

# OSHA Revises Whistleblower Manual to Clarify Issues Related to Remedies and Settlement of Whistleblower Claims

## Labor & Employment Law Update

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OSHA continues to focus enforcement efforts on whistleblower/retaliation claims. Whistleblower claims have been on the rise and this trend is expected to continue for the coming years. OSHA recently updated its Whistleblower Investigations Manual to offer clarity to remedies and settlements when handling a whistleblower claim under the Act.

The revised manual states that in some cases OSHA may issue a preliminary reinstatement and employers must make a bona fide job offer upon receipt of such findings. This would be a bold order, but it might be used with greater frequency as OSHA continues to step-up enforcement of retaliation claims. In addition, the manual now contains a section explaining that emotional distress/mental anguish, pain and suffering can be part of compensatory damages awarded under the OSHA whistleblower provisions. Of particular concern is that OSHA expressly states that it may rely solely on a complainant's own statement to prove objective manifestations of distress and statements by health care professions are not required.

The whistleblower manual now includes detailed guidance as to when punitive damages should be awarded in whistleblower cases. OSHA will likely consider punitive damages in cases when a management official knew his/her action violated the whistleblower statute or had reason to believe action was unlawful but did not act to stop or prevent the conduct. OSHA will focus on statements made by company officials, the amount of whistleblower training provided to staff, prior complaints about retaliation, and the company's policies and manuals. OSHA expressly acknowledges that punitive damages are likely not appropriate if the employer has a good faith defense, such as an effectively-enforced policy against retaliation. Employers should review current policies and handbooks to be sure it is clearly communicated that retaliation is not tolerated and that there are no obstacles for employees in reporting complaints to OSHA (i.e. employees are not required to first report concerns to management before going to OSHA).

OSHA continues to recognize the value in settling matters, including whistleblower claims, as opposed to litigating the claims. OSHA investigators are required to adhere to specific requirements when discussing settlement and employers should expect OSHA to seek 100% relief in order to settle (although full relief is not an absolute requirement for settlement). If a private settlement is reached and not submitted to OSHA (or if not approved by OSHA), the complaint may still be dismissed. However, if OSHA's investigation has gathered enough information to establish a violation or if OSHA determines it needs to protect other employees, OSHA may issue merit findings.

Based on the revised guidance issued by OSHA, employers can provide substantial protection from damages, including punitive damages, by updating policies and handbooks to strictly prohibit retaliation. In addition, all employers should provide regular training to employees (especially supervisors) about the rights of whistleblowers and the company's zero tolerance policy on retaliation. These simple steps will go a long way in avoiding liability and damages for whistleblower claims.

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