Published on *The National Law Review* https://natlawreview.com

Obama's National Labor Relations Board (NLRB) Comes to Occupational Safety and Health Administration's (OSHA) Rescue

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Retaliation against an employee who has filed a complaint, testified, or exercised any right under OSHA is a violation of that Act. **OSHA, however, has a small window of opportunity** for an employee who believes he has been retaliated against by his employer to bring a claim before OSHA. To be timely, an employee must file his whistleblower complaint with OSHA within thirty days from the date of an adverse action.

OSHA has been required to dismiss over 200 claims each year as being untimely filed. To remedy this situation, OSHA lobbied Congress to extend the statute of limitations for filing whistleblower complaints to 180 days from the date of the adverse action. According to the Assistant Secretary of Labor for Occupational Safety and Health, opening the window to file such a complaint for an additional 150 days will permit OSHA to investigate over 600 more retaliation complaints each year. Congress, however, has not yet extended the deadline.

Under the NLRA, **complainants already have 180 days to file**, so the NLRB has come to OSHA's rescue. The Board and OSHA have agreed that, if OSHA determines during its intake of a whistleblower complaint that the complaint would be untimely under OSHA, it will "recommend" to the employee that he contact the NLRB to file an unfair labor practice charge. When making this "recommendation," the OSHA intake officer will review the following items with the untimely whistleblower: (1) the NLRA, (2) the requirements for the Board to assert jurisdiction, and (3) the Board's toll-free number reserved for such whistleblower charges.

How many of these untimely OSHA retaliation charges, in fact, will be subject to the Board's jurisdiction remains to be seen. Certainly, it will not be all of them. While retaliating against an individual whistleblower on safety issues violates OSHA, it does not necessarily violate the NLRA. That Act affords protection to employees engaged in "concerted activities" for their mutual aid and protection. By definition such "concerted activities" must involve two or more persons complaining about some allegedly unsafe work condition. A union does not have to be involved for the Board to have jurisdiction. However, if an individual makes the complaint on behalf of himself regarding only his own working conditions, the NLRA would not be implicated.

The Board's announcement of the OSHA Referral Charge Program acknowledges that not all of

these untimely OSHA whistleblower charges will be viable claims under the NLRA. Of course, the untimely OSHA whistleblower will certainly understand after his OSHA wood-shedding that his only available relief lies with the NLRB and, to make a claim before it, he must have been acting with or on behalf of others. This coaching will have educated him as to the correct answers during the NLRB intake process, leading to another timely NLRA charge. This program is another example of the Board trying to bring more matters before it that do not involve union activity, inserting more government oversight of business without Congressional action, and continuing efforts to remake itself into an administrative agency more relevant to the union-free workplace.

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National Law Review, Volume IV, Number 190

Source URL:https://natlawreview.com/article/obama-s-national-labor-relations-board-nlrb-comes-to-occupational-safety-and-health-