U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

DEC 21 2015

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

THROUGH: JORDAN BARAB
Deputy Assistant Secretary

Dorothy Dougherty
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN, Director
Directorate of Whistleblower Protection Programs

SUBJECT: Policy for Enforcing Settlement Agreements, Preliminary Reinstatement Orders, and Final ALJ and ARB Orders

This memorandum provides guidance on how agency staff should proceed when a respondent breaches a whistleblower complaint-related settlement agreement, a preliminary reinstatement order, or a final order of either an Administrative Law Judge (ALJ) or the Administrative Review Board (ARB).

Settlement Agreements

Depending upon the statute under which the whistleblower complaint was filed and whether the case proceeded to a court hearing, OSHA staff will either reopen the whistleblower case or proceed through the Regional Solicitor (RSOL) to pursue court-ordered enforcement.

Regarding any case that has settled under statutes **other than** Section 11(c) of the OSH Act (11(c)), AHERA, or ISCA, pursuant to CPL 02-03-005, *OSHA Whistleblower Investigations Manual* (WIM) (April 21, 2015), Chapter 6, Section XIV:

> …if the respondent fails to comply with the settlement, the [Regional Administrator (RA)] or designee will refer the case to RSOL with a recommendation to file for enforcement of the order in federal district court where the statute authorizes the Secretary to file suit. What constitutes a failure to comply will change from case to case depending on the terms of the settlement, and the supervisor is encouraged to consult with RSOL before formally referring the matter. A letter will be sent to the parties informing them about this referral. In cases under statutes allowing enforcement of the order by the complainant in federal district court, the parties will be so advised.

Regarding any case that has settled under 11(c), AHERA, or ISCA:

> If a respondent fails to comply with a settlement in a Section 11(c), AHERA, or ISCA case, the supervisor should consult with RSOL. OSHA will also inform the complainant that violation of a settlement agreement is a breach of contract for which the complainant may seek redress in an appropriate court. (WIM Chapter 6, Section XIV)

In these 11(c), AHERA, and ISCA cases, OSHA staff will, in consultation with RSOL, evaluate the case to determine how to proceed.

- If the case settled before the merits of the complaint could be determined, the case will be reopened and investigated.
- If the case had already been determined to have merit before the settlement agreement was reached, the case will be referred to RSOL for litigation.
- If the case was settled after the case had been determined to have merit and had been brought to the District Court (i.e., the settlement agreement was approved by the court), then OSHA will refer the case to RSOL to obtain an enforcement order from the court.

For reference, please see the model case analysis below.

Under normal circumstances, the respondent's breach of a settlement agreement should not cause the investigator to open a new case. If, however, the Assistant Regional Administrator (ARA), in consultation with RSOL and DWPP, determines that the particular factors of the situation call for a new case to be opened, the ARA may do so and have his staff investigate the case accordingly.

Enforcement of Preliminary Reinstatement Orders and Final ALJ and ARB Orders For Any Merit Case Under Statutes Other Than Section 11(c) of the OSH Act (11(c)), AHERA, or ISCA

When OSHA is notified that a respondent has failed to comply with either a preliminary reinstatement order[1] or a final order of either the ALJ or ARB, the RA or designee will refer the case to RSOL with a recommendation to file for enforcement of the order in the federal district court where the statute authorizes the Secretary to file suit. What constitutes a failure to comply will change from case to case depending on the terms of the order, and the supervisor is encouraged to consult with RSOL before formally referring the matter. A letter will be sent to the parties informing them about this referral. In cases under statutes allowing enforcement of the order by the complainant in federal district court, the parties will be so advised.

Similar to the policy regarding the handling of a settlement agreement breach, a respondent's noncompliance with a preliminary reinstatement order or a final order of either the ALJ or ARB should not, under normal circumstances, cause the investigator to open a new case. If, however, the Assistant Regional Administrator (ARA), in consultation with RSOL and DWPP, determines that the particular factors of the situation call for a new case to be opened, the ARA may do so and have his staff investigate the case accordingly.

