

# LITIGATING ENVIRONMENTAL WHISTLEBLOWER CLAIMS UNDER OSHA PROCEDURES

NEXT CHALLENGE. NEXT LEVEL.

**NEXSEN | PRUET**

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**David Dubberly**  
Certified Specialist in Employment and  
Labor Law



# ENVIRONMENTAL WHISTLEBLOWER PROTECTIONS ENFORCED BY OSHA

- ▶ Clean Air Act, 42 U.S.C. § 7622
- ▶ CERCLA, 42 U.S.C. § 9610
- ▶ Federal Water Pollution Control Act, 33 U.S.C. § 1367
- ▶ Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)
- ▶ Solid Waste Disposal Act, 42 U.S.C. § 6971
- ▶ Toxic Substances Control Act, 15 U.S.C. § 2622

# OTHER WHISTLEBLOWER PROTECTIONS ENFORCED BY OSHA

- ▶ Occupational Safety and Health Act, 29 U.S.C. § 660(c)
- ▶ AIR 21, 49 U.S.C. § 42121
- ▶ Surface Transportation Assistance Act, 49 U.S.C. § 31105
- ▶ Consumer Financial Protection Act (Dodd-Frank), 12 U.S.C. § 5567
- ▶ Sarbanes-Oxley Act, 18 U.S.C. § 1514A
- ▶ Affordable Care Act, 29 U.S.C. § 1558
- ▶ 11 More

# FALSE CLAIMS ACT

- ▶ **FCA provides:**
  - ▶ Financial incentive for reports of alleged wrongdoing (including alleged environmental violations) in connection with government programs
  - ▶ Protection from retaliation
  - ▶ 31 U.S.C. §§ 3729-3730
- ▶ **But this presentation focuses on protections enforced by OSHA**

# WHY OSHA?

- ▶ **OSH Act first law with whistleblower protections to be enforced by OSHA**
- ▶ **As Congress passed more, kept giving OSHA authority to investigate whistleblower complaints in areas that have nothing to do with workplace safety**

# OSHA WHISTLEBLOWER COMPLAINTS

- ▶ 3,288 complaints in FY 2015 (50+% increase over 10 years)
  - ▶ 843 total found to be “merits” cases
  - ▶ 2,026 under OSH Act
  - ▶ 59 under environmental statutes
  - ▶ 18 environmental found to be “merits” cases

# OSHA PROCEDURES

- ▶ **Similar under most statutes**
  - ▶ Investigation by OSHA, litigation before a DOL ALJ, appeal to ARB
  - ▶ But differences regarding burdens of proof, filing deadlines, and available damages
- ▶ **Regulations for complaints under environmental statutes revised in 2011**
  - ▶ 29 C.F.R. Part 24
  - ▶ Summarized in OSHA's "Desk Aid"; see attached

# FILING COMPLAINT IS EASY

## 29 C.F.R. § 24.103(b)

- ▶ Phone, fax, e-mail
- ▶ Online
- ▶ In any language
- ▶ No requirement for sworn written statement
- ▶ No filing fees



# STATUTE OF LIMITATIONS

## 29 C.F.R. § 24.103(d)

- ▶ 30 days from when complainant learns of adverse action
- ▶ Time for filing may be tolled
  - ▶ Debilitating injury or illness
  - ▶ Major disaster
  - ▶ Filed with wrong agency

# PRIMA FACIE CASE

## 29 C.F.R. § 24.104(e)(2)

- ▶ Employee engaged in protected activity
- ▶ Employer knew or suspected employee engaged in protected activity
- ▶ Employee suffered adverse action
- ▶ There's enough evidence to raise at least inference that protected activity was “a motivating factor” in adverse action

# PROTECTED ACTIVITY

## 29 C.F.R. § 24.102(b)

- ▶ Starting/being about to start proceeding for alleged violation of an environmental law or regulation
  - ▶ Includes reporting internally
- ▶ Testifying/being about to testify in such a proceeding
- ▶ Assisting or participating/being about to do so in such a proceeding

# TEMPORAL PROXIMITY

## 29 C.F.R. § 24.104(e)(3)

- ▶ Required showing may be met if complainant shows adverse action took place “shortly after” protected activity

