

Preparing For A Surge In Virus-Related Whistleblower Claims

By **Lee Dunst, Jessica Brown and Daniel Weiss** (April 23, 2020, 5:08 PM EDT)

The COVID-19 pandemic has caused rapid and unprecedented global economic turmoil and disruption with massive employee layoffs across the economy. Federal and state governments have stepped in with numerous new, patchwork and ill-defined programs, rules and regulations to address the unemployment crisis and related effects.

This is all reminiscent of the days after 9/11 and the 2008 Great Recession. And if what's past is prologue, companies should expect that current and former employees will unleash an onslaught of allegations about company misconduct, both COVID-19-related and otherwise.

In fact, every day brings more press reports about whistleblowers stepping forward to make allegations about the pandemic-related conduct of their employers.[1] And government regulators and the plaintiffs bar are already publicizing various reporting mechanisms for disgruntled employees seeking to raise such claims.

While many companies already have policies and processes in place to address whistleblower complaints, it is no longer business as usual. Existing programs likely do not account for the countless disruptions that COVID-19 has caused to a company's operations.

With so many immediate and pressing issues to address during these challenging times, it is understandable that evaluating and updating a company's whistleblower action plan may not be seen as a mission-critical task. Inaction now, however, could have detrimental effects that last long after the pandemic has been contained and the economy has begun to recover.

With such the vast economic dislocation across the global economy, it is reasonable to assume that there will be a commensurate increase in



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whistleblower claims with millions of people suddenly out of work. This increase in whistleblower claims may stem from actions taken by workers under economic stress or other pressures that could give rise to reportable conduct, or because the usually effective precautions and controls fail during this difficult time.

And they might result from the fact that workers, confronted with the prospect of being let go and resulting economic instability, will have greater incentive than ever to report any suspicious activity, or to claim that they had done so after the fact, especially given the substantial monetary rewards that can be obtained.[2]

Regulators are focusing substantial attention on whistleblowers.

Federal and state regulators have already made clear that they will prioritize enforcement investigations and actions against COVID-19-related misconduct, which will also encourage an increase in whistleblowing. Before the COVID-19 pandemic, various agencies already included highly lucrative whistleblower incentives as part of their enforcement mechanisms.

The False Claims Act, for example, allows individuals to sue corporations on behalf of the U.S., and to retain a percentage of any penalty awarded.[3] Similarly, under the Dodd–Frank Wall Street Reform and Consumer Protection Act, passed in 2010 in part as a reaction to the 2008 financial crisis, whistleblowers who report financial misconduct to the U.S. Securities and Exchange Commission are entitled to receive substantial financial awards if they satisfy certain requirements.[4]

Awards typically range from 10% to 30% of the monetary sanction the SEC collects, meaning this incentive can be extremely powerful.[5]

During the current pandemic, regulators will turn to these and other channels to crack down on corporate misconduct, particularly if it is in any way related to the COVID-19 pandemic. The U.S. Department of Justice, for example, has urged citizens to report COVID-19-related fraud schemes by calling or emailing the National Center for Disaster Fraud and, in turn, information reported to the NCDF is disseminated to relevant federal law enforcement agencies and U.S. attorneys' offices across the country.[6]

This program reflects a larger shift in priorities, as announced by Attorney General William Barr last month, in which "detecting, deterring, and punishing wrongdoing" seen as connected to the COVID-19 pandemic has taken center stage.[7] State and local regulators are also focusing on investigating and punishing COVID-19-related misconduct.[8]

In addition to investigating the underlying alleged wrongdoing, regulators have emphasized that they will continue to aggressively enforce the myriad anti-retaliation and other whistleblower protection statutes.

For instance, the U.S. Department of Labor's Occupational Safety and Health Administration recently

issued a press release reminding employers that it is against the law for employers to retaliate against any employee who complains about unsafe working conditions.[9] OSHA's Principal Deputy Assistant Secretary Loren Sweatt said in a press release that any "worker who believes that their employer is retaliating against them for reporting unsafe working conditions should contact OSHA immediately."

