



# OSHA REGIONAL NOTICE

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

---

**DIRECTIVE NUMBER: CPL 02-16-07**

**EFFECTIVE DATE: May 27, 2016**

---

**SUBJECT: Regional Whistleblower Severe Violator Enforcement Program**

**REGIONAL IDENTIFIER: Region VII**

---

## ABSTRACT

- Purpose:** The purpose of this notice is to establish a four year Pilot in Region VII and to create a resource by which the most egregious violators of Whistleblower Statutes are identified.
- Scope:** This Notice applies to the Region VII Whistleblower Protection Program (“WPP”).
- References:** OSHA Instruction: CP: 02-03-007, January 28, 2016 – Whistleblower Investigations Manual, 29 CFR Parts 24, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, and 1987 the whistleblower protection provisions for the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §660(c) (section 11(c)); Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105; Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §2651; International Safe Container Act (ISCA), 46 U.S.C. §80507; Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367; Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971; Clean Air Act (CAA), 42 U.S.C. §7622; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610; Energy Reorganization Act (ERA), 42 U.S.C. §5851; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. §42121; The Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. §60129; Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109; National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. §2087; Section 1558 of the Affordable Care Act (ACA), P.L. 111-148; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank

Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203; Seaman's Protection Act, 46 U.S.C. §2114 (SPA); Section 402 of the FDA Food Safety Modernization Act (FSMA), P.L. 111-353; and Section 31307 of the Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. §30171.

Cancellation: None

State Impact: None

Action Offices: All Region VII Area Offices

Originating Office: Kansas City Regional Office

Contact: Assistant Regional Administrator for Whistleblower Protection Programs  
USDOL-OSHA Kansas City Regional Office  
2300 Main St, Suite 1010  
Kansas City, MO 64108  
(816) 502-9016

By and Under the Authority of



Marcia P. Drumm  
Regional Administrator

## Executive Summary

The purpose of this Notice is to establish a four year Pilot for a Regional Whistleblower Severe Violator Enforcement Program (“W-SVEP”) that will allow Region VII to identify and track the Region’s most egregious offenders of all whistleblower statutes enforced by OSHA through OSHA’s Region VII Administrator. This pilot applies to cases under the jurisdiction of OSHA’s Kansas City Regional Office.

Significant Changes: None, this is a new Program

- I. Subject: This Notice implements a Pilot for the Region VII Whistleblower Protection Program to collect data, identify offenders and apply consequences under all whistleblower statutes enforced by OSHA through OSHA’s Regional VII Administrator. It applies to cases under the jurisdiction of OSHA’s Kansas City Regional Office.
- II. Purpose: The purpose of this Notice is to outline and implement the procedures to follow during this Pilot program.
- III. Scope: This Notice applies to the Region VII Whistleblower Protection Program.
- IV. References: OSHA Instruction CP: 02-03-007, January 28, 2016 – Whistleblower Investigations Manual, all applicable directives, regulations, and all whistleblower protection statutes delegated to OSHA as listed on page 1 of the Notice.
- V. Expiration: This Notice expires on May 27, 2020.
- VI. Action: Region VII OSHA personnel must follow the procedures contained in this Notice.
- VII. Background: WPP provides a vital service to America’s workers, furthering the Agency’s mission of providing safe and healthy workplaces free of retaliation. Without meaningful whistleblower protections, workers are made to feel isolated and powerless. WPP continues making tremendous strides in its efforts to improve the strength of its program. The implementation of W-SVEP will signal another step in that direction and more closely align the priorities of OSHA’s whistleblower and safety/health enforcement programs.
- VIII. Procedures:
  - a. Any WPP investigation that meets one or more of the criteria below will be considered a W-SVEP employer and added to the W-SVEP log:
    1. Merit whistleblower case directly related to a fatality.
    2. Merit whistleblower case involving an egregious safety/health enforcement case.

