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Avoiding OSHA Whistleblower Claims During the COVID-19 Pandemic

Labor & Employment Workforce Watch

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As the number of employees who return to the workplace continues to increase, complaints from employees and refusals to work also have escalated. Employers who mishandle these scenarios may find themselves responding to an Occupational Safety and Health Administration ("OSHA") complaint.

Whistleblower Complaints – By the Numbers

From January through April 2020, OSHA saw a 30% increase in whistleblower complaints compared to same period in 2019. Of the 4,100-whistleblower complaints received from February through May 2020, 1,600 addressed COVID-19, and many of these complaints alleged retaliation for violations of guidelines related to social distancing or personal protective equipment ("PPE").

Despite staffing reductions at OSHA, the agency continues to prioritize COVID-related complaints. OSHA has already processed more than 50% of these complaints, with an average screening time of 10 days.

Mitigation – Best Practices

The good news is that employers have all the tools they need to prevent COVID-19 whistleblower claims. Employers who follow the safety guidelines and practices recommended by OSHA and the Centers for Disease Control and Prevention ("CDC") will be best positioned to defend such claims.

However, even employers who follow safety guidelines may face employee safety complaints. When faced with a safety complaint or a refusal to work based on a COVID-19 safety concern, employers should:

1. *Engage in open communication with the employee regarding his/her concern*. Employers should not dismiss an employee's concern before evaluating it.
2. *Investigate the employee's concern*. Employers should determine whether the risk, if any, related to the work involved has been addressed adequately, whether by a customized process/procedure, with the use of PPE, or by some other mitigating factor.
3. *Address the employee's concern*. If an employee has a valid concern, employers should implement feasible administrative and/or engineering controls. On the other hand, if no additional safety measures can be implemented, employers should remain proactive about implementing new safety measures as they become available.
4. *Follow-up with the employee*. Employers should inform employees of the results of their investigations and the steps to be taken to address their employees' concerns. Even if no additional safety measures are feasible, keeping employees informed and validating their rights to raise safety issues as well as reminding them of the

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employer's commitment to addressing those issues, will tend to reduce the risk a formal complaint will be submitted.

Employee Retaliation Protections

Employees are protected from retaliation for reporting a safety violation. Generally, the employee is protected even if his/her concern is ultimately incorrect, provided that the employee acted in good faith and the concern raised was reasonable.

Employers who follow the mitigation practices outlined above and document their efforts to investigate and address safety concerns will be in the best position to defend against any OSHA claims.

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