



OSHA Rolls Out a New Severe Violators Enforcement Program, but for Whistleblower and Not Safety Violations.

Insights

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Even when I disagree with an OSHA safety initiative, I'll concede that some good comes out of it, even if it is only to remind employers of the cost of neglecting safety. However, a Whistleblower Severe Violators Enforcement Program (W-SVEP) addresses a problem which doesn't exist and does far too little good for workers to justify use of OSHA's scant resources. Those of us in the Management labor bar cannot understand the Administration's preoccupation with alleged whistleblowers when we see so little evidence of such bad employer behavior. And we would know of it if it occurred with the frequency claimed by D.C. Consider these facts:

- The supposed studies and evidence touted by DC to show employer retaliation against employees for reporting injuries are statistically invalid, anecdotal or complete junk.
- The percentage of cases proved to have merit or even to result in a meaningful settlement to avoid litigation costs is low.
- Arguably, workplace injuries are over reported. The Injury and Illness Recordkeeping process was not designed to manage employer safety programs and was supposed to be used to detect any trend in hazards that indicated a need for new OSHA Standards. Therefore, the definitions of work related and other terms are so broad as to scoop up non work related injuries.

The shift of US DOL resources to this focus would not bother me as much if either Party would adequately fund OSHA, an Agency whose core mission is supported even by its ostensible opponents.

Oddly, the facts suggest that, with the exception of the Construction Crafts, the Administration's supporters don't really care about workplace safety; at least compared to creating new ways to sue employers.

So What Do We Know About the Whistleblower Severe Violators Enforcement Program (SVEP)?

Not much so far. From the OSHA News Release:

The US DOL is launching a pilot for its first severe violator enforcement program for employers that continually and willfully disregard the rights of whistleblowers.

OSHA's "Whistleblower-Severe Violator Enforcement Program" will be similar to its enforcement

Severe Violator Enforcement Program which includes employers that routinely ignore federal workplace safety and health regulations.

W-SVEP became effective on May 27, 2016, in the agency's Kansas City Region.

The criteria for inclusion on the W-SVEP log will include:

- *All significant whistleblower cases.*
- *Cases deemed worthy of either litigation or the issuance of merit Secretary's Findings in connection with egregious citations, a fatality, or a rate-based incentive program for work-related injuries.*
- *A merit whistleblower case where the employer is already on the enforcement SVEP log.*
- *A company with three or more merit whistleblower cases within the past three years.*

Once an employer is determined to have met one of the criteria listed above, OSHA will place them on the W-SVEP log. After three years, a company may petition the regional administrator for a follow-up visit and removal from the program.

At that time, OSHA will complete a comprehensive review of the company's policies and practices to determine if they have addressed and remedied the retaliation and its effects sufficiently.

In light of the statements in the new Electronic Recordkeeping Rule, think about how broadly OSHA may seek to force employers to change how they run their businesses and the HR function. We're talking about a less black-and-white area than safety. There will be divided opinions as to what practices discourage employers from reporting injuries. Not even the NLRB, with its recent focus on employer rules, or the EEOC so broadly attacks employer practices. This goes beyond back pay, reinstatement and addressing a specific instance of discrimination.

Open Questions.

I haven't yet seen the details and I doubt that many details are yet publically available. OSHA implemented the Safety SVEP without adequately thinking through the process and both OSHA and Employers are still working through (and changing) this process. The W-SVEP draws OSHA into far more murky areas than demanding more employee and supervisor, safety training, safety audits and reports, and hiring new safety personnel. Will OSHA look to OFCCP and EEOC approaches? Even those agencies offer a poor template.

And what is a **"Significant Whistleblower Case?"** Will OSHA apply the same dollar test as in the Safety SVEP?

If a dollar test is used, a large award might indicate an isolated instance of back pay for one highly compensated claimant and not proof of a pattern.

OSHA has the useful “Willful” classification for safety violations. I am unaware of a similar accepted characterization in the Whistleblower statutes.

Review OSHA’s revamped [Whistleblowers Protection page](#).

Conclusion.

Maybe this effort is a scare tactic designed to motivate employers to better behavior. But if the US DOL seriously takes the approach articulated in its 230+ page Electronic Recordkeeping Final Rule to attack employer polices, than employers need to prepare to fight every case and appeal as needed.

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