Avoiding Whistleblower Claims Under the OSH Act

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Overview

- Employees may be protected by multiple statutes from discrimination and/or retaliation on the basis of articulating safety claims or making complaints to the government
- Often, such claims can involve individuals involved in past or current worker's compensation actions, which triggers dual protection under state WC laws as well.
- Claims under OSH Act, DOT/CDL or environmental laws are possible concurrently.
  - OSHA 11C actions increasing and agency doing cross-referrals to NLRB (to allow 180 day SOL)
  - Modified 29 CFR Part 1904.36 incorporated 11C as a codified reg – potential for civil penalties of up to $134,937 per affected worker
  - In past year – multiple cases resulted in $200,000+ in punitive damages (plus relief to worker)

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Federal Statutory Protections

- Occupational Safety & Health Act (Section 11C) – covers workers in general industry, construction, agriculture, maritime
- Federal Mine Safety & Health Act (Section 105C) – also applies to contractors at mines such as cement plants, stone quarries and sand pits
- Surface Transportation Assistance Act (STAA) – enforced by OSHA to protect DOT-industry workers
- Various EPA Statutes – enforced by OSHA
- Sarbanes/Oxley Act (enforced by OSHA)

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What Is "Protected" Activity?

- Raising safety and health (or environmental) complaints with management;
- Complaints to OSHA/MSHA/EPA
- Giving confidential statements to government inspectors during inspections or investigations

✓Even where the employee has <u>not</u> made a complaint or statement, he/she can be protected if management THINKS that the worker is an informant or a complainant.

✓A complainant is protected even if the agency investigates and determines that no violation exists!

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Other Worker Protections

Other types of protected employee activities include:

- Being subject to a medical evaluation and potential transfer under a standard (e.g., because of overexposure to lead or arsenic).
- Refusing to work under an alleged unsafe or unhealthful condition, or refusing to operate equipment that he/she believes is unsafe
- Contest of a citation's abatement date
- Initiation of proceedings for promulgation of an occupational safety and health standard
- Application for modification or revocation of a variance
- Judicial challenge to a standard
- Trial testimony in a civil penalty proceeding against the employer, and
- Appeal of Review Commission order
- Exercising any other statutory rights under the OSH Act

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What Is "Adverse Action"?

- An employer is forbidden from considering any safety-related activity or complaints by a worker when making an employment decision that could be considered "adverse" by the employee or which constitutes "reprisal."
- Adverse actions include, but are not limited to:
  - termination,
  - lay-offs,
  - demotion,
  - shift or duty reassignment,
  - reduction in pay,
  - loss of overtime availability,
  - transfer to a different worksite, and
  - "blacklisting" an employee by giving his/her a bad reference.

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E-Recordkeeping Whistleblower Rules

- Final rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses:
  - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA's *Job Safety and Health – It's the Law* poster (www.osha.gov/Publications/poster.html).
  - An employer's procedure for reporting work-related injuries and illnesses must be "reasonable" and must not deter or discourage employees from reporting.
  - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses.

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1904.35 –Requirements

- ER must inform each employee how s/he is to report a work-related I/I
- ER must provide access to I/I records for employees and their personal or authorized representatives
  - Authorized Rep defined as "authorized collective bargaining agents of employees"
  - Personal Rep defined as any person the EE or former EE designates as such, in writing
- ER must have a "reasonable procedure" for EE to report work-related I/I promptly and accurately.
  - "A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace I/I"
- EE must be trained on their right to report I/I
- ER are prohibited from discharging or in any manner discriminating against EEs for reporting I/I
  - ➢ *This includes some incentive programs and worker discipline policies*

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OSHA Section 11(c) & 1904.36

Section 11(c)(1) of Occupational Safety & Health Act of 1970 states:

- "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

29 CFR 1904.36 states:

- "In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:

  Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act."

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Retaliation: Incentives & Discipline

- Incentive & discipline programs that deprive an injured worker of a bonus or prize, or punish in a disparate manner, are also viewed as violating both Section 11(c) and new Part 1904 …subject to NEW policy interpretation of 10/11/18
  - Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness.
- OSHA published initial policy in 2012 addressing Regional Administrators and encouraging critical scrutiny of programs during inspections to determine if they discourage employee reporting of I/I or penalize injured employees in some way

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OSHA 2018 Policy: Incentives

- Incentive programs could still violate if employee is penaltized for reporting I/I not for "legitimate purpose"
- Rate-based programs are permitted as long as they are not implemented in manner that discourages reporting, especially if program also includes elements such as:
  - Rewards for identifying unsafe conditions in workplace
  - Training program for employees to reinforce reporting rights and non-retaliation policy
  - Mechanism for accurately evaluating employees' willingness to report I/I

