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## Protecting Protected Activity

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# PROTECTING PROTECTED ACTIVITY

Daiquiri J. Steele\*

*Abstract:* The United States Supreme Court recently rolled back protections in employment retaliation cases by requiring plaintiffs to prove that their protected activity was the but-for cause of adverse actions by their employers. As a result, employers may escape liability even though the employee-plaintiffs have proven that employers had an impermissible motive in taking adverse actions. In doing so, the Court undermined the underlying statutes' retaliation provisions created to help enforce the underlying statute, leading to a court-instituted failure to protect activity that Congress sought to protect.

While legal scholars have paid much attention to the establishment of a but-for causation requirement in retaliation claims brought under employment discrimination statutes, they have paid less attention to other workplace statutes. This Article focuses on the transference of a but-for causation requirement to cases involving retaliation under minimum labor standards statutes.

The Article critiques judicial application of the but-for causation standard by explaining the inconsistent outcomes that may result for similarly situated plaintiffs, by critiquing the judiciary's reliance on a purely private law, negligence-based model rather than appreciating the role of minimum labor standards statutes as public law, and by demonstrating how application of traditional canons of statutory interpretation support a causation standard lower than but-for causation.

To remedy these problems, the Article suggests that courts should allow the common law tort of wrongful discharge in violation of public policy—a tort that addresses the intersection of public law and private law—to inform its interpretation of employment retaliation statutes generally and minimum labor standards legislation in particular.

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## INTRODUCTION

Congress adopts retaliation prohibitions as a primary mechanism for enforcing statutory protections in all employment statutes. Though the text of these provisions varies from one statute to another,<sup>1</sup> the purpose is the same—to fortify the other protections and entitlements created by the statute. The United States Supreme Court has recognized the important role retaliation provisions serve in enforcing the underlying statutes, and the Court's retaliation jurisprudence has reflected the import of this function for over half a century.<sup>2</sup> However, the Roberts Court changed course from the Court's former disposition of interpreting statutory retaliation provisions broadly, and thus protecting employees and the underlying statutory schemes.

Two pivotal Supreme Court decisions heightened the causation

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1. Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 561–63 (2011).

2. See Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RESV. L. REV. 375, 384 (2010); Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 917–18 (2009).

standards for employees bringing retaliation claims. *Gross v. FBL Financial Services, Inc.*<sup>3</sup> and *University of Texas Southwestern Medical Center v. Nassar*<sup>4</sup> established but-for causation as the standard for Age Discrimination in Employment Act of 1967 (ADEA)<sup>5</sup> cases and Title VII of the Civil Rights Act of 1964 (Title VII)<sup>6</sup> retaliation cases, respectively. The opinions asserted that the use of the term “because” or “because of” in the statutes reflects that Congress intended a but-for causation standard.<sup>7</sup> Both were 5-4 decisions, and both make it more arduous for employee-plaintiffs to hold employers liable, even when the plaintiffs have proven that employers used protected activity as a factor in making the adverse employment decision. The *Gross* and *Nassar* opinions were met with consternation from many legal scholars because of the potentially disastrous impact on workplace law.<sup>8</sup> Indeed, these Court decisions have been used as part of a broader strategy of constricting enforcement in workplace law and other areas.<sup>9</sup>

Instituting a heightened causation standard in retaliation cases makes it more difficult for victims to hold employers liable. Given the private enforcement schemes Congress has created for many employment statutes, a rule that makes it more onerous to hold employers liable strikes the wrong balance. Causation itself is a mechanism for limiting liability, and the higher the causation standard, the more limited the employer’s liability. This removes incentives for employers to ensure retaliation is not occurring. More importantly, it may deter employees from exercising statutory rights.

In *Gross*, Jack Gross, an employee of FBL Financial Services, Inc., brought an ADEA action against his employer alleging the employer

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3. 557 U.S. 167 (2009).

4. 570 U.S. 338 (2013).

5. 29 U.S.C. §§ 621–633.

6. 42 U.S.C. §§ 2000(e)-2 to -17.

7. *Gross*, 557 U.S. at 176; *Nassar*, 570 U.S. at 339.

8. 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 that the Court’s adoption of *Nassar* creates a rigid causation standard that inhibits the ability of employees to prove retaliation claims); Catherine Donnelly, *The Power to Retaliate: How Nassar Strips Away the Protections of Title VII*, 22 WASH. & LEE J. C.R. & SOC. JUST. 411, 419 (2016) (noting that *Nassar* was decided contrary to the congressional intent behind the Civil Rights Act of 1964); Amber L. Kipfmiller, *Examining Retaliation as a Use of Force: Why State Courts Should Return to the Pre-Nassar, Pro-Plaintiff Framework*, 87 MISS. L.J. SUPRA 1, 2 (2018); see also Moberly, *supra* note 2, at 445 (warning two years before the *Nassar* decision that a but-for causation standard would be “devastating to employees who blow the whistle on illegal conduct”).

9. See, e.g., *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. \_\_\_, 140 S. Ct. 1009, 1014–16 (2020) (requiring plaintiffs in civil rights cases brought under 42 U.S.C. § 1981 to plead but-for causation and citing *Gross* and *Nassar* as support).

demoted him because of his age.<sup>10</sup> The lower court instructed the jury to rule in Gross's favor if he proved that his age was a motivating factor in whether he would be promoted.<sup>11</sup> Writing for the Court, Justice Clarence Thomas noted that the ADEA made it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."<sup>12</sup> The opinion stated that the term "because of" means "by reason of" or "on account of," and those terms necessitated that a plaintiff prove that age was the but-for cause of the adverse action.<sup>13</sup> Interestingly, the Court also noted that it "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."<sup>14</sup> Despite this pronouncement, the Court went against its own advice in 2013 when it ruled in *Nassar*.<sup>15</sup>

Remarkably, when the Court granted certiorari in *Nassar*, there was no circuit split on whether a mixed motive standard could be applied in Title VII retaliation claims. Only two circuits, the Fifth and Eleventh, had considered whether Title VII retaliation claims may proceed under a mixed motive theory after *Gross*. Both answered in the affirmative. In *Smith v. Xerox Corp.*,<sup>16</sup> a female employee sued her employer for Title VII retaliation alleging she was terminated after filing a charge with the U.S. Equal Employment Opportunity Commission (EEOC). The Court held that despite *Gross*, a mixed motive jury instruction was appropriate in Title VII retaliation claims.<sup>17</sup> In *Saridakis v. South Broward Hospital District*,<sup>18</sup> an unpublished Eleventh Circuit Court of Appeals opinion, the court agreed with the Fifth Circuit Court of Appeals and held that *Gross* was not controlling in Title VII retaliation cases.<sup>19</sup> There was no dispute among circuits regarding the applicability of the heightened causation standard the Court espoused for ADEA retaliation cases to Title VII retaliation cases. Nevertheless, the Court still granted certiorari in *Nassar* and held but-for causation was requisite.

In *Nassar*, a medical doctor of Middle Eastern descent named Naiel

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10. *Gross*, 557 U.S. at 170.

11. *Id.* at 170–71.

12. *Id.* at 176 (emphasis in original) (quoting 29 U.S.C. § 623(a)(1)).

13. *Id.*

14. *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

15. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

16. 602 F.3d 320 (5th Cir. 2010).

17. *Id.* at 324.

18. 468 F. App'x 926 (11th Cir. 2012).

19. This case is cited for the sole purpose of demonstrating that no circuit split existed.

Nassar filed multiple Title VII claims, including one for retaliation for having previously filed a racial and religious harassment claim.<sup>20</sup> Justice Anthony Kennedy, writing for the majority, held that but-for causation was the standard for proving retaliation under Title VII.<sup>21</sup> With one opinion, the Court added a heightened causation standard to a statute that had been in effect for half a century.

While much of the scholarship concerning *Gross* and *Nassar* has focused on their application to anti-discrimination statutes, this Article adds to the literature by discussing a broader application of the statutory interpretation principles used in those cases. It adds to the criticism of *Gross* and *Nassar* and specifically argues that they should not be extended to the retaliation provisions of minimum labor standards statutes. This Article posits that the rationale underlying *Gross* and *Nassar*—that the term “because” in § 2000e-3(a) and § 623(a)(1) should be interpreted by courts as requiring but-for causation—is flawed.

Using the Fair Labor Standards Act of 1938 (FLSA),<sup>22</sup> the Occupational Safety and Health Act of 1970 (OSHA),<sup>23</sup> the Employee Retirement Income Security Act of 1974 (ERISA),<sup>24</sup> the Family and Medical Leave Act of 1993 (FMLA),<sup>25</sup> and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)<sup>26</sup> as examples, this Article illustrates how application of a but-for causation standard to minimum labor standards statutes would lead to inconsistency, and in some instances, irrationality in the law. It critiques the judiciary’s prioritization of the private law aspects of workplace statute retaliation provisions over their public law nature in the interpretation of these laws. In other words, it shows how the judiciary’s treatment of these retaliation provisions as more like employment contracts concerned only with the private relationship between employer and employee instead of incorporating the public purposes of these provisions and their underlying statutes is problematic. This is both a criticism of *Gross* and *Nassar* and a reason for not extending their holdings to minimum labor standards legislation. Lastly, this Article assesses the language of the retaliation provisions using canons of statutory interpretation. It applies several canons of statutory interpretation to illustrate that the application of the canons supports a lower causation standard in minimum labor standards

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20. *Nassar*, 570 U.S. at 344–45.

21. *Id.* at 360.

22. 29 U.S.C. §§ 201–219.

23. *Id.* §§ 651–678.

24. *Id.* §§ 1001–1461.

25. *Id.* §§ 2601–2654.

26. 38 U.S.C. §§ 4301–4334.

retaliation claims than but-for causation.

While *Gross* and *Nassar* have already drastically turned the tide of retaliation jurisprudence in employment discrimination cases, the decisions may have influence outside of the anti-discrimination realm. Title VII is viewed by courts as the premier employment discrimination statute, and many federal courts,<sup>27</sup> state courts,<sup>28</sup> and administrative agencies<sup>29</sup> align their decisions in cases involving other employment discrimination laws with Title VII case law. Indeed, many courts have already started applying the *Gross* and *Nassar* holdings to minimum labor standards legislation.<sup>30</sup>

This Article argues against such application. The Court's use of but-for causation as the standard for remedial statutes is particularly problematic. The purpose of causation requirements in cases is to limit defendant liability. Doing so in situations in which Congress is using a retaliation provision of a statute to undergird the duties and rights created in the statutes impedes the purpose of the statute. Where an employer used a motive explicitly forbidden by Congress, the employer should be held liable. Any additional motives, besides the one expressly forbidden by Congress, should be considered when determining remedy, not liability.

The entire purpose of minimum labor standards statutes is to provide

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27. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120–21 (1985) (noting that Title VII interpretations apply with equal force in the context of the ADEA); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 44 (2003) (applying Title VII precedent to an Americans with Disabilities Act case); *Barth v. Gelb*, 2 F.3d 1180, 1185–86 (D.C. Cir. 1993) (applying Title VII's *McDonnell Douglas* framework to a claim under the Rehabilitation Act of 1973); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (referencing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), a Title VII case, in determining that sexual harassment constitutes sex discrimination under Title IX of the Education Amendments of 1972); *Patterson v. McLean Credit Union*, 491 U.S. 164, 166 (1989) (stating that the Title VII disparate treatment framework applies to race discrimination claims under 42 U.S.C. § 1981); *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 5–6 (D.C. Cir. 2015) (applying the Title VII framework to a claim under the Employee Retirement Income Security Act of 1974); *Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822, 827 (5th Cir. 2015) (affirming the district court's application of Title VII's *McDonnell Douglas* test to a claim under the Genetic Information Nondiscrimination Act of 2008).

28. See, e.g., *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445–46 (Tex. 2004) (stating the Texas Commission on Human Rights Act is modeled after Title VII, and federal case law may be cited as authority in cases relating to the state statute); *Gomez v. Allegheny Health Servs.*, 71 F.3d 1079, 1083–84 (3d Cir. 1995) (noting that the Pennsylvania Human Relations Act and Title VII are construed consistently); *Sch. Bd. v. Hargis*, 400 So. 2d 103, 108 n.2 (Fla. Dist. Ct. App. 1981) (reasoning that Florida's civil rights statute was patterned after Title VII).

29. See U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL 83 (2020), [https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508\\_FCCM\\_05012020.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf) [<https://perma.cc/4G2C-2RU3>] (noting the Office of Federal Contract Compliance Program's policy is to interpret the nondiscrimination provisions of Executive Order 11246 consistent with Title VII principles).

30. See *infra* section II.A.

individuals or groups with the rights contained therein. If an employee proves that their employer used the exercise of a statutory right as a motive in an adverse employment decision, there should be some application of the statute. The heightened but-for causation standard permits this situation by allowing employers to escape liability for factoring in protected activity when making adverse employment decisions, as long as the employer can pair the impermissible motive with a permissible one. Making this pairing is an easy task given the at-will employment rule.<sup>31</sup> Moreover, moving from a motivating factor causation standard to a heightened but-for standard transfers the burden of proof from the employer, who bears the burden of proving the same decision defense, to the plaintiff. Additionally, a heightened standard weakens the deterrent effect of the laws.

This Article posits that transference of the Court's interpretation of "because" in employment discrimination statutes to minimum labor standards legislation would lead to inconsistent, and in some cases, irrational results. It argues that the Court's reliance on common law negligence theory to inform interpretation of an intentional offense is problematic. The Article asserts that this is symptomatic of a larger problem—courts treat employment retaliation disputes like they operate solely in the private sphere and fail to recognize the larger societal impact of retaliatory actions.

Part I describes the role of minimum labor standards legislation in labor protection. It examines how labor regulation can improve productivity, labor force participation, economic performance, and health outcomes, not only for employees but for society as well. It also discusses the prevalence of labor standard violation claims.

Part II describes the likely impact of *Gross* and *Nassar* on federal minimum labor standards statutes. It examines the purpose and text of five federal minimum labor standards legislation statutes and what causation standard would be applicable if the Court's rationale from *Gross* and *Nassar* are applied to the statutes. Additionally, this Part details the significance of consistency among federal labor standards legislation and illustrates how the U.S. Department of Labor (DOL) has attempted to attain consistency through its issuance of implementing regulations and agency guidance.

Part III demonstrates how the Court's interpretation is inconsistent with the results obtained using ordinary canons of statutory interpretation. It illustrates how their application to retaliation provisions in minimum labor standards support a causal standard lower than but-for causation.

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31. See *infra* Part IV.



This Part explains the flawed attempt of the *Gross* and *Nassar* Courts to apply the plain meaning rule and examines statutory interpretation canons related to textual integrity and extrinsic source canons.

Finally, Part IV details the common law baselines against which retaliation provisions in minimum labor standards statutes are interpreted. This Part discusses the Court's use of tort law in employment law statutory interpretation to interpret workplace laws generally, and the advantages and disadvantages of doing so. It also explains the intersectionality of private law and public law in minimum labor standards legislation and asserts that the Court should let the common law tort of wrongful discharge in violation of public policy inform its interpretation of causation standards in retaliation provisions of minimum labor standards laws. It provides an overview of the different causation standards used in the various jurisdictions, and illustrates the pervasiveness of a lower causation standard than but-for and reasons supporting the dominance of a lower standard.

## I. FEDERAL MINIMUM LABOR STANDARDS LEGISLATION

This Part discusses the salience of minimum labor standards legislation in labor protection and examines how labor regulation can improve economic and health outcomes not only for individual employees but also for society.

### A. *Wage Protection*

Until the Supreme Court's case of *West Coast Hotel Co. v. Parrish*<sup>32</sup> in 1937, governmental attempts to regulate wages and hours since the mid-nineteenth century<sup>33</sup> had been overturned by the courts as violating the constitutional principle of freedom of contract.<sup>34</sup> In 1938, Congress passed the FLSA. The Act's purposes include correcting and eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being

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32. 300 U.S. 379 (1937).

33. On March 31, 1840, President Martin Van Buren issued an Executive Order mandating a ten-hour maximum workday at Navy yards. Gerhard Peters & John T. Woolley, *Martin van Buren, Executive Order*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/201853> [<https://perma.cc/4UDV-DYK5>].

34. *See, e.g., Lochner v. New York*, 198 U.S. 45, 52–53 (1905) (invalidating a New York law regulating the hours bakers could work as unconstitutional because it interfered with freedom of contract); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610–11 (1936) (declaring a New York minimum wage law unconstitutional because the right to make contracts is a liberty protected by due process).

of workers.”<sup>35</sup> The law establishes a federal minimum wage,<sup>36</sup> prohibits oppressive child labor,<sup>37</sup> and institutes premium pay for overtime hours worked.<sup>38</sup>

The FLSA has been amended numerous times since its passage, but the most significant amendments have been the exclusion of pre-work and post-work activities from compensable work time;<sup>39</sup> the setting of a two-year statute of limitations for all claims, except those arising from willful violations which can be brought within three years;<sup>40</sup> expanding the number of employees covered by the Act through the creation of enterprise coverage;<sup>41</sup> extending coverage to most federal, state, and local government employees;<sup>42</sup> and requiring employers to provide reasonable time periods for breaks for employees to express breast milk for a nursing child.<sup>43</sup> Additionally, the Equal Pay Act of 1963 (EPA),<sup>44</sup> which prohibits sex-based discrimination in pay, and the ADEA, which prohibits employment discrimination on the basis of age, were both passed as amendments to the FLSA. Many of the FLSA amendments pertain to increases in the federal minimum wage, which was \$0.25 per hour when the FLSA was originally passed in 1938 and has been at \$7.25 per hour since July 2019.<sup>45</sup>

The FLSA has historically been and remains a valuable instrument in labor protection for millions of American workers. While there are many definitions of “wage theft,”<sup>46</sup> a general definition is the failure to pay the

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35. 29 U.S.C. § 202(a).

36. *Id.* § 206.

37. *Id.* § 212.

38. *Id.* § 207.

39. *Id.* § 254(a).

