining Co., 116 F.3d 1039, 1044 (4th Cir. 1997) (articulating test as whether, "under all of the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees"); NLRB v. Ill. Tool Works, 153 F.2d 811, 814 (7th Cir. 1946) ("The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.").

[101] The FLSA anti-retaliation provision only contains an opposition and participation clause. It makes it unlawful for any person

neither the Equal Pay Act of 1963 ("EPA"),[102] which prohibits sex-based wage discrimination; nor Title VII,[103] passed in 1964; nor the Age Discrimination in Employment Act of 1967 ("ADEA"),[104] which prohibits age discrimination in employment, contains interference provisions. The EPA was passed as an amendment to the FLSA, and its anti-retaliation provision is a replica of the FLSA anti-retaliation provision, which contains no interference clause. The ADEA was also passed as an amendment to the FLSA.[105] However, it was passed three years after Title VII, and its anti-retaliation provision mirrors Title VII's provision.

In 1970, OSHA was passed, and it contains an interference provision. The OSHA interference provision is unique because it does not contain the term "interfere." It states, "No person shall discharge or in any manner discriminate against any employee . . . because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA]."[106] OSHA does not contain a private right of action, despite attempts by the Department of Labor to convince the courts to find an implied private right of action,[107] so case law on OSHA retaliation claims is not as plentiful as case law on retaliation claims with other workplace statutes.

Workload and budgetary constraints stifle OSHA's enforcement ability. This hampered agency enforcement authority coupled with the lack of a private right of action has prompted some employees who believe they have been victims of retaliation for reporting occupational safety concerns to seek redress in state

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> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FSLA], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). The FLSA was amended by the Affordable Care Act to add a specific whistleblower provision relating to reporting ACA violations. *Id.* § 218c(a)(2).

[102] 29 U.S.C. § 206(d).

[103] 42 U.S.C. § 2000e-2.

[104] 29 U.S.C. §§ 621-633.

[105] Though it is an employment discrimination statute, the ADEA was passed as an amendment to the FLSA, and the original enforcement authority for the ADEA was given to the U.S. Department of Labor, not the EEOC. After amendments to the ADEA in 1978, President Jimmy Carter transferred the ADEA enforcement authority to the EEOC. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (May 9, 1978).

[106] 29 U.S.C. § 660(c)(1).

[107] Taylor v. Brighton Corp., 616 F.2d 256, 263-64 (6th Cir. 1980).

> The Secretary of Labor filed an amicus brief urging this court to find an implied private right of action under § 11(c). The Secretary says he has neither the resources nor the personnel to handle all § 11(c) complaints adequately. . . . A private right of action should be implied, the Secretary argues, because individual suits offer the only realistic hope of protecting employees from retaliatory discrimination. The Secretary should address his arguments to Congress, not the courts.

Id.

court via a wrongful discharge in violation of public policy claim.[108] However, the states are split on whether they will allow occupational safety violations to serve as the public policy implicated in such claims. Some will, while others hold that OSHA preempts the state common law claim.[109]

Passed four years after OSHA, ERISA, a law that provides security for employee pensions and other benefits, contains an interference clause. ERISA provides, in relevant part,

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled . . . .[110]

The ERISA interference[111] prohibition applies to vested and nonvested plans, whether they are pension plans or welfare benefit plans.[112] The ERISA interference provision has typically been broadly construed, but it is cabined by the principle that employers have not historically been required to provide benefits to employees and have wide discretion over those benefits they do opt to provide. Nevertheless, employers that choose to provide such benefits must keep the promises they make concerning those benefits.

There is no shortage of criticism concerning the drafting of the ERISA statute,[113] and its anti-retaliation provision, inclusive of its interference clause, is included in the critiques.[114] Courts uniformly require a showing of intent to interfere. While there is some variation regarding the elements of an ERISA claim between federal circuits, most courts require the plaintiff to show "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment

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[108] *See infra* Section IV.A (discussing shortfalls with such common law remedies).

[109] Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 628-29 (2006) (noting New Jersey court determined that OSHA could be basis of wrongful discharge claim, but other states have limited when federal law can be state public policy).

[110] 29 U.S.C. § 1140.

[111] ERISA also has a criminal equivalent of its interference clause found in Section 511 that prohibits interference through criminal acts, such as fraud or violence. *Id.* § 1141.

[112] *See* 29 C.F.R. §§ 2510.3-1 to -2 (2022) (defining employee welfare benefit plans and employee pension benefit plans).

[113] The late federal judge William Acker once wrote, "Occasionally, a statute comes along that is so poorly contemplated by the draftspersons that it cannot be saved by judicial interpretation, innovation, or manipulation. It becomes a litigant's plaything and a judge's nightmare. ERISA falls into this category." William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 285 (1999).

[114] *See, e.g.*, George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 814 (7th Cir. 2012) ("The [ERISA retaliation] provision is a mess of unpunctuated conjunctions and prepositions. Although the district court concluded that the language is unambiguous, it is anything but." (citation omitted)).

of any right to which the employee may become entitled."[115] Benefits-related common law claims, like wrongful discharge in violation of public policy, are typically deemed preempted by ERISA.

In 1990, Congress passed the ADA. The ADA's interference clause provides,

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA].[116]

The ADA's interference clause is one of the most comprehensive ones among workplace statutes. It is almost identical to the interference provision contained in the Fair Housing Act ("FHA").[117] The FHA interference clause was referenced during the legislative debate of the bill that became the ADA when the legislative committee noted that it intended for the interference clause of the FHA to be used as the basis for regulations pertaining to ADA interference.[118]

Under the ADA's clause, a threat from an employer does not have to be carried out for interference to occur. Likewise, the individual does not have to actually be deterred from exercising the right for it to be interference. Common examples of interference include attempts to deter an employee from requesting disability accommodations, efforts to coerce an employee into relinquishing an accommodation that is currently being provided, and threatening an employee with job loss or an applicant with nonhire if they do not submit to a prohibited medical inquiry or examination.[119]

Courts are split on whether intent is required for ADA interference claims, but the majority of courts do require it.[120] Importantly, coverage under the ADA's interference provision is not limited to qualified individuals with disabilities.

Passed three years after the ADA, the FMLA provides, "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."[121] The FMLA has one of the

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[115] Humphreys v. Bellaire Corp., 966 F.2d 1037, 1043 (6th Cir. 1992) (quoting Gavalik v. Cont'l Can Co., 812 F.2d 834, 852 (3d Cir. 1987)); May v. Shuttle, Inc., 129 F.3d 165, 169 (D.C. Cir. 1997); Bodine v. Emps. Cas. Co., 352 F.3d 245, 250 (5th Cir. 2003).

[116] 42 U.S.C. § 12203(b).

[117] 42 U.S.C. § 3617 (changing only minor words, such as "individual to "person").

[118] *See* H.R. REP. NO. 101-485, pt. 2, at 138 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 421.

[119] *EEOC Retaliation Guidance*, *supra* note 26.

[120] *Compare* Equal Emp. Opportunity Comm'n v. Day & Zimmerman NPS, Inc., 265 F. Supp. 3d 179, 204-05 (D. Conn. 2017) (holding intent is not required to prove ADA interference after analogizing ADA interference with NLRA interference, which does not require intent), *with* Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 550-51 (7th Cir. 2017) ("[A] plaintiff alleging an ADA interference claim must demonstrate that . . . the defendants were motivated by an intent to discriminate.").

[121] 29 U.S.C. § 2615(a)(1).

largest bodies of interference case law, likely because there is a private right of action and because plaintiffs are not required to exhaust administrative remedies prior to filing in federal court. The Department of Labor has stated, through the FMLA implementing regulations, that the FMLA's prohibition against interference forbids "discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."[122]

The FMLA has been broadly interpreted, and courts have compared FMLA interference to NLRA interference.[123] Refusing to permit an employee to take FMLA leave, discouraging employees from taking FMLA leave, and refusing to restore employees to their position upon return from FMLA leave are all common instances of interference.

Like OSHA's, the Uniformed Services Employment and Re-employment Rights Act of 1994 ("USERRA")[124] interference clause does not contain the term "interfere." It reads, "An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under [USERRA] . . . or (4) has exercised a right provided for in this [statute]."[125] USERRA's interference provision specifically deals with past rights, requiring the right to already have been exercised.[126] This language could prevent a court from finding interference where, for example, a service member informed her employer of her desire to take leave for military purposes but was threatened with job loss should she actually exercise that right. Moreover, because the statutory language specifically states that an employer may not discriminate "in employment," courts have declined to apply the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*[127] to USERRA interference claims. Consequently, USERRA interference only applies to adverse employment actions rather than adverse actions generally.[128]

In addition to prohibiting an employer from interfering with a right under the statute, interference clauses typically contain language stating that an employer

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[122] 29 C.F.R. § 825.220(c) (2022).

