



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

OSHA Head Says OSHA Will Lower Whistleblower's Burden of Proof in Investigations

By Brent I. Clark, Ada W. Dolph and Craig B. Simonsen

In *remarks* before its Whistleblower Protection Advisory Committee, OSHA Administrator *Dr. David Michaels* said that he will lessen the whistleblower's burden of proof in investigations.

Dr. Michaels spoke at the September 3, 2014 Whistleblower Protection Advisory *Committee meeting*. In his introduction, he noted that from 2009 through June 30, 2014, OSHA has issued 3,726 merit determinations, "recovering over \$119,000,000 in damages for whistleblower complainants, and reinstated 389 whistleblowers to their positions." In fact, "in the first three quarters of this year, we've already issued 602 merit determinations and awarded approximately \$21.5 million in damages to whistleblower complainants." Dr. Michaels asserted that from 2009 through June 30, 2014, OSHA more than doubled the number of complaints OSHA found to have merit (from 450 in FY2009 to 934 in FY2013). A real question, of course, is whether this extraordinary increase in merit findings by OSHA was actually warranted by the facts of those cases.

Apparently, though, there were not enough complaints that were found to have merit by OSHA's investigators, as the Administrator believes that the burden of proof in whistleblower investigations was just too high. "We are working on a new policy memo clarifying the Agency's position regarding burden of proof in whistleblower investigations. The memo will change the burden of proof to be based on a 'reasonable cause' that a violation occurred, which is a lesser burden to prove than a 'preponderance of the evidence.' OSHA and the office of the Solicitor of Labor are working on this policy memo and it should be completed shortly."

While the burden of proof in whistleblower cases is a legal standard prescribed in the 21 statutory provisions for whistleblower protections that OSHA administers, including *OSHA 11(c)*, *STAA*, *AIR21*, and *SOX*, Dr. Michaels believes that OSHA should lower the burden needed before OSHA can find a case has merit. The natural consequence of such policy change will be even more cases being found to have merit by OSHA.

Of course, what Dr. Michaels and OSHA cannot change is the actual burden of proof that the courts are required to apply under each statute. If OSHA is constantly using a lower burden of proof to screen and evaluate cases, regardless of the statute, it seems they may be headed for trouble if and when they get to court.

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