40. *Id.* § 255.

41. The 1961 FLSA amendments established the concept of enterprise coverage, whereby coverage is no longer based on whether an individual employee is engaged in commerce or production of goods for commerce, but instead based on whether the employer has other employees engaged in commerce or production of goods for commerce. The 1966 FLSA amendments expanded enterprise coverage. GERALD MAYER, BENJAMIN COLLINS & DAVID H. BRADLEY, CONG. RSCH. SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW (2013), <https://fas.org/sgp/crs/misc/R42713.pdf> [<https://perma.cc/HT7R-HC2N>].

42. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55; 29 U.S.C. § 203(e).

43. The Patient Protection and Affordable Care Act amended the FLSA to provide for the expression of breast milk. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119; 29 U.S.C. § 207(r)(1).

44. 29 U.S.C. § 206(d).

45. WILLIAM G. WHITTAKER, CONG. RSCH. SERV., RL33791, POSSIBLE INDEXATION OF THE FEDERAL MINIMUM WAGE: EVOLUTION OF LEGISLATIVE ACTIVITY (2008).

46. See Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656 n.8 (2014) (collecting definitions of “wage theft”).

legal wages owed to a worker for work already performed. Wage theft can take several forms, but common methods include failing to pay employees at all, minimum wage violations, overtime violations, having employees work “off the clock,” and illegal deductions from employee pay.<sup>47</sup>

A 2009 study<sup>48</sup> found that out of 4,000 participating workers, 26% were paid less than minimum wage in the week prior to the study and over 66% had experienced some sort of wage theft (e.g., not being paid for all hours worked, not receiving premium pay for overtime hours worked, and having their tips stolen) in the prior week.<sup>49</sup>

While wage theft can affect all workers, it is particularly acute for workers of color, women, and immigrants.<sup>50</sup> Men experienced minimum wage violations at a rate of 19.5%, while women experienced them at a rate of 30.2%.<sup>51</sup> The percentage of workers who had been victims of minimum wage violations were 32.8% for Latinx workers, 19.1% for Black workers, 15.1% for Asian workers, and 7.8% for White workers.<sup>52</sup> There is some, but not much, variation in the rate of workers experiencing wage and hour violations by age. Those ages eighteen to twenty-five and over age forty-six had a rate of 27%, while individuals ages twenty-six to thirty-five and thirty-six to forty-five had rates of 25.1% and 24.6%, respectively.<sup>53</sup> Foreign-born workers experienced wage and hour violations at approximately twice the rate of their U.S.-born counterparts.<sup>54</sup>

Wage and hour violation rates also vary by industry. In federal fiscal year 2019, the industries with the highest number of employees affected by wage and hour violations were food services, construction, retail, health care, agriculture, and hotels.<sup>55</sup> Agriculture, automotive repair, apparel manufacturing, child care, security guard services, cosmetology, hospitality, and janitorial services are also included among high

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47. See Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1308 (2019).

48. This study was conducted by the National Employment Law Project (NELP), University of Illinois at Chicago, Center for Urban Economic Development, and UCLA Institute for Research on Labor and Employment.

49. ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 2, 20 (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/UQ39-PJ7G>].

50. *Id.* at 9.

51. *Id.* at 42.

52. *Id.*

53. *Id.*

54. *Id.*

55. U.S. DEP'T OF LAB., WAGE & HOUR DIV., *LOW WAGE, HIGH VIOLATION INDUSTRIES* (2019) [hereinafter *LOW WAGE, HIGH VIOLATION*], <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries> [<https://perma.cc/5VCM-3KMJ>].

violation industries.<sup>56</sup>

Wage theft is occurring at such alarming rates that even though the FLSA was enacted over eighty years ago, many states recently started enacting state legislation that adds additional wage and hour protections. In May 2019, Colorado enacted a law imposing criminal penalties on employers who willingly refuse to pay wages.<sup>57</sup> The law classifies the failure to pay employee wages as “theft,” and provides for criminal penalties in addition to any civil recourse.<sup>58</sup> In 2019, Minnesota<sup>59</sup> and New Jersey<sup>60</sup> also had laws go into effect that criminalize wage theft. The Minnesota law is one of the toughest in the nation, imposing a fine schedule of up to \$35,000 and a prison sentence of up to twenty years.<sup>61</sup> The New Jersey law also criminalizes wage theft and imposes fines of up to \$15,000 and a maximum prison term of five years.<sup>62</sup>

Employers often are able to violate wage and hour laws and avoid consequences by deterring their employees from reporting the abuses. The 2009 NELP study discussed previously showed that 20% of workers complained to their employer about wage and hour violations.<sup>63</sup> Of these, 43% experienced retaliation from their employer.<sup>64</sup> Of the workers that had experienced a wage and hour violation that did not file any type of complaint, half decided not to report the violations for fear of losing their jobs or having even more wages stolen.<sup>65</sup> Others did not do so because they thought reporting the violations would be ineffective.<sup>66</sup>

While it is not as common as wage theft, child labor continues to be a problem in the United States. Between 2003 and 2016, 452 children in the United States died while working, seventy-three of whom were age twelve or younger.<sup>67</sup> These children were killed while working in the agriculture,

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56. *Id.*

57. Theft-Human Trafficking–Compensation and Salaries, H.B. 19-1267, 72d Gen. Assemb., Reg. Sess. (Colo. 2019).

58. *Id.*

59. 2019 Minn. Laws 41 (codified as amended at MINN. STAT. § 16C.285(3) (2020)).

60. S.B. 1790, 218th Leg., Reg. Sess. (N.J. 2018).

61. 2019 Minn. Laws 41 (codified as amended at MINN. STAT. § 16C.285(3) (2020)).

62. S.B. 1790, 218th Leg., Reg. Sess. (N.J. 2018) (noting that wage theft is a third degree crime); N.J. REV. STAT. § 2C-43-3 (2020) (stating that a third degree crime is punishable by up to a \$15,000 fine); N.J. REV. STAT. § 2C-43-6 (stating that a third degree crime is punishable by up to five years in prison).

63. BERNHARDT ET AL., *supra* note 49, at 3; *see also* discussion *supra* note 48.

64. BERNHARDT ET AL., *supra* note 49, at 3.

65. *Id.*

66. *Id.*

67. Andrew Van Dam, *452 Children Died on the Job in the U.S. Between 2003 and 2016*, WASH.

construction, logging, manufacturing, retail, and transportation industries.<sup>68</sup> In fiscal year 2019, DOL had 858 cases, involving over 3,000 minors, in which it found child labor violations.<sup>69</sup>

Government enforcement of the FLSA is crucial because wage theft and child labor violations continue. In fiscal year 2019, DOL found minimum wage violations in 9,566 cases.<sup>70</sup> This resulted in recovery of over \$39.5 million for affected workers.<sup>71</sup> In the same fiscal year, DOL had 11,018 overtime cases in which violations were found, resulting in over \$186.2 million in recovered wages.<sup>72</sup> Statistics like these demonstrate the ability of employees to recover for FLSA violations. However, these statistics do not encompass the employees who receive all of their legal pay because of the powerful deterrent effect of the FLSA.

### B. *Occupational Safety and Health*

There was a thirty-two-year gap between the passage of the FLSA and the passage of OSHA, the next important federal statute governing labor standards. In the late nineteenth and early twentieth centuries, state governments paid much attention to workplace conditions. The states took the lead on promulgating laws to protect workers from workplace hazards. By 1890, twenty-one states had occupational safety statutes.<sup>73</sup> Federal response to deaths and injuries from workplace accidents was steady, but slow. As was the case with many areas of federal regulation, the federal government initiated its entrance into occupational safety and health regulations through its purchasing power. In 1936, Congress passed the Walsh-Healey Public Contracts Act, which regulated both wages and safety for employers who were federal contractors.<sup>74</sup> Thereafter,

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POST (Dec. 20, 2018), <https://www.washingtonpost.com/business/2018/12/20/child-labor-deaths-us-twenty-first-century/#:~:targetText=About%20452%20children%20died%20as,their%20peers%20in%20other%20industries> [<https://perma.cc/7CZZ-RPDD>].

68. *Id.*

69. U.S. DEP'T OF LAB., WAGE & HOUR DIV., CHILD LABOR (2019) [hereinafter CHILD LABOR], <https://www.dol.gov/agencies/whd/data/charts/child-labor> [<https://perma.cc/5UUB-DEWD>]; LOW WAGE, HIGH VIOLATION, *supra* note 55.

70. CHILD LABOR, *supra* note 69.

71. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FAIR LABOR STANDARDS ACT (2019) [hereinafter FAIR LABOR STANDARDS ACT], <https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act> [<https://perma.cc/3XXP-7EZJ>].

72. *Id.*

73. U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., REFLECTIONS ON OSHA'S HISTORY 1 (2009), [https://www.osha.gov/history/OSHA\\_HISTORY\\_3360s.pdf](https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf) [<https://perma.cc/8D8L-G3XK>].

74. 41 U.S.C. §§ 6501–6511.

industry-specific occupational safety statutes were passed.<sup>75</sup> Congress enacted OSHA in 1970.<sup>76</sup>

Finding that workplace illnesses and injuries place a substantial burden on interstate commerce, Congress promulgated occupational safety and health standards. Since its passage, OSHA has been amended four times. The amendments increased the maximum penalties for OSHA violations,<sup>77</sup> directed the Secretary of Labor to establish agreements with the states to consult on safety and health matters,<sup>78</sup> prohibited the imposition of OSHA enforcement quotas by the DOL,<sup>79</sup> and included the U.S. Postal Service under OSHA's coverage.<sup>80</sup>

In federal fiscal year 2018, DOL completed 32,023 inspections.<sup>81</sup> Approximately 56% of these were unprogrammed inspections, which include inspections based on employee complaints, injuries, fatalities, and referrals.<sup>82</sup> The remaining 44% were programmed inspections akin to a compliance review.<sup>83</sup> The importance of occupational safety has prompted states to pass laws expanding the applicability of the standards contained in OSHA. Twenty-seven states have extended OSHA coverage via state statutes.<sup>84</sup> One of them was Massachusetts, which passed a law in 2019 that made its state and local government employees subject to the same standards contained in OSHA.<sup>85</sup>

### C. *Employee Benefits*

Congress enacted ERISA four years after passing OSHA.

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75. See Federal Coal Mine Safety Act of 1952, Pub. L. No. 82-552, 66 Stat. 692; Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 85-538, 72 Stat. 397 (1958); Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772.

76. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 666).

77. 29 U.S.C. § 666.

78. The Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998, Pub. L. No. 105-197, 112 Stat. 638 (codified as amended at 29 U.S.C. § 670), added this provision to OSHA.

79. 29 U.S.C. § 657(h).

80. *Id.* § 652(5).

81. U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., 2018 ENFORCEMENT SUMMARY, [https://www.osha.gov/dep/2018\\_enforcement\\_summary.html](https://www.osha.gov/dep/2018_enforcement_summary.html) [<https://perma.cc/KJ6V-KLQD>].

82. *Id.*

83. *Id.*

84. *Hearing Before the H. Comm. on Educ. & Lab.*, 111th Cong. 1 (2009), <https://www.osha.gov/news/testimonies/10292009> [<https://perma.cc/QN38-ASJD>] (statement of Jordan Barab, Acting Assistant Sec'y for Occupational Safety & Health Admin., U.S. Dep't of Lab.).

85. MASS. GEN. LAWS. ch. 149, § 6 1/2 (2020).

Congressional findings that promoted the statute's passage considered employee benefit plans vital to the well-being.<sup>86</sup> ERISA sets minimum standards for employee welfare and pension benefit plans.<sup>87</sup> The statute also provides federal insurance for certain pension plans.<sup>88</sup>

There have been several amendments to ERISA since its original implementation; only the most significant ones will be addressed here. The Retirement Equity Act of 1984<sup>89</sup> amended ERISA to protect families when women have to take extended absences from their jobs childbearing by relaxing the rules regarding breaks in service.<sup>90</sup> Additionally, the amendment clarified the extent to which pension plans must comply with state court divorce, separation, or child support orders concerning the division of a participant's retirement plan.<sup>91</sup>

Another major amendment to ERISA is the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).<sup>92</sup> This amendment required plan sponsors to provide continued health coverage for employees and their beneficiaries after termination of employment.<sup>93</sup> A provision requiring group health plans and insurers offering group health insurance to provide a minimum forty-eight hour hospital stay to mothers following a traditional delivery and at least a ninety-six hour stay following a Cesarean section delivery was added to ERISA through the Newborns' and Mothers' Health Protection Act of 1996.<sup>94</sup> Additionally, the Mental Health Parity Act of 1996 amended ERISA to mandate that a group health plan's maximum benefit limitation may not be less for mental health benefits than it is for medical and surgical benefits.<sup>95</sup>

The Health Insurance Portability and Accountability Act (HIPAA) amended ERISA to modify the rules concerning the use of preexisting condition exclusions by group health plans and prohibiting such plans from establishing enrollment rules based on health status, medical history, previous claims, disability, or genetic information.<sup>96</sup> In 2010, the Patient

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86. 29 U.S.C. § 1001(a).

87. *See generally id.* §§ 1021–1114.

88. *Id.* §§ 1301–1461.

89. Pub. L. No. 98-397, 98 Stat. 1426 (1984).

90. 29 U.S.C. § 1052(b)(5)(A)–(E).

91. *Id.* § 1056(d).

92. Pub. L. No. 99-272, 100 Stat. 82 (1986).

93. 29 U.S.C. § 1161.

94. *Id.* § 1185; Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, 110 Stat. 2935.

95. Mental Health Parity Act of 1996, Pub. L. No. 104-204, 110 Stat. 2944 (codified as amended at 29 U.S.C. § 1185a).

96. *See* Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended at 29 U.S.C. §§ 1191–1191c).

Protection and Affordable Care Act (ACA) amended ERISA to establish minimum standards for employer-sponsored health plans.<sup>97</sup> It also imposed tax penalties on covered employers if they do not provide affordable insurance to an appropriate proportion of their workforces.<sup>98</sup>

ERISA protections continue to play a vital role in protecting the pension, health, and welfare benefits of America's workers and their beneficiaries. In federal fiscal year 2019, DOL recovered more than \$2.5 billion in direct payments to plans, participants, and beneficiaries.<sup>99</sup> There were 1,146 civil investigations and an additional 275 criminal investigations under ERISA.<sup>100</sup> With respect to the civil investigations, 67% required DOL action to restore plan assets, provide benefits to beneficiaries, recover profits made from illegal or wrongful conduct, and reverse prohibited transactions.<sup>101</sup> The criminal investigations led to the indictment of seventy-six individuals.<sup>102</sup>

#### D. *Leave Entitlements*

Almost twenty years after ERISA's passage, Congress passed the FMLA in 1993. The FMLA mandates that covered employers provide twelve weeks of unpaid leave during any twelve-month period for an employee who has given birth; has had a child placed with them for adoption or foster care; is caring for a spouse, child, or parent with a serious health condition; or is unable to perform the functions of his or her position due to a serious health condition.<sup>103</sup> Among the stated purposes for the Act are balancing the needs of families with the demands of the workplace and ensuring the economic stability of families.<sup>104</sup> The statutory entitlements provided for in the Act are imperative to employees who may be suffering from serious health conditions themselves, are new parents, or are caregivers. It does not guarantee any type of paid leave, rather it guarantees that the employee will be able to return to their job after the FMLA leave has expired.<sup>105</sup> It also requires the employer to

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97. See Pub. L. No. 111-148, 124 Stat. 119 (2010).

98. 29 U.S.C. § 1185d.

99. U.S. DEP'T OF LAB., FACT SHEET: EBSA RESTORES OVER \$2.5 BILLION TO EMPLOYEE BENEFIT PLANS, PARTICIPANTS AND BENEFICIARIES 1 (2020), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf> [<https://perma.cc/MDN9-DN3Y>].

100. *Id.*

101. *Id.*

102. *Id.*

103. 29 U.S.C. § 2612.

104. *Id.* § 2601(b).

105. See *id.* § 2612(c).



maintain any healthcare coverage or other employment benefits the employee has while the employee is on leave.<sup>106</sup>

The business community staunchly opposed the FMLA, which was evident during the legislation's debate and ultimate passage.<sup>107</sup> The FMLA was eight years in the making, spanning three presidential administrations, and suffering two presidential vetoes before ultimately being signed into law. The business community's opposition helped to severely dilute the legislation from its original form. The original bill, introduced as the Parental and Disability Leave Act of 1985,<sup>108</sup> offered eighteen weeks of unpaid leave. Over the next eight years, various iterations of the legislation added more exemptions for small businesses and heightened eligibility requirements to qualify for the leave.<sup>109</sup>

106. *Id.* § 2614.

107. Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 69 (2004).

108. H.R. 2020, 99th Cong. (1985).

109. The Parental and Disability Leave Act of 1985 stated at section 106(a):

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or in any other manner discriminate against an individual for (1) exercising any right to which such individual is entitled under the provisions of this title, (2) the purpose of interfering [sic] with the attainment of any right to which such participant may become entitled under this title, or (3) opposing any practice made unlawful by this title.

*Id.* § 106(a). Section 106(b) of the bill read:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or in any other manner discriminate against any individual because such individual has filed any complaint or has instituted or caused to be instituted, or is about to institute or cause to be instituted, any proceeding under or related to this title, or has testified or is about to testify in any inquiry or proceeding or has given or is about to give any information connected to any inquiry or proceeding relating to this title.

*Id.* § 106(b).

