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OSHA Targets Employers That Retaliate Against Workers Raising COVID-19 Concerns



By [Allen Smith, J.D.](#)
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The Occupational Safety and Health Administration (OSHA) is going after employers that retaliate against workers who raise COVID-19 concerns. Make sure your policies address workplace safety and health during the pandemic and that managers are properly trained on those policies.

On March 12, OSHA issued a National Emphasis Program (NEP) targeting specific high-hazard industries or activities in which there is a risk of contracting the virus causing COVID-19. "The NEP also aims to protect workers from retaliation," said Dee Anna Hays, an attorney with management firm Ogletree Deakins in Tampa, Fla.

The Occupational Safety and Health Act prohibits employers from retaliating against employees because they report unsafe and unhealthy work conditions, whether internally or to OSHA.

"Given the sheer numbers of employees that have been impacted by COVID-related health and safety issues in their workplaces, it is all but certain that there will be a substantial increase in retaliation cases in the months and years to come as cases work themselves through the judicial system," said Clayton Halunen, a plaintiffs' lawyer with Halunen Law in Minneapolis.

As of April 11, OSHA had received 5,188 whistleblower complaints related to COVID-19.

Defining Retaliation

Termination is the most common form of retaliation, but it isn't the only form, said Vincent White, a plaintiffs' attorney with White, Hilferty & Albanese in New York City.

White has seen teachers who made COVID-19 safety complaints assigned rooms full of students with violent histories and denied the assistance required by the mental health evaluations of each student. Sometimes employees are transferred to far-off sites for speaking up about COVID-19 safety, he noted. "Every industry is different, but the limit [to what constitutes retaliation] is merely a given manager's imagination," he said.

Other acts of retaliation can include demotions, making threats, denials of overtime or promotion, reductions in pay or hours, or other actions that would dissuade a reasonable person from making reports of safety violations, Hays said.

If an employee opposes a mandatory return-to-workplace policy as premature, he or she might claim retaliation if the employer responds by immediately firing the worker, according to Matthew Deffebach, an attorney with management firm Haynes and Boone in Houston and Costa Mesa, Calif.

"What is more often seen are subtle issues where the employer is not engaging in retaliatory behavior, but the timing may be such that an employee perceives the response to be retaliatory," he said.

For example, an employee may have existing performance issues, but a negative performance evaluation and subsequent denial of a pay raise occur right after the employee complains to the manager that the company is not doing enough to enforce its mask mandate in the office. "The employer's negative performance evaluation had nothing to do with the complaint, but the employee may attempt to link the adverse action with the fact that the employee complained," Deffebach stated.

Available Relief

An employee who believes he or she has been unlawfully retaliated against for safety reasons typically files a complaint with OSHA.

If the matter isn't resolved to the agency's satisfaction, it may ask the Office of the Solicitor at the U.S. Department of Labor (DOL) to file a lawsuit in federal court where the DOL is the plaintiff seeking relief on the employee's behalf, Deffebach explained.

The DOL can seek hefty damages, including reinstatement, lost wages, emotional distress and punitive damages, said Tom Spiggle, a plaintiffs' lawyer with The Spiggle Law Firm in Arlington, Va.

"Employers should keep in mind that some states, like Virginia, have state laws that protect employees from retaliation as the result of raising concerns about COVID-19 safety regulations," he said. "These may include a private right of action allowing an employee to file a lawsuit in state court."

In Minnesota, for example, an employee would have a private cause of action under the state's Whistleblower Protection Act (WPA) if he or she is subject to an adverse employment action after making a good-faith report of a suspected violation of OSHA regulations, Halunen said. "Under the WPA, the employee may file a complaint directly in district court in order to pursue all available remedies, including but not limited to wage loss damages, emotional distress damages, attorney fees and costs."

Spiggle said that it's difficult for employers to defend against retaliation cases, as often the primary evidence is a straightforward timeline. "The employee complains about possible OSHA violation and shortly thereafter, the employer demotes or fires the employee. This timeline is often in writing, clearly documented by e-mail and other documents," he said.

While a timeline alone is not a "slam dunk" for the plaintiff, if it suggests a clear causal connection between an employee's complaint and the employer's action, an employer can have difficulty prevailing, Spiggle said.

[See *SHRM members-only toolkit: Developing Effective Safety Management Programs*]

Handbook Policies

Employers may find it helpful to address workplace safety and health in their handbooks.

Hays said that handbook policies may include information regarding the responsibility of every employee to:

- Work safely, following all safety and health procedures applicable to their jobs.
- Report potential safety and health hazards in the workplace.
- Report any work-related accidents, injuries and illnesses as soon as reasonably possible.

"Employers may also want to consider including reporting procedures and nonretaliation provisions in their policies and striving to create a culture where raising such concerns is encouraged," she said.

Managerial Training

Training of managers is important, as there may be issues that managers will not perceive as being COVID-19 safety-based complaints and unintentionally fail to respond appropriately, Deffebach said. "Managers should be trained to [spot those issues] and then loop in human resources on how to respond," he noted.

"Employers should emphasize in all manager training—and for all employees—that retaliatory conduct in the workplace is not tolerated," said Taylor Johnson, an attorney with management firm Keller and Heckman in Washington, D.C.

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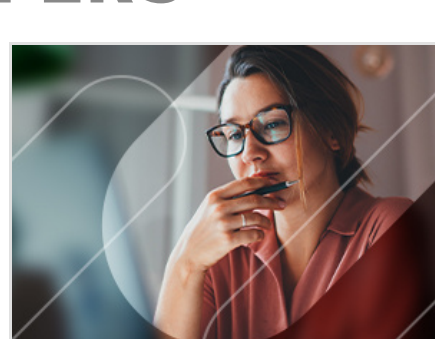
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