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OSHA's Injury Reporting Rule Focuses On Anti-Retaliation

Adam Roseman

Law360, New York (June 13, 2016, 12:12 PM EDT) -- Imagine: An employer has a safety incentive program that rewards employees with $50 gift cards each month an employee does not suffer an injury. One day, a machine operator trips on a wet floor and breaks his ankle. The employee promptly reports the injury and misses three weeks of work because of it. Because he suffered the injury, he is no longer eligible to receive a $50 gift card this month. Two months later, a compliance safety and health officer (CSHO) performs a programmed inspection at the employer's workplace. She performs witness interviews and reviews the employer's safety manuals, injury logs and safety programs. Two weeks later, the Occupational Safety and Health Administration issues citations for violating various regulations of the Occupational Safety and Health Act. One of the citations alleges that the employer impermissibly retaliated against the machine operator because he was not eligible to receive a $50 gift card that month because he suffered and reported the injury.

Why is that Retaliation?

On May 11, 2016, OSHA issued its controversial final rule on recordkeeping and reporting.[1] The final rule sets forth regulations designed to prohibit retaliation against employees that report work-related injuries or illnesses.

In short, the final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation, and clarifies the existing implicit requirement that an employer must provide reasonable procedures for reporting work-related injuries and illnesses that do not deter or discourage employees from reporting them. To this end, OSHA is now permitted to cite an employer for taking an adverse employment action against an employee for reporting a work-related injury or illness, even if the employee does not file a retaliation complaint with OSHA.

The expanded protections for employees who report work-related injuries or illnesses go into effect on Aug. 10, 2016, 90 days after the final rule is published in the Federal Register.

Background on Retaliation Under OSHA

Previously, all retaliation claims were covered under Section 11(c), 29 U.S.C. § 660(c), of the OSH Act, which prohibits any person from discharging or otherwise discriminating against any employee because the employee has exercised any protected right. Reporting a fatality, injury or illness is a protected right under section 11(c).

Under Section 11(c), an employee who believes he or she has been discriminated against may file a complaint with OSHA. The employee must file the complaint within 30 days of the alleged discrimination or retaliation. If, after an investigation, an investigator from the Office of the Whistleblower Protection Program (OWPP) has "reasonable cause" to believe that the employer violated Section 11(c), OSHA may seek monetary and equitable remedies including reinstatement, back pay, front pay and punitive damages.

If OSHA cannot resolve the matter with the employer, OSHA may refer the case to the secretary of labor. When this occurs, the secretary of labor may either require OSHA to continue to negotiate a settlement with the employer or the secretary may file suit against the employer in U.S. district court. The secretary of labor may obtain all available equitable and monetary relief under section 11 (c).

Additional Protections For Employees That Report Work-Related Injuries and Illnesses

Section 1904.35(b) outlines and employer's requirements to ensure that employees report work-related injuries and illnesses. The final rule adds paragraph (b)(1)(iv) to section 1904.35 to "incorporates explicitly into part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illness that employers are already obligated to follow under section 11(c) of the OSH Act." Thus, under 29 C.F.R. § 1904.35(b)(1)(iv), OSHA will be permitted to cite an employer for taking an adverse action against an employee for reporting an injury or illness, even if the employee does not file a Section 11(c) complaint with OSHA. Citable discrimination under paragraph (b)(1)(iv) would include termination, reduction in pay, reassignment to a less desirable position, or any other adverse action that could dissuade a reasonable employee from reporting a work-related injury or illness.

According to the final rule, Section 1904.35(b)(1)(iv) provides OSHA an additional avenue to ensure the "accuracy of work-related injury and illness records that is not dependent on employees filing [Section 11(c)] complaints [to OSHA] on their own behalf." OSHA believes this additional enforcement tool is necessary because "[s]ome employees may not have the time or knowledge necessary to file a Section 11(c) complaint or may fear additional retaliation from their employer if they file a complaint."