The next iteration of the legislation was the Parental and Medical Leave Act of 1986. S. 2278, 99th Cong. (1985); H.R. 4300, 99th Cong. (1985). Similar versions of this legislation were introduced in the House and the Senate, and both versions contained identical interference language. *See* S. 2278, 99th Cong. (1985); H.R. 4300, 99th Cong. (1985). In early 1987, the Parental and Temporary Medical Leave Act of 1987 and the Family and Medical Leave Act of 1987 were introduced in the Senate and House, respectively. S. 249, 100th Cong. (1987); H.R. 925, 100th Cong. (1987). These bills contained the same broad interference language that the 1986 versions did. S. 249, 100th Cong. (1987); H.R. 925, 100th Cong. (1987). While no action was taken on the Senate bill, hearings were held in the House, and the bill was reported favorably out of Committee. H.R. REP. NO. 100-511, pt. 2 (1988). However, no further action was taken. Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. (1987). A new version of the bill, the Parental and Medical Leave Act of 1988, was introduced in the Senate in June 1988. S. 2488, 100th Cong. (1988). This version again included the identical interference language found in the 1986 and 1987 versions. *Id.* The bill was filibustered in the Senate and was eventually withdrawn. James S. Ray & Barbara Berish Brown, *Federal Legislation Update: January–October 1988*, 5 LAB. LAW. 135, 145 (1989). The interference text remained unchanged in the versions of the bills introduced in the House and Senate in February 1989, and although the legislation was passed by Congress, it was vetoed by President George H.W. Bush. *See* 136 CONG. REC. 16,681 (1990). In January 1991, bills were introduced in the House and the Senate yet again. Family and Medical Leave Act of 1991, H.R. 2, 102d Cong. (1991); Family and Medical Leave Act

The FMLA has been amended four times since its passage. These amendments provided coverage to certain legislative branch employees,<sup>110</sup> created an entitlement for military family leave,<sup>111</sup> expanded the military family leave provisions,<sup>112</sup> and added hours of service eligibility requirements for airline flight crews.<sup>113</sup>

Family leave is a salient topic, and the role of the FMLA cannot be overstated. While there is no federal statute that requires paid family leave, many states have started passing laws that provide more protections for more people than the FMLA. For instance, California passed a law requiring that as of January 1, 2018, employees taking family leave be

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of 1991, S. 5, 102d Cong. (1991). They too contained the interference language, unchanged since the 1986 version of the legislation. H.R. 2; S. 5. The measure was passed, but President Bush again vetoed the bill. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 200 n.23 (2004). An attempt to override the veto was made, and while two-thirds of the senators voted to override it, there were not enough votes in the House. 138 CONG. REC. 27,493–513 (1992). Sixty-eight voted to override the veto, and thirty-one voted not to; one senator did not vote. 138 CONG. REC. 27,513 (1992). Two hundred fifty-eight members of the House voted to override the veto, and 169 members voted not to; five members did not vote. 138 CONG. REC. 29,140 (1992). In January 1993, another version of the measure was introduced in the House. Family and Medical Leave Act of 1993, H.R. 1, 103d Cong. (1993). Substantial changes were made to the bill after its introduction, but none of them related to the text of the interference provision; it remained unchanged from the 1986 version. *See* Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (as introduced in the House, Mar. 4, 1986); Parental and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986). Section 107(a)(1) of the 1986 House bill stated, "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 this title." H.R. 4300 § 107(a)(1). Section 107(a)(2) stated, "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title." *Id.* § 107(a)(2).

110. Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. §§ 1301–1438). This amendment added FMLA coverage to the Government Accountability Office and Library of Congress. It also provided that FMLA applies to certain congressional employees.

111. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008). This Act created two categories of military leave: military exigency leave and military caregiver leave. *Id.* The first category is for private sector employees with a close family member in the National Guard or Reserves. *Id.* The other is for leave to provide care for a covered service member with an illness or injury. *Id.*

112. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009). This Act expanded military exigency leave to extend leave to private sector employees with a close family member who is in the regular Armed Forces (in addition to Reserve members) and provided leave for U.S. Government civilian employees with a close family member in the Armed Forces, National Guard, or Reserves. *Id.* This Act also expanded caregiver leave to provide leave for family members of certain veterans with illness or injury and allowed the use of leave to care for a service member who had an illness or injury obtained before service but was aggravated during service. *Id.*

113. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (2009). This amendment added an hour-of-service eligibility criterion for coverage of certain airline flight crew employees. *Id.*

paid 70% of their wages if they qualify as a lowest-paid earner.<sup>114</sup> For almost all other workers, the rate will be 60%, up to a maximum weekly benefit of about \$1,300.<sup>115</sup> Other states that have family leave laws that go beyond the protections of the FMLA include New York,<sup>116</sup> New Jersey,<sup>117</sup> and Rhode Island.<sup>118</sup>

The FMLA is a vital labor protection tool that allows individuals to care for their families and themselves without having to forego employment to do so. This is especially true with over 43.5 million Americans serving as caregivers<sup>119</sup> and an increasing number of U.S. citizens becoming members of the “sandwich generation,” meaning they are caring for their children and their aging parents.<sup>120</sup> With the creation of new employee rights came added statutory protection of those rights in the form of a retaliation prohibition. The FMLA retaliation provision prohibits the interference with the exercise of rights provided under the Act.<sup>121</sup> It also prohibits retaliation against a person because said person had participated in proceedings or inquiries under the Act.<sup>122</sup> Retaliation against individuals who have requested and/or taken FMLA leave has taken many forms, including demotion, lack of promotion, punitive workloads, creation and maintenance of hostile work environments, employee discipline, negative performance appraisals, location transfers, and termination.<sup>123</sup>

Its passage was viewed as a step in the right direction. However, over

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114. Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 811 (2018).

115. *Calculating Paid Family Leave Benefit Payment Amounts*, STATE OF CAL., EMP. DEV. DEP'T, [https://edd.ca.gov/Disability/Calculating\\_PFL\\_Benefit\\_Payment\\_Amounts.htm](https://edd.ca.gov/Disability/Calculating_PFL_Benefit_Payment_Amounts.htm) [<https://perma.cc/2FMG-SPMT>].

116. N.Y. WORKERS' COMP. LAW §§ 200–242 (Consol. 2020).

117. New Jersey Family Medical Leave Act, N.J. STAT. ANN. § 34:11B-1 (West 2020).

118. 28 R.I. GEN. LAWS § 28-41-35(h) (2020).

119. AARP PUB. POL'Y INST. & THE NAT'L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 15 (2015), <https://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf> [<https://perma.cc/5V7T-93SQ>].

120. PEW RSCH. CTR., THE SANDWICH GENERATION: RISING FINANCIAL BURDENS FOR MIDDLE-AGED AMERICANS 1 (2013), [https://www.pewresearch.org/wp-content/uploads/sites/3/2013/01/Sandwich\\_Generation\\_Report\\_FINAL\\_1-29.pdf](https://www.pewresearch.org/wp-content/uploads/sites/3/2013/01/Sandwich_Generation_Report_FINAL_1-29.pdf) [<https://perma.cc/T9R5-8MXA>].

121. 29 U.S.C. § 2615.

122. *Id.*

123. *See, e.g.*, Blohm v. Dillard's Inc., 95 F. Supp. 2d 473, 477 (E.D.N.C. 2000) (analyzing situation in which operations manager at a department store was demoted after he took FMLA leave for the birth of his child during the store's inventory of merchandise); Switzer v. Rivera, 174 F. Supp. 2d 1097, 1106 (D. Nev. 2001) (alleging acts by supervisor prevented plaintiff from signing bid sheet to qualify for more senior position); Anusie-Howard v. Todd, 983 F. Supp. 2d 645, 646 (D. Md. 2013) (alleging FMLA retaliation when employer assigned a part-time employee full-time work after an FMLA leave request); Hite v. Biomet, Inc., 38 F. Supp. 2d 720, 726 (N.D. Ind. 1999) (alleging a hostile environment when returning to work after taking FMLA leave).

twenty-five years later, the initial step remains the only permanent step that has been taken.<sup>124</sup> The United States lags behind other industrialized nations with respect to family policy legislation.<sup>125</sup> For example, of the 185 countries and territories, the United States joins Papua New Guinea and Suriname as one of only three countries that does not have federal legislation providing monetary benefits to women during maternity leave.<sup>126</sup> Additionally, a survey of fifteen developed countries showed that the median duration of protected leave for mothers is sixty weeks, five times that of what the FMLA offers.<sup>127</sup>

Despite the FMLA's weaknesses compared to leave entitlements in other countries, it still remains the only federal legislation of its kind in the United States. It covers about half of the labor force, and the law has been instrumental in providing leave for employees. Although the FMLA protects both men and women, as well as people of all races, caregiving responsibilities disproportionately fall on women.<sup>128</sup> Effects of caregiving are even more pronounced on women of color.<sup>129</sup> Women of color with caregiving responsibilities are often treated less favorably than white women with caregiving responsibilities.<sup>130</sup> While women are disproportionately affected by FMLA responsibilities, men also face workplace discrimination with respect to caregiving responsibilities.<sup>131</sup>

#### E. *Protections for Servicemembers*

A year after passage of the FMLA, Congress passed USERRA. USERRA was created to strengthen its predecessor statutes—the Selective Training and Service Act of 1940, the Selective Service Act of 1948, the Universal Military Training and Service Act, and the Vietnam

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124. In March 2020, Congress passed the Emergency Paid Sick Leave Act as part of the Families First Coronavirus Response Act granting paid sick leave to certain covered employees. The Act states that the paid sick leave entitlement expires December 31, 2020. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

125. Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 401 (2007).

126. Christina Neckermann, *An International Embarrassment: The United States as an Anomaly in Maternity Leave Policy in the Industrialized World*, 38 HARV. INT'L REV. 40, 41 (2017).

127. *Id.* at 42.

128. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 3 (2007) [hereinafter EEOC], <http://www.eeoc.gov/policy/docs/caregiving.pdf> [<https://perma.cc/79AV-YFUH>].

129. *Id.*

130. *Id.* at 3–4; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 381–82 (2001).

131. EEOC, *supra* note 128, at 6–7.

Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).<sup>132</sup> Interestingly, a U.S. Supreme Court opinion concerning causation standards partially fueled the creation of USERRA. In *Monroe v. Standard Oil Co.*,<sup>133</sup> a refinery employee who was a military reservist filed a VEVRAA claim against his employer because the employer failed to take steps to permit him to make up work hours from weekends when the employee had military training.<sup>134</sup> The Court held that VEVRAA protected the "employee-reservist against discriminations like discharge and demotion, *motivated solely by reserve status.*"<sup>135</sup> The legislative history of USERRA makes it clear that Congress intended the use of membership in, application for membership in, or obligation to the armed forces as a motivating factor in an adverse employment decision as a violation of the statute.<sup>136</sup> As a result, unlike the other statutes discussed in this Article, USERRA actually establishes motivating factor as the causation standard in the text of the statute. Because the statute explicitly mentions the causation standard, there is no danger of the Court applying the heightened but-for causation standard to USERRA. However, this Article will discuss the statute nonetheless to illustrate some parallels between USERRA and other minimum labor standards statutes.<sup>137</sup>

USERRA guarantees veterans reemployment after military service,<sup>138</sup> prescribes the position to which they are entitled to return,<sup>139</sup> prohibits employers from discriminating against returning veterans because of their military service,<sup>140</sup> and prohibits employers from firing veterans without cause within a year of reemployment.<sup>141</sup> Since its passage in 1994, USERRA has been amended to expressly declare that there is no federal or state statute of limitations for claims under the statute,<sup>142</sup> alter the definition of "benefit[s] of employment" to include wages and salary,<sup>143</sup> and include coverage for members of the National Guard responding to emergencies within the United States.<sup>144</sup>

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132. See 38 U.S.C. § 4212.

133. 452 U.S. 549 (1981).

134. *Id.* at 549.

135. *Id.* at 559 (emphasis added).

136. See H.R. REP. NO. 103-65, pt. 1, at 24 (1994).

137. See *infra* section IV.B.

138. 38 U.S.C. § 4312.

139. *Id.* § 4313.

140. *Id.* § 4311.

141. *Id.* § 4316(c)(1).

142. *Id.* § 4327(b).

143. *Id.* § 4303(2).

144. *Id.* § 4303.

## II. THE APPLICATION OF *GROSS* AND *NASSAR* TO MINIMUM LABOR STANDARDS LEGISLATION

Federal minimum labor standards statutes are crucial to labor protections, and broad retaliation provisions are essential to effective enforcement. While *Gross* and *Nassar* decided the retaliation causation standard for two prominent employment discrimination statutes, it remains an open question for retaliation claims brought under minimum labor standards statutes. Applying *Gross* and *Nassar* to these laws undermines their purpose and yields grossly inconsistent results. This Part discusses the current legal landscape of causation standards in the labor standards legislation and details the resulting standards if *Gross* and *Nassar* are applied. It also provides examples of how similar situations would require differing causation standards using the *Gross* and *Nassar* rationales.

### A. *What the Courts Are Doing Currently*

Federal courts have already started applying *Gross* and *Nassar* to federal minimum labor standards retaliation cases.<sup>145</sup> A but-for causation standard is the predominant standard used in FLSA retaliation cases. Conversely, motivating factor is the prevalent causation standard courts use for retaliation claims under OSHA, ERISA, and FMLA. However, the Supreme Court has not reached the question of what causation standard is required for any of these statutes, and the courts of appeal vary greatly in their approaches.

Some courts were already applying but-for causation to FLSA retaliation claims prior to the *Gross* and *Nassar* decisions.<sup>146</sup> Other courts

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145. See, e.g., *Kubiak v. S.W. Cowboy, Inc.*, 164 F. Supp. 3d 1344, 1365 (M.D. Fla. 2016) (applying the but-for causation requirement from *Nassar* to an FLSA retaliation claim); *West v. City of Holly Springs*, No. 3:16CV79-MPM-RP, 2019 WL 2267294, at \*2 (N.D. Miss. May 28, 2019) (applying *Nassar* to an FLSA retaliation case); *Jackson v. Haynes & Haynes, P.C.*, No. 2:16-CV-01297-AKK, 2017 WL 3173302, at \*5 (N.D. Ala. July 26, 2017) (citing *Nassar* when holding that the plaintiff's FLSA retaliation claim fails because she cannot show the employer's retaliation was the but-for cause of her discharge); *Sharp v. Profitt*, 674 F. App'x 440, 451 (6th Cir. 2016) (applying *Nassar* to the FMLA); *Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 187 (D. Mass. 2017) (holding that *Nassar*'s logic signals a but-for causation requirement in the FMLA); *Acosta v. Brain*, 910 F.3d 502, 513–14 (9th Cir. 2018) (assuming, but not deciding, that the but-for causation standard from *Gross* and *Nassar* that the lower court used is applicable to an ERISA retaliation claim). *But see* *Perez v. Lloyd Indus., Inc.*, 399 F. Supp. 3d 308, 314 (E.D. Pa. 2019) (affording deference to the U.S. Department of Labor's interpretation of the retaliation causation standard under OSHA as either substantial reason or but-for despite the *Gross* and *Nassar* decisions).

146. See, e.g., *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 580–81 (5th Cir. 2004) (requiring but-for causation for an FLSA retaliation claim); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1343 (11th

have only started this application in the wake of the decisions. Currently, the Fifth<sup>147</sup> and Eleventh<sup>148</sup> circuits use a but-for standard. Additionally, the Tenth Circuit utilizes a but-for test, yet refers to it as a motivating factor standard.<sup>149</sup> In 1984, the Tenth Circuit held that “[w]hen the ‘immediate cause or motivating factor of a discharge is the employee’s assertion of statutory rights, the discharge is discriminatory under [the FLSA] whether or not other grounds for discharge exist.’”<sup>150</sup> However, despite this language, the Tenth Circuit has clarified that it views the motivating factor and but-for tests as equivalent, holding in a later case that “the discharge is unlawful only if it would not have occurred *but for* the retaliatory intent.”<sup>151</sup>

The Ninth Circuit Court of Appeals’ standard likewise lacks clarity. In 1996, the Ninth Circuit expressed a “dual motive test” in a FLSA retaliation claim.<sup>152</sup> It explained that under this test, a plaintiff must prove their protected activities were a “substantial factor” in bringing about the adverse employment action, and protected activities do not constitute a “substantial factor” where the adverse actions would not have been taken but for the protected activities.<sup>153</sup> In a 2014 Ninth Circuit FLSA retaliation case, the court noted that it would not decide whether *Nassar* applies to FLSA retaliation, but referenced one of its cases from 1999 rejecting the argument that the scope of Title VII’s anti-retaliation provision prescribes the construction courts should give the FLSA’s provision.<sup>154</sup> The dissenting opinion, written by a senior district court judge sitting by designation, asserted that a motivating factor standard should be used

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Cir. 2000) (noting that when showing causation, “the plaintiff must prove that the adverse action would not have been taken ‘but for’ the assertion of FLSA rights”); *Clark v. Shop24 Glob., LLC*, 77 F. Supp. 3d 660, 684 (S.D. Ohio 2015) (requiring an FLSA retaliation plaintiff to produce evidence that the adverse action would not have occurred but for his engagement in protected activity).

147. *Espinoza v. San Benito Consol. Indep. Sch. Dist.*, 753 F. App’x 216, 222 (5th Cir. 2018) (requiring the plaintiff to prove that the adverse employment action would not have happened but for the protected activity).

148. *Andreu v. Hewlett-Packard Co.*, 683 F. App’x 894, 895 (11th Cir. 2017) (requiring FLSA retaliation plaintiffs prove that the adverse action would not have occurred “but for” the protected activity).

149. *See Love v. RE/MAX of Am., Inc.*, 738 F.2d 383 (10th Cir. 1984).

150. *Id.* at 387 (quoting *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975)).

151. *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 n.4 (10th Cir. 1992) (emphasis in original); *see also Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997).

152. *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996).

