



OSHA

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 02-03-006

EFFECTIVE DATE: October 1, 2019

SUBJECT: Settlement Agreement Template

REGIONAL IDENTIFIER: Region I

ABSTRACT

Purpose: The purpose of this Instruction is to establish and implement a new settlement agreement template to facilitate settlement of whistleblower complaints.

Scope: This Notice applies to the Boston Regional Office.

References: OSHA Instruction: CPL 02-03-007, January 28, 2016 – Whistleblower Investigations Manual (WIM); the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 660(c); the Surface Transportation Assistance Act, 49 U.S.C. § 31105; the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651; the International Safe Container Act, 46 U.S.C. § 80507; the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Clean Air Act, 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; the Energy Reorganization Act, 42 U.S.C. § 5851; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; the Sarbanes-Oxley Act, 18 U.S.C. § 1514A; the Pipeline Safety Improvement Act, 49 U.S.C. § 60129; the Federal Railroad Safety Act, 49 U.S.C. § 20109; the National Transit Systems Security Act, 6 U.S.C. § 1142; the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; the Affordable Care Act, 29 U.S.C. § 218C; the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567; the Seaman’s Protection Act, 46 U.S.C. § 2114; the FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; the Taxpayer First Act, 26 U.S.C. 7623(d)(2)(B) (incorporating 49 U.S.C. 42121(b) and any other statute assigned by the Secretary of Labor.

Cancellations: None.

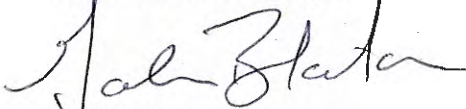
State Plan Impact: None.

Action Offices: Boston Regional Office, Office of Whistleblower Protection Programs.

Originating Office: Boston Regional Office.

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By and Under the Authority of



Galen Blanton
Regional Administrator

Executive Summary

This Instruction establishes a new settlement agreement template and FAQs to be used by investigators and the ADR Coordinator (ADRC) to facilitate settlement of whistleblower retaliation complaints. The updated settlement agreement template and FAQs can be shared with the parties at the outset of settlement negotiations. Use of these materials will help achieve efficient and fair complaint resolutions that are consistent with the purpose and intent of the relevant whistleblower statute.

Significant Changes

Establishes a new settlement agreement template for use by investigators and the ADRC to facilitate settlement of whistleblower retaliation complaints.

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I. Purpose

The purpose of this Instruction is to establish and implement a new settlement agreement template and FAQs to facilitate settlement of whistleblower complaints.

II. Scope

Boston Regional Office, Office of Whistleblower Protection Programs.

III. References

OSHA Instruction: CPL 02-03-007, January 28, 2016 – Whistleblower Investigations Manual (WIM); the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 660(c); the Surface Transportation Assistance Act, 49 U.S.C. § 31105; the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651; the International Safe Container Act, 46 U.S.C. § 80507; the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Clean Air Act, 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; the Energy Reorganization Act, 42 U.S.C. § 5851; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; the Sarbanes-Oxley Act, 18 U.S.C. § 1514A; the Pipeline Safety Improvement Act, 49 U.S.C. § 60129; the Federal Railroad Safety Act, 49 U.S.C. § 20109; the National Transit Systems Security Act, 6 U.S.C. § 1142; the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; the Affordable Care Act, 29 U.S.C. § 218C; the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5567; the Seaman’s Protection Act, 46 U.S.C. § 2114; the FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. §30171; and the Taxpayer First Act, 26 U.S.C. 7623(d)(2)(B) (incorporating 49 U.S.C. 42121(b).

IV. Cancellations

None.

V. Significant Changes

Establishes a new settlement agreement template for use by investigators and the ADRC to facilitate settlement of whistleblower retaliation complaints.

VI. Federal Program Change

This directive applies solely to the federal OSHA whistleblower program in Region I. It does not impact State Plan programs.

VII. Settlement Agreement Template

This Instruction establishes and implements a new settlement agreement template (see

Attachment A) and Frequently Asked Questions (FAQs) (see Attachment B) for the Region 1 investigators and/or ADRC to share with the parties to a whistleblower complaint to facilitate settlement. Use of these materials will help achieve efficient and fair complaint resolutions that are consistent with the purpose and intent of the relevant whistleblower statute.

A. Mandatory Provisions

The settlement agreement contains the following mandatory provisions, which should be included in every settlement agreement of a whistleblower complaint.

1. Compliance with Acts

The settlement agreement template contains a mandatory provision entitled “Compliance with Acts.”

2. Performance

The “Performance” provision states that performance of the settlement agreement by both parties will start immediately after the agreement is approved.

