

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 14-60

May 21, 2014

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: OSHA referred charges

This memorandum is to inform you that the Agency has entered into a program with the Occupational Safety and Health Administration (OSHA). During the OSHA intake process, complainants seeking to assert an OSHA whistleblower claim often learn that their charge would be untimely under Section 11(c) of OSHA, which establishes a 30-day statute of limitations. In these situations, the complainants either decline to file charges or their charges are dismissed because they were filed outside of the 30-day period. OSHA estimates that this happens in 300 to 600 cases each year. It is likely that some of these cases may also raise claims arising under the National Labor Relations Act; for example, instances of employer retaliation for group complaints concerning unsafe working conditions. These complaints may still be timely under our six-month statute of limitations. To address these situations, on March 6, 2014, OSHA Assistant Secretary David Michaels signed a memorandum, a copy of which is attached, agreeing to notify all complainants who file an untimely whistleblower charge of their right to file a charge with the NLRB.

OSHA agents will be provided talking points briefly describing the NLRB and providing our contact information for use in telephone or in-person conversations with complainants with untimely whistleblower claims. Similar information will be included in OSHA's letters administratively closing untimely whistleblower charges. Copies of these documents are attached.

To the extent possible, we would like to track the number of contacts we receive and the number of charges we docket as a result of OSHA referrals. In cases where the IO contact indicates that there was activity relating to safety and health, or there is some other reason to believe the IO contact was referred to our Agency through this program, the IO officer should inquire if the IO contact was referred to our Agency by another agency and select "Referred by OSHA" in the Method of Contact field in the IO Inquiry record if the response is affirmative. Note that we are also adding a "Referred by Other Agency" in the pick list in the Method of Contact field. This should be used for referrals from all agencies other than OSHA. In addition, the NLRB has established a separate toll free number for use by those referred by OSHA. That number is 1-844-

762-6572.¹ While our agents will not be giving this number out, it is important to remind contacts in the local OSHA offices that they should refer employees to this number. In connection with this program, Regions may be contacted by local OSHA offices for training or information about the National Labor Relations Act, including jurisdiction and exclusions. Regions should respond to these requests as promptly as possible. We also encourage Regions to reach out to local OSHA offices to provide briefings on the NLRB and encourage referrals in appropriate cases.

If you have any questions about this memorandum, please contact your Deputy, AGC or the undersigned.

/s/
A.P.

¹ The number noted in the memorandum signed by Assistant Secretary David Marsh is the established toll free number for all calls. As noted above, OSHA referrals will be through 1-844-762-6572. The OSHA number may also be used by Wage and Hour when referring employees to the NLRB.




Reply to the attention of:

DECISION

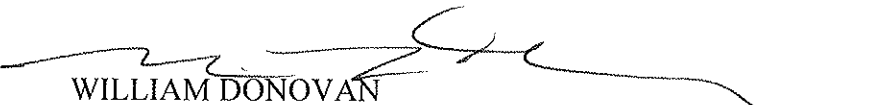
MEMORANDUM FOR THE ASSISTANT SECRETARY


THROUGH:

JORDAN BARAB
Deputy Assistant Secretary


DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM:


WILLIAM DONOVAN
Acting Director, Directorate of Whistleblower Protection Programs


LAFE SOLOMON,
Senior Advisor, Office of the Solicitor

SUBJECT: Referring Untimely 11(c) Complainants to the NLRB

SUMMARY

Section 11(c) of the Occupational Safety and Health Act of 1970 (Section 11(c)) requires that complaints be filed with OSHA within 30 days of the alleged adverse action. Hundreds of Section 11(c) complaints are screened out or dismissed each year because the complainant has failed to timely file the complaint. However, some of these complainants may be able to file a charge alleging unfair labor practices with the National Labor Relations Board (NLRB). In an effort to improve customer service for these complainants, as well as improve cooperation between OSHA and the NLRB, the Directorate of Whistleblower Protection Programs (DWPP) and the Office of the Solicitor recommend that OSHA refer complainants who have filed, or attempted to file, untimely complaints under Section 11(c) to the NLRB. Implementation of this policy can be achieved through normal OSHA intra-agency communications, as discussed further below.

BACKGROUND

Section 7 of the National Labor Relations Act (NLRA) in relevant part provides that "Employees shall have the right to ... engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA prohibits unfair labor practices which restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Employees may file a charge with the NLRB alleging unfair labor practices.

Section 11(c) provides that "no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Employees may file complaints with OSHA alleging retaliation prohibited by 11(c).

Although there may be some individual safety and health activities which may be protected solely under the OSH Act, many employee safety activities involve concerted activity protected under the NLRA and therefore may be protected under both Acts. Given this possible overlap, OSHA and the NLRB signed an MOU in 1975, outlining the procedures for handling worker safety retaliation complaints file with both or either agency. The MOU generally provides that where a complaint is filed with both agencies, enforcement actions should primarily be taken under the OSH Act, rather than the NLRA.

Since the development of the MOU, the number of 11(c) complaints filed with OSHA has steadily risen. DWPP and SOL agree that it is appropriate to reconsider ways in which NLRB and OSHA may cooperate in order to fully protect the rights of employees filing complaints with either agency. One area in which OSHA can take immediate action without requiring additional resources is referral of untimely 11(c) complainants to the NLRB.

