
Executive Summary

In April 2010, Assistant Secretary David Michaels and Deputy Assistant Secretary Richard Fairfax of the Occupational Safety and Health Administration (OSHA) created a whistleblower program review team ("the team"). The team was directed to conduct a "top to bottom" review of the whistleblower program and to make recommendations to the Assistant Secretary for improving the program.

Summary of the Report and Recommendations

Overall, the team found significant deficiencies and challenges facing OSHA's whistleblower protection program. The team believes that the program is staffed with many hard working and dedicated employees making every effort to successfully accomplish the mission with limited resources. The team believes that the agency needs to take expedient action to correct systemic problems identified in this report. If the agency makes widespread reforms to the whistleblower program, the team believes it will result in a credible, consistent and effective program.

Field Organizational Structure

1. If leadership elects to continue the structural model utilized by Regions I, II, III, VI, and VII, we recommend:
 - a. Ensure that flexi-place agreements are formalized, to include routine work in the Area Office, with the Area Office providing necessary administrative support.
 - b. The RSI will need to be adept at managing remotely located employees.
 - c. Staff meetings should be frequent with annual in-person meetings.
 - d. A formal mentoring process should be developed. The mentoring process should include the assignment of the trainee to an experienced investigator and frequent face-to-face meetings with the RSI.

2. If leadership elects to continue the structural model utilized by Regions IV and V, we recommend:
 - a. Ensure that all managers and supervisors are fully trained to grasp the complexities of the program.
 - b. Ensure that audits are conducted of all Area Offices.
 - c. Ensure that a coordinator position (Program Manager) is established and provided with the tools and resources to effectively coordinate the program.
 - d. Ensure that direct lines of communication are established so that investigators have easy access to technical guidance.
 - e. Regional staff meetings should be frequent with annual in-person meetings.
 - f. A formal mentoring process should be developed that includes trainee assignment

to an experienced investigator.

- g. Ensure that where ADs and AADs are first-line supervisors of investigators, that they have the same level of training and expertise as an RSI.
3. If leadership elects to continue the structural model utilized by Regions VIII, IX, and X:
- a. Ensure that travel costs are budgeted and available to accomplish a reasonable percentage of on-site investigations.
 - b. Utilize the most time efficient means of travel.
 - c. Ensure that AO staff is trained to handle general queries and complaints.
 - d. Ensure that a WB staff member is available as a duty officer to answer AO and customer queries.
 - e. Integrate enforcement and whistleblower functions by assigning joint outreach and operational activities.
 - f. Utilize investigators to conduct training of CSHOs on whistleblower policy and procedures.

Field Staffing and Workload

4. Adopt the team's two staffing models to determine field staffing levels.

Equipment

5. Establish mandatory equipment and IT software lists for all investigators.
6. Utilize the team's minimum equipment/software list.

Budget

7. Create a specific line item budget for the whistleblower program on all organizational levels within OSHA. The budget would designate specific funds for personnel, training, equipment, etc.

OWPP

8. Consider fundamental changes in the mission and function of OWPP and how OWPP is structured, managed, staffed, and funded.
9. Remove OWPP from DEP and place OWPP in its own office reporting to the Assistant Secretary's office. Alternatively, the whistleblower program could be its own Directorate. In any case, we believe it should report directly to the Assistant Secretary's office.
10. Institute confidence-building measures to improve the level of communication and collegiality between the OWPP and the field.
11. Provide adequate staffing to meet OWPP's new or revised mission and functions.

Policy/Procedures

12. Complete the revision of the whistleblower investigators manual.
13. Issue interim guidance on the new statutes that are not covered in the revised manual.
14. Incorporate the interim guidance on the statutes as soon as possible into the manual.
15. Update the manual as frequently as needed to ensure changes to policy and procedures are kept current.

Investigations Process

16. Revise and expand the guidance on administratively closing (screen-out) cases.
17. Until an IMIS update occurs, establish a standard method of documenting, tracking and retaining administratively closed complaints.
18. Capture administratively closed case time on the activity and hours form (OSHA 31s).
19. Ensure that supervisors review and approve all screen-outs.
20. Develop and provide training to personnel assigned to receive/screen whistleblower complaints.
21. Audit screen-outs during every audit.
22. Revise policy to emphasize the agency's desire for early resolution.
23. Allow for regional flexibility on the methodology used to investigate a case.
24. Following the implementation of the updated manual, study its impact on field operations.
25. Develop a training course on the collection and testing of evidence including the proper application of legal requirements contained in the statutes.
26. Develop and deliver a mandatory training course on settlement negotiations.
27. Develop and implement a national mediation/alternative dispute program.
28. Develop and provide a training course for those designated to participate in the mediation/alternative dispute program.

-
29. Ensure that settlements are analyzed for fair and equitable restitution and annotated in the case file.
 30. Ensure that IMIS instructions clarify how to properly record settled cases.
 31. Ensure that regions properly utilize the recommended settlement templates.
 32. Ensure that regions follow the policy on approving settlement agreements.
 33. Ensure that cases are properly reviewed and approved by supervisors.
 34. Reconsider the proposed policy allowing supervisors/team leaders to sign final determination letters. Require mid-level managers to sign final determination letters.