3. Enforcement of Settlement Agreement

The investigator or ADRC should choose one of the two options in the “Enforcement of Settlement Agreement” provision and delete the other option. One of the options is for cases filed under 11(c) of the OSH Act, ISCA, or AHERA, and the other option is for cases filed under the other whistleblower statutes enforced by OSHA.

4. Inquiries Concerning Complainant

5. Disposition of Complaint

B. Provisions to Address Potential Chilling Effect

The new settlement agreement template contains several options for addressing the potential chilling effect of alleged retaliation. At least one of the following provisions should be selected for inclusion in the final settlement agreement of a whistleblower complaint: a) Posting of and Compliance with Notice; b) Posting of an Informational Poster; and c) Training.

C. Remedies Provisions

The settlement agreement template contains provisions for reinstatement, monies (including three different options for the form of payment), and expungement of the personnel record. The investigator should select the appropriate remedy provision(s) that

reflects the agreement between the parties, and delete the other remedies as needed.

D. Optional Provisions

The settlement agreement template also contains the following optional provisions that the parties may choose to include:

1. Posting of and Compliance with Notice
2. Notification of Compliance
3. Training
4. Future Use of Settlement Agreement
5. Posting of an Informational Poster

E. Separate Agreement Provision

If the parties have also entered into a separate agreement to which OSHA is not a party, the investigator should include the “Separate Agreement” provision in the OSHA settlement agreement.

Attachment A

OSHA Settlement Agreement

In the matter of: **Respondent / Complainant / 1-2345-08-001**

SETTLEMENT AGREEMENT

The undersigned Respondent **[Name]**, the undersigned Complainant **[Name]**, and the Occupational Safety and Health Administration (“OSHA”), in the settlement of the above-captioned matter, agree as follows:

Compliance with Acts. Respondent will not discharge or in any other manner discriminate against Complainant or any other employee because of activity protected by the whistleblower provision of the **[insert name of statute], [insert statutory cite]**. Nothing in this Agreement (or in any separate agreement) is intended to or shall prevent, impede, or interfere with Complainant’s non-waivable right, without prior notice to Respondent, to provide information to a government agency, participate in investigations, file a complaint, testify in proceedings regarding Respondent’s past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency. Further, nothing in this Agreement (or in any separate agreement) is intended to or shall prevent, impede or interfere with complainant’s filing a future claim related to an exposure, an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to complainant on the date Complainant signed the separate agreement.

[OPTIONAL] Posting of and Compliance with Notice. Respondent will post in conspicuous places in and about its premises, including all places where notices to employees are customarily posted, copies of the Notice attached hereto and made a part hereof. This Notice, which shall be signed by a responsible official of Respondent’s organization and set forth the date of actual posting, shall continue to be posted for at least 60 consecutive days from the date of initial posting. Respondent will comply with all of the terms and provisions of said Notice. [For employers who communicate with their employees electronically, insert the following: Respondent shall also e-mail this notice to all employees at [insert establishment] or post this notice on its intranet. Intranet postings must also be maintained for at least 60 days.]

[OPTIONAL] Posting of an Informational Poster. Respondent will permanently post in a conspicuous place in or about its premises, including all places where posters for employees are customarily posted, [select appropriate poster [OSHA 3165-12-06R (“Job Safety and Health: It’s the Law!”); OSHA 3113 (“Attention Drivers”); FAA-WBPP-01 (“Whistleblower Protection Program”); 29 CFR Part 24, Appendix A (“Your Rights Under the Energy Reorganization Act”); OR the applicable OSHA Whistleblower Rights Fact Sheet(s)]. 1 **[For employers who communicate with their employees electronically, insert the following: Respondent shall also e-mail a copy of this poster or fact sheet to all employees at [insert establishment] or post it on its intranet.]**

¹ The OSH Act poster (OSHA 3165-12-06R), which provides information about section 11(c) and other rights under the OSH Act, is mandatory. 29 C.F.R. §1903.2(a). Employers covered by the ERA are required to display the ERA whistleblower poster. 42 U.S.C. §5851(i); 29 CFR Part 24, Appendix A.

[OPTIONAL] Training. Respondent will provide rank-and-file and management employees with training on employees' rights to report actual or potential violations without fear of retaliation under the [insert name of statute] and the employer's responsibility to refrain from retaliating against employees who raise such concerns. The training will take place within 60 days from the date the parties sign the agreement. Within [] days of the training's completion, Respondent will provide OSHA with copies of the training materials as well as the signatures of all rank-and-file and management employees who attended. Respondent will send this information to: [insert name of OSHA person and physical or email address].

Reinstatement. [Note: Choose one of two bulleted options if reinstatement is a possible remedy; delete the other bullet, and start the paragraph after the bolded word "Reinstatement"]:

- Respondent has offered reinstatement to the same or equivalent job, including restoration of seniority and benefits, that Complainant would have had but for the adverse action. Complainant has [declined/accepted] reinstatement. [If accepted: Complainant's job title will be [insert title] and Complainant will start on [insert date].
- Respondent is not offering, and/or Complainant is not seeking, reinstatement.

