

25TH LABOR & EMPLOYMENT SEMINAR



LIVE STREAM

Virtual for
2020

Whistleblower and Retaliation Claims in the COVID Era

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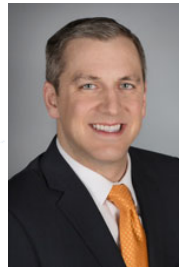
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Speakers



Tom H. Luetkemeyer
Partner
Hinshaw & Culbertson LLP



Evan J. Bonnett
Associate
Hinshaw & Culbertson LLP

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Introduction and Goals

The goals of this presentation are straightforward:

- ❖ We will provide an analysis of the types of retaliation and whistleblowing claims employers might confront in the COVID era.
- ❖ The immediate goal is a better understanding of the laws under which these claims would be made and the allegations or claim “vehicles” which could be employed by plaintiffs and their lawyers against employers.
- ❖ The second goal is a better understanding of the best practices to identify and prevent exposure to such claims.

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Key Definitions: Whistleblowing

A whistleblower often is defined by the activity he or she undertakes:

- ❖ Merriam Webster defines a whistleblower as one who reveals something covert or who informs against another, especially an employee who brings wrongdoing by an employer or by other employees to the attention of a government or law enforcement agency.
- ❖ Many states have statutory protection for whistleblowers. California, for example, has Cal. Lab. Code 1102.5, which prohibits an employer from enacting a policy that prevents an employee “from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law ... regardless of whether disclosing the information is part of the employee’s job duties.



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Key Definitions: Retaliation

- ❖ Retaliation is commonly understood in the employment context as adverse employer action taken against an employee for engaging in activity which is protected by virtue of federal or state law or the common law of a state.



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Key Definitions: Retaliation

- ❖ Prohibited retaliation under the common law of a state often is based on employer action which contravenes or frustrates a significant and clearly articulated public policy. These claims, in many states, are narrow and must be based on the state constitution, the laws of the state or the decisions of its highest courts.
- ❖ Many statutes include anti-retaliation provisions. For example, Section 11(c) of the Occupational Safety and Health Act, prohibits retaliation against employees who complain about unsafe or unhealthful conditions in the workplace.

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Key Definitions: Protected Activity

- ❖ Protected activity can take many forms including:
 - ❖ Complaints to regulatory agencies;
 - ❖ Complaints to law enforcement agencies;
 - ❖ Reports to an employee's board of directors;
 - ❖ Reports to human resources or supervisory personnel.
- ❖ Protected activity can be in the form of reports made internally as well as externally; however, a word of caution is in order as some state statutes require external complaints to trigger coverage and protection.

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Key Definitions: Adverse Action

- ❖ Not all employers actions are sufficiently “adverse” to trigger exposure under many laws.
 - ❖ The application of the concept differs depending on the statute.
 - ❖ For example, what is considered adverse under Title VII for a disparate treatment claim differs from the same statute’s application of its anti-retaliation provisions.
- ❖ In a 2006 United States Supreme Court decision, *Burlington Northern & Santa Fe Railway Co. v. White*, the Court said that the relative severity of employer action must be context specific.
 - ❖ In determining whether the harm is sufficiently adverse or significant, the courts should use an objective standard to asses whether a "reasonable employee" would view the harm as significant.
 - ❖ In that case, despite making a job assignment within the job description of a laborer, the employer nevertheless made a change which chilled protected activity.

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Key Definitions: Adverse Action

- ❖ OSHA has stated that adverse action can be “subtle” and “not always easy to spot”. In addition to commonly understood adverse actions such as terminations or demotions, OSHA in its publications provides examples of adverse action:
 - ❖ Reassignment to a less desirable position;
 - ❖ Actions which affect prospects for promotion, such as excluding an employee from a training meeting;
 - ❖ Falsely accusing an employee of poor performance;
 - ❖ Intimidation;
 - ❖ Denying overtime;
 - ❖ A denial of benefits.

ADVERSE ACTION

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The Proof Paradigm

- ❖ The proof and evidentiary paradigm for retaliation is relatively simple.
 - ❖ A plaintiff must allege whistleblowing or some protected activity under a specific statute or related to a substantial public policy.
 - ❖ The plaintiff must allege interference or a specific harm incurred by the plaintiff (adverse action) due to the action of the employer.
 - ❖ Sufficient evidence to establish a cause and effect relationship between protected activity and the adverse job action.
- ❖ Direct and circumstantial evidence may be used to establish the cause and effect relationship.

