



Preparing For The Proliferation Of Pandemic-Related Whistleblower Claims

Insights

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As the virus wreaks havoc in the United States with an indefinite increase in hospitalizations and deaths, the number of Occupational Safety and Health Administration inspections has surged across the nation. Many of these OSHA inspections are preceded by a deluge of COVID-19 health and safety-related whistleblower claims.

We recently summarized a comprehensive report promulgated by the U.S. Department of Labor Office of Inspector General, which found a massive increase in whistleblower activity. Specifically, the number of OSHA whistleblower claims has increased 30% when compared to pre-pandemic statistics. As expected, there is thus a concurrent spike in whistleblower/retaliation litigation. As OSHA inspections and parallel litigation rise, healthcare employers are particularly vulnerable. In analyzing the burgeoning trend of OSHA inspections and citations – as well as whistleblower litigation across the nation – this article expounds upon the risks and consequences specific to healthcare employers and how to best avoid liability.

In limiting liability, it is critical that healthcare employers understand the national and state-specific trends in OSHA violations and whistleblower litigation. We previously reported the national trend on citations against healthcare employers. The majority of OSHA violations are comprised of the alleged failure to provide appropriate personal protective equipment (PPE), a lack of proper training and/or a comprehensive plan for respiratory and illness protection, and the failure to report hospitalizations of employees for COVID-19. The following case studies reveal where national healthcare facilities have faltered, thereby providing an illustrative blueprint of which healthcare employers should take heed.

Whistleblowing OSHA Violations Throughout The Nation

At the onset of the pandemic and into late summer, there was a wave of alleged non-compliant nursing homes, resulting in OSHA citations carrying hefty fines of thousands of dollars. For example, in May, OSHA accused a nursing home in Georgia of failing to report the hospitalizations of six employees within the statutorily mandated period of 24 hours, thereby resulting in a \$6,500 fine. In July, OSHA's attention on nursing facilities continued wherein inspections were prompted by the reporting of employee hospitalizations. Upon the inspections of a group of nursing facilities in Ohio, citations were issued for failures related to the use of N95 respirator masks. The jointly owned homes were also admonished for the failure to conduct proper fit testing for medical grade face

masks worn by staff and the non-existence of a required written respiratory protection program and related training. Here, OSHA imposed a whopping \$40,482 in penalties.

Although federal agencies are insulated from OSHA fines, that did not stop OSHA from inspecting at least 35 Veterans Affairs healthcare facilities over the summer. As the result of three inspections running into September, OSHA cited a VA Hospital in Indianapolis with six “serious” violations. The violations included the failure to provide appropriate respirators to employees and patients entering the 159-bed hospital and the failure to assess hazards clerical workers faced. Non-federal agencies for the same citations face a maximum of \$13,494 per violation.

Over the Rocky Mountains to the coasts of California, OSHA inspections wage on into the fall. In September, Cal/OSHA cited a Sutter Health network after an employee contracted COVID-19. The agency’s finding of the medical foundation’s failure to provide proper respiratory protection when transporting patients suspected of carrying the virus resulted in a proposed fine of \$6,750. Congruent with the national pattern, this inspection was launched after whistleblowing an employee’s illness and related employee complaints of workplace hazards. Thereafter, the Cal/OSHA Chief described the healthcare and food processing industries as disproportionately impacted. He warned that the citation was the first of many to be issued in the coming weeks and months.

In short, the tantamount lesson to take away, as established in the OIG’s recent findings, is that OSHA inspections were prompted by whistleblowers in an overwhelming amount of cases.

Case Studies Reveal Specific Trends

Leaving healthcare employers in murky waters, OSHA has yet to issue a standard that specifically addresses how to control hazards posed by COVID-19. However, the above case studies demonstrate clear patterns in violations: (1) the failure to institute and comply with a comprehensive respiratory program; and (2) the failure to report hospitalizations of employees for COVID-19. Whistleblowers are primarily concerned by the lack of appropriate PPE, a problem conflated early on by a national mask shortage.

Unfortunately, OSHA’s guidance to the healthcare community amidst the mask shortage has been futile and circular, vaguely calling for healthcare employers to use other “protocols” to eliminate virus exposure. For example, regarding the Ohio nursing facilities, OSHA dinged the care homes for allowing employees to repeatedly use the same N95 mask for seven days when in fact this was a “protocol” undertaken as a result of the PPE shortage. Nonetheless, in examining this case study, it is important to understand that simply providing appropriate PPE is not enough.

Thus, many OSHA violations arise out of the failure to adopt a comprehensive respiratory program meeting the requirements of OSHA’s respiratory protection standard (*see* Title 29 of the Code of Federal Regulations section 1910.134). This comprehensive standard delineates the baseline for fit testing PPE on employees, patient medical exams, and the related training of employees on the same. Accordingly, it is essential that healthcare employers promptly yet carefully review the

same. Accordingly, it is essential that healthcare employers promptly, yet carefully, review the statutory obligations of the respiratory protection standard to evaluate and take all necessary precaution for continued compliance.

