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**Preparing For a Surge in Whistleblower
Claims: From Developing a Compliance
Plan to Best Practices When Investigating
and Litigating Claims**

Presented By:

Jessica Brown & Lee Dunst
Gibson, Dunn & Crutcher LLP

Robert T. Biskup
Deloitte Advisory

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Preparing for a Surge in Whistleblower Claims

COVID-19 whistleblowers in the news

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PURE PROTEIN HIGH PROTEIN LOW SUGAR GREAT TASTE

RETAIL · Published April 10

Trader Joe's fired staffer after coronavirus safety concerns were shared: Lawsuit

Kentucky man says he was wrongfully terminated for posting his concerns on Facebook

Exclusive: MARTA Whistleblower Says Company Not Protecting Riders From COVID-19

THE RASHAD RICHEY MORNING SHOW
MARCH 31, 2020 - 4:51 PM



WCVB 5 32 Shares

Whistleblower complaints over worker safety higher amid coronavirus pandemic

NBC BAY AREA LOCAL WEATHER INVESTIGATIONS VIDEO ENTERTAINMENT...

TRENDING Pandemic Financial Resources Live Coronavirus Blog Bay Area Reopening Plans Local Coronavirus Cases COVID-19: Remember... WEATHER ALERTS

CORONAVIRUS

Santa Clara Valley Medical Center Under Investigation After Whistleblower Complaint

By NBC Bay Area staff · Published April 11, 2020 · Updated on April 12, 2020 at 10:22 am

Tallahassee Democrat. NEWS SPORTS TLH LIMELIGHT OBITUARIES USA TODAY MORE

Coronavirus and the law: Tallahassee woman sues after layoff following remote work request

Investigations in the news

SEC Is Scrutinizing Public Companies Granted Virus Relief Funds



The headquarters building of the U.S. Securities and Exchange Commission (SEC) stands in Washington, D.C., U.S., on Monday, May 10, 2010. (Bloomberg)

By Christian Berthelsen and Matt Robinson | Bloomberg

May 28, 2020 at 1:19 p.m. PDT

The U.S. Securities and Exchange Commission has started an inquiry into publicly traded companies that received coronavirus stimulus funds from the federal government, scrutinizing whether representations they made in loan applications were consistent with their disclosures to investors in securities filings, according to three people familiar with the matter.



The New York Times

Armed With Whistleblower Tips, U.S. SEC Cracks Down on Coronavirus Misconduct

By Reuters

May 26, 2020



WASHINGTON — The novel coronavirus outbreak and economic fallout is proving to be a bonanza for whistleblower lawyers as the U.S. securities regulator cracks down on a range of related misconduct from companies touting sham cures to misuse of federal aid.

The Securities and Exchange Commission (SEC) fielded about 4,000 complaints from mid-March to mid-May, a 35% increase on the year-ago period, Steven Peikin, the agency's co-head of enforcement, said this month as cases of COVID-19, the respiratory illness caused by the coronavirus, shot up.

Today's discussion: Overview

Factors Driving the Surge in Complaints

Key Compliance Issues

Developing a Whistleblower Action Plan

Best Practices for Addressing Complaints

Questions and Answers

Factors Driving the Surge in Complaints

What's driving the surge in whistleblowing?

Economic downturn and instability

Medical and safety concerns

New federal and state programs and rules

Renewed public attention on alleged corporate misconduct

Economic downturn and instability

- Rapid and unprecedented economic turmoil with record unemployment and layoffs.
- Workforce under significant cost-reduction pressures and stress.
- Whistleblower incentives have never been greater.



Medical and safety concerns

- Work-from-home policies creating potential compliance gaps.
- Increased concern about workplace safety and health conditions.
- Cyber security and data protection concerns.



Korean government analysis of COVID-19 spread in Seoul call center

New federal and state programs and regulations

- New government-backed liquidity programs, regulations and rules are being issued at breakneck speed.
- Well-intentioned companies may face compliance challenges.
- Proliferation of mechanisms for reporting alleged misconduct.



Public and enforcement attention on alleged corporate misconduct

- COVID-19 is at the top of the agenda for every regulator.
- The U.S. Department of Justice has urged individuals to report COVID-19-related fraud schemes.
- Many State Attorneys General are focusing on investigating and punishing COVID-19-related misconduct.



