

## **AHERA: Blowing the whistle on asbestos in the schools**

The Asbestos Hazard Emergency Response Act (AHERA) was designed to reduce the risk of exposure to asbestos in schools. It requires public and private schools to inspect their buildings for asbestos-containing building materials. It also sets standards for when asbestos abatement is required and to make sure that asbestos left in place remains in good condition and is undisturbed by students, faculty and staff.

### **Who is Covered?**

The AHERA whistleblower provisions apply to state and local educational entities and therefore protect any employee of a public school or school district. The whistleblower protections likely apply to employees of private schools as well, though no court has directly addressed the issue.

### **What Activity is Protected Against Retaliation?**

The AHERA contains very broad whistleblower protections. The law states:

No State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this subchapter to any other person, including a State or the Federal Government.

15 U.S.C. § 2651(a). This means that school employees cannot be retaliated against for discussing anything related to asbestos in schools with anyone.

### **What Must a Plaintiff Do to Prevail?**

A successful complainant must prove the following by a preponderance of the evidence, meaning that it must be more likely than not that:

1. The employee engaged in protected activity;
2. The employer knew of the employee's reporting/protected activity;
3. The employer subjected the employee to unfavorable personnel action; and
4. The employee's protected activity was a "contributing factor" to the employer's decision to take unfavorable personnel action against the employee.

### **What is the Employer's Burden of Proof?**

In order to avoid liability, the employer must demonstrate "clear and convincing evidence" that it would have taken the same unfavorable personnel action against the employee in the absence of the employee's protected activity.

## **What Retaliatory Acts are Prohibited?**

The AHERA prohibits any unfavorable personnel actions taken by an employer in retaliation for protected activity which have a negative effect on the employee's terms, conditions, or privileges of employment. "Unfavorable personnel actions" can include, but are not limited to:

- a. Termination of employment;
- b. Demotion;
- c. Denial of promotion;
- d. Failure to pay overtime;
- e. Failure to hire/rehire;
- f. Intimidation or other physically or verbally threatening behavior;
- g. Unwarranted discipline;
- h. Unwarranted negative performance review;
- i. Suspension or other forced leave;
- j. Reduction in pay or hours;
- k. Denial of benefits;
- l. Reassignment that negatively impacts promotion prospects, seniority, or other benefits;
- m. Blacklisting; or
- n. Alteration of job duties (removal or excessive addition).

## **What Remedies Are Available to a Successful Claimant?**

If the DOL finds that the evidence supports your whistleblower claim under, you may be entitled to remedies that include:

- Reinstatement with previous seniority and benefits
- Back pay for lost wages, with interest
- Compensatory damages for harms like emotional distress and pain and suffering
- Other possible relief to make the employee whole, including attorneys' fees.

## **How Do I Decide Whether and How to Report Asbestos Dangers?**

Whether to report concerns about violations of the law – and, if so, when, how and to whom – can be a very difficult decision for an employee, as blowing the whistle can have negative consequences. However, the law provides strong protections, and employees who raise these concerns can look to a number of resources for assistance. If you are thinking about reporting such concerns, or if you already have and are facing retaliation, [contact](#) the experienced whistleblower lawyers at Katz, Marshall & Banks, LLP for an evaluation of your whistleblower case with no further obligation.