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November 12, 2012

OSHA to Offer Alternative Dispute Resolution for Whistleblower Complaints

Employers should evaluate whether new whistleblower complaints are eligible for the initiative, which provides expedited and potentially cost-saving resolution of claims.

On October 1, the Occupational Safety and Health Administration (OSHA) launched an initiative that implemented the Whistleblower Alternative Dispute Resolution (ADR) Program[1] for complaints filed with OSHA under the worker protection provisions of the 22 statutes administered by OSHA.[2] Pursuant to its authority under the Administrative Dispute Resolution Act of 1996, OSHA established two pilot programs under the greater ADR Program whereby parties to a whistleblower complaint may agree to participate in either an early resolution or a mediation process. OSHA envisions that employers and complainants will use the ADR Program to resolve claims in a voluntary and cooperative manner as an alternative to the time-consuming and expensive OSHA investigative process.

Background

OSHA authorized the implementation of two pilots offering alternatives to litigation to resolve whistleblower complaints filed with OSHA under the Occupational Safety and Health Act of 1970 and other statutes. Although the various whistleblower statutes and implementing regulations generally anticipate timely resolution of complaints,[3] the investigation and ultimate resolution of the complaint are often frequently delayed. Much of this delay can be attributed to the limited investigative resources available to OSHA. OSHA anticipates that the ADR Program will allow OSHA to conserve its limited investigative resources while providing relief and finality to both the complainant and the employer.

The two ADR Program pilots will be conducted concurrently in OSHA Regions V (Illinois, Indiana, Michigan, Minnesota, Wisconsin, and Ohio) and IX (Arizona, California, Hawaii, and Nevada). Each region will establish both an early resolution pilot and a mediation pilot, and each pilot will run for one year. OSHA will assess the progress of each pilot after the first 120 days, including the number of requests for ADR, the number of

1. Read OSHA's implementing directive for this program at http://www.osha.gov/OshDoc/Directive_pdf/DIR_12-01_CPL_02.pdf.

2. All employers may be subject to Section 11(c) the Occupational Safety and Health Act of 1970, which protects employees who believe they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. 29 U.S.C. § 660(c). In addition, employers in the transportation industry are subject to the following OSHA-enforced statutes: Surface Transportation Assistance Act, 49 U.S.C. § 31105; Federal Railroad Safety Act, 49 U.S.C. § 20109; National Transit Systems Security Act, 6 U.S.C. § 1142; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; Seaman's Protection Act, 46 U.S.C. § 2114; and International Safe Container Act, 46 U.S.C. § 80507. Moreover, employers in the energy industry are subject to the following OSHA-enforced statutes: Energy Reorganization Act (ERA), 42 U.S.C. § 5851; Clean Air Act, 42 U.S.C. § 7622; 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; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610; Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651; and Toxic Substances Control Act, 15 U.S.C. § 2622. Finally, employers subject to the Sarbanes-Oxley Act (SOX)—including certain publicly traded companies or companies with certain Securities and Exchange Commission reporting requirements and their contractors, subcontractors, and agents—are also subject to SOX's OSHA-enforced whistleblower provision. *See* 18 U.S.C. § 1514A.

3. For example, with respect to whistleblower complaints submitted to OSHA pursuant to the ERA, OSHA is required to investigate the complaint and issue an order either providing relief to the complainant or denying the complaint within 90 days of submission.

withdrawals from the pilot, the amount of damages awarded, the number of employee reinstatements, and whether OSHA evaluated the complaints as meritorious. Following this review, OSHA will determine the next steps for these pilots, including whether to expand them into the other OSHA regions.

Early Resolution

The early resolution process allows an unlimited number of complaints to be resolved prior to OSHA initiating an investigation and is intended to provide "a quick resolution of the dispute." Following the receipt of a complaint, OSHA will notify the employer and the complainant by letter about the availability of the early resolution process. If the parties agree to early resolution within 10 days of their receipt of the letter, OSHA's regional ADR coordinator will contact both parties to determine whether there is common ground for a settlement. The implementing directive does not explain or further describe how such "common ground" will be assessed. If the regional ADR coordinator finds common ground for settlement, then an OSHA representative—either the regional ADR coordinator, the regional supervisory investigator, or an investigator—will assist the parties in resolving their dispute.

