

# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*



## Email to Supervisor Re: Annual Review Meeting in the Afternoon. I Might Be Running Late Because I am on the Phone with OSHA Now

**Hypothetical, based upon a real fact pattern:** Prior to an annual review, an employee announces that she has called OSHA and blown the whistle on alleged Company wrongdoing. What should the Company do?

### What should the Company do?

As attorneys love to say, it depends. An employer may not retaliate against an employee for blowing the whistle and a negative annual review may be seen as a form of retaliation, especially if the review prevents the employee from earning additional compensation or a promotion. So, companies must be careful to avoid the appearance of retaliation where an annual review is given very soon after an employee blows the proverbial whistle.

Employers should consider several factors before giving the employee her annual review, but, in many cases (exceptions discussed below), an employer should give the review as written and as scheduled, as if the employee had never blown the whistle. An employer must not hold the employee's whistleblowing against her. In other words, the employer should not revise the review in any way simply because the employee called OSHA. In addition, if an employee had performance problems prior to calling OSHA, the employer does not have to ignore those problems and does not have to revise the review to take emphasis away from those legitimate problems, even though the employee blew the whistle. Blowing the whistle does not insulate a poor performer from receiving a negative review.

Additionally, the performance review process is usually a lengthy process, with multiple sources of input. If needed, the employer should be able to recreate the chronology to show that the review was drafted long before there was any indication that the employee at issue engaged in protected activity.

What factors should a company consider when faced with a whistleblower complaint before a review?

1. When was the complaint made in relation to the scheduled review? Close temporal proximity between the whistleblowing and the evaluation may be enough to establish causation.
2. When was the review drafted? (or, has it been drafted yet at all?) Similarly, was the whistleblower aware of any performance concerns prior to receiving the review? If you can show definitively that the review was drafted and/or concerns were made known *before* the whistleblowing, you can probably cut off any causation argument. See, e.g., *Boyd v. Accuray, Inc.*, 873 F. Supp. 2d 1156 (N.D. Cal. 2012) (no causation between protected activity and poor performance review because "poor performance was documented before [the employee] engaged in protected activity, and [the employee] was informed before engaging in protected activity that he would receive a substandard evaluation absent an improvement in his performance.")

3. Who drafted the review and who knows about the whistleblowing? If the supervisors who gave input into the review have no knowledge about the whistleblowing, you can likely cut off any causation argument. If they do have knowledge about the complaint, however, it will be more difficult to show that the employer did not consider the whistleblowing when giving the negative review.

After considering those factors, a company can minimize potential liability by following a few simple steps. First, if the review drafter is unaware of the whistleblowing, ensure that he or she is not told about the complaint and is screened from the investigation into the complaint to the greatest extent possible.

Second, go forward with the review as scheduled, with a few caveats if the person giving the review knows about the complaint. In that situation, the company should first examine the review to determine whether any criticisms in the review can be proven with documentation and, if they cannot be proven, critically examine whether they are accurate and truly warranted. Note: this is an instance in which a review following notice of the protected activity might necessitate revisions to the pre-drafted review. In all cases, it is a best practice to ensure that performance reviews are devoid of criticism that cannot be substantiated. Also, it is best to have a second management person sit in on the review. Finally, if the person scheduled to give the review is the subject of the complaint, i.e. the supervisor is alleged to have engaged in wrongdoing, then that supervisor should not be the person to administer the review meeting.

In addition, the company should determine whether there is any inconsistency between the whistleblower's rating/review and the ratings/reviews of comparable employees. A whistleblower is likely to point to the reviews of non-whistleblowing employees, so it is important that ratings and reviews are being allocated in a consistent fashion across the board.

After all, an ounce of prevention is worth a pound of cure. Many of the issues with annual reviews that arise in the whistleblower context can be addressed preemptively with a more careful review process. Even in the absence of whistleblower or other protected activity or status, employers should take care to ensure the validity of statements made in annual reviews and make efforts to compare similar classes of reviews to ensure consistency in ratings. Employers should consider training sessions for supervisors/reviewers before the review process commences in order to alleviate some of these issues.

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