

OSHA Issued Guidance on Settlements with Whistleblowers

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PRACTICES Labor and Employment, OSHA

The Occupational Safety and Health Administration (“OSHA”) took on another measure to ensure protection for whistleblowers. On September 9, 2016, OSHA issued guidelines to prevent “gagging” future whistleblowers in settlements between employers and employees.¹ OSHA already reviews settlement agreements between employees and employers to ensure that they are “fair, adequate, reasonable, and in the public interest, and that the employee’s consent was knowing and voluntary.” OSHA’s new guidance explains that provisions that prohibit employees from exercising their rights as whistleblowers must be removed from the settlement agreements. Below are examples of problematic provisions per the guidance:

- restricting the complainant’s ability to provide information to the government, participate in investigations, file a complaint or testify in proceedings based on respondent’s past or future conduct.
- requiring a whistleblower to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer’s past or future conduct.
- requiring the whistleblower to affirm that he or she has not previously provided information to the government or engaged in other protected activity or to disclaim any knowledge that the employer has violated the law.
- requiring a complainant to waive his or her right to receive a monetary award from a government-administered whistleblower program for providing information to a government agency.
- requiring complainant to transfer a monetary award from a government-administered whistleblower program to respondent to offset payments made to the complainant under the settlement agreement.
- Imposing liquidated damages that are disproportionate to the anticipated loss to the respondent, exceed the relief provided to the complainant or are more than a complainant would be able to pay.

OSHA may ask parties to add clear language that states that “nothing in the agreement prevents, impedes, or interferes with the complainant’s non-waivable right, without prior notice to respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent’s past or future conduct, or engage in any activities protected under the whistleblower statutes administered by OSHA or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.”

Employers considering a settlement agreement with a complainant should ponder these limitations before entering into settlement discussions on the presumption that the complainant can waive some of these whistleblower rights.

¹ [OSHA Press Release](#), September 15, 2016.