Monies. [Note: Choose one of three bulleted options, delete the other two bullets, and start the paragraph after the bolded word "Monies"]:

- Respondent will pay the Complainant \$ [] in back pay, less normal payroll deductions. The final net amount being provided to Complainant is \$ []. Respondent will provide a W-2 statement to Complainant. Respondent shall submit appropriate documentation to the Social Security Administration allocating back pay to the appropriate periods [OR, such as in FRSA cases, if applicable, to the Railroad Retirement Board allocating back pay to the appropriate periods]. Any check shall be made payable to the Complainant and mailed to the OSHA [Area/Regional] Office [give address].
- Respondent will pay Complainant a lump sum of \$ [] and issue an IRS Form 1099. Complainant and Respondent agree to comply with applicable tax laws. Any check shall be made payable to the Complainant and mailed to the OSHA [Area/Regional] Office [give address].
- Respondent will pay the Complainant \$ [] in back pay, less normal payroll deductions, will also pay the Complainant a lump sum of \$ []. Respondent shall issue a W-2 to Complainant with regard to the back pay and will also issue to Complainant an IRS Form 1099 with regard to the lump sum. Regarding the back pay, the final net amount being provided to Complainant is \$ []. Respondent shall submit appropriate documentation to the Social Security Administration allocating back pay to the appropriate periods [OR, such as in FRSA cases, if applicable, to the Railroad Retirement Board allocating back pay to the appropriate periods]. Regarding the lump sum, Complainant and Respondent agree to comply with applicable tax laws. Any check shall be made payable to the Complainant and mailed to the OSHA [Area/Regional] Office [give address].

Personnel Record. Respondent will expunge from all of Respondent's records, including but not limited to Complainant's personnel records, all references relating to the protected activity and [insert adverse action]. Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent will provide at least a neutral reference and will refrain from any mention of Complainant's protected activity. Neither

Respondent nor anyone on its behalf will say or convey to any third party anything that could be construed as damaging the name, character, or employment of Complainant. **[If applicable:** Respondent's description of any discharge shall only state that Complainant's employment ended on **[insert date]**].

Inquiries Concerning Complainant.

Should any third parties, including prospective employers, inquire as to the employment of Complainant with the Respondent, Respondent agrees to refrain from any mention of Complainant's protected activity. Respondent agrees that nothing will be said or conveyed to any third party that could be construed as damaging the name, character, or employment of Complainant. If a third party submits a Freedom of Information Act (FOIA) request, OSHA will disclose settlement agreements in accordance with the FOIA, unless one of the FOIA exemptions applies.

Performance.

Performance by both parties of the terms and provisions of this Agreement shall commence immediately after the Agreement is approved.

Enforcement of Settlement Agreement. **[Note:** Choose one of two bulleted options, delete the other bullet, and start the paragraph right after the bolded words "Enforcement of Settlement Agreement"]:

- **[For all cases other than Section 11(c) of the OSH Act, AHERA, or ISCA]** This agreement constitutes findings and an order under [the relevant whistleblower statute]. Complainant's and Respondent's signatures below constitute assent and the failure to object to the findings and the order under [the relevant whistleblower statute]. Therefore, the settlement agreement is a final order of the Secretary of Labor, enforceable in an appropriate United States district court under [the relevant whistleblower statute].
- **[For Section 11(c) of the OSH Act, AHERA, and ISCA cases]** Respondent's violation of any terms of the settlement may prompt further investigation and the filing of an action by the Secretary in an appropriate United States district court under the statute. This Agreement shall be admissible in such an action. Respondent agrees to waive any and all defenses based on the passage of time, including but not limited to laches, and agrees that this Agreement constitutes the sole evidence required to prove such waiver. A violation of this settlement agreement is a breach of contract for which Complainant may seek redress in an appropriate court.
 - **Include the following sentence at the end of the foregoing paragraph for Section 11(c) of the OSH Act, AHERA, and ISCA cases ONLY if it is a bilateral agreement:** If Complainant does not sign the Agreement, Complainant shall be a third-party beneficiary of the Agreement.
- **Disposition of Complaint.** Complainant agrees that acceptance of this Settlement Agreement constitutes settlement in full of any and all claims against Respondent arising out of Complainant's complaint filed with OSHA on [insert date] and the disposition of the complaint will be recorded as closed.

[OPTIONAL] Notification of Compliance. Respondent agrees that within ten (10) days of receiving a fully executed and approved copy of this Agreement, Respondent will notify the OSHA Regional Administrator in writing of the steps it has taken to comply with the terms and conditions

of this Agreement.

