

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face



Can a Whistleblower's Lawyer Participate In the Company's Investigation?

Hypothetical, based upon a real fact pattern: As part of an internal investigation into a whistleblower's complaint, the Company would like to interview the whistleblower. The whistleblower asks that her attorney be allowed to participate and also asks that the Company pay for her attorney's travel and time.

What should the Company do?

How the Company responds to the whistleblower's request will directly impact the extent to which she cooperates with the investigatory process *and* how a reviewing judge, jury or investigator views the Company's actions in response to a possible whistleblower retaliation complaint.

If the whistleblower feels confident that she will not be adversely impacted for making her complaint, she will likely provide the information and details sought by the Company. If, however, the whistleblower has even the slightest fear that management or coworkers will retaliate against her, she will likely withdraw and withhold important information. In most cases, the first concern in a whistleblower situation is getting to the bottom of the complaint. You want to know if there has been any unlawful or otherwise unsavory conduct, and in many cases, you need the information provided by the whistleblower to fully evaluate the situation. A whistleblower who feels assured that the Company takes her complaints seriously and is investigating them fully is less likely to feel the need to go to a third party for assistance. Then again, there are situations in which the whistleblowing activity is undertaken in order to provide some form of job security or otherwise provide the basis for a future legal action. In those cases, or if the whistleblowing employee has other reasons for seeking the advice of counsel, the employee may request that a private attorney be present when she is interviewed by the Company.

The correct decision in these situations is extremely fact-dependent and turns not only on whether legal claims against the Company have already been asserted, but also on the nature of the whistleblower complaint and the Company's level of potential exposure. In some situations, the Company may decide that it needs the whistleblower's information in order to carry out its investigation, and it needs that information now. The Company may not be able to wait to navigate potential disciplinary action for failure to cooperate in an internal investigation and then possibly lose access to the employee. The Company may decide to allow a private attorney to be present. However, in most circumstances, the Company need not allow the attorney to be present.

As a general matter, a whistleblower does not have a right to have an attorney present during a workplace investigation. The few courts that have addressed this issue have upheld the employer's decision to deny an

employee's request to have his or her counsel participate in the internal investigation. For example, a district court in Michigan held that an employee does not have a right to an attorney at an employer conducted administrative hearing, while a California court upheld the termination of an employee who was let go for refusing to answer his employer's questions about security breaches in absence of counsel. On the other hand, an employee may assert a constitutional right to an attorney when that employee is subject to a custodial interrogation by a government actor and/or the employee risks self-incrimination. An employee cannot invoke this right, however, against a private employer investigating the employee's work-related complaint. Of course, where the Company is under no obligation to allow a private attorney to participate in the investigatory process, they are under no obligation to compensate that attorney for her time or expenses.

A Company faced with this situation should consider the following steps:

- Step 1:** Inform the whistleblower that she does not have a right to have an attorney participate in its internal investigation and (simultaneously) remind her that she agreed to cooperate with the Company's investigation process as a condition of her employment. Here, it would be helpful if the Company can direct the whistleblower to a specific policy within its handbook or corporate manual.
- Step 2:** Assure the whistleblower that the Company cares about her specific complaint and relies on its employees to raise similar concerns with management. Explain that the interview will be kept confidential and that its focus is to gather facts and information to *address* and *correct* the reported issue.
- Step 3:** Explain to the whistleblower that it is both unlawful and against the Company's policies to retaliate against any employee for engaging in whistleblower activities. Assure the whistleblower that if the Company learns that another employee has retaliated against her, the Company will promptly take action against that employee.

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