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## Whistleblower Attorney Backs New OSHA Guidance On Settlement Reviews

An attorney who has pushed for stronger whistleblower protection laws is backing OSHA's recently-issued guidance for agency reviews of settlements between whistleblowers and employers, saying the updated criteria will help guard against contractual restrictions that could otherwise prevent future reporting of workplace violations.

In a Sept. 11 blog post, Jason Zuckerman, of Zuckerman Law, says that under the new guidelines OSHA will not approve settlement deals containing "gag" provisions preventing future whistleblower reporting.

"De facto gag clauses undermine the operation and frustrate the intent of the whistleblower protection laws that [the Department of Labor] enforces by chilling or discouraging employees from disclosing to regulatory and enforcement agencies information about threats to public health and safety," and other concerns, Zuckerman says.

Zuckerman also says the guide is consistent with recent U.S. Securities and Exchange Commission enforcement against companies for using overly broad confidentiality provisions in severance agreements, which also may deter whistleblowing.

In a recent memo to the regional administrators, OSHA headquarters details its updated criteria for agency officials who review settlement deals reached during investigations of whistleblower allegations. The revisions are designed to ensure those settlements do not preclude future employee actions protected under the many whistleblower statutes OSHA administers.

The guidance is part of the agency's ongoing efforts to bolster protections for whistleblowers. The updated criteria replace guidance included in OSHA's Whistleblower Investigations Manual, but does not otherwise change agency policy for reviewing settlements, the agency says.

The Aug. 23 memo from OSHA's Directorate of Whistleblower Protection Programs to regional administrators and whistleblower program managers says agency staff reviews settlement deals between employers and complainants to ensure they are fair, reasonable, and in the public interest.

"In reviewing these agreements OSHA sometimes encounters provisions that prohibit, restrict, or otherwise discourage a complainant from participating in a protected activity," the memo says. "In those cases, OSHA must ensure that such clauses are removed or clarified so that the agreements are lawful and consistent with the underlying purposes of the whistleblower protection statutes."

### Whistleblower Protections

OSHA is responsible for enforcing whistleblower protection provisions of nearly two dozen statutes, including the Sarbanes-Oxley financial sector law, Consumer Financial Protection Act and others that protect employees in the airline, commercial motor carrier, consumer product, environmental, financial, food safety, health care, and other sectors.

During the past year, OSHA has finalized rules setting new parameters for whistleblower protection in the transportation and rail sectors, and under the FDA Food Safety Modernization Act and the Seaman's Protection Act.

The new guidance details criteria for determining whether a settlement discourages or "impermissibly restricts" whistleblowing. Such constraints often result from broad confidentiality or non-disparagement clauses, OSHA says.

Specifically, OSHA says it will not approve settlements containing provisions that preclude future whistleblowing. So-called "gag" provisions may take a variety of forms, including restricting an employee from filing future complaints, requiring employer notification before filing a complaint, or requiring an employee to waive their right to receive a monetary award from a federal whistleblower program.

"OSHA will not approve a 'gag' provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity," the memo says. "Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government."

Should OSHA staff find such provisions or broad confidentiality or non-disparagement clauses in settlement deals, agency officials either will remove the provisions or add language to ensure employees understand their non-waivable right to provide information to the government.

The new guidance is part of OSHA's ongoing efforts to bolster whistleblower protections. Early this year, the agency issued revised guidance that lowers the bar for OSHA investigators to determine whether a workplace retaliation complaint has merit, leaving employers more vulnerable to whistleblower investigations, according to an assessment by occupational safety and health attorneys.

Still, members of the agency's Whistleblower Protection Advisory Committee, during an April 26 meeting, faulted a draft agency guide designed to help employers develop a program for preventing retaliation against workers who report unsafe conditions or activities, saying OSHA omitted key principles from the panel's advice that would have further deterred retaliation. — *Dave Reynolds*