Health care employers face rise in whistleblower claims during pandemic

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Since the inception of the Covid-19 pandemic, thousands of pandemic-related lawsuits have been filed against employers due to alleged labor and employment violations. Of those, whistleblower retaliation lawsuits are among the most common brought against health care industry employers.

Recent litigation concerning this trend serves as a reminder to health care employers to carefully navigate personnel decisions involving an aggrieved employee and ensure they are properly equipped against potential exposure of such claims under their current insurance coverage policies.

Section 11(c) of the Occupational Safety and Health Act

Signed into law in 1970, the Occupational Safety and Health Act (the "Act") ensures safe workplace conditions are maintained around the country. The Occupational Safety and Health Administration ("OSHA"), a federal administration agency, has the power to enforce whistleblower provisions under 25 different statutes, including those related to workplace safety and health, as well as those concerning consumer products, food safety, securities and health insurance. Its enforcement power includes the ability to inspect and issue citations to employers for proposed penalties for violations of OSHA standards.

While OSHA primarily provides protection for employees in the private sector, state and local government employees are offered protection through OSHA-approved State Plans. State Plans are OSHA-approved job safety and health programs operated by individual states rather than the federal agency. Currently, 22 States or Territories have OSHA-approved State Plans that cover both private and local government workers.

One of the most pivotal protections afforded to employees can be found in section 11(c) of the Act, namely the anti-retaliation provision (colloquially "Whistleblower"). The provision protects individual employees from employer retaliation for reporting safety deficiencies. Essentially, the provision states that a "Whistleblower" employee cannot be discharged or discriminated against by an employer because the employee engaged in or "exercised any rights provided under the Act."

Stated in a practical way, section 11(c) prohibits employers from retaliating against employees for participating in OSHA inspections, making safety-related complaints to employers or OSHA, reporting injuries, illnesses, or unsafe conditions to their employers, instituting OSHA-related proceedings, providing testimony, or refusing to disclose the identity of a complainant.

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The COVID-19 pandemic prompted a substantial increase in the number of whistleblower complaints and referrals to OSHA concerning alleged pandemic-safety related violations. Prior to 2020, the Agency received an average of 1,948 whistleblower complaints each year. On Feb. 18, 2020, OSHA started tracking COVID-19 related whistleblower claims. Throughout the last two years, federal and state OSHA affiliated agency programs received approximately 8,898 pandemic safety related whistleblower complaints.

While the foregoing data reports COVID-19 whistleblower complaints, a multitude of these complaints include other allegations about pre-pandemic safety-related concerns that went unreported or unresolved. In other words, an employee whistleblower complaint is highly likely to lead to a workplace safety cross-complaint or referral for enforcement through an on-site health and safety inspection.

Through present day, OSHA received 18,532 complaints about worksite safety enforcement relating to COVID-19 procedures and protocols. State agencies, on the other hand, received approximately 62,422 similar complaints.

The response to COVID-19 influence on whistleblower claims and litigation

One of the bedrock principles underlying the Act and OSHA regulation is to assure, as much as possible, that all employees are working under safe and healthy work conditions and to preserve human resources (29 U.S.C. 651(b)). To facilitate this goal, OSHA periodically issues "final interpretation" rules to provide clarity on how agency regulations or standards are to be interpreted and enforced.

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Prior to March 2020, OSHA utilized the "substantial reason" test to analyze whether a violation of section 11(c) had been established. Specifically, the pre-pandemic anti-retaliation provision provided that if an employee's engagement in a protected activity was merely a "substantial reason" for employment termination or other discriminatory action then section 11(c) was deemed violated.

In response to the post-pandemic spike in section 11(c) litigation, OSHA recently issued an amendment to 29 CFR 1977.6(b) governing violations of the anti-retaliation provision. Specifically, OSHA revised the rule regarding the causal connection between an employee's protected activity and the adverse employment action needed to establish a violation of section 11(c). The revision adopts the "but-for" causation test analyzed in a handful of Supreme Court decisions.

In 2013, the Court considered the causation standard in *University of Texas Southwestern Medical Center v. Nassar* and held that a plaintiff must prove but-for causation in Title VII discrimination cases. More recently, in 2020, the Court expanded on its analysis in *Bostock v. Clay County, Georgia*, stating the but-for causation test "directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."

Following the decisions in *Nassar* and *Bostock*, OSHA revised section 1977.6(b) and eliminated the "substantial reason" causation test. Under the amended rule, whistleblowers must meet the higher standard of proving that "but for" their protected activity, they would not have suffered adverse action. In other words, a violation occurs if OSHA shows that the employee would have not suffered the adverse action "but for" the protected activity allowing for it to happen.

Impact on health care employers

The data reflects employees are reaching out to OSHA at unprecedented levels to ensure proper safety and health protocols are being enforced in the health care space. The unique COVID-19 aspects of these whistleblower complaints present OSHA considerations and employee expectations that employers have not encountered previously.

The uncertainty wrought by COVID-19 has left health care employers and employees facing unparalleled challenges in the workplace. The sharp spike in COVD-19-related whistleblower complaints against health care employers resulted in increased protection for employers, as evidenced by OSHA's recent adoption of a "but-for" causation test shifting the proverbial weight of the whistleblower's burden to prove retaliation even greater.

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Despite the increased employer protection, robust compliance programs that mitigate legal and reputational risk associated with whistleblowers are key considerations for health care employers moving forward. Should health care employers have any questions concerning whether they have policies in place to adequately address COVID-19 whistleblower claims, they should contact their attorneys.

Abbye E. Alexander and Christopher J. Tellner are regular, joint contributing columnists on health care litigation for Reuters Legal News and Westlaw Today.

About the authors



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