153. *Id.*

154. *Avila v. L.A. Police Dep’t*, 758 F.3d 1096, 1101 n.3 (9th Cir. 2014) (citing *Lambert v. Ackerley*, 180 F.3d 997, 1005 (9th Cir. 1999)). *But see* *McBurnie v. City of Prescott*, 511 F. App’x 624, 624 (9th Cir. 2013) (citing *Gross* when holding that the district court did not err in giving the jury a “but-for” causation instruction on *McBurnie*’s FLSA retaliation claim).

because of past circuit precedent.<sup>155</sup>

In circuits that have not decided the issue, many district courts are applying *Gross* and/or *Nassar* to FLSA retaliation claims.<sup>156</sup> However, there are some district courts that are applying the motivating factor standard.<sup>157</sup>

With respect to standard of causation in OSHA retaliation claims, fewer courts have decided the issue. This is likely because OSHA does not provide for a private right of action. However, motivating factor appears to be the prevailing standard in district courts.<sup>158</sup> DOL has promulgated regulations that address OSHA's retaliation provision. The applicable regulation reads, in relevant part, as follows:

[T]o establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has

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155. *Avila*, 758 F.3d at 1107 n.3 (Vinson, J., dissenting).

156. *See Demers v. Cnty. of Barron*, No. 18-CV-030-WMC, 2019 WL 2287980, at \*11 (W.D. Wis. May 29, 2019) (noting that "[w]hile the Seventh Circuit has not addressed the specific standard applicable in FLSA retaliation claims, given the similarity of language between the retaliation provisions of the FLSA and Title VII, the court agrees with defendant that the 'but for' or 'because of' standard, rather than the motivating factor standard, governs plaintiff's [FLSA retaliation claim]"); *Palencar v. N.Y. Power Auth.*, No. 5:15-CV-1363, 2019 WL 4918426, at \*14 (N.D.N.Y. Oct. 4, 2019) (applying *Nassar* to the plaintiff's Title VII and FLSA retaliation claims); *Poff v. Quick Pick, LLC*, No. 2:15-CV-00405-JMS-MJD, 2018 WL 6061569, at \*4 (S.D. Ind. Nov. 20, 2018) (applying but-for causation standard to FLSA retaliation claim); *Sanchez v. Caregivers Staffing Servs., Inc.*, No. 1:15-CV-01579, 2017 WL 380912, at \*3 (E.D. Va. Jan. 26, 2017) (citing *Nassar* when holding that but-for causation applies to FLSA retaliation claims); *Aponte v. Mod. Furniture Mfg. Co.*, 14-CV-4813ADSAKT, 2016 WL 5372799, at \*16 (E.D.N.Y. Sept. 26, 2016) (citing *Nassar* and applying but-for causation while noting that although the Second Circuit has not explicitly applied a but-for causation standard to FLSA claims, other lower courts have done so); *Kubiak v. S.W. Cowboy, Inc.*, 164 F. Supp. 3d 1344, 1365 n.30 (M.D. Fla. 2016) (asserting that there is no meaningful basis on which to distinguish the language in Title VII's anti-retaliation provision and the language in the FLSA's provision, and holding that but-for causation applies in FLSA retaliation cases); *Mould v. NJG Food Serv. Inc.*, 37 F. Supp. 3d 762, 778 n.11 (D. Md. 2014) (interpreting FLSA retaliation claims as requiring proof that the plaintiff's protected activity was the but-for cause of the adverse employment action).

157. *See, e.g., Winful v. Med. Univ. of S.C.*, No. 2:13-CV-02150-DCN, 2015 WL 5691558, at \*6 (D.S.C. Sept. 28, 2015) (allowing the plaintiff to use a mixed motive framework to show an impermissible factor motivated the employer's adverse employment decision).

158. *See, e.g., Brown v. Lexington-Fayette Urb. Cnty. Gov't Dep't of Pub. Works*, No. 08-500-JMH, 2010 WL 1529410, at \*4 (E.D. Ky. Apr. 15, 2010) (holding that the plaintiff had not demonstrated that a genuine issue existed as to whether the OSHA grievance she filed was "a substantial or motivating factor" in her termination); *Chao v. Norse Dairy Sys.*, No. C-2-05-0826, 2007 WL 2838958, at \*10 (S.D. Ohio Sept. 26, 2007) (applying a motivating factor standard in a case brought by the U.S. Secretary of Labor alleging OSHA violations).



been violated.<sup>159</sup>

According to the regulation, individuals claiming retaliation under OSHA have the option of showing the protected activity was a substantial reason or the but-for cause of the adverse action. However, the DOL, Occupational Safety and Health Administration has started applying *Nassar* to its OSHA investigations. Citing the Court's ruling in *Nassar*, the agency has decided that it must have reasonable cause to believe that the adverse action would not have occurred but for the protected activity.<sup>160</sup> This change is reflected in the agency's OSHA Whistleblowers Investigation Manual that went into effect in January 2016.<sup>161</sup> The prior manual that was effective September 2011, after *Gross* but before *Nassar*, stated that motivating factor was the causation standard to be used in OSHA retaliation cases.<sup>162</sup> The agency notes that the but-for causation standard is more stringent than the motivating factor, or the even lower, contributing factor tests that it uses for other retaliation and whistleblower statutes.<sup>163</sup>

Motivating factor is the prevailing standard for ERISA retaliation claims, and for most courts this standard pre-dated *Gross* and *Nassar*. The

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159. 29 C.F.R. § 1977.6(b) (2019).

160. U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 3-6 (2016) [hereinafter DOL 2016], [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-007.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-007.pdf) [<https://perma.cc/U6HX-CWAV>].

161. *Id.*

162. U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 3-6 (2011) [hereinafter DOL 2011], [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-03-003.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-003.pdf) [<https://perma.cc/PQ3S-B4QC>].

163. The U.S. Department of Labor, Occupational Safety and Health Administration has enforcement authority over twenty-two retaliation/whistleblower statutes. They are categorized as district court statutes, administrative statutes, and environmental statutes. OSHA is one of three district court statutes, all of which have "because" language similar to the Title VII retaliation provision. The causation standard for the thirteen administrative statutes is contributing factor, while the standard for the six environmental statutes is motivating factor. See DOL 2011, *supra* note 162, at 3-6 to 3-7.

Second,<sup>164</sup> Sixth,<sup>165</sup> Eleventh,<sup>166</sup> and District of Columbia<sup>167</sup> Circuits use a motivating factor standard for ERISA retaliation. While it has not explicitly decided the issue post-*Gross* and *Nassar*, the Seventh Circuit Court of Appeals has stated that the ERISA retaliation provision “does not explicitly permit [mixed motive] claims, so on the strength of [Seventh Circuit] caselaw, but-for causation is probably required.”<sup>168</sup> Additionally, the Ninth Circuit has been applying motivating factor as the causation standard in ERISA retaliation claims for decades.<sup>169</sup> However, the court recently signaled that *Gross* and *Nassar* may change this. In *Acosta v. Brain*,<sup>170</sup> the Ninth Circuit decided a case in which the district court applied a but-for causation standard to an ERISA claim. The court explained the *Gross* and *Nassar* decisions, and assumed, without deciding, that but-for causation applied.<sup>171</sup> The court noted that the more stringent but-for standard did not affect the issues on appeal.<sup>172</sup> ERISA has an amendment issue that is similar to the one cited concerning the ADEA in *Gross*. The *Gross* Court compared the actions of Congress with respect to Title VII and the ADEA. Because both employment discrimination statutes were amended around the same time, the Court reasoned that because Congress only added a motivating factor standard to Title VII, not the ADEA, Congress was intentional about not wanting to add motivating factor language to the ADEA.<sup>173</sup> This reinforced the Court’s interpretation of the ADEA as requiring but-for causation. An analogous situation exists with respect to ERISA and the ACA. In 2010,

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164. See, e.g., *Dister v. Cont’l Grp., Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (holding that a vital element the plaintiff must prove under ERISA is that the employer was at least in part motivated by the specific intent to engage in activity prohibited by the statute).

165. See, e.g., *Stein v. Atlas Indus., Inc.*, 730 F. App’x 313, 321–22 (6th Cir. 2018) (holding that the employee need not prove that interference or retaliation with ERISA entitlements was the employer’s sole purpose but rather, the employee needed to show that a reasonable jury could find that unlawful considerations were a motivating factor in its actions); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992) (holding an ERISA retaliation is not required to prove that the employer’s sole purpose in terminating his employment was to interfere with his retirement benefits, but rather that it was a motivating factor in the decision).

166. See, e.g., *Echols v. Bellsouth Telecomms., Inc.*, 385 F. App’x 959, 961–62 (11th Cir. 2010) (requiring the plaintiff to show that interference with her rights under ERISA was a motivating factor in her discharge).

167. See, e.g., *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 6, 10 (D.C. Cir. 2015) (applying a motivating factor standard to an ERISA retaliation claim).

168. *Nauman v. Abbott Lab’ys*, 669 F.3d 854, 857–58 & n.2 (7th Cir. 2012).

169. See, e.g., *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990) (applying a motivating factor causation standard).

170. 910 F.3d 502 (9th Cir. 2018).

171. *Id.* at 513–14.

172. *Id.* at 514 n.3.

173. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

Congress amended ERISA through the passage of the ACA, and while it amended ERISA in several ways it did not explicitly state the causation standard. Courts may use this as evidence that Congress did not intend ERISA to have a motivating factor standard.<sup>174</sup> However, since motivating factor was the prevailing standard in ERISA retaliation claims and *Nassar* had not yet been decided, Congress had no reason to consider such an amendment.

The FMLA cases decide, or at least mention, the causation issue the most out of the minimum labor standards statutes examined in this Article. There is currently a circuit split with respect to the causation standard required in FMLA retaliation cases. A review of the evolution of the circuit split necessitates an examination of the FMLA retaliation causation legal landscape prior to the Court's 2009 decision in *Gross*.<sup>175</sup> Before *Gross*, courts construed causation in employment discrimination statutes broadly and used a motivating factor standard.<sup>176</sup> In *Gross*, the plaintiff filed suit against his employer for demoting him, asserting that the demotion was because of his age, and thus in violation of the ADEA.<sup>177</sup> The Court held that but-for causation was required under the ADEA, and that there could be no ADEA mixed motive claims.<sup>178</sup>

After *Gross*, the Sixth Circuit Court of Appeals had the opportunity to address the issue of whether *Gross*'s heightened causation standard for ADEA retaliation claims affected the causation standard for FMLA retaliation. In *Hunter v. Valley View Local Schools*,<sup>179</sup> the court addressed the issue of whether but-for causation was required for FMLA retaliation claims in the wake of *Gross*. The Sixth Circuit decided to revisit the appropriateness of applying Title VII precedent to the FMLA after noting the Supreme Court drew a dichotomy between the ADEA and Title VII with respect to application of *Price Waterhouse v. Hopkins*<sup>180</sup> mixed motive framework.<sup>181</sup> The Sixth Circuit concluded that *Price Waterhouse* was still applicable to the FMLA; thus, a mixed motive framework, rather than but-for causation, was in order.<sup>182</sup> The court held that if the plaintiff

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174. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

175. *Gross*, 557 U.S. at 167.

176. *See, e.g.*, Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001) (noting that the causation required for Title VII retaliation is construed broadly, and the employee merely has to show that the adverse action and protected activity are not completely unrelated).

177. *Gross*, 557 U.S. at 169.

178. *Id.* at 177.

179. 579 F.3d 688 (6th Cir. 2009).

180. 490 U.S. 228 (1989).

181. *Hunter*, 579 F.3d at 691.

182. *Id.* at 692.

established that her employer discriminated against her, the burden then shifted to the employer to show that it would have taken the same action despite the impermissible motive.<sup>183</sup>

The Eighth Circuit Court of Appeals—post-*Gross*, but pre-*Nassar*—considered an FMLA retaliation claim in which a dispatcher who had been terminated from her job alleged retaliation under the FMLA in *Wisbey v. City of Lincoln*.<sup>184</sup> The court noted that the plaintiff was not required to prove but-for causation; rather, she need only prove that a retaliatory motive played a role in the adverse employment action.<sup>185</sup> Other circuits had the opportunity to determine the effect *Gross* had on FMLA retaliation claims, but opted not to render a definitive decision.<sup>186</sup>

Of the circuits that have had the issue of the FMLA retaliation causation standard post-*Nassar*, the Sixth Circuit is the only circuit to mandate a but-for requirement as the causation standard. Two of the other circuits have applied a motivating factor standard,<sup>187</sup> and three other circuits have had an opportunity to announce a standard multiple times, but declined to do so.<sup>188</sup>

In *Sharp v. Profitt*,<sup>189</sup> the Sixth Circuit ruled on an FMLA retaliation case involving a Waste Management employee who had been terminated after taking FMLA leave. The court held that but-for causation was the FMLA retaliation causation standard.<sup>190</sup> The court noted, referencing *Nassar*, that it had frequently looked to Title VII precedent with respect to the FMLA.<sup>191</sup> The court also drew analogies to the terms “because” and “for” as part of its rationale.<sup>192</sup> Specifically, the court noted that the “because” language was used by the Supreme Court in ascribing the but-for causation standard to Title VII.<sup>193</sup> Although the *Sharp* opinion states,

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183. *Id.*

184. 612 F.3d 667, 676 (8th Cir. 2010).

185. *Id.*

186. See *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43, 56 n.8 (D.C. Cir. 2011) (“Because we affirm the district court on [the employee’s] appeal, we do not reach [the employer’s] conditional cross-appeal regarding the viability of a mixed motive claim under the FMLA.”); *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 302 (3d Cir. 2012) (“Although [the employee] calls on us to apply the mixed-motive framework to her retaliation claim, she readily survives summary judgment under the more taxing *McDonnell Douglas* standard. Accordingly, we proceed under *McDonnell Douglas* and leave for another day our resolution of whether the FMLA continues to allow mixed-motive claims in the wake of *Gross*.”).

187. See *infra* notes 196–201 and accompanying text.

188. See *infra* notes 205–207 and accompanying text.

189. 674 F. App’x 440 (6th Cir. 2016).

190. *Id.* at 451.

191. *Id.*

192. *Id.*

193. *Id.*

“given our interpretive practices and the meaning ‘for’ has in the statute’s context, it seems that FMLA retaliation requires a showing of but-for causation,” it states a paragraph later, “we do not need to decide today whether but-for causation applies to the FMLA.”<sup>194</sup> Despite the imprecise nature of the opinion, district courts in the Sixth Circuit have cited *Sharp* as precedent for the proposition that FMLA claims require a showing of but-for causation.<sup>195</sup>

The Third Circuit Court of Appeals considered the same issue in *Egan v. Delaware River Port Authority*.<sup>196</sup> Here, the court concluded that under the FMLA implementing regulation promulgated by the DOL, employers are prohibited from using an employee’s FMLA leave as a negative factor in employment decisions. The regulation also states “an employee does not need to prove that invoking FMLA rights was the sole or most important factor upon which the employer acted.”<sup>197</sup> In other words, the DOL regulation allows a motivating factor standard, and the Third Circuit gave deference to the regulation. Hence, the court held that the motivating factor standard should be used in FMLA retaliation cases.

The Second Circuit Court of Appeals also examined the FMLA retaliation causation standard issue in *Woods v. START Treatment & Recovery Centers, Inc.*<sup>198</sup> Here, an employee was terminated from her job as a substance abuse counselor at an addiction treatment facility after taking FMLA leave.<sup>199</sup> She alleged the termination was in retaliation for taking the leave, and appealed the lower court’s decision to give a jury instruction requiring but-for causation.<sup>200</sup> Similarly to the Third Circuit, the Second Circuit in *Woods* gave the DOL’s FMLA implementing regulation<sup>201</sup> *Chevron* deference.<sup>202</sup> Thus, the court held that a motivating factor standard was appropriate.<sup>203</sup>

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194. *Id.*

195. See *Shimko v. Lowe’s Home Ctrs., LLC*, No. 4:17-CV-11709, 2019 WL 934857, at \*8 (E.D. Mich. Feb. 26, 2019) (describing the holding in *Sharp* as “explaining that establishing a *prima facie* case of FMLA retaliation requires ‘a showing of but-for causation’”); *Brown v. Duke Energy Corp.*, No. 1:13CV869, 2019 WL 1439402, at \*10 (S.D. Ohio Mar. 31, 2019) (“[I]t seems that FMLA retaliation requires a showing of but-for causation.” (quoting *Sharp*, 674 F. App’x at 451)); *Harris v. City of Lewisburg*, No. 1:15-CV-00114, 2017 WL 3237780, at \*7 (M.D. Tenn. July 31, 2017) (noting *Sharp*’s proposition that FMLA retaliation claims require the plaintiff to prove but-for causation).

196. 851 F.3d 263 (3d Cir. 2017).

197. *Id.* at 272.

198. 864 F.3d 158 (2d Cir. 2017).

199. *Id.* at 162.

200. *Id.*

201. *Id.* (citing 29 C.F.R. § 825.220(c) (2016)).

202. *Woods*, 864 F.3d at 168.

203. *Id.* at 166.

Other circuits have chosen not to decide the issue, despite the opportunity to do so. The Fifth Circuit was confronted with the issue several times, but expressly decided not to address it in each instance.<sup>204</sup> Likewise, the First,<sup>205</sup> Seventh,<sup>206</sup> and Eleventh<sup>207</sup> Circuits has postponed determination on the issue. In sum, while only one circuit applies the heightened but-for causation standard to FMLA retaliation claims, many lower courts have done so, and it remains possible that the Supreme Court will adopt that standard for such claims.

### B. *Distinguishing the Statutes*

While the text of retaliation provisions in workplace statutes varies greatly,<sup>208</sup> each provision typically has at least one of the following: an opposition clause, a participation clause, and an interference clause.<sup>209</sup> Opposition clauses make it unlawful for an employer or potential employer to take an adverse employment action against an employee or applicant for employment because the individual has opposed a practice made unlawful by a statute. Participation clauses generally protect employees or applicants who have participated in any proceeding regarding the exercise of a right guaranteed by the statute. This typically

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204. *See* *Wheat v. Fla. Par. Juv. Just. Comm'n*, 811 F.3d 702, 706 (5th Cir. 2016) (“Neither this Court, nor the Supreme Court, has decided whether the heightened ‘but for’ causation standard required for Title VII retaliation claims applies with equal force to FMLA retaliation claims.”); *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013) (“We emphasize that we need not, and do not, decide whether *Nassar*’s analytical approach applies to FMLA-retaliation claims and, if so, whether it requires a plaintiff to prove but-for causation.”); *Harrelson v. Lufkin Indus., Inc.*, 614 F. App’x 761, 763 n.3 (5th Cir. 2015) (“We have yet to decide whether *Nassar* applies to the FMLA context.”); *Castay v. Ochsner Clinic Found.*, 604 F. App’x 355, 356 n.2 (5th Cir. 2015) (“Because we concluded that the plaintiff’s claim in that case would fail under either [Title VII or FMLA] standard, we did not decide whether the ‘but for’ causation standard should apply in FMLA retaliation cases.”).