[123] Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123 (9th Cir. 2001) (observing that, as language in FMLA "largely mimics" language in NLRA, courts' interpretation of NLRA helps clarify meaning of FMLA).

[124] 38 U.S.C. §§ 4301-4335.

[125] *Id.* § 4311(b).

[126] *See* Quick v. Frontier Airlines, Inc., 544 F. Supp. 2d 1197, 1208 (D. Colo. 2008) ("In determining whether an employer retaliated . . . ,[courts] must first decide whether the employee [asserted] such rights, thereby coming within the class of persons protected by the statute." (quoting Wallace v. City of San Diego, 479 F.3d 616, 624 (9th Cir. 2007))).

[127] 548 U.S. 53 (2006).

[128] Kitlinski v. Merit Sys. Prot. Bd., 857 F.3d 1374, 1381 n.3 (Fed. Cir. 2017) (noting anti-retaliation provision of Title VII is not restricted to adverse employment actions while USERRA anti-retaliation provision is because Title VII provision "does not contain the limiting language found in [the USERRA provision]"); *see also* Lisdahl v. Mayo Found., 633

may not "threaten, coerce, or intimidate" employees. The statutes that contain these prohibitions do not provide a definition of these terms, yet the courts frequently rely on these terms within an interference clause to find that broad types of employee misconduct are actionable.

B. *Unexplained Absences*

Despite the presence of interference clauses in many workplace statutes, these clauses are absent in just as many statutes. These absences appear to be unexplained by either the time period in which the legislation was passed or the nature of the statute.

Because interference clauses started appearing in workplace statutes in the early twentieth century, one might expect their presence to be as prevalent in workplace statutes as anti-retaliation clauses. However, not all minimum labor standards statutes have interference clauses. For instance, the Fair Labor Standards Act of 1938,[129] which provides a federal minimum wage, overtime provisions, child labor protections, and other labor standards does not contain an interference provision.[130] There is nearly a half-century gap after Congress began inserting interference clauses during which most labor standards statutes did not include interference clauses. The RLA and NLRA, passed in 1926 and 1935, respectively, contained interference clauses. These statutes conferred on workers the right to organize and collectively bargain.[131] The interference provisions were included to proscribe employers from hampering the exercise of these rights. In other words, the interference clauses were included to protect the statutory entitlement to organize and collectively bargain.

Interestingly, just three years later, a landmark piece of workplace legislation, the FLSA, was passed.[132] Like the RLA and NLRA, the FLSA created statutory entitlements for workers. Specifically, it entitled workers to a minimum wage and overtime pay when applicable.[133] However, an interference clause was not included in the FLSA. In the 1960s, several landmark workplace laws were passed, including the EPA, Title VII, and the ADEA, yet none of these statutes contained interference clauses. It was not until 1970, when OSHA was passed, that interference clauses reappeared in the drafting of workplace statutes. Statutes passed in the 1970s, like OSHA and ERISA, and in the 1990s, like the ADA, FMLA, and USERRA, contain interference clauses. Even one of the most recent workplace law statutes, the Pregnant Workers Fairness Act ("PWFA"),[134] which

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F.3d 712, 721 (8th Cir. 2011) ("[T]extual differences between the anti-retaliation provisions of Title VII and USERRA suggest that the latter has a more limited scope." (quoting Crews v. City of Mt. Vernon, 567 F.3d 860, 869 (7th Cir. 2009))).

[129] 29 U.S.C. § 215(a)(3).

[130] *Id.*

[131] 45 U.S.C. § 152; 29 U.S.C. §§ 151-169.

[132] Pub. L. No. 75-718, 53 Stat. 1060-70 (codified as amended at 29 U.S.C. §§ 201-219).

[133] 29 U.S.C. §§ 206-207.

[134] 42 U.S.C. § 2000gg.

passed in 2022 and went into effect in June 2023, contains an interference clause.[135] The PWFA requires the provision of "reasonable accommodations to [a worker's] known limitations related to . . . pregnancy, childbirth, or related medical conditions," except where such provision would cause the employer undue hardship.[136]

Additionally, there appears to be no correlation between the type of workplace law (i.e., minimum labor standards or antidiscrimination) and the presence of interference clauses. The NLRA, ERISA, and FMLA are minimum labor standards laws because they create statutory entitlements, like the right to bargain collectively[137] and the right to take unpaid leave for qualifying family and medical conditions,[138] for employees. These can be referred to as universalist statutes because the demographic characteristics of the employees involved are not at issue. Interference clauses in these statutes prohibit employers from interfering with an employee's right to the entitlement.

However, the ADA is typically viewed as an employment discrimination statute wherein discriminating against individuals because of a protected characteristic is prohibited. The ADA requires reasonable accommodations for employees with disabilities, and these accommodations constitute entitlements. Similarly, other employment discrimination laws, like Title VII and the Pregnancy Discrimination Act of 1978,[139] require accommodations for religion and pregnancy. Viewing the accommodation requirements as statutory entitlements requires little argument. However, even employment discrimination statutes that do not require accommodations nevertheless create statutory entitlements. For instance, the right of an employee to not be sexually harassed in the workplace is a statutory entitlement. Likewise, the right of an employee to not be treated differently because of the employee's age is a statutory entitlement. Just as interference clauses in statutes like the NLRA, ERISA, and the FMLA protect statutory entitlements created in those statutes, they can and should be used to protect the antidiscrimination entitlements contained in employment discrimination laws.

III. IMPLIED INCLUSION

Interference clauses broaden the protections against employer reprisal for exercising or attempting to exercise a statutory right. Perhaps the Ninth Circuit put it best when comparing interference clauses and retaliation clauses, stating, "[Interference clauses] protect[] a broader class of persons against less clearly defined wrongs."[140] Ideally, the judiciary would interpret all workplace statutes as

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[135] *Id.* § 2000gg-2(f)(2).

[136] *Id.* § 2000gg-1(1).

[137] 29 U.S.C. § 157.

[138] 29 U.S.C. § 2601(b)(2).

[139] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

[140] Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003).

having an implied prohibition against employer interference, regardless of whether the statute contained an explicit interference clause. Doing so would not be uncommon or incongruent with retaliation jurisprudence.

The Supreme Court has recognized implied retaliation prohibitions in certain statutes despite the absence of any type of retaliation clause. For instance, in *Sullivan v. Little Hunting Park, Inc.*,[141] the Court considered whether 42 U.S.C. § 1982[142] contained a prohibition against retaliation.[143] The case involved a white homeowner who was a member of a corporation that operated a community park and playground for residents of Fairfax County, Virginia.[144] The corporation's bylaws entitled a member to assign his share to the tenant when he rents his home with approval by the board of directors.[145] The white homeowner leased a home to a Black man, and the corporation refused to allow the membership share to be assigned.[146] When the white homeowner protested the refusal, the corporation expelled him.[147] The Court concluded that a proscription against retaliation indeed was implied in the statute, even though the statute contained no specific anti-retaliation language.[148]

Nearly forty years after *Sullivan*, in *CBOCS West, Inc. v. Humphries*,[149] the Court held that the Civil Rights Act of 1866 contained an implicit retaliation provision, and thus retaliation claims were actionable under 42 U.S.C. § 1981 despite the absence of an anti-retaliation provision in the statute.[150] The Court has also found implied rights of action for retaliation in other statutes outside of the workplace law context, including 42 U.S.C. § 1982[151] andTitle IX of the Education Amendments of 1972.[152]

This line of cases seems to suggest that, as with anti-retaliation provisions, the Court would be amenable to interpreting statutes with no explicit interference provision as containing an implicit prohibition against interference. Moreover, *Sullivan* can, and should, be read as holding that § 1982 contains an implicit interference prohibition. The statute provides all citizens the right to,

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[141] 396 U.S. 229 (1969).

[142] 42 U.S.C. § 1982 states, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[143] *Sullivan*, 396 U.S. at 237.

[144] *Id.* at 234.

[145] *Id.*

[146] *Id.* at 234-35.

[147] *Id.* at 235.

[148] *See id.* at 237.

[149] 553 U.S. 442 (2008).

[150] *Id.* at 452.

[151] *Sullivan*, 396 U.S. at 237.

