

JULY 10, 2019 | DISCRIMINATION, HARASSMENT & RETALIATION

Guide to Responding to 11(c) Safety Retaliation Complaints and Notices of Alleged Hazards/Employee Safety Complaints

By [Lindsay A. DiSalvo](#) and [Beeta B. Lashkari](#)

When OSHA receives a complaint related to worker safety and health or a severe injury report, one action by OSHA is to give the employer an opportunity to respond before it takes the more extreme action of opening an inspection. In addition, when OSHA receives an allegation of retaliation, it must provide the employer a chance to explain why the adverse employment action of which it is accused was legitimate or did not occur as alleged. These responses are an opportunity for the employer to avoid an inspection or litigation of a retaliation claim. A strong response could assuage OSHA's concerns and resolve the complaint in a favorable manner for the employer. However, these responses can also create a written record of admissions to which OSHA can hold the employer accountable, and any supporting documentation may be closely scrutinized and used to create liability.


Thus, employers must ensure there is a procedure in place for managing and developing the responses to these situations, and be strategic about the information they share with OSHA in the response. We are pleased to share the following tips and strategies for how to effectively address such complaints.

Whistleblower Complaints



To start, although OSHA enforces whistleblower standards under 22 different statutes, the agency receives most of its retaliation claims (over 62%) under [Section 11\(c\) of the Occupational Safety and Health \(OSH\) Act](#). Section 11(c) prohibits employers from retaliating against workers who in good faith attempt to exercise a worker safety-related protected right under the law.

While the vast majority – about 71% – are either dismissed by OSHA or withdrawn by the employee, the sheer number of complaints OSHA receives, and the fact that nearly 30% of them do end in favor of the employee, should be more than motivation for employers to thoroughly address each one filed against them. This is particularly true because, under Section 11(c), employees can be entitled to substantial remedies, such as reinstatement, back pay, front pay, compensatory damages, and punitive damages if the employee can show “evil motive or callous indifference” on the part of the employer.

Understanding the elements of the employee's case, and how to defend against them, therefore, is essential. Prior to 2016, the employee had to establish a *prima facie* case of retaliation in order to maintain a claim and proceed through an OSHA investigation. Now, however, [OSHA guidance in its Whistleblower Manual](#) states that an employee need only prove its claim has merit. As such, the bar for employees is much lower, and a complaint can go forward even if there is only reasonable cause to believe a violation occurred. 

Nonetheless, the elements of a whistleblower claim under Section 11(c) are similar to the elements under other types of retaliation claims. The employee must prove that:

1. s/he engaged in protected activity;
2. the employer took some adverse action; and
3. there was a causal connection between the protected activity and adverse action.
4. Additionally, and unlike other types of retaliation claims, the employee must also prove knowledge; i.e., that the decisionmaker knew of the protected activity at the time of taking the adverse action.

If the employee can show the required elements, the employer then has the opportunity to counter them by demonstrating it had a legitimate, non-discriminatory reason for the adverse action. The reason may be insubordination or poor performance, among a host of other reasons.

It is important for employers to understand the elements an employee must establish and its own potential defenses because these are the topics an employer should address in its position statement to OSHA. Essentially, this is the employer's first and best chance to submit a persuasive written response to the allegations in the complaint, so drafting this statement is the opportune time to seek assistance from experienced legal counsel.

Here are some of our best practice tips:

- Investigate the complaint promptly and document your findings.
 - Determine if the complaint was timely
 - Collect relevant documents to support your position
 - Interview employees with any knowledge of the claim, etc.
- Draft an effective position statement.
 - The position statement should give context to the employee's allegations from the employer's perspective, and should be told in a way that is easy for the OSHA investigator to follow.
 - We recommend splitting the position statement into two parts: (i) factual background; and (ii) legal analysis.
 - We also recommend providing supporting documentation, but caution that the documentation should not disclose potentially adverse or confidential information.
- To avoid any potential for additional claims of retaliation, immediately after receiving notification of the complaint from OSHA, take steps to ensure no retaliatory actions are taken against the complaining employee; e.g., reminding managers that they should not take any action that could be perceived as retaliatory.

Health and Safety Complaints

Under [Section 8\(f\)\(1\) of the OSH Act](#), every employee is given the right to complain to OSHA and ask for an inspection when s/he believes there has been a violation of a health and safety standard. OSHA, however, simply does not have the resources to conduct an inspection for each and every complaint it receives. Accordingly, it must decide whether the complaint merits an on-site inspection, or whether the agency will send out a Notice of Alleged Hazard(s) (also known as a "Phone and Fax Complaint") to the employer.

OSHA has a list of priority complaints that typically result in an on-site inspection. These include:



- written, signed complaints by current employees that have enough detail to enable OSHA to determine that a violation or hazard likely exists that threatens physical harm;
- complaints that allege that a physical harm has occurred as a result of the hazard and that it still exists; and
- reports of imminent danger.

If OSHA does initiate an on-site inspection, we recommend you check out Conn Maciel Carey's [OSHA Inspection Toolkit](#) and contact experienced OSHA defense counsel for assistance.

Where OSHA decides *not* to conduct an inspection, it will still send out a Notice of Alleged Hazard(s) to solicit additional information from the employer related to the complaint. This notice will convey the specific safety and/or health complaint that OSHA received, and will request that the employer investigate and respond — either to rebut the truth of the allegation or to describe the corrective actions the employer has taken. An inadequate response to that Notice can trigger an on-site inspection, and can be used against the employer in that inspection and potential enforcement process.

