U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

AUG 23 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS;
WHISTLEBLOWER PROGRAM MANAGERS

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

JORDAN BARAB
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN, Director
Directorate of Whistleblower Protection Programs

SUBJECT: New policy guidelines for approving settlement agreements in whistleblower cases

As part of OSHA's administration of whistleblower protection statutes, OSHA reviews settlement agreements between complainants and their employers reached during the investigative stage to ensure they are fair, adequate, reasonable, and in the public interest, and that the employee's consent was knowing and voluntary. In reviewing these agreements OSHA sometimes encounters provisions that prohibit, restrict, or otherwise discourage a complainant from participating in protected activity related to matters that arose during his or her employment. In those cases, OSHA must ensure that such clauses are removed or clarified so that the agreements are lawful and consistent with the underlying purposes of the whistleblower protection statutes. Accordingly, below are updated criteria that OSHA will use to evaluate whether a settlement impermissibly restricts or discourages protected activity.

This guidance supersedes the guidance in Chapter 6, paragraphs XII.E.2 and 3 of the OSHA Whistleblower Investigations Manual, but does not otherwise change OSHA's policies with regard to review of settlements:

Criteria for Reviewing Private Settlements for Provisions that Restrict or Discourage Protected Activity

OSHA will not approve a "gag" provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity. Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government. These constraints often arise from broad confidentiality or non-disparagement clauses, which complainants may interpret as restricting their ability to engage in protected activity. Other times, these constraints are found in specific provisions, such as the following:

a. A provision that restricts the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct. For example, OSHA will not approve a provision that restricts a complainant's right to provide information to the government related to an occupational injury or exposure.

b. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.

c. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.

d. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a "reward") from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws.[1] Such an award waiver may discourage a complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. For example, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement.

OSHA occasionally encounters settlements that require a breaching party to pay liquidated damages. As liquidated damages are sometimes unenforceable, OSHA reserves the right not to approve a settlement where the liquidated damages are clearly disproportionate to the anticipated loss to the respondent of a breach. OSHA may also consider whether the potential liquidated damages would exceed the relief provided to the complainant, or whether, owing to the

[1] Other statutes that establish award programs for individuals who provide information directly to a government agency include the Commodity Exchange Act, 7 U.S.C. 26(b); Foreign Corrupt Practices Act, 15 U.S.C. 78u-6(b); Internal Revenue Act, 26 U.S.C. 7623(b); and the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. 30172.

complainant's position and/or wages, he or she would be unable to pay the proposed amount in the event of a breach.

When the above types of provisions are encountered, or settlements have broad confidentiality and non-disparagement clauses that apply "except as provided by law," employees may not understand their rights under the settlement. Accordingly, OSHA will ask parties to remove the offending provision(s) and/or add the following language prominently positioned within the settlement: "**Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.**"