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OSHA Issues Revised Whistleblower Investigations Manual

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Continuing its emphasis on its Whistleblower Protection Program, the Occupational Safety and Health Administration (OSHA) released an updated [Whistleblower Investigations Manual](#) on May 21, 2015. OSHA enforces whistleblower provisions contained in 22 separate statutes, including Section 11(c) of OSHA-Act, the Affordable Care Act, Sarbanes-Oxley, the Consumer Financial Protection Act of 2010, and the recently added Moving Ahead for Progress in the 21st Century Act (relating to motor vehicle safety). The updated Whistleblower Investigations Manual contains several notable changes to Chapter 6 (“Remedies and Settlement Agreements”). They include the following:

- **Preliminary Reinstatement:** If OSHA issues an order of preliminary reinstatement, the respondent must make a bona fide job offer upon receipt of the order.
- **Front Pay in Lieu of Reinstatement:** The new Manual provides additional situations where front pay in lieu of reinstatement may be appropriate. In the 2011 version, the Manual provided that front pay may be appropriate where reinstatement was “not feasible.” The revised Manual states that front pay may also be appropriate where reinstatement would result in “debilitating anxiety” to the complainant or other mental health risks. The Manual further emphasizes that “proper limitations” should be placed on any front pay remedy, including setting a reasonable duration for front pay based on the complainant’s anticipated return to work, factoring in the complainant’s prior compensation rate, and adjusting any front pay remedy to account for any post-termination income received by the complainant.
- **Additional Guidance Regarding Calculating Back Pay:** The Manual clarifies that, where the complainant is paid a salary or by piece rate, the salary or piece rate should be broken down into a daily rate and multiplied by the number of days the complainant worked. Further, investigators must take into account lost bonuses, benefits, raises, and promotions when calculating back pay. In situations where a complainant secures alternate employment, the Manual instructs that interim earnings—less any expenses incurred as a result of accepting and retaining the new position—should be deducted from the back pay calculation using the “periodic mitigation method,” as defined in the Manual. Unemployment benefits are not deducted from gross back pay, but workers’ compensation benefits may be deducted. Investigators must support back pay calculations with documentary evidence.

- **Complainant's Duty to Mitigate:** In a positive step for respondents, the new Manual expressly states that the complainant has a duty to mitigate damages. To mitigate, the complainant must exercise "reasonable diligence" in seeking alternate employment. "Reasonable diligence" requires an "honest, good faith effort," but the complainant does not need to actually secure subsequent employment to effectively mitigate. Complainants must consider other "available and suitable employment" and suggests that this may include going into another line of work depending on the circumstances.
- **Expanded Categories of Pecuniary Damages and Interest Assessed on Compensatory Damage Awards:** The Manual expands the categories of pecuniary damages that may be recovered to include expenses incurred while searching for interim employment (e.g., mileage, job placement fees, meals and lodging incurred when traveling for interviews). As with proving other types of damages, documentary evidence should support the awards. In addition to assessing interest on back pay awards, interest may be awarded for compensatory damages of a pecuniary nature.
- **Required Showing for Emotional Distress Damages:** The 2015 Investigations Manual includes a new section regarding emotional distress damages, which did not appear in the previous version. The new "Emotional Distress/Mental Anguish/Pain and Suffering" section begins by noting that, while emotional distress damages may be awarded, such damages are not appropriate in every case. To justify emotional distress damages, the complainant must proffer evidence of both an objective manifestation of emotional distress, as well as a causal link between the alleged retaliatory conduct and the complainant's distress. The complainant's evidentiary burden is ultimately quite low, however, as the Manual allows the investigator to rely solely on the complainant's own statement. Further, documentary evidence from a healthcare provider is only required if the complainant seeks to prove a diagnosable medical condition. Moreover, the following factors should be considered in calculating emotional distress damages: the severity of the distress, the degradation and humiliation experienced by the complainant, the complainant's length of time out of work, and amounts awarded in comparable cases. With respect to causation, the complainant may prove that the respondent's retaliatory conduct exacerbated an existing condition, but investigators are instructed to limit emotional damages accordingly.
- **Determining Whether to Award Punitive Damages and the Amount:** The new Manual provides detailed guidance regarding when punitive damages are appropriate and how to calculate a punitive damages award. In deciding whether punitive damages are appropriate, investigators must focus on (1) whether the decision-maker was aware that the employment action taken against the complainant violated the relevant whistleblower statute, as proved by witness statements, prior complaints of retaliation, and anti-retaliation training and information provided by respondent; and (2) the egregiousness of the conduct at issue. The Manual provides the following examples of "egregious" conduct: an adverse action accompanied by violence, harassment or humiliation, or post-termination blacklisting of the complainant; multiple alleged whistleblowers are subjected to an adverse action or the case fits a "pattern or practice" of retaliation associated with the particular respondent; respondent maintains a written policy which, on its face, contravenes a right protected by statute; or the retaliation is accompanied by a serious substantive violation (i.e., a termination of an alleged whistleblower accompanied by a willful violation of the OSHA-Act). With respect to calculating a punitive damage awards, the 2011 version of the Manual provided little guidance. The new edition sets forth 10 nonexclusive factors to consider in calculating a punitive damages award, including whether the organization created a workplace culture that discouraged whistleblowing and how the organization responded to the complaint. As additional benchmarks for calculating a punitive damages award, the Manual reminds investigators that some whistleblower statutes cap such remedies at \$250,000. The Manual further advises that, even if the statute does not cap the punitive damages award, the award should generally not exceed nine times the amount of the complainant's other monetary relief. Notably, however, the Manual expressly allows an award of punitive damages even if there is no other monetary relief.
- **Respondent's "Good Faith" Defense Against Punitive Damages:** The Manual now recognizes a "good faith" defense to punitive damages in whistleblower claims. Similar to the defense against punitive damages in employment-discrimination cases established by the Supreme Court in *Kolstad v. American Dental Association*, "good faith" can be shown by demonstrating that "managers were acting on their own and the respondent had a clear and effectively-enforced policy against retaliation." Presumably, the policy behind this defense is to motivate employers to implement a compliance system to detect and deter violations.