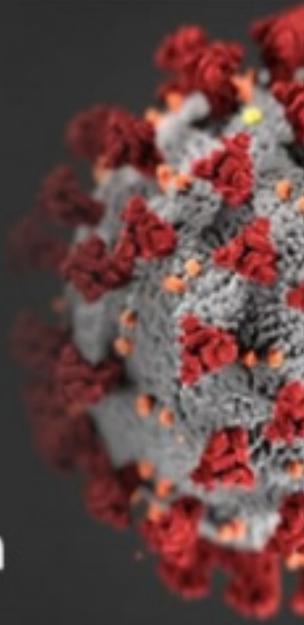
New Jersey AG Gurbir Grewal announces enforcement action against COVID-19 price gouging

New federal and state programs and regulations

COMBATting CORONAVIRUS FRAUD

REPORT COVID-19 FRAUD

Contact the National Center for
Disaster Fraud Hotline:
866-720-5721 or
[Justice.gov/DisasterComplaintForm](https://oig.justice.gov/coronavirus/)



<https://oig.justice.gov/coronavirus/>

New federal and state programs and regulations

Attorney General James Urges Employees to File Complaints Against Employers Ignoring NYS Executive Orders

NEW YORK — Attorney General Letitia James today issued the following statement asking any employee who believes that their employer is in violation of labor laws or official directives set forth by New York State Governor Andrew Cuomo's Office to contact the New York State Office of the Attorney General's Labor Bureau and file a complaint:

"Each and every one of us is called to work together and cooperate with emergency responders and public officials who are working hard to keep all New Yorkers safe. During this time, my office is closely monitoring the treatment of employees across the state. If you believe your employer is in violation of either existing labor laws or recently issued executive orders, please contact our office at (212) 416-8700 or Labor.Bureau@ag.ny.gov. We urge employers to allow workers to work from home where applicable in accordance with all New York State executive orders."

<https://ag.ny.gov/whistleblower>

Report price gouging to the Attorney General's Office



See it



Snap it



Send it

www.atg.wa.gov/file-complaint



<https://www.atg.wa.gov/report-covid-19-scams-price-gouging>

Public and enforcement attention on alleged corporate misconduct

- Guidance issued May 13 indicates the Treasury Department and SBA will review all Paycheck Protection Program loans over \$2 million for impropriety.
- The DOJ has begun aggressive enforcement, including several prominent fraud charges. *See, e.g., U.S. v. David Stanley, et al.* (D.R.I. May 5, 2020).
- On April 23, the House of Representatives created the bi-partisan Select Committee on the Coronavirus Crisis to “conduct a full and complete investigation . . . of the use of taxpayer funds.”



Key Compliance Issues

Compliance plan: Overview

Pivot to “dynamic” risk assessment

Dial up the frequency and content of compliance communications with the C-Suite and Board

Extend the eyes, ears, and reach of compliance

Remain vigilant for financial fraud allegations, as history tends to repeat itself

Invest in compliance focused on government economic stimulus measures

Compliance plan: Conduct “dynamic” risk assessments

- Adopt a culture of risk assessments that are frequently refreshed and updated to avoid compliance blindsides and anticipate what is around the corner.
- Address likelihood of reduced budgets across the “three lines of defense.”
- Ensure focus on highest risk areas of compliance, consistent with regulatory guidance.

Compliance plan: Dial up the frequency and content of compliance communications with the C-Suite and Board

- Chief Compliance Officers can provide invaluable assistance to management in proactively embedding new operational business processes, controls and systems to effectively manage emerging compliance risk.
- CCOs also can serve as a critical communication bridge for regular information updates to the board to assist them in optimizing the execution of their fiduciary oversight duties.
- Address new and unique training challenges.

Compliance plan: Extend the eyes, ears, and reach of compliance

- Given the probable increase in whistleblower activity, companies should consider their surge capacity needs from an operational perspective, as remote and virtual compliance audits become the norm.
- This can be done by proactively exploring variable cost external support including “on-call” investigation support and capabilities designed for rapid deployment, technology-enabled delivery, and predictable costs to augment in-house investigations resources around the world.
- Increased emphasis on investigation metrics, ageing, and audit trails.

