

# OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints

*More than half the 1,744 retaliation complaints received were dismissed without being investigated; only two percent were investigated and resolved.*

Since the pandemic began, there has been an outpouring of public support for worker safety and health, and worker organizing for better working conditions has gained far greater visibility. More people are articulating the beliefs that the lives of human beings are more valuable than any labor and that worker health is linked to public health. Workers are joining in solidarity not only to confront unjust employers and corporations but also to demand robust enforceable protections.

It is therefore unacceptable that workers who filed COVID-19-related whistleblower complaints with the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) during the first six months of the coronavirus crisis—alleging employer retaliation for exercising their workplace health and safety rights—received scant support from the agency tasked with their protection.

## Key Findings

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We analyzed OSHA’s public data showing 1,744 COVID-19-related retaliation complaints filed by workers from the beginning of the pandemic through August 9<sup>th</sup> and found that only 348 complaints—just one in five—were docketed for investigation; and only 35 complaints—just two percent—were resolved in that period.<sup>1</sup> Most of the complaints—54 percent—were dismissed or closed without investigation.<sup>2</sup> Of the tiny number of resolved complaints, it is unclear whether any were settled in a manner beneficial to the workers. OSHA does not make those outcomes public or explain the settlements.<sup>3</sup>

Resolving a mere two percent of OSHA retaliation complaints in six months is a dismal record under any circumstances. It undermines workers’ confidence that they’ll be protected when reporting unsafe working conditions. But it is especially egregious during a pandemic that, to date, has resulted in more than 210,000 COVID-related deaths and over 7.4 million cases in the United States—many likely due to workplace-related coronavirus transmissions—the most of any country in the world.

Black and immigrant workers, and Latinx and other workers of color are fighting for their collective survival amid the COVID-19 pandemic and speaking up to defend their health and safety in frontline workplaces. Workers are doing their part and bravely demanding better conditions, but OSHA is not doing its part.

OSHA's failure to protect workers who raise health and safety concerns during the pandemic has a disproportionate impact on Black workers. A recently released NELP report, [Silenced About COVID-19 in the Workplace](#),<sup>4</sup> found that Black workers are more than twice as likely as white workers to have seen possible retaliation by their employer; they are also twice as likely as white workers to indicate having unresolved COVID-related concerns at work.

When workers raise concerns, they can risk losing their jobs or being subjected to other forms of employer retaliation. That's why the OSHA whistleblower complaint program is so important. But, as our review of the complaint data shows, OSHA's mismanagement of the program during this pandemic is failing these workers—and this course must be reversed.

## OSHA Whistleblower Program Is Crucial for Workers But Must Be Strengthened

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When Congress enacted the Occupational Safety and Health Act<sup>5</sup> almost 50 years ago, it acknowledged the significant role that workers would play in advocating for their own safety. The law, which established the Occupational Safety and Health Administration (OSHA) to ensure safe workplaces, provided employees with new rights to raise safety concerns and to file a complaint with OSHA to request an inspection.<sup>6</sup> Congress also clearly understood that workers would be reluctant to use these rights if they feared they would be fired or otherwise retaliated against. As a result, Congress included section 11(c)<sup>7</sup> in the law, prohibiting employers from firing or otherwise retaliating against workers who exercise their safety and health rights, and directed OSHA to use its authority to investigate workers' complaints and enforce those prohibitions.

### Trump Officials Paint a Rosy Picture

Trump administration officials have painted a rosy picture of their operation of the OSHA whistleblower program during the pandemic. Labor Secretary Eugene Scalia declared in a Coronavirus Task Force briefing at the White House in April: "We are fielding and responding to calls from workers worried about their health, and sometimes from workers who believe they've been illegally disciplined by their employer for expressing health concerns. We will not tolerate retaliation."<sup>8</sup>

Loren Sweatt, the Labor Department's principal deputy assistant secretary for OSHA, wrote in a Labor Day op-ed titled "OSHA is protecting workers during pandemic" that "OSHA's whistleblower investigations have led to real changes to workplace policies—changes that ensure workers can raise concerns about safety and health on the job without fear of adverse action."<sup>9</sup>

**OSHA's dismal record of unresolved COVID-related retaliation complaints undermines confidence that workers will be protected when reporting unsafe working conditions.**

But these officials' assertions ring hollow when more than half the whistleblower complaints were dismissed without being investigated and only two percent were investigated and

resolved. This dismal record says to all workers that the agency in charge of ensuring their voice is protected in the workplace just does not have their back.

