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OSHA Proposes Award of $22 Million in Whistleblower Case

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On Sept. 1, 2022, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a news release claiming that a financial services employer "violated the whistleblower protection provisions of the Sarbanes-Oxley Act" (SOX) by terminating the employment of a manager who "alleged financial misconduct." According to OSHA, it had "ordered" the employer "to pay the employee more than $22 million" as a result of the "violation." However, the news release is misleading because OSHA does not have authority to order the payment of a proposed award in a whistleblower case.

OSHA's Investigative Role in Whistleblower Cases

OSHA has authority to investigate whistleblower claims under the Occupational Safety and Health Act (OSH Act), SOX, and 20 other federal laws that have whistleblower protection provisions (including environmental laws and laws regulating the aviation, railroad, trucking, healthcare, and nuclear power industries).

But OSHA's findings are not necessarily final as they can be reviewed in a *de novo* hearing by an administrative law judge, whose decision can then also be appealed to the Labor Department's Administrative Review Board (ARB) for another review. ARB decisions can be further reviewed in federal court.

This procedural backdrop illustrates that whistleblower cases, even those without merit, can go on for an extended period of time and be costly to defend.

Elements of Whistleblower Actions

Whistleblower provisions prohibit employers from taking "adverse action" against employees because they engaged in "protected activity."

In the OSH Act context, "protected activity" includes:

→ Making a good faith complaint about safety to OSHA, another agency, or management;

→ Participating in an investigation of a safety complaint; and

→ Refusing to perform a dangerous assigned task under certain circumstances.

To set out a *prima facie* case in a workplace safety whistleblower case, an employee must show that:

→ He or she engaged in protected activity;

→ The employer took adverse action against the employee; and

→ "But for" the protected activity, the employer would not have taken the adverse action.

In the SOX context, "protected activity" mainly includes disclosing conduct that the "whistle blowing" employee reasonably believes violates:

→ Federal criminal prohibitions against securities or bank fraud;

→ Any rule or regulation of the Securities and Exchange Commission; or

→ Any provision of federal law relating to fraud against shareholders.

To set out a *prima facie* case in a SOX whistleblower case, an employee must show that:

→ He or she engaged in protected conduct;

→ The employer took adverse action against the employee; and

→ The protected activity was a "contributing factor" in the employer's decision to take adverse action.

The "contributing factor" causation test used in SOX cases is easier for employees to meet than the "but for" test used for alleged violations of the OSH Act.

Employer Defenses and Potential Remedies

As legal counsel for employers, Nexsen Pruet defends whistleblower cases by showing that the adverse action was taken for legitimate, non-retaliatory reasons unrelated to the protected activity, such as for poor performance or misconduct, or by relying on other available defenses. Documents that can be used to support employer defenses may include performance reviews, written warnings, training records, witness statements, and company policies.

In the matter announced by OSHA on Sept. 1, the employer asserted that the position of the employee who alleged misconduct was eliminated in a restructuring. Also, the employer has since stated publicly that it will appeal OSHA's findings and plans to an administrative law judge.

Under most of the statutes with whistleblower provisions enforced by OSHA, if the agency believes a complaint has merit, it can *propose* that the employer pay back wages, interest, lost bonuses and benefits, front pay (or reinstate the employee), compensatory damages, and the employee's attorney's fees. But again, OSHA's findings and proposed fines represent allegations based on its own investigation—they do not constitute an order or final determination. The employer can request a hearing and present evidence showing that the adverse action was taken for legitimate, non-retaliatory reasons and the agency's proposal could be reversed.

Best Practices to Minimize the Risk of Whistleblower Claims

OSHA's Sept. 1 news release serves as a reminder that employers should be proactive in taking steps to try to minimize the risk of whistleblower claims. Best practices for employers include:

- Adopting safety and corporate ethics policies that require employees to report alleged financial misconduct;
- Stating that employees who report violations will be protected from retaliation;
- Providing more than one individual to whom employees can make complaints;
- Training personnel to investigate reports of violations;
- Documenting all communications with the complaining employee about his or her allegations and the investigation;
- Seeking legal advice from subject matter experts before taking disciplinary action involving employees who report perceived misconduct;
- Documenting the valid, non-retaliatory reasons for any disciplinary action or employment decision; and
- Giving employees written performance feedback on a regular basis so that appropriate disciplinary action can be taken promptly if and when necessary, even in cases where an employee complains of a policy violation.

Taking steps like these may not prevent whistleblower claims, but they should substantially reduce the risk of litigation and liability for employers.

Employers faced with employment law claims should consider promptly contacting experienced counsel. The attorneys in Nexsen Pruet's Employment and Labor Law Group are ready to help as needed.