

OSHA Whistleblower Claims Are Up: Are Employers Prepared?

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The Occupational Safety and Health Administration (OSHA) is the government agency responsible for enforcing the whistleblower retaliation provisions of numerous laws protecting workers in a wide-range of industries. The Sarbanes–Oxley Act of 2002 and the Dodd–Frank Wall Street Reform and Consumer Protection Act, which contain whistleblower protections and focus on combating corporate and accounting fraud, are likely the most well known of these laws. But there are many other laws that contain anti-retaliation causes of action for whistleblowers, such as the Surface Transportation Assistance Act of 1982 (creating safety standards for commercial vehicles), the Seaman’s Protection Act (improving safety on seagoing vessels), the Clean Air Act (reducing air pollution), and the Consumer Product Safety Improvement Act of 2008 (protecting consumers from defective products) that are less well-known.

Data provided by OSHA, a federal agency under the purview of the U.S. Department of Labor, shows that the number of whistleblower complaints filed has increased by 29 percent over the last five years, from 7,408 complaints in 2014 to 9,566 complaints in 2018. In 2018, OSHA opened full investigations into 3,007 of those complaints. While the number of complaints has gone up, the number of OSHA investigators has declined. OSHA had 76 investigators at the end of 2018, down from 100 in 2014.

OSHA’s increased workload, combined with the loss of investigators, has led to it being unable to timely complete its investigation process. Pursuant to its governing regulations, OSHA has 90 days to complete its whistleblower investigations. But last year, it took OSHA on average 272 days to make a determination on a complaint. The backlog has gotten so bad that in some cases OSHA may be aware of a complaint for months before an employer is contacted. The delays have led to employees pursuing their claims in federal court, after the expiration of the 90-day period, rather than at the administrative level, devaluing the administrative exhaustion requirements of many of the statutes containing whistleblower provisions. The delayed process has also created problems for employers, who have had problems locating witnesses, months after the fact, to disprove a complainant’s “stale” allegations.

Employers will want to prepare themselves for these types of claims and the agency delays associated with increased whistleblower activity nationwide. Establishing policies and procedures regarding how to log, track, and handle internal complaints that could lead to federal whistleblower

claims are one way Employers can help mitigate some of the issues that result from delays at the agency level. With the right strategy, it is possible to successfully defend against OSHA whistleblower claims even in this era of increased complaints.

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