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OSHA Whistleblower Protection: Giving Sharper Teeth to a “Legal Dinosaur”

*By Mark A. Lies II and Meagan Newman**

There is no question that the new Administration is cracking down on discrimination against whistleblowers. Critics of the prior Administration claim that OSHA's handling of whistleblower claims was lagging, if not deficient, and led to inadequate protection for employees who raise legitimate safety and health concerns. Still, the statistics for 2009 are not significantly different than those of prior years. In 2009, OSHA received 2,160 whistleblower complaints and completed 1,947 investigations. OSHA recommended litigation or otherwise found merit in only 3 % of whistleblower complaints; 20 % were resolved by settlements; 63 % were dismissed; and 14 % were withdrawn. The Assistant Secretary of Labor for Occupational Safety and Health, David Michaels, has said that he simply does not believe that the vast majority of whistleblower complaints are unfounded--instead he believes that institutional, administrative and legislative barriers to the complaints are behind the statistics showing unsuccessful complaints. As a result, recently there has been much more aggressive enforcement of the laws protecting whistleblowers in the workplace and a major push by OSHA to increase existing legal protections for whistleblowers.

OSHA's Call for Tougher Whistleblower Protections

In testimony before the Senate Committee on Health, Education, Labor and Pensions on April 27, 2010, Assistant Secretary Michaels, called the OSH Act's whistleblower provision a "legal dinosaur." Assistant Secretary Michaels noted as weaknesses in the existing law: inadequate time for employees to file complaints; lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through filing an action in U.S. District Court.

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New Legislation on the Horizon

Even prior to Assistant Secretary Michaels' testimony before the Senate, there had been a push to pass legislation to increase whistleblower protections. Senator Edward Kennedy re-introduced the Protecting America's Workers Act prior to his death last year. A similar bill had been introduced in the House by Representative Lynn Woolsey earlier in the year. Now, the legislation is seeing increased momentum. If passed, the Protecting America's Workers Act (H.R. 2067, S. 1580) will significantly alter the landscape of OSHA enforcement. In addition to strengthening whistleblower protection, the Act will increase civil and criminal penalties for OSHA violations, including changing criminal violations which may be brought against corporate officers and others responsible for violations, from misdemeanors to felonies.

With respect to whistleblowers, the Act will explicitly make reporting illnesses and injuries in the workplace protected activity under the Occupational Safety and Health Act's whistleblower protection provision. Refusing to work when the employee believes she is facing an imminent danger will also be codified as protected activity. Additionally, the Act would grant employees a private right of action to enforce their claims. Yet, OSHA would like more. Assistant Secretary Michaels is asking lawmakers to add provisions to the Protecting America's Workers Act that would increase the potential stakes for employers by adding civil penalties to the provision. Currently, OSHA whistleblower protection provision only allows for compensatory damages. Additionally Assistant Secretary Michaels would like to add a provision that allows for temporary reinstatement of the employee pending the outcome of the whistleblower case, consistent with a similar provision in the Mine Safety and Health Act (MSHA).

OSHA is Making the Most of Existing Protections

Even without the increased enforcement power that the Protecting America's Workers Act would bring, OSHA is currently aggressively administering the whistleblower protection statutes it enforces. Currently, OSHA investigates and enforces whistleblower provisions under 17 federal statutes including the OSH Act, 7 environmental statutes, 6 transportation-sector statutes, as well as nuclear energy safety, and consumer product safety and securities fraud statutes, including the Sarbanes-Oxley Act of 2002.

OSHA is using the tools it currently has to seek higher penalties than were traditionally assessed in whistleblower cases. For example, In March, OSHA ordered the Tennessee Commerce Bank in Nashville to reinstate a whistleblower and pay him more than \$1 million in compensatory damages and other relief. The employee claimed he was fired in retaliation for raising concerns about internal controls, employee accounts, insider trading and other issues, in violation of the Sarbanes-Oxley whistleblower protection provision. Also, in January of this year OSHA secured a settlement with Texas employer, Orion Drilling Co., to pay \$10,000 in back wages after finding an employee was retaliated against for raising complaints about mold in the workplace.

Employers should be aware of the potential liability associated with whistleblower discrimination and take all possible measures to ensure that employees who raise safety concerns

do not face adverse action as a result of this protected activity. Along these lines, employers should develop a strategy, including:

- Employers should have written anti-discrimination and anti-retaliation policies that clearly prohibit any adverse action against employees who have raised safety concerns or engaged in other forms of protected activity.
- Train supervisors to be aware of complaints and how to respond; employees do not have to use any unique language in order to raise a complaint that is protected under OSHA's whistleblower provisions.
- Mandate reporting injuries and illnesses, but be aware that such activity is deemed by OSHA to be protected activity.
- Because OSHA will closely scrutinize safety incentive programs to ensure that these programs are not "disincentive programs" that discourage workers from seeking and getting help when they're hurt on the job, including programs that may award prizes or other incentives based upon the lack of recordable injuries or illnesses.
- Carefully investigate and document all complaints received and respond to employees after investigation.
- Carefully document all employee discipline. Often, discipline issued to an employee whose performance was lacking prior to any incidents of protected activity, is the best way to show that later discipline or termination was not discriminatory, that is, not based upon "protected activity."