

Key OSHA Virus Whistleblower Insights From Watchdog Audit

By **Steven Pearlman, Pinchos Goldberg and Scott Tan** (September 1, 2020, 10:50 AM EDT)

In a **Law360 quest article** published on May 26, we alerted employers to an anticipated flood of various types of COVID-19 health and safety-related whistleblower retaliation claims, including those filed with the Occupational Safety and Health Administration, as well as those filed in courts under common law and state and federal statutes.

The predicted deluge of complaints to OSHA has been borne out by statistics released by OSHA showing a total of 2,660 COVID-19-related whistleblower complaints were filed between Feb. 18 and Aug. 25.[1]

This led to questions as to whether the agency could adequately address complaints in a timely manner.

With this in mind, we noted in our May 26 article that the U.S. Department of Labor's Office of Inspector General announced on May 6, that it would conduct an audit to assess the impact of COVID-19 whistleblower complaints on OSHA's operations and the actions OSHA has taken in response.[2] We now have the results in hand.

On Aug. 14, the OIG **released a report** titled "COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic." In addition to setting forth the understandable results of the audit arising in the wake of a pandemic and unprecedented conditions, the report included recommendations as to how OSHA can expedite its investigation procedures and reduce delays caused by the increased caseload.[3]

The following discusses the OIG's findings, the implications of those findings and OSHA's response.

The OIG's Report

Scope and Methodology

The OIG conducted the audit to answer the following question: What impact have COVID-19 whistleblower complaints had on OSHA, and how has OSHA addressed COVID-19 whistleblower complaints?

The audit covered whistleblower complaint data from Feb. 1, 2019 to May 30, 2019, and also from Feb. 1, 2020 to May 31, 2020, provided by OSHA as of June 5, 2020. Relying on data provided by OSHA, the OIG presented a set of key statistics and numbers on the whistleblower program.[4]

Findings



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Increase in Whistleblower Complaints

The OIG found that the pandemic has significantly increased the number of whistleblower complaints OSHA has been receiving. According to the report, from Feb. 1 to May 31, the whistleblower program received 4,101 complaints, a 30% increase over the 3,152 complaints received during the same period in 2019.[5]

From Feb. 1 to May 31, 1,618 COVID-19-related whistleblower complaints were filed with OSHA, with numbers varying substantially across the 10 regions OSHA administers.[6] Region 5 — covering Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin — received 325 COVID-19-related whistleblower complaints, the highest of any region. By contrast, Region 10 — covering Alaska, Idaho, Oregon and Washington — received 61 COVID-19-related whistleblower complaints, the fewest of any region.[7]

From Feb. 1 to May 31, investigators screened and administratively closed 858 of the 1,618 COVID-19-related whistleblower complaints.[8] During the same period, after screening, 404 complaints were docketed, which begins the fact-gathering process by notifying concerned parties of OSHA's intent to open a formal investigation.[9]

The OIG found that for COVID-19-related complaints, this screening process was completed in an average of seven days after the complaint was filed, which is three days faster than the average of 10 days to administratively close non-COVID-19-related whistleblower complaints.[10] Of the 404 docketed complaints, 62 were closed after the investigation concluded, leaving 342 COVID-19 whistleblower complaints open as of May 31.[11]

Increase in Caseloads

The OIG found that investigators faced an increased caseload due to the number of complaints filed during the pandemic, which resulted in delays. The OIG stated that based on OSHA's internal metrics, for the quarter ending in March 31, an average of 279 days was needed to close an investigation, representing an increase of 41 days from the 238 days reported in a 2015 audit.[12]

The OIG noted that based on its interviews, most of the additional complaints were filed under Section 11(c) of the Occupational Safety and Health Act, which requires investigations to be completed within 90 days of the filing date.

The OIG attributed part of the increased delay to the reduction in whistleblower program employees from 126 in 2019 to 120 in 2020. Though OSHA requested 10 new whistleblower investigator positions in its fiscal year 2021 budget request to Congress, it only had 76 active investigators as of Feb. 28, with five investigator positions remaining open.[13]

Between Feb. 1 and May 31, there was an average of 53 whistleblower complaints received per investigator, compared with 41 during the same period in 2019.[14]

In Region 7 — covering Iowa, Kansas, Missouri and Nebraska — the average whistleblower complaints per investigator increased only by three — the lowest of any region. In contrast, Region 9 — covering primarily Arizona, California, Hawaii and Nevada — experienced the largest increase of 21 additional whistleblower complaints per investigator.[15]

The OIG's Conclusion and Recommendations

Perhaps not surprisingly, the OIG concluded that the COVID-19 pandemic has significantly

increased the number of whistleblower complaints received by OSHA, and that "OSHA was challenged to complete investigations in a timely manner before the pandemic, and the potential exists for even greater delays now."

