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How Employers Can Prepare for More OSHA Whistleblower Investigations

October 14, 2013—8:00-8:50 AM

Following this session, you will be able to:

- Identify changes made to OSHA's whistleblower program policy, training and internal systems.
- Explain the complaint process.
- Identify what needs to be done to be compliant with the policy.
- Discuss steps that can be taken to minimize the number of potential whistleblower complaints filed.
- Identify how to lessen the impact and liability faced if targeted by OSHA.



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INTRODUCTION

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Introduction to OSHA

- OSHA – Occupational Safety and Health Administration
- Enforces whistleblower provisions of over 20 statutes
 - Workplace safety, airline, commercial motor carrier, environmental, financial reform, food safety, health care reform, pipeline, railroad, etc.
- Employees who engage in “protected acts” are protected against “adverse employment action.”
 - Protected Acts:
 - Participation in safety and health activities;
 - Reporting a work related injury, illness, or fatality; or
 - Reporting a violation of one of the statutes
 - Adverse Action:
 - Includes: firing or laying off; blacklisting; demoting; denying overtime or promotion; disciplining; denial of benefits; failure to hire or rehire; intimidation; making threats; reassignment affecting promotion; reducing hours or pay



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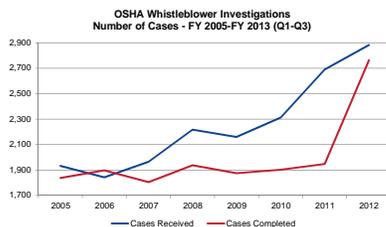
The OSH Act

- OSHA Act – Occupational Safety & Health Act of 1970
- Employers must provide a “safe and healthful workplace.”
- Among requirements, employers cannot discriminate against employees for exercising rights, including filing OSHA complaint, taking part in an inspection, or raising a health or safety complaint.
 - Protects workers who complain to employer, OSHA, or other government agencies about unsafe or unhealthful working conditions or environmental problems.
 - Cannot be subject of adverse employment action because you complained under the OSHA Act.

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OSHA Whistleblower Claims on the Rise

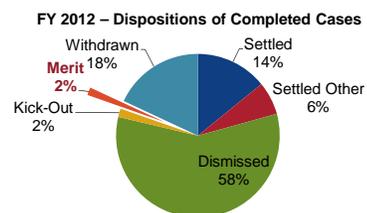
- Over the past few years, OSHA whistleblower claims have been on the rise.
 - From 2011 to 2012, cases received were up 7.14%.
 - From 2011 to 2012, cases completed were up 41.96%.



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The Vast Majority of Claims are Baseless

- Despite this large increase in cases and large increase in completed cases, the vast majority of whistleblower claims are baseless.
 - In 2012, out of 2,882 total determinations, only 45 cases were determined to have merit; while 405 settled and 1,660 were dismissed.



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“Baseless” Claims Still Cost Time and Money

- Whether meritless or not, employers must still spend a great deal of time and money fighting whistleblower claims before they are withdrawn or dismissed.
- According to NERA Economic Consulting, in 2011 the average settlement for whistleblower cases was **\$715,045**.
 - As a comparison:
 - Wrongful termination cases - \$789,184
 - Retaliation cases - \$722,179
 - Employment discrimination cases - \$600,690



THE OSHA COMPLAINT PROCESS

When OSHA Receives a Complaint Under the OSH Act

- First, reviews the complaint to ensure its valid on its face.
- OSHA will review the complaint to see if an off-site investigation or an on-site inspection is more appropriate.
- Considerations for an on-site inspection:
 - Whether physical harm alleged
 - Whether an imminent danger exists
 - Whether employee has failed to adequately respond to information about a hazard
 - Whether employer has “past history of egregious, willful or failure-to-abate OSHA citations within the past three years”

If OSHA Chooses On-Site Investigation

- When OSHA decides to conduct an on-site investigation, employees have the right to have a representative there.
- Recent OSHA Interpretation Letter
 - Employees can designate a union representative to represent them during an OSHA inspection, even where there is no union.
- If you don't have a union, refuse entry to these union representatives.



Off-Site Investigations

- Typically, an investigator will call the employer, describe the reported hazards, and follow up with a fax or letter.
- Employers have 5 days to respond, describe any problems they find, and the corrective actions taken.
- The complainant will receive a copy of the employer's response. If he or she isn't satisfied with the response, he or she can request an on-site inspection.



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Remember

- If you're in compliance with the OSH Act, there is less chance of an employee filing a complaint with OSHA.
- No OSHA complaint means no possibility of retaliation for the complaint.



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RECENT CHANGES TO THE WHISTLEBLOWER PROCESS

OSHA's Announced Changes to Whistleblower Protection Program

- In 2010, OSHA Commissioned a "top-to-bottom" review of its entire Whistleblower Protection Program.
- In 2012, OSHA Deputy Assistant Secretary Richard Fairfax released what is known as "Fairfax Memo."
- Promised to dramatically change the way in which employers can implement employee discipline and safety incentive programs.
- OSHA has lamented the lack of whistleblower claims that have merit:
 - In 2010, Assistant Secretary of Labor David Michaels complained in a speech that only 3% of all whistleblower claims were found to have merit in 2009.
 - He promised to raise this rate, which he termed "an injustice of affected workers."