[OPTIONAL] Future Use of Settlement Agreement. Respondent’s signing of this Settlement Agreement is not an admission or denial of a violation of any law, standard, or regulation enforced by OSHA. Nothing in this Agreement may be used against either party in any action except for an action for the enforcement of this Agreement’s terms and provisions as described above or through other means and except for proceedings and matters arising under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.*

[Add the following paragraph if the Respondent and Complainant are also signing a separate agreement:

[INCLUDE PROVISIONS BELOW IF APPLICABLE DUE TO TERMS OF A SEPARATE AGREEMENT.

Confidentiality

Respondent and Complainant have agreed to keep the settlement agreement confidential. The settlement agreement is part of OSHA’s records in this case and is subject to disclosure under FOIA, unless an exemption applies. The complainant and respondent have requested that OSHA designate the agreement as containing potentially confidential information and request pre-disclosure notification of any FOIA request pursuant to 29 C.F.R. 70.26.

OSHA Authority

[INCLUDE IF APPLICABLE] Separate Agreement. Respondent and Complainant have signed a separate agreement encompassing matters not within the Occupational Safety and Health Administration’s (OSHA’s) authority. OSHA’s approval of that agreement is limited to the statutes that OSHA enforces. Therefore, OSHA approves and incorporates in this Agreement only the terms of the other agreement pertaining to the [insert name/citation of statute involved].

Choice of Law

The settlement agreement contains a choice of law provision that provides that the agreement will be governed by the laws of [insert state]. This provision does not limit the applicability of federal law under the [insert relevant OSHA whistleblower statute(s)]. **This Settlement Agreement has been obtained and entered into without duress and in the best interests of all parties.**

RESPONDENT:

COMPLAINANT:

(Signature/title/date)

(Signature/date)

OSHA:

Approved by:

(Signature/title/date)

Attachment B

FAQ on OSHA Approval of Settlement Agreements under Whistleblower Statutes

1. What is OSHA’s role in the settlement of whistleblower cases?

The Occupational Safety and Health Administration (“OSHA”) believes that voluntary resolution of whistleblower cases is often desirable and encourages investigators to assist parties actively in reaching an agreement where appropriate. OSHA’s policy is to seek settlement of all whistleblower cases that it believes are meritorious prior to referring the case for litigation.

OSHA may work with the parties through its ADR program or at any time during the investigation to reach a settlement of the case that is memorialized in an OSHA standard settlement agreement or an agreement which the employer and the employee draft (“employer-employee agreement”).² Generally, OSHA must review and approve any employer-employee agreement before it will close an investigation based on a settlement of the case.

2. Does OSHA have a settlement agreement that can be used by the parties?

Yes. Whenever possible, the parties are encouraged to use the OSHA standard settlement agreement template. *See* Attachment A to this document.

3. What types of terms are included in settlement agreements involving whistleblower claims?

Settlement agreements must specify the remedies for the complainant, which may include reinstatement, back pay, front pay, compensatory damages, punitive damages, attorneys’ fees, or other compensation. Alternatively, the settlement agreement may specify payment of a lump sum amount to the complainant or payment of separate lump sum amounts to the complainant and complainant’s counsel. However, OSHA recommends that the settlement agreement expressly state the allocation of payment between wages and other amounts.

Non-monetary remedies may also be appropriate to include in a settlement agreement. Common non-monetary remedies that OSHA seeks in settlement include the following, although additional non-monetary remedies may be appropriate as well:

- a. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the complainant’s personnel file or other records, and/or changing a complainant’s personnel file to reflect in a neutral manner that complainant’s employment ended;
- b. The agreement of the respondent, and those acting on respondent’s behalf, to provide at least a neutral reference (e.g., title, dates of employment and pay rate) to potential

² The term “employer-employee agreement” is being used because employers and employees are typically the main parties to settlement agreements. This FAQ also applies to all agreements where individuals who file whistleblower complaints with OSHA settle with any person (as defined in the applicable whistleblower statute), including non-employers, who are alleged to have violated a whistleblower statute investigated and/or enforced by OSHA.

employers of the complainant, to refrain from any mention of complainant's protected activity, and to refrain from saying or conveying to any third party anything that could be construed as damaging the name, character or employment of complainant;

- c. Posting of a notice to employees stating that the respondent agrees to comply with the relevant whistleblower statute and/or posting of an informational poster or fact sheet about that statute. Postings should be readily available to all employees, e.g., posted on a bulletin board or distributed electronically;
- d. Training of managerial and rank-and-file employees regarding employees' right to report potential violations of the law without fear of retaliation under the relevant whistleblower statute.

See also the Whistleblower Investigations Manual ("WIM") chapter on settlements.

