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OSHA's New Whistleblower Investigations Manual Lowers Pleading Standards

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The Occupational Safety and Health Administration ("OSHA") just changed the way that it evaluates whistleblower retaliation complaints in a manner that should concern employers in nearly every industry. This is important because OSHA is not merely responsible for enforcing the whistleblower protections set forth in the Occupational Safety and Health Act of 1970 ("OSH Act"). In the years since the OSH Act was passed, Congress has expanded OSHA's whistleblower authority to protect workers from retaliation under 22 federal statutes, including the Sarbanes-Oxley Act ("SOX"), the Affordable Care Act, and the Clean Air Act.[1]

OSHA recently issued a revised Whistleblower Investigations Manual ("Manual"), effective on January 28, 2016, that is intended for use by the agency's whistleblower investigators in determining whether a retaliation case should be pursued or dismissed. The Manual replaces whistleblower guidance that OSHA published in May 2015 and includes two changes that significantly affect important aspects of the investigation process. One change favors whistleblowers; the other favors employer concerns.

Positive Change for Whistleblowers

Under the May 2015 guidance, after examining evidence offered by both sides, the investigator was instructed to dismiss the complaint unless the whistleblower could establish the elements of a prima facie allegation of retaliation. Taking SOX as an example, a complainant is required to prove by a preponderance of the evidence that he or she (i) engaged in conduct protected by SOX, (ii) the employer took an unfavorable personnel action against him or her, and (iii) the protected activity was a contributing

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[1] OSHA also enforces the whistleblower protection provisions of the Asbestos Hazard Emergency Response Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Consumer Financial Protection Act of 2010; the Consumer Product Safety Improvement Act; the Energy Reorganization Act; the FDA Food Safety Modernization Act; the Federal Railroad Safety Act; the Federal Water Pollution Control Act; the International Safe Container Act; the Moving Ahead for Progress in the 21st Century Act; the National Transit Systems Security Act; the Pipeline Safety Improvement Act; the Safe Drinking Water Act; the Seaman's Protection Act; the Solid Waste Disposal Act; the Surface Transportation Assistance Act; the Toxic Substances Control Act; and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.

factor in the adverse personnel action. "A complaint of alleged violation shall be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."[2] If an alleged whistleblower meets this prima facie burden, the burden shifts to the employer to establish by clear and convincing evidence, as an affirmative defense, that it would have taken the same adverse personnel action regardless of any alleged protected activity. Thus, even if the whistleblower could establish a prima facie case, the complaint would still be dismissed if the employer demonstrated by clear and convincing evidence the elements of the affirmative defense.

The Manual eliminates the prima facie standard for determining whether a merit finding should be made, reducing the possibility that a complaint will be promptly dismissed. The new standard that applies to whistleblower retaliation investigations is whether "OSHA has reasonable cause to believe a violation occurred." Specifically, OSHA need only "find reasonable cause that a complaint has merit" by evaluating "evidence provided by both sides or otherwise gathered during the investigation."

Notably, investigators are instructed that the new standard does not require as much evidence as would be required at trial: "The evidence does not need to establish conclusively that a violation *did* occur." They need only be convinced that a judge *could* find retaliation. Investigators are expected to make some credibility determinations to evaluate whether a reasonable judge could find in the whistleblower's favor, but they are not required to resolve all possible conflicts in the evidence or even make conclusive credibility determinations to find reasonable cause that a violation occurred. Investigators need only believe, after considering all the evidence gathered during the investigation, that the whistleblower could succeed in proving a violation.

This subjective standard, and the elimination of the employer's ability to avoid a merit finding by providing clear and convincing evidence that the alleged retaliatory act would have taken place without the whistleblower's protected activity, seems to have tipped the balance in the whistleblower's favor and placed employers in a precarious situation—unable to determine with any degree of certainty their chances of prevailing in any whistleblower case. The new standard will also very likely increase the number of cases that are scheduled for hearings before an administrative law judge, at the request of either the employer that receives a reasonable cause finding or an employee who does not. This uncertainty may result in more employers agreeing to participate in OSHA's early resolution option, which encourages the investigator to explore with both parties whether they would like to attempt to settle the whistleblower retaliation complaint. The resolution option can take place at any point after a whistleblower complaint has been filed, including before an investigation begins.

Positive Change for Employers

OSHA modified the manner in which information is exchanged between the parties. Under the May 2015 guidance, employers and whistleblowers were required to provide

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[2] 29 C.F.R. § 1980.104(b).

to each other every document that they gave to OSHA. Sensitive to the alarming increase in workplace violence incidents, the Manual allows investigators to provide a summary of the information supplied by the employer to the whistleblower in instances where sharing the actual documents could inflame or incite unstable complainants.

This guidance is quite new, and OSHA may, as it tends to do, provide additional guidance documents at a later time to aid investigators and provide more clarity to the regulated community.

What Employers Should Do Now

- Remember that it is essential to maintain documentation of all disciplinary actions and employee performance issues.

- Recommit yourselves to ensuring that disciplinary policies and performance expectations have been clearly conveyed to employees and applied to all employees consistently.

- Train managers on both how to recognize potential whistleblower claims under the statutes most relevant to your industry, and how to effectively manage a current employee who has raised a claim to minimize the possibility of retaliation.

- In appropriate cases, request that an OSHA investigator share a summary rather than the actual documents with someone who has filed a charge. Although the decision to provide a summary remains at the discretion of the investigator, he or she may not appreciate the situation unless you raise the issue and advocate for this method of information sharing.

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