



# COVID-19 OSHA Whistleblower Claims On The Rise As Virus Rages On

Insights

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A recent report from the federal government revealing that workplace safety whistleblower claims have exponentially increased during the pandemic should give all employers pause – and should motivate you to take immediate steps to ensure you don't find yourself on the receiving end of such a claim. What do you need to know about this dramatic rise and what can you do about it?

## **Federal Report Shines A Light On Massive Increase In Safety Whistleblower Activity**

Last month, the U.S Department of Labor Office of Inspector General (OIG) issued a report finding that the number of OSHA whistleblower claims increased by 30% increase between February to May 2020 as compared to the same period during 2019, jumping from approximately 3,150 complaints in 2019 to approximately 4,100 complaints in 2020. In addition, the report noted that 39% of whistleblower complaints filed from February 2020 through May 2020 (approximately 1,600) were directly related to COVID-19. These complaints included allegations of retaliation for claiming violations of social distancing guidelines and failure to provide personal protective equipment.

The report also noted that a shortage of OSHA investigators, combined with an increase in complaints, has caused delays in OSHA's ability to complete investigations. The OIG recommended to OSHA that it needed to fill the handful of open whistleblower investigator positions to address these issues, and also take additional steps to increase agency efficiency with respect to these claims. In response, Loren Sweatt, OSHA's Principal Deputy Assistant Secretary of Labor, stated that she agreed with each of the OIG's recommendations and vowed that OSHA would be making the reinforcement of the agency's whistleblower program a "priority." This means that there will soon be a full complement of agency investigators ready to visit worksites across the country, looking not only for safety concerns but examining possible retaliation claims against workers who raise such concerns.

## **Whistleblower Litigation Has Also Spiked In Recent Months**

COVID-19 whistleblower complaints filed during the pandemic, however, have not been limited to those filed with OSHA. Since March 2020, there has been a surge of employee complaints across the country alleging violations of statutory whistleblower laws. In fact, [Fisher Phillips' COVID-19 Employment Litigation Tracker](#) indicates that whistleblower/retaliation claims represent one of the largest categories of COVID-19 litigation.

As of mid-September 15, 136 of the 674 employment-related lawsuits have been related to alleged whistleblower litigation filed in federal or state court. According to the employment litigation tracker, California has the most virus-related workplace retaliation lawsuits with 30. New Jersey follows closely behind at 26. These claims are being filed by employees in a variety of scenarios, including the following:

- *Cimmino v. Italian Village Pizzeria*, Superior Court of New Jersey: An employee alleges violations of New Jersey's statutory whistleblower protection law, the Conscientious Employee Protection Act (CEPA). He alleges that his employer did not take the appropriate steps to protect him and other employees as they were not provided masks and the company did not establish appropriate social distancing protocols. He alleges that after he requested to be quarantined when several employees exhibited flu-like symptoms and/or tested positive for COVID-19, he was not allowed to return to work in retaliation for expressing safety concerns.
- *Concorso v. Route 23 Auto Mall, LLC*, Superior Court of New Jersey: A former employee alleges that she was retaliated against for demanding that her employer take appropriate precautionary action to prevent the spread of COVID-19. She alleges that, in response to her concerns, she was initially selected for furlough and subsequently terminated from her employment. As of result of this conduct, she filed a lawsuit alleging violations of CEPA.
- *Clark v. Calson Management, LLC*, Superior Court of California: A former healthcare employee filed a claim alleging wrongful termination in violation of the California Labor Code for objecting to work assignments. In this action, she alleges that her employer required her to assess patients for acceptance to its senior living community despite her belief that she had likely be exposed to COVID-19. After objecting to continuing with the assessments due to her concerns about spreading the virus to vulnerable seniors, she was terminated.

### **What Can You Do?**

Both the OIG report and the rise in COVID-19 related whistleblower complaints highlight that workplace safety complaints are on the rise with no indication of slowing down. While you cannot always prevent individuals from filing such complaints, there are steps you can take to help minimize the chances of a claim being filed and increase your organization's legal exposure, which include the following:

- regularly monitor and implement CDC, OSHA, and local guidance regarding appropriate COVID-19 workplace safety practices;
- train employees on appropriate COVID-19 safety procedures; and
- update anti-retaliation policies to cover workplace safety and health issues.

In addition, you should listen to employee safety concerns and investigate employee complaints. You must be sure to diligently document the steps taken, and information obtained, during any workplace safety investigation. A strong documentary record can be the difference between

significant liability and the ability to present strong defenses in any subsequent OSHA investigation or civil litigation.

For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions](#) section also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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