4. Does OSHA have a position on the tax treatment of amounts recovered in a settlement involving whistleblower claims?

OSHA cannot provide complainants or respondents with individual tax advice and is not responsible for ensuring that tax withholding and reporting of amounts received in a whistleblower settlement are performed in accordance with applicable tax law. The parties are responsible for compliance with applicable tax law and may need to seek advice from their own tax advisers.³

5. Does OSHA review employer-employee settlements?

Yes. Generally, OSHA must review and approve any employer-employee agreement before it will close an investigation based on a settlement of the case.

6. Where does the requirement to review employer-employee settlements come from?

Most of the whistleblower statutes that OSHA administers state that a proceeding on a complaint may be terminated based on a settlement agreement *made* or *entered into* by the Secretary of Labor ("Secretary"), the complainant and the person alleged to have committed the violation.⁴

³ For a basic discussion of the income and employment tax consequences and proper reporting of employment-related settlements and judgments, the parties may wish to refer to *IRS Counsel Memorandum*, Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements (Oct. 22, 2008), available at: <http://www.irs.gov/pub/lanoa/pmta2009-035.pdf>. The parties may also wish to refer to OSHA's *Taxability of Settlements Desk Aid* (Sept. 30, 2015), available at https://www.whistleblowers.gov/memo/TaxabilityofSettlementsChartCCF_FLSD9-30-15.html. However, OSHA notes that these guidance documents may change in the future.

⁴ See Energy Reorganization Act ("ERA"), 42 U.S.C. 5851; the Clean Air Act ("CAA"), 42 U.S.C. 7622; the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300j-9(i); the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622; SOX, 18 U.S.C. 1514A (incorporating 49 U.S.C. 42121(b)); the Pipeline Safety Improvement Act ("PSIA"), 49 U.S.C. 60129; Surface Transportation Assistance Act ("STAA"), 49 U.S.C. 31105(b)(2)(C); the Seaman's Protection Act ("SPA"), 46 U.S.C. 2114(b) (incorporating STAA procedural provisions); the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121; the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. 20109; the National Transit Systems Security Act ("NTSSA"), 6 U.S.C. 1142; the Consumer Product Safety

Interpreting this language, several courts of appeals have held that, once a whistleblower investigation has begun, the Secretary has three options under these statutes -- (1) issue an order granting relief, (2) issue an order denying relief, or (3) enter into a consensual settlement involving the Secretary and the private parties.⁵ The regulations under the various whistleblower statutes implement this statutory requirement,⁶ which is fulfilled by obtaining OSHA's approval of the settlement at the investigative stage of a whistleblower proceeding or the approval of the Administrative Law Judge ("ALJ") or the Administrative Review Board ("ARB") at the adjudicative stage of the proceeding.⁷

Furthermore, although not explicitly required by statute, OSHA has, as a matter of longstanding policy, encouraged submission of settlement agreements in cases under the Federal Water Pollution Control Act ("FWPCA"), the Solid Waste Disposal Act ("SWDA"), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 29 CFR 24.111(a). Under these statutes, a settlement that has not been reviewed and approved by the Secretary will not be considered a final order of the Secretary enforceable under section 29 CFR 24.113.

Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c), also does not have an express provision on settlement agreements. However, as a matter of policy, OSHA reviews employer-employee section 11(c) settlement agreements. *Cf.* 29 CFR 1977.17 (Secretary retains authority over section 11(c) case even if complainant seeks to withdraw complaint; voluntary and uncoerced request for withdrawal will be given careful consideration and substantial weight). Similarly, OSHA also reviews employer-employee settlements under the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. 2651 (incorporating section 11(c) procedures), and the International Safe Container Act ("ISCA"), 46 U.S.C. 80507.

7. What is the effect of OSHA's approval of a settlement agreement?

In cases under the OSHA whistleblower statutes other than section 11(c), AHERA, and ISCA, an OSHA-approved settlement is a final order of the Secretary and the settlement may be enforced by the Secretary (or in many instances by the private parties) in federal district court.

In cases under section 11(c), AHERA, and ISCA involving an OSHA-approved settlement, if the employer fails to comply with the settlement agreement, the Secretary may file suit in an

Improvement Act ("CPSIA"), 15 U.S.C. 2087; Affordable Care Act ("ACA"), 29 U.S.C. 218C; Consumer Financial Protection Act, ("CFPA"), 12 U.S.C. 5567; Food Safety Modernization Act ("FSMA"), 21 U.S.C. 299d; Moving Ahead for Progress in the 21st Century Act ("MAP-21"), 49 U.S.C. 30171; and the Taxpayer First Act, 26 U.S.C. 7623(d)(2)(B) (incorporating 49 U.S.C. 42121(b)).

⁵ See, e.g., *Beliveau v. United States Dept. of Labor*, 170 F.3d 83, 86 (1st Cir. 1999) (interpreting TSCA); *Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1153 (5th Cir. 1991) (interpreting ERA).

