



OSHA Whistleblower Update: Curious Case of Expanding Agency

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OSHA Whistleblower Update: Curious Case of Expanding Agency

Did you know that the Occupational Safety and Health Administration (*OSHA*) enforces and investigates claims under 22 different federal whistleblower laws, ranging from Section 11(c) of the OSH Act to the Clean Air Act, the Consumer Financial Protection Act of 2010, the Safe Drinking Water Act, Sarbanes-Oxley and the Surface Transportation Assistance Act? Given the number of laws that fall within OSHA's purview, it should come as no surprise that the agency has sought to expand its reach of late in ways that may leave employers scrambling to understand the risks and obligations they face when a whistleblower comes forward.

Whistles Blowing Louder

In 2009, OSHA awarded \$13.25 million in damages from whistleblower complaints. By 2013, that number exceeded \$25 million – an 89% increase. In fiscal year 2016, the awards have been eye-popping: a Michigan janitor was awarded \$193,139, an Alaskan aviation company was ordered to pay a pilot over \$500,000 and a railroad conductor received over \$250,000 in punitive damages alone.

Between 2009 and 2015, OSHA increased the number of completed investigations from 1,943 to over 3,300. The number of determinations categorized as a "Positive Outcome for Complainant" nearly doubled, from 450 to 843. The disproportionate uptick in these "Positive" cases suggests that OSHA is emphasizing investigative methods that favor complainants.

That number is likely to increase after the agency issued, in February 2016, new standards for investigators that reduce the showing necessary to find a violation from a "preponderance of the evidence" to mere "reasonable cause." The more lenient standard means that more charges will likely survive the initial screening phase of an investigation, resulting in an increased likelihood of burdensome investigations.

Pilot Programs Cause Turbulence for Employers

In 2016, OSHA launched two pilot programs that should be on your radar. For Iowa, Missouri, Kansas and Nebraska, OSHA announced the Whistleblower-Severe Violator Enforcement Program. This program creates a public and widely distributed log of employers that have been found by the agency as having had "significant whistleblower cases."

This program, like OSHA's original Severe Violator Enforcement Program (SVEP), poses a series of concerns from a procedural fairness standpoint, as employers can and will be added to the list before a final determination is made on the merits. In other words, an employer may find itself having been labeled as a "severe violator" before even having their day in court. This would be akin to the U.S. Equal Employment Opportunity Commission adding an employer to its Severe Discriminator list after a substantial evidence finding—before the agency even files a lawsuit in federal court accusing the employer of discrimination. While an employer can contest placement on the list, this takes place only after the employer has been placed on the list, meaning that reputational damage has likely already occurred.

Meanwhile, in August, OSHA's Region 9 – covering mostly western states – rolled out the Expedited Case Processing Pilot. If certain criteria are met, the program allows OSHA to bypass an investigative finding and submit the case

file directly to an administrative law judge for further determination. This sets up a possible conflict: a complainant's urge to expedite the process may be at odds with an employer's interest in developing a full record or attempting to secure a settlement.

Keeping Records : From 11(c) to §1904.35

Almost 60% of whistleblower charges filed with OSHA fall under Section 11(c) of the OSH Act, which covers most complaints regarding occupational safety and health. Despite making up the majority of all charges, Section 11(c) also has the shortest statute of limitations of any law administered by OSHA's whistleblower division: a mere 30 days after the retaliatory action.

This window is poised to remain open for a good deal longer as OSHA prepares to commence enforcement of 29 C.F.R. §1904.35, part of the new recordkeeping requirements rule. The rule prohibits employers from creating any policy that would "discourage or deter" an employee from reporting a workplace injury or illness. The rule further states that employers are "prohibited from discharging or in any manner discriminating" against employees who report, mirroring the purpose of 11(c).

This marks a fundamental change in how OSHA can pursue some whistleblower investigations. Claims can now be brought under either 11(c) or §1904.35. This has some significant ramifications for employers:

- Section 11(c) required a complainant to file a complaint. Under §1904.35, OSHA may cite an employer for a whistleblower violation, with or without the employee filing.
- The statute of limitations could be expanded from 30 days to six months. Unlike the 30 days permissible for Section 11(c), OSHA has six months to issue a citation under §1094.35.

- Section 11(c) is limited to make-whole remedies (generally, back pay). However, §1094.35 includes both make-whole remedies and the cost of citations. Employers could be liable for up to \$12,600 in citations for a single violation.

OSHA now has the flexibility to pick and choose how to pursue whistleblower claims relating to injury reporting. Should a charge be filed too late to fall under Section 11(c), OSHA can simply classify it as a §1904.35 violation. If an employee does not want to file a charge at all, OSHA can still pursue the employer under the new rule. Employers may, in essence, find themselves having ended up out of the frying pan and into the fire. To reduce the risk of retaliation claims, employers should evaluate all policies on injury and illness reporting for compliance with the requirements of §1094.35. While some or all of these rules and/or initiatives may be rescinded or scaled back under President Trump, it remains to be seen what will change and when.