Compliance plan: Remain vigilant for financial fraud, as history tends to repeat itself

- The risk areas we may see post-crisis will be many we have seen before:
 - Significant management estimates
 - Contingent liability and other discretionary reserves
 - Tangible and intangible asset valuations and impairments
 - Revenue recognition and topside consolidation adjustments
 - Management overrides of internal controls
 - Employee/vendor conflicts of interest
 - Expense account abuse
 - Corrupt payments to foreign government officials

Compliance plan: Invest in compliance focused on government economic stimulus measures

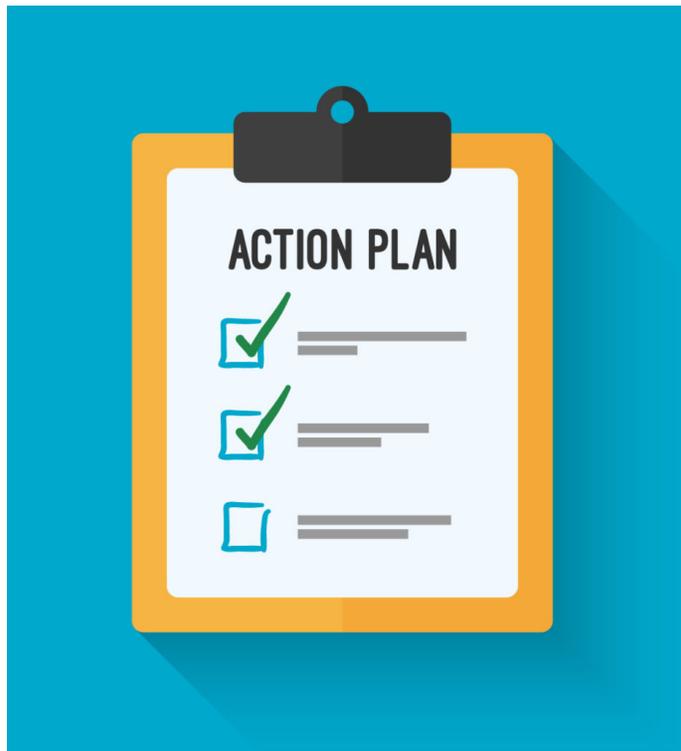
- Companies should scour their organizations for any form of government monetary connectivity and, where such linkages exist, to implement reliable controls and IT systems, coupled with robust monitoring for fraud, waste, abuse, internal control gaps, accounting irregularities, and regulatory exposure.



CARES Act business loans authorized

Developing a Whistleblower Action Plan

Developing / updating a whistleblower action plan



- A company's whistleblower action plan should be appropriate for this unprecedented current environment.
- A robust action plan is a mission-critical task.
- The failure to be prepared could have detrimental effects long after the pandemic has been contained and the economy has begun to recover.