# BURDENS OF PROOF

## 29 C.F.R. §§ 24.104(e)(4), 109(b)(2)

- ▶ Employer must produce evidence adverse action motivated by legitimate, non-discriminatory reason
- ▶ If it does, employee must prove articulated reason was pretext for retaliation
- ▶ Even if there's evidence retaliation was “motivating factor” in adverse action, OSHA should still dismiss case if employer proves by preponderance of evidence it would have taken same action in absence of protected activity

# PROMPT RESPONSE REQUIRED

## 29 C.F.R. §§ 24.104(b)-(c), 105(a)

- ▶ Employer has 20 days from receipt of notice of complaint to submit response (can secure extension)
  - ▶ May request meeting with OSHA
- ▶ Information submitted to OSHA shared with complainant
- ▶ OSHA investigates and decides if there's "reasonable cause" to believe complaint has merit
  - ▶ On April 20, 2015 OSHA published memo "clarifying" (*i.e.*, watering down) "reasonable cause" standard

# AVAILABLE RELIEF

## 29 C.F.R. §§ 24.105(a)(1), 109(d)(1), 110(d)

- ▶ Reinstatement to former position with same terms and conditions of employment
  - ▶ But not preliminary/immediate reinstatement as under some statutes
- ▶ Back pay with interest for lost wages
- ▶ Compensatory damages
  - ▶ Emotional distress, loss of professional reputation
  - ▶ Job search expenses, 401(k) withdrawal fees

# AVAILABLE RELIEF

## 29 C.F.R. §§ 24.105(a)(1), 109(d)(1), 110(d)

- ▶ **Costs and expenses, including attorney's fees**
- ▶ **Under SDWA and TSCA, punitive damages  
“where appropriate”**
- ▶ **Non-monetary relief**
  - ▶ Posting OSHA poster
  - ▶ Training
- ▶ **OSHA updated its Whistleblower Investigations Manual, in particular Chapter 6 on remedies, as of May 21, 2015**



# CHALLENGING OSHA'S FINDINGS

## 29 C.F.R. §§ 24.105(a)(1), (c), 106(a)-(b)

- ▶ If OSHA concludes there's "reasonable cause," will send written report of findings and preliminary order awarding relief
- ▶ Upon receipt, losing party has 30 days to appeal to DOL's Chief ALJ by filing objections and requesting hearing
- ▶ If timely appeal, provisions of order will be stayed
- ▶ If no timely appeal, order becomes final

# ALJ HEARING AND DECISION

## 29 C.F.R. §§ 24.107(a)-(b), 108(a)-(b), 109(a), (e)

- ▶ **Appealing party entitled to evidentiary hearing**
  - ▶ Revised rules of practice and procedure for hearings before ALJ's became effective June 18, 2015; see 29 C.F.R. Part 18
    - ▶ Discovery
    - ▶ Motions for summary decision
- ▶ **OSHA may participate as party or amicus; EPA may participate as amicus**
- ▶ **ALJ decision must contain findings, conclusions, and order on remedies**
- ▶ **Decision effective in 10 business days unless losing party files petition for review with DOL's ARB**

# ARB REVIEW

## 29 C.F.R. §§ 24.110(a)-(c), 112(a)-(d)

- ▶ Petition must set out all ALJ errors and issues
- ▶ If ARB declines to review case, ALJ decision becomes final
- ▶ If case accepted for review, ARB will send briefing schedule
  - ▶ It has 90 days to issue final decision
- ▶ No new evidence is introduced; ARB makes decision based on record developed by ALJ
- ▶ Adverse decision by ARB can be appealed to Circuit Court of Appeals

# SETTLEMENTS

## 29 C.F.R. §§<sup>11</sup> 24.111(a)-(d)

- ▶ Settlements under CAA, SDWA, and TSCA must be approved by OSHA
  - ▶ Confidentiality provisions?
  - ▶ Waiver of future employment provisions?

# QUESTIONS/COMMENTS?

**David Dubberly**

**803-253-8281**

**[ddubberly@nexsenpruet.com](mailto:ddubberly@nexsenpruet.com)**

**Twitter: @DavidDubberly**