Additionally, legislation such as the federal Coronavirus Aid, Relief and Economic Security, or CARES, Act,[10] a \$2.2 trillion stimulus that provides for substantial loans and subsidies to businesses, creates the potential for misuse or perceived misuse of funds. Because of this possibility for fraud, the CARES Act provides for additional funding to create oversight bodies that will investigate how this money is being spent.

In addition, House Speaker Nancy Pelosi, D-Calif., has announced a bipartisan U.S. House of Representatives committee to oversee the distribution of funds under the CARES Act, stating that the "panel will root out waste, fraud, and abuse and will protect against price gouging, profiteering, and political favoritism." [11] The additional monitoring and scrutiny that accompany CARES Act funding will create even more opportunities for whistleblowers to emerge.

Companies need a robust plan to respond to more whistleblowers.

The most effective way to prepare for the expected increase in whistleblower claims in the current environment is to ensure that a company has an appropriate and robust action plan in place, and sticks to that plan as whistleblower scenarios arise.[12] While a comprehensive whistleblower action plan is complex and multifaceted (and not one-size-fits-all for every business), below are some key issues to consider when reevaluating an action plan.

Knowing the Law

This is a rapidly changing environment. Companies should take stock of the various whistleblower laws and regulations that may apply within their given industry, and whether any new guidance is being issued with regard to those laws related to the COVID-19 pandemic.

Communications and Reporting Channels

Companies should ensure that they have clear and operational internal communication and reporting channels for whistleblower complaints. This includes ensuring that existing processes have not been compromised as a result of work-from-home protocols or layoffs.

Companies should then reemphasize the continued availability of these reporting mechanisms to employees, particularly if they are updated to reflect remote work environments. As always, this messaging should drive home the company's nonretaliation policy.

Robust Response and Investigative Protocols

Companies should consider whether existing investigation protocols need to be updated to reflect the current atmosphere. Most obviously, remote work may make it more difficult to follow existing guidelines with regard to confidentiality or in-person interviews.

Moreover, individuals tasked with conducting investigations may have been furloughed or otherwise affected by COVID-19. While these processes should be updated and documented, every effort should be made to maintain confidentiality and existing protocols.

The same is true with responding to the whistleblower and determining whether existing processes for that communication need to be revised to reflect work-from-home protocols. With the expected uptick in whistleblower claims and the disruption to a company's internal investigative structure caused by the COVID-19 pandemic, it is possible that a company's ability to address employee complaints could be delayed. While some delay may be understandable, it is imperative that companies not allow whistleblower complaints to fall through the cracks or go unanswered.

Document Retention

Companies should evaluate their document retention policies to ensure that key paper and electronic documents are retained. This applies both to potentially relevant business documents as well as documents related to the company's investigation and resolution of any complaints.

For instance, if there is a reduction in force following a complaint, companies should take steps to obtain and retain information from the employees who had their employment terminated and prevent them from taking confidential corporate documents in violation of company policy, while respecting protected whistleblowing activity, including by having appropriate confidentiality carveouts — e.g., under the Defend Trade Secrets Act whistleblower provision — in any separation agreements.

Communications With Government Regulators

In light of the heightened government scrutiny, companies should review their existing policies to ensure proper communication with government regulators. Where the whistleblower has already approached regulators, protocols should ensure effective and prompt communication back to the government throughout the internal investigation. Where the complaint is entirely internal, a decision framework should exist to assist in evaluating the potential costs and benefits of self-disclosure to government regulators.

Conclusion

As we all know from our personal and professional lives, the world has been turned upside down dramatically in recent weeks. From massive layoffs of employees across the U.S. and globally to work-from-home protocols implemented at most businesses, we are all sailing into uncharted waters.

Therefore, companies should not just rely on existing policies and processes with the hope that they are just as applicable today as they were mere weeks ago. With the expectation that whistleblower complaints will rise in the coming weeks and months, the most effective thing a company can do now is review and update its existing protocols to ensure that they reflect each company's current challenging work environment.

This proactive step will allow the company to seamlessly and efficiently execute its robust action plan and demonstrate to the whistleblower, regulators or plaintiffs counsel that the company's response to the complaint was appropriate and in no way compromised by the COVID-19 crisis.

