

OSHA WHISTLEBLOWER COMPLAINTS SHARPLY ON THE RISE OVER COVID-19 SAFETY CONCERNS

Hodgson Russ OSHA Alert
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The Occupational Safety and Health Administration (OSHA) doesn't just handle safety-related complaints by enforcing substantive safety regulations governing workplace conditions. The Occupational Safety and Health Act also includes whistleblower protection and anti-retaliation protection for employees who make safety-related complaints to their employers or OSHA. The COVID-19 pandemic has not only prompted a substantial increase in the number of complaints and referrals to OSHA for enforcement activity, but the agency has also reported significant escalation of the number of whistleblower complaints it has received that relate to COVID-19. And while the enforcement and whistleblower functions operate separately under the OSHA umbrella, cross-referrals often result from employee-initiated whistleblower claims.

Section 11(c) Whistleblower Protections

Section 11(c)(1) of the Occupational Safety and Health Act provides that "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 chapter." Discriminate, as used in the statute, is a broad and flexible concept, and includes things such as termination, demotion, disciplinary action, blacklisting, layoffs, failure to promote, reassignments of work duties, hours reductions or denials of overtime, harassment, intimidation, threats, or other similar adverse impacts upon the employee. Stated in a practical way, Section 11(c) prohibits employers from retaliating against employees for reporting injuries, illnesses or unsafe conditions to their employers, participating in OSHA inspections, making safety-related complaints to their employers or OSHA, complying with OSHA safety regulations, refusing to disclose the identity of a complainant, instituting OSHA-related proceedings or providing testimony, and, in limited circumstances, refusing to perform dangerous assigned tasks.

An employee's refusal to perform a task is protected activity under the Section 11(c) and 29 C.F.R. § 1977.12 where the employee: (1) has a reasonable apprehension of death or serious injury, (2) refuses to perform an assigned task in good faith, (3) has

Attorneys

Glen Doherty
Michael Hecker
Charles H. Kaplan
Jason Markel
Michael Zahler

Practices & Industries

Occupational Safety & Health Act
(OSHA)

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no reasonable alternative, (4) has insufficient time to eliminate the condition through regularly statutory enforcement channels, such as by contacting OSHA, and (5) has sought from his or her employer, and was unable to obtain, a correction of a dangerous condition.

Generally, this standard does not permit an employee to walk off the job or refuse to perform work entirely. It also does not apply to generalized fears. Rather, it permits an employee to refuse performing a certain assigned task based upon the circumstances set forth above—a highly fact-specific inquiry. It remains to be seen whether specific refusal-to-perform circumstances could exist in the COVID-19 context to satisfy those requirements, both legally and factually. Nonetheless, refusal to work situations can be quite complex to analyze and may implicate other labor laws beyond OSHA. Employers facing such situations are encouraged to seek out appropriate legal advice.

OSHA has not promulgated specific regulations addressing COVID-19 safety issues. Nor has it imposed specific requirements employers must undertake to limit their employees' exposure to COVID-19. Employers are instead expected to conduct a hazard assessment of their workplace and respond accordingly. There are several pre-existing safety regulations that come into play with COVID-19 hazards (e.g., respiratory protection, personal protective equipment, cleaning and sanitation, hazard communication, signage, etc.). Additionally, the Act's "General Duty Clause" at Section 5(a)(1) requires employers to protect their employees against "recognized hazards" to their safety or health which may cause serious injury or death. Any of these could be implicated in a whistleblower complaint.

OSHA standards aside, the COVID-19 pandemic has created an unprecedented level of angst for both employees and employers across the nation. The uncertainties surrounding the disease and ever-morphing State-based reopening requirements, CDC recommendations, Departments of Health guidance, and guidance and requirements from various governmental agencies have created considerable challenges for employers on the safety and compliance fronts. Many employees, not unexpectedly, may be fearful about potential exposures associated with returning to work, and the adequacy of the safety efforts, procedures, and PPE being implemented by their employers to protect them. The result is a heightened awareness over personal and workplace safety. The reported data released by OSHA reflect that employees are reaching out to OSHA at unprecedented levels to help ensure it.