OSHA anticipates that feasible means of abatement for a violation under Section 1904.35(b)(1)(iv) would "mirror" remedies available under Section 11(c) including eliminating the source of retaliation and making whole any employees that suffered adverse employment actions as a result of the retaliation.

The final rule also explains that, it is a violation for an employer to use a safety incentive program (like the one highlighted in the hypothetical above) to take adverse employment action, like denying a benefit, because an employee reports a work-related injury or illness. OSHA also believes that blanket post-injury drug testing policies may deter work-related injuries and illnesses. Thus, although the final rule does not ban drug testing of employees, employers are prohibited from "using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses." Employers may, however, perform post-incident drug testing where (1) there is a reasonable possibility that employee drug use contributed to the incident; (2) the drug test can accurately identify impairment caused by drug use.

Nothing in the final rule, however, appears to prohibit employers from disciplining employees for violating legitimate safety rules, even if the same employee that violated a safety rule also was injured as a result of that violation and reported the injury or illness. With that said, the final rule explicitly warns employers that disciplining employees for violating "vague" safety rules like "work carefully" is often pretext for retaliating against employees who report work-related injuries or illnesses injuries.

The Practical Effect of OSHA's New Anti-Retaliation Provision

OSHA's new anti-retaliation provision in its recordkeeping regulation will significantly impact employers and raises important legal questions.

- **A Longer Statute Of Limitations:** Under Section 11(c), employees that report work-related injuries or illnesses and allegedly suffer retaliation for doing so have only 30 days to file a complaint with OSHA in order to seek monetary and equitable relief. Because OSHA will now be permitted to cite an employer for retaliating against an employee under 1904.35(b)(1)(iv), OSHA now has six months to issue a citation for the same alleged retaliation.

- **A Different Investigator:** Occupational safety and health compliance officers, who are trained to perform safety and health inspections at worksites, will now be charged with investigating alleged retaliation under Section 1904.35(b)(1)(iv). Under Section 11(c), an investigator, who is trained specifically to investigate retaliation, from the OWPP investigates employee retaliation complaints. Accordingly, a less experienced government investigator will be responsible for investigating alleged employee retaliation for reporting a workplace injury or illness, often a complex personnel issue.

- **Increased Liability:** Employers face increased liability for the same allegedly violative retaliatory conduct. An employer may be required to reinstate the employee and pay him or her pay back pay under Section 11(c), and would be required to pay a monetary penalty to OSHA as a result of the enforcement citation under Section 1904.35(b)(1)(iv). This is critical because the monetary penalties for an enforcement citation are scheduled to increase by 80 percent after Aug. 1, 2016. For example, the maximum penalty for "serious" violation of the OSH Act will increase from $7,000 to $12,600.

- **Increased Retaliation Litigation:** Before the secretary of labor even considers initiating a lawsuit in a federal district court for an alleged Section 11(c) violation, the whistleblower investigator must make and issue a "reasonable cause" finding that there is a causal link that the adverse action would not have occurred but for the protected activity. Regardless of the whistleblower investigator's findings, the secretary of labor possesses the ultimate discretion regarding whether the case is suitable for litigation. By contrast, once OSHA issues a citation for an alleged violation of Section 1904.36(b)(1)(iv), the secretary of labor automatically files a complaint, commencing litigation, with the Occupational Safety and Health Review Commission if the employer decides to contest the citation.

Key Takeaways

OSHA's new regulation, as set forth in its final rule, sends a clear message to employers that the agency is increasing its focus on, among other initiatives, preventing retaliation against employees who report work-related injuries and illnesses. In light of the new regulation and its practical effect on employers, employers are encouraged to review their injury reporting requirements, post-incident drug testing protocols, and safety incentive programs to ensure compliance with the new requirements under OSHA's recordkeeping regulations.

