News

Recordkeeping

Tougher Sanctions Considered for Employers Who Discourage Injury, Illness Reporting

Employers could be cited by OSHA for discouraging workers from reporting injuries or illnesses, even in cases in which no worker had filed a complaint, according to a notice scheduled to appear in the Aug. 14 Federal Register.

The proposal is the latest addition to the Occupational Safety and Health Administration's proposed rulemaking (RIN 1218-AC49) to require many employers to file electronically their accident and injury reports and for OSHA to post those reports on its public website (44 OSHR 235, 3/13/14).

"OSHA wants to make sure that employers, employees and the public have access to the most accurate data about injuries and illnesses in their workplaces so that they can take the most appropriate steps to protect worker safety and health," OSHA administrator David Michaels said in an Aug. 13 statement.

Since March 2012, OSHA has discouraged companies from using incentive programs—such as rewarding workers for 1,000 days without a reportable injury—to ensure employees feel free to report when they are hurt or made sick on the job (42 OSHR 266, 3/22/12).

The public has through Oct. 14 to submit comments about the new proposal to OSHA at http://www.regulations.gov. Comments must include the RIN number or Docket No. OSHA-2013-0023.

Concerns Raised. In the notice, OSHA said it expanded the proposed rulemaking in response to comments made during Jan. 9 and 10 public meetings where worker and employer representatives presented their cases (44 OSHR 50, 1/16/14).

At the meetings, many union and workers' rights representatives said they were concerned that if OSHA posted online injury and illness data for each employer, that could lead to companies discouraging workers from filing reports, so that it would appear that the employer had a better record.

Under the new proposal, the notice said, OSHA "would be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint."

Currently, OSHA can take action against an employer only after a worker files a retaliation complaint under Section 11(c) of the Occupational Safety and Health Act. The proposed rule would allow OSHA to cite employers for policies, not just actions against workers who complain to the agency.

Chamber Questions. Marc Freedman, executive director of labor law policy at the U.S. Chamber of Commerce, told Bloomberg BNA Aug. 13 that he questions how OSHA could pursue a case if there was no requirement for a complaint.

He challenged the notion that employers have or would put in place programs to discourage workers from filing injury and illness reports. Supporters of the proposed rulemaking will need to present data and studies to back their position, and not just depend on anecdotes, Freedman said.

At the January public sessions, Chamber of Commerce representatives spoke against the original proposed rulemaking. The chamber still believes OSHA lacks the legal authority to post injury and illness reports and questions whether OSHA has enough personnel and resources to implement the proposal, Freedman said.

Union Backing. Peg Seminario, the AFL-CIO's director of safety and health, welcomed OSHA's consideration of expanding the proposed rulemaking.

"We're glad to see OSHA is taking the issue seriously," she told Bloomberg BNA Aug. 13.

The problem with Section 11(c) cases is that they come after retaliatory actions and don't cover systematic efforts to discourage reporting, Seminario said.

Nancy Lessin, a senior safety staff member with the United Steelworkers, said union surveys have found practices suppressing injury reporting in 90 percent of USW-represented facilities.

"When workers are discouraged from reporting, hazards causing those injuries and illnesses are not identified and won't get addressed," Lessin told Bloomberg BNA Aug. 13.

By Bruce Rolfsen

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A copy of the advance Federal Register notice is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-19083.pdf.

Enforcement

Surge of OSHA Complaints Could Follow New NLRB Policy to Inform Workers of Rights

In a move that could set off a surge of workplace safety and health complaints, National Labor Relations Board personnel who discover apparent violations of federal occupational safety laws should tell workers that they can file complaints with the Occupational Safety and Health Administration, the NLRB said in an Aug. 8 memorandum.

NLRB Associate General Counsel Anne Purcell told regional offices that witnesses in unfair labor practice investigations might indicate an employer has violated

the Occupational Safety and Health Act. In those instances, NLRB agents should advise the workers who lodged the unfair labor practice claim that they can also file a claim with OSHA.

Workers lodged an average of 23,000 unfair labor practice claims per year from fiscal year 2004 to 2013.

"Every case is investigated," Marge Hamrick, program analyst at the NLRB's Office of the Chief Information Officer, told Bloomberg BNA Aug. 12.

Cross-Agency Coordination. The NLRB policy memo appears to be a further effort to coordinate enforcement of laws meant to protect workers. In addition to apparent safety violations, the memo instructs NLRB officials to alert workers of their right to file complaints related to wage and hour law violations.

