



# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*

## Employee calls OSHA, can she now refuse to work?

*By Jim Curtis and Kevin Fritz*

**Hypothetical, based upon a real fact pattern:** EH&S staff of a manufacturing facility certifies the production area as fully compliant with all health and safety regulations. The facility is subsequently contacted by OSHA and OSHA opens an inspection at the facility. Thereafter an employee reveals that he called OSHA to complain about safety hazards in the production line. The employee then refuses to work on production line until OSHA completes its inspection and certifies that there are no hazards.

### What should the Company do?

Even though EH&S staff certified that the production area was fully compliant, employees have the right to file a complaint with OSHA when they believe working conditions are unsafe or unhealthful. Accordingly, the employee has engaged in protected activity.

#### Safety Concerns

Once the employee reveals that he called OSHA to complain, the employer's response is simple:

1. Thank the employee for raising safety concerns;
2. Tell the employee that safety concerns are taken seriously;
3. Investigate the employee's complaint and take corrective action, if necessary;
4. Inform the employee of the results of the company's investigation.

#### Refusing to Work

While the employee has a protected right to call OSHA and file a complaint, that does not necessarily mean that the employee may refuse to work on the production line until OSHA completes its inspection. Rather, OSHA only allows an employee to refuse to work based upon an alleged safety hazard when:

- The employee must have asked the employer to eliminate the danger, and the employer failed to do so;
- The employee refused to work in "good faith" – meaning the employee genuinely believed that there was imminent danger;

- A reasonable person would agree that there was an actual danger of death or serious injury; *and*
- Not enough time exists to correct the situation through regular enforcement channels.

If the employer determines that the employee's refusal to work was not made in good faith or is not reasonable under the circumstances, then the employee's refusal is not protected.

Here, the situation is complicated by the fact that the employee has complained to OSHA and OSHA is investigating. There is nothing in the Act that allows an employee to refuse to work pending an OSHA investigation. However, any adverse action during an OSHA investigation will be subject to great scrutiny and will likely prompt a retaliation claim. The employer should revisit the alleged safety hazard with the EH&S staff and confirm that the process is safe and compliant. Assuming the process is safe and compliant, the employee's supervisor and/or EH&S representative should meet with the employee to discuss the employee's concerns and explain why there is no hazard. If the employee still refuses to work, then the employee's position has become unreasonable. The employer may consider addressing the issue with OSHA, although OSHA is typically very reluctant to become involved in employment issues. The employer may choose to move the employee to another job and wait for OSHA to complete its inspection. In the event that the employee cannot be moved and must work on the production line, the employer can consider discipline. However, this should only be done as a last resort if the employee is being unreasonable. As always, should the employer go the discipline route, be sure the file is well documented that the employee is not being disciplined for raising safety concerns, but rather for the employee's unreasonable refusal to work.

### Employer Tips

When confronted with an employee's health and safety concerns and/or work refusal, consider the following:

**Inform.** Always let the employee know that their concerns are taken seriously and will be investigated by the appropriate parties.

**Investigate.** Investigate the employee's complaint. Determine whether the safety complaint was made in good faith and if the task poses an actual hazard.

**Act.** If there is a hazard fix it. If not, explain to the employee why the process is safe and encourage the employee to return to work.

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