OSHA's new anti-retaliation provision further underscores the importance of employers to maintain documentation of all disciplinary actions and that safety work rules are clearly communicated and consistently applied. Employers should proceed with extreme caution or consult with their counsel when implementing an adverse employment action against an employee shortly after an employee reports an injury or illness.

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[1] The two changes to OSHA's recordkeeping rule relate to retaliation and the electronic submission of injury and illness information.

Secretary of Labor v. U.S. Steel Corporation, Inc. and OSHA's Continued Stand Against Employer Retaliation

03.18.16

People: Murphy P.E., Michael G. | Roseman, Adam
Experience: Labor & Employment
Offices: Orlando | Philadelphia

Employers, do your safety policies and procedures require employees to immediately report their injuries? Do you discipline employees for failing to follow your safety policies and procedures?

Most employers with safety programs in place probably answered "yes" to both of those questions and probably believe that both of those propositions are central to managing their safety programs. Standing on their own, each of those propositions is fine. However, applying the discipline policy to an instance where an employee fails to immediately report an injury can run afoul of OSHA's prohibition on employer retaliation.

Last month, the Secretary of Labor filed a lawsuit against U.S. Steel Corporation, Inc. (U.S. Steel) in the U.S. District Court for the District of Delaware on behalf of two U.S. Steel employees because U.S. Steel allegedly retaliated against them for failing to immediately report their workplace injuries, as required by company policy.

The complaint alleges, among other things, that U.S. Steel's immediate reporting policy "discourages employees from reporting injuries as soon as they realize they have been injured because they must risk violating the company's temporally stringent requirement under its immediate reporting policy." Further, the complaint alleges that U.S. Steel's immediate reporting policy "violates the governing regulations establishing a recordkeeping system for recording workplace injuries and illnesses by creating a barrier for reasonable employees to report workplace injuries and illnesses." Accordingly, the Secretary of Labor seeks to reverse the disciplinary action taken against the employees and enjoin U.S. Steel from enforcing its immediate reporting policy and to nullify it.

Background

According to the Complaint, a utility technician at U.S. Steel's Clairton Plant, in Clairton, Pennsylvania, discovered a splinter lodged in his thumb and extracted it. Two days later, his thumb and hand were swollen and he received medical treatment for an infection. When he reported the incident to his supervisor, U.S. Steel suspended him for five days without pay for violating U.S. Steel's immediate reporting policy.

A laborer at U.S. Steel's Irvin Plant in West Mifflin, Pennsylvania suffered a similar fate. He bumped his head but did not experience any symptoms until a few days later. After he sought medical treatment for stiffness in his right shoulder, he reported his medical treatment to U.S. Steel as a possible workplace injury. U.S. Steel suspended him for violating the company policy.

Both workers filed complaints with the Occupational Safety and Health Administration (OSHA) alleging that U.S. Steel suspended them in retaliation for reporting the workplace injuries. OSHA found that in both cases the company violated the anti-discrimination provision of the OSH Act, section 11(c), when the company used its immediate reporting policy as a basis for sanctioning employees who reported injuries "late."

How We Got Here

Over the past few years, OSHA has continued to focus on eliminating retaliation under section 11(c) of the OSH Act. In 2012, OSHA's former Deputy Assistant Secretary Richard Fairfax published a memorandum to all OSHA Regional Administrators titled "Employer Safety Incentive and Disincentive Policies and Practices." In this memorandum, OSHA explained that reporting a work-related injury or illness is a "core" employee right and retaliating against an employee for doing so is illegal under section 11(c), and might also run afoul of the OSH Act's recordkeeping requirements.

OSHA then provided specific examples of employer policies that it believes dissuades an employee from reporting injuries or illnesses. One such example was a policy that was similar to U.S. Steel's. Indeed, OSHA believes that if an employee "who reports an injury or illness is disciplined, and the stated reason is that the employee violated an employer rule about the time or manner for reporting injuries and illnesses... there is a clear potential for violating section 11(c)."