205. *Chase v. USPS*, 843 F.3d 553, 559–60 n.2 (1st Cir. 2016) (“[W]e save for another day the question of *Nassar*’s impact on FMLA jurisprudence with respect to the required causation standard . . .”).

206. *See* *Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n.3 (7th Cir. 2014) (“Our circuit has not addressed, and the parties have not briefed, whether but-for causation should apply to FMLA claims in light of *Gross* and *Nassar*.”).

207. *Jones v. Allstate Ins. Co.*, 707 F. App’x 641, 646 (11th Cir. 2017) (noting that the court would not decide whether the district court erred in applying a “but-for” causation standard to the plaintiff’s FMLA retaliation claim because the plaintiff had not proved she suffered an adverse employment action).

208. Professor Alex B. Long bemoans the inconsistencies in the statutory text and has called for a single retaliation provision that would apply to all federal workplace statutes. *See* Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 561–63 (2011).

209. *See* *Crawford v. Metro. Gov’t*, 555 U.S. 271, 274 (2009) (labeling anti-retaliation clauses in Title VII as an “opposition clause” and “participation clause”); *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514–15 (1997) (referring to the provision preventing interference with rights under ERISA as the “interference clause”).

includes filing a complaint, causing a complaint to be filed, or testifying in a proceeding. Some participation clauses also cover anticipatory participation, meaning those provisions encompass individuals who are about to testify in a proceeding, but have not yet done so. Interference clauses prohibit employers from interfering with the rights conferred by the statute. Because of the textual inconsistencies between the minimum labor standards statutes, an analysis of the text of each is important.

The FLSA retaliation provision reads, in relevant part, as follows:

[T]o 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 this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.<sup>210</sup>

The FLSA retaliation provision is only comprised of a participation clause, and it uses the term “because.” If *Gross* or *Nassar* are applied, FLSA retaliation plaintiffs would be required to prove but-for causation under the FLSA. Application of *Gross* seems especially plausible, because *Gross* was an ADEA case, albeit not a retaliation case, and the ADEA was passed as an amendment to the FLSA.

Unlike FLSA, which only has a participation clause, OSHA has both a participation and an opposition clause.<sup>211</sup> OSHA’s retaliation provision reads as follows:

No person shall discharge or in any 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 this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this [statute].<sup>212</sup>

While the DOL has promulgated implementing regulations pertaining to the OSHA retaliation provision, these regulations neither address the causation standard nor contain any alternative language that may lead a court to give deference to a lower standard. However, the DOL itself appears to be applying *Nassar*, but not *Gross*, to OSHA retaliation cases.<sup>213</sup> One reason DOL may not be applying *Gross* is because *Gross*

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210. 29 U.S.C. § 215(a)(3). Industry committees, composed of members that the U.S. Department of Labor appointed, recommended rates of minimum pay in various industries. Section 205 of the FLSA provided the statutory authority for the DOL for such committees. *Id.* § 205.

211. *Id.* § 660(c)(1).

212. *Id.*

213. *See* DOL 2016, *supra* note 160.

was not a retaliation case. Application of *Nassar* would require that OSHA retaliation plaintiffs prove but-for causation.

Unlike the FLSA and OSHA retaliation provisions, neither *Gross* nor *Nassar* can apply in ERISA context based on the statute's retaliation language. The ERISA retaliation provision reads as follows:

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 under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress.<sup>214</sup>

This provision contains two interference clauses and two participation clauses, one of each for individuals and contributing employers. Notably, only one of the four clauses contains the term "because." As a result, application of *Gross* and *Nassar* to ERISA would mean that a contributing employer would be able to use a motivating factor standard regardless of the provision under which it filed its claim. However, individual employees would only be able to use a motivating factor standard if they filed under the interference provision. If the employee filed under the participation clause, the employee would have to prove the heightened but-for standard of causation.

An illustration is helpful here. Suppose Employees *X* and *Y* work for the same organization. *X* files an ERISA complaint with the DOL alleging the employer terminates employees for the purposes of evading its obligations under a long-term disability plan. As part of its investigation, DOL calls *Y* to testify. After learning of this, the employer fires both *X* and *Y*. *X* files a retaliation claim under the interference provision of the statute, and *Y* files a retaliation claim under the participation clause. *X*, the employee who filed the original complaint, can proceed under a

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214. 29 U.S.C. § 1140 (citations omitted).



motivating factor standard. However, *Y*, the employee who testified when called on to do so by the federal government, would have the heightened burden of proving but-for causation. The Supreme Court has previously referred to this type of situation in which the complaint initiator has more protections than a witness as “freakish.”<sup>215</sup> Additionally, in situations in which an individual and an employer were both retaliated against (in unrelated incidents) for testifying in an ERISA proceeding, the individual would have a higher causation burden than the employer if *Gross* and *Nassar* were applied.

This example illustrates the inconsistency that would result from such an application. It also undermines the assertions of the *Gross* and *Nassar* Courts that use of the term “because” in the statute was meant to signal but-for causation. All four clauses of the ERISA retaliation clause are in the same provision of the statute.<sup>216</sup> It seems highly unlikely that Congress would want a heightened but-for causation standard for the second of four clauses in the same provision and only signal so by using the term “because.”

Exactly which FMLA provision covers retaliation is the subject of a circuit split, and proves vital in the statutory interpretation of what the standard should be, as well as analyzing the actual FMLA retaliation provision.<sup>217</sup> The FMLA has three provisions that could constitute a retaliation prohibition. The first states “[i]t 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].”<sup>218</sup> The second provision states “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA].”<sup>219</sup> The final provision states,

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual (1) has filed any charge or has institute or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA]; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under

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215. *Crawford v. Metro. Gov't*, 555 U.S. 271, 277–78 (2009) (“[N]othing in [Title VII] requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”).

216. 29 U.S.C. § 1140.

217. Compare cases cited *infra* note 224, with cases cited *infra* note 225.

218. 29 U.S.C. § 2615(a)(1).

219. *Id.* § 2615(a)(2).

[the FMLA].<sup>220</sup>

A specific type of retaliation is provided for in § 2615(b).<sup>221</sup> It covers adverse actions taken by employers when employees have filed complaints or lawsuits or provided information or testimony related to FMLA rights.<sup>222</sup> This is a retaliation clause based on participation. However, not all instances of FMLA retaliation are covered by this provision. Many litigants assert that they were retaliated against, not because they filed a complaint about FMLA rights, but rather for simply requesting and/or taking FMLA leave.<sup>223</sup> This frequent scenario is not covered by § 2615(b). Some courts have used the FMLA's opposition clause, § 2615(a)(2), for scenarios such as this. Specifically, the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits have found a retaliation cause of action under § 2615(a)(2).<sup>224</sup> The First, Eighth, and Ninth Circuits have found that § 2615(a)(1) can support a retaliation cause of action.<sup>225</sup> Additionally, some courts have found a retaliation cause of action in the DOL's FMLA implementing regulations alone.<sup>226</sup> The regulations state in relevant part, "[t]he Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise

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220. *Id.* § 2615(b).

221. *Id.*

222. *Id.*

223. *See, e.g.,* Demyanovich v. Cadon Plating & Coatings, LLC, 747 F.3d 419, 434 (6th Cir. 2014) (reversing summary judgment for the employer in a case where the employee was terminated after requesting FMLA leave for congestive heart failure); Pereda v. Brookdale Senior Living Cmty., Inc., 666 F.3d 1269, 1276–77 (11th Cir. 2012) (reversing motion to dismiss where employee was fired after requesting FMLA leave but before taking it).

224. *See* Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 546 (4th Cir. 2006); Haley v. All Compressor LLC, 391 F.3d 644, 649 (5th Cir. 2004); Bryant v. Dollar Gen. Corp., 538 F.3d 394, 402 (6th Cir. 2008); Bryson v. Regis Corp., 498 F.3d 561, 570 (6th Cir. 2007); Kauffman v. Fed. Express Corp., 426 F.3d 880, 884 (7th Cir. 2005); Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1170 (10th Cir. 2006).

225. *See* Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 n.4 (1st Cir. 1998) (discussing that retaliation for exercising rights under the FMLA can be read into § 2615(a)(1)); Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1006 (8th Cir. 2012) ("The textual basis for such a claim [in which an employer takes adverse action against an employee because the employee exercised rights to which he is entitled under the FMLA] is not well developed in our cases, but the claim likely arises under the rule of § 2615(a)(1)."); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001) (concluding that § 2615(a)(2) and § 2615(b) do not cover adverse actions an employee suffers simply because they have taken FMLA leave; rather, this cause of action is covered under § 2615(a)(1)).

226. *See* Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 301 (3d Cir. 2012) (concluding that neither § 2615(a)(1) nor § 2615(a)(2) expressly prohibits employers from terminating employees for exercising or attempting to exercise FMLA rights, but a U.S. Department of Labor regulation has interpreted the sum of these two provisions as mandating this result).

FMLA rights.”<sup>227</sup> Some courts have used the regulation alone to find a retaliation cause of action without reference to a specific statutory provision.<sup>228</sup> In 2009, the DOL amended the FMLA’s implementing regulations and addressed the issue in the preamble to the amended regulations. The relevant portion of the preamble reads as follows:

[T]he Department proposed in paragraph (c) to state explicitly that the Act’s prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights. Section 2615(a)(1) makes it unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided for under the Act. Although section 2615(a)(2) of the Act also may be read to bar retaliation . . . , the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)’s prohibition of discrimination and retaliation.<sup>229</sup>

At least one circuit has changed course regarding the applicable section of the FMLA that pertains to adverse actions against employees who have exercised or attempted to exercise FMLA leave rights.<sup>230</sup>

The choice of which provision of the FMLA covers retaliation is important, not because of what the text says, but because of what it does not say. In both *Gross* and *Nassar*, the Court harped on the term “because of” in the ADEA and Title VII. In *Gross*, the Court posited that the term “because of” in the ADEA meant “by reason of” or “on account of,” and this justified a but-for causation standard.<sup>231</sup> The *Nassar* Court noted the importance the *Gross* Court placed on “because of.”<sup>232</sup> This term also appears in Title VII. Interpreting the term “because of” to signal a requirement of but-for causation is something the Court itself previously warned against in *Price Waterhouse*, cautioning, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to

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227. 29 CFR § 825.220(c) (2019).

228. *See, e.g.*, *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146–47 n.9 (3d Cir. 2004) (“Even though 29 C.F.R. § 825.220(c) appears to be an implementation of the ‘interference’ provisions of the FMLA, its text unambiguously speaks in terms of ‘discrimination’ and ‘retaliation,’ and we shall, of course, apply it in a manner consistent with that text.”).

229. Family and Medical Leave Act, 73 Fed. Reg. 67934, 67986 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

230. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 167 (2d Cir. 2017) (“We have in the past suggested that retaliation claims fall under § 2615(a)(2) . . . . We now hold that FMLA retaliation claims like [the plaintiff’s], *i.e.* terminations for exercising FMLA rights by, for example, taking legitimate FMLA leave, are actionable under § 2615(a)(1).”).

231. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009).

232. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013).

misunderstand them.”<sup>233</sup> Notably, the term does not appear in the FMLA retaliation provision.<sup>234</sup> This absence means that the portion of the text upon which the Court relied in its previous decisions to apply the heightened causation standard should not be part of the FMLA’s interpretation.

The term “because of,” which appears vital to the statutory interpretations rendered by the U.S. Supreme Court in both *Gross* and *Nassar*, does not appear in either § 2615(a)(1) or § 2615(a)(2). The FMLA’s retaliation language is broader and spans three provisions of the statute.<sup>235</sup> It should be read to encompass a mixed motive cause of action. The term “interfere” in the statute is broad enough to encompass retaliation claims as well as non-retaliation claims. Despite the routine application of Title VII case law to FMLA cases, courts should be wary of using *Nassar* as the default causation standard, given the textual differences in the statutes. The Supreme Court has warned of the dangers of blindly applying precedent from one employment statute to another.

In *Gross*, the Court stated that the differences in statutory text between Title VII and the ADEA prevented the Court from applying *Price Waterhouse*, Title VII precedent, to the ADEA.<sup>236</sup> Likewise, in *Nassar*, when applying the *Gross* but-for standard to Title VII retaliation claims, the Court noted that “[g]iven the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”<sup>237</sup> While the ADEA and Title VII may not have textual differences, Title VII and the FMLA certainly do. These variances mandate a different interpretation of the retaliation causation standard.

Finally, USERRA is unique among these statutes because a motivating factor retaliation causation standard is actually written into the statute.<sup>238</sup> However, the text of the statute illuminates a flaw in the *Gross* and *Nassar* Courts’ rationale concerning but-for causation. The USERRA retaliation provision reads, in relevant part, as follows:

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 this chapter, (2) has testified or otherwise made a

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233. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

234. *See* 29 U.S.C. § 2615.

235. *Id.*

236. *Gross*, 557 U.S. at 175 n.2.

237. *Nassar*, 570 U.S. at 352.

238. 38 U.S.C. § 4311(b).

statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.<sup>239</sup>

The statute also states in 38 U.S.C. § 4311(c)(2)<sup>240</sup> that an employer has violated section (b) if protected activity is “is a motivating factor in the employer’s action.”<sup>241</sup> It also states:

An employer shall be considered to have engaged in actions prohibited—

(2) under subsection (b), if the person’s (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a *motivating factor* in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such person’s enforcement action, testimony, statement, assistance, participation, or exercise of a right.<sup>242</sup>

The provision contains an interference clause and a participation, both of which are prefaced by the term “because.”<sup>243</sup> Application of the *Gross* and *Nassar* rationales to USERRA would mean that Congress intended but-for causation to apply. That is, the *Gross* and *Nassar* opinions would lead one to believe that but-for causation should apply due to the term “because.” However, the next paragraph of the retaliation provisions makes it clear that this was not the intent of Congress, as it explicitly states that the retaliation provision is violated if protected activity is a

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239. *Id.* (emphasis added).

240. The complete text of 38 U.S.C. § 4311(c)(2) states:

An employer shall be considered to have engaged in actions prohibited under subsection (b), if the person’s (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such person’s enforcement action, testimony, statement, assistance, participation, or exercise of a right.

*Id.* § 4311(c)(2).

241. *Id.*

242. *Id.* (emphasis added).

243. *Id.* § 4311(b).

motivating factor in the adverse action.<sup>244</sup> USERRA is evidence that Congress’s use of the term “because” does not signal its desire to invoke a heightened causation standard. Indeed, in the wake of the *Monroe* decision,<sup>245</sup> Congress explicitly wanted the statute to be a response to the Court’s imposition of heightened causation.<sup>246</sup> Nevertheless, it still used the word “because” in the statute.

The table below shows the resulting standard if courts interpreted the term “because” in retaliation provisions of minimum labor standards statutes to require but-for causation.

**Table 1:  
Results of Application of *Gross* and *Nassar* to Minimum Labor  
Standards Statutes**

Statute	Clause	Causation Standard
FLSA	Participation Clause	But-for
OSHA	Participation Clause Opposition Clause	But-for But-for
ERISA	Employee Interference Clause Employee Participation Clause Employer Interference Clause Employer Participation Clause	Motivating Factor But-for Motivating Factor Motivating Factor
FMLA	Opposition Clause Participation Clause Interference Clause	Motivating Factor But-for Motivating Factor
USERRA	All Clauses	Motivating Factor

### C. *Inconsistent Results*

An application of *Gross* and *Nassar* to the federal minimum labor standards statutes discussed above would result in but-for causation being

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<sup>244</sup> *Id.* § 4311(c)(2).

<sup>245</sup> *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

<sup>246</sup> H.R. REP. NO. 103-65, pt. 1, at 24 (1993) (“To the extent that courts have relied on dicta from the Supreme Court’s decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.”).

applied to FLSA, OSHA, and ERISA's individual participation clause, while motivating factor would be required for the FMLA, ERISA contributing employers, ERISA's interference clause, and USERRA.<sup>247</sup> The inconsistent standards may lead to illogical results.

Four examples illustrate this problem. First, there is the issue of servicemember leave under USERRA and servicemember caregiver leave under FMLA. Employment leave for servicemembers is codified in a different statute from leave for those who care for servicemembers.<sup>248</sup> The former is protected by USERRA, while the latter is covered by the FMLA.<sup>249</sup> Suppose a father took FMLA leave to care for his daughter, a member of the National Guard who was wounded while deployed. Both the father and daughter are demoted upon their return to work for their taking of leave. Both file retaliation claims with DOL, and both are subsequently terminated, prompting each to file a retaliation claim. The father files under the FMLA's participation clause, and the daughter files under USERRA's participation clause. The father would have to prove the heightened but-for standard of causation, while the daughter would simply have to show that her taking of protected leave was a motivating factor. The fact that Congress granted both servicemembers and their caregivers a statutory right to leave illustrates the value Congress placed on the functions of both. It is difficult to believe that Congress sought to institute a higher burden of proof for the person who is needed to care for the servicemember than for the servicemember herself, both because it is unlikely that is what Congress intended and it would be nonsensical to do so.

The second example is that of nursing mothers under the FLSA and FMLA. The FLSA requires employers to provide employees breaks for the purpose of expressing breast milk for a nursing child and a private place, other than a bathroom, that may be used by the employee while expressing milk.<sup>250</sup> The FMLA provides for unpaid leave for the birth or adoption of a child and to care for the child. Enforcement of the breastfeeding provisions of the FLSA has already proven difficult,<sup>251</sup> and requiring a but-for causation standard for retaliation claims under the provision would dilute enforcement even more. Application of *Gross* and *Nassar* to both the FLSA and FMLA would result in a but-for causation standard for all FLSA retaliation claims and a motivating factor standard

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247. See *supra* section II.B.

