

LEGAL UPDATES

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Service

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OSHA Issues New Internal Whistleblower Investigation Manual

In response to critical reports by both the Government Accountability Office and the Labor Department Inspector General, and the expansion of federal whistleblower protections, OSHA has revamped its internal Whistleblower Investigations Manual (Manual). While the Manual has been billed as an effort to improve, streamline and standardize investigations of whistleblower complaints, it also reflects a move to make whistleblower complaints easier to file, more manageable to investigate and more onerous on employers. In other words, employers should be aware of an increased vigor in OSHA investigation activity following the adoption of the new Manual, particularly in light of the pressure placed on OSHA for improvement in its investigation of whistleblower complaints.

OSHA enforces the whistleblower provisions of 21 federal laws, which cover a variety of subject matters from workplace safety to transportation, environmental and consumer protection, healthcare, and securities regulation. Those many whistleblower provisions protect employees who report violations of federal law from retaliation by their employers. OSHA is responsible for investigating employee complaints of retaliation to determine, among other things, whether the complainant engaged in protected activity (e.g., exercise of rights under the applicable federal law or reports, whether internal or external, to authorities regarding violations of the law), whether the respondent knew about the activity, whether the respondent subjected the complainant to adverse action (e.g., discipline, demotion, termination of employment, reduction in pay and other negative job consequences), and whether the protected activity motivated or contributed to the adverse action. If OSHA determines that evidence supports the whistleblower's complaint, it will seek to remedy the retaliation with the employer and, if necessary, seek judicial relief.

The Manual guides OSHA investigators in the conduct of whistleblower investigations. OSHA had not updated the Manual since August 22, 2003, when OSHA had responsibility for enforcement of 14 whistleblower provisions. On September 20, 2011, however, OSHA issued a revised Manual (http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf). Recognizing that each of the now 21 whistleblower provisions OSHA enforces "contain[s] various differences and distinctions in the way cases are processed and investigated," the updated Manual is intended to guide investigations under each provision. The 249-page Manual contains several significant changes, which OSHA has noted under "Significant Changes" on Pages IV and V of the Manual and explained in more detail in Chapter 1, Part VIII.

Those changes include the addition of three new chapters and other updates to provide guidance for whistleblower complaints under the Federal Railroad Safety Act (Chapter 16), the National Transit System Security Act (Chapter 17), and the Consumer Product Safety Improvement Act (Chapter 18). OSHA has also adopted a revised "global" sample letter system that "can easily be modified for use in whistleblower investigations under any statute within OSHA's jurisdiction." For example, the Manual includes standard complainant and respondent notification letters at pages 2-11 and 2-13, postponement and deferral letters at pages 4-13 to 4-15, and Secretary's Findings at pages 5-16 to 5-30. Numerous "global" sample letters and other sample documents are included throughout the new Manual.

The updated Manual also contains several other notable changes/updates related to the intake and evaluation of complaints, the conduct of investigations, OSHA's report-writing process, and remedies. They include the following:

Throughout the investigation of a whistleblower complaint, OSHA will provide the complainant with "a copy of all of the respondent's submissions to OSHA that are responsive to the complainant's whistleblower complaint," subject to OSHA's redaction of information pursuant to the Privacy Act. See Chapter 1, § XI.

OSHA clarifies that whistleblower complaints under any statute may be filed orally or written, and in any language. These complaints can also be filed electronically via the Whistleblower Protection Program website, www.whistleblowers.gov. While acknowledging that OSHA's implementation of regulations for certain federal laws requires complaints to be made "in writing," the Manual formalizes a "longstanding practice of reducing all orally-filed complaints to writing." See Chapter 1, § II.

The Manual contains requirements for an investigator's efforts to obtain information from the complainant. It requires that the investigator attempt to interview the complainant in every investigation and attempt to obtain all relevant documentation from the complainant. It further encourages the investigator to obtain a signed interview statement from the complainant. See Chapter 3, § VI.D.

It provides expanded guidance on dealing with "uncooperative respondents," including procedures for issuance of administrative subpoenas during whistleblower investigations. The Manual provides that "[w]hen drafting subpoenas, the party should be given a short timeframe in which to comply" and the subpoena should use "broad language." It also provides investigators two options following a respondent's failure to cooperate or refusal to respond, though the Manual does not indicate a preference between the two. One option is to "evaluate the case and make a determination based on the information gathered during the investigation." The other option is to enforce the subpoena. Additionally, while OSHA *may* advise a respondent via letter of the consequences for failing or refusing to cooperate, it does not require such correspondence be sent to a respondent. See Chapter 3, § VI.F.

The Manual no longer requires that an investigator obtain a signed statement from each relevant witness. An investigator must still attempt to interview each relevant witness. See Chapter 3, § VI.H.

A new section outlines the various remedies available to complainants under each OSHA-enforced statute, including reinstatement and front pay, back pay, compensatory damages, punitive damages, attorney's fees and interest. It further provides that interest on back pay and other damages shall be computed by compounding daily the IRS interest rate for the underpayment of taxes. See Chapter 6, § II.

What This Means to You

The Obama Administration has set out to strengthen OSHA's Whistleblower Protection Program through restructuring, adding investigators and providing them additional training, and specifically budgeting for program improvements. OSHA has also requested a \$6.1 million budget increase for fiscal year 2012 to fund 45 additional investigators. As the number of whistleblower complaints rises, the revamped Whistleblower Investigations Manual provides further indications of OSHA's intent to step up enforcement. Employers should be prepared for increased and aggressive enforcement efforts, and steadfastly enforce policies prohibiting retaliatory conduct.

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