

# FP SNAPSHOT ON WORKPLACE SAFETY: WILL SCOTUS WHISTLEBLOWER RULING HAVE BROADER IMPACT ON OSHA INVESTIGATIONS?

Insights  
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Welcome to this edition of the FP Snapshot on workplace safety, where we take a quick snapshot look at a recent significant workplace law development that affects your safety and health programs. This edition is devoted to how a recent Supreme Court ruling could impact workplace retaliation claims and OSHA whistleblower investigations. Read on to find out what you need to do as a result.

## What Happened?

Earlier this month, the Supreme Court held that a whistleblower does not need to show their employer acted with retaliatory intent to prove retaliation under a federal law that protects financial investors. Instead, the Justices unanimously held that a whistleblower bringing a claim under the Sarbanes-Oxley Act (SOX) needs to show that their protected activity (such as reporting or disclosing violations) was a contributing factor in the adverse employment decision. The ruling resolves a disagreement among federal appeals courts and sets a consistent standard of proof in SOX cases. As a result, we expect to see more whistleblower claims make it to a jury trial.

What does a SCOTUS decision about a financial-sector law have to do with workplace safety and the Occupational Safety and Health Administration (OSHA)? Notably, OSHA enforces whistleblower provisions for more than 20 whistleblower statutes, including SOX and the Occupational Safety and Health Act (OSH Act). Moreover, the SCOTUS ruling could impact whistleblower protections under laws that are similarly structured to SOX. This underscores the

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importance of employers being able to articulate the reasons for making an adverse employment decision and to prove they would have made the decision anyway in such cases. For a deeper dive into the SCOTUS decision, [you can read our full Insight here](#).

## What Do Employers Need to Know?

The first thing to recognize is that different whistleblower statutes apply different burdens on employees to prove their employer retaliated against them for reporting alleged wrongdoing. These causations standards generally fall into three categories:

- **“But For” Causation:** This is the most stringent standard, which requires an employee to prove that their employer took adverse employment action against them because of the protected whistleblower activity. This is the standard applied under the OSH Act.
- **“Motivating Factor” Standard:** This is a middle ground analysis that requires the employee to show that the protected whistleblower activity was a substantial factor in the employer’s decision to take adverse action.
- **“Contributing Factor” Standard:** This standard is the easiest for an employee to prove, because they need to show only that the protected whistleblower activity affected in any way the outcome of the employment decision.

The Supreme Court acknowledged in the SOX case that “the contributing-factor framework that Congress chose in Sarbanes-Oxley is not as protective of employers.” But “that is by design,” the Court said. “Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward.”

Does this mean officials will ease the standard for whistleblowers to prove retaliation under other health and safety laws, such as the OSH Act? The answer isn’t clear. While the SCOTUS ruling did not address the OSH Act, it’s worth noting that the current “but for” standard is tougher for employees to establish. So, a shift to a “contributing factor” analysis would ultimately open up the depth and breadth of whistleblower claims under the act.

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## **What Can You Do to Mitigate the Risks?**

Although the stringent “but for” standard still applies to the OSH Act, there are some steps you can take to stay proactive. Moreover, don’t forget that your state enforcement agency may already apply a lower standard of proof than federal OSHA if you operate in a location with its own State Plan – which heightens your risk even more.

Here are 10 action items that can help ensure your policies and practices are effective at preventing retaliation and protecting your business from claims under SOX, the OSH Act, and other whistleblower laws that OSHA enforces:

1. Determine which anti-retaliation laws apply to your operations.
2. Develop a robust policy and clearly communicate expectations with managers, supervisors, and employees.
3. Exercise care when considering discipline for whistleblowers.
4. Train your HR team and managers on how to respond to complaints.
5. Designate a person or task force for oversight and enforcement.
6. Investigate complaints thoroughly and promptly. Make sure employees know who to reach out to with concerns.
7. Do not retaliate. Ensure your managers know what activities are protected and how to respond, or who to contact when they need help navigating a sensitive workplace issue.
8. Do not require confidentiality from complaining employees.
9. Keep information about the investigation confidential to the extent possible.
10. Maintain thorough documentation and proper recordkeeping.

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