Avoiding Whistleblower Claims Under the Occupational Safety & Health Act

August 11, 2021
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Overview

- Whistleblower protections in the EHS arena involve overlapping statutory protections, and legal exposures
  - Further protections are under consideration in Congress in Protecting America’s Workers Act
- OSHA/MSHA aggressively enforce their laws - and OSHA also enforces whistleblower provisions of DOT & EPA statutes – and the Sarbanes Oxley Act
- OSHA does cross-referrals to NLRB (with 180 day SOL)
- Rules apply to EHS professionals themselves, in terms of raising concerns with management and the consequences if the hazards are unresolved.
- Anti-retaliation protections extend to post-injury drug testing, safety incentive programs, and COVID-19 complaints
OSHA’s Discrimination Protections

Section 11(c)(1) of Occupational Safety & Health Act of 1970 states:

- “No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.”
OSHA Investigations

Any one of the following eight criteria may trigger an OSHA inspection arising from an employee complaint:

1. A written, signed complaint by a current employee or employee representative that has enough detail to result in an OSHA determination that a violation or danger likely exists that threatens physical harm;
2. An allegation that physical harm has occurred as a result of a hazard and that the hazard still exists;
3. A report of an “imminent danger”;
4. A complaint about company in an industry covered by an OSHA “emphasis program” or a hazard targeted by an emphasis program;
5. Inadequate response from an employer after getting OSHA inquiry;
6. Complaint against employer with a history of egregious, willful or failure-to-abate OSHA citations;
7. Referral from a “whistleblower” investigator; or
8. A complaint at a facility scheduled for or already undergoing an OSHA inspection.
Whistleblower Protections in OSHA’s E-Recordkeeping Rule

- 2016 rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses:
  - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA’s Job Safety and Health – It’s the Law poster (www.osha.gov/Publications/poster.html).
  - An employer’s procedure for reporting work-related injuries and illnesses must be “reasonable” and must not deter or discourage employees from reporting.
  - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses.
Reporting Rules: 29 CFR 1904.35

- ER must inform each employee how s/he is to report a work-related I/I
- ER must provide access to I/I records for employees and their personal or authorized representatives
- ER must have a “reasonable procedure” for EE to report work-related I/I promptly and accurately.
  - “A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace I/I”
- EE must be trained on their right to report I/I
- ER are prohibited from discharging or in any manner discriminating against EEs for reporting I/I
  - *This includes some incentive programs (if employees lose an award based on injury) and disciplinary programs (if employees are penalized more harshly due to injury)*
Codified Rule Against Discrimination – 29 CFR 1904.36

In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:

Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.
OSHA Policy on Drug Tests & Sec 11C

- 2016 E-Recordkeeping Rule included preamble language on drug testing (and incentive programs) – finding some to be violation
  - Biden administration returning to “Obama” interpretation
- Trump policy says permissible drug testing includes:
  - Random drug testing.
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state workers’ compensation law.
  - Drug testing under other federal law, such as DOT regs for CDL
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
    - If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
OSHA Section 11(c) Actions

- An employee who believes that he has been discharged or otherwise discriminated against by any person for protected safety activity may, within 30 days after such violation occurs, file a complaint with the Secretary of Labor.
- Upon receipt of the complaint, the Secretary initiates an investigation and if OSHA determines that the provisions have been violated, the agency will bring an action in any appropriate United States District Court against the employer.

  NOTE: Section 11(c) actions go straight to federal court and are not considered by an ALJ or the OSHRC.
OSHA Section 11(C) Actions

- A discrimination action under Section 11(c) may not be brought directly by an employee (no private right of action); the action may only be brought by OSHA on an employee's behalf.
  - This could be altered by the Protecting America’s Workers Act (pending in Congress)

- Although there is a 30 day deadline to file a complaint with the Secretary of Labor, it is a statute of limitations subject to equitable tolling.
  - For example, if an employer misleads a worker into believing he/she has been laid off rather than fired, the worker can file complaint within 30 days after learning true situation. *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984).
OSHA Current Rule: Work Refusals

The OSH Act does NOT entitle employees to just walk off the job because of potential unsafe or unhealthful conditions but . . .

