

Illinois Guidance Underscores Whistleblower Protections as Employees Head Back to the Workplace During COVID-19

As employers open or expand access to workplaces, safety considerations remain paramount during the continuing COVID-19 pandemic. And with the influx of employees returning to worksites, employers should prepare not only for the physical safety of their workers, but also have a plan to intake and address employee safety concerns related to COVID-19. Employers have long been prohibited from retaliating against whistleblowers, and that remains true for employees raising concerns related to COVID-19—both internally to their employers and externally to outside government agencies. Highlighting these protections, the Illinois Department of Public Health (IDPH) included an overview of whistleblower and anti-retaliation provisions raised by the COVID-19 pandemic when it published its "[Guidance for Employers and Employees on Workers' Rights and Safety During Phase 4 of the Restore Illinois Plan](#)" (the Guidance) on August 3, 2020.

The Guidance addresses workers' rights and safety as they return to work during the pandemic. As highlighted by the Guidance, specific federal, state, and local protections against whistleblower retaliation include:

- **State and Federal Occupational Safety and Health Acts:** Since 1970, the federal Occupational Safety and Health Act (OSHA) has protected private sector employees who raise safety and health concerns with their employer or a government agency. Similarly, the Illinois OSHA protects state and local government employees who raise safety and health concerns to their employer or a government agency. Both acts provide penalties for noncompliance, including under some circumstances, a private right of action by employees.
- **The Illinois Whistleblower Protection Act:** The Illinois Whistleblower Act has long prohibited retaliation against an employee for disclosing information they believe violates a state or federal law, rule, or regulation. To the extent employees raise a COVID-19-related complaint regarding violations of state or federal law or regulation, they will be protected by this act. Like OSHA, the Illinois Whistleblower Act provided penalties for non-compliance and a private right of action.
- **Chicago's COVID-19 Anti-Retaliation Ordinance:** Expanding existing whistleblower protections, on May 20, 2020, the city of Chicago passed an ordinance protecting certain employees who remain at home to comply with public health orders or for other COVID-19-related reasons. Specifically, the ordinance prohibits employers from terminating or demoting employees who cannot work due to certain COVID-19-related reasons, even if the employee has exhausted legally protected or employer-provided leave. The ordinance, pulling from the Chicago Minimum Wage Ordinance, defines "Covered Employee" as non-government employees who perform at least two hours of work (including compensable travel time) for an employer within a two-week period while physically present within the city of Chicago. In addition to penalties and fines, the ordinance provides a private right of action for employees.

While most of the above whistleblower laws are Illinois-specific, similar protections exist in other states and local municipalities throughout the nation. Thus, wherever they are located, employers should have a structure in place to (1) receive COVID-19-related complaints from employees, (2) investigate those complaints, (3) ensure any substantiated concerns or violations are effectively mitigated, and (4) prohibit and address retaliation for those complaints.

In some work settings, physical safety plans were already a routine part of pre-COVID-19 life; but other workplaces have had less exposure to day-to-day safety planning. Rather than starting from scratch, companies should consider whether existing compliance infrastructure can be utilized to foster internal communications about employee concerns during the pandemic. These may include:

- **Whistleblower Hotlines:** Many employers have implemented whistleblower hotlines as part of their in-house compliance program. To the extent that such reporting mechanisms already exist within a company, employers should consider reinforcing to their workers that existing compliance channels can be utilized to report COVID-19-related concerns.
- **Compliance Committees and Liaisons:** Though not a requirement under the recent IDPH Guidance, employers are encouraged to develop a workplace safety plan to identify and address risks. As noted by the Guidance, "[w]orkers are an integral part of an effective workplace safety plan as they are often in the best position to identify hazards in a particular area or job." Thus, to encourage worker input and feedback on safety and health matters, the Guidance instructs employers to consider designating one or more employees to be points of contact for health or safety concerns or, in larger workplaces, creating a workplace safety and health committee made up of worker representatives from a variety of roles within the business.
- **Employee Training:** In some cases, it may be appropriate to provide workplace safety training to on-site employees, including independent contractors and temporary employees. For instance, the IDPH Guidance suggests that such employees receive workplace safety training that includes training on COVID-19 symptoms and how to self-assess for symptoms. And just like other compliance training employees receive, the Guidance recommends that safety training and the corresponding written materials should be available in languages spoken by employees and accessible to employees with a range of education levels.

To be sure, there will be no "one size fits all" solution to COVID-19 safety and best practices in a range of workplace settings that exist throughout the nation, with attendant state and federal regulations applicable to each of them. However, as illustrated by the recent IDPH Guidance, several of the traditional pillars of robust compliance programs may be transferable to COVID-19 employee concerns. Just like many other compliance concerns, it will benefit employers to ensure their workforce knows that COVID-19 whistleblower complaints can be submitted through internal reporting channels and that reporters will not be subject to retaliation. Although this is uncharted territory for many employers, these are not untraveled waters. Compliance programs are often most successful when employees feel comfortable raising concerns internally to management that is well-positioned to address them; the pandemic only underscores this critical employer-employee dynamic.

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