## Office of Inspector General's Report Identified Shortcomings

Shortcomings in the operation of the whistleblower program have been evident for years. But a [new report](#) by the Department of Labor's Office of Inspector General (OIG) found that while the number of retaliation complaints has increased significantly during the pandemic, the program's full-time staffing has actually decreased, with five investigator positions remaining unfilled, and that the timeliness of complaint investigations has worsened. According to the OIG, investigations now take an average of 279 days to complete, an increase of 41 days from the 238 days reported in 2015, and an increase of 129 days from the 150 days reported in 2010. The report warned that "the potential exists for even greater delays in closing investigations" and said the agency needs to improve its handling of whistleblower complaints. "When OSHA fails to respond in a timely manner, it could leave workers to suffer emotionally and financially," the report added, "and may also lead to the erosion of key evidence and witnesses."

## OSHA'S Relatively Weak Whistleblower Statute

For years it's also been clear that OSHA's whistleblower legal protections are too weak. Unlike newer whistleblower statutes passed after 2000,<sup>10</sup> in the OSHA law complainants were not given the right to appeal a decision to dismiss their case through a full administrative hearing. Complainants also have no right to litigate their claim in court on their own. Unlike newer whistleblower statutes, complainants cannot obtain a higher-level administrative adjudication when OSHA dismisses their complaint. Once OSHA dismisses a case, as the agency has in more than half of the complaints filed to date related to COVID-19, complainants can only complain back to OSHA, the same agency that just dismissed the case. There is no right to a *de novo* hearing at the Office of Administrative Law Judges—as is the case in most whistleblower laws passed in the last 20 years.<sup>11</sup>

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Further, with no private right of action under the law, complainants have no alternate route for resolving their disputes when OSHA dismisses their case or has not provided a final resolution in a timely fashion.

OSHA's whistleblower protections also require that workers file a whistleblower complaint with OSHA within 30 days of the date of the retaliatory action (some states, including Kentucky, California, Connecticut, Hawaii, North Carolina, Oregon, and Virginia, allow a longer timeframe). The 30-day timeframe is far shorter than most recently enacted whistleblower statutes, including the Federal Railroad Safety Act, the Consumer Product Safety Improvement Act, the Surface Transportation and Assistance Act, the Seaman's Protection Act, SOC, the Dodd-Frank Wall Street Reform and the Consumer Protection Act, the Food Safety Modernization Act, and the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, all of which give complainants 180 days from the date of the adverse action to file a complaint with OSHA.<sup>12</sup>

Further, under the OSHA law, the burden of proof is much more rigorous on a whistleblower complainant than in more recent statutes. These newer laws only require the complainant to show that their whistleblowing was a “contributing” factor to the employer’s adverse action. OSHA’s whistleblower provisions, however, require the complainant to show that the adverse action was “because” of the whistleblowing. Finally, OSHA’s current whistleblower protections do not provide the agency authority to order immediate preliminary reinstatement of employees when the agency finds they suffered an illegal termination.<sup>13</sup>

## **Stronger Federal, State, and Local Measures Needed to Protect Workers**

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To protect themselves and the broader public during the pandemic and beyond, workers who speak up about their safety and health and raise concerns about their lack of protection need to be backed by enforceable measures. Their voices are critical to ensuring that our workplaces and communities are safe. But current federal protections are clearly too weak, and along with the failure of the current administration to adequately staff whistleblower enforcement, they do not provide sufficient protection against retaliation for workers who speak up.

