U.S. Department of Labor

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

JUL 24 2007

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515-0115

The Honorable Bart Stupak
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515-0115

Dear Chairman Dingell and Chairman Stupak:

This is in further response to your letter of March 9, 2007 and an e-mail of April 3, 2007 sent by a member of your staff, Richard Miller, requesting documents and information regarding the Department of Labor's whistleblower protection program. The Committee's underlying oversight request pertains to the Department's approval of settlement agreements between employers and employees who have filed whistleblower complaints that contain clauses in which the employees agree to waive future employment.

Pursuant to your March 9, 2007 letter, the Department asked all relevant agency heads to disseminate a copy of your letter to staff that work on whistleblower protection programs and advise them of their ability to freely and fully cooperate with Committee requests. As we documented in a March 23, 2007 e-mail to Mr. Miller, the Solicitor's Office (SOL), Occupational Safety and Health Administration (OSHA), Office of Administrative Law Judges (OALJ), and Administrative Review Board (ARB) forwarded your letter and guidance to appropriate staff on or about March 22, 2007. We also met with Committee staff on March 30, 2007, to provide an overview of our program and discuss some of the issues raised in your letter.

As you know, the Department has completed its document production and provided the Committee with 12,866 pages of unredacted documents responsive to your request. *See* cover letters dated March 29, 2007 (1,476 pages), April 9, 2007 (7,528 pages), April 27, 2007 (2,492 pages), and May 23, 2007 (1,370 pages). As we have stated previously, many of the produced documents contain confidential information that, if released, might harm the important privacy

interests of whistleblowers, disclose confidential business information of respondents, and/or impinge upon the Department's ability to investigate and obtain evidence in whistleblower adjudications in the future. Accordingly, we would again respectfully request that the Committee not release these materials to the public in order to protect these privacy interests.

Your letter specifically concerns 11 whistleblower statutes administered by the Department. Those statutes are 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 Federal Water Pollution Control Act, 33 U.S.C. 1367; the Pipeline Safety Improvement Act, 49 U.S.C. 60129; the Safe Drinking Water Act, 42 U.S.C. 300j-9(i); the Solid Waste Disposal Act, 42 U.S.C. 6971; the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105; the Toxic Substances Control Act, 15 U.S.C. 2622; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121; and the Sarbanes-Oxley Act, 18 U.S.C. 1514A (incorporating 49 U.S.C. 42121(b)).

OSHA has been delegated the responsibility for investigating complaints filed under these whistleblower provisions. *See* Secretary's Order No. 5-2007, 72 Fed. Reg. 31,160 (June 5, 2007). Once OSHA issues findings and a preliminary order, litigation of the complaint generally is handled by the private parties, except in cases arising under STAA. In STAA cases, if OSHA issues merit findings, the Solicitor's Office generally litigates to obtain relief for the complainant. Any party objecting to OSHA's findings and preliminary order may request a *de novo* hearing before a Department administrative law judge (ALJ). ALJ decisions are subject to review by the Administrative Review Board (ARB), which has been delegated responsibility for issuing final agency whistleblower decisions on behalf of the Secretary. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 67 Fed. Reg. 64,272 (Oct. 17, 2002).

Once a complaint has been filed under these whistleblower protection statutes, the Department reviews any settlement reached by the parties. Complaints settled at the investigative stage are reviewed by OSHA, while settlements in cases pending before an ALJ for *de novo* review or before the ARB for appellate review are reviewed by those respective tribunals. In the context of STAA, the ARB enters a final approval of settlement agreements that are first reviewed preliminarily by an ALJ.

Whistleblower protection provisions are designed to encourage whistleblowing in aid of the underlying public policy purposes of the statutes in which they are contained. The Department plays a unique role that involves more than providing a forum for private parties to litigate their private employment retaliation disputes. For example, review of settlements by the Department is

required under eight of the 11 statutes into which you inquired.[1] As a policy matter, the Department reviews settlements under all 11 statutes.

