

# Handling Whistleblower Complaints During a Pandemic

## Internal Investigations and Workplace Management When Whistleblower Reports Arise

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### Initial steps in investigation and protecting against retaliation.

To avoid a whistleblower retaliation claim, an employer must proceed carefully when investigating a complaint filed internally by an employee. As a general proposition, employers should investigate all complaints of alleged wrongdoing and unethical conduct objectively and thoroughly. During the coronavirus pandemic, when a complaint is received, the employer should advise the complaining employee that retaliation is prohibited against any employee who raises a good faith belief of wrongdoing. On a related note, the employer should caution supervisors and managers against disparaging the complaining employee. The employee should be given a name of a person to contact in the event the employee experiences (or believe he or she has experienced) any retaliation for making a complaint. Inform all employees of the company's anti-retaliation policy and discuss any concerns that they may have about retaliatory conduct. Ask employees to report any potentially retaliatory acts (such as being reassigned to an undesirable work location).

### Who handles the investigation?

- Consider whether the investigation can be handled internally (human resources, in-house counsel), or, if the allegations are sufficiently serious to warrant engaging with outside counsel.
- If the allegations present a risk of government enforcement action, engaging outside counsel may be the best choice. In addition, outside counsel may help ensure confidentiality during the investigation, which especially may be prudent if the allegations involve misconduct by senior management. Moreover, communications with outside counsel during the investigation ensures that the findings are protected by the attorney-client privilege.
- Any investigation should be conducted by an unbiased and experienced investigator. Given that the investigator could be called as a witness, it is important to ensure the investigator has a thorough understanding of the scope of the investigation and the nature of the conduct in relation to applicable laws.

### Clarify the scope of the investigation and who may be called to testify.

- Throughout the investigation, the investigator should document all steps taken and maintain a file of all documents collected and reviewed.
- It may be prudent to capture emails and other computer files for certain witnesses, depending on the circumstances.
- The employer also should decide whether it is necessary to issue a litigation hold to preserve documents in anticipation of a formal complaint (or simply to ensure that documents and information relevant to the investigation itself are not inadvertently deleted pursuant to standard document retention policies).

### **The pandemic does not warrant delay in scheduling interviews.**

- The investigator should schedule the interviews as soon as feasible, and review background information for each witness and all relevant documents beforehand.
- At the beginning of each witness interview, the investigator must emphasize to the witness that he/she represents the company and not the witness.
- In a virtual setting, multiple interviewers should participate to ensure adequate recordkeeping and evaluation of witness credibility. Identifying instances where witnesses were uncertain or even deceptive requires careful observation during the interview itself, and in that situation, additional questioning likely will be needed.

### **Confidentiality.**

- All communications regarding an employee complaint and the resulting investigation (including communications with the complaining employee) should be treated as confidential to the fullest extent possible.
- Confidentiality is key to avoiding a retaliation claim—a supervisor who is unaware of an employee's complaint is incapable of retaliation. Even so, the investigator should never promise a witness complete confidentiality regarding the interview, although it is acceptable to explain that confidentiality will be maintained to the extent possible, and that the witness will not suffer retaliation for participating in the interview.

### **Reporting investigation findings and results.**

- After completing the investigation, the investigator should report the findings back to the complaining employee and then decide whether the investigation findings warrant remedial action.
- The investigator should next deliver a final report on the investigation and resulting action to the designated recipient (e.g., board, board committee, in-house counsel). Before doing so, the investigator and employer should carefully consider whether a written report is necessary, given that a written report may reappear as evidence in a future litigation. In some cases, it may be preferable for the investigator to deliver an oral report, and further, to confirm that no written report is forthcoming because there may still be job actions under consideration.
- A written final report likely is warranted if litigation is already underway, whether filed by an agency or the claimant whistleblower. This will help to demonstrate a comprehensive investigation and prompt review, and to explain the good faith bases for any job actions that occurred as a result.
- Employers should be particularly cautious when handling a whistleblower complaint from an employee who also has job performance problems or other issues in the workplace. In that event, it is important that the employee is treated the same as similarly situated workers following a consistent application of the relevant policies.
- While an employee can still be disciplined for legitimate business reasons unrelated to a complaint, disciplining a complaining employee generates an increased risk of a retaliation claim.