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[1] Steve Neavling, "Whistleblowing nurse fired after complaining of inhumane conditions at Detroit's Sinai-Grace amid coronavirus outbreak," Detroit Metro Times (April 10, 2020), available at <https://www.metrotimes.com/news-hits/archives/2020/04/10/whistleblowing-nurse-fired-after-complaining-of-inhumane-conditions-at-detroits-sinai-grace-amid-coronavirus-outbreak>; Matt Troutman, "Whistleblower Details Coronavirus Nursing Home Shortfalls," Patch (April 14, 2020), available at <https://patch.com/new-york/prospectheights/whistleblower-details-coronavirus-nursing-home-shortfalls>; "Santa Clara Valley Medical Center Under Investigation After Whistleblower Complaint," NBC Bay Area, available at <https://www.nbcbayarea.com/news/local/santa-clara-valley-medical-center-under-investigation-after-whistleblower-complaint/2271266/>; WAOK Radio, "Exclusive: MARTA Whistleblower Says Company Not Protecting Riders From COVID-19," (Mar. 31, 2020), available at <https://waok.radio.com/articles/radiocom/rashad-richey-marta-not-protecting-riders-from-covid-19>; Sophie Sherry, "Nurse says she was fired by Northwestern Memorial Hospital after warning co-workers that face masks being used were not the safest," Chicago Tribune (Mar. 25, 2020), available at <https://www.chicagotribune.com/news/breaking/ct-nurse-northwestern-memorial-hospital-coronavirus-20200324-6smjuxbn6fgnxpaiyzzkjymorq-story.html>.

[2] For example, on April 3, 2020, the SEC announced an award of approximately \$2 million to a whistleblower who provided information and assistance that substantially contributed to an ongoing investigation. See Securities and Exchange Commission, "SEC Awards Approximately \$2 Million to Whistleblower," (April 3, 2020), available at <https://www.sec.gov/news/press-release/2020-80>.

[3] 31 U.S.C. §§ 3729-3733.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 111th Cong. (2010).

[5] See, e.g., Securities and Exchange Commission, “SEC Announces Largest-Ever Whistleblower Award,” (Sep. 22, 2014), available at <https://www.sec.gov/news/press-release/2014-206> (noting SEC whistleblower award of more than \$30 million). This activity does not show any signs of slowing, notwithstanding the current COVID-19 pandemic. See *supra* note 4.

[6] Department of Justice, “Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud,” Mar. 20, 2020, available at <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>.

[7] William Barr, “Memorandum on COVID-19 – Department of Justice Priorities,” Department of Justice (Mar. 16, 2020), available at <https://www.justice.gov/ag/page/file/1258676/download>.

[8] See New York State COVID-19 “New York on PAUSE” Enforcement Task Force Violation Complaint Form, available at <https://mylicense.custhelp.com/app/ask>; Complaint Forms Available to Report Violations of Coronavirus Mandates, available at <https://www.wktv.com/content/news/Complaint-forms-available-to-report-violations-of-NY-state-mandates-569290041.html>; California Department of Justice, “Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities,” (Mar. 4, 2020), available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>; Jim Brunner, “Washington state attorney general warns 5 businesses to stop coronavirus price-gouging of sanitizer, masks on Amazon,” *Seattle Times* (Mar. 31, 2020), available at <https://www.seattletimes.com/seattle-news/health/state-attorney-general-warns-5-businesses-to-stop-coronavirus-price-gouging-of-sanitizer-masks-on-amazon/>.

[9] United States Department of Labor, “U.S. Department of Labor Reminds Employers That They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic,” April 8, 2020, available at <https://www.osha.gov/news/newsreleases/national/04082020>.

[10] H.R. 748, 116th Cong. (2020).

[11] Heather Caygle, Kyle Cheny and Melanie Zanona, “Pelosi Forms New Select Committee to Oversee \$2 trillion Coronavirus Relief Package,” *Politico* (April 2, 2020), available at <https://www.politico.com/news/2020/04/02/pelosi-forms-new-select-committee-to-oversee-2-trillion-coronavirus-relief-package-161436>.

[12] Jason C. Schwartz and Lisa J. Banks, “Whistleblower Law: A Practitioner’s Guide,” *American Lawyer Media/Law Journal Press*.