[152] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 168 (2005) (holding cause of action valid where plaintiff, who was not member of protected class, alleged retaliation by defendant after complaining of Title IX violations, despite Title IX not explicitly prohibiting retaliation).

among other things, lease real and personal property.[153] The Court held that the corporation's "refus[al] to approve the assignment of the membership share . . . was clearly an *interference* with [the tenant's] right to 'lease.'"[154]

Although the Court seems unwilling to interpret statutes as having implied causes of action, even using the Court's current posture, interpretation of workplace statutes as containing an implied interference clause seems plausible. In *Ziglar v. Abbasi*,[155] a four-two decision,[156] the Court indicated a possible retreat from its previous practice of finding implied causes of action to fulfill the purpose of a statute.[157] *Ziglar* was not a workplace law case; rather, it involved claims that immigrant-detainees were subjected to constitutional and civil rights violations while in government custody.[158] There, the Court noted,

> In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime*," the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.
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> . . .
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> Later, the arguments for recognizing implied causes of action for damages began to lose their force.[159]

This language from the 2017 *Ziglar* opinion suggests that finding implied causes of action where they are not explicitly listed in the statute is a thing of the past. However, as mentioned above, the Court found implied causes of action for retaliation in 2005 in Title IX[160] and in 2008 for § 1981.[161] The view of the Court seems to be that whether an implied right of action exists depends on

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[153] 42 U.S.C. § 1982.

[154] *Sullivan*, 396 U.S. at 237 (emphasis added).

[155] 582 U.S. 120, 135-36 (2017).

[156] Justices Neil Gorsuch, Elena Kagan, and Sonia Sotomayor did not participate in the decision. *Id.* at 156. Justice Gorsuch had not yet been seated on the Supreme Court when the Court heard arguments in the case. Justices Kagan and Sotomayor recused themselves, presumably because Justice Sotomayor heard arguments in the case when it was before the Second Circuit and Justice Kagan was involved in the case when she was Solicitor General. Jonathan R. Nash, *The Case Against Four Person Majorities on the Supreme Court*, HILL (July 24, 2017, 4:00 PM), https://thehill.com/blogs/pundits-blog/the-judiciary/343488-the-case-against-four-person-majorities-on-the-supreme-court/ [https://perma.cc/EEB2-K34J]. Six justices are required to maintain a quorum of the Court. 28 U.S.C. § 1.

[157] *See Ziglar*, 582 U.S. at 135-36 (noting Congress is usually responsible for deciding damages remedy).

[158] *Id.* at 125-26 (noting detainees were in custody for months under harsh conditions as result of U.S. law enforcement response to 9/11).

[159] *Id.* at 131-32 (citations omitted) (first quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001); and then quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

[160] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 168 (2005).

[161] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008).

statutory intent. The Court has noted, "If the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'"[162]

Interference prohibitions align with this view. When Congress creates a workplace entitlement (e.g., the entitlement to be paid a minimum wage), it necessarily intends to prevent interference with the entitlement. Despite the Court needing to interpret all workplace statutes as containing an implied interference proscription, explicit language in the statute is best as it leaves no doubt as to statutory intent. Perhaps the Court put it best when it wrote, "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."[163] Consequently, legislative intervention is warranted, and Congress should include interference clauses in all workplace statutes.

IV. INTEGRATING INTERFERENCE

Ideally, the judiciary would interpret all workplace statutes as having an implied prohibition against employer interference, regardless of whether the statute contained an explicit interference clause. However, explicit statutory language incorporating interference theory would be better than relying on judicial interpretation.

Interference theory is a useful tool to safeguard the rights created by the statutes. Interference provisions are needed in all workplace statutes. For instance, recall the above hypothetical involving the employee who had been in an accident and was terminated before he could request a disability. That employee would have the benefit of being able to recover under interference theory because the ADA has an interference clause. However, this scenario may turn out markedly different if a pregnancy accommodation or religious accommodation under Title VII had been at issue instead of a disability accommodation under the ADA. This is because, unlike the ADA, Title VII has no interference clause. Nonetheless, the rights Title VII seeks to secure are no more or less important than the rights the ADA secures. To increase the efficacy of enforcement, interference clauses should be added to all workplace statutes.

This Part explains the need for interference clauses in all workplace statutes given the contemporary judicial interpretation of interference and retaliation claims. It begins with a discussion of why existing interference remedies at common law are not adequate to protect individuals seeking redress for interference with statutory entitlements. It then contrasts the legal analytical frameworks for retaliation theory and interference theory and applies these frameworks to two incredibly common types of employer misconduct to illustrate how interference

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[162] *Ziglar*, 582 U.S. at 133 (quoting *Alexander*, 532 U.S. at 286-87).

[163] Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

theory is helpful in remedying this misconduct in ways that are out of the reach of retaliation theory.

A. *The Insufficiency of Common Law*

It may seem as though there is no need to insert interference clauses in statutes because the common law can fill in the gaps. Tortious interference claims still exist in common law and can be applied to a myriad of circumstances, including employment contexts. Though several interference-based causes of action exist at common law, these common law remedies are inadequate to effectively address the problem for several reasons. First, the default common law employment rule is at odds with the current need for protections from employer interference. Additionally, the variability of the common law from one jurisdiction to another would pose a problem regarding uniformity of workplace rights. Moreover, preemption issues present challenges to effective enforcement. Finally, a statutory interference cause of action would avoid some of the criticisms typically leveled at the tortious interference cause of action.

At-will employment is the common law default rule in every state except Montana.[164] At-will allows an employer to terminate an employee for "a good reason, a bad reason, or no reason at all," absent a contract stating otherwise.[165] While at-will employment is by far the dominant common law rule in the United States, the doctrine does have some exceptions. Common law exceptions include wrongful termination in violation of public policy, implied contracts, and the implied covenant of good faith and fair dealing.[166]

Wrongful termination in violation of public policy protects employees from being fired for a reason in contradiction to public policy. Common examples include being terminated for filing a workers' compensation claim, taking leave from work for jury duty, and refusing to engage in illegal conduct at the behest of the employer.[167] While this is an extremely important exception to at-will employment, it is limited in two primary ways. The first is that it only applies where the adverse action is termination. Other unfavorable personnel actions (such as demotion, suspension, wage decrease, etc.) are typically not covered.[168] Additionally, claims for wrongful termination where the public policy involved

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[164] Montana requires an employer to have "good cause" to terminate a nonprobationary employee. *At-Will Employment - Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/3G43-FQS9] (noting Montana created far-reaching cause of action applicable to any employee who believes they were "terminated without good cause").

[165] *E.g.*, Loucks v. Star City Glass Co., 551 F.2d 745, 747 (7th Cir. 1977).

[166] *See generally* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3 (2001).

[167] *See* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 68 (2008).

[168] *Id.* at 116.

is a federal workplace statute have been held to be preempted by the federal statute at issue.[169]

Another common law exception to the at-will employment rule is implied contract. Though most employment contracts are express, forty-two U.S. jurisdictions recognize implied contracts.[170] These jurisdictions hold that an employer can imply that employment is for a fixed or indefinite term or can imply that employees will only be discharged for cause based on the employer's statements or past practice.[171] The primary drawback to this exception is that there may often be evidentiary issues that preclude proving the implied contract.

The implied covenant of good faith and fair dealing is another common law exception to the at-will employment rule. Some courts have applied the covenant in holding that employers cannot terminate an employment relationship in bad faith or with malicious motivations.[172] A minority of jurisdictions recognize this exception.[173]

The aforementioned common law exceptions represent a small percentage of exceptions to the at-will employment doctrine. Most of the exceptions to at-will employment are statutory. Antidiscrimination law is are one example. For instance, an employer can fire an employee for a good reason, a bad reason, or no reason at all, but the employer cannot fire an employee because of their race,

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[169] *See, e.g.*, Wiles v. Medina Auto Parts, 773 N.E.2d 526, 532 (Ohio 2002) ("When viewed as a whole, the FMLA's remedial scheme provides an employee with a meaningful opportunity to place himself or herself in the same position the employee would have been absent the employer's violation of the FMLA. . . . This combination of compensatory damages and equitable remedies is sufficiently comprehensive to ensure that the public policy embodied in the FMLA will not be jeopardized by the absence of a tort claim for wrongful discharge in violation of public policy."); Lontz v. Tharp, 647 S.E.2d 718, 722 (W. Va. 2007) (finding plaintiff's allegation that she was fired based on employer's belief that she was encouraging union organizing activities was preempted by NLRA); Andrews v. Alaska Operating Eng'rs-Emps. Training Tr. Fund, 871 P.2d 1142, 1147 (Alaska 1994) (holding plaintiff's claim that he was fired to prevent him from testifying about possible misuse of pension funds was preempted by ERISA).

[170] *See At-Will Employment - Overview*, *supra* note 164.