⁶ See 29 C.F.R. 24.111(a) & (d) (ERA and environmental whistleblower statutes); 29 CFR 1978.111(a) & (d) (STAA); 29 CFR 1979.111(a) & (d) (AIR21); 29 CFR 1980.111(a) & (d) (SOX); 29 CFR 1981.111(a) & (d) (PSIA); 29 CFR 1982.111(a) & (d) (FRSA & NTSSA); 29 CFR 1983.111(a) & (d) (CPSIA); 29 CFR 1984.111(a) & (d) (ACA); 29 CFR 1985.111(a) & (d) (CFPA); 29 CFR 1986.111(a) & (d) (SPA); 29 CFR 1987.111(a) & (d) (FSMA); 29 CFR 1988.111(a) & (d) (MAP-21).

⁷ *Macktal*, 923 F.2d at 1153.

appropriate United States District Court under those statutes to redress the violation. The Complainant may also file suit for breach of contract in an appropriate court.

8. What standards does OSHA apply when reviewing employer-employee settlement agreements?

OSHA reviews settlement agreements to determine whether they: (1) are knowing and voluntary, i.e., the parties have an understanding of the terms of the settlement agreement and have had the opportunity to consult with counsel or other representative, if desired, prior to signing the settlement agreement; (2) provide appropriate relief to the complainant and are consistent with public policy, i.e., the settlement agreement is not repugnant to the relevant whistleblower statute; and (3) do not undermine the protection that the relevant whistleblower statute provides.

9. What provisions will not be approved by OSHA?

OSHA will not approve the following provisions:

- OSHA will not approve a provision that states or implies that OSHA or DOL is party to a confidentiality agreement.⁸
- OSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future.⁹
 - Protected activity under section 11(c) includes, but is not limited to: filing occupational safety or health complaints with OSHA or other agencies; filing occupational safety or health complaints with management, including reporting injuries and/or illnesses; instituting or causing to be instituted any proceeding under or related to the OSH Act; providing testimony relating to occupational safety or health; exercising any right afforded by the OSH Act; refusing to perform a dangerous assigned task under certain circumstances; complying with and obtaining benefits of OSHA standards and regulations; participating in an OSHA inspection; requesting information from OSHA; or refusing to inform an employer of the identity of the person who complained to or contacted OSHA. *See* OSHA 11(c) Desk Aid, dated 1/9/2019, in www.whistleblowers.gov
 - Protected activity under the other whistleblower statutes generally includes complaining about possible violations of the underlying statute and related activities. For example, reporting potential violations of Federal Aviation Administration (“FAA”) regulations to the employer and the FAA and participating in an FAA investigation would be examples of protected activity under AIR 21. *See* OSHA Air 21 Desk Aid, dated 3/1/2019, in www.whistleblowers.gov
- OSHA will not approve the following “gag” provisions:

⁸ See WIM, Chapter 6, p. 6-19 (Jan. 28, 2016).

⁹ *Id.* at 6-19 - 6-20.

- (i) provisions restricting the complainant's ability to provide information to the Government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct;¹⁰
- (ii) provisions requiring a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the Government regarding the employer's past or future conduct;¹¹
- (iii) provisions requiring a complainant to affirm that he or she has not previously provided information to the Government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law;¹²
- (iv) provisions requiring a complainant to waive his or her right to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency or remit any portion of such an award to respondent.¹³

Additionally, if the settlement agreement contains a waiver of future employment, OSHA must ensure that the waiver is not too broad, applying the specific criteria in the WIM. .

10. What additional types of clauses have been rejected in employer-employee settlements?

- Overbroad release provisions, e.g., provisions releasing a laundry list of managers, directors, officers, entities, and affiliates for every possible claim complainant could have, which typically do not provide complainant with a reasonable idea about the identity of those being released, do not appear to have any connection to complainant's employment with the employer or protected activity at issue, and/or can be read to release claims unconnected with complainant's employment with the employer.¹⁴
- Releases involving fraud, misrepresentation, or deception.¹⁵
- Liquidated damages provisions. OSHA may refuse to approve a settlement agreement that requires a breaching party to pay liquidated damages that are clearly disproportionate to the

¹⁰ See <https://www.whistleblowers.gov/memo/2016-08-23>; *In the Matter of Anheuser-Busch Inbev SA/NV*, Release No. 78957, 2016 WL 5404890 (Sept. 28, 2016).

¹¹ See <https://www.whistleblowers.gov/memo/2016-08-23>; *In the Matter of KBR, Inc.*, Release No. 34-74619, 2015 WL 1456619 (April 1, 2015).

¹² See <https://www.whistleblowers.gov/memo/2016-08-23>.

