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Avoiding Whistleblower Claims Under the OSH Act & Mine Act

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Whistleblower protection claims are one of the legal areas where safety/health and human resources professionals can be placed into a position of working in a coordinated manner, or taking independent action that can come into conflict internally and have significant consequences for a company. In addition to the standard relief that arises from normal "wrongful discharge" or "discrimination" legal actions, whistleblower claims arising under the Occupational Safety and Health Act of 1970 (OSH Act) or the Federal Mine Safety & Health Act of 1977, as amended (Mine Act) will bring the Occupational Safety and Health Administration (OSHA) or the Mine Safety and Health Administration (MSHA) into the mix, conducting an intense investigation of the complainant's claim, and in some cases issuing citations or civil penalties as a result of their findings.

This paper will explore the rights of employees under the OSH Act, Mine Act and other whistleblower statutes whose causes of action are investigated and prosecuted by OSHA. It will discuss the interrelationship of these claims with other protections, under workers' compensation laws, and federal statutes such as the Americans with Disabilities Act. It will define what constitutes "adverse action" and the procedural distinctions among these various federal laws. Finally, it will include recommendations for handling these complaints from the employer's perspective and will look to the future, to expansion of these protections in pending congressional legislation.

OSHA's Whistleblower Protection Laws

The Occupational Safety and Health Act of 1970, 29 USC § 651 et seq., created the Occupational Safety and Health Administration (OSHA) and gave it jurisdiction over general industry, construction, agricultural, and maritime workplaces. In the following years, nearly half of the states have chosen to enact their own occupational safety and health laws and have been approved by federal OSHA to run their own "state plan" programs. State plan programs must be at least as effective (or stringent) as their federal counterpart, but may have more restrictive laws in terms of protecting the safety and rights of workers. This paper focuses solely on federal statutes, and those in "state plan states" should consult local statutes or codes, as there may be more extensive whistleblower protections in their jurisdiction.

Section 11(c) of the OSH Act contains current whistleblower protections for those workers under OSHA's jurisdiction. This section states: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify

in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

The OSH Act does not entitle employees to simply "walk off" the job because of potentially unsafe or unhealthful conditions but this is being considered in new legislation (HR 2067 and S 1580) introduced in the U.S. Congress during 2009. However, when an employee is confronted with either leaving or performing assigned tasks that expose him to serious injury or death, the U.S. Supreme Court has held that the worker is protected from discrimination related to a "good faith" work refusal (*Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980)).

To trigger such protections, the condition causing the employee's apprehension of death or injury must be the type that would cause "a reasonable person, under the circumstances then confronting the employee, [to] conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels" (29 C.F.R. §1977.12(b)(2)). The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition before "walking off" the job. It is important to note that the protection is granted by the Code of Federal Regulations, and not pursuant to the OSH Act itself, which means that it could be rescinded through rulemaking in future administrations. To prevent this, Congress now seeks to codify the work refusal provision legislatively.

By comparison, with respect to work refusals, MSHA employs a four-part test, and this may be formally adopted by Congress in the months or years to come as applicable to OSHA-regulated businesses. The miner must have (1) a *good faith,* (2) *reasonable belief* that a (3) *hazard* exists that is ordinarily (4) *communicated* to the mine operator. Miners also can claim that they were constructively discharged if the mine operator "created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign" (*Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994)).

OSHA Complaint-Triggered and Section 11(c) Investigations

Any one of the following eight criteria may trigger an OSHA inspection and/or investigation, arising from an employee complaint:

1. A written, signed complaint by a current employee or employee representative that has enough detail to result in an OSHA determination that a violation or danger likely exists that threatens physical harm;
2. An allegation that physical harm has occurred as a result of a hazard and that the hazard still exists;
3. A report of an "imminent danger;"
4. A complaint about a company in an industry covered by an OSHA "emphasis program" or a hazard targeted by an emphasis program (e.g., silica or ergonomics);
5. Inadequate response from an employer who received information on the hazard through an OSHA phone/fax investigation;
6. A complaint against an employer with a history of egregious, willful or failure-to-abate OSHA citations within the previous three years;
7. Referral from a "whistleblower" investigator; or
8. A complaint at a facility scheduled for or already undergoing an OSHA inspection.

