

OSHA Steps Up Efforts To Revamp Whistleblower Program

By **Abigail Rubenstein**

Law360, New York (May 18, 2012, 7:20 PM ET) -- The U.S. Department of Labor's Occupational Safety and Health Administration on Thursday announced a plan to establish an advisory committee to improve its administration of whistleblower protections, a move attorneys say underscores the government's renewed focus on workers who report workplace safety, consumer product, environmental, food safety, securities and other violations.

OSHA, which enforces the whistleblower provisions of 21 statutes that protect workers who report violations, completed an internal top-to-bottom review of its whistleblower program last year after U.S. Government Accountability Office audits in 2009 and 2010 found substantial problems.

The agency has since announced several changes aimed at beefing up the program, from restructuring so that the program reports directly to the head of OSHA to updating its manual for investigators for the first time in years.

In Thursday's Federal Register, OSHA said it planned to set up a Whistleblower Protection Advisory Committee to advise the agency on the development and implementation of improved customer service models, enhancements in the investigative and enforcement process, training, and regulations governing OSHA investigations.

The committee will also advise OSHA on cooperative activities with other federal agencies that are responsible for areas covered by the statutes OSHA enforces, it said.

"This announcement continues a trend toward a recognition that the OSHA whistleblower program's star is rising within the [U.S. Department Of Labor], where it is being recognized as an important division," said Gregory Keating, co-chair of Littler Mendelson PC's whistleblower and retaliation practice group.

"And it continues a trend I'm seeing across the board of an expansion of the resources and the support mechanisms that our federal government is making available for whistleblowers," Keating said.

OSHA already has several advisory committees, but it has not launched a new one in some time, so the decision to create this one demonstrates the emphasis OSHA's leadership is placing on the whistleblower program, said Jonathan Snare, a partner at Morgan Lewis & Bockius LLP who formerly worked in several roles at the DOL.

These committees are usually made up of a cross section of stakeholders from both the labor and management sides as well as public policy experts, and if the new committee is assembled on this model, it will provide a valuable resource for both employers and employees, according to Snare, who once worked as assistant secretary for OSHA.

"It could provide a public forum for both sides to discuss the whistleblower program," Snare said. "Employees could come in and complain that they felt their claims were not adequately investigated or employers could say they didn't think an investigation was fair."

And a committee that includes a broad range perspectives would also serve to continue the discussions that OSHA had with stakeholders in its efforts to develop the changes it has made so far to improve the process for whistleblowers and corporations, said R. Scott Oswald of The Employment Law Group.

"It is a continuation of that process meant to ensure that the pragmatic changes that OSHA has established do not in any way erode over time because there will be a group of individuals that have a vested interest in whistleblower programs' success," Oswald said.

Still, some question how effective the new committee will be in addressing the whistleblower program's shortcomings.

"There's no mystery as to what the issue is," said Cole Wist of Ogletree Deakins Nash Smoak & Stewart PC. "There are budgeting and staffing issues that are creating a backlog of cases, and I'm not sure whether or not an advisory committee is going to do anything to fix that problem."

Some of the other changes OSHA has made have more squarely addressed those issues.

The agency's plan to strengthen the whistleblower program includes adding additional investigators and bolstering investigator training, which it has started doing. Its proposed 2013 budget seeks funding to hire another 37 new whistleblower investigators.

But for now, the agency is touting the new committee as another significant aspect of its bid to improve the program.

"Workers who expose securities and financial fraud, adulterated foods, air and water pollution, and workplace safety hazards have a legal right to speak out without fear of retaliation, and the laws that protect these whistleblowers also protect the health, safety and well-being of all Americans," said Dr. David Michaels, assistant secretary of labor for occupational safety and health.

"Establishing a federal advisory committee is another important effort to strengthen protections for whistleblowers," he said.

--Editing by Eydie Cubarrubia.