¹³ See <https://www.whistleblowers.gov/memo/2016-08-23>; *In the Matter of HomeStreet, Inc. and Darrell van Amen*, Release No. 34-79844, 2017 WL 218847 (Jan. 19, 2017); *In the Matter of Health Net, Inc.*, Release No. 34-78590, 2016 WL 4474755 (Aug. 16, 2016) (waiving right to financial award).

¹⁴ *In the Matter of Ponce de Leon v. Wells Fargo Bank, N.A.*, 2017-SOX-00053 (March 5, 2018); *Horn v. Timex Logistics Co.*, 2014-STA-00029 (ALJ Nov. 17, 2014).

¹⁵ See 8 *Am. Jur. 2d Proof of Facts* § 617 (1976).

harm that may result from a breach of the agreement, would exceed the relief provided to the complainant, or complainant would be unable to pay the proposed amount in the event of a breach.¹⁶

- Choice-of-law provisions stating the agreement is to be governed by the laws of a particular state.¹⁷
- Tax indemnification provisions.¹⁸
- Ambiguous attorneys' fee provisions.¹⁹
- Provisions that recast the fee obligations of parties in a manner inconsistent with the congressional scheme.²⁰
- Confidentiality provisions that did not have a degree of mutuality and/or that did not designate in good faith portions of the filing that qualified for protection from inspection and disclosure.²¹

11. How does OSHA handle employer-employee agreements that include language about claims not within OSHA's authority?

OSHA only has the authority to review and approve settlements of cases under its statutes. It will approve a general release, provided the release is not overbroad, with the disclaimer that its authority to approve the settlement agreement is limited to the statutes under its authority. Therefore, OSHA's approval only relates to the terms of the agreement pertaining to the OSHA whistleblower statute(s) under which the complaint was filed.²²

12. What provisions does OSHA recommend that parties include in employer-employee agreements?

To ensure that an employer-employee settlement agreement makes clear that it does not prohibit protected activity, OSHA recommends the following term:

¹⁶ See <https://www.whistleblowers.gov/memo/2016-08-23>; *McGuire v. BP Products N. Am., Inc.*, 2014-TSC-00001 (ALJ Jan. 17, 2014).

¹⁷ *In the Matter of Julianne Leatherman-Berry v. BNSF Railway Co.*, 2015-FRS-00039 (ALJ Nov. 27, 2015). *McGuire v. BP Products N. Am., Inc.*, 2014-TSC-00001 (ALJ Jan. 17, 2014).

¹⁸ *Horn v. Timex Logistics Co.*, 2014-STA-00029 (ALJ Nov. 17, 2014).

¹⁹ *Id.*

²⁰ *McGuire v. BP Products N. Am., Inc.*, 2014-TSC-00001 (ALJ Jan. 17, 2014).

²¹ *In the Matter of Julianne Leatherman-Berry v. BNSF Railway Co.*, 2015-FRS-00039 (ALJ Nov. 27, 2015).

²² See *In the Matter of Elliott v. Enercon Services, Inc.*, 92-ERA-47, 1993WL 832039 (Sec'y June 28, 1993); *In the Matter of O'Sullivan v. Northeast Nuclear Energy, Co.*, 88-ERA-37, 1992 WL 752772 (Sec'y June 17, 1992).

Nothing in this agreement is intended to or shall prevent, impede, or interfere with Complainant's non-waivable right, without prior notice to respondent, to provide information to the Government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a Government-administered whistleblower award program for providing information directly to a Government agency.

In some cases, it may also be appropriate to add:

Nothing in this agreement is intended to or shall prevent, impede, or interfere with Complainant's filing of a future claim related to an exposure to a hazard, or an occupational injury, or an occupational illness, whose existence was unknown, or reasonably could not have been known, to complainant on the date Complainant signed this agreement.

13. Will a settlement agreement be made part of the OSHA case file?

Yes. OSHA may not review the settlement and return it to the parties without making it part of the case file.²³ Similarly, the parties must disclose the entire settlement to OSHA and cannot, for example, redact the amount of the settlement.²⁴

14. Can OSHA promise to keep a settlement agreement confidential?

No. Approved settlement agreements represent the final decision of the Secretary of Labor in whistleblower cases and are government records subject to the Freedom of Information Act. Accordingly, OSHA cannot promise to keep them confidential. However, OSHA may allow the parties to designate all or portions of the settlement agreement as confidential business information and will follow Executive Order 12600 if a FOIA request is received for the settlement agreement. In those cases, the agreement should contain the following language:

The complainant and respondent have agreed to keep the settlement agreement confidential. The settlement agreement is part of OSHA's records in this case and is subject to disclosure under FOIA, unless an exemption applies. The complainant and respondent have requested that OSHA designate the agreement as containing potentially confidential information and request predisclosure notification of any FOIA request pursuant to 29 C.F.R. 70.26.