Section 11(c) requires that employees file a complaint of retaliation with OSHA within 30 days of the alleged adverse action. This is a very short time in which to file a complaint, as compared to some of the newer anti-retaliation statutes that OSHA enforces, most of which have a 180-day time limit to file a complaint. Approximately 300 Section 11(c) complaints are screened-out each year for missing the 30-day filing deadline, at least a third of which miss the deadline by 30 days or less. OSHA may not investigate these complaints to determine whether retaliation has occurred.

RECOMMENDED POLICY

DWPP and SOL recommend that OSHA establish the following policy:

OSHA personnel will advise all complainants who have filed, or attempted to file, an untimely Section 11(c) complaint to also contact the NLRB to inquire about filing a charge alleging unfair labor practices. OSHA personnel must first follow their Region's policy with respect to discussing the complainant's rights under Section 11(c) and options with respect to untimely filed complaints (e.g. screen out or docket/dismiss).

After such discussion, OSHA personnel will then advise complainants regarding their ability to contact the NLRB. OSHA will advise the complainant that they *may* file a charge with the NLRB and that the NLRB time limit to file (6 months) is longer than OSHA's (1 month) and therefore OSHA recommends that the complainant contact the NLRB as soon as possible to discuss his or her rights. OSHA personnel should then give the complainant the contact information for the complainant's appropriate NLRB Field Office, which can be found at

<http://www.nlr.gov/who-we-are/regional-offices>, and the NLRB's toll-free number, 1-866-667-NLRB. Closing letters for screened out complaints will also include information regarding contacting the NLRB. DWPP will work with SOL to provide sample language to be used during telephone conversations and in screen-out closing letters.

Any OSHA personnel who respond to calls or written communications from employees regarding their rights under Section 11(c) should be trained and instructed on this policy, including non-whistleblower staff. This instruction can be delivered simply through intra-agency communications from the Regional Administrators (RAs) to their Regional and Area Office staff, via email communication and regular staff meetings.

EXPECTED PUBLIC REACTION

DWPP does not expect the establishment of this policy to generate any public criticism. DWPP expects internal and external stakeholders to respond favorably.

COMMUNICATION ROLL OUT STRATEGY

OSHA will communicate this policy to the RAs and Whistleblower Supervisors through a memorandum from the Assistant Secretary to the RAs. DWPP will also discuss this policy with the RAs and Whistleblower Supervisors during regularly scheduled teleconferences. The RAs and Whistleblower Supervisors will then communicate this policy to their Regional and Area Office staff through regularly scheduled staff meetings and normal email communications. DWPP does not recommend a public roll out of this policy.

RECOMMENDED COURSE OF ACTION

DWPP and SOL recommend that you approve the proposed policy so that OSHA may begin implementation.

CONTACT

Please contact Bill Donovan, Acting Director, at (202) 693-2554, if you have any questions.

APPROVAL

Approved:  _____

Date: 3-6-14

Disapproved: _____

Date: _____

COMMENTS

11(c) UNTIMELY Administrative Closure Letter

[Date]

[Complainant Name]

[Street Address]

[City, State ZIP]

Re: [Company Name] / [Complainant] / Case No. [1-2345-02-001]

Dear [Complainant]:

This is to confirm your telephone conversation of [date] with [Investigator Name] of my staff. It is my understanding that [Investigator Name] explained to you that we are unable to pursue investigation of your claim because [your complaint was not filed within the 30-day time period required by Section 11(c)(2) of the Occupational Safety and Health Act], and you concur with the decision to close the case administratively. Therefore, we are administratively closing our files on your claim.

I regret that OSHA is unable to assist you further in this matter. However, OSHA recommends that you contact the National Labor Relations Board (NLRB) as soon as possible to inquire about filing a charge alleging unfair labor practices. The NLRB is responsible for enforcing employee rights under the National Labor Relations Act (NLRA). Employees are protected under the NLRA to act together to try to improve working conditions, including safety and health conditions, even if the employees aren't in a union. The NLRB time limit to file a charge is 6 months from the unfair labor practice. You may reach the NLRB at 1-844-762-6572. You may also locate your nearest NLRB Field Office at www.nlr.gov/who-we-are/regional-offices.

Thank you for your interest in occupational safety and health.

Sincerely,

[Name]

Regional Administrator

Referring Untimely 11(c) Complainants to the NLRB
Talking Points for Phone or In-Person Conversations

Once you have completed discussing the employee's rights and options under Section 11(c), please recommend that the employee contact the NLRB. The following points should be included in your discussion.

- OSHA recommends that you contact the NLRB as soon as possible, to inquire about filing a charge alleging unfair labor practices.
- The time limit to file a charge with the NLRB is 6 months from the unfair labor practice.
- The NLRB is responsible for enforcing employee rights under the National Labor Relations Act (NLRA). The NLRA protects employee rights to act together to try to improve working conditions, including safety and health conditions, even if the employees aren't in a union.
- OSHA may not determine whether you are covered by the NLRA. Please contact the NLRB to discuss your rights under the NLRA.
- You may reach the NLRB at 1-844-762-6572.
- You may also locate your nearest NLRB Field Office at www.nlr.gov/who-we-are/regional-offices (OSHA may want to look up the nearest office and provide the number and address).