3. Merit whistleblower case where Respondent has a rate-based incentive program for reporting injuries.
  4. Merit whistleblower case where Respondent is on the safety/health enforcement SVEP log.
  5. Significant whistleblower case.
  6. Three or more merit whistleblower cases within the past three years.
- b. An employer's inclusion in the W-SVEP (See Appendix B) will coincide with additional measures to publicize the egregious behavior and inclusion on the W-SVEP log. Utilizing the language "for appropriate action as warranted" in all applicable correspondence, the Region will implement the following measures to that end:
1. News releases for merit Secretary's Findings and/or U.S. district court filings will note the employer's inclusion in the W-SVEP.
  2. A copy of the merit Secretary's Findings and/or U.S. district court filing, along with a copy of the press release, will be provided to the company's corporate headquarters.
  3. A copy of the merit Secretary's Findings and/or U.S. district court filing, along with a copy of the press release, will be provided to federal agencies (e.g., DOT, FRA, SEC) with primary enforcement authority over the type of complaint filed.
  4. A copy of the merit Secretary's Findings and/or U.S. district court filing, along with a copy of the press release, will be provided to all labor unions within the employer's facility.
  5. A copy of the merit Secretary's Findings and/or U.S. district court filing, along with a copy of the press release, will be provided to all DOL agencies having jurisdiction over the employer's facility. This will also include the EEOC and an OSHA state plan if applicable.
  6. A compliance referral will be made to OSHA's Safety & Health office regarding possible 1904.35 (b)(iv) violations upon implementation of the new rule.
- c. An employer may be removed from the W-SVEP log when a court does not find merit or reduces damages to the point an employer no longer meets W-SVEP criteria. Removal may also occur after a follow-up process as described below. Three years after receipt of notification of qualifying for W-SVEP status, the employer may submit, in writing, to the Regional Administrator, or designee, a request for a follow-up investigation. Below is a summary of the follow-up process:
1. The written request, and supporting documentation, must be submitted to the Regional Administrator, or designee.
  2. The Regional Administrator, or designee, will review the follow-up request for eligibility and will assign to the Assistant Regional Administrator (WPP) for follow-up investigation.

3. The Regional Investigator will conduct a follow-up investigation, which will comprise the following:
    - i. As applicable, a review of the employer's internal policies and procedures that correct the whistleblower merit findings to ensure changes have been implemented.
    - ii. A review of Region VII enforcement records to determine if additional significant or merit whistleblower cases occurred after the employer was placed on the W-SVEP log, as well as any new fatalities, safety/health egregious citations issued, and whether the employer is still on the safety/health enforcement SVEP log.
    - iii. A review of any additional evidence submitted by the employer to support removal from the W-SVEP log.
    - iv. In-person or telephonic interviews of management and non-management employees to ensure changes have been implemented and there is no longer a chilling effect in the workplace. (See Appendix A)
  4. When the Regional Investigator completes the follow-up investigation, those findings will be submitted to the W-SVEP committee to determine approval or denial of the removal request. The committee will be comprised of five members, which will include a Regional Solicitor and other appointees made by the Regional Administrator, or designee.
- d. The committee will evaluate the original case and the follow-up investigation material and approve or deny the removal request in accordance with the following criteria:
1. The W-SVEP committee will thoroughly evaluate the Regional Investigator's findings along with any additional evidence from the employer not previously disclosed, and the original reason the employer was added to the W-SVEP log.
  2. The W-SVEP committee will make a determination within 30 days to approve or deny the employer's request to be removed from the W-SVEP log.
  3. The Assistant Regional Administrator (ARA) WPP will notify the employer in writing within 10 days of notification of the decision of the W-SVEP committee.
  4. If the W-SVEP committee approves the removal from the W-SVEP log, the employer will be removed upon notification of the decision.
  5. If the W-SVEP committee denies the removal from the W-SVEP log, the employer will be notified in writing and will be notified of its right to reapply for removal the following year.

IX. Evaluation: Sixty (60) days after the Pilot has concluded, the Assistant Regional Administrator shall submit to the Regional Administrator an evaluation report that includes, but is not limited to:

- 1) The Assistant Regional Administrator's assessment of how effective the Pilot was in meeting its goals.
- 2) Data and information used to support the conclusions stated above. Some of the criteria being evaluated will include responsiveness of employers, policy and/or procedural changes and its effect on the workplace, and the number of whistleblower complaints, by employer, since inclusion in the log.
- 3) Statement and rationale of whether the Pilot program should be continued, modified, and/or rolled out in other Regions.
- 4) Any other comments or recommendations received during the Pilot.

## APPENDIX A

U.S. Department of Labor

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



Reply to the attention of:

**MAR 12 2012**

MEMORADUM FOR: REGIONAL ADMINISTRATORS  
WHISTLEBLOWER PROGRAM MANAGERS

FROM:   
RICHARD E. FAIRFAX  
Deputy Assistant Secretary

SUBJECT: Employer Safety Incentive and Disincentive Policies and Practices

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. This memorandum is intended to provide guidance to both field compliance officers and whistleblower investigative staff on several employer practices that can discourage employee reports of injuries and violate section 11(c), or other whistleblower statutes.

Reporting a work-related injury or illness is a core employee right, and retaliating against a worker for reporting an injury or illness is illegal discrimination under section 11(c). Other whistleblower statutes enforced by OSHA also may protect employees who report workplace injuries. In particular, the Federal Railroad Safety Act (FRSA) prohibits railroad carriers, their contractors and subcontractors from discriminating against employees for reporting injuries. 49 U.S.C. 20109(a)(4).