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OSHA and COVID

- ❖ The four most relevant OSHA regulations applicable to COVID are:
 - ❖ The Personal Protective Equipment (PPE) standards found for general industry at 29 CFR 1910, Subpart I;
 - ❖ The General Duty Clause of the Occupational Safety and Health Act, which is found in Section 5(a)(1). That section requires employers to provide “a ... place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm”;



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OSHA and COVID

- ❖ OSHA's death and inpatient hospitalization recording and reporting requirements, which are found generally at 29 CFR Part 1904; and
- ❖ The Bloodborne Pathogens standard, found at 29 CFR 1910.1030. Note that while this standard typically does not apply to respiratory secretions, the standard does provide helpful guidance and a framework for prevention.

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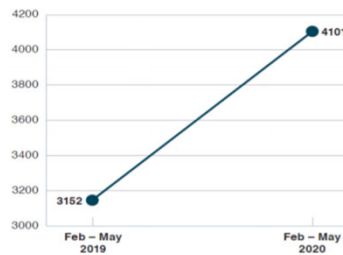
OSHA Whistleblowing Claims on the Rise

- ❖ The Office of Inspector General of OSHA has noted a significant surge in whistleblowing complaints related to COVID.
- ❖ Whistleblower complaints increased generally from 2019 to 2020, and at the same time, OSHA's Whistleblower Program employee count decreased.
- ❖ The OIG noted that 39% of all whistleblower complaints received between February 1, 2020 and May 31, 2020 were related to COVID-19.
- ❖ This has resulted in even greater delays in the agency's investigation of such complaints.

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OSHA Whistleblowing Claims on the Rise

FIGURE 1: TOTAL WHISTLEBLOWER COMPLAINTS RECEIVED



Source: OSHA Whistleblower Data – Unaudited

From February 1, 2020, to May 31, 2020, the Whistleblower Program received 1,618 COVID-19 whistleblower complaints.³ The COVID-19 whistleblower complaints received per region varied from 61 in Region X to 325 in Region V (see Figure 2).

Source: DOL IG Audit, 8/14/20

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Why We Care – OSHA Remedies

- ❖ Employees can pursue and obtain a variety of remedies for retaliation, including most of the usual remedies found in employment laws:
 - ❖ Reinstatement;
 - ❖ Back pay;
 - ❖ Loss of benefits; and
 - ❖ Attorney's fees.
- ❖ Generally, employees must follow the administrative scheme, and if an OSHA investigation results in a determination that the claim has merit, the Department of Labor may choose to litigate in federal court.
- ❖ If the claim is dismissed after an investigation, it can be appealed internally, before OSHA, but an employee generally cannot bring a civil lawsuit under the Act.

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Whistleblower laws enforced by OSHA

❖ OSHA is responsible for *many* whistleblower laws

❖ This eye chart shows them all (and the time to file under each):

- ❖ Asbestos Hazard Emergency Response Act (90 days)
- ❖ Occupational Safety and Health Act (30 days)
- ❖ Pipeline Safety Improvement Act (180 days)
- ❖ Safe Drinking Water Act (30 days)
- ❖ Sarbanes-Oxley Act (180 days)
- ❖ Seaman's Protection Act (180 days)
- ❖ Section 402 of the FDA Food Safety Modernization Act (180 days)
- ❖ Section 1558 of the Affordable Care Act (180 days)
- ❖ Solid Waste Disposal Act (30 days)
- ❖ Surface Transportation Assistance Act (180 days)
- ❖ Toxic Substances Control Act (30 days)
- ❖ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (90 days)
- ❖ Clean Air Act (30 days)
- ❖ Comprehensive Environmental Response, Compensation and Liability Act (30 days)
- ❖ Consumer Financial Protection Act of 2010 (180 days)
- ❖ Consumer Product Safety Improvement Act (180 days)
- ❖ Energy Reorganization Act (180 days)
- ❖ Federal Railroad Safety Act (180 days)
- ❖ Federal Water Pollution Control Act (30 days)
- ❖ International Safe Container Act (60 days)
- ❖ Moving Ahead for Progress in the 21st Century Act (motor vehicle safety) (180 days)
- ❖ National Transit Systems Security Act (180 days)

Securities Law Whistleblowers

❖ In addition to discussing the OSHA Act, another of OSHA's whistleblower laws should be discussed here:

- ❖ The Sarbanes Oxley Act (SOX)
 - ❖ SOX covers securities registered under the Securities and Exchange Act.
 - ❖ Protects employees from retaliation

❖ Dodd-Frank Act

- ❖ Not administered by OSHA
- ❖ Creates SEC Whistleblower Office
- ❖ Permits anonymous filers



False Claims Act



- ❖ 31 USC 3729
- ❖ “Qui Tam” provisions allows individuals to sue on behalf of the government
 - ❖ Individuals who prevail earn 15-30% of the recovery
 - ❖ In 2019, this equaled \$270,000,000.
- ❖ Employees or contractors who file FCA actions are protected whistleblowers.

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SOX/Dodd-Frank/FCA Claims

- ❖ Of particular concern related to COVID --
 - ❖ **Economic Injury Disaster Loan or Paycheck Protection Program**
- ❖ Any individual can bring these claims, but an insider is most likely to have the relevant information
- ❖ To minimize risk:
 - ❖ Federal grants or loans (e.g., PPP): focus on documentation of *each particular type of expenditure* to best support the loan forgiveness

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COVID-Related Qui Tam

- ❖ Why do I need to be worried about these? I understand OSHA, but these seem obscure.
- ❖ The Key COVID Answer:
 - ❖ Economic Injury Disaster Loan (EIDL)
 - ❖ Paycheck Protection Program (PPP)
 - ❖ Certifications
 - ❖ And claims that:
 - ❖ the business was not eligible for PPP loans;
 - ❖ the business did not spend the PPP money as required or made inaccurate filings about such expenditures; and/or
 - ❖ the loan was not necessary to support the ongoing operations of the applicant, or that the small business had recourse to other moneys.

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FFRCA and State Laws

- ❖ FFCRA – anti-retaliation for receiving paid leave benefits or for requesting such benefits
- ❖ Retaliatory Discharge
 - ❖ Over half of the states (including CA and IL) recognize a cause of action for discharge in contravention of a clearly-mandated public policy.
 - ❖ This includes refusal to violate the law.
- ❖ Statutes
 - ❖ The Illinois Whistleblower Protection Act prohibits retaliation against an employee for disclosing information they believe violates a state or federal law, rule, or regulation.
 - ❖ The California labor code also protects employees from retaliation for similar reasons. This also prohibits retaliation against an employee “refusing to participate in an activity” that would result in a violation of the law.
- ❖ Ordinances
 - ❖ Chicago ordinance M.C.C. 1-24 prohibits Chicago-based employers from taking adverse action against a employees obeying orders of the Governor, Mayor or Dept. of Health relating to stay-at-home orders, quarantine, isolation orders, etc.

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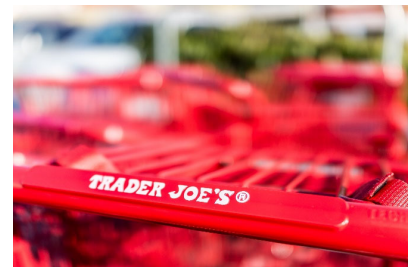
What We are Seeing in Claims

- ❖ Typical COVID-related whistleblowing and retaliation lawsuits include allegations that employers:
 - ❖ Are not providing appropriate PPE;
 - ❖ Are not reporting incidents where the virus is contracted in the workplace;
 - ❖ Refused to allow employees to return to work after self-quarantining;
 - ❖ Terminated employees for speaking out to protect patients in health care settings;
 - ❖ Selected employees for furlough based on demands by employees that employers take precautionary measures to prevent the spread of COVID-19.

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Case in Point – Trader Joe's

- ❖ In *Kristopher King v. Trader Joe's*, a state court case filed in Kentucky, the plaintiff alleges his discharge violated Kentucky public policy.
- ❖ The allegations in his complaint include:
 - ❖ The grocer's refusal to allow employees to wear gloves as a precautionary measure to mitigate the spread of the infection;
 - ❖ The plaintiff created a private Facebook page with fellow Trader Joe's employees, specifically discussing concerns the employees had with the grocer's alleged lack of support in implementing safety measures;



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Case in Point – Trader Joe’s (cont.)

- ❖ The posts included the following:
 - ❖ No plan/strategy to keep the crew safe;
 - ❖ Crew getting in trouble for wearing gloves at the register;
 - ❖ Mates caring more about the store than crew members.
- ❖ Management allegedly asking the employee to resign as a result of the Facebook post and his demands that the grocer implement safety protocols following the issuance of the governor’s executive order;
- ❖ Ultimately, the grocer allegedly terminated the plaintiff on a pretext.