Thus, the OIG made the following recommendations:

- Fill the five open whistleblower investigator vacancies.
- Monitor, evaluate and consider extending a previously implemented pilot triage program to all regions.
- Expand a preexisting caseload management system that reassigned older whistleblower complaints from backlogged regions to regions with spare capacity.

The second and third recommendations reflect steps OSHA had already begun implementing. The OIG found that prior to the COVID-19 pandemic, the whistleblower program had begun planning a triage program to respond more efficiently to increased numbers of whistleblower complaints.

On May 1, the pilot triage program commenced in Region 2 — covering New Jersey, New York, Puerto Rico and the U.S. Virgin Islands.[16] The program allowed investigators to expedite the complaint screening process by closing procedurally barred complaints without first contacting the complaints for additional information.

The OIG also found that beginning early this year, the whistleblower program started reassigning complaints from regions experiencing a backlog of investigations to less busy regions, but had yet to adopt this method more broadly for complaints made during the COVID-19 pandemic.

OSHA's Response

In a letter published alongside the OIG's report, Principal Deputy Assistant Secretary of OSHA Loren Sweatt stated that strengthening the whistleblower program continues to be one of OSHA's top priorities and she agrees with the OIG's recommendations.[17] In addition, Sweatt noted that OSHA had closed more than 50% of COVID-19 related complaints, and that its average whistleblower complaint screening time had exceeded the goal set in the agency's fiscal year 2020 operating plan.

Sweatt also stated that OSHA would continue to take steps to improve efficiency, noting the success of OSHA's alternative dispute resolution program, which provides complainants with an alternative means of resolving their complaints outside of OSHA's investigative process.

In addressing the first recommendation, Sweatt noted that OSHA had already filled two of the investigator vacancies and was working to fill the remaining three in accordance with federal hiring procedures. As to the second recommendation, she stated that on July 20, OSHA issued standard procedures for the development, implementation and monitoring of pilot programs, which would be used to evaluate the Region 2 pilot triage program at its conclusion.

With respect to the third recommendation, Sweatt noted that OSHA had begun the process of balancing investigator caseloads across regions earlier this year, which had already shown success through improved customer service, reduced case inventories and backlogs

and shorter investigation times.

Implications

As noted, OSHA's data shows that employers are indeed facing a deluge of health and safety whistleblower claims in the wake of the COVID-19 pandemic. And it is fair to assume that such claims will continue to be filed in substantial numbers. While OSHA may enhance its ability to handle the high volume of claims by expanding upon its existing efforts and following the OIG's recommendations, it is likely that OSHA could still be stretched.

One consequence may be that frustrated complainants may be more likely to seek relief in courts by asserting claims under various whistleblower statutes or by bringing common law retaliatory discharge claims.

In light of the foregoing, employers should take steps to minimize the risks attendant to health and safety whistleblower claims by following the range of suggestions listed in our May 26 article.

They include:

- Developing a plan detailing the steps employers are taking to protect employees' health and safety during the pandemic;
- Updating anti-retaliation policies to cover complaints concerning health and safety issues;
- Providing training on this subject to employees of all levels;
- Providing a channel for complaints of health and safety issues, including anonymous complaints;
- Documenting complaints in detail; and
- Vetting the reasons behind any adverse employment actions against employees who have complained of health and safety violations.

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[1] COVID-19 Response Summary - Whistleblower Data, Aug. 26, 2020, <https://www.whistleblowers.gov/covid-19-data>.

[2] Memorandum: Audit of OSHA COVID-19 Whistleblower Complaint Process, May 6, 2020, https://www.oig.dol.gov/public/oaprojects/COVID-19%20Whistleblower%20Engagement%20Memo_050620.pdf.

[3] OIG Audit Report, COVID-19: OSHA Needs to Improve Its Handling of Whistleblower Complaints During the Pandemic, Aug. 14, 2020, <https://www.oig.dol.gov/public/reports/oa/2020/19-20-010-10-105.pdf>.

[4] The OIG also interviewed OSHA Whistleblower Program management officials, a Regional Supervisory Investigator and three Investigators. It also reviewed prior audit reports, news articles and recent COVID-19 legislation to help determine the impact on OSHA.

[5] OIG Audit Report, pp. 3-4.

[6] Id.

[7] OIG Audit Report, p. 5.

[8] OIG Audit Report, p. 8.

[9] Id.

[10] Id.

[11] OIG Audit Report, p. 10.

[12] OIG Audit Report, p. 6, referencing DOL OIG Report Number 02-15-202-10-105, dated Sept. 30, 2015.

[13] OIG Audit Report, p. 7.

[14] OIG Audit Report, p. 9.

[15] OIG Audit Report, p. 10.

[16] OIG Audit Report, p. 11.

[17] OIG Audit Report, p. 20, "Appendix B: Agency's Response to the Report", dated Aug. 10, 2020.