



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

To Conduct Annual Review or Not to Conduct Annual Review, That is the Question

By Jim Curtis and Stephanie Christiansen-LaRocco

Hypothetical, based upon a real fact pattern: A DOJ or OSHA whistleblower investigation takes place at the same time that the Company does annual reviews. The government asks to interview three key employees who work with the whistleblower. Should the Company proceed with the annual reviews before or after the interviews?

What should the Company do?

Ideally, the Company should proceed with the annual reviews in the normal course of business so there can be no suggestion that the content of the reviews were influenced by the outcome of the government interviews. However, if the Company intends to deliver a particularly negative review to one of the employees selected for interview, the Company may choose to delay delivering the review until after the interview to prevent the negative review from influencing the employee's interview. Remember, however, that the government interview is protected activity and that employers cannot retaliate against employees for cooperating in a whistleblower investigation. Accordingly, the Company needs to anticipate that the employee may claim that the subsequent negative review was in retaliation for cooperating in the government's investigation. Accordingly, should the Company choose to delay the review so as not to taint the interview, **the contents of the review should be complete, documented and finalized before the interview takes place** so that there can be no credible claim that the Company adjusted the review in retaliation for cooperating in the whistleblower investigation. See *Boyd v. Accuray, Inc.*, No. 11-cv-01644 (N.D. Cal. June 4, 2012) (finding no evidence of retaliation where evidence indicated adverse employment decision was planned before employee engaged in protected activity).

The Company should also strictly limit the number of people who know the employee is slated to be interviewed by the government to a "need to know" basis. If the supervisor who prepared the review and the individuals providing the negative feedback are unaware the employee is participating in a whistleblower investigation, the Company will be better protected from allegations that the negative performance review was in retaliation for such participation. See *Buytendorp v. Extendicare Health Svs., Inc.*, 498 F.3d 826, 836 (8th Cir. 2007) (finding plaintiff's theory of retaliatory performance review unsupported where author of review was unaware of plaintiff's whistleblowing activity).

As with any effective review, the reviews for the interviewees should be based on each employee's performance over a specific time period, with both negative and positive events documented with respect to when they occurred. **Documenting when the specific facts and events occurred that form the basis of the review is critical to defending against potential retaliation claims if a negative review is delivered after the government interviews.** See *Perez v. Region 20 Educ. Serv. Center*, 307 F.3d 318, 325 (5th Cir. 2002) (employee's retaliation claim failed where company could substantiate the specific criticisms that led to employee's negative performance review). Ideally, serious performance issues should be addressed as they arise throughout the year so that the employee does not feel blindsided at the end of the year by a particularly critical review.

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