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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Navigating Dems' Whistleblower-Friendly Stance

By **Gregory Keating and Daniel Green** (April 1, 2021, 6:16 PM EDT)

Employers should expect, and prepare for, heightened compliance and litigation challenges associated with employees who report alleged violations of law.

New laws and aggressive enforcement of existing statutes from the Biden administration and Democratic congressional majorities should be expected.

Expanding Legislative Protections for Whistleblowers

At the tail end of 2020, Congress passed three laws imposing new whistleblower protections, the Criminal Antitrust Anti-Retaliation Act, Protecting our Infrastructure of Pipelines and Enhanced Safety Act and the Anti-Money Laundering Act.

The CAARA extends federal whistleblower protections to employees who report criminal violations of federal antitrust laws to either the government or a supervisor. The CAARA's new protections come in the context of the U.S. Department of Justice Antitrust Division's continuing focus^[1] on criminally prosecuting no-poach and wage-fixing agreements among employers.

Section 116 of the PIPES Act expands existing whistleblower protections for employees of pipeline operators, including by prohibiting predispute arbitration agreements from covering whistleblower claims.

The AMLA^[2] represents an aggressive new approach to recruiting whistleblowers. Recent whistleblower statutes, like the Dodd-Frank Wall Street Reform and Consumer Protection Act,^[3] provided financial incentives for whistleblowers to come forward by offering a percentage of funds recovered in enforcement actions as a bounty, but largely foreclosed compliance professionals and other employees whose job responsibilities include detecting and reporting misconduct from collecting these bounties.

The AMLA omits this restriction on bounty eligibility, opening bounty eligibility to a new group of employees likely to have information relevant to investigators.

Pending federal legislation may further extend whistleblower protections.

The most prominent item of legislation expanding whistleblower protections, the COVID-19 Whistleblower Protection Act, would protect whistleblowers who report misuse of funds appropriated under a host of federal statutes combating the COVID-19 pandemic, including the Paycheck Protection Program and the Coronavirus Aid, Relief and Economic Security Act.

The most recent version of the statute would protect whistleblowers' identities from their employers, and prohibit predispute arbitration agreements covering whistleblower retaliation claims.

Another item of pending legislation, the Rights for the Transportation Security Administration Workforce Act, would, among other things, close a loophole exempting TSA employees from whistleblower protections available to most other federal employees.



Gregory Keating



Daniel Green

The states have also expanded whistleblower protections. New York recently expanded New York Labor Law Section 741 — the statute affording whistleblower protections to health care employees — to protect complaints related to inadequate workplace safety.

Prior to the amendment, the law only protected reports related to improper quality of patient care.

California expanded the remedies available to prevailing plaintiffs in whistleblower retaliation claims brought under California Labor Code Section 1102.5 to include an award of attorney fees.

Finally, Virginia passed expansive legislation prohibiting private sector employers from discriminating or retaliating against employees who report violations of state or federal law or otherwise cooperate in government investigations.

Increased Regulatory Enforcement of Whistleblower Protections

Expect heightened enforcement of whistleblower protections from the Biden administration. The U.S. Securities and Exchange Commission actively used its whistleblower program in 2020, issuing a record 197 individual awards, including a single award of \$114 million.

In September 2020, the SEC issued a final rule^[4] for the whistleblower program, streamlining the process for claiming whistleblower bounties while asserting SEC authority to limit the total dollar value of larger awards.^[5]

Halfway through this fiscal year, the SEC surpassed^[6] the highest dollar amounts of whistleblower awards granted in any previous fiscal year, thanks in part to portions of the final rule increasing the situations in which the SEC can award bounties.^[7]

The SEC recently announced^[7] the creation of a new climate and environmental, social and corporate governance task force that "will evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues" as an essential component of its enforcement strategy.

A recent whistleblower bounty award^[8] granting bounties to employees who provided material information to the government while denying bounties to employees who reported misconduct to the news media may further encourage employees to report misconduct to the SEC. The SEC's substantial whistleblower awards will likely have a snowball effect, drawing attention to the Whistleblower Program and encouraging additional whistleblowers to come forward.