- The employer should re-emphasize to relevant personnel that they must not retaliate against the complaining employee or any employee witnesses who participate in the investigation, even if the investigation reveals that the complaint was baseless. Retaliation can be overt (e.g., denial of a promotion, or termination) or subtle (e.g., giving the employee the “cold shoulder”). Both forms are unlawful.
- Review any unfavorable personnel action against an employee who has reported wrongdoing to make sure it is not:
  - Being taken for retaliatory reasons or timed in a way that creates an impression of retaliation;
  - Less favorable because the employee came forward with concerns; and/or
  - Dissimilar to how other employees are treated in a similar circumstance.

## Best Practices to Mitigate Against Whistleblower Risks

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As the economy emerges from the pandemic shutdown, employers will face new logistical problems that will require novel solutions. With no vaccine on the immediate horizon, any gathering of employees represents a health risk, and thus employers now must address issues like reconfiguring workspaces to facilitate social distancing, sourcing protective equipment for employees, monitoring employees for symptoms of illness, assessing the risk of business travel, monitoring employees for safety compliance, and more. These concerns are particularly acute in certain public-facing business sectors like healthcare or hospitality. There are a number of reports that hospitals are instructing health-care workers not to speak publicly about safety concerns, such as shortages in personal protective equipment.<sup>1</sup> In sum, the present circumstances create a fertile breeding ground for whistleblower complaints, and in this context, employers should have a suite of vigorous policies that will ensure compliance with applicable laws.

- To achieve this goal, employers first should understand the whistleblower laws and regulations applicable to their given industry, and then check for any new guidance from federal and/or state agencies addressing the COVID-19 pandemic in relation to those laws.
- In particular, employers should know when certain whistleblower complaints trigger mandatory reporting to federal or state agencies under various government programs.

### Assess controlling policies on your workplace.

- To begin the process, employers first should review the policies they have in place (*i.e.*, anti-retaliation, whistleblower policies) to determine whether changes are necessary to comply with the current law or to address logistical issues that have arisen in light of the pandemic.
- Regarding workplace safety, employers can follow guidance from the Centers for Disease Control (“CDC”), OSHA, and state specific guidance addressing workplace safety and employee health (including local Public Health directives, as well as new legislation like Virginia’s temporary emergency standard). Note that during the pandemic, agency guidance has been updated frequently, and thus “following the guidance” requires additional time and increased diligence.

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<sup>1</sup> See, e.g., <https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/>

- Employers should also review, disseminate, and consistently enforce internal reporting procedures for employee complaints arising from the COVID-19 crisis, including for concerns over health and safety or about compliance with state and federal laws and regulations. To this end, OSHA has issued guidance for employers to facilitate training for employees regarding their right to report safety concerns, suggesting an anti-retaliation program that includes five elements:<sup>2</sup>
  1. Management leadership, commitment, and accountability;
  2. System for listening to and resolving employees' safety and compliance concerns;
  3. System for receiving and responding to reports of retaliation;
  4. Anti-retaliation training for employees and managers; and
  5. Program oversight.
- A training regimen reflecting these elements will send a positive signal to an agency investigator with reservations about the employer's workplace culture.

**During the coronavirus pandemic, other specific suggestions may serve to enhance or help facilitate compliance with OSHA's guidance.**

- For example, employers should ensure that frontline managers understand not only the safety protocols put in place during the pandemic, but also how to handle safety complaints, what triggers whistleblower protections, and how to avoid retaliation.
- Employers should remind supervisory personnel to take seriously any concern raised by an employee, particularly as it relates to COVID-19.
- Supervisory personnel should understand that they must not prevent employees from talking about their safety concerns. It goes without saying that, if someone has raised a COVID-19 workplace safety issue, any future personnel actions against that individual should be reviewed by legal counsel.

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<sup>2</sup> See "Recommended Practices for Anti-Retaliation Programs," [available at https://www.osha.gov/Publications/OSHA3905.pdf](https://www.osha.gov/Publications/OSHA3905.pdf).