Under Section 11(c), an employee who believes that s/he has been discharged or otherwise discriminated against by any person for protected safety activity may, within 30 days after such violation occurs, file a complaint with the Secretary of Labor. Upon receipt of the complaint, the Secretary initiates an investigation and, if OSHA determines that the provisions have been violated, the agency will bring an action in any appropriate United States District Court against the employer. Therefore, OSHA whistleblower complaint claims are not litigated through the Occupational Safety and Health Review Commission, but go directly to federal court if OSHA decides to prosecute. There currently is no "private right of action" under the OSH Act. Consequently, a discrimination action under Section 11(c) may not be brought directly by an employee; such an action may only be brought by OSHA on an employee's behalf. However, this would be altered by the Protecting America's Workers Act (HR 2067 and S 1580), pending in Congress at this writing.

Although there is a 30-day deadline to file a complaint with the Secretary of Labor, it is a statute of limitations subject to equitable tolling. For example, if an employer misleads a worker into believing s/he has been laid off rather than fired, the worker can file complaint within 30 days after learning true situation (*Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984)).

Mine Act Whistleblower Protections

The Federal Mine Safety and Health Act of 1977, as amended, 30 USC 801 et seq., has far more robust protections for workers under its whistleblower provisions than is provided for workers under OSHA jurisdiction. The Mine Safety and Health Administration (MSHA) has jurisdiction over coal mines, metal mines, non-metal mines, and other facilities that include stone quarries, sand and gravel pits and dredging operations, cement plants, and alumina plants. Recently, MSHA has sought with some success to expand its jurisdiction into asphalt plants, coal-fired power plants, maintenance shops that service mining equipment, and even some manufacturing facilities that engage in "mineral milling" as part of their materials refinement process pre-production.

MSHA insists that all miners be trained at the start of their employment concerning their whistleblower rights under Section 105(c) of the Mine Act, under 30 CFR Parts 46 and 48. This training is also often repeated during annual refresher sessions that are also mandated by law. Section 105(c) of the Mine Act prohibits discrimination against mine employees, as well as contractors' employees who perform work at the mine, based on the exercise of safety and health rights under the Act. A company can be penalized by MSHA, and additional relief can be ordered (reinstatement, back pay, etc.) to the miner who was the subject of discriminatory action. MSHA Sec. 105(c) penalties can reach $70,000 per violation against the mine operator (or contractor). MSHA can also impose individual personal penalties against "agents of management" of up to $70,000 per person for whistleblower violations, under its authority in Section 110(c) of the Mine Act. These "agents of management" include both salaried and hourly workers, who are officer or directors of the corporation, or who are supervisors, leadmen, foremen, managers or others who can hire, fire, discipline, or in other ways direct the workforce or carry out managerial functions (e.g., doing worker training or workplace examinations, or having authority to initiate corrective action, stop work, or exercise purchasing authority).

In addition to the penalties that MSHA can civilly impose on the employer, the complainant is eligible for temporary reinstatement while the investigation or litigation is pending (if the judge makes a preliminary finding that the complaint is not frivolous). The miner who prevails in whistleblower litigation under Section 105(c) can also receive back pay, permanent reinstatement,

benefits restoration, and (if exercising the private right of action) attorney fees and costs. In addition, management's refusal to rehire such individuals after the situation is corrected can constitute as second prohibited discrimination (retaliation), and result in additional penalties and MSHA prosecution

The scope of protections under the Mine Act is quite broad. Everyone who is a miner is protected, including salaried supervisors and contractors! A miner who believes that s/he was discriminated against because of participation in a protected activity must file a complaint with MSHA within 60 days of the alleged discriminatory action's occurrence. This is not a jurisdictional statute of limitations, however, and it is quite often waived based on equitable tolling.

Once a complaint is lodged with MSHA, the agency will assign a special investigator from the District Office to determine whether the complaint is meritorious. This includes use of "Special Investigation" techniques that are more commonly used in Section 110(c) personal prosecution actions (civil and criminal), arising from willful violations of safety and health standards.

