

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
ATTORNEYS AT LAW

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### April Updates

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### The OSHA & COVID-19 Connection

When you think of OSHA (officially, the Occupational Safety and Health Administration that is part of the Department of Labor), you likely think of large manufacturing plants and supervisors walking the floor wearing safety vests and hard hats. While OSHA has by and large targeted manufacturing employers and construction companies for enforcement of its regulations, that is by no means the extent of its power or focus, nor will it be under the Biden administration.

In 2021, every private employer, large and small, NEEDS to be aware of OSHA more than ever. Why? Two nasty words – **damages and fines**. (For example, in January 2021, OSHA announced that it had issued citations to hundreds of employers for COVID-19 violations with initial penalties totaling \$4,034,288.) With added resources and new directives, OSHA investigators are out in droves seeking workplace safety violations related to COVID-19 and other standards. And this trend shall continue.

We don't need to look any further than those who President Biden has selected to lead the Department of Labor. By selecting former Boston Mayor Marty Walsh as Secretary of the Department of Labor, California Labor Secretary Julie Su as Deputy Secretary, and James Frederick as acting head of OSHA, President Biden has put a team in place that will seek every opportunity to support and defend organized labor. It should be no surprise that worker safety will be one of their top priorities.

### Your Obligations Under OSHA Relative to COVID-19

Under OSHA's "General Duty Clause", employers are required to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." With regard to COVID-19, which is considered a direct threat to health and safety, this means adherence to the guidelines issued by the Centers for Disease Control and Prevention (CDC). OSHA seems to treat the CDC's helpful guidance as a mandate, so employers must as well. Typically, an OSHA inspector will find that an employer is in violation of the General Duty Clause if it fails to adhere to a CDC recommended course of action for its industry— even though presented as "guidance." The lesson here is that each industry is served to read, assess and implement the CDC's guidance specific to its workplace. Thereafter implementation must include a written COVID-19 safety policy tailored to the workplace and the applicable industry-specific CDC guidance. Such industry-specific policies are necessary for threats beyond COVID-19 as well.

### Retaliation and Whistleblowing Claims: a BIG Concern

If an employee complains to their employer that they do not feel safe at work due to a perceived OSHA violation and the employer fires that employee, that is retaliation, and it is illegal. If an employee were to go to the Department of Labor and complain about perceived OSHA violations in their workplace, that is "whistleblowing," and the

employer cannot terminate the employee for that complaint either. (These laws apply to nearly all private sector employers engaged in interstate commerce.)

Any employee, or even an applicant, can file a health and safety complaint with OSHA and request an inspection of their workplace if they believe there is a serious hazard and that their employer is not following OSHA standards. OSHA makes it very easy for an employee to file— they can call, fax, email, or send by mail. An employee can even choose to file a complaint on a confidential basis.

Section 11(c) is the Whistleblowing provision of the Occupational Safety Health Act, and it provides that “no person shall discharge or in any manner discriminate against any employee” because the employee has exercised rights under the Act.

In order to establish a claim, an employee must show that they:

- Filed any complaint under or related to the OSH Act (it is enough to raise concerns directly with an employer if they are directly tied to health and safety);
- Instituted or caused to be instituted any proceeding under or related to the OSH Act;
- Testified or is about to testify in any proceeding under the OSH Act; or
- Exercised on their own behalf or on behalf of others any right afforded by the OSH Act.

Once the employee files the Whistleblowing complaint, OSHA will assign an investigator who will conduct an investigation within 90 days, although based on the number of cases right now, OSHA is taking months longer. These investigations can be a major distraction to your business. The investigator will interview the employee and any witnesses, likely your other employees. The investigator will interview you, ask for documentary evidence, policies and procedures, and possibly schedule a workplace walk-through inspection.

The investigator will then determine whether there is “reasonable cause” (a low standard) to believe that the Whistleblowing law was violated. ***It is important to note that even if the employee’s initial “concern” with workplace safety had no validity, an employer can still be found liable for violating the Whistleblowing provision.***

If OSHA finds reasonable cause, the Secretary of Labor may file a complaint in Federal Court on behalf of the employee. If OSHA does not find reasonable cause, the employee may bring a new review of the matter in Federal Court within 90 days of receipt of OSHA’s findings or within 210 days if there has been no final decision issued. The process can be long and costly even for the victor.

Is your workplace positioned to minimize such complaints? Do you have appropriate safety policies in place? Do you need assistance defending a retaliation claim or a whistleblower case? **Foley & Foley can help!**

### Julayne Lazar

Julayne has focused her 20-year career exclusively on employment and labor law, holding positions at private and public employers where she focused on counseling, litigating, and training. Julayne has also worked at several employment administrative agencies that she continues to represent before on behalf of her clients.



### We can help...

Whistleblowing charges continue to surge at OSHA with about 40% of the cases filed at OSHA in 2020 being related to COVID-19.

As an employer, you need to be proactive now. . . We offer a number of services tailored to your company and industry for COVID-19 and OSHA (including policies, trainings, investigations, and OSHA safety plans).

### Contact Us



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