The parties must agree to a settlement within 20 days of their receipt of OSHA's initial letter to the parties. The regional ADR coordinator may draft the settlement agreement for the parties. Alternately, the parties may draft and submit an agreement to OSHA for its approval. As is currently the case with settlements reached between parties to a whistleblower complaint, the settlement agreement must be reviewed and approved by OSHA. If the parties are unable to reach an agreement within the 20-day time period, OSHA's investigation will proceed as normal. The implementing directive notes that the employer's initial statement of position is due 20 days after the employer's receipt of OSHA's initial letter and that attempting early resolution will not provide an extension of time to the employer for this submission. Our experience, however, is that the deadlines for statements of position can sometimes be extended upon receipt of the complaint.

Some facets of this process already are informally in place in that OSHA's investigators will occasionally seek to mediate disputes during the investigative process in an apparent attempt to conserve investigative and enforcement resources. The early resolution process appears to formalize and provide structure to these informal attempts to voluntarily resolve such disputes.

Mediation

The mediation process is a voluntary process in which the parties agree to use a neutral third party to assist in resolving the issues raised by a whistleblower complaint. OSHA will use the Federal Mediation and Conciliation Service (FMCS) to serve as the neutral third party in these mediations. The FMCS, established by the Labor Management Relations Act of 1947, is an independent federal agency of the U.S. government. FMCS provides a variety of ADR services to industry and federal government agencies. The use of FMCS's mediation services is mandatory under the mediation process. Significantly, OSHA will pay all of the expenses associated with the mediation. Unlike the early resolution process, the option to participate in the mediation process will not be available to all parties involved in whistleblower disputes during the course of the pilot, as OSHA's mediation resources are limited. OSHA has authorized Regions V and IX to conduct only 15 mediation sessions each during the course of the pilot.

Eligibility for Mediation

The parties may request to participate in the mediation process at any time after an investigation is underway, i.e., after the employer has responded to the complaint. Following such a request, the regional ADR coordinator, in consultation with the FMCS mediator, will determine whether the dispute is suitable for mediation. OSHA's implementing directive states that the regional ADR coordinator will consider the following factors in making this determination:

- Whether the parties are willing to participate and resolve the dispute in good faith
- Whether an FMCS mediator is available

- Whether OSHA has the financial resources to provide for the mediation
- Whether the parties have legal representation

If the dispute is deemed suitable for mediation, OSHA will then stay the investigation and schedule a convening call with the parties and the FMCS mediator within 10 business days. The purpose of this convening call is for the regional ADR coordinator and the mediator to discuss the dispute with the parties and to further evaluate the suitability of the dispute for mediation. Following the convening call, if the regional ADR coordinator and the mediator agree that the case is suitable for mediation, OSHA will notify the parties and schedule the mediation.

Conduct of the Mediation

OSHA's implementing directive provides the following guidance for the conduct of the mediation:

- The FMCS mediator will normally conduct the mediation within 30 to 60 business days after the convening call.
- The mediation will be conducted at a neutral and private location.
- The mediation ordinarily will be conducted in person, although "virtual" mediation sessions are permitted in extraordinary circumstances.
- Initial mediation proceedings will be scheduled for one day but may be extended if the parties are close to a settlement.
- The mediator has discretion to determine the structure and process of the mediation. For example, he or she may lead a joint discussion between the parties or may meet with each party separately during the mediation.
- The parties' representatives to the mediation must have full settlement authority.
- If the mediation does not result in a settlement, the parties may nonetheless subsequently enter into a settlement agreement at any other time during the course of the investigation.