Key Takeaways

While the Secretary of Labor has filed lawsuits against companies for allegedly retaliating against employees in violation of section 11(c) for raising safety and health concerns or filing complaints with OSHA, this is the first complaint where the Secretary of Labor alleges that a corporation retaliated against employees for reporting injuries in an untimely manner in violation of company policy and seeks to nullify the a company's injury reporting policy.

OSHA's position puts companies between a rock and a hard place, as their immediate injury reporting policy may serve to promote health and safety at its facilities and assist in preventing future injuries, but also, according to OSHA, may discourage employees from reporting workplace injuries and violate section 11(c) of the OSH Act.

Although the result of the lawsuit is uncertain, companies should review their injury reporting policy to determine whether it is similar to U.S. Steel's. If it is, companies should tread cautiously when an employee reports an injury shortly, but not immediately, after the injury occurred. Companies may want to consider investigating the reason(s) why the employee did not immediately report the injury before deciding to subject the employee to an adverse employment action for violating a company policy. Be sure to consult with employment counsel in these situations before disciplining or terminating an employee for failing to timely report an injury. As seen from *Secretary of Labor v. U.S. Steel*, OSHA believes doing so constitutes retaliation under section 11(c) of the OSH Act.

U.S. Department of Labor

OSHA® Occupational Safety and Health Administration

Job Safety and Health
IT'S THE LAW!

All workers have the right to:

- A safe workplace.
- Raise a safety or health concern with your employer or OSHA, or report a work-related injury or illness, without being retaliated against.
- Receive information and training on job hazards, including all hazardous substances in your workplace.
- Request an OSHA inspection of your workplace if you believe there are unsafe or unhealthy conditions. OSHA will keep your name confidential. You have the right to have a representative contact OSHA on your behalf.
- Participate (or have your representative participate) in an OSHA inspection and speak in private to the inspector.
- File a complaint with OSHA within 30 days (by phone, online or by mail) if you have been retaliated against for using your rights.
- See any OSHA citations issued to your employer.
- Request copies of your medical records, tests that measure hazards in the workplace, and the workplace injury and illness log.

This poster is available free from OSHA.

Contact OSHA. We can help.

Employers must:

- Provide employees a workplace free from recognized hazards. It is illegal to retaliate against an employee for using any of their rights under the law, including raising a health and safety concern with you or with OSHA, or reporting a work-related injury or illness.
- Comply with all applicable OSHA standards.
- Report to OSHA all work-related fatalities within 8 hours, and all inpatient hospitalizations, amputations and losses of an eye within 24 hours.
- Provide required training to all workers in a language and vocabulary they can understand.
- Prominently display this poster in the workplace.
- Post OSHA citations at or near the place of the alleged violations.

FREE ASSISTANCE to identify and correct hazards is available to small and medium-sized employers, without citation or penalty, through OSHA-supported consultation programs in every state.

- **Part Number:** 1904
- **Part Title:** Recording and Reporting Occupational Injuries and Illness
- **Subpart:** D
- **Subpart Title:** Other OSHA injury and Illness Recordkeeping Requirements
- **Standard Number:** 1904.36
- **Title:** Prohibition against discrimination.
- **GPO Source:** e-CFR

In addition to § 1904.35, section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

[66 FR 6132, Jan. 19, 2001; 81 FR 29692, May 12, 2016]

Next Standard (1904.37)

Regulations (Standards - 29 CFR) - Table of Contents

- **Part Number:** 1904
- **Part Title:** Recording and Reporting Occupational Injuries and Illness
- **Subpart:** D
- **Subpart Title:** Other OSHA injury and Illness Recordkeeping Requirements
- **Standard Number:** 1904.35
- **Title:** Employee involvement.
- **GPO Source:** e-CFR

1904.35(a)

Basic requirement. Your employees and their representatives must be involved in the recordkeeping system in several ways.