248. See 29 U.S.C. §§ 2601–2654; 38 U.S.C. §§ 4301–4334.

249. Compare 29 U.S.C. §§ 2601–2654, with 38 U.S.C. §§ 4301–4334.

250. 29 U.S.C. § 207(r)(1)(B).

251. See Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1840 (2018).

for FMLA participation clause claims. Hence, nursing mothers who are working (i.e., not on family leave), yet are being denied their FLSA rights to breaks for expressing milk would have a more arduous burden in pursuing a retaliation claim than a nursing mother who was on FMLA leave and retaliated against for taking the leave. In other words, if an employer wanted to commit retaliatory acts against nursing mothers,<sup>252</sup> the mother who chose to work while nursing and forego family leave would be worse off in a retaliation claim than the one who took the leave. Moreover, such a case could invoke claims under minimum labor standards legislation and under employment discrimination statutes. If the working nursing mother (i.e., the one not on family leave) was treated differently because she needed to express milk, she would have a viable status-based claim under Title VII.<sup>253</sup> Pursuant to the Civil Rights Act of 1991, the status-based claim would only apply a motivating factor standard.<sup>254</sup>

A third example involves heightened protection for reporting violations that endangers an individual's pension under ERISA compared to lower protections for similar violations under the FLSA. Because the FLSA and ERISA would have different causation standards after the application of *Gross* and *Nassar*, employees alleging retaliation under the FLSA for exercising rights or participating in proceedings related to their wages would have a heightened causation standard to meet than employees who allege retaliation under ERISA for exercise of rights or participating in proceedings related to pension benefits.

A fourth and final example concerns having heightened protection from employer retribution for taking leave to recover from a workplace injury under the FMLA than from reporting the hazardous workplace conditions that led to the injury in the first place pursuant to OSHA. It is unlikely that Congress intended for individuals who need to take leave from work because of an on-the-job injury to have less protection from retaliation than an employee who reports the unsafe working conditions that led to the injury.

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252. For examples of FLSA retaliation cases involving nursing mothers, see generally *Eddins v. SSP Am., Inc.*, No. 4:12-CV-00177-JEG, 2013 WL 12128683, at \*2 (S.D. Iowa Jan. 31, 2013); *Swenson v. Falmouth Pub. Schs.*, No. 2:19-CV-00210-GZS, 2019 WL 4739667, at \*3 (D. Me. Sept. 27, 2019).

253. See *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–30 (5th Cir. 2013) (holding that adverse employment action against a female employee because she was expressing milk violates Title VII); see also *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556, at \*4 (D. Colo. June 25, 2012) (noting that Title VII could support claims concerning lactation if other coworkers were allowed to take breaks to use the restroom while lactating mothers were prohibited from expressing breast milk).

254. 42 U.S.C. § 2000e-2(m).



Additionally, unlike the inconsistency that results with respect to differences between statutes, some of these inconsistencies are actually within the same statute, as is the case with ERISA and the FMLA.<sup>255</sup> The fact that there are different causation standards depending on which clause of the same retaliation provision a person files under is unreasonable. Application of *Gross* and *Nassar* to minimum labor standards statutes would lead to very inconsistent results and should be avoided.

### III. THE BUT-FOR CAUSATION STANDARD LACKS SUPPORT AS A MATTER OF STATUTORY INTERPRETATION

This Part examines the numerous canons of statutory interpretation that support imposition of a lower causation standard for minimum labor standards statute retaliation claims. It begins with an explanation of how the *Gross* and *Nassar* Courts failed to apply the plain meaning rule. It then discusses textual integrity and extrinsic sources canons.

#### A. *Failure to Appropriately Apply the Plain Meaning Rule*

The use of the term “because” does not plainly signal but-for causation. The concept of causation itself is not even plainly signaled from the text of the ADEA or Title VII. Rather, causation was judicially added as part of the legal framework for these statutes. The Court, not Congress, imported causation into workplace statutes. To assert that the use of the word “because” not only signals a causation requirement, but the specific requirement of but-for causation does not constitute a plain meaning.

Moreover, the crux of the plain meaning rule is commonality. A recent empirical study illustrates the Court’s failure to aptly apply the plain meaning rule. Using a sample size of 1,486 participants, the study presented participants with a fact pattern modeled from one of three recent federal court decisions.<sup>256</sup> *Gross* was one of the decisions.<sup>257</sup> After reading the fact pattern, participants answered questions pertaining to causation and blameworthiness.<sup>258</sup> Results showed that even where but-for causation was not present, 74% of the participants still found the casual language of the statute to be satisfied.<sup>259</sup> This lends support for the idea that the but-for test is too restrictive in that most ordinary people found

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255. See *supra* section II.B.

256. James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 995 (2019).

257. *Id.* The other decisions were *Burrage v. United States*, 571 U.S. 204 (2014) and *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014).

258. See Macleod, *supra* note 256, at 997.

259. *Id.* at 999.

that a result occurred because of conduct even in the absence of but-for causation.<sup>260</sup>

The plain meaning rule dictates that words are to be given their ordinary meaning, unless doing so would result in absurdity.<sup>261</sup> Absurdity is a high threshold to meet. An example of absurdity can be found in the case of *United States v. Kirby*,<sup>262</sup> a case in which a sheriff who arrested a mail carrier for murder was charged with violating a statute that prohibited knowingly and willfully obstructing mail delivery.<sup>263</sup> However, even when absurdity does not result the Court has stated that unreasonableness will serve as a substitute. In *United States v. American Trucking Ass'ns*,<sup>264</sup> the Court stated,

When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words.<sup>265</sup>

While the results of application of *Gross* and *Nassar* to labor standards legislation may not rise to the level of absurd, they are both futile and unreasonable because such application negates the retaliation provisions that are meant to safeguard the protected activity.

### B. *Textual Integrity Canons*

The next canon requires that each statutory provision be read in the context of the whole statute. This is commonly known as the Whole Act Rule.<sup>266</sup> The origins of the canon date back to 1850,<sup>267</sup> and it has been frequently invoked for over a century and a half.<sup>268</sup> It requires that when

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260. *Id.* at 999–1000.

261. For a history of the absurdity doctrine, see Linda D. Jellum, *But That Is Absurd! Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917 (2011).

262. 74 U.S. 482 (1868).

263. *Id.* at 483.

264. 310 U.S. 534 (1940).

265. *Id.* at 543.

266. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 675 (5th ed. 2014).

267. *See United States v. Boisdoré's Heirs*, 49 U.S. 113, 122 (1850) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

268. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. \_\_\_, 137 S. Ct. 1002, 1010 (2017) (noting that interpretation of a phrase in a statute is not confined to a single sentence when the text of

a court is interpreting a provision of a statute it looks to the entire statute, as well as the statute's object and policy.<sup>269</sup> Application of this canon to minimum labor standards statutes would require courts to consider the retaliation provision in relation to the statute at large, and recognize the object of the retaliation provision in the entire statutory scheme. But-for causation allows violation of the statute with no attaching liability, so long as the illegitimate motive—interfering with the exercise of statutory rights or investigation of other statutory violations—is paired with a legitimate motive.

Another textual integrity canon is the presumption against hiding elephants in mouseholes. The doctrine was named after a quote from the *Whitman v. American Trucking Ass'n*<sup>270</sup> opinion in 2001. In it, Justice Antonin Scalia, writing for the majority wrote, “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>271</sup> Though the name is fairly modern in origin, the concept is not.<sup>272</sup> Instituting a heightened but-for causation standard merely through the use of the term “because” would be hiding an elephant in a mousehole. It is implausible that Congress would signal a heightened standard through use of a term that is used in countless other statutes that do not even have a causation requirement. It is even more improbable that Congress intended to signal different causation standards for separate clauses within the same retaliation provision through the use of the term “because.”

### C. *Extrinsic Source Canons*

Extrinsic source canons pertain to agency deference and continuity in law. They include deference to agency interpretation of statutes they enforce as a canon, examining informal agency interpretations such as those in handbooks to interpret the statute, and the borrowed

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the whole statute is instructive to its meaning); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (recognizing that interpreting a statute requires looking to the provisions of the law as a whole); *Richards v. United States*, 369 U.S. 1, 11 (1962) (noting that it is fundamental that a section of a statute not be read in isolation from the context of the entire statute and interpreting legislation requires looking at the entire statute and its object); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (stating that expounding a statute requires looking to the provisions of the whole law).

269. *Boisdoré's Heirs*, 49 U.S. at 122.

270. 531 U.S. 457 (2001).

271. *Id.* at 468.

272. See generally *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994).

statute rule.<sup>273</sup>

### 1. *Deference to Agency Interpretation*

The DOL has promulgated regulations for OSHA and the FMLA that speak specifically to the applicable causation standard.<sup>274</sup> These regulations ought to be afforded deference pursuant to the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>275</sup> In *Chevron*, the Court articulated a test for determining when an agency's interpretation of a statute ought to be afforded deference.<sup>276</sup> Before the test can be implemented, the doctrine established in *United States v. Mead Corp.*,<sup>277</sup> also referred to as *Chevron Step Zero*, must be satisfied.<sup>278</sup> *Mead* requires, as a threshold matter, that before an agency's interpretation of a statutory provision qualifies for *Chevron* deference, it must be clear that Congress delegated authority to said agency to make rules carrying the force of law, and that the agency's interpretation was created pursuant to that authority.<sup>279</sup> *Chevron* requires that a court determine whether Congress has spoken directly to the specific question at issue.<sup>280</sup> If Congress has been silent or ambiguous, then *Chevron* requires an inquiry as to whether the DOL's interpretation is reasonable with respect to both interpretation and policy.<sup>281</sup>

Both the OSHA and the FMLA regulations concerning the causation standard qualify for *Chevron* deference. Congress granted the DOL rulemaking authority under OSHA.<sup>282</sup> The OSHA regulation addressing retaliation gives individuals the option of proving retaliation by showing that protected activity was either a substantial reason for or a but-for cause of the adverse action.<sup>283</sup> Many courts have afforded *Chevron* deference to the DOL's OSHA regulation.<sup>284</sup> For instance, in *Perez v. Lloyd Industries*,

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273. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 841–44 (1984); ESKRIDGE, JR. ET AL., *supra* note 266, at 866–67 (discussing the borrowed statute rule).

274. 29 C.F.R. § 1977.6(b) (2019); *id.* § 825.220(c).

275. 467 U.S. 837 (1984).

276. *Id.* at 842–43.

277. 533 U.S. 218 (2001).

278. *Id.*

279. *Id.* at 226–27.

280. *Chevron*, 467 U.S. at 842.

281. *Id.* at 843.

282. 29 U.S.C. § 655.

283. 29 C.F.R. § 1977.6(b) (2019).

284. See, e.g., *Perez v. Clearwater Paper Corp.*, 184 F. Supp. 3d 831, 842 (D. Idaho 2016) (citing the DOL regulation to hold that “[c]ausation is established where the protected activity was a

*Inc.*,<sup>285</sup> a district court in Pennsylvania addressed an employer's argument that but-for causation was required in OSHA retaliation claims pursuant to *Gross* and *Nassar*.<sup>286</sup> The court held that the employer's argument that the but-for causation was required for OSHA retaliation claims ignored the "clear controlling regulatory language."<sup>287</sup>

With respect to the FMLA, the statute not only gives the DOL the authority to create regulations, but it mandated that the agency do so.<sup>288</sup> Hence, requirements of *Mead* are satisfied. Congress has been silent on the issue of the causation standard to be used in FMLA retaliation cases. None of the provisions under § 2615 dealing with interference speak to causation. Moreover, the statute does not contain the "because of" language that the Court thought dispositive in *Gross* and *Nassar*.<sup>289</sup> Additionally, the DOL's interpretation is a reasonable one. The agency has interpreted the broad interference language of the FMLA as prohibiting the use of the exercise of FMLA rights in making any negative employment decisions whatsoever. Although the Court has made it clear that it leans towards but-for causation with respect to workplace law retaliation,<sup>290</sup> the Court should not substitute its judgment in place of the agency that Congress duly authorized to fill any gaps in the statute. The Court has acknowledged that congressional authorization to engage in the rulemaking process is a very good indicator of delegation that merits *Chevron* deference.<sup>291</sup>

## 2. *In Pari Materia* Rule

In addition to agency interpretations, another extrinsic source canon of statutory construction that supports a lower causal standard than but-for cause in minimum labor standards retaliation claims is the *in pari materia*

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substantial reason for the adverse employment action"); *Perez v. USPS*, 76 F. Supp. 3d 1168, 1188 (W.D. Wash. 2015) (finding that the Secretary of Labor proved causation because he demonstrated that the employee's protected activities were a substantial reason for the adverse actions); *Perez v. Renaissance Arts & Educ., Inc.*, No. 8:12-CV-514-T-MAP, 2013 WL 5487097, at \*2 (M.D. Fla. Sept. 30, 2013) (noting that proving the protected activity was a substantial reason for the adverse action establishes causation).

285. 399 F. Supp. 3d 308 (E.D. Pa. 2019).

286. *Id.* at 321.

287. *Id.*

288. 29 U.S.C. § 2654 instructs the Secretary of Labor to prescribe regulations for the FMLA.

289. *See supra* section II.B.

290. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) (stating that but-for causation is the default rule, and Congress is presumed to have incorporated but-for causation absent an indication to the contrary in the statute).

291. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

canon.<sup>292</sup> According to this canon, when similar provisions or terms are found in comparable statutes, there is a presumption that the provisions or terms should be applied the same way.<sup>293</sup> The fundamental rationale for the canon is that ensuring harmonization of two similar areas of law assists in making the law make sense.<sup>294</sup>

The Supreme Court has noted several times that the decision to borrow statutory text in a new statute is a “strong indication that the two statutes should be interpreted *pari passu*,”<sup>295</sup> and the Roberts Court has frequently relied on one statute to interpret another.<sup>296</sup> The *in pari materia* rule is buttressed by other canons of construction. For instance, the Borrowed Statute Rule provides that when Congress borrows provisions of a statute, it adopts the interpretations of that statute.<sup>297</sup> While this canon typically applies when one jurisdiction models its statute on that a previous jurisdiction, it can also apply to statutes within the same jurisdiction.<sup>298</sup> Indeed, the presumption underlying the canon is much stronger within the same jurisdiction.<sup>299</sup>

Application of the *in pari materia* and borrowed statute canons to the minimum labor standards retaliation cases suggests that motivating factor should be the causation standard used when comparing the FLSA, OSHA, ERISA, and FMLA to their predecessor statute—the National Labor Relations Act of 1935 (NLRA).<sup>300</sup> Passed in 1935 to quell disruption of industry commerce by labor-management disputes, the NLRA endowed employees with the right to organize and required employers to

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292. For a detailed discussion of the *in pari materia* doctrine, see Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177 (2020).

293. See ESKRIDGE, JR. ET AL., *supra* note 266, at 866 (citing Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 873 (2012)).

294. Desai, *supra* note 292, at 193–94.

295. *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); see also *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (noting that when Congress uses the same language in two statutes that have similar purposes, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes).

296. See, e.g., Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 234, 236 (2010) (finding that of the Roberts Court relied on other statutes in statutory interpretation 39.2% of the time during its first three and a half terms).

297. See ESKRIDGE, JR. ET AL., *supra* note 266, at 866–67.

298. *Id.*

299. *Id.*

300. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

bargain collectively with employees through employee-selected representatives.<sup>301</sup>

The NLRA contains a retaliation provision that has an interference clause and a participation clause.<sup>302</sup> The interference clause makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the NLRA].”<sup>303</sup> The statute’s participation clause makes it an unfair labor practice “to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under [the NLRA].”<sup>304</sup>

The National Labor Relations Board (NLRB) has interpreted the NLRA’s interference clause to require only motivating factor causation. In *Wright Line*,<sup>305</sup> the NLRB held that motivating factor was the requisite causation standard in NLRA retaliation cases under the interference clause.<sup>306</sup> The NLRB’s standard in *Wright Line* was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*,<sup>307</sup> a NLRA mixed motive retaliation case in which the Court held that shifting the burden to the employer to prove the same decision defense was reasonable. In *Transportation Management*, the Court stated,

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.<sup>308</sup>

Both the NLRB<sup>309</sup> and courts<sup>310</sup> have applied the motivating factor standard from *Wright Line* to retaliation claims under the NLRA’s participation clause, despite the clause’s use of the term “because.” As the

301. 29 U.S.C. § 157.

302. *See id.* § 158(a)(1).

303. *Id.* § 158(a)(1); *see also* *Wright Line*, 251 N.L.R.B. 1083, 1092 (1980).

304. 29 U.S.C. § 158(a)(4) (emphasis added).

305. 251 N.L.R.B. 1083 (1980).

306. *Id.* at 1089.

307. 462 U.S. 393 (1983), *abrogated on other grounds by* *Dir., Off. of Workers’ Comp. Programs, Dep’t of Lab. v. Greenwich Collieries*, 512 U.S. 267 (1994).

308. *Id.* at 403.

309. *See generally* *Taylor & Gaskin, Inc.*, 277 N.L.R.B. 563 (1985).

310. *See S. Freedman & Sons, Inc. v. NLRB*, 713 F. App’x 152, 157–58 (4th Cir. 2017) (applying motivating factor as the causal standard in a NLRA participation clause retaliation claim); *NLRB v. McCullough Env’t Servs., Inc.*, 5 F.3d 923, 931 (5th Cir. 1993) (applying the motivating factor standard to a retaliation claim under the NLRA’s participation clause); *Am. Model & Pattern, Inc. v. NLRB*, No. 85-6060, 86-5049, 1987 WL 37138, at \*4 (6th Cir. Apr. 17, 1987) (holding that an employer violates the NLRA’s participation clause if an employee’s participation in a NLRB proceeding is a motivating factor in the employer’s adverse action against the employee).

predecessor statute to almost all minimum labor standards legislation, this interpretation of the causation standard as requiring only motivating factor causation should be imported from NLRA retaliation cases to other minimum labor standards retaliation cases using the *in pari materia* canon.