Appeals Process

35. Direct OWPP to reduce the appeals backlog by performing a specific number of appeal reviews every month.
36. Return all Region IV, V, and VI appeals for their processing or, in the alternative, offer staff on detail to process appeals.
37. Require OWPP and those regions with a pilot program to report on the progress of their appeal reviews on a monthly basis.
38. Identify the best procedures of each appeals program to develop a single written policy, whether administered by the National Office, regional level or a combination thereof.
39. Establish an appeal processing deadline of 60 calendar days.
40. Limit the number of reviewing officials to as few as possible; we recommend no more than two employees.
41. Utilize employees that have whistleblower expertise to review appeals.
42. Utilize a formalized template to document the analysis and conclusion of the review.
43. Ensure there is an independent reviewer and deciding official.
44. Determine the OWPP staffing needs for their appeals processing responsibility.

Performance Measures

In order to effectively measure performance, we suggest the following measures be considered:

45. Activity and hours form (OSHA 31): Ensure that investigators, CSHOs conducting

investigations as a collateral duty, and any other program supervisor complete the case activity and hours form (OSHA 31).

46. Lapse Time: Measure lapse time in a manner similar to enforcement such as:

- a. complaint receipt to interview
- b. complainant interview to investigation
- c. investigation completed date
- d. investigation approval date
- e. findings issuance date

47. Merit Findings: Measure findings issued separate from settlements.

48. Settlement Rate: Include quality measurements such as:

- a. percentage of settlements that contain the core elements of a settlement
- b. percentage of OSHA settlement agreements versus party settlements
- c. percentage of settlements for enhanced settlements (Notice to Employees, Training, etc.)
- d. percentage of cases referred for litigation – OSHA Action 11c/STAA

49. Appeals: Include outcome and timeliness.

- a. percentage of remand
- b. percentage upheld
- c. timeliness of appeal decision

Whistleblower IMIS

50. Make modifications to whistleblower IMIS system such as:

- a. capture administratively dismissed cases (screen-outs)
- b. improve the reports system
- c. allow for deferral case time suspension
- d. identify multiple statutes
- e. separate merit findings from settlements
- f. provide for data error reports

51. Roll out the whistleblower OIS in the earliest timeframe possible.

52. Update the whistleblower IMIS manual and post the manual on the OWPP intranet page.

53. Develop a new IMIS course.

54. Mandate all field staff attend the new whistleblower IMIS course.

-
55. Break out settled cases from merit cases in the IMIS system.
 56. Include administratively closed cases (screened out) in the IMIS system.
 57. Ensure that regions enter all data in a timely and consistent manner including post investigation closure.
 58. Ensure that settled cases are not entered as withdrawals.

Freedom of Information Requests/Non-Public Disclosure

59. Develop a comprehensive FOIA/Privacy Act guidance manual for the processing of a FOIA request, and non-public disclosure. The manual should include an example of a redacted case file and specific guidance on the more difficult issues such as confidential business information.
60. Develop and implement training for field staff to properly apply the FOIA/Privacy Act requirements.
61. Revise the non-public disclosure request to actually require a request.
62. Evaluate the impact of the non-public disclosure policy on staffing and resources.
63. Consider a moratorium on the non-regulatory disclosures until the impact on the field is studied.

State Plan Monitoring

64. Conduct comprehensive reviews of the state whistleblower programs immediately in states where comprehensive reviews have not been recently conducted.
65. Clarify the policy conflict on dually-filed complaints.

Management Accountability Program

66. Expand and update the suggested audit questions for the whistleblower program.
67. Incorporate the suggested audit topics into the Management Accountability Program Directive.
68. Ensure that subject matter experts are utilized as participants selected to represent DEA on the National Office attended audits.

Training

69. Review and update the 2006 competency model.
70. Develop and implement a whistleblower training directive.
71. Revise and develop new whistleblower courses to include: managing and supervising the whistleblower program, legal aspects, interviewing techniques, statute specific investigation course, investigative writing, settlements/mediations course, Freedom of Information Act and Non-Public Disclosure, evidence gathering and handling, and Web IMIS.
72. Move all training responsibility to DTE and adequately staff for development and delivery.

External Stakeholders

73. Create a Fact Sheet or Quick Card on the OSHA whistleblower settlement process covering those prohibited or repugnant clauses that the agency discourages from being placed in a settlement.
74. Hold panel discussions with groups like GAP, VCR and TELG, as well as known respondent's attorney groups to bolster investigator training.
75. Partner with and obtain training from the various enforcement agencies to acquire a general understanding of the enforcement principles under a specific statute.
76. Develop a pro se handbook to provide whistleblowers a guide on how to maneuver through the whistleblower investigation process.
77. Explore the possibility of documentation sharing between OSHA and the complainant and respondent, through an online system where they can gain access to the vetted documents through a secure password protected web site. The website would be available 24/7.
78. Create an alliance between OSHA and the American Bar Association and other interested whistleblower advocacy groups.
79. Utilize corporate or company wide settlement agreements and publicize significant whistleblower actions.
80. Post whistleblower actions on the public web page, similar to enforcement actions.
81. If information is available that supports that employees are being retaliated against for reporting injuries, then OSHA should conduct a full recordkeeping audit.