[171] *See, e.g.*, Kestenbaum v. Pennzoil Co., 766 P.2d 280, 284 (N.M. 1988) ("[O]ral statements made by an employer may be sufficient to create an implied contract which provides that an employee shall not be discharged except for cause.").

[172] *See, e.g.*, Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 738 (Ala. 1987) (holding at-will employment contract obligates employer to act in good faith and deal fairly with employees); Mitford v. Ferdinand de Lasala, 666 P.2d 1000, 1007 (Alaska 1983) (finding employer's termination of plaintiff violated employer's duty of good faith and fair dealing because there was evidence termination was done to prevent plaintiff from sharing in employer's profits); Fortune v. Nat'l Cash Reg. Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (deciding implied covenant of good faith and fair dealing in at-will employment contract is breached when principal fires agent in attempt "to deprive the agent of any portion of a commission due the agent").

[173] *See At-Will Employment - Overview*, *supra* note 164 (noting Montana as one exception).

color, national origin, or other protected characteristics.[174] Anti-retaliation laws that prohibit individuals for being terminated because they have enforced rights under a minimum labor standards statute are another exception. In fact, workplace law statutes are passed for the explicit purpose of abrogating the common law. Workplace statutes create specific labor and employment rights, and the enforcement mechanisms for these statutes should likewise be statutory. Where there is a statutory right, there should be a statutory remedy.

Common law tortious interference claims are, in a sense, antithetical to the common law at-will employment rule. Flexibility is a hallmark of the at-will rule, allowing either the employer or employee to terminate the employment relationship at any time. In contrast, stability of business relationships is the cornerstone of tortious interference liability.[175] Tortious interference is concerned with ensuring that existing contracts are stable, enforceable, and provide economic predictability.[176] Reliance on a common law remedy aimed at protecting the stability of contracts will often paradoxically conflict with the default rule governing employment, which does not value stability.

In addition to interference being antithetical to the common law default rule of at-will employment, the variability of the common law between jurisdictions poses enforcement problems. The variation across jurisdictions with respect to common law tortious interference is vast.[177] The text of workplace statutes, including their anti-retaliation provisions, varies greatly.[178] Additionally, among the workplace statutes that already contain interference provisions, there are drastic differences in text, which can lead to disparate enforcement. Further, differences from one jurisdiction to another can lead to even more inconsistency. In other words, the difference in how an individual's ERISA interference claim is interpreted and how another individual's ADA interference claim is interpreted yields less inequity than, for example, the difference in how one individual's wrongful discharge claim for reporting an OSHA violation is analyzed in Illinois versus how another individual's wrongful discharge claim for reporting the same OSHA violation is handled in Indiana.

Two notable variations are whether malice is a necessary element of a tortious interference claim, and whether claims can be brought against employers. Some states require malice as an element of tortious interference,[179] while others do

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[174] *See* Porter, *supra* note 167, at 68-69.

[175] *See* Danforth, *supra* note 53, at 1513.

[176] *Id.* ("[Tortious interference] facilitates the ability of contracts to stabilize commercial activity—to provide economic predictability not only for the parties to a contract but also for strangers.").

[177] *See generally* BRIAN M. MALSBERGER, TORTIOUS INTERFERENCE IN THE EMPLOYMENT CONTEXT: A STATE-BY-STATE SURVEY (2022).

[178] *See supra* Section II.A.

[179] *See, e.g.*, Burcham v. Unison Bancorp, Inc., 77 P.3d 130, 152 (Kan. 2003) ("A claim of tortious interference with a contract is predicated upon malicious conduct by the defendant.").

not.[180] There are also states who require malice specifically where an employment relationship is involved.[181] At times, malice has been confused with intent,[182] but they are not the same. Typically, the requisite malice is ill will or spite.[183] The burden to prove malice in some jurisdictions can prove fatal to an aggrieved employee's case, particularly given information asymmetry between employees and employers.[184]

One primary distinction of tortious interference common law claims in an employment context is that they require wrongdoing by a *third party* to the current or prospective business relationship.[185] A party to the contract could not be the person held liable for tortious interference. Rather, breach of contract would provide the appropriate remedy for parties. For this reason, many state and federal courts have often held that a tortious interference claim is not available to remedy an employer's interference with an employee's rights.[186]

This requirement of a third party has muddied the waters with respect to employment claims. This has particularly posed problems for courts trying to decide whether an individual who engaged in the alleged misconduct constitutes the employer, which would not make them a third party, or whether the person

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[180] *See, e.g.*, Clements v. Withers, 437 S.W.2d 818, 822 (Tex. 1969) (requiring showing of intentional and knowing interference, but not actual malice, to recover in tortious interference claim).

[181] *See, e.g.*, Psy-Ed Corp. v. Klein, 947 N.E.2d 520, 536 (Mass. 2011) ("Where the defendant is a corporate official acting in the scope of his corporate responsibilities, a plaintiff has a heightened burden of showing the improper motive or means constituted 'actual malice,' that is, 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest.'" (quoting Blackstone v. Cashman, 860 N.E.2d 7, 13 (Mass. 2007))).

[182] *See* Tipton v. Burson, 238 P.2d 1098, 1100 (Ariz. 1951) ("The malice required in actions for damages for wrongfully interfering with a contract does not necessarily imply spite or ill will but malice in its legal sense and by this is meant 'the intentional doing of a wrongful act without justification or excuse.'" (quoting Meason v. Ralston Purina Co., 107 P.2d 224, 229 (Ariz. 1940))).

[183] *See, e.g.*, *Psy-Ed Corp.*, 947 N.E.2d at 536.

[184] *See* Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 97 (2008) ("Numerous studies have shown that employees are severely misinformed about their employment rights, particularly the lack of protection against unjust dismissals.").

[185] RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1979) ("One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."); *see also, e.g.*, Israel v. Wood Dolson Co., 134 N.E.2d 97, 99 (N.Y. 1956) (requiring plaintiff bringing tortious interference claim to show defendants were not parties to contract).

[186] *See, e.g.*, Long, *supra* note 53, at 882 (discussing how many courts have dismissed tortious interference claims by plaintiffs against their employers because "the tort of interference cannot be committed by a party to a contract").

stands in their individual capacity, which would make them a third party to the contract or business relationship at issue.[187]

In situations where an agent of the employer has the authority to make personnel decisions on behalf of the employer, courts view that agent as the employer.[188] Thus, the requirement of having a third party for tortious interference claims is not met. Perhaps Alex Long stated it best, saying, "In the modern workplace, it is difficult to state for certain just where an 'employer' ends and a 'supervisor' begins."[189] In those instances where the line between employer and supervisor is indistinguishable, there can be no viable tortious interference claim. In situations in which the supervisor is found not to have acted within the scope of their employment, the supervisor constitutes the third party, and a tortious interference claim is viable. However, the supervisor's pockets usually are not as deep as the employer's, limiting the scope of relief available to the victim.[190]

In most tortious interference claims, there are three parties: (1) the conveyor of the right through contract; (2) the person who, because of the conveyance, now has some sort of legal entitlement; and (3) the person who interferes with the entitlement.[191] With statutory interference claims, the employer is neither the conveyor of the right nor the individual to whom the right is conveyed. Rather, the conveyor of the right through statute is Congress, and the individual to whom the right is conveyed is the employee. Hence, if an employer interferes with the right, that employer constitutes a third party.

While common law is certainly not enough to fill the statutory gaps in workplace legislation, the above explanation of the shortfalls of the common law in no way means that common law causes of action are immaterial. Despite the advantages to having a statutory interference claim as a remedy, there are also some challenges, one of which is simply the uphill battle that many plaintiffs face in bringing workplace claims, and particularly, employment discrimination claims. Many employment discrimination claims are decided at the summary judgment stage, with employers prevailing on summary judgment over 70% of the time.[192] Scholars have posited several possible reasons for workers'

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[187] Long, *supra* note 49, at 507-09.

[188] Long, *supra* note 53, at 885-86.

[189] Long, *supra* note 49, at 493.

[190] *Id.* at 506 (warning when employee may sue supervisor who fired employee, their "pockets may not be as deep as the corporate employer's").

[191] *See id.* at 504.

[192] *See* BARRETT & FARAHANY, LLP, ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA 3 (2013) (finding percentage of summary judgment motions deciding in employers' favor to be as high as 83% percent); SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 23 (2017) (noting study "found that in over 70 percent of discrimination cases in which the employer moved for summary judgment,

unsuccessful attempts to enforce workplace law. These reasons can range from political bias[193] to disproportionate access to information,[194] and, in some cases, erroneous preconceptions about employees fabricating their claims.[195] Having a remedy available through the common law instead of a traditional statutory claim may allow plaintiffs to avoid some of the pitfalls that come with statutory workplace law claims, as common law interference claims are less likely to be resolved on a motion for summary judgment.[196] Moreover, statutory claims have procedural requirements, like the obligation to exhaust administrative remedies, that may also affect aggrieved employees.[197] Common law interference claims do not require these measures, so they may prove to be less burdensome for plaintiffs seeking relief.[198] Consequently, while inclusion of interference clause statutes is necessary, such inclusion should not replace common law causes of action.

