

# OSHA Issues New Guidelines to Stop Employers from Barring Whistleblowing

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The Occupational Safety and Health Administration (“OSHA”) has issued [new whistleblower-friendly guidelines](#) regarding the approval of settlement agreements between employees and employers arising out of retaliation complaints. OSHA guidelines in this field are important to whistleblowers, as OSHA investigates and enforces numerous significant whistleblower laws beyond the Occupational Health and Safety Act, including protections for retaliation found under the Sarbanes-Oxley Act ([SOX](#)), several [environmental whistleblower statutes](#) (including CERCLA, the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act) as well [transportation-focused whistleblower laws](#) (such as “AIR21”, and the Surface Transportation Assistance Act, to name a few).

Employees who have been retaliated against for blowing the whistle on employer practices made illegal under the laws enforced by OSHA must file their retaliation complaints with OSHA itself. After receiving the complaint, OSHA will investigate and issue a “reasonable cause” finding, including a possible order of reinstatement for the employee. The parties then have a right to an adversarial hearing, much like a trial, to determine the underlying merits of their dispute.

Parties can, and often do, negotiate settlement agreements during the investigative stage of the OSHA proceedings. Once a complaint is filed with OSHA, however, the agency must approve of any final settlement agreement before agreeing to close the case. Employers have with increasing frequency sought to insert provisions in these settlement agreements that curtail or impede employees’ abilities to communicate freely with government agencies about employers’ illegal activities. OSHA’s new guidelines aim to stop the employers’ insistence of such settlement agreement “gag” provisions.

## Curtailing Settlement Gag Provisions

OSHA will now look unfavorably upon provisions in settlement agreements that:

1. Restrict 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;
2. Require 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;
3. Require 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; or
4. Require 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.

These guidelines should prove helpful in addressing important concerns that frequently arise in the course of settlement negotiations. For example, in the context of company securities law violations, many employees who file charges with OSHA after being retaliated against for voicing internal objections about their employers’ practices also seek to submit anonymous tips under the [SEC’s Whistleblower Program](#). Their ability to file these anonymous tips – and ultimately obtain awards of as much as 30 percent of the amounts the SEC recovers from the wrongdoers as a result of the

whistleblowers' information – would be jeopardized or chilled if they were forced by a settlement agreement provision to disclose the existence of the otherwise confidential tips.

With OSHA's new regulations in place, employers cannot attempt to condition settlement of a retaliation claim on an employee's disclosure of a past SEC whistleblower tip or promise not to file such a tip in the future. Indeed, the new OSHA guidelines supplement similar SEC regulations and policies that [penalize companies](#) for including language in employee severance agreements impeding an employee's ability to report securities law violations.

OSHA also includes in its guidelines a warning to employers not to push for disproportionate "liquidated damages" provisions in their settlement agreements. These provisions can require employees to pay exorbitant amounts, often as much as or even more than the entire settlement payment to the employee, in the event of a breach of any one of the many clauses typically included in settlement agreements. OSHA now says that it will withhold approval of settlement agreements containing disproportionate liquidated damages provisions.

### **What This Means for Whistleblowers**

What does this all mean for whistleblowers who wish to file retaliation claims under one of the many statutes enforced by OSHA? Employees should be able to pursue their claims without fear that the employers will condition fair settlements on overly burdensome restrictions on the employees' rights to speak freely with government agencies about employer wrongdoings or prejudice the employees' other whistleblower claims. On the other hand, it is possible that OSHA's prohibitions of these types of provisions will render settlement agreements less attractive for employers, thereby making employers less willing to enter them in the first place. Katz, Marshall & Banks will be monitoring how this dynamic plays out in the months ahead to see if any trends develop.