

# OSHA Strengthens Whistleblower Retaliation Enforcement

## Labor & Employment Law Update

on October 8, 2014

Recently, OSHA announced that it would be lowering the burden of proof for whistleblower claim investigations from “reasonable cause” to a mere “preponderance of the evidence.” As a result, employees need only show that, more likely than not, there was an adverse employment action as a result of an OSHA complaint, rather than showing that the adverse employment action was the direct result of the OSHA complaint.

At the same time, OSHA is seeking to hire 20% more full-time employees in its whistleblower programs and will be hiring in each region an Assistant Regional Administrator for Whistleblower Protection, responsible for direct caseload management and oversight of investigations. Between 2009 and June 2014, OSHA issued 3,726 whistleblower merit determinations and obtained \$119 million in damages against employers, and reinstated 389 employees. OSHA also announced it would be exchanging information with the Federal Motor Carrier Safety Administration (FMCSA) to further prosecute allegations of whistleblower retaliation.

### **The Bottom Line:**

Retaliation claims are on the rise (another employment agency, the EEOC, reported that in 2013, retaliation charges accounted for over 41% of all charges). Facing an increased number of OSHA employees to investigate whistleblower claims under a decreased burden of proof, employers will need to tread carefully when dealing with their employees who have reported unsafe conditions to them, threatened to go to OSHA, or are suspected of having made a safety report to OSHA. When dealing with these employees, employers should:

- Carefully follow their own published employment policies (handbooks, safety rules, etc.);
- Treat all employees fairly and equally;
- Document the basis for an discipline or other adverse employment action (and, to avoid claims of non-promotion, etc., document why other employees received raises, promotions...); and

- Engage counsel when dealing with potentially sticky situations.

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