The Department's review involves determining whether the agreements are fair, adequate, and reasonable, in the public interest, and that the employee's consent was knowing and voluntary. *See, e.g., Khandelwal v. Southern California Edison*, No. 97-050, 1998 WL 168938, *1 (ARB Mar. 31, 1998) (agency will dismiss complaint based on settlement if "(1) the terms of the settlement are fair, adequate, and reasonable, (2) the provisions of the agreement are not contrary to public policy, and (3) the complainant's consent was knowing and voluntary"); *Faust v. Chemical Leaman Tank Lines, Inc.*, Nos. 92-SWD-2, 93-STA-15, 1996 WL 326928, *1 (ARB June 13, 1996) ("Public policy demands that settlement agreements between the parties of a discrimination complaint filed under the federal employee protection statutes be reviewed by the Secretary of Labor (or his designee) to determine whether the terms are a fair, adequate and reasonable settlement of the complaint."). A settlement is not operative unless approved by the Department.

As an initial matter, we would note that it has been the longstanding position of the agency that provisions that restrict an employee's right to bring information to the government's attention, so-called "gag" clauses, are contrary to public policy. *See Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, 1997 WL 714638, *5-*6 (Nov. 10, 1997); *Marthin v. TAD Tech. Servs. Corp.*, OAA Nos. 1994-WPC-1, 2, and 3, 1994 WL 897269, *1 (June 8, 1994); *see also Delcore v. W.J. Barney Corp.*,

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[1] In *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153, 1154 (5th Cir. 1991), the Fifth Circuit stated that under the ERA's whistleblower provision, 42 U.S.C. 5851, the Secretary has only three options for handling discrimination complaints -- an order granting relief, an order denying relief, or a consensual settlement involving all three parties (i.e., the employee, the employer, and the Secretary). The court's ruling was based on the following statutory language in 42 U.S.C. 5851(b)(2)(A):

> Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. . . . The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

Several years later, the First Circuit held that virtually identical statutory language under the whistleblower provisions of the CAA (42 U.S.C. 7622(b)(2)(A)), the SDWA (42 U.S.C. 300j-9(i)(2)(b)(i)), and the TSCA (15 U.S.C. 2622(b)(2)(A)) also limit the Secretary to those three options. *See Beliveau v. United States Department of Labor*, 170 F.3d 83, 86 (1st Cir. 1999). The court in *Beliveau* concluded that once a complaint is filed under these statutes, the Secretary is statutorily required to review a settlement agreement.

Case No. 89-ERA-38, Sec. Final Dec. and Ord., Apr. 19, 1995, *aff'd sub nom. Connecticut Light & Power Co. v. Reich*, 85 F.3d 89 (2d Cir. 1996) (holding that it was improper for a respondent to offer the complainant a monetary settlement in exchange for his agreement to restrict his participation in future regulatory and judicial proceedings). Accordingly, the Department will not approve settlements that contain such provisions.

The Department does approve settlements that provide that the parties themselves will keep the terms confidential. Not only are such confidentiality provisions routine in settlements of employment disputes, but the promise of confidentiality may inure to the benefit of both the employee and the employer. *See generally*, 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1932-33 (3d ed. 1996); *see also Flynn v. Portland General Elec. Corp.*, 1989 WL 112802, *2 (D. Or. Sept. 21, 1989) ("strong public policy favoring settlement of disputed claims dictates that confidentiality agreements regarding such settlements not be lightly abrogated"). Some whistleblowers, for example, may desire to settle their disputes in anonymity. Once submitted for review, however, settlement agreements become a part of the agency record in the case, and are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552.

As a matter of practice, the Department has approved settlements containing future employment waivers for over twenty years, and has not taken a written position on the validity of such waiver provisions previously. We are also not aware of any courts that have specifically addressed the validity of future employment waivers, although the Tenth Circuit has concluded in two cases that an employer's reliance upon such a waiver in a settlement to deny a former employee's application for employment was not retaliatory. *See Jencks v. Modern Woodmen of America*, 479 F.3d 1261, 1265-67 (10th Cir. 2007) (employer proffered legitimate, non-retaliatory reason for refusing to offer plaintiff a sales agent contract based on prior negotiated settlement agreement of Title VII claims foreclosing plaintiff from future employment with employer); *Kendall v. Watkins*, 998 F.2d 848, 851-52 (10th Cir. 1993) (employer's refusal to consider plaintiff for employment based on language in former settlement of Title VII claims was not discriminatory). Indeed, the inclusion of future employment waiver provisions in agreements settling employment disputes appears to be an accepted practice. *See* Wayne N. Outten, *Settlement And Utilization of Separation Agreements in Discrimination And Sexual Harassment Cases: An Employees' Lawyer's Perspective*, 743 PLI/Lit 437 (2006) ("Typically, employees accept such a provision, though certain exceptions should be considered.").

