



Home > OSHA

Executive Order Fails to Address Problems Plaguing OSHA Whistleblower Program



by **Geoff Schweller** — January 27, 2021 in **Employment, Government, News, OSHA**

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On January 21, President Biden issued an [Executive Order on Protecting Worker Health and Safety](#). A part of the President's National Strategy for the COVID-19 Response and Pandemic Preparedness, the Executive Order instructs the Occupational Safety and Health Administration (OSHA) to issue new guidance on employee protections for COVID-19. However, the Order does not directly address the massive issues plaguing OSHA's [Whistleblower Protection Program](#) (WPP), which seriously undermine any protections for workers.

According to the Order, "[e]nsuring the health and safety of workers is a national priority and a moral imperative." The Order calls for the Secretary of Labor, "acting through the Assistant Secretary of Labor for Occupational Safety and Health," to issue revised guidance on COVID-19 related workplace safety, consider emergency temporary measures related to COVID-19, and to review the enforcement efforts related to COVID-19.

As a whole, the Executive Order is vague and it will be up to OSHA to follow through with specific and appropriate measures to protect employees during the COVID-19 pandemic. Even so, the Order notably does not directly instruct OSHA to address the problems which are currently plaguing its WPP. Without a functioning system to protect employees who raise safety concerns, any new guidance on workplace safety requirements will be seriously undermined.

OSHA's WPP was established in 1970 with the passage of the [Occupational Health and Safety Act](#). WPP is meant to protect employees from retaliation if they raise concerns about health and safety issues at their workplace. Over the years, WPP's scope has expanded and is now in charge of enforcing [23 separate statutes](#) which prohibit retaliation against employees who report violations of law by their employer. WPP investigates complaints of whistleblower retaliation and if the investigation finds merit to the complaint, the whistleblower may be entitled to remedies such as back-pay and reinstatement.

Since the COVID-19 pandemic began, a number of reports have highlighted how OSHA has failed to protect whistleblowers who raise COVID-related workplace safety concerns. In August of 2020, the Department of Labor (DOL) Office of Inspector General (OIG) [released a report](#) which found that OSHA must improve its handling of whistleblower complaints during the ongoing COVID-19 pandemic. The report details how the

combination of staffing shortages within OSHA's WPP and a rise in whistleblower complaints due to the pandemic severely hinders the agency's ability to investigate claims in a timely manner.

The DOL OIG report was followed by [an even more damning report](#) issued by the National Employment Law Project (NELP) in October of 2020. The NELP report found that OSHA had resolved only 2% of COVID-19-related retaliation complaints during the first six months of the pandemic.

In December of 2020, the DOL OIG [released another report](#) documenting major issues with OSHA's handling of whistleblower complaints. The report was focused on investigations into whistleblower complaints conducted by a specific regional office of OSHA's WPP (Region IX). The report found that 96% of investigations did not meet all the essential elements mandated for investigations and 88% "exceeded statutory timeframes for investigations by an average of 634 days."

The Executive Order notes that many healthcare workers and other essential workers "are people of color and immigrants," suggesting that President Biden is concerned with the racial justice element of workplace safety. In June of 2020, [NELP published a report](#) which found, among other things, that "Black workers are more than twice as likely as white workers to have seen possible retaliation by their employer."

The language of the Executive Order focuses on strengthening safety guidelines and enforcement efforts. While it does call for "a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principle," the Order does not directly mention OSHA's WPP or instruct OSHA to resolve the number of problems with the handling of whistleblower complaints.

Read:

[Executive Order on Protecting Worker Health and Safety](#)

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