

# **COVID-19 Whistleblower Protections: Few Options for Workers Reporting Unsafe Working Conditions**

July 24, 2020

The United States has been rocked by the COVID-19 pandemic in innumerable ways and it has had profound and ongoing impacts on workers. One of the most vexing problems arising from COVID-19 has been [protecting workers](#) who object to employers that are failing to implement meaningful safety precautions to protect their workers during the pandemic. As just one of many examples, [an Amazon employee was fired](#) after he opposed the company's failure to meaningfully protect warehouse employees who had potentially been exposed to the coronavirus. This article will examine our failures in addressing this problem through meaningful federal action and highlight instances where local legislators have passed laws to protect workers who find themselves facing this predicament.

## **The Deficiencies of Federal Law to Protect Workers During the Coronavirus Crisis**

The primary federal law requiring a safe working environment is the Occupational Safety and Health Act ("OSH Act"). Section 11(c) of the OSH Act prohibits employers from discharging or discriminating against an employee because the employee exercised any rights under the Act, including the right to raise health or safety complaints. 29 U.S.C. § 660(c). The OSH Act theoretically protects an employee who refuses to work based on unsafe working conditions, although the requirements for a protected work refusal are [stringent](#).

Unfortunately, the OSH Act does not effectively protect workers in general, much less in the face of a burgeoning pandemic. The Act does not have a private right of action, so employees who suffer retaliation for reporting unsafe working conditions cannot sue in court. Instead, Section 11(c) allows employees to file a complaint with the Occupational Safety and Health Administration ("OSHA") and request that OSHA protect them. Thus, government officials ultimately decide what to do with the OSH Act complaint; if they fail to protect an employee, that employee has no other recourse under the statute. In addition, the OSH Act has a 30-day statute of limitations—the shortest of any federal anti-retaliation statute. Finally, the strict requirements governing what constitutes a protected refusal to work will leave

many employees in the cold. OSHA officials have acknowledged the weakness of the OSH Act protections. In 2010, then-Deputy Assistant Secretary for Occupational Safety and Health, Jordan Barab, [testified before Congress](#) that Section 11(c)'s lack of a private right of action and statutory right of appeal were "[n]otable weaknesses" in the law. Mr. Barab also lamented the OSH Act's "inadequate time for employees to file complaints."

Several states have their own version of the OSH Act, protecting employees who raise concerns about workplace health and safety. Like the federal OSH Act, however, many of these state laws do not contain private rights of action. See, e.g., D.C. Code § 32-1117 (no private right of action); Md. Code, Labor & Empl. § 5-604 (same); *but see* Va. Code § 40.1-51.2:2 (providing private right of action and a 60-day limitations period for filing a complaint).

### **Proposed Legislation to Protect Whistleblowers**

Given the clear deficiencies in the ability of the OSH Act to protect whistleblowers concerned about workplace safety, whistleblower advocacy organizations like the Project on Government Oversight ("POGO") have [pushed for Congress](#) to pass whistleblower protection legislation in response to the pandemic. POGO called for legislation that would protect whistleblowers who reported waste, fraud, and abuse related to the trillions of dollars distributed in connection with the country's pandemic response. POGO also called for Congress to pass legislation that would "prohibit retaliation against essential workers making disclosures related to worker or public health and safety during the pandemic."

On June 15, 2020, in response to calls from groups like POGO, Senator Kamala Harris and Representatives Jackie Speier and Jamie Raskin introduced the [COVID-19 Whistleblower Protection Act](#) as part of the Coronavirus Oversight and Recovery Ethics Act ("CORE Act"). The CORE Act puts in place meaningful protections against retaliation for individuals who report waste, fraud, and abuse related to government funds that were distributed to combat the COVID-19 pandemic. Like other recent whistleblower protection legislation, it is primarily enforced through the Department of Labor but permits whistleblowers to "kick out" their claims into federal court. Further, language in the bill nullifies the effectiveness of pre-dispute mandatory arbitration provisions with respect to claims asserted under the law. In many ways, it is a model piece of whistleblower protection legislation.

One significant omission from the CORE Act, however, is language amending the OSH Act or otherwise granting meaningful protections to whistleblowers who report workplace health and safety concerns related to COVID-19. Thus, nothing in the bill purports to protect an individual who refuses to come to work, or opposes her

employer's practices, because her employer has failed to take sufficient steps to mitigate COVID-19-related risk to employee health. In most of the country, employees in that situation are left with the OSH Act as their primary recourse for retaliation.

### **Protecting Whistleblowers at the Local Level**

Given the lack of federal action to address this problem, some municipalities have passed legislation specifically designed to protect employees who report COVID-19-related workplace safety concerns. For example, Mayor Kenney of Philadelphia recently signed into law [Bill No. 200328](#), which requires employers to “comply with all aspects of public health orders addressing safe workplace practices to mitigate risks” related to COVID-19. The bill further states that “[n]o employer shall take any adverse employment or other action against an employee” who refuses to work in conditions that do not comply with public safety guidelines, and that “no employer shall take any adverse employment or other action against any employee for making a protected disclosure.” A “protected disclosure” is defined as a “good faith communication” disclosing information “that may evidence a violation of a public health order that may significantly threaten the health or safety of employees or the public, if the disclosure or intention to disclose was made for the purpose of remedying such violation.” The legislation includes a private right of action and permits awards to successful litigants including reinstatement, back pay, compensatory damages, and liquidated damages “of \$100 to \$1000 on behalf of the City for each day in which a violation occurs.”

In late May, the City of Chicago [enacted a bill](#) that contained slightly narrower but still powerful protections. In the bill, the City of Chicago prohibited employers from retaliating against employees for complying with public health orders relating to COVID-19 issued by the City or the State or for following COVID-19-related quarantine instructions from a treating health care provider. The protections extend to employees who are caring for an individual subject to such a quarantine. The bill includes a remarkable damages provision entitling successful claimants to liquidated damages “equal to three times the full amount of wages that would have been owed had the retaliatory action not taken place.”

These actions by municipalities are meaningful and offer critical protections to citizens living in those cities. At the same time, the need for this local legislation highlights the glaring absence of meaningful protections for workers in the rest of the country. It seems that every week we hear more horror stories about conditions in which workers are forced to work during this pandemic, lest they risk losing their jobs in the midst of a devastating economic downturn. The weaknesses in the OSH Act and the absence of even proposed federal legislation that would fill

this critical gap in protection is a moral failure.