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6 Whistleblower Don'ts Every Employee Should Know

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If you have blown the whistle on wrongdoing by your employer, there is a wealth of good advice about what you *should* do if you face retaliation. But it also is important to know what you *shouldn't* do during the whistleblower process. Many employees ruin strong retaliation claims – and even expose themselves to legal liability – through their well-meaning attempts to document wrongdoing or advocate for themselves.

The following are some of the most important don'ts of whistleblowing for employees who want to preserve the strength of their claims and avoid legal liability.

Don't Take the Kitchen Sink

The most common advice whistleblower attorneys give is "Document everything." This is crucially important because of the presumption that your employer can fire you at any time for a good reason, a bad reason or no reason at all, as long as it is not for an illegal reason. If you only complained about fraud in a conversation with your boss a week before you were fired, it is your word against hers. If you have not documented your concerns by reporting them in writing to your supervisor or the appropriate people in your company to address the wrongdoing, it is much harder to prove that your employer knew that you were blowing the whistle.

Besides documenting that you complained, it is also important to have evidence that the wrongdoing was occurring. This can be tricky. On one hand, you generally have a legal right to provide to the government documents that demonstrate illegal conduct. On the other hand, your employer has a legitimate legal interest in protecting trade secrets and confidential information.

There is no bright-line rule defining the scope or volume of company information that you can provide to your attorneys or law enforcement. But courts have consistently refused to condone an employee's indiscriminate removal of gigabytes of company documents. The same is true when an employee accesses files outside the scope of his job duties. Also, as a practical matter, any copying, deleting or emailing to yourself of company files will raise red flags and may prompt an employer to take disciplinary action.

Ultimately, it is important to understand that your employer's illegal conduct is not a green light to gather a trove of evidence that may or may not be relevant. It may be permissible to copy some documents to provide to your attorneys or law enforcement, but don't confuse "document everything" with "take anything."

Don't Just Press "Record"

Besides giving us the ability to communicate instantly and see pictures of our friends' vacations (whether we want to or not), smartphones have given us the ability to record everything we hear and see. Most people do not consider the legality or implications of their actions before hitting "record."

This issue arises frequently for whistleblowers.

An employee who suspects that he or she is facing retaliation for complaining about illegal conduct may be tempted to try to catch the company in the act by recording a conversation. Recording a manager threatening to fire you for reporting fraud or safety issues can provide powerful evidence of both the underlying misconduct and the hostility towards you. It can also expose you to liability.

Some states require consent of all parties to record a conversation, and failure to do so can be a crime. Also, many employers explicitly prohibit recording in the workplace, and most employers would argue that recording violates some company policy. Moreover, people in sensitive positions involving trade secrets, national security, law enforcement, etc., may have additional obligations and constraints.

As with documents, recordings can be both very helpful and very harmful to whistleblowers. Don't assume you can just press record.

Don't Wait

If you think you have a whistleblower retaliation claim, it is important to consult with an employment attorney quickly. If you do not file a charge or complaint within the timeframe set by the relevant law, your claim may be lost. Time limits vary greatly by claim, with some federal statutes allowing just 30 days to file a charge.

It's important to note that even if your state provides a claim for wrongful discharge that has a limitations period of a year or two, you may be out of luck if you miss a filing deadline under a federal or state whistleblower statute. Courts in some states take the view that if there is a remedy available under a statute, an employee cannot bring a claim under state law for wrongful termination. Without understanding the full array of federal, state and local anti-retaliation laws, it can be easy to miss a deadline and lose the legal protections to which you should be entitled.

An employment lawyer can advise you as to what claims may be available if you experience retaliation in the workplace. He or she can also explain how long you have to file a claim if you cannot resolve your claim with your employer. Waiting too long can leave you without recourse.

Don't Guess Where to File

You shouldn't wait to seek legal advice . . . but what if you do? Whether because they don't want to rock the boat or because they don't realize they have a claim, whistleblowers sometimes run up against filing deadlines and do not, or cannot, meet with an attorney in time. If this happens to you, don't guess where to file your claim, or you may still miss the filing deadline. For example, if you file a railroad whistleblower retaliation claim with the Equal Employment Opportunity Commission (EEOC) rather than with the correct agency – the Occupational Safety and Health Administration (OSHA) – the clock on your statute of limitations likely will not stop ticking.

The good news is that OSHA, which administers more than 20 whistleblower retaliation statutes, provides some useful information to guide whistleblowers. While it is not a substitute for seeking legal advice, it is a handy resource and a good way to tell if there is a law that covers your situation.

Don't Tell Everyone

No matter how rightfully angry you are – and how sincerely you want to expose your employer's wrongdoing – avoid the temptation to tell the world your story before seeking legal advice. Sending

letters to the president, Congress, the FBI, the press, etc., may be cathartic, but probably won't be effective.

Relatedly, do not post disparaging or overly negative things about your employer or former employer on social media, listservs or in any other public forum. Venting may make you feel better for a time – and it may be completely warranted under the circumstances – but in all likelihood, no amount of "likes" or retweets will stop the illegal conduct you opposed or help you get your job back.

Besides being ineffective at remedying harm, mass mailings and public airings of grievances can make an employee look vindictive and likely will sink any opportunity to resolve the matter without years of litigation.

Don't Try to Do It All Yourself

If you have experienced retaliation in the workplace, whether termination or something less drastic, you may want to try to handle the matter yourself before seeking legal advice. Indeed, your employer may initiate that conversation. Many laypeople are excellent and seasoned negotiators, and many non-employment attorneys have brilliant legal minds. But ultimately, discussing a resolution without the benefit of an employment lawyer's perspective can set expectations too high or too low and hamstring settlement negotiations, if not shut them down altogether. Seek an assessment from an employment lawyer, and don't sell yourself short or overplay your hand.

Takeaway

There are many protections for conscientious, courageous employees who are punished for speaking out about wrongdoing. There are also many pitfalls. Keeping in mind the don'ts can ensure that you strongly position yourself to vindicate your rights.