Accordingly, it is important to provide an effective and careful response. Here are some of our best practice tips for responding to Notices of Alleged Hazard(s):

- Conduct a prompt and thorough investigation.
- Make sure to document the investigation process, scope, and findings in your response to OSHA.
- Remember, this is not a subpoena response, so selectively share your information that presents an honest response, but one that casts your safety program in the best possible light.
- Demonstrate and document the absence of the alleged hazard, if the complaint is without merit.
- If the investigation identifies opportunities for improvement or the need for corrective action, immediately implement or plan the corrective actions and improvements, and inform OSHA of the corrective actions and improvements without admitting to regulatory deficiencies.
- Do not "blame" employees.
- Ask OSHA for a closeout report, and keep it in your file, along with your response and the original Notice.

Severe Injury Reports

In 2015, OSHA's [new injury and fatality reporting rule](#) became effective, significantly revising the triggering events for reporting workplace accidents to OSHA under the Agency's [Injury and Illness Recordkeeping regulations at 29 C.F.R. 1910.104](#), *et seq.* The new Severe Injury Reporting Rule lower the threshold for proactively reporting a catastrophic incident from the hospitalization of three or more employees to the [hospitalization of a single employee](#), and added [amputations](#) (including partial amputations) and losses of an

eye to the types of injuries that employers must proactively report. By lowering the threshold from three employees hospitalized to a single employee has dramatically increased the number of incidents that are not reported to OSHA, from at most 50 a year to tens of thousands today.

Because OSHA has been flooded by reports of worker injuries, it became impossible for the agency to respond to each, or even a meaningful percentage of reports, with an on-site enforcement inspections. Accordingly, OSHA issued "[Enforcement Procedures for \[OSHA's\] New Reporting Requirements](#)," which advises its field offices when to conduct on-site inspections, or conversely, when to not inspect, and instead to utilize its new "[Rapid Response Investigation" \(RRI\) protocol](#)."

According to its Enforcement Procedures, OSHA categorizes injury reports into one of three buckets to help make its decision. Category 1 reports are supposed to always result in an onsite inspection. These include:

1. incidents resulting in a fatality;
2. hospitalizations of 2+ employees;
3. injuries to youth employees;
4. incidents involving an employer with a known history of injuries, past Repeat or Willful violations, or an SVEP employer; and
5. incidents related to an active [National or Local enforcement emphasis program](#)

Category 2 reports may result in an on-site inspection or RRI, based on the discretion of the OSHA Area Director after s/he evaluates a variety of factors, including whether:

1. employee was exposed to a very serious hazard;
2. hazardous conditions have already been corrected;
3. the incident resulted from a systemic failure;
4. temporary workers were involved;
5. another governmental agency made a referral; or
6. the incident involved chemical exposures, heat stress, or other health (vs. safety) issues.

Category 3 — everything else — always result in RRI's.



The RRI letter is an investigative tool that OSHA uses to help OSHA understand the root cause of the incident and what the employer has done to correct it. Under the RRI program, the employer will receive an RRI request letter, which directs the employer to conduct an accident investigation, document the findings and corrective actions, post a copy of this letter where employees can review it, and submit the findings and corrective actions to OSHA.

Importantly, if you do not respond, then OSHA will open an on-site inspection. Likewise, if OSHA finds your response inadequate, it will also open an on-site inspection. Accordingly, it is critical to respond to these requests and to do so carefully; i.e., provide enough and the right information to dissuade OSHA from opening an inspection, but not to make admissions that can be used against you in an inspection or enforcement proceeding.

Here are some of our suggestions for how best to respond to an RRI request:

- Conduct a thorough investigation. Review applicable documents, talk to injured workers and witnesses, etc.

- Be strategic about what and how information is provided in your response. Be careful not to document an admission.
- For an RRI letter, use OSHA's "non-mandatory" investigation form, which makes it easier for OSHA to "check the box" that all information it needs to close the file has been provided.
- Do not list "employee misconduct" as the first or sole cause of an injury, if at all possible, but include it, if applicable, to preserve that defense.
- Include at least one corrective action in your response. Whether this is a correction or improvement, it shows the agency that you are taking the issue seriously.

For much more information about all of this, check out Conn Maciel Carey's April 2019 webinar: "[Guide to Responding to 11\(c\) Safety Retaliation Complaints and Notices of Alleged Hazards / Employee Safety Complaints](#)." Participants in [that webinar](#) learned about the following:



- The types of complaints and incidents that lead OSHA to request information from the employer;
- Specific prohibitions of Section 11(c) (OSHA's anti-retaliation law) and how retaliation complaints are evaluated;
- Strategies employers can use to effectively respond to Section 11(c) complaints, Notices of Alleged Hazards, and RRI requests; and
- Proactive measures employers can take to avoid employee complaints.

Here are links to [a copy of the slides](#) and [a recording of the webinar](#). Let us know if you have questions about responding to OSHA whistleblower actions or employee safety complaints, or any any other OSH law issues. We would love to be a resource for you.

The April webinar was the 4th webinar event in Conn Maciel Carey's [2019 OSHA Webinar Series](#). Click [here](#) to view our full schedule, detailed program descriptions, and individual registration pages for the remaining webinars in the [2019 OSHA Webinar Series](#). To register for all of the remaining programs in the 2019 series, [click here to send an email request](#), and we will get you automatically registered.



If you missed any of our past webinars in our annual OSHA Webinar Series, here is a link [Conn Maciel Carey's webinar archive](#).