

OSHA to Refer Expired Whistleblower Claims to NLRB

In May 2014, the Occupational Safety and Health Administration ("OSHA") entered into an agreement with the National Labor Relations Board ("NLRB") to refer expired whistleblower claims to the NLRB. This agreement follows OSHA's conclusion that employees filing a cause of action under the Occupational Safety and Health Act ("Act") may also have an unfair labor practices claim under the National Labor Relations Act ("NLRA").

Congress enacted the Act to assure safe and healthy working conditions. Section 11(c) of the Act prohibits employers from discriminating or taking retaliatory action against an employee for filing a safety complaint against the employer or exercising any right prescribed by the Act, referred to as "whistleblower claims." An employee has 30 days to file a whistleblower claim after the alleged violation occurs. A complaint brought after the 30-day period is dismissed as untimely. OSHA estimates that between 300 and 600 cases each year are dismissed on this ground.

Although OSHA is the primary agency responsible for enforcing claims of retaliation after a report of a safety violation, a number of the dismissed charges may also be actionable under the NLRA. Section 7 of the NLRA provides the right for employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA prohibits employers from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7." In contrast to the Act, an employee who has been retaliated against for engaging in a concerted activity may file a claim with the NLRB at any time within six months of the alleged violation.

The two agencies will now work in concert to encourage complainants to file claims that are untimely under the Act with the NLRB. OSHA has agreed to inform all complainants who file an untimely whistleblower charge of their right to file a charge with the NLRB. OSHA agents will discuss with the employee complainant their rights under the NLRA and the six-month statute of limitations period and will recommend that the complainant contact the NLRB. OSHA agents will also provide complainants with the NLRB's contact information, including the location of the nearest regional office.

The agreement may have a significant impact on the NLRB's interpretation of

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safety-related claims. Section 7 of the NLRA is limited to "concerted activities." Thus, OSH Act claims must be a concerted activity to be actionable under the NLRA. However, the new agreement applies to all untimely retaliation claims brought under the Act. This may signify that the NLRB is going to view most safety-related retaliation issues as "concerted activity" because safety-related issues rarely affect only a single employee. The result may be a significant increase in unfair labor practice charges, especially in industries where safety is a major concern.

If you have questions about this new and important development, please contact your Reinhart attorney or any member of Reinhart's Labor & Employment group.

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