The Occupational Safety and Health Administration — which enforces the whistleblower protection provisions of 25 different federal laws, including the Occupational Safety and Health Act — will likely exhibit the sharpest change between the Trump and Biden administrations.

The August 2020 inspector general's report for OSHA found significant understaffing across the board, especially among investigators despite a 30% year over year increase in whistleblower retaliation complaints.

Expect the Biden administration to fill empty investigator positions and possibly increase the total complement of OSHA investigators.

OSHA's new program^[9] to protect high-risk workers from COVID-19 illustrates a focus on enforcing whistleblower protections. The program, implemented in response to a January executive order^[10] instructing OSHA to develop "science-based guidance" to protect essential workers most at risk of contracting COVID-19 in the workplace, will not only focus on workplace safety, but on protecting employees who raise safety concerns.

According to an OSHA news release, the program will prioritize enforcement actions against "employers that retaliate against workers for complaints about unsafe or unhealthy conditions, or for exercising other rights protected by federal law." OSHA hopes to accomplish this goal through follow-up inspections of employers previously subject to OSHA inspections and monitoring the effectiveness of previous enforcement efforts.

A significant portion of the increase in whistleblower complaints to OSHA concerned COVID-19 related safety concerns. Unlike many statutes that authorize private causes of action for whistleblower retaliation, Section 11(c) of the OSH Act requires the U.S. Department of Labor to file suit on behalf of whistleblowers.

Expect Secretary of Labor Marty Walsh to more actively pursue Section 11(c) retaliation claims than his Trump administration counterparts.

The COVID-19 pandemic has caused the states to ramp up enforcement of whistleblower protections. For example, New York recently initiated a high-profile enforcement action^[1] against an employer alleged to have fired an employee for reporting unsafe working conditions due to COVID-19.

Employers should expect to contend with robust whistleblower enforcement from both federal agencies and the states for the foreseeable future.

What Employers Should Do Now

Robust compliance programs mitigate legal and reputational risk associated with whistleblowers while fostering better productivity and morale.

Multiple internal reporting channels provide employers an opportunity to correct issues employees may recognize before the employees report to outside authorities. Employers should consider and invest in the following best practices to foster transparency in the workplace:

- Establish wider and more user-friendly channels for employees to report or relay their concerns.
- Examine, and modify as appropriate, investigation protocols so the company knows who will handle specific types of concerns before they are raised.
- Build a culture of trust with employees to ensure they understand they can report concerns without risking retaliation.
- Train the C-suite, the board and front-line managers so they are able to understand what constitutes protected whistleblowing in this evolving risk area, and the critical role they each play in reducing risk and enhancing morale for the company.

Gregory Keating is a member and Daniel J. Green is an associate at Epstein Becker Green.

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[1] <https://www.law360.com/articles/1358906>.

[2] <https://www.law360.com/articles/1357164/osha-to-oversee-whistleblower-complaints-under-new-laws->.

[3] <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

[4] <https://www.law360.com/articles/1312156/sec-rule-asserts-authority-to-adjust-whistleblower-awards>.

[5] The SEC final rule is subject to an ongoing legal challenge.

[6] <https://www.law360.com/articles/1357914/sec-sets-early-record-for-whistleblower-awards-in-fy-2021>.

[7] <https://www.law360.com/articles/1361555/sec-task-force-will-use-data-tips-to-uncover-esg-violations>.

[8] <https://www.law360.com/articles/1361454/sec-pays-5m-to-tipsters-denies-duo-who-alerted-media>.

[9] <https://www.law360.com/articles/1364466>.

[10] <https://www.law360.com/articles/1347409/biden-inks-order-bolstering-virus-protections-for-workers>.

[11] <https://www.law360.com/articles/1355914/ny-ag-sues-amazon-over-covid-19-worker-protections>.

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