

## How To Cope With Increased Whistleblower Complaints

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The COVID-19 pandemic has generated many challenges for employers who have been struggling since early 2020 to continue operating, paying their employees, and addressing health and liability concerns in the face of government restrictions, reduced business and safety risks.

One such challenge has been a rise in whistleblower complaints and government investigations since March 2020.

For example, the U.S. Small Business Administration has reported that its Office of Inspector General has been receiving thousands of whistleblower complaints per week during the pandemic and the U.S. Department of Labor's Office of Inspector General has reported that the pandemic has resulted in a 30% increase in whistleblower complaints.[1]

A number of factors may explain this trend, including reduced sales and customer demands, employee shortcuts to improve performance, false or misleading applications for pandemic relief, layoffs and other financial impacts to otherwise loyal employees, and workplace conditions that may make employees feel unsafe.

Employers facing actual and potential whistleblower complaints often struggle with fundamental questions about the process for avoiding, investigating and mitigating whistleblower concerns. We address some of these key questions and best practices for handling whistleblower investigations below.

### **Why is a whistleblower complaining about us?**

Often, employers are surprised that any of their employees might complain about their workplace or are surprised to learn that the whistleblower is someone they would not have otherwise suspected.

While anyone can be a whistleblower, from all walks of life and employment circumstances, research has shown that certain work environments may be more likely to generate complaints and certain types of people are more likely to be whistleblowers.



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First, we'll assess employer circumstances that may attract whistleblower complaints. Employees are more likely to report concerns to the government if the company lacks a robust speak-up compliance culture that encourages employees to share concerns.

As the U.S. Department of Justice's "Evaluation of Corporate Compliance Programs" guidance makes clear, well-designed compliance programs include the "existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct."<sup>[2]</sup>

Likewise, a company is susceptible to whistleblower complaints if it fails to support individuals who raise concerns internally or makes those individuals feel like outcasts.

Finally, a company that is perceived as prone to retaliate against an individual for reporting concerns is more likely to face government investigations of those concerns.

Second, although employees of all types become whistleblowers, studies have shown that whistleblowers often have certain personality traits, including a long tenure with the company, high education, a strong sense of fairness versus company loyalty and a proactive nature.<sup>[3][4]</sup>

Thus, employers seeking to avoid whistleblower complaints would do well to implement robust compliance policies and practices that consistently communicate and reinforce the company's values, including internal criticism of the company's management and processes.

Additionally, companies should make sure that employees who do have concerns are not alienated, cast in a negative light, or subject to any form of retaliation for raising their concerns.

### **Can we identify the anonymous whistleblower?**

When individuals raise concerns about a company — either internally or to an investigative agency — they might choose to make themselves known or may remain anonymous.

Government counsel without exception will protect the identity and anonymity of a whistleblower while continuing to investigate the company. An anonymous whistleblower complaint can raise some difficult scenarios for employers trying to investigate and respond to the concerns.

In particular, the first instinct of some employers is to try to find out the identity of the anonymous complainant.

Companies should avoid that path, however, for a few reasons. First, it is a distraction that will cause the company to undertake a fruitless guessing game, rather than focusing on more important issues like conducting a prompt and complete investigation.

Regardless of whether the whistleblower is identified, the employer still has to face the allegations and is not permitted to take action against the whistleblower — so the effort to identify the whistleblower has little value.

Conducting an appropriate investigation in order to take prompt, corrective action should be a company's priority.

## **How do we investigate an anonymous complaint? And when do we know when the investigation of an anonymous complaint has reached its end?**

An employer might wonder how to properly conduct — and close out — an investigation without knowing the identity of the whistleblower.

There may be concerns that the anonymous whistleblower might gain access to confidential or attorney-client privileged information about the company's investigation as a result of their anonymity.

In order to limit any risk of exposing such information, and also to preserve the attorney-client privilege, the company should keep the details of the investigation limited only to a very small control group on a need-to-know basis, with clear instructions about attorney-client privilege and the sharing of information.

Knowing when to stop an investigation of an anonymous complaint is much more of an art than a science. An investigation should only stop after the company has taken certain appropriate steps.

First, the company should obtain any additional information possible from the anonymous reporter (without trying to identify them) through an online ethics tool, or other collection methods such as phone calls that allow the reporter to share details without identifying himself or herself, and following up on clues that the company learns.

Second, the company should obtain information about the environment surrounding the complaint.

For instance, while counsel might not know who the reporter is, they can investigate the departments that are alleged to have been involved or would have oversight of the alleged misconduct, conduct interviews of supervisors and key employees, or direct audits of the appropriate functions.

Once those steps are complete, the company will need to assess whether it has learned enough to take appropriate corrective actions to resolve the concerns, even if it was not able to confirm every particular fact in the complaint.

It must also determine whether a reasonable fact-finder would agree that the steps the company took to resolve the concern were reasonable under the circumstances.

At that point, if the company is able to take appropriate actions and/or decide that the allegations do not constitute a violation of law or policy, the company may complete the investigation after preparing appropriate documentation of the investigation and its findings.

With the public release of COVID-19 vaccines, it looks like there may be some relief in sight for employers in 2021.

However, we anticipate that the increased rate of whistleblower complaints will continue for some time to come, and employers should continue to assess their policies, practices and investigation plans in order to avoid such complaints or to appropriately resolve any employee whistleblower concerns that might arise.

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[1] <https://www.oig.dol.gov/public/reports/oa/2020/19-20-010-10-105.pdf>

[2] <https://www.justice.gov/criminal-fraud/page/file/937501/download>

[3] [https://moralitylab.bc.edu/wp-content/uploads/2011/10/DunganWaytzYoung\\_2015.pdf](https://moralitylab.bc.edu/wp-content/uploads/2011/10/DunganWaytzYoung_2015.pdf)

[4] <https://www.forbes.com/sites/traversmark/2019/09/26/inside-the-mind-of-a-whistleblower/>