THE WHISTLEBLOWER PROTECTION PROGRAM : AN EMPLOYER'S PERSPECTIVE

The existence of over twenty-two federal whistleblower statutes coupled with the increased vigor in which the Occupational Health and Safety Administration ("OSHA") investigates, pursues, and enforces these provisions (collectively referred to as the "Whistleblower Protection Program") suggests that whistleblower complaints may become today's cause de jure. The Whistleblower Protection Program's heightened emphasis on enforcement became evident in 2012, when OSHA restructured the program in a move that "represent[ed] a significantly elevated priority status for whistleblower enforcement." As a part of this restructuring, the Whistleblower Protection Program now reports directly to the Assistant Secretary of Labor rather than the Directorate of Enforcement Programs. In addition to the various statutes within the purview of the Whistleblower Protection Program, employers should also be aware that state law and common law may provide additional avenues of recourse for employees who believe their employers have retaliated against them.

The Whistleblower Protection Program prohibits a person from discharging and/or taking another adverse action against an employee for engaging in certain protected activities. Generally, these activities fall into four broad categories: (1) providing information to a government agency; (2) filing a complaint or instituting a proceeding provided for by law; (3) testifying in a proceeding; and (4) refusing to perform an assigned but unsafe task. Examples of adverse employer actions may include, but are not limited to: discharge, demotion, reprimand, harassment, hostile work environment, lay-off, failure to hire, failure to promote, blacklisting, transfer to a different job, change in duties or responsibilities, denial of overtime or promotion, reduction in pay, denial of benefits, making a threat, intimidation, and constructive discharge.

An applicant for employment, employee, former employee, or an employee's authorized representative may be permitted to file a whistleblower complaint with OSHA. No particular form is required for filing a complaint, and a complaint may be filed either in writing or orally.

Once a complaint is filed, it will first be reviewed for timeliness and whether it asserts a prima facie allegation. If these requirements are met, the complaint will be investigated in accordance with the relevant statutory requirements. After receiving notification that a complaint has been filed, the employer has the opportunity to prepare a written response and/or request a meeting to present his/her position to the agency. In addition, the employee will usually be contacted to obtain additional information.

If the agency believes the evidence supports the allegations set forth in the employee's complaint, OSHA will issue an order, which may require, in addition to other potential remedies, the employer to reinstate the employee, pay back wages, restore benefits, and/or pay compensatory damages. Under certain statutes, the employer must comply with the agency's order immediately. However, each statute sets forth a specific process wherein the employer can contest OSHA's order should he/she receive an unfavorable decision.

To make a *prima facie* showing of a whistleblower violation, an employee must generally show:

1. The employee engaged in a protected activity;
2. The employer knew or suspected that the employee engaged in a protected activity;
3. The employee suffered an adverse action; and
4. The protected activity motivated or contributed to the adverse action.

Thus, a complaint will be dismissed unless the employee has made a showing that the protected activity was a contributing or motivating factor in the adverse action alleged in his/her complaint. Additionally, there are a number of other defenses an employer may assert as a defense to an employee's claims of retaliation.

Pursuant to the Whistle-

Filing Deadlines and Statutes:

OSHA, CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA—30 days

ISCA—60 days

AHERA, AIR21—90 days

STAA, ERA, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, FSMA, MAP21 —180 days

The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is typically considered the date of filing. However, the time for filing a complaint may be tolled for reasons articulated in applicable case law, such as when the employer actively concealed or misled the employee, the employee has a debilitating illness or injury, a major natural or man-made disaster, and/or the employer's own acts or omissions.

Importantly, many jurisdictions employ the "discovery rule" to determine when an employee's cause of action accrues for purposes of calculating the statute of limitations. Generally, the "discovery rule" postpones the accrual date of a claim where the plaintiff is unaware of an injury. Thus, the discovery rule delays the initial running of the statute of limitations from the date the alleged violation occurred, but only until the employee discovers or should have discovered that he/she has been injured and that the injury was caused by the employer's conduct.

In addition, the time in which a party may appeal an order is also prescribed in the regulations, and unless an objection to the same is timely made, the decision becomes a final agency action, not subject to further review. Therefore, it is important for employers to be mindful of the timeliness requirements for appealing the agency's order.