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OSHA and Drug Testing

- OSHA has taken position that post-accident drug testing programs may be viewed as violation of Sec. 11(c) and subject to fines (of up to $134,937 for willful violations)
  - Problem is programs that test all injured workers, regardless of fault
- OSHA believes drug testing may be viewed as discipline and could have chilling effect on willingness to report injuries
- 2018 OSHA Policy clarifies that permissible drug testing includes:
  - Random testing
  - Testing unrelated to reporting of work-related I/I
  - Testing under state workers' compensation law
  - Testing under other federal law (e.g., DOT)
  - Testing to evaluate root cause of workplace incident that harmed or could have harmed employees
- OSHA says if use drug test to evaluate root cause, need to test all workers whose conduct could have contributed – not just injured EE

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OSHA Work Refusals

The OSH Act does NOT entitle employees to just walk off the job because of potential unsafe or unhealthful conditions but . . .

- When an employee is confronted with either leaving or performing assigned tasks that expose him to serious injury or death, worker is protected from discrimination related to a "good faith" work refusal. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).
- The condition causing the employee's apprehension of death or injury must be the type that would cause "a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." 29 C.F.R. §1977.12(b)(2).
- The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

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Constructive Discharge Cases

- Employee can claim that he was constructively discharged if the employer "created or maintained conditions so intolerable that a reasonable person would have felt compelled to resign."
- In such cases, the employee may be entitled to back pay for the period in which he/she is off the job.
- Management's refusal to rehire such individuals after the situation is corrected can constitute as second prohibited discrimination (retaliation), and result in additional penalties.

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OSHA Section 11(c) Procedures

- An employee who believes that he has been discharged or otherwise discriminated against by any person for protected safety activity may, within 30 days after such violation occurs, file a complaint with the Secretary of Labor.
- Upon receipt of the complaint, the Secretary initiates an investigation and if OSHA determines that the provisions have been violated, the agency will bring an action in any appropriate United States District Court against the employer.
  - NOTE: Section 11(c) actions go straight to federal court and are not considered by an ALJ or the OSHRC.
  - NOTE: If the 30 days SOL is missed, a worker can now complaint to OSHA about retaliation and OSHA can investigate under Part 1904- This effectively extends SOL to 180 days!

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OSHA Section 11(C) Procedures

- A discrimination action under Section 11(c) may not be brought directly by an employee (no private right of action); the action may only be brought by OSHA on an employee's behalf.
  - This could be altered by the Protecting America's Workers Act (HR 1074 - pending in Congress)
- Although there is a 30 day deadline to file a complaint with the Secretary of Labor, it is a statute of limitations subject to equitable tolling.
  - For example, if an employer misleads a worker into believing he/she has been laid off rather than fired, the worker can file complaint within 30 days after learning true situation.

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But Wait . . . There's More!

- Discriminatory action against an employer for safety and health related activity may also lead to legal action under common law doctrines of wrongful discharge.
  - Although the OSH Act creates an administrative procedure to investigate employee discrimination complaints, some Courts have held that this procedure is not the sole remedy available to employees. *See Kilpatrick v. Delaware County S.P.C.A.,* 632 F. Supp. 542 (E.D. Pa. 1986); *Sorge v. Wright's Knitwear Corporation,* 832 F. Supp. 118 (E.D. Pa. 1993).
  - This is because there is no "private right of action" under the OSH Act and OSHA's failure to prosecute was viewed as not waiving worker's other tort rights under common law.
  - Other courts, have held that there is no private cause of action under federal law arising from a private employer's retaliatory discharge of an employee who has filed a complaint or instituted a proceeding under or related to the OSH Act. *See George v. Aztec Rental Center, Inc.*, 763 F.2d 184 (5th Cir. 1985).

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Surface Transportation Assistance Act

- Section 405 of the **Surface Transportation** Assistance Act of 1982 (STAA) provides discrimination protection similar to protection provided under Section 11(c) of the OSH Act and Section 105(c) of the Mine Act
  - STAA actions are investigated by OSHA (even at mine sites!)
- STAA's protection is limited to employees of most commercial motor carriers engaged in interstate or intrastate operations who directly affect motor carrier safety – including CDL drivers, rail and aviation workers
- STAA mandates that a carrier or employer may not discharge, discipline, or discriminate against a driver regarding pay, terms, or privileges of employment because the driver
  - (1) files a complaint or begins a proceeding related to the violation of a commercial motor vehicle safety regulation, standard or order or has or will testify in such a proceeding or
  - (2) refuses to operate a vehicle on the grounds that the operation violates a regulation, standard or order related to commercial motor vehicle safety or on the grounds that the driver has a reasonable apprehension of serious injury due to the vehicle's unsafe condition.