B. *Differences in Legal Framework*

There are stark differences in the analytical frameworks for claims brought under retaliation theory versus those asserting interference theory. The framework for retaliation cases is uniform and is applied similarly across federal circuits regardless of the workplace statute at issue. Much more variation exists with the framework for interference theory, and the interference framework for some statutes have garnered more consensus than others. For instance, with FMLA interference claims, courts are fairly uniform in their approach, requiring five elements to make out a prima facie case of interference: (1) the plaintiff was an eligible employee; (2) the employer was subject to FMLA requirements;

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the motion was granted"); Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1946-47 (2020) (describing how 86% of federal employment discrimination cases are dismissed by motion, and stating "three-quarters of summary judgment motions are resolved in favor of the employer").

[193] *See* SPERINO & THOMAS, *supra* note 192, at 135-36 (noting although generally Republicans favor narrower employee protections and Democrats favor broader protections, simple partisan lens does not fully explain discrimination law jurisprudence).

[194] BENJAMIN HARRIS, INFORMATION IS POWER: FOSTERING LABOR MARKET COMPETITION THROUGH TRANSPARENT WAGES 4 (2018).

[195] Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223, 234-40 (2014) (arguing empirical evidence does not support belief that employees frequently fabricate discrimination claims against employers).

[196] Long, *supra* note 53, at 876 ("[A]s the question of impropriety is usually one for the jury, interference claims are less likely to be resolved on a motion for summary judgment than are discrimination claims . . . .").

[197] *See* 29 C.F.R. § 35.40 (2022) (making exhaustion of administrative remedies prerequisite to filing claim under ADEA); *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/53ZC-6HMU] (last visited Jan. 15, 2024) (outlining procedures for filing discrimination claim).

[198] *See* Long, *supra* note 53, at 880 (noting avoiding removal to federal court is another reason plaintiffs may prefer common law claims).

(3) the plaintiff was entitled to leave; (4) the plaintiff gave proper notice of his intention to take FMLA leave; and (5) the employer denied the plaintiff the benefits to which the plaintiff was entitled under the FMLA.[199] However, some courts simply require showing the employer somehow interfered with a FMLA right and harm resulted from that interference.[200] The analytical methodology for interference claims of other statutes has much more variation among courts. Some courts apply the standard *McDonnell-Douglas*-inspired burden-shifting test that they apply to retaliation claims to interference claims.

Despite the interference framework remaining largely heterogenous, the framework offers some stability, not with respect to what it requires, but regarding what it does not require. This Section discusses the intent requirement of interference theory, an element that is not consistently required among circuits or statutes. It also examines the lack of a need to prove engagement in protected activity and how this helps bring redress for employees who have experienced employer threats and anticipatory retaliation.

1. Intent to Interfere

Retaliation is an intentional offense.[201] Its burden-shifting framework is patterned after the *McDonnell Douglas* framework,[202] which was created to allow a showing of intent in the absence of direct evidence. However, interference is an intentional offense in some circuits and with some statutes, but not others. Whether intent is required for an interference claim varies between circuits and according to statute, though there tends to be some agreement with certain statutes. All federal circuits but one have held that interference claims brought

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[199] This approach is taken by the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits. *See, e.g.*, Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 722 n.8 (1st Cir. 2014); Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 424 (2d Cir. 2016); Ross v. Gilhuly, 755 F.3d 185, 191-92 (3d Cir. 2014); Caldwell v. KHOU-TV, 850 F.3d 237, 245 (5th Cir. 2017); Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006); Taylor-Novotny v. Health All. Med. Plans, Inc., 772 F.3d 478, 498 (7th Cir. 2014); Brandt v. City of Cedar Falls, 37 F.4th 470, 478 (8th Cir. 2022); Sanders v. City of Newport, 657 F.3d 772, 778 (9th Cir. 2011).

[200] The Fourth, Tenth, Eleventh, and DC Circuits use this approach. *See, e.g.*, Adams v. Anne Arundel Cnty. Pub. Schs., 789 F.3d 422, 427 (4th Cir. 2015) ("To make out an 'interference' claim under the FMLA, an employee must thus demonstrate that (1) he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm."); Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1180 (10th Cir. 2006) (requiring showing of eligibility for leave entitlement, adverse action constituting interference, and causal connection between adverse action and exercise or attempted exercise of right); White v. Beltram Edge Tool Supply, Inc., 789 F.3d 1188, 1191 (11th Cir. 2015) ("An interference claim has two elements: (1) the employee was entitled to a benefit under the FMLA, and (2) her employer denied her that benefit."); Savignac v. Jones Day, 486 F. Supp. 3d 14, 42 (D.C. Cir. 2020) (requiring plaintiff to show interference and prejudice arising from interference).

[201] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74 (2005) ("Retaliation is, by definition, an intentional act.").

[202] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

pursuant to the FMLA do not require a showing of intent.[203] Circuits uniformly agree that intent is required for ERISA interference claims.[204] The consensus

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[203] *See, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998) ("Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer."); *Graziadio*, 817 F.3d at 424 (holding intent of employer is not part of five-part test to determine FMLA interference); Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 312 (3d Cir. 2012) (stating employee in FMLA interference claim does not need to prove intent to interfere); Sharif v. United Airlines, Inc., 841 F.3d 199, 203 (4th Cir. 2016) ("Unlike prescriptive entitlement or interference claims, employer intent [in retaliation claims] is relevant."); Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 282 (6th Cir. 2012) ("'[I]f an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a violation has occurred,' regardless of the intent of the employer." (quoting Arban v. W. Publ'g Corp., 345 F.3d 390, 401 (6th Cir. 2003))); King v. Preferred Tech. Grp., 166 F.3d 887, 891 (7th Cir. 1999) ("When an employee alleges a deprivation of these substantive guarantees, the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. In such cases, the intent of the employer is immaterial."); Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006) ("[A]n employee can prove interference with an FMLA right regardless of the employer's intent."); *Sanders*, 657 F.3d at 778 ("In interference claims, the employer's intent is irrelevant to a determination of liability."); Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 960 (10th Cir. 2002) (noting deprivation of right to take FMLA leave or reinstatement after taking such leave constitutes interference regardless of employer's intent); Bartels v. S. Motors of Savannah, Inc., 681 F. App'x 834, 840 (11th Cir. 2017) ("The employee need not show that the employer intended to deny an FMLA benefit—the employer's motives are irrelevant in the context of an interference claim."); McFadden v. Ballard Spahr Andrews & Ingersoll, LLP, 611 F.3d 1, 7 (D.C. Cir. 2010) (noting employee only needs to show interference to succeed on FMLA claim). *But see* DeVoss v. Sw. Airlines Co., 903 F.3d 487, 491 (5th Cir. 2018) ("[T]he cause of action created in § 2615(a), which prohibits employers from interfering with, or retaliating for, the exercise of FMLA rights, is understood to require showing that the employer had a discriminatory reason for the adverse employment action.").

[204] Barbour v. Dynamics Rsch. Corp., 63 F.3d 32, 37 (1st Cir. 1995) ("The ultimate inquiry in a[n] [ERISA interference] case is whether the employment action was taken with the specific intent of interfering with the employee's ERISA benefits."); Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1111 (2d Cir. 1988) (articulating that plaintiff must show employer's intent to engage in activity prohibited by interference clause); Gavalik v. Cont'l Can Co., 812 F.2d 834, 851 (3d Cir. 1987) ("Under the prevailing case law, and in accordance with the statutory language, the essential element of proof under [ERISA] is specific intent to engage in proscribed activity."); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 238-39 (4th Cir. 1991) (requiring specific intent to interfere with pension rights); Clark v. Resistoflex Co., 854 F.2d 762, 770 (5th Cir. 1988) (requiring plaintiff to show employer's specific intent to violate ERISA in order to recover for ERISA interference); Spangler v. E. Ky. Power Coop., Inc., 790 F. App'x 719, 721 (6th Cir. 2019) ("[A] plaintiff must prove that an adverse action . . . was taken 'with the specific intent of violating ERISA.'" (quoting Roush v. Weastec, Inc., 96 F.3d 840, 845 (6th Cir. 1996))); Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC, 741 F.3d 819, 826 (7th Cir. 2014) ("A[n] [ERISA interference] claim requires a showing of specific intent to interfere with the participant's attainment of benefits."); Barnhardt v. Open Harvest Coop., 742 F.3d 365, 369 (8th Cir. 2014) ("In order to recover under a[n] [ERISA] interference claim, a plaintiff 'must prove that [the defendant]

that FMLA interference claims do not require intent while ERISA interference claims do may be attributable to the statutory text of each. The FMLA interference provision states, "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."[205] The ERISA interference clause differs in that it provides, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled . . . or *for the purpose of* interfering with the attainment of any right . . . ."[206] Despite the difference in outcome with interference—with the FMLA not requiring intent and ERISA interference requiring intent—the circuits seem to be on one accord. On the other hand, the landscape regarding interference claims under the NLRA and ADA has more dissimilarity. The majority rule is that NLRA interference claims do not require a showing of intent.[207] Most courts look to the conduct rather than the motivation behind the conduct to determine whether NLRA interference has occurred.[208] Courts have had less occasion to take up the matter of whether ADA interference claims require intent.[209] The circuits that have decided the question have yielded mixed results.