If an employee alleges wrongful termination or retaliation, employers should conduct a thorough investigation into the manner in which the employer-employee relationship ended. For example, if the employee was not fired but instead quit his job, or if the employee was not employed at the time he/she claims to have been subject to retaliation, the employer may have adequate grounds for seeking a dismissal of the complaint.

Additionally, in many instances, an employee who alleges employment discrimination has a duty to mitigate his/her damages by seeking suitable employment. Courts recognize that "[a] person who is 'sincere about obtaining employment' can be expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances.

Certain whistleblower statutes also provide that an investigation into an employee's complaint will be terminated if the employer demonstrates that it would have taken the same adverse action in the absence of the employee's protected activity. In other words, an employer must be able to show another valid reason for taking the adverse action. Therefore, it is imperative for an employer to always be consistent in any adverse action taken against an employee.

As a practical matter, a majority of employers understand that whistleblower violations are the exception rather than the rule. Rarely, does one find an employer that fires an employee who suggests an idea to improve safety in the workplace or forces an employee to perform an illegal act. However, there is always room for improvement, even for the most sophisticated employer, to enhance its operations and ensure compliance with the Whistleblower Protection Program and its implementing regulations.

To avoid and/or minimize the risk of whistleblower claims, employers should have a strong compliance program in place that contains policies and procedures aimed at reducing whistleblower claims while at the same time helping shape positive employee responses to whistleblowers. Employers should, at the very least, have a complaint policy in place accompanied with a compliance statement expressing the employer's strong commitment to comply with all laws and encouraging employees to come forward with any concerns regarding compliance. Notably, employers that have multiple internal channels available for employees to raise compliance issues are often more successful in reducing the risk of their employees "blowing the whistle" outside the workplace. Moreover, employers should ensure their employees are properly trained and educated in using its complaint system. Further, managers and supervisors must be trained on the rights afforded under the Whistleblower Protection Program.

However, if an employer is faced with a whistle-blowing situation, it is important not to treat the complaining employee any differently than an employee who has not complained. Management should also send a consistent, non-retaliatory message in all communications regarding the whistleblower, and to the extent possible, maintain confidentiality of the situation. Once a complaint has been made, the employer should not be afraid to communicate with its employees. Immediately conduct an unbiased investigation into all credible complaints, and if the employer finds the complaint to have merit, it should take reasonably necessary steps to remedy the situation as quickly as possible.

Once a complaint is filed, the parties are not precluded from engaging in settlement discussions. They may agree to settle the matter at any time prior to the issuance of a final order However, before a final settlement agreement is reached, it typically must first be approved by OSHA. Additionally, in certain circumstances, employers will need to consider the potential impacts a whistleblower proceeding will have on other pending litigation and vice versa.

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Although, in the past, the plaintiffs' bar has been hesitant to bring certain whistleblower claims, given the high cost of litigation in proportion to a small monetary award, more recently, there has been more incentive to bring these claims because of the potential to recover punitive damages and attorney fees and expenses. Under certain statutes, the maximum amount that may be awarded for punitive damages is $250,000.

In assessing a punitive damage award, the Supreme Court has set forth guideposts for determining whether such an award meets procedural and substantive constitutional limits of fairness and due process. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that may be imposed." Thus, the following guideposts are considered by the ALJ in determining the appropriateness of a punitive damages award:

1. The degree of reprehensibility of the defendant's misconduct;

2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

3. The difference between the punitive damages award…and the civil penalties authorized or imposed in comparable cases.

However, "[t]he most important indicium of the reasonableness of a punitive damages award, is the degree of reprehensibility of the defendant's conduct." The Supreme Court has instructed courts to consider the following in establishing reprehensibility: whether the harm suffered by the plaintiff was economic or physical; whether the defendant's conduct demonstrated a reckless disregard or indifference to the safety or health of others; whether the plaintiff was financially vulnerable; whether the defendant's conduct was habitual as opposed to an isolated incident; and whether the defendant acted with intentional malice, deceit, trickery, or mere accident.

It is likely we will see an increase in the number of whistleblower claims filed by employees in the future. Therefore, now is the time for employers to reassess and re-evaluate their current practices and procedures to ensure they are maintaining compliance with not only the Whistleblower Protection Program, but other employment and safety laws and regulations as well. Most importantly, regardless of the type of policy or procedure an employer decides to implement at their place of business, remember to always be consistent and to document everything.