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OSHA Announced Changes in Four Main Areas

- Restructuring
- Training
- Program Policy
 - OSHA now accepts oral complaints.
 - Including a policy requiring investigators to “make every attempt to interview the complainant in all cases.”
- Internal Systems



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The “Fairfax Memo”

- Released in an effort to focus on obstacles to compliance.
- Outlines how some common employer practices can discourage workers from reporting safety hazards.
- Specific policies highlighted by the memo that could violate whistleblower law:
 - Traditional incentive programs that provide rewards for a lower number of reported injuries or safety violations.
 - Traditional work rules and discipline policies, such as “work carefully” and “maintain situational awareness” if used as a “pretext” for discrimination.
 - Per se safety rules that punish all injured employees regardless of fault.
 - Policies that punish employees who do not report injuries or rule violations in a timely or proper manner.

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The Whistleblower Protection Advisory Committee

- The DOL has also established the Whistleblower Protection Advisory Committee.
- The Committee will advise and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health.
- Will advise on ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA’s administration of whistleblower protections.
- More changes may be coming.



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Results of these Changes

- An increase in the number of witnesses interviewed during OSHA investigations.
- An increase in requests for production of documents, including requiring employers to provide broad categories previously unrequested.
- Per the *OSHA Whistleblower Investigations Manual*, OSHA investigators will provide this information to complainants.

Employers need to think through information requests before simply blindly responding.

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THE OSHA WHISTLEBLOWER PROCESS

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Filing Whistleblower Complaints with OSHA

- Employees must file complaints of retaliation within the legal time limits.
 - OSH Act: 30 days after alleged retaliation
 - Sarbanes-Oxley Act: 180 days after alleged violation
 - Affordable Care Act: 180 days after alleged violation
- Complaints can be by phone, in person, or in writing.



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The OSHA Investigation

- Upon receipt of a complaint, OSHA will first review it to determine whether it is valid on its face.
- Following that, OSHA will begin investigating the complaints.
- Investigations vary somewhat depending on the whistleblower statute in question.
- As mentioned, OSHA has stated that the interviewer must attempt to interview the complainant in all cases.

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What Must Be Determined

- For a finding that retaliation took place, the investigation must reveal:
 - The employee engaged in protected activity;
 - The employer knew about or suspected the protected activity;
 - The employer took an adverse action; and
 - The protected activity motivated or contributed to the adverse action.

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The OSHA Order

- If retaliation is found, and no settlement is reached, OSHA will generally issue an order, requiring:
 - Reinstatement;
 - Back pay
 - Other benefits
- Depending on the statute in question, employer may have to comply immediately.
- Under the OSHA Act, the Secretary of Labor will file suit in federal court to obtain relief.
- Under other statutes OSHA enforces, employees may have to request a hearing before an Administrative Law Judge, with that decision reviewed by the DOL's Administrative Review Board.

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MINIMIZING THE RISK OF OSHA WHISTLEBLOWER CLAIMS

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Stay Compliant and Take Safety Complaints Seriously

- As mentioned, if you're in compliance, there is less chance of an employee filing a complaint.
- Additionally, take employee safety complaints seriously.
 - If employees think you're on their side, they're less likely to file a complaint or request an OSHA investigation.
- No complaint, means no retaliation for filing a complaint.

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Review Existing Whistleblower Policies

- In light of OSHA's renewed emphasis on whistleblowing and the "Fairfax Memo," review existing whistleblower policies and update them where necessary.
- If you don't have an existing whistleblower policy, create one.
- Take a multi-disciplinary approach – include representatives from HR, Legal, and Compliance.
- Regularly meet and review whistleblower claims, share information, and provide feedback to each other.



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De-Personalize the Complaint Process

- When someone files a complaint under OSHA, or one of the other statutes, there are two things to worry about:
 - The complaint itself.
 - Ensuring that the whistleblower doesn't suffer retaliation.
- Creating a layer between the complainant and the direct supervisor can help companies respond faster and professionally.
- Allow for anonymous reporting of claims.
 - Best practice: establish a hotline where employees can call in complaints anonymous. However, record the calls.
 - The hotline should connect to an independent assessor of the complaints, who then contacts an internal auditor to investigate.
 - Internal auditor can be someone within the company.
 - Another option: implement an old-fashioned suggestion box, where employee can leave notes.

Reporting Procedures Should Be Well Publicized.

Train Managers and Supervisors

- Managers and supervisors should be trained on whistleblower rules.
- They should be reminded about the rules against retaliation so it is fresh in their minds.



Pause Before Taking Disciplinary Action

- Once you are aware of an employee's status as a whistleblower, that employee must be treated the same as any other employee.
- This doesn't mean you cannot discipline where warranted.
- If you need to discipline, involve HR, the legal department, or outside counsel when necessary.

Document. Document. Document.

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- Keep track of all actions you take in writing.
- Ensure supervisors and managers take good notes on why they are terminating or disciplining an employee.
- Make sure you managers/supervisors take good notes when confronted with a safety-related complaint or concern.
- Be consistent. Do not treat one employee different from another.

I've Been Accused of Retaliation: Now What?

- Stay calm.
- Gather all of your documents.
- Proof that you complied with the law and regulations is always your best defense.
- Check with counsel before taking any additional actions.

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Thank You For Your
Time and Attention!

Any Questions?

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