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Another case in point – Amazon suit

- ❖ In New Jersey federal court, a former employee tasked with enforcing safety protocols alleges that he was fired for reporting that a shift manager violated those protocols.
- ❖ The employer’s safety protocols followed CDC guidance.
- ❖ However, the employee alleges he was terminated after reporting violations of the protocols to HR.

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Be Aware of Section 7 Rights

- ❖ Although not brought in either of the previous lawsuits (it would have been preempted anyway), be aware that employers can face unfair labor practice liability under Section 8(a)(1) of the National Labor Relations Act (NLRA).
- ❖ Section 7 of the NLRA provides employees with the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining **or other mutual aid or protection**, as well as the right to refrain from any or all such activities.
- ❖ Employees discussing with each other safety issues related to COVID and even to complain about the sufficiency of employer actions likely are within the protections of Section 7.

OSHA Recommended Anti-Retaliation Practices



Employer Best Practices



- ❖ **Whistleblower Programs**
 - ❖ Create an anti-retaliation program
 - ❖ Ensure systems for reporting hazards, compliance, and retaliation exist
 - ❖ Include steps for maintaining confidentiality of reporting employees
 - ❖ Educate management *and* staff on the anti-retaliation program
 - ❖ Ensure that managers are aware of the various laws implicated in COVID-19 decision-making on employee relations matters;
 - ❖ Make sure managers, human resources professionals and decision-makers know that safety complaints are protected activities;
 - ❖ Include legal obligations and organizational benefits
 - ❖ Ensure uniformly-applied consequences (discipline) for non-compliance with employer policies on reporting and anti-retaliation.
- ❖ Eliminate or restructure incentives that may encourage or allow retaliation or discourage reporting.
 - ❖ E.g., rewarding employees with prizes for low injury rates or directly linking supervisors' bonuses to lower reported injury rates.

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Employer Best Practices – OSHA

Preventing Issues:

- ❖ Educate employees on COVID-19 prevention, and inform them of the steps the employer already is taking.
- ❖ Understand that COVID creates anxiety for some employees:
 - ❖ Educate managers on how to defuse conflict and move forward constructively.
- ❖ Provide a specific mechanism for safety related complaints, and assure employees that raising concerns would be as protected as raising a harassment complaint;
- ❖ Consider means of preserving employee confidentiality when complaints are made;
- ❖ Publicly recognize employees who bring issues to light and suggest meaningful preventive measures.

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Employer Best Practices

Preventing Issues:

- ❖ Create multiple or alternative mechanisms for reporting safety concerns
 - ❖ E.g., hotlines, neutral or trusted officials, anonymous e-reporting
- ❖ Investigate safety complaints promptly and document the action taken.
- ❖ Don't take it personally and follow through:
 - ❖ Investigate complaints and act consistently, even if the employee is unpleasant or incorrect in filing the report
 - ❖ Follow through on employee concerns even if they appear trivial at first.
- ❖ Consider options (teleworking) if an employee is concerned for his or her own safety.
- ❖ Refusals to work must be examined carefully as the activity may be lawful if the employee believes the workplace is unsafe.

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Employer Best Practices

Sometimes you have to take an action against an employee who has also filed a complaint. What do you do?

Ensure any employment status changes (such as terminations, demotions, or denials of promotions) are only 1) made for legitimate non-retaliatory reasons and 2) are not likely to be *perceived* as retaliatory.

- ❖ Performance-based issues
 - ❖ Where performance is in question and the employee has raised safety issues, make sure the reason for discipline is backed up by specific objective evidence, much the same as one would do if an employee had raised a complaint about compensation or discrimination;
- ❖ Discipline-based issues
 - ❖ Conduct an examination of comparative evidence before discipline is imposed when the employee has also raised safety concerns. For example, has the employer disciplined for such behaviors in the past?
 - ❖ Ask how the workforce would perceive the discipline.

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Questions?

Any questions not answered during today's presentation will be addressed at our **Advice on Tap** session on **Friday, October 30 at 12:00 Noon Central.**

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THANK YOU



Evan J. Bonnett

815-490-4931 | ebonnett@hinshawlaw.com

Tom H. Luetkemeyer

312-704-3056 | tluetkemeyer@hinshawlaw.com