If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention, or the workers' compensation benefits to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.

There are several types of workplace policies and practices that could discourage reporting and could constitute unlawful discrimination and a violation of section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations, particularly the requirement to ensure that employees have a way to report work-related injuries and illnesses. 29 C.F.R. 1904.35(b)(1). I list the most common potentially discriminatory policies below. OSHA has also observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates. While OSHA appreciates employers using safety as a key management

metric, we cannot condone a program that encourages discrimination against workers who report injuries.

1. OSHA has received reports of employers who have a policy of taking disciplinary action against employees who are injured on the job, regardless of the circumstances surrounding the injury. Reporting an injury is always a protected activity. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of section 11(c) or FRSA. In other words, an employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury. In addition, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and where it is encountered, a referral for a recordkeeping investigation should be made. Where OSHA encounters such conduct by a railroad carrier, or a contractor or subcontractor of a railroad carrier, a referral to the Federal Railroad Administration (FRA), which may conduct a recordkeeping investigation, may also be appropriate.
2. In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) or FRSA. OSHA recognizes that employers have a legitimate interest in establishing procedures for receiving and responding to reports of injuries. To be consistent with the statute, however, such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, the rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all. Nor may enforcement of such rules be used as a pretext for discrimination. In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, and a referral for a recordkeeping investigation should be made.
3. In a third situation, an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee. OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards and prevent injuries from occurring in the first place. In some cases, however, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury. A careful investigation is needed. Several circumstances are relevant. Does the employer monitor for compliance with the work rule in the absence

of an injury? Does the employer consistently impose equivalent discipline against employees who violate the work rule in the absence of an injury? The nature of the rule cited by the employer should also be considered. Vague rules, such as a requirement that employees “maintain situational awareness” or “work carefully” may be manipulated and used as a pretext for unlawful discrimination. Therefore, where such general rules are involved, the investigation must include an especially careful examination of whether and how the employer applies the rule in situations that do not involve an employee injury. Enforcing a rule more stringently against injured employees than noninjured employees may suggest that the rule is a pretext for discrimination against an injured employee in violation of section 11(c) or FRSA.

4. Finally, some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time. Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or “near misses”. OSHA's VPP Guidance materials refer to a number of positive incentives, including providing tee shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. See *Revised Policy Memo # 5 – Further Improvements to VPP* (June 29, 2011).

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not “in any manner discriminate” against an employee because the employee exercises a protected right, such as the right to report an injury. FRSA similarly prohibits a railroad carrier, contractor or subcontractor from discriminating against an employee who notifies, or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury. If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. One important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it “might have dissuaded reasonable workers from” reporting injuries. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006).

In addition, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904. In this case, the employer is violating that rule, and a referral for a recordkeeping investigation should be made. If the employer is a railroad carrier, contractor or subcontractor, a violation of FRA

injury-reporting regulations may have occurred and a referral to the FRA may be appropriate. This may be more likely in cases where an entire workgroup is disqualified because of a reported injury to one member, because the injured worker in such a case may feel reluctant to disadvantage the other workgroup members.

Please contact the Office of Whistleblower Protection Programs at (202) 693-2199 if you have further questions.

## APPENDIX B

U.S. Department of Labor

Occupational Safety and Health Administration  
Two Pershing Square  
2300 Main Street, Suite 1010  
Kansas City, Missouri 64108  
Phone: (816) 283-8745  
Fax: (816) 283-0547



May 19, 2016

Ms. Jane Doe  
Owner  
ACME Products  
10 Elm Street  
Roadrunner, MO 11111

Dear Ms. Doe:

Enclosed you will find a copy of the Secretary's Findings/U.S. district court filing in Complaint# \_\_\_\_-\_\_\_\_-\_\_\_\_. The results of this investigation place your company/business into the Whistleblower Severe Violator Enforcement Program ("W-SVEP") effective this date. This company/business has been placed on the W-SVEP due to <insert specific criteria from list>. After three calendar years have elapsed from entering the W-SVEP, the company may request, in writing, to the Regional Administrator, or designee, a follow up investigation.

After completion of the follow up investigation the original case file along with the findings from the follow up investigation will be evaluated to determine if the company qualifies for removal from the W-SVEP log. The Whistleblower Protection Program Assistant Regional Administrator ("ARA") will notify the company in writing within 40 days of their decision. If removal from the W-SVEP is denied, the company may request another investigation after a period of one year.

Also enclosed is information about OSHA's Whistleblower Protection Program. If you have any questions, please contact me at (816) 502-9016.

Sincerely,

Karena Lorek  
Assistant Regional Administrator

Enclosures: OSHA Whistleblower Fact Sheets, Secretary's Findings/U.S. district court filing