The memo represents the flip side of a joint initiative finalized in May directing safety whistle-blowers who miss the 30-day deadline to file retaliation complaints with OSHA to instead file grievances with the NLRB (44 OSHR 513, 5/29/14).

In the same vein, OSHA announced in July an agreement with the Federal Motor Carrier Safety Administration to allow the agencies to exchange complaints when they fall under each other's authority.

"Law enforcement agencies frequently share information about potential violations that are outside of the immediate scope of their authority, as should be the case," Eric Frumin, safety and health director at the Change to Win labor federation, told Bloomberg BNA Aug. 12. "So if it's the DEA and the ATF or OSHA and the NLRB, it all makes sense."

Cross-agency cooperation like OSHA and the NLRB's policy to inform workers about their rights is a sensible way to promote efficient use of the agencies' limited resources, Keith Wrightson, worker safety and health advocate at Public Citizen, told Bloomberg BNA Aug. 12.

While the OSH Act, the National Labor Relations Act and other workplace laws already mandate informing workers of their statutory rights, the OSHA-NLRB policy may be an effort to further help non-lawyer workers understand their statutory rights, said John N. Raudabaugh, a former NLRB member and now a professor at Ave Maria School of Law.

More Worker Complaints. But the policy may also be an attempt to drive worker complaints to the respective agencies, thus maintaining their stability and congressional funding in a time when reductions in unionization rates might otherwise weaken them, Raudabaugh told Bloomberg BNA Aug. 12.

"Clearly there will be more complaints," attorney Nickole C. Winnett of Jackson Lewis PC told Bloomberg BNA Aug. 12.

Workers in manufacturing, transportation and warehousing, health care and social assistance, and construction were the most common filers of unfair labor practice complaints in fiscal year 2009, the last year the NLRB produced annual reports. Workers in those four industries were responsible for more than half of the complaints filed that year, suggesting those are the industries that the referral policy might affect the most.

Moreover, companies with workforces that aren't unionized, are newly unionized or are represented by weak unions might feel the strongest impact of the policy, said Aaron R. Gelb, partner at Vedder Price. Sophisticated, entrenched unions are more likely to directly encourage workers to file grievances with whichever agencies they can, Gelb told Bloomberg BNA Aug 12.

"The board is making an aggressive push to be relevant in nonunion workplaces, where there's no union to steer people," Gelb said.

NLRB Inspectors Aren't Safety Experts. One potential problem with the referral policy, management-side attorneys said, is that it calls for NLRB staffers to make the call on what constitutes a potential violation of the health and safety provisions of the OSH Act.

In fact, the memo explaining the policy stressed that NLRB personnel aren't expected to be experts in occupational safety and health laws. The memo cites information available online—"OSHA at a Glance"—that can provide guidance and suggests that the NLRB and OSHA may team in the future to develop training materials for NLRB staffers.

Regardless of online information or plans for future training, NLRB personnel haven't received in-depth training in other statutes, said Brian E. Hayes, former NLRB member and current co-leader of Ogletree Deakins PC's traditional labor practices.

"Because of the fact that we're dealing with folks—and this is no negative reflection on board personnel—who haven't been trained in this, there's a possibility of over-referral," Hayes told Bloomberg BNA Aug. 12. "That's not necessarily a good thing for anyone involved. Over-referral burdens the agency to which matters have been referred and it certainly burdens the parties that are the subject of the referral."

Policy 'Unobjectionable,' Industry Lawyer Says. But the referral policy is narrowly written and contains limitations, making it not as "potentially draconian" as it could have been, said Baruch Fellner, partner with Gibson Dunn & Crutcher LLP.

The policy could have directed the NLRB to make referrals directly to OSHA rather than advising workers on their right to file complaints, Fellner told Bloomberg BNA Aug. 12. The only contact between the two agencies that the policy calls for would occur through the regional Labor Department solicitor's office when they have ongoing parallel investigations in need of coordination.

In addition, referring workers to their rights is triggered by the detection of potential OSH Act violations, which is a narrower category than worksite hazards, Fellner said.

"It is entirely unobjectionable from a legal perspective and a policy perspective," Fellner said of the policy. "The two agencies are looking to leverage their respective limited resources. While under the circumstances it's difficult to endorse, nevertheless I don't see any appropriate reason to object."

By Robert Iafolla

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NLRB memo on referral policy is available at http://op.bna.com/dlrcases.nsf/r?Open=ldue-9mvmcv.

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