

discrimination. Employee concerns about air quality in the workplace are not whistleblower activity protected by CEPA absent allegations that these conditions pose a threat to employee health and safety. Similarly, employee complaints about excessive corporate expenditures are not protected under Sarbanes-Oxley absent allegations that the employer is misrepresenting its financial statements in its annual report to shareholders.

Failure to recognize employee complaints that trigger whistleblower protection poses a risk that any adverse employment action against the complaining employee, whether or not related in any way to the employee's whistleblowing activity, will be construed as unlawful retaliation. In a successful suit under CEPA, Sarbanes-Oxley or the LAD, the employee is entitled to economic and emotional distress damages, and under certain circumstances, punitive damages against the employer. Coupled with attorney's fees that are also available to the successful plaintiff, these damages can easily reach hundreds of thousands of dollars or more.

Receiving the Complaint: Supervisors must be instructed to take all employee complaints seriously – a rush to judgment that the complaint is baseless or trivial can be fatal to a retaliation claim. The employee must be given ample opportunity to fully voice all concerns and should be asked to submit the full complaint in writing. Alternatively, the supervisor should prepare an account of the employee's complaints and have the employee sign off on the document as an accurate and full account of the issues raised. By doing so, the employer can determine whether any aspect of the employee's complaint implicates issues of health and safety, unlawful activity, fraud or discrimination in the workplace that trigger whistleblower protection. Moreover, a contemporaneous written account will shield an employer from attempts by the employee to alter the nature of the grievance in an attempt to garner protection as a whistleblower when faced with subsequent job action.

Investigating the Complaint: Employers must promptly investigate employee complaints to determine if the concerns are legitimate. In certain circumstances the employer should consider engaging an experienced human resources professional or employment counsel to investigate the employee's complaint, particularly those

alleging sexual harassment or where the neutrality of an internal investigator can be called into question (e.g., charges of unlawful conduct by senior management). All interviews conducted and actions taken during the course of the investigation should be adequately documented.

Resolving the Complaint: If an employee's complaint is legitimate, the employer must be prepared to take all reasonable action to remedy the situation. Whether or not the complaint is legitimate, the employer must inform the employee of the outcome of its investigation both in person and in writing, and assure the employee that he or she will not be subject to any form of retaliation for having brought the concerns forward. Leaving the complaining employee "in the dark" about the resolution of the complaint will likely lead to charges that the employer failed to take any action on the employee's complaint.

Conclusion: Openly embracing employee complaints with an eye toward resolving legitimate concerns is the greatest weapon an employer has in the defense of a whistleblower retaliation claim. Perhaps more important, the good will engendered by the caring employer is a powerful vaccine against employees' perceptions of unfairness and retaliation by the employer in the workplace.

That said, there is no guarantee that the complaining employee will not file a whistleblower retaliation charge if the employee is subject to subsequent discipline, particularly where the complaint and discipline are relatively close in time. For this reason, employers must exercise extreme caution when taking action against an employee who engaged in prior whistleblowing activity to ensure that the discipline is warranted, that company discipline policies were followed, that all necessary documentation is in place, and that there are no factors suggesting that the employee's whistleblowing played any role whatsoever in the decision to impose discipline.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Kathleen M. Connelly, Esq. of the Labor & Employment Law Group. She provides advice and counsel to company management in employment law matters and can be reached at kconnelly@lindabury.com.