1904.35(a)(1)

You must inform each employee of how he or she is to report a work-related injury or illness to you.

1904.35(a)(2)

You must provide employees with the information described in paragraph (b)(1)(iii) of this section.

1904.35(a)(3)

You must provide access to your injury and illness records for your employees and their representatives as described in paragraph (b)(2) of this section.

1904.35(b)

Implementation.

1904.35(b)(1)

What must I do to make sure that employees report work-related injuries and illnesses to me?

1904.35(b)(1)(i)

You must establish a reasonable procedure for employees to report workrelated injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;

1904.35(b)(1)(ii)

You must inform each employee of your procedure for reporting workrelated injuries and illnesses;

1904.35(b)(1)(iii)

You must inform each employee that:

1904.35(b)(1)(iii)(A)

Employees have the right to report work-related injuries and illnesses; and

1904.35(b)(1)(iii)(B)

Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and

1904.35(b)(1)(iv)

You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

1904.35(b)(2)

Do I have to give my employees and their representatives access to the OSHA injury and illness records? Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

1904.35(b)(2)(i)

Who is an authorized employee representative? An authorized employee representative is an authorized collective bargaining agent of employees.

1904.35(b)(2)(ii)

Who is a "personal representative" of an employee or former employee? A personal representative is:

1904.35(b)(2)(ii)(A)

Any person that the employee or former employee designates as such, in writing; or

1904.35(b)(2)(ii)(B)

The legal representative of a deceased or legally incapacitated employee or former employee.

1904.35(b)(2)(iii)

If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it? When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

1904.35(b)(2)(iv)

May I remove the names of the employees or any other information from the OSHA 300 Log before I give copies to an employee, former employee, or employee representative? No, you must leave the names on the 300 Log. However, to protect the privacy of injured and ill employees, you may not record the employeeâ¿¿s name on the OSHA 300 Log for certain "privacy concern cases," as specified in § 1904.29(b)(6) through (9).

1904.35(b)(2)(v)

If an employee or representative asks for access to the OSHA 301 Incident Report, when do I have to provide it?

1904.35(b)(2)(v)(A)

When an employee, former employee, or personal representative asks for a copy of the OSHA 301 Incident Report describing an injury or illness to that employee or former employee, you must give the requester a copy of the OSHA 301 Incident Report containing that information by the end of the next business day.

1904.35(b)(2)(v)(B)

When an authorized employee representative asks for copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within 7 calendar days. You are only required to give the authorized employee representative information from the OSHA 301 Incident Report section titled "Tell us about the case." You must remove all other information from the copy of the OSHA 301 Incident Report or the equivalent substitute form that you give to the authorized employee representative.

1904.35(b)(2)(vi)

May I charge for the copies? No, you may not charge for these copies the first time they are provided. However, if one of the designated persons asks for additional copies, you may assess a reasonable charge for retrieving and copying the records."

[66 FR 6132, Jan. 19, 2001; 81 FR 29691-29692, May 12, 2016; 81 FR 31854-31855, May 20, 2016]

Next Standard (1904.36)

Regulations (Standards - 29 CFR) - Table of Contents

r. *Traumatic injury* — a condition of the body caused by external force, including stress or strain. The injury:

(1) Must be identifiable as to time and place of occurrence and member or function of the body affected.

(2) Must be caused by a specific event or incident, or series of events or incidents, within a single day or work shift.

541.3 Forms

Each installation head/Health & Resource Management office must maintain an adequate supply of the following basic forms, which are needed for recording and reporting injuries.