Best Practices for Addressing Complaints

Adopting best practices

Responsiveness to employee complaints

Internal communication and reporting channels

Early assessment

Investigation and response protocols

Key paper and electronic document retention

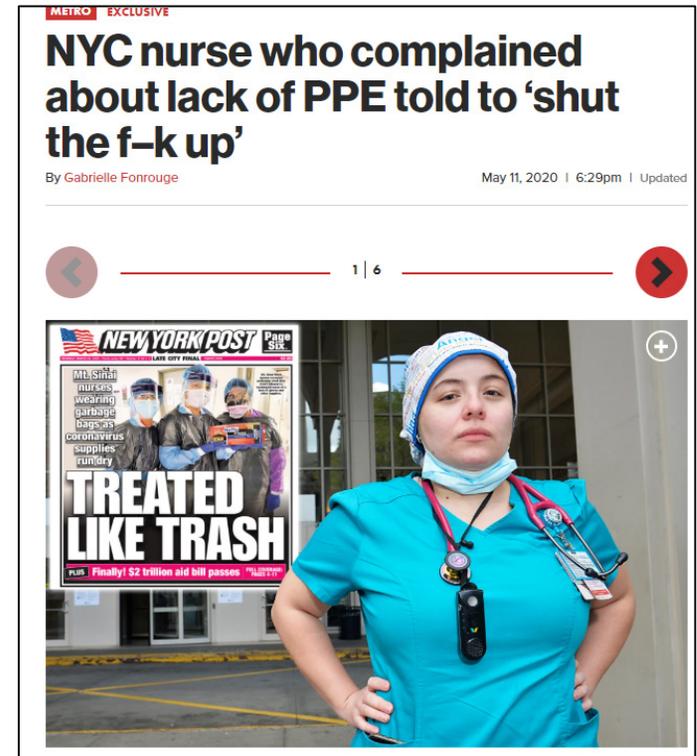
Anti-retaliation policies and training

Communications with government regulators

Responsive action

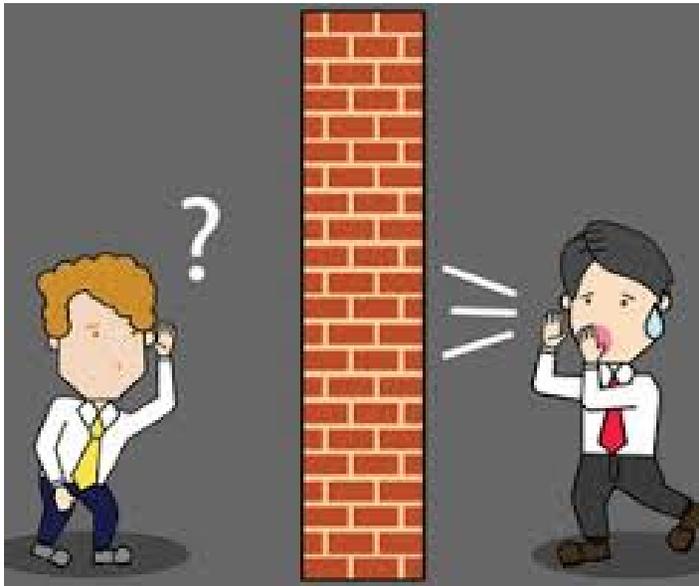
Adopting best practices: Responsiveness to employee complaints

- Take all complaints seriously—vague complaints often lead to discovery of issues.
- Getting ahead of problems early is extremely important, as is allowing employees to feel heard.
- Sometimes the reaction to an employee will end up becoming the bigger concern than the underlying complaint itself.



New York Post, May 11, 2020

Adopting best practices: Internal communications and reporting channels



- Ensure your communication and reporting processes are still operational.
- Consider the impact of work-from-home, furloughs, and layoffs, as well as the transition and re-opening processes.

Adopting best practices: Early assessment

- Evaluate risk to organization—this includes financial but also public relations.
- Allocate appropriate resources to complaints.



Adopting best practices: Investigation and response protocols

- Responses to complaints must still be timely.
- Have a defined scope.
- Identify goals and structure of conducting investigation.
- Remember corporate *Upjohn* warnings.



Adopting best practices: Key paper and electronic document retention



- Pandemic or not, companies must retain documents as required under applicable law.
- Employees may be using personal devices at home or platforms to communicate that they don't normally use.
- Also, if there are layoffs following a complaint, the company should have procedures in place to obtain and retain information from those employees while respecting any protected whistleblowing activity.

Adopting best practices: Anti-retaliation policies and training

- As in normal times, federal and state law bars retaliation against whistleblowers.
- Maintain controls to ensure that any adverse employment action is well supported by non-retaliatory reasons.
- Limit disclosure of complaint to managers and supervisors, because they cannot retaliate if they don't know about the complaint.
- Encourage whistleblower to report any retaliation — organization should proactively tell whistleblower that there will be no retaliation.



Adopting best practices: Communications with government regulators



- Make sure that any policies on communicating with government regulators accounts for the current climate.
- Know when and how to report.
- Self-reporting considerations (not “one-size fits all”).

Adopting best practices: Responsive action

- Take some action in response to complaint and investigation.
- Disclosure of findings of investigation to whistleblower is a case-by-case analysis.
- Consider addressing issues that may have led to complaint – even if the specific complaint is not substantiated.
- Evaluate culture or perception issues, even if the complaint was unfounded.

Presenters

Jessica Brown



Jessica Brown is a Partner in Gibson Dunn's Denver office

Contact at jbrown@gibsondunn.com

Lee Dunst



Lee Dunst is a Partner in Gibson Dunn's New York office

Contact at ldunst@gibsondunn.com

Robert T. Biskup



Robert T. Biskup is Managing Director, Regulatory, Forensics & Compliance, at Deloitte's Detroit office

Contact at rbiskup@deloitte.com