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possessed a "specific intent to interfere" with her ERISA benefits.'" (quoting Manning v. Am. Republic Ins. Co., 604 F.3d 1030, 1044 (8th Cir. 2010))); Kimbro v. Atl. Richfield Co., 889 F.2d 869, 881 (9th Cir. 1989) (requiring showing of employer intent to establish ERISA interference claim); Garratt v. Walker, 164 F.3d 1249, 1256 (10th Cir. 1998) (requiring ERISA interference plaintiff to show that employer's intent to interfere with ERISA rights was motivating factor in employer's conduct); Gitlitz v. Compagnie Nationale Air Fr., 129 F.3d 554, 558 (11th Cir. 1997) ("The ultimate inquiry in a[n] [ERISA] case is whether the employer had the specific intent to interfere with the employee's ERISA rights." (quoting Clark v. Coats & Clark, 990 F.2d 1217, 1222 (11th Cir. 1993))); Giles v. Transit Emps. Fed. Credit Union, 794 F.3d 1, 5 (D.C. Cir. 2015) ("To prevail on a[n] [ERISA interference] claim, a plaintiff must demonstrate the employer specifically intended to engage in prohibited activity.").

[205] 29 U.S.C. § 2615(a)(1).

[206] 29 U.S.C. § 1140 (emphasis added).

[207] This is in contrast to retaliation claims under § 8(a)(3) of the NLRA, which do require intent. PAUL M. SECUNDA, JEFFREY M. HIRSCH & MICHAEL C. DUFF, LABOR LAW: A PROBLEM-BASED APPROACH 211 (2d ed. 2017) ("Section 8(a)(3) is intent-based and Section 8(a)(1) is not.").

[208] *See, e.g.*, NLRB v. Ill. Tool Works, 153 F.2d 811, 814 (7th Cir. 1946) ("[T]he test of interference, restraint and coercion under § 8(1) of the [NLRA] does not turn on the employer's motive or on whether the coercion succeeded or failed."); Fun Striders, Inc. v. NLRB, 686 F.2d 659, 662 (9th Cir. 1981) ("Although anti-union motive is required in [NLRA retaliation] violations, it is not an essential element of [NLRA interference] violations.").

[209] *See, e.g.*, EEOC v. Day & Zimmerman NPS, Inc., 265 F. Supp. 3d 179, 204 (D. Conn. 2017) ("Neither the Supreme Court nor the Second Circuit has yet outlined a legal test for an interference claim under the ADA."); Piotrowski v. Signature Collision Ctrs., LLC, No. 21-cv-02115, 2021 WL 4709721, at *2 (E.D. Pa. Oct. 8, 2021) ("It does not appear that the Third Circuit has set forth the elements for an ADA interference claim."); Huber v. Blue Cross & Blue Shield of Fla., Inc., No. 20-3059, 2022 WL 1528564, at *5 (E.D. La. May 13, 2022) ("The Fifth Circuit has not articulated a specific test to state an ADA interference claim.");

Some courts apply the *McDonnell Douglas* burden-shifting test to interference claims. Others do not.[210]

2. Protected Activity and Adverse Action

Much like intent is a defining characteristic of retaliation claims, but not necessarily interference claims, protected activity is also a distinguishing trait. Retaliation claims require a showing of protected activity and the employer's knowledge of such activity. Consequently, the protected activity usually comes before the action that constituted the employer misconduct. As mentioned above, anticipatory retaliation is an exception. Unlike retaliation claims, interference claims do not require protected activity. An employee does not have to exercise or attempt to exercise a statutory right for interference to occur. For example, firing an employee to keep her pension from vesting is actionable interference, even if the employee had not attempted to collect on the pension yet. Likewise, posting a notice that the taking of FMLA leave is frowned upon is an example of interference, even if no employee has yet submitted a request for FMLA leave.

The distinction between retaliation theory, which requires previous engagement in protected activity, and interference theory, which does not, becomes particularly salient with respect to threats of retaliation. Employer threats of retaliation can impede effective enforcement of a workplace statute without there having been previous protected activity. For instance, suppose an employer tells an employee she will be demoted if she reports an occupational safety violation, and consequently, the employee does not make the report. That employer has impeded the right of the employee to seek redress for the violation, and in doing so, hampered enforcement of the occupational safety regulation. Nevertheless, the employee may not be able to recover under retaliation theory because the court may interpret the fact that no complaint was made as a lack of protected activity, a crucial element of the prima facie case. However, this behavior would constitute interference.

Two important employer practices make the need for interference causes of action whereby protected activity is not required particularly imperative for effective enforcement. The first is employer threats of retaliation. Threats of retaliation are commonplace in America's workplaces.[211] Retaliation threats by employers may be explicit or come in the form of more veiled exchanges. Additionally, the subjection of other employees to retaliatory behavior is itself a threat. One of the primary purposes of retaliation is to deter other employees from reporting employer misconduct. Making an example of someone who

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Bayer v. Neiman Marcus Grp., Inc., No. 13-cv-04487, 2018 WL 2427787, at *6 (N.D. Cal. May 30, 2018) ("[N]either the Supreme Court nor the Ninth Circuit has yet outlined a legal test for a[n] [ADA] interference claim . . . .").

[210] *See* Liu v. Amway Corp., 347 F.3d 1125, 1136 (9th Cir. 2003) (noting that "[w]hile other circuits have applied the *McDonnell Douglas* framework to FMLA interference cases," the Ninth Circuit has explicitly declined to do so).

[211] *See* sources cited *supra* note 16.

reports suspected employer wrongdoing and suffers an adverse action because of it can have a chilling effect on reporting by other employees. If, for example, an employer tells an employee, "If you try to get my employees to form a union, I will fire you," the threat of termination may lead the employee to abandon any planned efforts to organize. In this instance, the employee has not yet exercised rights under the NLRA, and because of the threat, will not exercise such rights. Consequently, this employee would not be able to bring a successful retaliation claim because the employee did not engage in protected activity. Nevertheless, the employee could prevail on an interference claim. The following explanation by the Fourth Circuit is informative:

> An employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity. This is true even if an employee has yet to exercise a right protected by the Act. The rationale for this rule is straightforward. [The NLRA interference provision] reaches all acts by employers that 'interfere with, restrain, or coerce' their employees' exercise of protected rights, and this requires that the section reach employer conduct even when employees have yet to engage in protected activity.[212]

Whether the employer misconduct occurs after protected activity or the misconduct prevents protected activity, the outcome is the same. The employer has impeded the workplace statute and nullified the right Congress granted to the employee.

Additionally, courts have routinely found that an employer's threat does not constitute an adverse action.[213] Such findings are incongruent with the Supreme Court's pronouncement that actions that may dissuade a reasonable worker from engaging in protected activity constitute adverse actions.[214] This deviation from the articulated standard for adverse actions has been met with scholarly derision.[215] Nevertheless, the lower courts have continued this practice for well over a decade. The courts' decisions that threats do not constitute adverse actions coupled with the practical effects of threats dissuading workers from actually engaging in protected activity make it unlikely that retaliation theory will either

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[212] Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998) (internal citations omitted).

[213] Baloch v. Kempthorne, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (concluding employer's proposed suspensions did not constitute adverse action where suspension was not actually served); Tepperwien v. Entergy Nuclear Ops., Inc., 663 F.3d 556, 571 (2d Cir. 2011) (deciding employer's threat of termination did not constitute adverse action); Poullard v. McDonald, 829 F.3d 844, 856 (7th Cir. 2016) ("'Federal law protects an employee only from retaliation that produces an injury,' and by themselves, these threats did not." (quoting Stephens v. Erickson, 569 F.3d 779, 790 (7th Cir. 2009))).

