

Your Counsel: COVID-19, OSHA and whistleblower complaints



By **STEVEN V. MODICA**

information also helps



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Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems — many of which fall outside our expertise.

Through this column, we provide practical information to help you assist those who have employment, disability benefit, workers' compensation, and related issues. This information also helps lawyers understand their rights and responsibilities as employers.

As we enter 2021, we can all agree that we are ready for a fresh start. Most importantly, we are ready to put the COVID-19 pandemic behind us and move past the fear and heartache it caused.

COVID-19 changed so many areas of life as we knew it. In particular, it changed the way that we worked. For many, we worked (or continue to work) at home. For others, our offices became equipped with sanitizer stations, thermometers, and taped lines and signs indicating distancing and other safety rules.

Not surprisingly, the COVID-19 pandemic has raised concerns regarding the safety and health of the workforce and the protections afforded to those who report potential workplace safety violations.

With the Occupational Safety and Health Act of 1970 (the "Act"), Congress created the Occupational Safety and Health Administration ("OSHA") to ensure safe and healthful working conditions in private sector workplaces. To accomplish this, OSHA sets and enforces standards and provides training, outreach, education, and assistance.

OSHA has not promulgated specific regulations addressing COVID-19 safety issues or imposed specific requirements employers must undertake to limit their employees' exposure to

COVID-19. Instead, employers are to conduct a hazard assessment of their workplace and respond accordingly. 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 that may cause serious injury or death.

OSHA administers more than 20 whistleblower protection laws and enforces anti-retaliation protection for employees who make safety-related complaints.

Under Section 11(c)(1) of the Act, it is illegal for an employer to retaliate against an employee who exercises his or her rights under the Act. This includes filing a safety or health complaint with OSHA or providing testimony; raising a health and safety concern with or reporting a work-related injury, illness, or unsafe condition to the employer; participating in an OSHA inspection; complying with OSHA safety regulations; refusing to disclose the identity of a complainant; and, in limited circumstances, refusing to perform dangerous assigned tasks.

Under Section 11(c) and 29 C.F.R. § 1977.12, an employee's refusal to perform a task is protected if he or she: (1) has a reasonable apprehension of death or serious injury; (2) refuses to perform an assigned task in good faith; (3) has no reasonable alternative; (4) has insufficient time to eliminate the condition through statutory enforcement channels, like contacting OSHA; and (5) sought, but was unable to obtain, correction of a dangerous condition from the employer.

A covered employee is any employee of a person engaged in a business affecting interstate commerce, except employees of the United States, states, or political subdivisions of states (federal employees are protected from retaliation for occupational safety or health activity under procedures established by their agencies and the Whistleblower Protection Act). United States Postal Service employees are also covered employees.

As you might imagine, whistleblower complaints have dramatically increased since the onset of the COVID-19 pandemic. From February 1, 2020 to May 31, 2020, OSHA received 4,101 whistleblower complaints. Of those complaints, 1,618 were COVID-19-related.

A whistleblower complaint must allege four key elements:

1. the employee engaged in activity that the whistleblower protection laws protect;
2. the employer knew about, or suspected, that the employee engaged in the protected activity;
3. the employer took adverse action against the employee; and
4. the employee's protected activity motivated or contributed to the adverse action.

Examples of unfavorable employment actions include:

- firing or laying off;
- blacklisting;
- demoting;
- denying overtime or promotion;
- disciplining;
- denying benefits;
- failure to hire or rehire;
- intimidation;
- making threats;
- reassignment affecting prospects for promotion; and
- reducing pay or hours.

Employees must file their complaint with 30 days after the alleged unfavorable employment action occurs (i.e., when the employee is notified of the retaliatory action). Whistleblowers are not permitted to bring a civil action to enforce their rights. Rather, only the United States Department of Labor can bring an action against an employer who has arguably retaliated against a whistleblower.

An employee can file a complaint with OSHA verbally, by visiting or calling the local OSHA office, or in writing by sending a written complaint to the closest OSHA office. You can also file a complaint at www.whistleblowers.gov/complaint_page.html.

Written complaints may be filed by fax, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier. The date of the postmark, fax, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is considered the date filed. OSHA does not require that complaints be made on any particular form and complaints may be submitted in any

language.

The closest OSHA area office is in Buffalo. You can visit them at 130 S. Elmwood Ave, Suite 500 or call 716-551-3053.

You cannot anonymously file a whistleblower complaint with OSHA. If OSHA proceeds with an investigation, it will notify your employer of your complaint and give the employer an opportunity to respond.

We understand that the COVID-19 pandemic has raised numerous new issues for employers and employees. If you need help navigating these issues, we encourage you to contact us or other qualified counsel for guidance.

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sociate, Anne F. Modica, Esq., joined the firm in January 2020. If you enjoyed this article, please "like" Modica Law Firm on Facebook to stay current on all that we're sharing. If you have questions about this article or want to suggest a future topic, contact Steve or Anne Modica at 585-368-1111 or Firm@ModicaLawFirm.com.