- When an employee is confronted with either leaving or performing assigned tasks that expose him to serious injury or death, worker is protected from discrimination related to a “good faith” work refusal. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

- The condition causing the employee's apprehension of death or injury must be the type that would cause “a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.” 29 C.F.R. §1977.12(b)(2).

- The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

- 2021 COVID-19 E.O. says that those fearing COVID and refusing job are entitled to unemployment insurance benefits

- OSHA’s COVID-19 NEP has whistleblower component and CSHOs will advise workers on their rights under OSH Act
Pending Whistleblower Legislation

- Protecting America’s Workers Act – HR 2876 introduced 4/28/2021 as comprehensive OSHA reform (20 co-sponsors)
- Expands employee filing period to 180 days
- Adds right to seek temporary reinstatement for complainant
- Clarifies that:
  - No person shall discharge, or cause to be discharged, or in any manner discriminate against, or cause to be discriminated against, an employee for refusing to perform the employee’s duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees.
  - The circumstances causing the employee’s good-faith belief that performing such duties would pose a safety or health hazard shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is such a hazard. In order to qualify for protection under this paragraph, the employee, when practicable, shall have communicated or attempted to communicate the safety or health concern to the employer and have not received from the employer a response reasonably calculated to allay such concern.”
MSHA Section 105C Claims

- Section 105(c) of the Mine Act prohibits discrimination against mine employees based on the exercise of safety and health rights under the Act.
- Unlike the OSH Act, the Mine Act provides for temporary reinstatement of the complainant in many cases while matter is in litigation.
- Mine operator or contractor can be penalized by MSHA, and additional relief can be ordered (reinstatement, back pay etc.) to the miner who was the subject of discriminatory action.
- MSHA Sec. 105(c) penalties can reach $74,775 per violation
  - Individual penalties can be issued to supervisors involved with discriminatory action ... and MSHA reviews these for criminal referral as well!
  - Back pay may equal or exceed this amount by the time litigation is concluded.
Section 405 of the **Surface Transportation Assistance Act** of 1982 (STAA) provides discrimination protection similar to protection provided under Section 11(c) of the OSH Act and Section 105(c) of the Mine Act.

STAA actions are investigated by OSHA’s regional offices.

STAA’s protection is limited to employees of most commercial motor carriers engaged in interstate or intrastate operations who, in the course of their employment, directly affect motor carrier safety.

- It DOES cover CDL drivers
STAA Protections

- STAA mandates that a carrier or employer may not discharge, discipline, or discriminate against a driver regarding pay, terms, or privileges of employment because the driver
  1. files a complaint or begins a proceeding related to the violation of a commercial motor vehicle safety regulation, standard or order or has or will testify in such a proceeding or
  2. refuses to operate a vehicle on the grounds that the operation violates a regulation, standard or order related to commercial motor vehicle safety or on the grounds that the driver has a reasonable apprehension of serious injury due to the vehicle’s unsafe condition.
The unsafe conditions causing the driver’s apprehension must be such that a reasonable person would conclude there is a danger of an accident, injury, or serious impairment of health resulting from the unsafe condition.

The driver must also have sought from the carrier and been unable to obtain correction of the unsafe condition.

A driver who is discharged or disciplined in violation of these provisions may file a complaint with the Secretary of Labor within 180 days after the alleged violation occurred (6 times longer than OSHAAct deadline, making this alternative basis for suit if driver “missed the boat” in notifying OSHA of allegations).
Other Whistleblower Laws

- In addition to the STAA, OSHA also has authority to administer the whistleblower provisions of 12 other laws!
- These deal with issues such as environmental hazards, airlines, pipelines, nuclear power, and securities fraud.
OSHA handles discrimination claims arising under laws including:

