

Worker Covid-19 Health, Safety Complaints Require Careful Attention

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The Department of Labor, EEOC, and National Labor Relations Board recently announced a joint initiative to increase employee protections from retaliation related to workplace Covid-19 complaints. Reed Smith's Paulo McKeeby and Amanda Brown suggest steps that employers should take to minimize the risk of employee retaliation claims being filed against them.

Recent headlines have highlighted the Biden administration's interest in pursuing retaliation claims in the employment context, particularly as related to Covid-19. In light of this, and whistleblower protections under Section 11(c) of the Occupational Safety and Health Act, employers should provide timely and thoughtful responses to employee complaints related to the OSHA Emergency Temporary Standard, other health and safety concerns, or Equal Employment Opportunity laws.

If not, employers may find themselves the subject of an investigation or litigation.

On Nov. 10 the Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board [announced a joint initiative](#) to increase protections for whistleblowers. As part of the announcement, Solicitor of Labor Seema Nanda remarked: “[i]n the U.S. Department of Labor’s fight against...unsafe or unhealthy workplaces, and other unlawful employment practices, we will use all tools available to protect workers from retaliation.”

The agencies are already making good on these promises to increase whistleblower protections. On Nov. 17, [the EEOC updated](#) its Covid-19 [technical assistance](#) to address retaliation in pandemic-related employment situations.

The update indicates the kinds of employee activities that would be protected from retaliation, including: an Asian American employee reporting a coworker’s comments about Asian people

spreading Covid-19; an employee who requests to telework as a disability accommodation after the workplace reopens; and an employee who requests modified protective gear that can be worn with religious garb as a religious accommodation.

Also on Nov. 17, the DOL filed a lawsuit in the Eastern District of Texas alleging a private employer violated Section 11(c) of the OSH Act by terminating an employee after the employee complained to both his employer and the local chamber of commerce regarding the company's Covid-19 safety practices. The DOL is seeking injunctive relief, posting of a notice, reinstatement, lost wages, pain and suffering damages, and exemplary damages.

Health and Safety Practices Are Top Employee Concerns

While employees previously could file complaints with OSHA that an employer's Covid-19 procedures violated the Act's General Duty Clause, the highly publicized nature of the ETS means Covid-19 health and safety practices are top of mind for employees.

Under the ETS, most employers with 100 or more U.S. employees must implement a policy that either (i) mandates Covid-19 vaccination for all employees, or (ii) encourages vaccination for all employees and requires testing of unvaccinated employees.

The ETS also requires employers to (a) maintain records of proof of vaccination and test results; (b) offer paid time off for vaccination and for recovery from the side effects of vaccination; (c) exclude employees who test positive for Covid-19; (d) require unvaccinated employees to wear face coverings; (e) provide information to employees regarding the ETS, including whistleblower protections, and vaccination; and (f) report Covid-19 fatalities and hospitalizations. While the ETS is currently stayed as a result of a Fifth Circuit ruling, employers should still take action to comply with the ETS given the uncertainty around its legal challenges.

Protected conduct under the ETS could include an employee reporting a co-worker's falsification of proof of vaccination or test results, or an employee complaining that they did not receive adequate leave for vaccination or recovery from vaccine-related side effects.

Importantly, an employee does not have to prove an actual violation of the ETS for their conduct to be protected. The employee only has to make a good faith, reasonable complaint.

How to Minimize Risk of a Retaliation Claim

To minimize the risk of a retaliation claim associated with the ETS, Covid-19 health and safety concerns, or other pandemic-related protected conduct, employers should consider the following actions:

- Ensure managers and human resources personnel are aware of the ETS requirements and are trained to be mindful of any employee complaints that raise concerns regarding health and safety practices or the requirements under the ETS. It is essential that managers and human resources personnel recognize conduct that may be protected under the Act or EEO laws.

- Employers also should ensure they are providing a thoughtful review and response to any employee accommodation requests related to vaccination or testing. If an employee raises concerns regarding health and safety practices, compliance with the ETS, or other pandemic-related issues, employers should respond quickly by investigating the matter and advising the employee that it is addressing his or her concerns. Depending on the nature of the claims, the employer should weigh whether the investigation should be conducted by human resources, legal, or a third-party. The employer should notify the employee when the investigation has been completed.
- Employees who have made complaints are not insulated from discipline for legitimate reasons, but employers should consult with legal counsel before taking any adverse action against an employee who has raised complaints related to ETS compliance or workplace safety. Employers should be mindful that adverse action is a broad concept and encompasses anything that may deter a reasonable employee from making similar complaints and may include warnings, negative evaluations, or job transfers.

While employers are busy preparing to comply with the OSHA ETS and navigating the challenges associated with the evolving workplace, remaining mindful of the above practices will help mitigate employers' exposure to whistleblower claims.

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