Policymakers on the federal, state, and local levels should take the following steps to ensure that workers are backed by enforceable measures that require employers to improve their workplaces and refrain from retaliation or negligence:

- Provide federal and state OSHA agencies with increased funding for whistleblower investigators to double the current staffing.
- Provide workers with a private right of action so that they may go to court if they are retaliated against. For federal OSHA law, that means modifying the adjudication process to provide a “kick-out” provision that enables workers to take their disputes to a federal district court if OSHA fails to reach a conclusion in a timely manner.
- Modify the OSHA law to allow for a full administrative review by a complainant to the Office of Administrative Law Judges and the Administrative Review Board of OSHA determinations.
- Provide federal OSHA with the authority to order immediate preliminary reinstatement of employees who OSHA finds have suffered illegal termination.
- Extend the timeframe for filing complaints under the federal OSHA law to one year.
- Revise the burden of proof under the OSHA law to conform to the standard utilized in more recently enacted statutes passed since 2000.
- Many existing state whistleblower laws protect workers from retaliation only for filing formal health and safety complaints—and often don’t protect them from being punished for notifying fellow workers or the public about workplace threats. It is essential that whistleblower protections be expanded to protect that full range of communication, which is critical for publicizing and addressing serious workplace threats.<sup>14</sup>

- For state and local laws, include a rebuttable presumption that any adverse action taken against an employee or person within 90 days of protected activity is retaliatory. Such a presumption is an effective approach for protecting whistleblowers and has been incorporated into state and local wage theft laws.
- States and cities must take steps to ensure that workers may refuse to work under dangerous conditions without being subject to retaliation—and that they continue to be paid so long as the dangerous workplace condition remains unremedied. This right to be free from retaliation should, like the whistleblower protections detailed above, include a rebuttable presumption that any adverse action taken against an employee or person within 90 days of protected activity is retaliatory.

## Endnotes

<sup>1</sup> <https://www.osha.gov/foia/archived-covid-19-data>

<sup>2</sup> OSHA also received an additional 680 COVID-19-related worker retaliation complaints that the agency forwarded to other government agencies for investigations: 112 worker retaliation complaints were forwarded to other federal agencies such as the Department of Labor’s Wage and Hour Division, and 568 retaliation complaints were referred to state OSHA agencies.

<sup>3</sup> <https://www.gao.gov/assets/290/285189.pdf>

<sup>4</sup> <https://www.nelp.org/publication/silenced-covid-19-workplace/>

<sup>5</sup> <https://www.osha.gov/laws-regs/oshact/toc>

<sup>6</sup> [https://www.osha.gov/laws-regs/oshact/section\\_11](https://www.osha.gov/laws-regs/oshact/section_11)

<sup>7</sup> [https://www.osha.gov/laws-regs/oshact/section\\_11](https://www.osha.gov/laws-regs/oshact/section_11)

<sup>8</sup> <https://www.dol.gov/sites/dolgov/files/OPA/Remarks-by-Secretary-Eugene-Scalia-at-the-Coronavirus-Task-Force-Podium-Briefing-20200409.pdf>

<sup>9</sup> [https://madison.com/wsj/opinion/column/loren-sweatt-osha-is-protecting-workers-during-pandemic/article\\_c59ea71d-5a06-515b-a7e8-0d95e118d5c2.html](https://madison.com/wsj/opinion/column/loren-sweatt-osha-is-protecting-workers-during-pandemic/article_c59ea71d-5a06-515b-a7e8-0d95e118d5c2.html)

<sup>10</sup> [https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower\\_acts-desk\\_reference.pdf](https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower_acts-desk_reference.pdf)

<sup>11</sup> [https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower\\_acts-desk\\_reference.pdf](https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower_acts-desk_reference.pdf)

<sup>12</sup> [https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower\\_acts-desk\\_reference.pdf](https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower_acts-desk_reference.pdf)

<sup>13</sup> [https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower\\_acts-desk\\_reference.pdf](https://www.whistleblowers.gov/sites/wb/files/2019-06/whistleblower_acts-desk_reference.pdf)

<sup>14</sup> <https://www.nelp.org/wp-content/uploads/Protecting-Worker-Safety-Health-COVID-State-Local-Policy-Response.pdf>