COVID-19 Whistleblower Complaints are on the Rise

Between 2014 and 2019, OSHA received an average of 1,948 Section 11(c) whistleblower complaints each year. OSHA started separately tracking whistleblower claims that include COVID-19-related safety concerns, beginning February 18, 2020. Through August 13, 2020—a period of less than *six months*—Federal and State OSHA programs have received more than 2,540 COVID-19-related whistleblower complaints alone.

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An employee states a potential claim for retaliation under Section 11(c) by detailing facts which suggest that the following elements may be met:

1. that he or she engaged in a protected activity;
2. that he or she suffered an adverse employment action;
3. that the employer would not have taken the adverse action against the employee but-for the employee engaging in the protected activity; and
4. the employer knew of the protected activity.

For initial reporting and complaint purposes, employee allegations of facts consistent with these elements are sufficient to initiate the process. If the employer is ultimately found to have violated the statute, potential remedies for a valid claim may include reinstatement, front pay, back pay and benefits, correction or expungement of disciplinary records, compensatory damages, prejudgment interest, and, in egregious cases, punitive damages.

While a number of whistleblower complaints are closed as unsustainable following administrative screening, many will proceed to the investigative stage where a formal investigation is initiated with a notice letter to the employer. Employers should not mistake a letter complaint of this nature as an informal inquiry. Once the employer is notified of a whistleblower complaint, the burden shifts to the employer to offer a response and explanation. The content and quality of that response often makes the difference in how the investigation will proceed, and having appropriate legal support is advisable to manage the situation. Often OSHA attempts to broker an early settlement resolution through reinstatement, financial payment, or other accommodation. Such offers should be evaluated carefully and with due regard for their implications beyond the OSHA setting.

Employers Face Cross-Referral Risks from OSHA Complaints

While the data discussed above reports on COVID-19 whistleblower complaints, many of these complaints will undoubtedly include other allegations about safety-related concerns in the workplace that allegedly went unresolved, or to suggest that retaliation resulted from complaining about multiple safety concerns. Employees who reach out to OSHA often present a group of individual sub-complaints, both in the whistleblower and non-whistleblower settings. A COVID-19 safety concern may be the proverbial “straw-that-broke-the-camel’s-back” issue that caused the employee to reach out to OSHA. Having done so, the employee is likely to air all other safety-related concerns and regulatory compliance issues that may be of concern. The result may be a much broader OSHA investigation about a host of issues beyond COVID-19, or cross-referrals within the agency for compliance inspections.

OSHA makes efforts to inform complaining employees of their whistleblower rights. Thus, employees complaining of workplace safety issues to the enforcement office will likely be informed by that office of his or her whistleblower rights. An employee whistleblower complaint may lead to a workplace safety cross-complaint or referral for enforcement through an on-site health and safety inspection. Indeed, through August 13, 2020, OSHA has received 8,054 complaints and 1,070 referrals about worksite safety enforcement relating to COVID-19. State Plans received another 22,585 complaints and 1,812 referrals.

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When cross-complaints and cross-referrals occur, employers may find themselves grappling with a safety-related enforcement inspection as well as a separate whistleblower investigation simultaneously, sometimes with overlapping issues. Employers should tread carefully where employees raise safety concerns and recognize that employee safety complaints—*of any kind*—should be promptly investigated, analyzed, and managed. Employers should strive to inform employees promptly of the efforts being undertaken to address their concerns and ensure that the method and manner of response does not give rise to perceived discrimination or retaliation.

The Takeaway

Whistleblower complaints involving COVID-19 issues are on the rise, as are COVID-19-related safety complaints. The unique COVID-19 aspects of these matters present OSHA considerations and employee expectations that employers have not encountered previously. Employers facing either type of inquiry may find it beneficial to seek legal guidance and advice to understand their rights and obligations, and to better manage and respond to these situations.

If you have questions about OSHA whistleblower matters, COVID-19-related safety issues, return to work assistance, or other OSHA-related questions or concerns, please contact Jason Markel (716.848.1395), Glen Doherty (518.433.2433) or Charles H. Kaplan (646.218.7513) for more information.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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