If MSHA finds that a complaint has merit, the Commission can order temporary reinstatement of the miner, pending a final resolution of the complaint. This proceeding is not a merits finding. See Section 105(c)(2) of the Mine Act and FMSHRC Procedural Rule 44(c). The Administrative Law Judge may order pay in lieu of actual reinstatement, while action is pending, and this may be less disruptive to the workforce. In a temporary reinstatement action, the issues before the judge are whether protected activity actually occurred (the claim is not frivolous) and, if so, whether such activity "was reasonably contemporaneous with the adverse action complained of."

MSHA whistleblower cases proceed to litigation if either MSHA files a complaint on behalf of the miner, or if MSHA concludes its investigation and does not pursue action against the mine operator but the complainant files suit *pro se* (or with private counsel) through a complaint to the Federal Mine Safety and Health Review Commission (FMSHRC), an independent agency that adjudicates MSHA whistleblower cases as well as citation cases. If either side is displeased with the Administrative Law Judge's findings, a Petition for Review can be filed with FMSHRC. The Commission decision, in turn, can be appealed by the losing party to the U.S. Court of Appeals (DC Circuit or the Circuit in which the mine is located). The final level of appeal is the U.S. Supreme Court.

What Is "Protected Activity" and "Adverse Action?"

Protected activity is broadly construed under both the OSH Act and the Mine Act, as well as under various environmental statutes' whistleblower provisions, which OSHA also is tasked with enforcing. The types of activity include:

- Raising safety and health (or environmental) complaints with management;
- Complaints to OSHA/MSHA/EPA;
- Giving statements to OSHA, MSHA, EPA inspectors during inspections or investigations;
- Situations where, even though the employee has not made a complaint or statement, management thinks that the worker is an informant or a complainant; and
- Being the subject of a medical evaluation and potential transfer under a standard (e.g., because of overexposure to lead or arsenic).

An employer cannot take action because a worker exercised any other statutory rights under the Mine Act or OSH Act (e.g., the right to be compensated while serving as the "employee rep" during inspections or to be paid during mandatory training). As noted above, a mine operator cannot discriminate against an employee who refuses to work under an alleged unsafe or unhealthful condition, or who refuses to operate equipment that he/she believes is unsafe, but there is no such statutory provision for OSHA-regulated worksites at this time. Significantly, a complainant is protected even if the agency investigates a complaint about unsafe conditions, but determines that no violation or hazard actually exists.

Adverse action is likewise quite expansive, and there are myriad ways for employers to get into trouble and run afoul of whistleblower laws in the event that these actions are taken close in time to protected activity. There is a general, non-codified, presumption that adverse action within a six-month timeframe after the protected activity occurred is related, and the burden will shift back to the employer to show a legitimate business reason for the adverse action that was not motivated in any way by the protected activity.

An employer is forbidden from considering any safety-related activity or complaints by a worker when making an employment decision that could be considered "adverse" by the employee or which constitutes "reprisal." These include, but are not limited to:

- Termination,
- Lay-offs,
- Demotion,
- Shift or duty reassignment,
- Reduction in pay,
- Loss of overtime availability,
- Transfer to a different worksite,
- "Blacklisting" an employee by giving his/her a bad reference,
- Confidential statements to MSHA/OSHA investigators and compliance officers,
- Contest of a citation's abatement date,
- Initiation of proceedings for promulgation of an occupational safety and health standard,
- Application for modification or revocation of a variance,
- Judicial challenge to a standard,
- Trial testimony in a civil penalty proceeding against the employer, and
- Appeal of Commission order (e.g., where an employee intervenes in litigation to challenge dismissal of a citation or reduction of MSHA/OSHA civil penalty).

Under MSHA case law, which is more broadly developed than OSHA case law (because OSHA cases are often disposed of administratively or settle before reaching U.S. District Court), the scope of an adverse action is not limited to terminations, demotions, and formal discipline, but rather extends to "more subtle forms of discrimination" (*Sec'y on behalf of Long v. Island Creek Coal Co.*, 2 FMSHRC 1529, 1543 (June 1980)). Some judges hold that it also would violate section 105(c) to assign a miner onerous tasks or subject a miner to harassment in retaliation for protected activities.

Recommendations for Preventative Measures

It is critical for safety and health professionals to understand the rights of workers and the responsibilities of managers in order to avoid violating workers' whistleblower rights. Depending on corporate structure, this may demand coordinating activities and communicating information between the personnel/HR department and the safety/health department in order to avoid taking action against an employee that may trigger Section 105(c) or Section 11(c) protections.