- The Clean Air Act (42 U.S.C. §7622)
- The Safe Drinking Water Act (42 U.S.C. §300j-9(i))
- Federal Water Pollution Control Act (33 U.S.C. §1367)
- Solid Waste Disposal Act (42 U.S.C. §6971)
- Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9610)
Sarbanes-Oxley Act


- Under Title VIII of the SOA, OSHA has jurisdiction over complaints by employees of companies with securities registered under section 12 of the Securities and Exchange Act, and over those companies that must file reports pursuant to section 15(d) of that Act.
- OSHA also has jurisdiction over any officers, agents, contractors, or subcontractors of such companies.
Sarbanes-Oxley Act

- The SOA seeks to prohibit adverse action against employees who provide information to supervisors or the government relating to securities fraud.
- The statute specifically covers information provided internally (including safety/environmental self-audits), as well as information provided to Federal regulatory or law enforcement agencies and Congress.
- An employee has 90 days from the date of the violation to file a complaint against a company over which OSHA has jurisdiction.
- The action itself and the procedures relating to it are to be governed by rules set forth in 49 U.S.C. §42121(b), “AIR21”
What Is “Protected” Activity?

- Raising safety and health (or environmental) complaints with management;
- Complaints to OSHA/MSHA/EPA/DOT
- Giving statement to government inspectors during inspections or investigations.
- Even where the employee has not made a complaint or statement, he/she can be protected if management THINKS that the worker is an informant or a complainant.
- A complainant is protected even if the agency investigates and determines that no violation exists!
Other “Protected” Activities

- A worker is also protected if he/she is the subject of a medical evaluation and potential transfer under a standard (e.g., because of overexposure to lead or arsenic)
- An employer cannot take action because a worker exercised any other statutory rights under the OSH Act (e.g., the right to be compensated while serving as the “employee rep” during inspections, or worker reported an injury/illness)
  - OSHA views threat (or actual) drug test in response to reporting an injury or illness as potentially retaliatory (and chilling effect) – policy shifting
- An employer cannot discriminate against a worker who refuses to work under an alleged unsafe or unhealthful condition, or who refuses to operate equipment that he/she believes is unsafe.
Even More Protected Activities!

Other types of protected employee activities include:

- Confidential statements to OSHA/MSHA investigators and compliance officers,
- Contest of a citation’s abatement date,
- Initiation of proceedings for promulgation of an occupational safety and health standard,
- Application for modification or revocation of a variance,
- Judicial challenge to a standard,
- Trial testimony in a civil penalty proceeding against the employer, and
- Appeal of Review Commission order (e.g., where an employee intervenes in litigation to challenge dismissal of a citation or reduction of OSHA/MSHA civil penalty).
Adverse Actions

An employer is forbidden from considering any safety-related activity or complaints by a worker when making an employment decision that could be considered “adverse” by the employee or which constitutes “reprisal.” These include, but are not limited to:

- termination,
- lay-offs,
- demotion,
- shift or duty reassignment,
- reduction in pay,
- loss of overtime availability,
- transfer to a different worksite, and
- “blacklisting” an employee by giving his/her a bad reference.
Preventative Measures

- No employer should hinder any Section 11(c) investigation or prevent employees or management representatives from talking to the investigator.
- All complaints must be thoroughly investigated, and appropriate remedial action taken promptly.
- Any disciplinary action that could have Section 11(c) implications should be carefully considered and undertaken only with witnesses present.
- Such matters should be kept confidential, to extent practicable, to avoid potential defamation suits.
- Consider OHS implications of DEI-related complaints – sexual assault and even bullying may be actionable by OSHA (and injuries arising from workplace harassment are recordable/reportable).
Preventative Measures

- Counsel should normally be consulted in these situations.
- A record of all disciplinary action should be maintained, even prior to the receipt of a complaint, so that an employee’s performance can be documented in the event that the mine operator must support his non-discriminatory decisions.
- Disparate discipline of injured workers or complainants will be actionable under Section 11(c) and Section 105(c)!
Burden of Proof

- In whistleblower cases, the burden of proof is divided between the complainant and the employer.
- The complainant bears the burden of proving that he/she engaged in a protected activity and that the adverse action was motivated IN ANY PART by the protected activity.
- If the complainant meets this burden, this constitutes a *prima facie* case.
What Is “Discriminatory Intent”?