If a settlement is reached during the mediation, OSHA will review the settlement to ensure that it is in accord with OSHA's policies on settlement procedures. If a settlement is not reached, OSHA will resume its investigation.

Representation

A party may be represented at the mediation by legal counsel or any other third party, such as a union representative. The implementing directive states that, in the case where one party is represented and the other is not, the regional ADR coordinator and the mediator will take steps necessary to ensure that the nonrepresented party is "not disadvantaged by the uneven representation." The directive does not otherwise describe the steps to be taken, except to note that such steps will "be determined on a case-by-case basis."

Confidentiality

OSHA's implementing directive provides that the mediator is not permitted to discuss the merits of the complaint or the content of the mediation with OSHA. The mediator may communicate only the outcome of the mediation. If an agreement is reached, the mediator will send the proposed agreement to OSHA for review. In addition, the implementing directive provides that statements made or evidence submitted during the mediation may not be disclosed to any party outside of the mediation and that the parties may retain any documents or evidence brought to the mediation. All information or material created by the mediator during the mediation proceeding will be destroyed. Further, the parties must agree in writing that the mediator cannot be later subpoenaed or called to testify as to what either party said during the mediation. A sample agreement regarding these issues is appended to the implementing directive.

Considerations for Employers

The early resolution pilot and the mediation pilot are opportunities for employers to resolve whistleblower complaints expeditiously and with potentially significant cost savings. Employers in OSHA Regions V and IX—Illinois, Indiana, Michigan, Minnesota, Wisconsin, Ohio, Arizona, California, Hawaii, and Nevada—are currently eligible to request to participate in either pilot. Resolving disputes through participation in the early resolution process, which by design attempts to resolve the dispute before OSHA's investigation begins, can allow the employer to avoid the initial, and often substantial, costs that might otherwise be expended to thoroughly investigate the complaint internally and to respond to the OSHA investigation.

We see no significant downside to participating in the early resolution process. If the attempt at settlement fails, OSHA will begin its investigation, and the employer likely will not be disadvantaged by this delay. Although the employer must be prepared to submit a statement of position soon after the early resolution process ends, employers may be able to mitigate the expense and/or inconvenience by requesting an extended deadline to submit their statements of position. In our experience, this can be done as soon as a copy of the complaint is received. In addition, preparing for and participating in the early resolution process will undoubtedly result in the collection of a significant amount of information about the complaint, which will assist in the employer's conduct of due diligence and the preparation of its statement of position.

Although, in some cases, the fast-paced timeline of the early resolution process could cause an employer to feel pressured to settle, in practice, an employer will be able to submit an initial statement of position denying allegations and then, at a later time, submit a more detailed, supplemental statement of position explaining why the allegations are not true. In addition, an employer may still engage in ADR at a later stage if the early resolution process is not successful.

The mediation process offers benefits to employers similar to those of the early resolution process and also has a limited downside. OSHA's investigation will be stayed during the mediation process, and the mediation's costs will be borne by OSHA. The process also is confidential, and material provided by employers to the mediator will not become part of the agency record or be provided to complainants.

In light of the potential benefits of these programs, employers facing new whistleblower complaints should consider whether they are eligible for the new pilot programs and whether pursuing one of these new options is preferable to proceeding in the normal course.

Contacts

The Morgan Lewis Energy Practice counsels clients in safety-significant industries, such as nuclear energy, transportation, and oil and gas, in connection with whistleblower claims filed with the U.S. Department of Labor, U.S. Department of Energy, and state and federal courts. We also counsel clients with respect to the maintenance of a safety-conscious work environment and the prevention and detection of actual or perceived workplace retaliation.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Lewis M. Csedrik	202.739.5166	lcsedrik@morganlewis.com
Timothy P. Matthews	202.739.5527	tmatthews@morganlewis.com
Charles C. Thebaud	202.739.5512	cthebaud@morganlewis.com
Paul J. Zaffuts	202.739.5537	pzaffuts@morganlewis.com

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