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Common Questions in Evaluating a Whistleblower Complaint Filed with OSHA

BY LINDSAY A. DISALVO

By [Lindsay A. DiSalvo](#)

In FY 2023, the Occupational Safety and Health Administration ("OSHA") received 3,243 Whistleblower complaints filed under various statutes' anti-retaliation provisions. OSHA is charged with investigating alleged retaliation under more than 20 different statutes, including, but limited to, the Occupational Safety and Health Act ("OSH Act"), the Sarbanes-Oxley Act ("SOX"), the Surface Transportation Assistance Act ("STAA"), and the Environmental Protection Act ("EPA") and related environmental statutes. Although the number of Whistleblower complaints dipped some in FY 2021 after peaking at 3,448 in FY 2020, they have been steadily increasing since then. Indeed, the number of complaints filed with OSHA increased by about 15% between FY 2022 and FY 2023, and a vast majority of these complaints, about 71%, are filed under Section 11(c) of the OSH Act.

We have yet to see what impact, if any, the change in Administration will have on the filing and investigation of Whistleblower complaints, though if the prior Trump Administration is any indication, complaints are likely to continue to increase. Thus, it's important for an employer to know the types of questions they should ask in evaluating how to respond to a Whistleblower complaint and what information will be most useful to provide the OSHA investigator. Here, we provide several of those essential questions to assist in navigating the Whistleblower investigation process. Note that the same or similar questions also apply to analyzing other types of retaliation claims, like those filed with the Equal Employment Opportunity Commission under Title VII and other anti-discrimination laws.

Under Which Statute Did the Complainant File Their Complaint?

As previously stated, OSHA investigates allegations of retaliation filed with the Agency under more than 20 statutes' anti-retaliation provisions. Thus, it is essential that the employer understand which statute is applicable to the complaint it has received as there are essential differences between each statute, such as the timing for filing of a complaint, the types of protected activity covered by the applicable statute, and the type of causal connection the complainant must be able to establish to meet its burden of proving retaliation. The applicable statute should be clearly stated toward the top of the notification letter the employer receives from OSHA after a complaint has been filed.

Did the Complainant Timely File the Complaint?

Each of the statutes under which OSHA investigates complaints of retaliation has a certain statutory timeframe in which the complaint must be filed. If the complaint is filed outside of that timeframe, it is considered untimely, and OSHA will administratively close or dismiss the complaint. The starting point for that relevant time period is the day after the alleged retaliatory decision is BOTH made and communicated to the complainant. It is essential to know under which statute the complaint has been filed because the relevant time frames differ. For instance, the OSH Act requires that complaints asserting a violation of Section 11(c) be filed within 30 days of the retaliatory decision and the employee's knowledge of the retaliatory decision. This is a relatively quick timeframe and the shortest of the Whistleblower provisions OSHA is charged with investigating. Other statutes, such as SOX and STAA, allow complainants up to 180 days for which to file their complaint with the Agency.

There are certain circumstances in which these timeframes may be extended, for instance where a complainant can show the employer concealed or misled the employee as to the existence of the adverse action, but generally the filing deadline established by the statute applies. The OSHA investigator should evaluate the timeliness of the complaint as part of its screening process, but the facts related to timing may not be readily apparent at that early stage, so the employer should evaluate this as well.

Did the Complainant Engage in Any Activity Protected by the Statute?

To support a retaliation allegation, the complainant must be able to establish that they engaged in an activity or activities that are protected by the specific statute under which they are pursuing their claim. OSHA tends to take a broad view of what constitutes protected activity under the relevant statute, but the activity does have to be something covered by that law to establish a claim of retaliation. For instance, if the complainant brings a claim under SOX but asserts that the activity that led to their termination was a formal complaint to Human Resources that they were not given a promotion for which they applied due to their age, their complaint should fail because they did not engage in activity protected under SOX.

Broad categories of protected activity include, but are not limited to, reporting potential violations to management (in a formal or informal manner), providing information to a government agency, filing a complaint with a government agency, participating in or assisting with government proceedings, and refusing to work under certain conditions. This is an essential tenant of a complainant's retaliation claim and could be the basis for the complaint to be dismissed.

How Close in Time Was the Adverse Employment Action to the Activity Alleged to Have Led to the Adverse Action?

There are several ways a complainant can establish that the adverse employment action taken against them was caused by their protected activity, but one of the more common and effective approaches is evidence of close proximity between the complainant's protected activity and an adverse employment action. A particularly short duration between protected activity and the decision to take an adverse employment action, such as a few days, can be sufficient on its own for complainant to show that the protected activity caused the adverse employment action. And it's a particularly strong showing where there is no evidence of an intervening event that could have caused the termination.

However, if it's a longer time between the protected activity and adverse employment action, this can be an

important fact for the employer to raise as it undercuts a potential connection between the two events.

For What Reason Was the Adverse Employment Action Actually Taken?

In assessing the legitimacy of the complaint and the information it presents to the OSHA investigator, an employer should understand for what reasons the particular decisionmakers chose to implement the adverse employment action against the complainant. Although an employer generally wants to be proactive in its response to the OSHA investigator, poking holes in the complainant's claim where it can, showing a non-retaliatory motive for the adverse employment action is the employer's burden. If the employer knows or determines that the adverse employment action occurred for a lawful reason, such as the employee's repeated unexcused absences or a violation of an established work rule or insubordination, it should ensure the OSHA investigator is aware of that reason or reasons and consider providing documentation to support that justification as well.

These questions, among others, should help the employer determine whether there is any legitimacy to the complaint, its strategy for responding to the complaint, including whether it may want to consider mediating before preparing a written response, and what information it wants to ensure is provided to the OSHA investigator to help substantiate its position and the complainant's inability to support the complaint. The employer's responses to these questions will also provide much of the information the employer should be prepared to provide legal counsel should legal counsel be brought in to assist in defending the employer's actions and position.

For more information on issues related to Retaliation/Whistleblower complaints, check out our [recent webinar](#).