Moreover, when the Age Discrimination in Employment Act was amended in 1990, Congress provided certain minimum requirements that must be met before

waivers of claims or rights will be considered knowing and voluntary. *See* Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f). The OWBPA represents Congress's most recent effort to ensure that employees are not coerced or manipulated into waiving their legal rights. *See Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997). Significantly, although the OWBPA provides that an employee may not waive future legal rights under the OWBPA, 29 U.S.C. 626(f)(1)(C), it does not specifically prohibit clauses that waive an employee's right to apply for future employment with the employer.

Our review of all settlements approved by the Department under the 11 statutes listed above indicates that future employment waiver clauses have appeared in settlements for over 20 years. Notably, in the cases cited in your letter and the *U.S.A. Today* March 14, 2007 article, as well as the majority of all settlements we have produced to the Committee, the whistleblowers appear to have been represented by counsel in agreeing to these terms. In fact, the Government Accountability Project (GAP) was counsel of record to the whistleblowers in the *Zipoli, Wallace* and *Brown* cases, and the whistleblowers received compensation in consideration of their agreement to the settlement provisions. *See* March 14, 2007 *U.S.A. Today* article by Peter Eisler (*e.g.*, noting $175,000 settlement for Mr. Zipoli).[2]

In response to your letter and a petition for rulemaking from the Government Accountability Project, we have considered whether any future employment waiver clauses conflict with the purposes of the Department's whistleblower programs. It is possible that broad waivers on future employment, such as those that restrict an employee's ability to seek employment with any employer at a particular site, could act as deterrents to whistleblowing both by keeping known whistleblowers out of a certain workforce and by discouraging other employees from voicing legitimate concerns. On the other hand, public policy generally supports voluntary settlements. Employers may be less inclined to settle cases (and agree to pay back wages), if they believe that they have to continue a potentially conflict-ridden employment relationship. Some employees, such as those nearing retirement or planning to relocate for other reasons, reasonably may prefer to accept a larger financial payment in exchange for agreeing not to apply for future employment.

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[2] Notwithstanding GAP's petition, it appears to have represented clients who have agreed to these provisions since at least 1985 and as recently as January of this year. *See Hatley v. Brown & Root*, 1984-ERA-00023 (ALJ Aug. 28, 1985) ("[whistleblower] shall not file an application or otherwise seek employment with Brown & Root at any time, and she hereby waives and relinquishes any right that she might have to be considered for employment with Brown & Root in the future") *and Martin v. Dep't of Energy*, 2007-ERA-00002 (ALJ Jan. 8, 2007) (*available at* http://www.oalj.dol.gov/).

We have carefully considered a number of other aspects of this issue. For example, an agreement not to seek reemployment with an employer in consideration for a specific amount of money is analogous to an agreement not to seek reinstatement (which we do not believe is at issue in your letter or in GAP's petition). Anti-retaliation statutes generally include reinstatement as part of their "make-whole" relief provisions. In reaching settlement agreements, employees frequently agree to forego reinstatement, or to accept additional compensation (often characterized as front pay in a settlement) in lieu of reinstatement. Courts also award this type of additional compensation when they believe that reinstatement is not viable because of continuing hostility between the employee and the employer or because of psychological injuries suffered by the employee as a result of the discrimination. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001). The fact that this remedy exists in many circumstances supports the argument that waivers of future employment do not inherently violate public policy.

Waivers of future employment also are analogous to covenants not to compete, the validity of which generally is examined by courts on a case-by-case basis. The enforceability of such covenants often depends upon state law. Among the factors that courts consider in determining the reasonableness of a restrictive covenant are its duration, its territorial scope, and whether it is unduly burdensome on the employee's ability to earn a living. *See, e.g., Hardesty Co., Inc. v. Williams*, 368 F.3d 1029, 1031 (8th Cir. 2004) (under Arkansas law covenants not to compete "must be reasonable in geographical limitation and duration, must protect a legitimate interest, must be no greater than reasonably necessary to protect the legitimate interest, and should not injure the public's interest")(citing *Dawson v. Temps Plus, Inc.*, 987 S.W.2d 722, 727 (Ark. 1999)); *United Rentals (North America), Inc. v. Keizer*, 355 F.3d 399, 406 (6th Cir. 2004) (covenants not to compete are enforceable under Michigan law if "reasonable as to its duration, geographical area, and the type of employment or line of business") (citing Mich. Comp. Laws Ann. § 445.774a). Thus, covenants not to compete are not inherently contrary to public policy. By extension, comparable waivers of future employment are not either.