²³ See *Richter v. Baldwin Assoc. et al.*, 84-ERA-9 (Sec'y Feb. 22, 1994); *Plumlee v. Alyeska Pipeline Service Co.*, 92-TSC-7 (Sec'y Aug. 6., 1993).

²⁴ See *Gonzales v. J.C. Penny Corp.*, ARB 10-148, 2010-SOX-45 (ARB Sept. 28, 2012) (noting that OSHA should not have approved settlement agreement with the monetary terms redacted); *Fuchko v. Georgia Power, Co.*, 89-ERA-9 (Sec'y Sept. 19, 1994).

15. Will OSHA approve a settlement in which the parties agree to keep the settlement confidential?

Generally, yes. However, as noted above, OSHA cannot be a party to a confidentiality agreement. In addition, the penalties for the complainant's breach of a confidentiality agreement may not be so punitive as to be void against public policy. In particular, ALJs have voided private party confidentiality agreements when those agreements include items such as liquidated damages provisions that are ambiguous as to what constitutes a breach of confidentiality and/or that dwarf the amount of the original settlement. *See* Question 8, above.

16. Can OSHA selectively reject terms of settlement agreements?

No. Unless the agreement has a severability clause,²⁵ OSHA must approve the agreement or renegotiate it with the private parties. OSHA cannot reject only specific terms of the agreement.²⁶

17. What happens if the parties refuse to submit the settlement agreement and instead the complainant asks OSHA to withdraw the complaint?

If OSHA believes that a complainant is requesting to withdraw a whistleblower complaint because the complainant and respondent have reached a settlement, OSHA will, where applicable, advise the parties that they must submit the agreement for OSHA's review and approval. *See* Question 6 above. If the parties do not submit their agreement to OSHA or if the agreement does not comply with OSHA's requirements and the parties do not revise the agreement so that OSHA can approve it, OSHA may dismiss the complaint without issuing factual findings. If, however, OSHA's investigation has already gathered sufficient evidence for OSHA to conclude reasonable cause exists to believe that a violation occurred, or in other appropriate circumstances, such as where there is a need to protect employees other than the complainant, OSHA may issue merit findings, file suit, or continue the investigation.

18. Will OSHA investigate a case where the employee has signed a severance agreement releasing claims against the employer?

It depends. An employee may not waive the right to file a whistleblower complaint in a pre-complaint severance agreement, but may waive the right to recover damages.²⁷ Pursuant to OSHA's longstanding policy, OSHA will conduct a preliminary investigation to determine if the pre-complaint severance or separation agreement is (1) fair, adequate, and reasonable, (2) does not violate public policy, and (3) the employee's consent to the agreement was knowing and voluntary. If OSHA determines the pre-complaint severance agreement meets the foregoing conditions, OSHA will generally accept the existence of a severance agreement as a defense to the whistleblower claim and dismiss the case.

²⁵ A severability clause refers to a provision stating that if any part of an agreement is found invalid or unenforceable, the remaining provisions of the agreement remain valid and enforceable.

²⁶ *Macktal v. Sec'y of Labor*, 923 F.2d 1150 (5th Cir. 1991).

²⁷ *See In the Matter of Khandelwal v. Southern California Edison*, ARB Case No. 97-050, 1998 WL 168938 (ARB March 31, 1998). A complainant may not, however, as noted above under Question 9, waive his or her right to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency or remit any portion of such an award to respondent.

Disclaimer:

This document is advisory in nature and informational in content. It represents OSHA's summary of the requirements that apply to OSHA's review and approval of settlement agreements under the whistleblower statutes. It is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations created by OSHA standards or regulations, the Occupational Safety and Health Act, or other whistleblower statutes enforced by OSHA. As applicable, the Federal Register, the Code of Federal Regulations, and decisions of the Department of Labor's Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of the whistleblower statutes discussed herein.

U.S. Department of Labor

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September 16, 2019

MEMORANDUM FOR: Galen Blanton
Regional Administrator

A handwritten signature in blue ink, appearing to read "m mabee".

FROM: Michael Mabee
Assistant Regional Administrator, Whistleblower Protection Program

SUBJECT: Implementation of Settlement Agreement Template Pilot

Effective October 1, 2019, Region I's Whistleblower Protection Program (WPP) will implement the Settlement Agreement Template Pilot ("Pilot"). Documents include a new settlement agreement template and Frequently Asked Questions (FAQs) staff can share with parties before negotiations begin. Use of these materials will help us achieve fairer and faster resolutions consistent with the purpose and intent of relevant whistleblower statutes.

Once the Pilot receives all necessary approvals, we will discuss the purpose of the pilot with the investigative team. At the end of FY 2020, we will evaluate the pilot and share the results with the DWPP's Director.