An HR manager looking to compile a layoff list may be unaware that one or more targeted workers filed safety complaints with OSHA or MSHA, or testified against the company in a legal proceeding brought by one of those agencies, or even opted to speak privately to a compliance officer during an inspection. Yet, if there is a temporal nexus between the protected activity and the "adverse action," the complainant will have automatically demonstrated a prima facie case of discrimination under these whistleblower laws and the federal agency will have no choice but to launch a comprehensive investigation of the employer.

Employers must also understand the shifting burdens of proof, which are similar to those under Civil Rights laws and other federal employment statutes. In whistleblower cases, the burden of proof is divided between the complainant and the employer. The complainant bears the burden of proving that he/she engaged in a protected activity and that the adverse action was motivated in any part by the protected activity. If the complainant meets this burden, this constitutes a *prima facie* case and the case will go forward and it is likely that (where available) temporary reinstatement will be ordered by the Court.

The employer is given the opportunity to articulate a legitimate business reason for the "adverse" action, but companies should be aware that courts have inferred discriminatory intent from the following:

1. knowledge of the employer that the complainant was making safety complaints;
2. hostility toward safety matters and complaints about safety;
3. proximity between the time safety complaints were made and the time that adverse action occurred; and
4. disparate treatment (e.g., the complaining worker was disciplined more harshly than others who engaged in similar non-safety-related action).

Moreover, the existence of prior discrimination proceedings at a particular company will likely be considered by the judge in determining "hostility" or *animus* toward safety complainants. The employer may rebut the finding by showing either that (1) the worker was not engaged in any protected activity, or (2) the adverse action was not motivated in any part by the protected activity.

Even if the protected activity was a factor in the decision, the employer can still defend if it demonstrates that it would have taken the adverse action in any event for the unprotected activity alone. To adequately defend a company's decision in such a situation, it is critical to have proper documentation on how the decision was arrived at, why the complainant was selected, and (hopefully) if the case involves a disciplinary decision, evidence that the complainant was treated no differently from others who, in the past, engaged in the same violation of company policy or procedures. Documentation is key!

The following are some suggested actions that safety/health and HR professionals should consider adopting as policy:

- No employer should hinder any Section 11(c) or 105(c) investigation or prevent employees or management representatives from talking to the investigator.
- All complaints must be thoroughly investigated, and appropriate remedial action taken promptly.
- Any disciplinary action that could have Section 11(c) or 105(c) implications should be carefully considered, and undertaken only with witnesses present.
- Such matters should be kept confidential, to extent practicable, to avoid potential defamation suits.
- Counsel should normally be consulted in these situations.
- A record of all disciplinary action should be maintained, even prior to the receipt of a complaint, so that an employee's performance can be documented in the event that the employer must support his non-discriminatory decisions.

Other Whistleblower Laws Enforced by OSHA

There are several other statutory protections for whistleblowers that safety/health and HR professionals should keep in mind, as these are all investigated and prosecuted by OSHA and so can bring unwanted scrutiny on a company's operations and its safety/health practices even where there is no safety component to the whistleblower's allegations. One of the most commonly prosecuted is under the Surface Transportation Assistance Act (STAA), Section 405, which provides discrimination protection for commercial drivers similar to those protections of the OSH Act and Mine Act. However, under the STAA, there is a 180-day statute of limitations, and for construction and mining companies that employ "CDL" drivers, the STAA is often invoked where the employee missed the OSH Act or Mine Act's shorter statute of limitations. STAA actions are investigated by OSHA's regional offices, and OSHA even investigates STAA claims that arise from CDL drivers at mines!

The protections are limited to employees of most commercial motor carriers engaged in interstate or intrastate operations who, in the course of their employment, directly affect motor carrier safety. The STAA mandates that a carrier or employer may not discharge, discipline, or discriminate against a driver regarding pay, terms, or privileges of employment because the driver:

(1) files a complaint or begins a proceeding related to the violation of a commercial motor vehicle safety regulation, standard or order or has or will testify in such a proceeding, or

(2) refuses to operate a vehicle on the grounds that the operation violates a regulation, standard or order related to commercial motor vehicle safety or on the grounds that the driver has a reasonable apprehension of serious injury due to the vehicle's unsafe condition.