#### IV. INTERPRETING RETALIATION STATUTES AGAINST COMMON LAW BASELINES

This Part discusses the unique intersectionality of private law and public law in the employment and retaliation jurisprudence. As discussed above, imputation of *Gross* and *Nassar* reasoning to federal minimum labor standards legislation can have consequences that lead to confusion, irrationality, and inconsistency among and within the statutes.<sup>311</sup>

Employment law is uniquely situated at the intersection of public law and private law. While there are differing definitions of what constitutes public law and private law, many scholars agree that constitutional law, criminal law, and administrative law are considered areas of public law, while torts, contracts, and property are considered areas of private law.<sup>312</sup> Many may characterize employment law generally as private law addressing the rights of individual employees, this Article contends that both antidiscrimination employment statutes and minimum labor standards legislation constitute public law. Because federal courts interpret workplace statutes against a backdrop of tort law (private law), this interpretation should be done with the public values that underlie the statute in mind.<sup>313</sup>

##### A. *The Judiciary's Prevailing Private Law Approach*

Tort principles have been part of the Supreme Court's employment law jurisprudence for over half a century. The Court has long subscribed to the notion that when Congress creates a "federal tort" it does so against the general background of tort law.<sup>314</sup> Numerous scholars have been critical of the Court's importation of tort doctrine into employment

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311. See *supra* sections II.B, II.C.

312. See Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125, 125 (2013); Shyamkrishna Balganesh, *Private Law Statutory Interpretation*, 92 S. CAL. L. REV. 949, 949 (2019).

313. For a full discussion of the role of public values in statutory interpretation, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

314. See *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613–14 (2009); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68–69 (2007); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).



cases.<sup>315</sup> However, there have been instances in which the courts' reliance on the law of torts for statutory interpretation has served the purposes of the statutes well. Examples include application of tort rules concerning remedies to recovery under Title VII and importation of discovery rules into the Lily Ledbetter Fair Pay Act.<sup>316</sup> Tort doctrine is not completely divorced from retaliation law, as both torts and retaliation provisions are concerned with deterrence of bad behavior and compensation to some degree. However, if courts are going to invoke tort principles in statutory interpretation of retaliation statutes, the courts should make sure the tort principles align for the statute at issue. The *Gross* and *Nassar* Courts failed to do this when they used negligence doctrine to interpret an intentional offense.

The *Gross* opinion quotes Prosser and Keeton on Law of Torts in support of its application of but-for causation to the ADEA.<sup>317</sup> The *Gross* Court notes that according to Prosser and Keeton, “[a] act or omission is not regarded as a cause of an event if the particular event would have occurred without it.”<sup>318</sup> However, this proclamation addresses negligence, and it is inapposite to apply it to retaliation, which is an intentional offense.<sup>319</sup> Consequently, it is inapposite to apply it to intentional offenses.

The Court has noted that retaliation is intentional. In *Jackson v. Birmingham Board of Education*,<sup>320</sup> the Court stated, “[r]etaliation is, by definition, an intentional act.”<sup>321</sup> Unlike a negligent tortfeasor who will only be held liable for foreseeable consequences, an intentional tortfeasor will be liable for essentially every result stemming from the tortious conduct, whether the result is direct or indirect.<sup>322</sup> Intentional tortfeasors should bear the risk of the plaintiff getting a windfall because the intentional tortfeasor created the risk. Intentional tortfeasors have more

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315. See generally Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375 (2014); William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014); Charles A. Sullivan, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079 (2014).

316. 42 U.S.C. § 2000a.

317. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176–77 (2009).

318. *Id.* at 176–77 (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 265 (5th ed. 1984)).

319. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005) (“Retaliation is, by definition, an intentional act.”).

320. 544 U.S. 167 (2005).

321. *Id.* at 173–74.

322. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 227 (2d ed. 2011).

liability; however, this is not reflected in the *Gross* and *Nassar* decisions.

While there is normative scholarship asserting that the analytical framework for discrimination should not require intent,<sup>323</sup> currently intent is required. For courts to mandate a showing of intent in a disparate treatment analysis, which is the analysis used for retaliation claims, yet use negligence theory to inform that analysis, is incongruous. Limiting liability of intentional retaliatory actions by employers does a disservice to retaliation provisions in statutes. Retaliation prohibitions in minimum labor standards statutes serve a vital public interest. Hence, allowing employers who engage in retaliatory conduct against employees to escape liability for intentional conduct by taking advantage of legal doctrine designed to address negligent conduct implicates public policy.

### *B. Minimum Labor Standards Legislation as Public Law*

Courts tend to treat workplace disputes as though they operate solely in the private sphere. In other words, these disputes are viewed as private disputes between employer and employee. This perspective is flawed because it fails to consider the impact these disputes may have on the public at large.

While some may consider laws that convey individual workplace protection rights as private rights, this notion ignores the larger societal purpose of the laws. Indeed, many workplace laws are grounded in constitutional principles. It is axiomatic that employment discrimination laws are grounded in equal protection principles. However, minimum labor standards statutes are similarly anchored. While it is easy to perceive the public law origins in certain legislative arenas, such as the child labor provisions of the FLSA, others may not be so obvious. All of the minimum labor standards laws are promulgated pursuant to Congress's power under the Commerce Clause and some pursuant to its general welfare power. Additionally, the Court has held that the FMLA caregiver provisions were based on gender discrimination and should be considered prophylactic legislation under the Fourteenth Amendment.<sup>324</sup>

A common thread that runs through minimum labor standards

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323. See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1059 (2017) (proposing a theory of discrimination based on recklessness); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005) (opposing the dichotomy between conscious discrimination for which courts provide a remedy and unconscious discrimination for which courts do not, but should under Title VII); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (arguing that discrimination is more akin to negligent conduct than intentional conduct, and courts should recognize a negligence theory of discrimination in addition to the intentional doctrine).

324. *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

legislation is economic security. Economic security of both the worker and the worker's family is important individually and collectively. The import of having a minimum wage and overtime pay cannot be overstated. Additionally, benefits like pension plans and healthcare are equally vital to economic security. In fact, they are so vital that the federal government sought to insure pension plans through the Pension Benefit Guaranty Corporation and the ACA provisions.<sup>325</sup>

Additionally, retaliation and whistleblowing provisions generally are aimed at serving the public interest. The primary categories these laws are intended to serve are industrial peace, civil rights, public health and safety, and protection of the public treasury.<sup>326</sup> The relationship between child labor and health is well documented.<sup>327</sup> These categories that are generally applicable to all retaliation and whistleblowing statutes also coincide with the purposes of minimum labor standards legislation. The FLSA worked in tandem with the NLRA to raise wages and facilitate peace between labor and management.<sup>328</sup> The Supreme Court has also noted a correlation between an eight-hour workday and public health.<sup>329</sup> Upon the introduction of the bill that would become the FLSA, Secretary of Labor Frances Perkins noted that in states where working hours were reduced to eight hours per day, public health improved.<sup>330</sup> Moreover, interdisciplinary research has documented the health effects of long working hours.<sup>331</sup> Having a minimum wage protects the economic

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325. Adam E. Cearley, *The PBGC: Why the Retiree's Traditional Life Raft Is Sinking and How to Bail It Out*, 23 EMORY BANKR. DEV. J. 181, 183–84 (2006).

326. See DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 8 (2d ed. 2004).

327. See generally Todd Postol, *Public Health and Working Children in Twentieth-Century America: An Historical Overview*, 14 J. PUB. HEALTH POL'Y 348 (1993); Susan H. Pollack, Philip J. Landrigan & David L. Mallino, *Child Labor in 1990: Prevalence and Health Hazards*, 11 ANN. REV. PUB. HEALTH 359 (1990) (suggesting work-related injury is a significant public health problem in children and suggests additionally that illness related to toxic exposure may be a problem in working children).

328. See generally Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000).

329. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (noting that the denial of a living wage to workers is detrimental to their health and well-being).

330. *Fair Labor Standards Act of 1937: Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Lab. & the H. Comm. on Lab.*, 75th Cong. 188 (1937).

331. See Haiou Yang, Peter L. Schnall, Maritza Jauregui, Ta-Chen Su & Dean Baker, *Work Hours and Self-Reported Hypertension Among Working People in California*, 48 HYPERTENSION 744, 744–45 (2006); A.E. Dembe, J.B. Erickson, R.G. Delbos & S.M. Banks, *The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States*, 62 OCCUPATIONAL & ENV'T MED. 588, 592 (2005) (finding that working overtime increased an employee's likelihood of on-the-job injuries by 61%); Allard E. Dembe, *Ethical Issues Relating to the Health Effects of Long Working Hours*, 84 J. BUS. ETHICS 195, 196 (2009) (exploring the ethical implications of long working hours and health challenges).

security of American workers and their families. Millions of dollars are spent on programs that promote the economic security of families including Early Head Start and Head Start, Temporary Assistance for Needy Families, Community Services Block Grant, and Federal-State Unemployment Insurance Programs.<sup>332</sup> If employers cannot terminate, demote, or take other adverse employment actions against employees who exercise statutory rights, working American families will be self-sustaining and will need fewer public resources. Furthermore, the Court has recognized the public interest served by the FLSA.<sup>333</sup>

OSHA promotes public health and safety, as it protects the safety of workers, and in some cases, third parties. ERISA falls under the public health and safety and public treasury protection categories because of its provisions relating to health care coverage and pension regulations. The FMLA implicates civil rights, treasury protection, and public health. The statute clearly lists its equal protection aims with respect to gender discrimination.<sup>334</sup> It states that one of the purposes of the statute is to balance the demands of the workplace with the needs of families “in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis.”<sup>335</sup> Moreover, it has implications with respect to race that are less pronounced. Women of color with caregiving responsibilities are often treated less favorably than white women with caregiving responsibilities.<sup>336</sup> USERRA implicates national security and treasury protection. The statute’s stated purpose is “to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.”<sup>337</sup> If employers are allowed to discriminate against uniform service members, it could discourage participation in the armed services, which could impact national security. Additionally, if these service members are

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332. GENE FAUK, KAREN E. LYNCH & JESSICA TOLLESTRUP, CONG. RSCH. SERV., R45097, FEDERAL SPENDING ON BENEFITS AND SERVICES FOR PEOPLE WITH LOW INCOME: IN BRIEF (2018).

333. *See, e.g.*, *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (stating that the FLSA is “a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce”).

334. *See Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.”).

335. 29 U.S.C. § 2601(b)(4).

336. Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 39–40 (2012).

337. 38 U.S.C. § 4301(a)(1).

unable to earn a living because of employment discrimination, they may need treasury-funded public assistance.

The fact that individual employees may not relinquish their rights under the minimum labor standards statutes through contract supports the interpretation that these laws constitute public law. Courts have repeatedly held that even when a statutory right is conferred on a private party, it is not waivable if it is in the public interest.<sup>338</sup> For example, *Brooklyn Savings Bank v. O'Neil*,<sup>339</sup> an FLSA overtime case, addressed whether an employee can waive his rights under the FLSA.<sup>340</sup> The Court held that “[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”<sup>341</sup>

The Court has explicitly prohibited the waiver of FLSA rights.<sup>342</sup> The DOL issued agency guidance in 2016 stating that the DOL will not approve an settlement agreements that restrict an individual from participating in protected activity.<sup>343</sup> Included among the provisions that the DOL will not approve are provisions that require an individual to waive his or her right to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency.<sup>344</sup> Additionally, the FMLA implementing regulations expressly prohibit employees from waiving, and employers from inducing them to waive, their prospective FMLA rights.<sup>345</sup> Most federal courts allow waiver of procedural rights under USERRA, but

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338. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (refusing to enforce waiver of Title VII rights because waiver “would defeat the paramount congressional purpose behind Title VII”); *Midstate Horticultural Co. v. Pa. R.R. Co.*, 320 U.S. 356, 361 (1943) (declining to enforce an agreement between a carrier and shipper to extend the statute of limitations beyond the period contained in the Interstate Commerce Act because the purpose of the provision was to protect the public interest); *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982) (“Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA’s provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees.”); *Pereira v. State Bd. of Educ.*, 37 A.3d 625, 654 (Conn. 2012) (“[When] a law seeks to protect the public as well as the individual, such protection to the state cannot, at will, be waived by any individual . . .”).

339. 324 U.S. 697 (1945).

340. *Id.* at 700.

341. *Id.* at 704.

342. *Id.* at 706–07.

343. Memorandum from Maryann Garrahan, Dir. of Whistleblower Prot. Programs, to Reg’l Adm’rs & Whistleblower Program Managers 1 (Aug. 23, 2016).

344. *Id.* at 2.

345. 29 C.F.R. § 825.220(d) (2019).

maintain that substantive USERRA rights cannot be waived.<sup>346</sup>

Finally, the fact that many of the minimum labor standards statutes allow for criminal penalties in addition to civil ones also serves as evidence that they are public law. Criminal law is considered public law.<sup>347</sup> While the FLSA, OSHA, and ERISA are primarily civil in nature, they also provide for criminal penalties in addition to the civil penalties. Conviction of a willful violation of the FLSA can result in a maximum fine of \$10,000, imprisonment for a maximum term of six months, or both.<sup>348</sup> Likewise, OSHA authorizes criminal penalties when a willful violation of an OSHA rule, order, standard, or regulation causes an employee's death.<sup>349</sup> The penalties include a maximum fine of \$10,000 and maximum prison sentence of six months upon conviction.<sup>350</sup> Both the fine and prison term maximums double if the individual has a previous conviction for the same offense.<sup>351</sup> ERISA also provides for criminal penalties.<sup>352</sup> Before the statute was enacted, the U.S. criminal code made theft or conversion of benefit plan assets,<sup>353</sup> falsification of plan documents,<sup>354</sup> and improper payments to plan officials<sup>355</sup> criminal

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346. See *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1107 (6th Cir. 2010) (allowing for the waiver of employee's procedural rights under USERRA); *Vahey v. Gen. Motors Co.*, No. 11-CV-00661, 2012 WL 9390844, at \*3 (D.D.C. Mar. 1, 2012) (holding that substantive USERRA rights cannot be waived, but procedural rights can); *Aull v. McKeon-Grano Assocs., Inc.*, No. 027526 (HAA), 2007 WL 655484, at \*6 (D.N.J. Feb. 26, 2007) (noting that statutes of limitations are not substantive rights under USERRA, and allowing waiver).

347. See *Balganesh*, *supra* note 312, at 949.

348. 29 U.S.C. § 216(a).

349. *Id.* § 666(e).

350. *Id.*

351. *Id.*

352. *Id.*

353. 18 U.S.C. § 664 provides that:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 664.

354. 18 U.S.C. § 1027 states that:

Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined under this title, or imprisoned not more than five years, or both.

*Id.* § 1027.

355. 18 U.S.C. § 1954 prohibits plan officials from receiving, agreeing to receive, or soliciting "any

offenses. ERISA criminalized certain reporting and disclosure violations,<sup>356</sup> prohibited coercive interference with plan and statutory rights,<sup>357</sup> and prohibited certain convicted persons from holding plan positions.<sup>358</sup>

Retaliation provisions in minimum labor standards legislation are not concerned with horizontal interaction between private parties. Rather, they are part of the overall regulatory enforcement scheme. Many workplace law statutes, including federal minimum labor standards laws, rely on private enforcement of public law.<sup>359</sup> It is part of the regulatory scheme Congress deliberately established. There are many advantages to private enforcement of retaliation laws, including the better positioning of employees to identify retaliation and an ability to pursue litigation independent of the budget Congress has allotted to the applicable administrative agency.<sup>360</sup>

To incentivize enforcement, Congress has created numerous mechanisms, including attorneys' fees awards, punitive damages, and private rights of action.<sup>361</sup> However, the courts' implementation of a heightened but-for causation standard for retaliation claims may deter private parties from bringing claims. Employees, who are already at a disadvantage due to inferior knowledge of employer practices, now have to meet a heightened causation standard in retaliation cases. Even for employees who may not understand this burden at the outset, there would be attorneys who do. This could make it difficult for some employees to secure counsel.

Private law protects private interests and is based in principles of personal autonomy and laissez-fair.<sup>362</sup> Minimum labor standards legislation is designed to work against coercive market forces that may promote low wages, exploitation of child labor, wage theft, pension theft, hazardous working conditions, and burdensome leave requirements.

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fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning [the] plan." *Id.* § 1954.

356. 29 U.S.C. § 1131.

357. *Id.* § 1141.

358. *Id.* § 1111.

359. For a thorough discussion of the role of private enforcement in public law, see J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

360. See David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1242 (2018).

361. Glover, *supra* note 359, at 1151.

362. See generally Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647 (2009).

Market forces give employers an incentive to discourage employees from taking leave, which is one of the reasons minimum labor standards are so vital. The but-for standard ensures the employer receives the windfall, rather than the employee.<sup>363</sup> This is a proposition that the Supreme Court has supported in the past.<sup>364</sup> This reasoning is applicable to all mixed-motive claims including FMLA retaliation claims. Congress made any kind of retaliation based on requesting or taking FMLA leave unlawful,<sup>365</sup> not just retaliation that divests someone of a job. An employer's showing that the employee would have been terminated anyway does not extinguish liability. It simply should exclude certain remedies.

In interpreting public law, courts should be wary of using private law as a backdrop. Invocation of private law principles to interpret public law is not new, and there are a myriad of statutes for which the courts have done so.<sup>366</sup> Courts have substantially invoked private law norms to interpret public statutes and have diluted the efficacy of the statutes as a result.<sup>367</sup> If courts are going to import common law principles into statutory interpretation, they need to look for guidance in areas of the common law that similarly deal with the juncture of public law and private law, particularly given the influence of the at-will employment doctrine.

