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OSHA IN THE GOLDEN AGE OF WHISTLEBLOWING

Tips for Avoiding Whistleblowing "Retaliation" Claims

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By Steve Parascandola and Kerry Shad

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Much has been written about how "whistleblowing"—instances of employees alleging or reporting suspected employer misconduct—is on the rise. What is less well-known are the reasons for this, and the role of one agency in particular in facilitating the increase in whistleblower claims: OSHA. While certain other agencies (e.g., the IRS and SEC) also have "whistleblower protection units," OSHA has been leading the charge in terms of both encouraging whistleblower claims and in guarding against employer retaliation.

Why So Many Whistleblowers?

Historically, simple revenge was a common basis for a call to OSHA to report alleged employer misconduct. Most every HR director has at least one tale of an aggrieved employee who, feeling underappreciated or worse, has threatened to "report" alleged regulatory violations. However, today's whistleblowers are not always the traditional disgruntled employee with little actual basis for a complaint other than a perceived slight or grudge over being let go. Nowadays, whistleblowers are coming increasingly from the ranks of otherwise seemingly content employees.

There are different reasons for this. Perhaps chief among them is the increasing array of regulatory protections against employer retaliation. OSHA alone is responsible for investigating whistleblower complaints under more than 20 different federal statutes. There are many similar state regulatory programs providing such protections for employees. As the number of these protections has grown, so has employee awareness of them. Some believe this growing awareness likely has resulted in increased employee willingness to report employer misconduct that simply annoys or bothers the conscience of individual employees.

Another reason given for the rise in whistleblowing is the increase in financial incentives for reporting employer misconduct. Employees who report fraud on the government (e.g., overbilling the government for goods or services) can receive financial rewards, as can those who report securities violations.

Increased Scrutiny and the Role of OSHA

It is no secret that the Obama Administration has made workplace safety a key part of its regulatory focus over the past six years. Increased federal funding for greater OSHA enforcement has been a stated goal of the Administration. President Obama's first Secretary of Labor, Hilda Solis, famously said some years ago that OSHA was officially getting "back into the enforcement business." Assistant Secretary David Michaels has made

agency enforcement a top priority during his tenure, commissioning, among other things, a "top-to-bottom review" of OSHA whistleblower protection programs with an eye toward affording employees greater freedom to report noncompliance.

Over the past six years, OSHA penalties per citation are up, penalties per inspection are up, and cases involving penalties of greater than \$100,000 are up. OSHA referrals to the U.S. Justice Department for criminal prosecutions have increased. OSHA also has placed a heavy focus—and insisted that state OSHA programs follow suit—on greater assessment of "serious" citations for noncompliance.

In fact, the heavy emphasis on additional "serious" and "egregious" citations has resulted in an almost 25% increase in companies in OSHA's Severe Violator Enforcement Program. Agency referrals to the Department of Justice for criminal charges—historically infrequent—have increased over this period, as have the number of facility inspections themselves and, perhaps most ominously, the number of inspections actually resulting in citations.

This year will prove to be no different in this regard, with some seeing 2015 shaping up as perhaps OSHA's busiest year ever in terms of enforcement. In early February, the White House requested an additional \$18 million for enforcement, an additional \$5 million for whistleblower protections, and an additional \$4 million for state OSHA plan funding. OSHA's whistleblower protection unit has grown dramatically over the past six years, with the Whistleblower Protection Program alone now taking up about 4% of the agency's overall budget. OSHA also plans to add approximately 90 new employees, mostly directed at enforcement-related duties. In addition to increased enforcement of currently-existing regulations, OSHA also has ramped up its rulemaking activities.

Tips for Avoiding Whistleblower "Retaliation" Claims

Manufacturers in particular are wise to pay close attention to OSHA's increased activities these days. Unlawful retaliation claims have more than doubled since 2000. Once OSHA or another agency has received an employee complaint, the odds are that the agency is going to conduct some form of investigation.

Employers are wise to follow a few simple steps on the "prevention" side: know the laws and don't break them; adequately communicate regulations and company practices and policies to employees; and create a work environment where employees feel empowered to honestly and ethically self-audit and report possible wrongdoing.

The following scenario is becoming more common among manufacturers: OSHA opens an investigation at your workplace, interviews a number of employees and, based on the information provided, issues citations to your company. You as the employer still have to deal with one or more of the employees who were interviewed and thereby engaged in "protected activity."

Among other things, OSHA specifically views any of the following as possible retaliatory measures against a whistleblower: discipline, demotion, suspension, reassignment, dismissal, reduction in hours or pay, denial of overtime or promotion, blacklisting, threats and other forms of "intimidation," and failure to hire or rehire.

What should you be thinking about? How do you deal with a situation that breeds discontent and mistrust?

First of all, it's important to know what specific rights potential whistleblowers have and help management understand those rights. In short, employees have the right to report safety and health-related workplace or environmental violations by an employer and to participate in an investigation into such reports by OSHA without

negative repercussions.

Here are some key considerations for dealing with employees after they have engaged in protected activity and become a whistleblower:

- Think about moving the employee to a different supervisor if the employee's reports of wrongdoing involved their previous supervisor.
- Help the involved supervisor and anyone else who is aware of the protected activity:
 - *Understand the employee's right to raise the concern.*
 - *Understand the no-retaliation policy and what actions may constitute retaliation.*
 - *Professionally manage their emotions by acknowledging both the difficulty in managing an employee who has accused them of wrongdoing and the necessity of doing so fairly.*
- Have Human Resources reach out to the employee to check in with how they are doing, and document the discussion.
- If the employee raises a retaliation issue, consider having a person who was not involved in the original "protected" complaint investigate the retaliation allegation.
- Document and address performance issues. Hopefully, they were documented to the extent such issues existed before the employee became a whistleblower. Employers should not be held hostage by an underperforming employee who has engaged in protected activity, but employers must be smart in dealing with such employees.
- Before terminating an employee who engaged in whistleblowing, ask yourself the following questions:
 - *Are the reasons for the termination well documented?*
 - *Do the facts support the stated reasons or are there inconsistencies?*
 - *Do the documents support the reasons or are there contradictory documents or no documents?*
 - *Is the performance or conduct at issue new or was it tolerated before the employee blew the whistle, but not after?*
 - *Is termination consistent with past practice in similar situations?*
 - *Is there some connection between the termination and the whistleblowing? If so, consider bringing in an uninvolved decision maker to evaluate the termination.*
 - *Would an outsider view the termination as reasonable?*
 - *Would your best employee be dealt with the same way?*

While these steps in and of themselves do not guarantee a successful resolution of the complaint, they can minimize any potential escalation of tempers and legal action.

As OSHA continues to receive increased funding for enforcement activities and whistleblower protection, smart manufacturers will step up their efforts to comply with regulations and proactively mitigate the significant legal risk associated with employee complaints and/or participation in OSHA investigations. Understanding how these issues arise and knowing how to handle them when they do is not easy, but it is well worth the effort.

Steve Parascandola and **Kerry Shad** are partners at Smith Anderson (www.smithlaw.com), a Raleigh, NC-based law firm. Prior to joining Smith Anderson, Parascandola spent more than three years as an assistant attorney general in the North Carolina Department of Justice. Shad's practice focuses on representing employers in all types of employment-related litigation. She regularly defends employers against complaints of discrimination, harassment and retaliation of all kinds.

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