Courts have inferred discriminatory intent from the following:

1. knowledge of the employer that the complainant was making safety complaints;
2. hostility toward safety matters and complaints about safety;
3. proximity between the time safety complaints were made and the time that adverse action occurred; and
4. disparate treatment (e.g., the complaining worker was disciplined more harshly than others who engaged in similar non-safety-related action)

- The existence of prior discrimination proceedings at a particular company will likely be considered by the judge in determining “hostility” toward safety complainants.
Employer’s Response

- The employer may rebut the finding by showing that the worker was either not engaged in any protected activity, or that the adverse action was not motivated in any part by the protected activity.
- Even if the protected activity was a factor in the decision, the employer can still defend if it demonstrates that it would have taken the adverse action in any event for the unprotected activity alone.
  - DOCUMENT, DOCUMENT, DOCUMENT!!!!!
Discriminatory action against an employer for safety and health related activity may also lead to legal action under common law doctrines of wrongful discharge.

- Although the OSH Act creates an administrative procedure to investigate employee discrimination complaints, some Courts have held that this procedure is not the sole remedy available to employees. See Kilpatrick v. Delaware County S.P.C.A., 632 F. Supp. 542 (E.D. Pa. 1986); Sorge v. Wright's Knitwear Corporation, 832 F. Supp. 118 (E.D. Pa. 1993).
- This is because there is no “private right of action” under the OSH Act and OSHA’s failure to prosecute was viewed as not waiving worker’s other tort rights under common law.
- Other courts, have held that there is no private cause of action under federal law arising from a private employer's retaliatory discharge of an employee who has filed a complaint or instituted a proceeding under or related to the OSH Act. See George v. Aztec Rental Center, Inc., 763 F.2d 184 (5th Cir. 1985).
Worker’s Compensation Laws

- Most state workers’ compensation laws provide that it is unlawful for employer to discharge or otherwise discriminate against worker for claiming worker’s comp or testifying at a comp hearing.
- Claimant bears ultimate burden of persuasion in retaliatory discharge claims.
- Relevant inquiry is whether ER’s proffered reasons for termination are credible or pretextual.
Practical Considerations

- Regardless of which statute a claim arises under, employers must be prepared to manage claims intelligently...
  - No employer should attempt to hinder any investigation of a safety, health, STAA, or environmental complaint or prevent management employees from talking with compliance officers or investigators.
  - Managers must know the law AND know their rights.
  - The correction of any unsafe or unhealthy condition (or environmental hazard) must be a priority at any workplace.
  - All employee complaints must be investigated thoroughly – even the chronic complainer may have a legitimate gripe once in a while!
Practical Considerations

- Any disciplinary action should be taken with at least one other management official present (a witness and credibility verifier).
- Employees cannot use these laws to protect themselves from improper conduct (conduct for which they would have been disciplined in any event).
- A documented record of disciplinary action should be kept to demonstrate the legitimate (non-safety-related) basis of employer’s decisions.
- Managers must be able to readily (and quickly) distinguish between protected and unprotected activity.
- Understand which laws apply to which workers (and which workers may be covered by multiple laws – e.g., OSHAct AND STAA).
Practical Considerations

- Supervisory personnel should keep confidential those problems experienced with difficult employees on the job. Unnecessary discussion may serve as admissions against interest in later proceedings.
- Should a matter proceed to litigation, tactical decisions must be made quickly. The cost/benefit of litigating should be weighed at the outset.
- If mistakes were made, acknowledge these problems early with company counsel in order that appropriate decisions can be made concerning litigation and settlement.
- Although you cannot prevent discrimination claims from being filed, effective training and communication – as well as use of common sense – will help reduce the number of sustainable claims!
Questions????

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Thank you!

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