C. *Lessons from a Common Law Tort at the Intersection of Private Law and Public Law: Wrongful Discharge in Violation of Public Policy*

If courts are going to import tort principles into employment law, they need to be cognizant that employment law represents the intersection of public and private law. They should look to a common law tort jurisprudence that already addresses the intersection of public and private law, specifically the tort of wrongful discharge in violation of public policy.

Because Congress is often silent on the causation standard to be applied

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363. See Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 784–85 (2019).

364. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401–03 (1983), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267 (1994).

365. 29 U.S.C. § 2615(b).

366. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978) (noting that the common law of torts has developed a set of rules regarding compensation for injuries, and declaring that these rules provide the starting point for interpretation of 42 U.S.C. § 1983); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (stating that Congress expected the courts to interpret the Sherman Act's broad mandate by drawing on common-law tradition).

367. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1364 (1982).



to the retaliation provisions of statutes, courts are left with the task of interpreting the statute to determine which causation standard should be used. Courts have long used the common law as a backdrop against which to interpret statutes. While this Article does not argue that this practice is erroneous, it does assert that courts should only use portions of the common law that are appropriate to achieve the purpose of the statute, particularly when the purpose of the provision at issue is to undergird the statute itself. While a statute's purpose cannot be divorced from its text, it is important that everyday words like "because" not be used to justify major changes to retaliation jurisprudence that affect the efficacy of the statute.

The at-will employment doctrine holds that an employee can be terminated for "a good reason, a bad reason, or no reason at all."<sup>368</sup> At-will employment is the default rule in forty-nine states and the District of Columbia.<sup>369</sup> Montana is the only state that requires an employer to have "good cause" to terminate a non-probationary employee.<sup>370</sup> However, the at-will employment doctrine does have exceptions, most of which are statutory.<sup>371</sup> Anti-discrimination laws are one exception.<sup>372</sup> Retaliation for violation of federal minimum labor standards statutes are another.<sup>373</sup> Wrongful discharge in violation of public policy is a common law exception.<sup>374</sup> It follows that courts seeking to import tort principles into workplace law would look to the wrongful discharge tort as instructive. The tort<sup>375</sup> of wrongful discharge in violation of public policy is

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368. See *Loucks v. Star City Glass Co.*, 551 F.2d 745, 747 (7th Cir. 1977).

369. *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/67MV-FYDU>].

370. *Id.*

371. Constitutional exceptions to the at-will employment doctrine also exist for public employees. See generally *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

372. *At-Will Employment Overview*, *supra* note 369.

373. *Id.*

374. *Id.*

375. Some jurisdictions allow a claim for wrongful discharge in violation of public policy under contract theory, not tort theory. See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (noting that an exclusive contract theory of the tort of wrongful discharge in violation of public policy is most appropriate).

recognized in forty-five U.S. jurisdictions.<sup>376</sup> Alabama,<sup>377</sup> Florida,<sup>378</sup> Georgia,<sup>379</sup> Louisiana,<sup>380</sup> Maine,<sup>381</sup> and New York<sup>382</sup> do not recognize the cause of action. Many of the jurisdictions that recognize the tort apply a lower causation standard than but-for causation.<sup>383</sup> Causation standards in

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376. Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 623 (2006).

377. Alabama does not have a cause of action for wrongful discharge in violation of public policy. Its courts have reasoned that such a claim does not exist because it would “abrogate the inherent right of contract between employer and employee.” *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977); *see also* *Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1052 (Ala. 1990) (refusing to create a cause of action for wrongful discharge in violation of public policy because doing so would “overrule nearly 70 years of existing Alabama case law, and because the suggested basis of ‘public policy’ is too nebulous an underpinning to justify adoption of such a rule” (quoting *Hinrichs*, 352 So. 2d at 1132)).

378. *See Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1989) (holding that in the absence of a statute granting a property interest or an employment contract, employment is terminable at the will of either party without cause and an action for wrongful discharge is not permitted); *Brown Jordan Int’l Inc. v. Carmicle*, Nos. 0:14-CV-60629, 0:14-CV-61415, 2015 WL 6123520, at \*6 (S.D. Fla. Oct. 19, 2015) (applying Florida law and holding that “Florida does not recognize a common law cause of action for wrongful or retaliatory discharge” (quoting *Saavedra v. Univ. of S. Fla. Bd. of Trs.*, No. 8:10-CV-1935-T-17TGW, 2011 WL 1742018, at \*4 (M.D. Fla. May 6, 2011))), *aff’d*, 846 F.3d 1167 (11th Cir. 2017).

379. *See Ga. Power Co. v. Busbin*, 250 S.E.2d 442, 443–44 (Ga. 1978) (finding that in the absence of a contract, employment is at will and does not support a cause of action against the employer for alleged wrongful discharge); *Jellico v. Effingham Cnty.*, 471 S.E.2d 36, 37 (Ga. Ct. App. 1996) (holding that employee who was fired for refusing to certify building that were not complaint with the building code could not recover because in Georgia, an at-will employee cannot bring an action against his employer for wrongful discharge from employment, and employers are permitted to discharge employees, regardless of motives, without liability).

380. *See Williams v. Delta Haven, Inc.*, 416 So. 2d 637, 638 (La. Ct. App. 1982) (deciding that there is no wrongful discharge when an at-will employee is fired); *Jackson v. E. Baton Rouge Par. Sch. Bd.*, 393 So. 2d 243, 245 (La. Ct. App. 1980) (finding that at-will employees may be dismissed “by their employer at any time, for any reason, and the employer does not incur liability for the discharge”).

381. Maine has declined to recognize the tort of wrongful discharge in violation of public policy. However, it leaves open the possibility for recognition of such a claim. *See MacDonald v. E. Fine Paper, Inc.*, 485 A.2d 228, 230 (Me. 1984) (“[W]e decline, on the record presently before us, to decide whether this jurisdiction recognizes a common law action for retaliatory discharge in circumstances where public policy is being contravened. We need only decide that the record demonstrates conclusively that no public policy has been violated by [the employee’s] discharge.”); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 100 (Me. 1984) (dismissing the plaintiff’s wrongful discharge claim but noting that it “do[es] not rule out the possible recognition of such a cause of action when the discharge of an employee contravenes some strong public policy”).

382. *See Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983) (“This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature.”); *Horn v. N.Y. Times*, 790 N.E.2d 753, 759 (N.Y. 2003) (noting that New York courts have consistently declined to create the tort of wrongful discharge in violation of public policy).

383. *See supra* section III.C; *see, e.g., VECO, Inc. v. Rosebrock*, 970 P.2d 906, 920 (Alaska 1999) (holding that a motivating factor standard should be used for wrongful discharge claims in Alaska);

wrongful discharge cases range from the sole cause standard to the contributing factor standard. However, most jurisdictions that recognize the tort use a substantial motivating factor, motivating factor, or

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*Murcott v. Best W. Int'l, Inc.*, 9 P.3d 1088, 1089 (Ariz. Ct. App. 2000) (using substantial motivating factor as the causation standard in wrongful discharge claims under Arizona law); *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385–86 (Ark. 1988) (holding that wrongful discharge claims in Arkansas are viable under contract, not tort, theory, and that “termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interests of the economic system or the public good and constitutes a breach of the employment contract” (quoting *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974))); *Cronk v. Intermountain Rural Elec. Ass'n*, No. 90CA0666, 1992 WL 161811, at \*5 (Colo. App. Apr. 2, 1992) (applying substantial motivating factor as the causation standard); HAW. JURY INSTR. – CIV. 16.14 (2016) (codifying “substantial or motivating factor” into Hawaii court rules as the applicable causation standard in wrongful termination in violation of public policy cases); *First Prop. Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 186 (Ky. 1993) (using substantial motivating factor as the causation standard in Kentucky wrongful discharge cases); *Magee v. DanSources Tech. Servs., Inc.*, 769 A.2d 231, 253–54 (Md. Ct. Spec. App. 2001) (applying a motivating factor standard); *Goins v. Ford Motor Co.*, 347 N.W.2d 184, 191 (Mich. Ct. App. 1983), *abrogated on other grounds by Watassek v. Mich., Dep't of Mental Health*, 372 N.W.2d 617 (Mich. Ct. App. 1985) (applying a significant factor causation standard in a Michigan wrongful discharge case); *Denoto v. Sears Imported Autos.*, No. A11-1355, 2012 WL 1149350, at \*2 (Minn. Ct. App. Apr. 9, 2012) (“An employee must demonstrate that his discharge was ‘motivated by his good faith refusal to violate the law.’” (quoting *Phipps v. Clark Oil & Refin. Corp.*, 408 N.W.2d 569, 572 (Minn. 1987))); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 86 (Mo. 2010) (holding that “contributing factor” is the causation standard for wrongful discharge cases in Missouri); *Weidler v. Big J Enters., Inc.*, 953 P.2d 1089, 1095 (N.M. Ct. App. 1997) (upholding New Mexico jury instructions setting forth an element of retaliatory discharge as “protected activity was a substantial or motivating factor in his discharge from employment”); *Brooks v. Stroh Brewery Co.*, 382 S.E.2d 874, 878 (N.C. Ct. App. 1989) (using substantial factor as the causation standard for wrongful discharge cases in North Carolina); *Miracle v. Ohio Dep't of Veterans Servs.*, 157 Ohio St. 3d 413, 2019-Ohio-3308, 137 N.E.3d 1110, 1113 (defining the causation element of wrongful discharge in violation of public policy as requiring a showing that “the plaintiff’s dismissal was motivated by conduct related to the public policy”); *Bostwick v. Atlas Iron Masters, Inc.*, 780 P.2d 1184, 1188 (Okla. Ct. App. 1988) (applying a substantial motivating causation standard in a retaliatory discharge case); *Hinton v. Designer Ensembles, Inc.*, 540 S.E.2d 94, 97 (S.C. 2000) (using “significantly motivated” as the causation standard in a South Carolina wrongful discharge case (quoting *Wallace v. Milliken & Co.*, 406 S.E.2d 358, 360 (S.C. 1991))); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002) (applying a motivating factor standard); *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998) (applying a substantial factor causation standard); *Rickman v. Premera Blue Cross*, 184 Wash. 2d 300, 314, 358 P.3d 1153, 1160 (2015) (using a substantial motivating factor causation standard in a wrongful discharge case); *Page v. Columbia Nat. Res., Inc.*, 480 S.E.2d 817, 828–29 (W. Va. 1996) (applying a motivating factor causation standard); *Cardwell v. Am. Linen Supply*, 843 P.2d 596, 600 (Wyo. 1992) (requiring protected activity to have “significantly motivated” the discharge in wrongful termination cases (quoting *Buckner v. Gen. Motors Corp.*, 760 P.2d 803, 807 (Okla. 1988))). *But see Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005) (holding that a sole cause standard is applicable to wrongful discharge claims in Indiana); *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 894 (Iowa 2015) (noting that Iowa uses a determinative factor standard); *Allums v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998) (holding that recovery for retaliatory discharge under Nevada law may not be had upon a “mixed motives” theory; thus, a plaintiff must demonstrate that their protected conduct was the proximate cause of their discharge); *Shaw v. Titan Corp.*, 498 S.E.2d 696, 700 (Va. 1998) (noting that Virginia has not adopted a mixed motive standard in wrongful discharge claims).

contributing factor standard, all of which are lower than the but-for standard.<sup>384</sup> Although the tort is only applicable in situations in which there has been termination of employment,<sup>385</sup> it is useful with respect to other adverse employment actions as well.

Courts typically prohibit termination where the employee is discharged for refusing to commit an illegal act, performing a civic duty, and exercising a statutory right.<sup>386</sup> However, many of the jurisdictions that recognize the cause of action use a causation standard lower than the but-for standard.<sup>387</sup> This common law cause of action and the proliferation of a lower causation standard should inform the causation standard applied to retaliation provisions in minimum labor standards legislation.

Exercising a right or claiming a benefit under an employment statute constitutes protected activity for the purpose of the exemption.<sup>388</sup> Though this at-will employment exception is traditionally used at the state level, the same rationale would hold true at the federal level with minimum labor standards legislation. Courts have applied wrongful discharge to the exercise of many different types of rights.<sup>389</sup>

Moreover, courts recognize federal law as being the basis for a state tort. California became the first state to do so in 1980, and other states have followed.<sup>390</sup> Some states place restrictions on the use of federal law as public policy by requiring that the federal law have some impact on the citizens of the state.<sup>391</sup> Nevertheless, this seems an easy threshold to meet. Federal minimum labor standards statutes have been used as the underlying public policy in wrongful discharge claims. For example, the Supreme Court of Missouri held in *Fleshner v. Pepose Vision Institute, P.C.*<sup>392</sup> that an employee could recover for wrongful termination after she was fired for meeting with a the DOL investigator concerning an FLSA minimum wage complaint.<sup>393</sup> The court noted that “[t]he public policy reflected by the minimum wage law is that employees should be encouraged to communicate with government labor investigators about

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384. See sources cited *supra* note 383.

385. WESTMAN & MODESITT, *supra* note 326.

386. *At-Will Employment Overview*, *supra* note 369.

387. See sources cited *supra* note 383.

388. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 5.02(c) (AM. L. INST. 2015).

389. See, e.g., *Kalany v. Campbell*, 640 S.E.2d 113, 117–18 (W. Va. 2006) (retaliatory action taken against an individual who reports allegations of sexual harassment is in violation of the public policy of West Virginia); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 685 (Iowa 1990) (alleging retaliatory discharge for pursuing workers’ compensation claim).

390. Modesitt, *supra* note 376, at 626.

391. See *id.* at 627.

392. 304 S.W.3d 81 (Mo. 2010).

393. See *id.* at 97.

their employers' overtime compensation without fear of retaliation."<sup>394</sup> In *Cerracchio v. Alden Leeds, Inc.*,<sup>395</sup> a New Jersey court held that OSHA constituted a valid public policy that could support a wrongful discharge claim.<sup>396</sup> The FMLA was held to be a public policy on which wrongful discharge could be based in *Fischer v. City of Roslyn*.<sup>397</sup>

Despite the prevalence of federal labor standards statutes forming the basis of wrongful discharge claims, not every statute qualifies. In *Ingersoll-Rand Co. v. McClendon*,<sup>398</sup> the U.S. Supreme Court held that ERISA preempts state common law wrongful discharge in violation of public policy claims.<sup>399</sup> The Court held that the claim that the employer terminated the employee because of the employer's desire to avoid contributing to or paying benefits under the employee's pension fund was preempted by ERISA, noting that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [the statute]."<sup>400</sup>

The use of federal labor standards laws, the state equivalents of these laws, and other policies that concern exercise of state statutory rights (e.g., filing a workers compensation claim) show that state courts have considered the type of protected activity at issue and believed it prudent not to use a but-for causation standard.

While wrongful discharge in violation of public policy is an exception to employment at will,<sup>401</sup> it is a narrow one. Many courts have placed limitations on what constitutes public policy. Some courts require the public policy at issue to be delineated in a constitution, statute, regulation, administrative rule or decision, case law, or code of professional conduct.<sup>402</sup> Despite the narrow tailoring courts have done with respect to the tort, the causation standard remains low in most jurisdictions. Courts have applied a mixed motive causation standard to the tort of wrongful

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394. *Id.*

395. 538 A.2d 1292 (N.J. Super. Ct. App. Div. 1988).

396. *See id.* at 1298. Exercise of OSHA rights is recognized as a basis for a wrongful discharge claim in other jurisdictions. *See, e.g.,* Pytlinski v. Brocar Prods., Inc., 760 N.E.2d 385, 388 (Ohio 2002) (allowing an employee to recover when the employee was fired for reporting several violations of law, including OSHA violations).

397. No. 29361-1-III, 2011 WL 2639931, at \*6 (Wash. Ct. App. July 7, 2011).

398. 498 U.S. 133 (1990).

399. *Id.* at 140.

400. *Id.* at 138 (quoting 29 U.S.C. § 1144(a)).

401. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1662-63 (1996).

402. Modesitt, *supra* note 376, at 626.

discharge in violation of public policy.<sup>403</sup> If an employer had dual motives for terminating an employee, one related to exercise of a statutory right and another one that would be permissible, a motivating factor standard should be used in furtherance of public policy and the purpose of the statute.

## CONCLUSION

Federal minimum labor standards legislation plays a vital role in protecting members of the American workforce, and the private enforcement regulatory scheme that Congress has created relies on retaliation prohibitions for its efficacy. It is imperative that these retaliation proscriptions be given the broadest possible interpretation to effectuate enforcement of the statute.

The Supreme Court's decision to require but-for causation in retaliation claims under federal employment discrimination statutes should not be transferred to retaliation claims under minimum labor standards statutes. Interpreting the term "because" in a statute as a signal of congressional intent to require employee-plaintiffs to prove but-for causation is incongruent with canons of statutory interpretation. Moreover, it would lead to less intra-statute consistency and less inter-statute harmony.

The Court's use of the common law generally, and negligence theory in particular, as the backdrop against which it interprets claims for intentional offenses arising from statutes that were created for the express purpose of abrogating the common law is particularly problematic. This approach is a symptom of a much larger problem—courts view employment retaliation claims as though they are private disputes between employee and employer. This perspective fails to recognize the impact non-compliance with workplace law has on society at large. The public nature of workplace law retaliation provisions necessitates that courts consider the public policy behind these retaliation prohibitions. This holistic consideration supports interpreting the retaliation provisions to require a causation standard lower than but-for cause.

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403. See *Marlo v. UPS*, 890 F. Supp. 2d 1243, 1245 (C.D. Cal. 2012) (applying California law and holding that a motivating factor causation standard applied to the tort of wrongful discharge in violation of public policy); *Shaw v. Titan Corp.*, No. 96-2143, 1998 WL 277045, at \*3 (4th Cir. May 18, 1998) (applying Virginia law and holding the district court did not err in failing to give a but-for causation jury instruction in a wrongful discharge in violation of public policy case). *But see* *Shaw v. Titan Corp.*, 498 S.E.2d 696, 700 (Va. 1998) (noting that a mixed motive standard in wrongful discharge claims has not been adopted in Virginia).

