5 precautions for blowing the whistle on COVID-19 public health dangers

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BEST PRACTICE: With the COVID-19 crisis being "a literal life and death situation," if an employee is considering blowing the whistle, the first step is to ensure the method of disclosure complies with the law and agency policy, Federal Practice Group partner Debra D'Agostino told ***cyber*FEDS®**.

While some employees may fear retaliation from blowing the whistle, especially given the state of the economy and job market, "disclosing risks to public safety is protected under the Whistleblower Protection Act," D'Agostino said.

However, the Merit Systems Protection Board has "held that agencies can appropriately fire employees based on how they made a protected disclosure," she noted.

Plus, how the employee discloses the information could dictate whether the disclosure is protected under the WPA, Kalijarvi, Chuzi, Newman & Fitch attorney Richard Renner told ***cyber*FEDS®** in an exclusive interview.

For employees considering pandemic-related disclosures about public health and safety, D'Agostino and Renner recommended the following best practices:

1. Follow the law and agency policy before making disclosures.

Although intelligence community employees have separate procedures for making disclosures, both intelligence and non-intelligence employees must follow the law and agency policy, D'Agostino said.

"For employees in the Intelligence Community, this means starting with a complaint to the Intelligence Community Inspector General," she said.

Although the steps are not as clearly defined outside the intelligence community, the "safest method of making a disclosure is within your own chain of command," she said. If that fails, "complain to the agency's Office of Inspector General and then the U.S. Office of Special Counsel or Congress' government oversight committees," she said.

2. Be wary about communicating disclosures to the media without advice from counsel.

If these avenues fail, D'Agostino recommended contacting an attorney before making a public disclosure to the media, through social media, or via other public forums, she added.

Even if a reporter agrees to not disclose a source, "agencies can usually trace an electronic trail to figure out who made the disclosure," she warned.

Remember that "a public disclosure of classified information is a criminal violation," while public disclosures of other sensitive information may be a violation of policy or regulation, she warned.

3. Beware of potential discipline for false or misleading statements.

Agencies can discipline employees for making statements -- including as part of a protected disclosure --that are false or misleading, such as charging the employee with lack of candor, D'Agostino said. So, "make sure any disclosure is professionally worded, sticks to the facts, and avoids exaggerations or unnecessary details."

4. Avoid misconduct or performance issues before and after any disclosures.

With "no fail-safe way to avoid retaliation," employees "will have to weigh the importance of the disclosure against the potential retaliation," she said. Before and after making a protected disclosure, employees should "avoid any misconduct or performance issues that the agency could use to take an adverse action," D'Agostino said.

Even if questioning whether an order is appropriate or legitimate, practitioners should advise employees to follow instructions and document their compliance with any directives, she advised.

Those who believe they are being asked to carry out an illegal action "should consult with an attorney before declining to comply to avoid risking a charge of insubordination," she added.

Also, cooperating in good faith with any inquiries is important, even if those inquiries could be retaliatory, because employees can be fired for misconduct discovered through the retaliatory investigation, she noted.

5. Advise employees of benefits of making disclosures to IG or OSC.

Simply notifying a manager about a COVID-19-related threat to public health and safety will not provide employees with the strongest protection against whistleblower retaliation, Renner said.

To get the "strongest protection," employees should tell the inspector general's office or the Office of Special Counsel, under 5 USC 2302 (b)(9)(C). This provides greater protection than merely making a disclosure to a boss under 5 USC 2302 (b)(8).

If an employee tells a manager about the potential threat, Section 2302(b)(8) also requires proving that the disclosure involved a "specific and substantial" threat to public health or safety, Renner said.

But deciding that a particular threat is "specific and substantial" is subjective and may differ depending on who presides over the case, he warned.

If the judge finds that the disclosure did not involve a "specific and substantial" threat to public health and safety, an employee who only notified his supervisor is not protected under the WPA, he added.

So just telling a manager would only offer protection if the judge agrees that the threat was specific and substantial danger, he explained.

For example, Renner said, in Standley v. Merit Systems Protection Board, et al., 117 LRP 47616 (Fed. Cir. 2017, nonprecedential), the Federal Circuit agreed with the administrative judge who found that disclosures involving the manager's decision not to fund a nuclear detonation detection reporting system were not protected because they did not involve a specific and substantial threat to public health and safety and pertained to a policy decision. The court found that allegations involving a policy dispute were not a protected disclosure when the evidence showed that a disinterested observer could not reasonably believe the disclosures indicated a violation of law or a danger to public health and safety.

Personal protective equipment

If an employee is concerned about potential retaliation for expressing fears over lack of personal protective equipment, instead of simply telling the supervisor, the employee also should notify the inspector general or OSC, Renner said.

Under 5 USC 2302 (b)(9)(C), which prohibits agencies from retaliating against employee for "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel," an employee would not have to prove that the threat was specific and substantial, and "no judge is going to say you are not protected," he explained.

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