- **Calculating Attorney's Fees:** While the prior version of the Manual cursorily addressed the issue of calculating attorney's fees, the 2015 version explains that attorney's fees should be calculated using the "lodestar method." Investigators may reduce an attorney's hourly rate if it is excessive and complainant attorneys must provide documentation to substantiate their hours allegedly worked.
- **Training Added to the List of Non-Monetary Remedies OSHA may Seek:** Over the past few years, the DOL's sister agency, the U.S. Equal Employment Opportunity Commission, has been requiring respondents to institute training when conciliating a cause determination with respect to a Charge of Discrimination. OSHA seems to be following the EEOC's lead in this regard, as it has added manager training to the list of non-monetary remedies that may be awarded. The Manual explains that training may be appropriate in three particular situations, including "where the respondent's misconduct was especially egregious, the adverse action was based on a discriminatory personnel policy, or the facts reflect a pattern or practice of retaliation."
- **Tax Treatment for Amounts Recovered in a Settlement:** The Internal Revenue Service has been looking more closely at the wage versus non-wage dichotomy pertaining to settlements in the employment context. Consistent with this practice, the Manual clarifies that complainants and respondents are responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are done in accordance with the Internal Revenue Code.
- **Public Policy Behind Settling Whistleblower Claims:** The Manual explains that the public policies behind whistleblower statutes require that settlements not be "repugnant to the relevant whistleblower statute or undermine the protection that the relevant whistleblower statute provides."
- **Dismissal of Complaint Following a Private Settlement Agreement Between the Parties:** The revised manual makes clear that OSHA may dismiss the complaint even if the parties do not submit their private agreement to OSHA for approval or if OSHA does not approve the signed agreement. (Previously, OSHA investigators were required to deny any attempt by the parties to withdraw a complaint in these situations and were instructed to proceed with the investigation.) Where dismissal is permitted, OSHA's records should only reflect that the parties reached a settlement independently and not include any factual findings. The Manual explains that the investigation will continue despite a private settlement if (1) the investigator has already gathered sufficient evidence for OSHA to conclude a violation occurred, or (2) there is a need to protect employees other than the complainant.

Employers currently defending against, or potentially facing, a whistleblower complaint should consult the updated sections discussed above for useful guidance regarding the amount of damages that may be sought by the assigned investigator, and the proof that will be required. Additionally, to help avoid a possible punitive damages award, employers should consider implementing new, or improving on existing, compliance programs.