The unsafe conditions causing the driver's apprehension must be such that a reasonable person would conclude there is a danger of an accident, injury, or serious impairment of health resulting from the unsafe condition. The driver must also have sought from the carrier and been unable to obtain correction of the unsafe condition. A driver who is discharged or disciplined in violation of these provisions may file a complaint with the Secretary of Labor within 180 days after the alleged violation occurred. In addition, most jurisdictions hold that the STAA does not preempt state law actions for wrongful discharge. This is different from the majority of holdings that have precluded state common law actions where there was a remedy available under the OSH Act or Mine Act. But

see *Kilpatrick v. Delaware County S.P.C.A.,* 632 F. Supp. 542 (E.D. Pa. 1986); *Sorge v. Wright's Knitwear Corporation,* 832 F. Supp. 118 (E.D. Pa. 1993) (holding that that this procedure is not the sole remedy available to employees).

Examples of activities that run afoul of the STAA include:

- A driver may not be discharged for refusing to drive a vehicle that is exhibiting any problems such as a lack of power, or for refusing to drive a vehicle that has an inspection report with an incorrect identification number.
- A dispatch that contemplates a violation of the driving-time rules by the driver is illegal, even if the driver had available driving-time at the outset of the run, and the carrier may not discharge a driver for refusing to accept such an assignment.
- A driver cannot be disciplined for taking a break to avoid fatigue, even if the rest results in the load being delivered late.

If the investigative findings indicate that a violation of Section 405 has occurred, an attempt shall be made to negotiate a voluntary settlement, as with Section 11(c) complaints. Complainants and respondents must be fully advised by OSHA as to their legal rights. If the matter does not settle, either party may object, in writing, to the Finding, Preliminary Order, or both. A written objection must be made with the OSHA Regional Administrator, the Chief Administrative Law Judge (ALJ) at the U.S. Department of Labor, and the other party within 30 days of receipt of the Finding and Order. If no objection is filed within 30 days of the receipt, the Findings and Preliminary Order will become final and not subject to judicial review. Regardless of whether an objection was filed by either party, any portion of a Preliminary Order of reinstatement will be effective immediately upon receipt of the finding and Preliminary Order. A hearing will be scheduled by the Chief ALJ.

To establish a violation of the provisions of the STAA, a complainant "must show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive—a mere good faith belief in a violation does not suffice" (*Yellow Freight Systems v. Martin,* 983 F.2d 1195, 1199 (2d Cir. 1993)). "[S]uccess in a whistleblower complaint requires more than passionate argument. Even the most forceful argument will collapse if the complainant fails to develop strong factual underpinnings; assertion, conjecture and argument, by themselves, are insufficient" (*Somerson v. Yellow Freight System, Inc.*, 1998-STA-9 and 11 (ALJ Feb. 18, 1999)).

In addition to the STAA, OSHA also has authority to administer the whistleblower provisions of 11 other federal laws. These deal with issues such as environmental hazards, airlines, pipelines, nuclear power, and securities fraud. Each of the statutes below permits an employee to file a complaint with the Secretary of Labor (through OSHA) and requires that the Secretary then notify the parties of the filing of the complaint, the allegations contained therein, and the evidence upon which those allegations are based. The Secretary must provide an opportunity for the named party to submit a written response and witness statements, and a chance to meet with OSHA investigators to present a case in support of his position. At the conclusion of the investigation, the Secretary must issue a determination as to whether the complaint has merit.

The whistleblower provisions of environmental statutes enforced by OSHA are:

- The Asbestos Hazard Emergency Response Act (15 U.S.C. §2651) (AHERA);

- The Energy Reorganization Act of 1974 (42 U.S.C. §5851)
- The Clean Air Act (42 U.S.C. §7622)
- The 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)
- Toxic Substances Control Act (15 U.S.C. §2622)
- Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9610).

Each of the environmental laws provides protection against discrimination for employees who commence an action, testify in an action, or participate in any way in an action alleging safety/environmental violations committed by an employer. An employee who believes he is being discriminated against can file a complaint with the Secretary of Labor within thirty (30) days of the alleged violation. The Secretary must complete the investigation and inform the parties of his determination as to whether a violation has occurred within thirty days, and must issue a final order within ninety (90) days of the receipt of the complaint. The parties are permitted to request a review by an Administrative Law Judge.