Furthermore, we do not believe that future employment waiver clauses are a form of blacklisting. Blacklisting is a unilateral act by employers, in sharp contrast to a voluntary agreement by an employee not to seek specific employment in the future. "Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment." *See Pickett v. TVA*, 2003 WL 22855210, *6 (ARB Nov. 28, 2003) (citing *Barlow v. United States*, 51 Fed.Cl. 380, 395 (2002)). "Blacklisting assumes that an employer covertly follows a practice of discrimination." *Pickett*, 2003 WL 22355210, at *6. Settlement

agreement provisions waiving future employment opportunities do not fall within the legal definition of blacklisting.

We intend to respond to GAP's petition for rulemaking shortly after sending this letter and will provide a copy of our response to the Committee as well. As indicated above, the issue is a serious one. Based on our review, we have concluded that future employment waiver clauses are not per se against public policy. Rather, their validity should be determined on a case-by-case basis. Indeed, it does not appear that other federal agencies involved with litigating or adjudicating employment disputes have a per se prohibition on future employment waivers, although the Equal Employment Opportunity Commission views them with disfavor. *Compare, e.g.,* National Labor Relations Board, Office of the General Counsel Memorandum OM 07-27 (Dec. 27, 2006) and *McFadden v. Dep't of Agriculture*, 94 MSPR 188 (MSPB Sept. 10, 2003) *with* EEOC's Settlement Standards, Regional Attorney's Manual, Office of General Counsel (April 2005).

Accordingly, to ensure that whistleblowers have appropriate protections, OSHA has issued written guidance to its regional offices (copy enclosed) to specifically review any employment waiver clause as part of the existing review process to ensure a "fair, adequate and reasonable settlement of the complaint." *Faust*, 1996 WL 326928, *1. The validity of a future employment waiver will depend upon the facts and circumstances of each case. Among the factors that will be considered before a settlement agreement with a future employment waiver clause is approved will be: (1) the breadth of the waiver; (2) the amount of remuneration; (3) the strength of the employee's retaliation case and the corresponding risks of litigation; and (4) the employee's representation or lack of representation by counsel.

As part of this policy, we will not generally consider a settlement offer containing an overly restrictive waiver of future employment as an independent act of retaliation. In support of this position, we note that the Sixth Circuit rejected the argument that an impermissible "gag" provision contained in a severance offer was retaliatory per se. *See EEOC v. Sundance Rehabilitation*, 466 F.3d 490 (6th Cir. 2006); *see also Connecticut Light & Power Co.*, 85 F.3d 89 (holding that settlement offers containing prohibited "gag" provisions can constitute adverse action in certain circumstances).

We will not effectuate our written guidance on this policy through rulemaking. A regulation governing permissible settlement provisions may be considered legislative in nature, *see generally, Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979), and the Secretary does not have legislative rulemaking authority under the 11 whistleblower statutes at issue here. Moreover, OSHA has not issued

interpretative rules under these statutes. Its regulations implementing the statutes are procedural in nature. *See, e.g.*, Preamble to Part 1980, 69 Fed. Reg. 52106 (Aug. 4, 2004); Preamble to Part 24, 63 Fed. Reg. 6620 (Feb. 9, 1998).

We note that OSHA's decision is not binding on the ARB and ALJs. However, OSHA may in an appropriate circumstance request that the Solicitor's Office file an amicus brief before an ALJ and/or the ARB that supports this policy should the issue arise.

We trust that this response has answered the questions raised by your Committee. Please be assured that OSHA remains committed to providing meaningful whistleblower protection to key sectors of the American workforce.

Sincerely,

Edwin G. Foulke, Jr.

Enclosure

cc: The Honorable Joe Barton
The Honorable Ed Whitfield
Chief Judge John Vittone, Office of Administrative Law Judges
Chief Administrative Appeals Judge M. Cynthia Douglass,
Administrative Review Board