U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 23 2007

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

ATTENTION: REGIONAL SUPERVISORY INVESTIGATORS

FROM: EDWIN G. FOULKE, JR.

SUBJECT: Policy for approving settlement agreements containing future employment waiver clauses in whistleblower cases

In OSHA's administration of whistleblower protection statutes, OSHA reviews settlement agreements between complainants and their employers reached during the investigative stage to ensure they are fair, adequate, and reasonable, in the public interest, and that the employee's consent was knowing and voluntary.[1] A limited number of these agreements contain clauses wherein a complainant waives the right to seek further employment with his or her employer. In those cases, OSHA must ensure that such clauses are consistent with the underlying purposes of our whistleblower protection programs.

Based on a recent review of prior settlement agreements, OSHA believes it is appropriate to examine, on a case-by-case basis, all future employment waiver clauses under the 14 whistleblower protection provisions that OSHA administers and enforces. In certain circumstances, an employment waiver in a whistleblower settlement may not be reasonable or in the public interest. Accordingly, OSHA will specifically review the terms of any employment waiver clause in a settlement agreement as part of the existing review process. The validity of a future employment waiver will depend upon the facts and circumstances of each case. Among the factors that should be considered before approving a settlement agreement in which the complainant agrees to waive his or her rights to future employment are:

1) The breadth of the waiver. OSHA should consider whether the future employment waiver effectively prevents the complainant from working in

[1] This is required by some of the whistleblower statutes OSHA administers, and OSHA has also reviewed settlements under the other statutes as a matter of longstanding policy.

his or her chosen field in the locality in which he or she resides. In considering this factor, the particular skills of the complainant should be considered. Certain employees have skills in their chosen fields that are readily transferable to many employers or to several industries, while others may have skills that are tailored to one employer or industry.

Generally speaking, OSHA should have less concern with clauses that narrowly waive an employee's right to work for his or her former employer (or its subsidiaries and/or parent companies). Clauses, however, that broadly restrict an employee's ability to seek employment with any employer in the geographic area of the former employer's worksite should be closely scrutinized.

2) The amount of the remuneration. OSHA should consider whether the complainant received adequate consideration in exchange for his or her agreement not to apply for future employment with his or her employer.

3) The strength of the complainant's retaliation case. In determining whether a settlement agreement is "fair, adequate, and reasonable," OSHA generally considers the strength of the employee's case. The strength of the employee's case and the corresponding risks of litigation also will have bearing on the reasonableness of a future employment waiver clause.

4) Representation by counsel. Before approving future employment waivers in cases where complainants are not represented by counsel, OSHA should ensure that the complainant's consent to the waiver is knowing and voluntary.

5) Other relevant factors. Any other specific facts bearing on the reasonableness of the waiver should be considered. For example, it would be appropriate to consider whether the employee is intending to leave his or her profession, to relocate, to pursue other employment opportunities, or to retire. In such circumstances, the employee reasonably may choose to forego the option to apply for future employment in exchange for a larger monetary settlement as often occurs generally in employment litigation when additional compensation (often characterized as front pay in a settlement) is substituted for reinstatement by mutual agreement.

These factors are not intended to be exclusive and no individual factor is dispositive. Each agreement must be examined on its own terms.

cc: Chief Judge John Vittone, Office of Administrative Law Judges
Chief Administrative Appeals Judge M. Cynthia Douglass,
Administrative Review Board