States Enact Protections For Virus Whistleblowers

While it is the whistleblower who initially attracts the prying eyes of an OSHA inspection, the agency often finds additional violations, particularly regarding comprehensive respiratory programs. The massive surge in whistleblower complaints related to OSHA violations has prompted some states and cities to enact specific protections shielding virus whistleblowers from retaliation, largely resulting from the federal government's inaction in this arena.

For example, in New York, the state expanded its already broad whistleblower safeguards by mid-June. Governor Cuomo signed an amendment carving out a new protected category of workplace safety, thereby barring healthcare employers from retaliating against employees who complain to the press or on social media about unsafe workplace conditions. Later that month, Colorado and Philadelphia followed suit. Colorado enacted legislation which prevents healthcare employers from terminating employees due to complaints about flawed virus protection and lack of PPE during public health emergencies. Philadelphia passed the Essential Worker Protection Act, which includes a specific ban on retaliation against healthcare employees raising workplace safety concerns.

Not long behind, effective July 1, Virginia put its first whistleblower protections on the books. The new law includes a provision prohibiting healthcare employers from firing an employee who voices "a reasonable concern" about virus infection control to the employer, a government agency, the press, or through social media.

More Than A Slap On The Wrist: Litigation And Other Risks Posed By Whistleblowers

As previously mentioned, the consequence of OSHA violations generally means hefty fines. However, there is much more at stake. First, litigation is often far more expensive, and this has only been compounded by new and broad state specific protections for virus whistleblowers. Moreover, many of the state laws provide for recovery of attorneys' fees and costs.

There has also been an uptick of class action whistleblower lawsuits, often carrying significant monetary liability. Further, specifically in California, we recently predicted a new wave of filings under the Private Attorneys General Act, predicated on alleged Cal/OSHA violations. Penalties associated with PAGA quickly add up: \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation.

Finally, and often most detrimental in the long run, is the reputational harm arising from a healthcare institution's failure to protect its employees. This risk is especially threatening to an industry largely predicated upon safety and patient care. Moreover, after prolonged litigation, federal courts in the District of Columbia and California concluded that employer illness and injury data is not confidential. On September 4, OSHA announced that such data is now publicly available on the agency's website. Although OSHA has noted that employer provided data does not necessarily

denote fault or a violation, this does little to assuage the real threat of reputational harm to an industry which prides itself on customer (i.e. patient) satisfaction.

So What Should Healthcare Employers Do?

With so much at stake and unfortunately no end to the pandemic in immediate sight, it is important healthcare employers act now, if you have not already done so, to evaluate workplace safety and take swift corrective measures. Recently, OSHA's principal deputy assistant warned of OSHA's continued plans to focus on healthcare employers in vigilantly enforcing the respiratory protection standard.

As a result, healthcare employers should take steps to minimize risks attendant to health and safety whistleblower claims by following the range of recommendations listed in our prior reporting, found [here](#) and [here](#). These include:

- Promptly reviewing and staying informed of OSHA's updated guidance, "[Guidance on Preparing Workplaces for COVID-19](#)," including the agency's recent recordkeeping enforcement. It is likewise critical healthcare employers remain up-to-date with local and state guidance. Moreover, you should be advised of OSHA's industry specific guidance for healthcare workers to best mitigate virus exposure.
- Immediately reviewing and potentially revising the comprehensive respiratory protection program to guarantee compliance with all aspects, including proper virus PPE, specific employee training, and fit testing requirements. All employers should maintain detailed documentation in personnel files demonstrating all employees have adequately complied with fit testing and training.
- Maintaining a clearly written reporting structure for employees with health and safety concerns as well as reports of confirmed COVID-19 cases and exposure. This necessarily includes reviewing retaliation policies to ensure compliance with potentially new state laws. In this vein, it is critical healthcare employers document and maintain records of reported employee complaints as well as your investigation and actions in response.
- Reviewing and maintaining OSHA guidance concerning safe work spaces, including "clean areas." This entails the implementation of engineering and administrative controls to differentiate between "clean areas" and contaminated areas, such as the use of physical barriers to guide patients and staff throughout the facility. Additionally, you should erect strict measures to isolate patients with confirmed or suspected COVID-19 and restrict access to minimize employee exposure.
- Developing the mindset that an OSHA inspection is forthcoming and prepare accordingly. This includes not only compliance with COVID-19 related OSHA regulations as emphasized herein, but all safety regulations applicable to your company. You must also train employees on proper procedure in handling an OSHA inspection, including the proper corporate individual(s) to oversee the inspection, which often necessitates legal counsel.

Conclusion

Now more than ever, healthcare employers must focus, review, and adjust health and safety measures to protect your employees from the virus. There is no doubt that the rate of OSHA inspections will continue to rise in the imminent future, and you will want to take proactive steps to ensure you don't end up with a negative experience should an inspection take place at your facility.

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