

OSHA to amend rules on whistleblower complaints

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Recently, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) published interim final rules in the *Federal Register* which revise the whistleblower regulations governing complaints filed under the Sarbanes-Oxley Act of 2002, which prohibits publicly traded companies and their subsidiaries, as well as certain other employers, from retaliating against their employees "for reporting mail fraud, wire fraud, bank fraud, securities fraud, violations of SEC rules or regulations, or violations of any provision of federal law relating to fraud against shareholders," according to OSHA's press release dated November 2, 2011.

The whistleblower provisions of Sarbanes-Oxley were amended in 2010 to make clear that subsidiaries of publicly traded companies are also covered employers under the act, as well as to add nationally recognized statistical rating organizations as covered employers.

The 2010 amendments also extended the statute of limitations for filing a complaint from 90 to 180 days and also provided parties with a right to a jury trial in U.S. District Court actions brought under Sarbanes-Oxley's so-called "kickout" provision. That provision states that if OSHA has not issued a final decision within 180 days of the filing of the complaint, and no showing exists that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate U.S. District Court, without regard to the amount in controversy.

Sarbanes-Oxley was also amended to provide that the rights and remedies in 18 U.S.C. 1514A may not be waived by any agreement, policy form, or condition of employment, including by a pre-dispute arbitration agreement, and also to provide that no pre-dispute arbitration agreement shall be valid or

enforceable, if it requires arbitration of a dispute arising under this section.

The new interim final rules implement these changes and also change the complaint filing process to allow complainants to file complaints orally and in any language. However, if the complaint is verbal, OSHA will reduce the verbal complaint to a written one. They also make changes to conform to the whistleblower investigative process provisions of other statutes administered by OSHA.

Once a complaint is filed, OSHA will notify the employer and also the U.S. Securities and Exchange Commission, and the employer will have 20 days to file a written response to the complaint. The employer's response, as well as other information provided by the employer, will be shared with the complainant.

At least initially, the complainant has the burden of proof and must establish by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) the employer knew or suspected that the complainant engaged in protected activity; (3) the complainant suffered an adverse employment action; and (4) under the circumstances there is at least an inference that the protected activity was a contributing factor in the adverse employment action. If the complainant fails to meet this burden of proof, then the complaint will be dismissed.

If the complainant meets his/her burden of proof, then the employer must prove by "clear and convincing evidence" that it would have taken the same adverse employment action in the absence of the protected activity. Upon such a showing by the employer, OSHA will dismiss the complaint.

Under the new interim rules, OSHA is to issue written findings within 60 days of the filing of the complaint. If OSHA finds reasonable cause to believe there is merit to the complaint, then it will order "all relief necessary" to make the complainant

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whole. This includes "preliminary" reinstatement, back pay with interest, and compensation for any special damages, including litigation costs, expert witness fees, and a reasonable attorney's fee.

The employer may file objections to OSHA's findings and request a hearing. However, such objections will not suspend an order of preliminary reinstatement. Significantly, OSHA, when appropriate, may order that the complainant receive "economic reinstatement" — that is, in essence, front pay in lieu of preliminary reinstatement, when it believes that actual reinstatement is not advisable.

The interim final rule went into effect November 3, 2011, and can be viewed in its entirety at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=22220.

OSHA also enforces the whistleblower provisions of the Occupational Safety and Health Act and some 20 other statutes pertaining to various workplace, commercial motor vehicle, airline, nuclear, pipeline, environmental, railroad, public transportation, maritime, consumer product, health care reform, corporate securities, food safety, and consumer financial reform regulations. More information on these other statutes can be found at <http://www.whistleblowers.gov>. ▲

Governor's Safety & Health Conference coming soon

The 28th Annual Governor's Safety & Health Conference and Exposition is set for May 8-11, 2012, at the Galt House in Louisville. As usual, there will be training courses, concurrent workshops, discussions of trends and issues, and keynote speakers. And on the exposition side, it's the largest health and safety exposition in the Commonwealth. So you may want to mark your calendar now to attend.

Registration on-site will be open from 4 to 6 p.m., Monday, May 7. But you'll want to pre-register well before then. The admission price, a ticket for the entire event, is \$450 if post-marked before March 31, but increases to \$550 after March 31. Full admittance includes all meals, general sessions, six workshops, two receptions, the banquet and membership in the Kentucky Safety & Health Network.

One-day admittance is also allowed. The rate is \$325 if post-marked before March 31, but increases to \$425 after March 31. Exhibitors will be able to display their products to a target audience, a surgical strike if you will, to about 800 participants. For exhibitor information, go to <http://www.kshn.net/Conference/exhibitors/exhibitors.htm>.

Early registration will be available online and by mail-in beginning in February through the Kentucky Department of Labor. No date has been posted for when registration will be open, but in February, go to <http://www.kshn.net/Conference/registration/registration.htm>. ▲

CITATIONS & FINES

Below is a listing of the citations and fines issued by the Kentucky Occupational Safety and Health agency during the month of October 2011. Provided here are summaries of the citations and the total amount of the fines. A company has 15 working days from receipt of the citations and proposed penalties to either elect to comply with them, to request and participate in an informal conference with the KOSH area director, or to contest them before the independent Occupational Safety and Health Review Commission.

CENTRAL PALLET MILLS

P.O. Box 190, Central City
 Inspection site: 5745 Paradise Road, Central City
 10-10-11 \$498,750

Failure to Abate

- Employer had not developed nor implemented a written permit-required confined space program for spaces, including the pulverizer area. \$105,000
- Employer's lockout/tagout program was deficient and did not address intended use of procedure, steps for shutting down, isolating, blocking and securing machines, removing lockout devices, and requirements for testing equipment. \$147,000
- Conveyor systems and rotating chop saw were not properly guarded. \$105,000
- Chains and sprockets on chop saw conveyor were not properly guarded. \$36,750
- Trim saws were not properly guarded. \$105,000

AT&T MOBILITY SERVICES

14892 N. U.S. Hwy. 25 E., Corbin
 Inspection site: 189 Babe Bolin Dr., Garrett
 10-11-11 \$44,100

Willful Serious

- Employee was being transported in Yamaha Rhino on very steep grade on access road; vehicle flipped, and employee was seriously injured; employer should have made safety improvements to road. \$44,100

THOMPSON MACHINERY COMMERCE CORP.

1245 Bridgestone Blvd., Lavergne, Tenn.
 Inspection site: 615 Gilbert Graves Dr., Murray
 10-24-11 \$25,200

Serious

- Employees working on 13,200-volt mounted switch were not trained and familiar with safety-related work practices, including use of proper PPE; two employees were injured from arc blast; employees were not properly supervised and site was not regularly inspected; employees were not properly trained on work outside their normal duties. \$6,300
- Employer's lockout/tagout program was deficient and did not specifically address the intended use of the procedure; employees were not properly trained in lockout/tagout procedures. \$6,300