[214] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see also* Alexander, *supra* note 16, at 800-05 (arguing lower courts misapply *Burlington Northern* by failing to consider employer threats adverse actions).

[215] *See* Alexander, *supra* note 16, at 787; Sperino, *supra* note 15, at 2044-47 (presenting empirical results showing courts unjustifiably discount deterrence effect of employer threats).

be an effective vehicle for recovery for employees or provide deterrence for employers. Interference theory would, however, provide necessary protections.[216] Hence, interference theory should be paired with retaliation theory in all labor and employment statutes.

The second employer practice that makes the need for an interference cause of action particularly essential is the practice of taking adverse action against an employee before the employee can engage in protected activity. Suppose an employee was recently in an automobile accident and plans to request a reasonable accommodation from the employer due to a disability that resulted from the accident. The employer discovers, or even simply suspects, that the employer will request an accommodation. In an effort to prevent that from happening, the employer fires the employee before the employee has an opportunity to request the accommodation. The employer has engaged in wrongdoing. However, the employee cannot bring a successful retaliation claim because the termination occurred before the employee had an opportunity to engage in protected activity. Additionally, the employee may be hampered in their ability to bring a failure to accommodate claim because the employee did not request an accommodation. Here, the ADA's interference clause would provide a remedy where the ADA retaliation clause does not.

The aforementioned examples concerning the NLRA and ADA show the utility of an interference clause to safeguard the rights created by the statutes. Interference provisions are needed in all workplace statutes. For instance, the above hypothetical involving the ADA accommodation would come out markedly different if a pregnancy accommodation or religious accommodation under Title VII were at issue instead of a disability accommodation. This is because Title VII has no interference clause. Nonetheless, the rights Title VII seeks to secure are no more or less important than the rights secured by the ADA. To increase

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[216] *See, e.g.*, Borneman v. Principal Life Ins. Co., 291 F. Supp. 2d 935, 961-62 (S.D. Iowa 2003) (finding threats about ERISA plaintiff's future career "can constitute an adverse employment action in the context of an interference claim" because such threats "materially affect whether or not such employee can freely exercise his ERISA rights," but these threats do not constitute adverse actions for retaliation purposes); HarperCollins S.F. v. NLRB, 79 F.3d 1324, 1329 (2d Cir. 1996) (finding employer's threat to close particular office location in event of work stoppage constituted NLRA interference); Ziccarelli v. Dart, 35 F.4th 1079, 1090 (7th Cir.) ("Threatening to discipline an employee for seeking or using FMLA leave to which he is entitled clearly qualifies as interference with FMLA rights."), *cert. denied* 143 S. Ct. 309 (2022); S. Bakeries, LLC v. NLRB, 871 F.3d 811, 821 (8th Cir. 2017) (upholding NLRB's finding that employer's threats to close plant violated NLRA interference provision); Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692, 698 (10th Cir. 1996) (upholding NLRB's finding that employer's threats to employees as they prepared to strike constituted NLRA interference).

the efficacy of enforcement, interference clauses should be added to all workplace statutes.

IV. CHARACTERISTICS OF AN EFFECTIVE INTERFERENCE CLAUSE

There are several characteristics of statutory interference clauses that increase their effectiveness. This Part discusses the specific characteristics that should be included in the interference provisions of workplace statutes to provide for robust protection and effective enforcement. They include explicitly stating that intent is not required, providing prescriptive and proscriptive protections, requiring aggrieved parties to exhaust administrative remedies where the statute as a whole requires exhaustion, not requiring the employer to have been successful in their attempt to prevent the employee from exercising the statutory right, covering postemployment actions, and providing protections to those who aid others in the exercise of statutory rights.

A. *Requirements*

There are certain provisions that an interference clause should contain to be effective. Interference clauses are effective when they make it clear the plaintiff need not prove the employer intended to discriminate. Interference clauses also have more teeth when they do not require showing that the employer was successful in its attempt to deny the benefit.

The interference clauses in workplace statutes should not require intent.[217] In many instances, whether an employee-plaintiff is able to successfully prove their claim of interference hinges on whether the employee can show intent. As one court aptly explained, "Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer."[218] For instance, an employee whose employer erroneously and unintentionally paid the employee below minimum wage should be entitled to bring a claim for the FLSA violation and recover despite the employer's lack of intent for the wage violation. Moreover, eliminating the intent requirement would provide further separation between retaliation and interference claims, though they both would exist to promote effective enforcement of the law. The Supreme Court has stated, "Retaliation is, by definition, an intentional act."[219] However, regardless of employer motive, employees are due their workplace rights provided under labor and employment statutes. In other areas of workplace law, the Court has recognized that even in the absence of employer

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[217] *See* Daiquiri J. Steele, *Enduring Exclusion*, 120 MICH. L. REV. 1667, 1695 (2022) (arguing not requiring intent in interference clauses would strengthen protection from retaliation).

[218] Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998).

[219] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74 (2005).

intent, the law should provide a remedy where employer conduct operates to negate the effect of the statute.[220]

Another characteristic that should be included in the interference clauses is that they should be subject to the requirement to exhaust administrative remedies as part of the statutory framework. Exhaustion helps achieve judicial efficiency.[221] For instance, claims under statutes enforced by the EEOC require exhaustion of administrative remedies, and complainants must obtain a right-to-sue letter from the EEOC before filing their claim in federal court.[222] While the EEOC issues right-to-sue letters liberally, only 17% of charges filed with the EEOC end up in federal court.[223] Hence, while the EEOC's gatekeeping function is not without its critics,[224] the EEOC is executing this function well.[225] The requirement to exhaust administrative remedies, where already in existence, should remain a part of all statutory claims, including interference claims.

One common thread that runs through statutory interference cases is the requirement that the employees not only prove interference, but also show that they were prejudiced by that interference.[226] This notion is antithetical to the concept of interference. In fact, the lack of a requirement to prove a tangible negative personnel action is a factor that distinguishes retaliation claims from interference claims. The requisite showing for an adverse action for retaliation claims is a showing of material adversity. The Supreme Court has defined the level of harm required by holding that the employer's action must be materially adverse.[227] This was done to separate significant harms from trivial harms.[228] Interference claims do not necessarily require a showing of a denial of benefits. Some circuits, like the Eleventh Circuit, require a showing of a denial of benefits. Other circuits, like the Seventh Circuit, do not. Those circuits that do not require a denial of benefits as an element reason that an act of interference by the employer violates the statute regardless of the result.[229] In other words,

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[220] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

[221] William Funk, *Exhaustion of Administrative Remedies - New Dimensions Since* Darby, 18 PACE ENV'T L. REV. 1, 2 (2000).

[222] 42 U.S.C. § 2000e-5(f)(1).

[223] ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 41-42 (2017).

[224] *See, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 698 (2013) ("[T]he EEOC's charge resolution process appears to provide precious little gatekeeper value.").

[225] *See* Daiquiri J. Steele, *Rationing Retaliation Claims*, 13 U.C. IRVINE L. REV. 993, 1018 (2023).

[226] *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88-89 (2002).

[227] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

[228] *Id.*

[229] *E.g.*, Ziccarelli v. Dart, 35 F.4th 1079, 1084-85 (7th Cir. 2022).

interference clauses only require that there be an act of interference, not that the act be successful.

One important aspect of an effective interference regulatory scheme is to ensure that the interfering conduct itself qualifies as the requisite harm. In other words, the employer should not have to be successful in their attempts to interfere with the workplace right for the employee to have a viable interference claim. FMLA interference jurisprudence illustrates the different ways in which courts deal with harm and the arguments on both sides.