Form	Title
CA-1	Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation
CA-2	Notice of Occupational Disease and Claim for Compensation
CA-2a	Notice of Recurrence
CA-5	Claim for Compensation by Widow, Widower, and/or Children
CA-5b	Claim for Compensation by Parents, Brothers, Sisters, Grandparents, or Grandchildren
CA-6	Official Superior's Report of Employee's Death
CA-7	Claim for Compensation
CA-7a	Time Analysis Form
CA-7b	Leave Buy-Back (LBB) Worksheet/Certification and Election
CA-10	What a Federal Employee Should Do When Injured at Work
CA-16	Authorization for Examination and/or Treatment
CA-17	Duty Status Report
CA-20	Attending Physician's Report
CA-35A	Evidence Required in Support of a Claim for Occupational Disease
CA-35B	Evidence Required in Support of a Claim for Work-Related Hearing Loss
CA-35C	Evidence Required in Support of a Claim for Asbestos-Related Illness
CA-35D	Evidence Required in Support of a Claim for Work-Related Coronary/ Vascular Condition
CA-35E	Evidence Required in Support of a Claim for Work-Related Skin Disease
CA-35F	Evidence Required in Support of a Claim for Work-Related Pulmonary Illness (not asbestosis)
CA-35G	Evidence Required in Support of a Claim for Work-Related Psychiatric Illness
CA-35H	Evidence Required in Support of a Claim for Carpal Tunnel Syndrome
HCFA-1500	Health Insurance Claim Form
OWCP-915	Claim For Medical Reimbursement
PUB WHD 1420	Employee Rights and Responsibilities Under the Family and Medical Leave Act
PS Form 2488	Authorization for Medical Report
PS Form 2573	Request — OWCP Claim Status

542 FECA Claim Requirements

542.1 Employee Claims for Injury or Illness

542.11 Traumatic Injury

542.111 Notice

The notice of traumatic injury is given on Form CA-1.

542.112 Time Limit

FECA requires that written notice of a traumatic injury be given by the employee, or person acting on behalf of the employee, within 3 years of the injury. However, failure to give notice on Form CA-1 within 30 calendar days from the date the injury occurred will result in a loss of entitlement to COP

and may also result in a loss of compensation rights if the claim for compensation is not filed within 3 years. In order to protect their own interests and to ensure an uninterrupted income, employees should give notice or have someone give notice on their behalf, immediately after the traumatic injury occurs.

542.12 Occupational Disease or Illness

542.121 Notice

The notice of occupational disease or illness is given on Form CA-2.

542.122 Time Limit

FECA specifies that notice be given by the employee, or person acting on behalf of the employee, within 3 years of the onset of the condition. In cases of latent disability, the time for filing the claim does not begin to run until the employee has a compensable disability and is aware, or reasonably should be aware of the causal relationship between the disability and the employment. Failure to give notice within this time period may result in a loss of compensation rights. If the claim is not filed within 3 years, compensation may still be allowed if notice of injury was given within 30 days or the employer had actual knowledge of the injury or death within 30 days after occurrence. This knowledge may be evidenced by written records or verbal notification.

Note: Continuation of regular pay is not applicable in instances of occupational disease or illness.

542.13 Recurrence

542.131 Notice

The notice of recurrence is given on Form CA-2a.

542.132 Time Limit

A specific time limit for giving the notice of recurrence is not specified by FECA. The recurrence should be reported by the employee if it causes the employee to lose time from work and incur a wage loss or if the employee experiences a renewed need for treatment after previously being released from care.

542.14 Survivor Claim for Death Benefits

542.141 Claim

A claim for compensation benefits by a survivor of an employee whose death was related to a job-related injury or illness is made on Form CA-5 or Form CA-5b by the survivors or person acting on behalf of the survivors. The form is given to the control office. The survivors may also submit the completed Form CA-5 or CA-5b directly to OWCP.

542.142 Time Limit

A claim for death benefits must be filed within 3 years of the death. The filing of a notice of injury or occupational disease will satisfy the time requirements for a death claim as a result of the same injury or disease. In the case of death due to latent disability, the time for filing does not begin until the survivors are aware, or reasonably should be aware, of the causal relationship between the death and factors of the employee's postal employment.