The 2016 update to the Whistleblower Investigations Manual used by the Occupational Safety and Health Administration (OSHA) could prove to be a much-needed boon to employees across the country. As many readers of this blog know, OSHA is responsible for enforcing provisions in over 20 separate federal statutes that provide protections against retaliation for employees in a wide range of industries. For years, complaints before OSHA have encountered the agency’s consistently disappointing record of issuing few findings in favor of employees. OSHA’s Whistleblower Investigations Manual is the document that governs how the agency conducts the investigations that lead to these findings, i.e., the document providing the rules by which whistleblower retaliation claims are investigated. The agency's 2016 update to the manual provides an important change that may result in a greater percentage of findings in favor of employees.

Whistleblower Win Statistics

For at least a decade, whistleblower retaliation complaints filed with OSHA have statistically been very unlikely to result in a positive outcome for the employee. From FY2012 to FY2015 – the last four years for which we have statistics – 9,199 whistleblower retaliation complaints filed with OSHA have either been dismissed or withdrawn. During that same time, OSHA has issued just 232 merit determinations in favor of employees, with an additional 2,996 cases reaching a settlement prior to OSHA’s determination. In other words, of employees who filed a retaliation complaint with OSHA between 2012 and 2015, less than 2% received a merit determination, and another 24% decided to accept a settlement. The remaining three-quarters of complainants were left with nothing.

The Manual Updates

OSHA’s updated Whistleblower Investigations Manual may put a dent in that figure. Among the changes made by the 2016 update – and certainly the most important change – was an alteration in the standard by which OSHA is to adjudge whether a complaint has merit. Previously, a complainant was required to establish all the elements of his or her retaliation claim and, if successful, could still receive an adverse finding if the employer was able to provide OSHA with “clear and convincing evidence” that it would have taken the same adverse action against the employee in the absence of the employee’s protected activity. The 2016 update states that in order for OSHA to find in favor of a complainant, investigators need only find that there is “reasonable cause to believe that a violation occurred.” OSHA further explained that “[u]nder the reasonable cause standard, OSHA must believe, after evaluating all of the evidence gathered in the investigation from the respondent, the complainant, and other witnesses or sources, that a reasonable judge could rule in favor of the complainant …. The evidence does not need to establish conclusively that a violation did occur.”

The change came following an April 2015 guidance document clarifying that the reasonable cause standard was the operative standard for OSHA investigators. In that guidance, OSHA made clear that “a reasonable cause finding does not necessarily require as much evidence as would be required at
trial to establish unlawful retaliation by a preponderance of the evidence.” Practitioners can likely think of this as something similar to the standard for surviving a motion for summary judgment, only without the presumption in favor of the non-moving party: whether a reasonable judge viewing the evidence uncovered could find in favor of the complainant.

**Impact of OSHA’s Changes**

The effect this change will have on whistleblower litigation remains to be seen, but any change that could meaningfully increase the number of merit determinations will be music to our ears. While the defense bar may point to the fact that roughly a quarter of complainants receive either a favorable determination or a settlement – and assert that nothing was wrong – that figure fails to recognize the effect that the dismal merit determination figure has on those settlements. When an employer is negotiating with a terminated employee, the employer has the luxury of holding up a 2% statistic and saying to the employee, “settle with us or lose.”

Even ignoring the cases that ended with some voluntary action on the part of the parties, cases that were not withdrawn or settled were approximately 28 times as likely to be dismissed as to result in a merit determination for an employee. Many employees with meritorious complaints may choose to take a less attractive settlement rather than risk facing the overwhelming likelihood that their claim will be dismissed by OSHA and they will be forced to proceed through the Department of Labor’s lengthy adjudicative process. If that merit determination figure increases, employers will lose the cudgel that they are able to wield at the negotiating table, and employees will be more likely to receive a fair outcome for their claims of retaliation.