



OSHA Making Changes to Whistleblower Investigations

Insights

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On September 4, the Whistleblower Protection Advisory Committee (WPAC) unanimously voted in favor of several revisions to the OSH Act that would expand protection for workers who are retaliated against for raising health and safety concerns at their workplace.

What is WPAC?

WPAC is a committee comprised of twelve voting members who meet biannually to advise and make recommendations to the Secretary of Labor on matters relating to occupational health and safety, including “ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA’s administration of whistleblower protections.” For more information on WPAC, visit <http://www.whistleblowers.gov/wpac.html>.

WPAC’s Recommendations

Several of WPAC’s proposed changes would make it easier for employees to bring retaliation complaints under Section 11(c), despite the overall increase in merit determinations from 2009 to 2013. In his opening remarks at WPAC’s September meeting, Dr. David Michaels, the Assistant Secretary of Labor for OSHA, stated, “[i]n 2013, we more than doubled the number of merit determinations we issued in 2009 (from 450 in FY2009 to 934 in FY2013). These 934 merit determinations included 74 merit findings, 860 settlement agreements, and awards of over \$25 million in total damages to whistleblower complainants—that’s an 89% increase from the \$13.25 million in damages awarded in FY2009.” To view Michaels’ remarks in their entirety, visit https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=3259.

Despite the rise in merit determinations of whistleblower complaints, the advisory committee proposes to lower the standard of proof in whistleblower investigations from the current “preponderance of the evidence” standard to a “reasonable cause” or “contributing factor” standard. There are concerns that lowering the standard of proof could invite an influx of frivolous claims, but the full effect of the recommendation remains unknown for now. OSHA is currently working on a policy memo to provide guidance regarding this change to its standard of proof.

WPAC’s other recommendations include:

- extending the filing deadline for retaliation claims from 30 days following an alleged retaliatory action to 180 days;

- permitting appeal of OSHA decisions directly to Department of Labor administrative law judges, which would replace OSHA's current method of internally addressing appeals;
- giving employees a right to temporary reinstatement following an initial finding in their favor;
- allowing complainants to take their cases to federal court;
- expanding employees' opportunities to seek punitive damages and attorneys' fees; and
- prohibiting pre-dispute arbitration agreements that seek to limit an employee's right to file a Section 11(c) complaint.

What Does This Mean for Employers?

WPAC serves the Department of Labor in an advisory capacity. Its recommendations are merely proposals to change the current regulations governing whistleblower protection. Accordingly, most of WPAC's recommendations will require congressional approval before they can take effect.

Other Changes on the Way for Whistleblower Investigations

OSHA also announced plans to reduce the backlog of Section 11(c) appeals. As one step toward this goal, OSHA will improve the oversight process for its regional offices by assigning assistant regional administrators to specifically address whistleblower issues within each office. Michaels reported that OSHA decreased its response time for Section 11(c) appellants from 279 days in early 2013 to only 89 days by late 2013, and it intends to develop consistent and uniform methods within its regional offices to further reduce the backlog.

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