OSHA also enforces the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). AIR21 prohibits discrimination against airline employees who provide information regarding violations of standards set by the Federal Aviation Administration (FAA) or any other federal law relating to air carrier safety. An airline employee has 90 days from the date of the alleged violation to file a complaint under AIR21. Within 30 days of the notification of the findings, either party may file objections to the findings, the preliminary order, or both, and request a hearing. Parties are permitted to request a review by an Administrative Law Judge. Not later than 120 days after the conclusion of a hearing, the Secretary shall issue a final order providing relief or denying the complaint. In a unique provision, if the Secretary finds that a complaint is frivolous or has been brought in bad faith, the Secretary may award to the employer a reasonable attorney's fee not exceeding $1,000.

A third transportation-related statute enforced by OSHA is the Pipeline Safety Improvement Act of 2002 (PSIA). PSIA provides that an employee, or a person acting on the employee's behalf, may file a complaint with the Secretary of Labor within 180 days of the occurrence of the violation. The Secretary of Labor shall then notify the persons named in the complaint and the Secretary of Transportation of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the opportunities that will be afforded such persons with regard to any investigation. If the Secretary finds it likely that a violation has occurred, he shall issue a preliminary order. Objections may be filed and a hearing requested within 60 days after the date of notification of the findings. Parties are permitted to request a review by an Administrative Law Judge. If a hearing is requested, a final order must be issued within 60 days of the conclusion of the hearing. As with AIR21, if the Secretary of Labor finds that a complaint is frivolous or has been brought in bad faith, the Secretary of Labor may award the prevailing employer a reasonable attorney's fee not exceeding $1,000.

Finally, OSHA is charged with enforcement of whistleblower protections under the Sarbanes-Oxley Act of 2002 (18 U.S.C. §1514A, "SOx"). SOx took effect in December 2003 but few successful prosecutions against corporations have been brought to date. OSHA's regulations governing actions under the SOx are provided at 29 C.F.R. §1980. Under Title VIII of SOx, OSHA has jurisdiction over complaints by employees of companies with securities registered under section 12 of the Securities and Exchange Act, and over those companies that must file reports pursuant to section 15(d) of that Act. OSHA also has jurisdiction over any officers, agents, contractors, or subcontractors of such companies. SOx seeks to prohibit adverse action against employees who provide information to supervisors or the government relating to securities fraud. The statute specifically covers information provided internally (including safety/environmental self-audits), as well as information provided to federal regulatory or law enforcement agencies and Congress. An employee has 90 days from the date of the violation to file a complaint against a company over which OSHA has jurisdiction. The action itself and the procedures relating to it are to be governed by rules set forth in 49 U.S.C. §42121(b), AIR21.

Conclusion

As is evident, significant coordination is needed between HR and safety, health and environmental professionals to ensure that a company does not take adverse action against those who might be protected under one of the statutory systems described above. Moreover, there should be recognition that employees who have exercised their rights to file workers' compensation actions for work-related injuries or illnesses also have protected status.

Most state workers' compensation laws provide that it is unlawful for employer to discharge or otherwise discriminate against worker for claiming workers' comp or testifying at a comp hearing. Moreover, many times work-related accidents will be the subject of OSHA or MSHA investigations and citation prosecutions. The workers' compensation claimant who also testifies in an OSHA or MSHA citation hearing, or who gives a statement to the OSHA/MSHA investigator, will have dual protected status under these federal statutes as well as the state worker's compensation laws, and there will be no claim preclusion, which means that the employer may find himself facing two distinct sets of whistleblower/anti-retaliation litigation.

Although the complainant/claimant bears ultimate burden of persuasion in retaliatory discharge and whistleblower protection claims, in real practice, the relevant inquiry is whether the employer's proffered reasons for termination or other adverse action are credible or could be found to be pretextual; whether the adverse action was motivated in whole or in part by the employer's knowledge or belief that the subject employee was a "whistleblower." Given congressional emphasis on whistleblower protection expansion in recent years (and in current proposed legislation), these protections are likely to be strengthened. Now is the time to review disciplinary policies as well as documentation programs to ensure that, in the event of litigation, a solid and legitimate defense can be offered.