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Environmental Statutes

- *OSHA also handles discrimination claims arising under laws including:*
  - *The Clean Air Act (42 U.S.C. §7622)*
  - *The Safe Drinking Water Act (42 U.S.C. §300j-9(i))*
  - *Federal Water Pollution Control Act (33 U.S.C. §1367)*
  - *Solid Waste Disposal Act (42 U.S.C. §6971)*
  - *Toxic Substances Control Act (15 U.S.C. §2622)*
  - *Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9610)*

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Sarbanes-Oxley Act

Sarbanes-Oxley Act of 2002 (18 U.S.C. §1514A)

- Under Title VIII of the SOA, OSHA has jurisdiction over complaints by employees of companies with securities registered under section 12 of the Securities and Exchange Act, and over those companies that must file reports pursuant to section 15(d) of that Act
- OSHA also has jurisdiction over any officers, agents, contractors, or subcontractors of such companies
- SOA seeks to prohibit adverse action against employees who provide information to supervisors or the government relating to securities fraud.
- The statute specifically covers information provided internally (including safety/environmental self-audits), as well as information provided to Federal regulatory or law enforcement agencies and Congress.
- An employee has 90 days from the date of the violation to file a complaint against a company over which OSHA has jurisdiction.
- The action itself and the procedures relating to it are to be governed by rules set forth in 49 U.S.C. §42121(b), "AIR21"

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Burden of Proof

- In whistleblower cases, the burden of proof is divided between the complainant and the employer.
- The complainant bears the burden of proving that he/she engaged in a protected activity and that the adverse action was motivated IN ANY PART by the protected activity.
- If the complainant meets this burden, this constitutes a *prima facie* case.

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What Is "Discriminatory Intent"?

Courts have inferred discriminatory intent from the following:

1. knowledge of the employer that the complainant was making safety complaints;
2. hostility toward safety matters and complaints about safety;
3. proximity between the time safety complaints were made and the time that adverse action occurred; and
4. disparate treatment (e.g., the complaining worker was disciplined more harshly than others who engaged in similar non-safety-related action).

➢ The existence of prior discrimination proceedings at a particular company will likely be considered by the judge in determining "hostility" toward safety complainants.

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Employer's Response

- The employer may rebut the finding by showing that the worker was either not engaged in any protected activity, or that the adverse action was not motivated in any part by the protected activity.
- Even if the protected activity was a factor in the decision, the employer can still defend if it demonstrates that it would have taken the adverse action in any event for the unprotected activity alone.
  - DOCUMENT, DOCUMENT, DOCUMENT!!!!!

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Preventative Measures

- Any disciplinary action that could have Section 11(c) implications should be carefully considered and undertaken only with witnesses present – watch for *Weingarten* rights too
- Such matters should be kept confidential, to extent practicable, to avoid potential defamation suits
- Any drug testing arising from a personal injury incident should be undertaken only as part of a root cause investigation, covering all involved workers (not just the injured parties) unless based on reasonable suspicion or required by DOT, a CBA or other contract
- Employees cannot use these laws to protect themselves from improper conduct (conduct for which they would have been disciplined in any event).
- A documented record of disciplinary action should be kept to demonstrate the legitimate (non-safety-related) basis of employer's decisions.
- Managers must be able to readily (and quickly) distinguish between protected and unprotected activity.
- Understand which laws apply to which workers (and which workers may be covered by multiple laws – e.g., OSHAct AND STAA).

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Practical Considerations

- Regardless of which statute a claim arises under, employers must be prepared to manage claims intelligently . . .
  - No employer should attempt to hinder any investigation of a safety, health, STAA, or environmental complaint or prevent management employees from talking with compliance officers or investigators.
  - Managers must know the law AND know their rights.
  - The correction of any unsafe or unhealthy condition (or environmental hazard) must be a priority at any workplace.
  - All employee complaints must be investigated thoroughly – even the chronic complainer may have a legitimate gripe once in a while!

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Practical Considerations

- Supervisory personnel should keep confidential those problems experienced with difficult employees on the job. Unnecessary discussion may serve as admissions against interest in later proceedings.
- Should a matter proceed to litigation, tactical decisions must be made quickly. The cost/benefit of litigating should be weighed at the outset.
- If mistakes were made, acknowledge these problems early with company counsel in order that appropriate decisions can be made concerning litigation and settlement.
- Although you cannot prevent discrimination claims from being filed, effective training and communication – as well as use of common sense – will held reduce the number of *sustainable* claims!

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Questions???

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