The primary harm courts look for in an FMLA interference case is the denial of the entitlement to FMLA leave.[230] These courts specifically require that the employer in some manner deny the employee the leave to which the employee is entitled, which can occur by denying any FMLA leave, denying the full number of weeks of requested FMLA leave, approving the leave but still requiring the employee to perform work during the leave period, or a host of other employer actions. However, some courts that previously required a showing of benefit denial are starting to reconsider that requirement. For example, the Seventh Circuit previously required an FMLA interference plaintiff to show a denial of benefits to recover.[231] Recently, in *Ziccarelli v. Dart*, the court reconsidered its position.[232] There, an employee of the Cook County Sherriff's Office had utilized 304 of the 480 available leave hours for the year due to treatment for Post-

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[230] *See, e.g.*, Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 424 (2d Cir. 2016) ("[T]o prevail on a claim of interference with her FMLA rights, a plaintiff must establish: (1) that she is an eligible employee under the FMLA; (2) that the defendant is an employer as defined by the FMLA; (3) that she was entitled to take leave under the FMLA; (4) that she gave notice to the defendant of her intention to take leave; and (5) that she was denied benefits to which she was entitled under the FMLA."); Sommer v. Vanguard Grp., 461 F.3d 397, 399 (3d Cir. 2006) (noting successful interference claim requires employee to both have entitlement to FMLA benefits and suffer denial of those benefits); Tatum v. S. Co. Servs., 930 F.3d 709, 713 (5th Cir. 2019) (requiring FMLA interference plaintiff to show employer denied him benefits to which he was entitled under FMLA); Donald v. Sybra, Inc., 667 F.3d 757, 761 (6th Cir. 2012) (requiring employee in FMLA interference claim to show employer denied her FMLA benefits to which she was entitled); Brandt v. City of Cedar Falls, 37 F.4th 470, 478 (8th Cir. 2022) (requiring FMLA interference plaintiff to show she was denied FMLA benefits by employer); Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1243 (9th Cir. 2014) (mandating showing of denial of FMLA benefits to recover for interference); White v. Beltram Edge Tool Supply, Inc., 789 F.3d 1188, 1191 (11th Cir. 2015) ("An interference claim has two elements: (1) the employee was entitled to a benefit under the FMLA, and (2) her employer denied her that benefit.").

[231] Taylor-Novotny v. Health All. Med. Plans, Inc., 772 F.3d 478, 498 (7th Cir. 2014) ("'To prevail on an FMLA interference claim, an employee must show that her employer deprived her of an FMLA entitlement.' Specifically, the 'employee must establish that: (1) she was eligible for the FMLA's protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled.'" (quoting Ridings v. Riverside Med. Ctr., 537 F.3d 755, 761 (7th Cir. 2008))).

[232] *Ziccarelli*, 35 F.4th at 1085.

Traumatic Stress Disorder ("PTSD").[233] When the employee contacted the employer's FMLA manager to discuss using a combination of sick leave, annual leave, and FMLA leave for his PTSD treatments, the FMLA manager allegedly told the employee that he would be disciplined if he attempted to take any additional FMLA leave.[234] Fearing that he would be disciplined if he tried to take additional FMLA leave, the employee opted to retire instead.[235] He later brought an FMLA interference claim against his employer.[236]

Using a statutory construction argument, the court stated that the FMLA interference provision "makes clear that a violation does not require actual denial of FMLA benefits."[237] The court pointed to the statute's language making it unlawful "to interfere with, restrain, or deny the exercise of or the attempt to exercise" a right contained in the FMLA.[238] It stated that if Congress had only been concerned about the denial of FMLA benefits, then there would have been no need for Congress to use the terms "interfere" and "restrain" in addition to the term "deny."[239] Hence, the court held that a showing of denial of benefits was not required to recover for FMLA interference.

The reasoning in *Ziccarelli* is sound both from a textualist and a purposivist perspective. From a textualist standpoint, the fact that "interfere" and "restrain" are listed in addition to "deny" means to require denial would give no meaning to the other two terms.[240] This interpretation is supported by the statutory canon that all words in a statute be given effect. Additionally, the purpose of the interference clause is to help enforce the right to the applicable leave. This should be the case with all interference clauses.

In addition to courts viewing FMLA interference cases this way, courts have also viewed NLRA cases in the same manner, not requiring a showing of denial of the entitlement. For instance, if an employer engages in conduct aimed at preventing their employees from forming a union, but the employees unionize anyway, that employer is no less blameworthy of interference with the employees' NLRA rights than if the employees had opted not to unionize.[241] An

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[233] *Id.* at 1081-82.

[234] *Id.* at 1082.

[235] *Id.*

[236] *Id.* at 1083.

[237] *Id.* at 1085.

[238] *Id.* at 1084 (quoting 29 U.S.C. § 2615(a)(1)).

[239] *Id.* at 1086 (noting language "strongly suggests that interfering, restraining, and denying are distinct ways of violating the FMLA").

[240] *Id.* at 1085 (arguing statutory text of § 2615(a)(1) suggests that employer need not deny employee's exercise of FMLA rights in part because "interfere," "restrain," and "deny" are listed disjunctively, they are not coextensive, and there is no evidence that they were included "for the sake of redundant emphasis").

[241] *See* Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123 (9th Cir. 2001) (listing examples of employer activities which the Ninth Circuit holds interfere with employee rights under NLRA, regardless of whether union eventually formed, including distributing literature warning of potential job losses and surveilling employee meetings with union organizers).

effective interference clause should not require a showing of actual denial of the entitlement.

Another way to view the issue is that if courts are going to require a denial of the entitlement, then courts should be clear on exactly what the entitlement is. The entitlement is not only the right to, for example, take FMLA leave or unionize, but the entitlement also includes the right to do so, or to attempt to do so, free from interference.

In essence, the courts should find unlawful interference even when an employer's attempt to deter an employee from exercising the applicable right is unsuccessful. The fact that the employer was unsuccessful in its attempt to circumvent the law makes the employer no less culpable. There are already instances in workplace law where courts have found violations of the law, even if the same result would have occurred. Two prominent examples include mixed motive and adverse action cases.

With regard to adverse action cases, the standard is whether the employer's conduct would likely dissuade a reasonable worker from engaging in protected activity.[242] The standard does not require that the employer actually dissuade a reasonable worker from engaging in the activity, nor does it require that the employer actually dissuade the worker at issue from engaging in protected activity.[243]

B. *Coverage*

In addition to containing certain provisions in the interference clause, it is important that the clause itself be broad enough in scope to cover actions taken by the employer after the employment relationship terminates, as well as protections of those who aid others in the exercise of rights under the applicable statute.

Interference clauses in workplace statutes should also expressly provide for broad interpretation of interference claims to include actions taken postemployment. In many instances, interference can come in the form of reference checks by a prospective new employer. For example, suppose Employee X seeks new employment after being terminated for taking FMLA leave. The prospective new employer calls Employee X's former employer for a reference. The former employer states, "Employee X never came to work," alluding to the fact that Employee X took FMLA leave. As a result, there would be two relevant legal claims. The first would be statutory interference against the employer for firing the employee. However, the interference clause should also be broad enough to cover the disparaging remarks to the prospective new employer arising out of the exercise of FMLA leave rights. As one court noted, "The substance of the FMLA . . . is that an employer may not do bad things to an employee who has

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[242] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

[243] *See id.* at 73 (finding even when suspended employee eventually received backpay for retaliatory suspension without pay, such suspension "could well act as a deterrent" against filing discrimination complaint and thus give rise to adverse action claim).

exercised or attempted to exercise any rights under the statute."[244] Hence, the interference clauses in workplace statutes should be broad enough to cover employer interference that occurs post employment.

Interference clauses should not only protect those who exercise rights, but also those who aid and encourage others to exercise rights. The ADA interference clause provides for this, stating that it is "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]."[245] Indeed, courts have noted that the elements of ADA interference cover not only those who attempt to exercise ADA rights, but also those who help or encourage others to do so.[246] This is not uncommon in retaliation law, as courts have found that protected activity includes activities that were done for the benefit of others, not simply for the benefit of the reporting employee. For instance, if an individual reports that he witnessed his coworker being discriminated against, the reporting employee is protected despite the fact that he was not the victim of the discrimination.[247]

CONCLUSION

Retaliation and interference are two theories that provide useful tools for enforcement of workplace rights. Interference clauses can often provide broader protections than retaliation provisions, and retaliation and interference theories work best when both are contained in a workplace statute. However, not all workplace statutes contain an interference provision. This Article proposes courts should interpret workplace statutes as having implied interference clauses in the same way that courts have interpreted statutes as containing implied anti-retaliation clauses. Doing so would provide stakeholders—including workers, business partners, competitors, and regulators—with greater tools to enforce workplace rights.

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[244] Smith v. BellSouth Telecomms., Inc., 273 F.3d 1303, 1313 (11th Cir. 2001) (quoting Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 798 n.5 (11th Cir. 2000)).

[245] 42 U.S.C. § 12203(b).

[246] *E.g.*, Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 550-51 (7th Cir. 2017) ("[A] plaintiff alleging an ADA interference claim must demonstrate that: (1) she engaged in activity statutorily protected by the ADA; (2) she was engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) the defendants coerced, threatened, intimidated, or interfered on account of her protected activity; and (4) the defendants were motivated by an intent to discriminate."); Huber v. Blue Cross & Blue Shield of Fla., Inc., No. 20-3059, 2022 WL 1528564, at *5 (E.D. La. May 13, 2022) (citing *Frakes*, 872 F.3d 545, 550-51).

[247] *See, e.g.*, McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (finding employer could be held liable when employer retaliated against supervisor because supervisor allowed employee to file complaint against employer).