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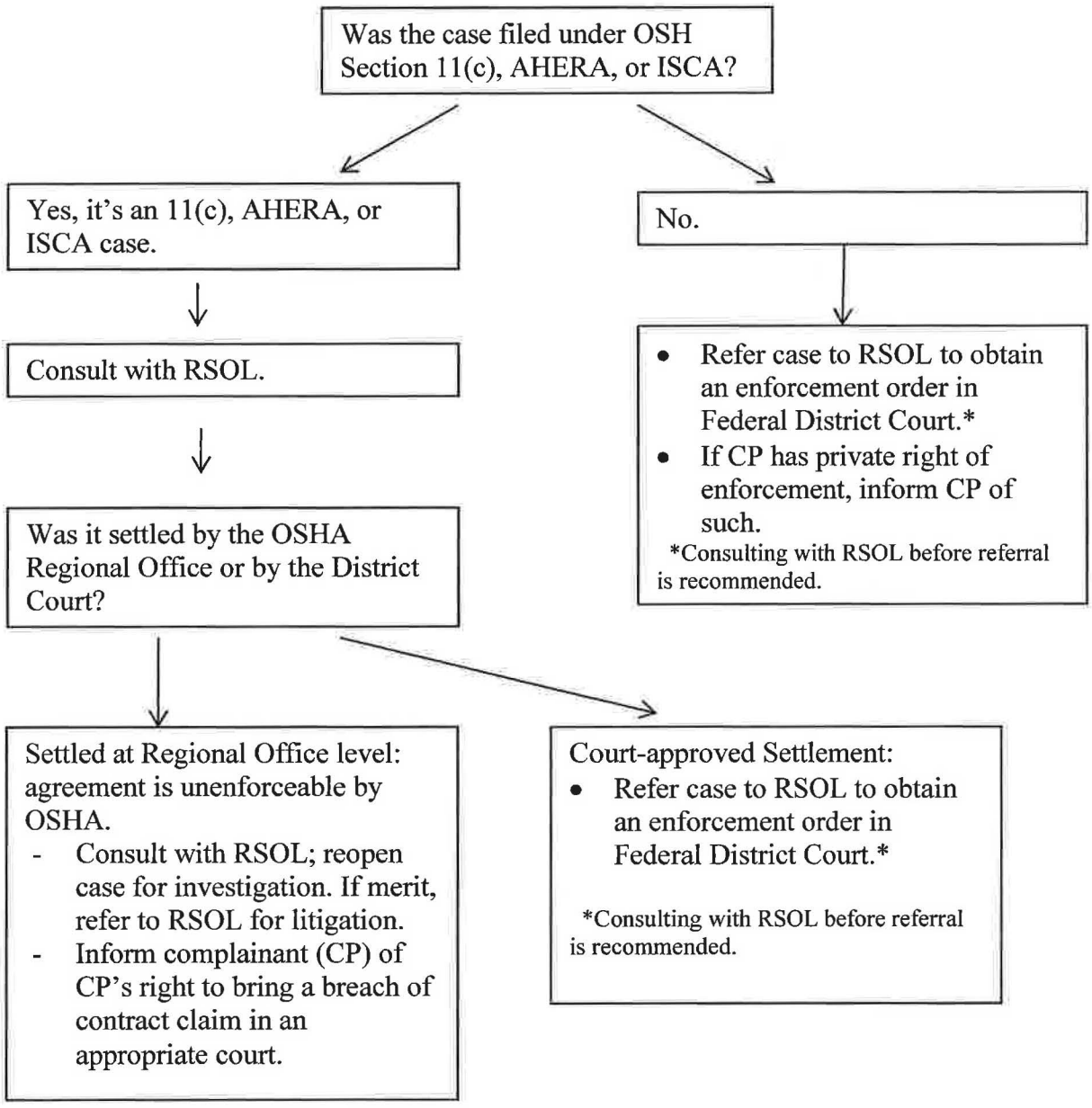
[1] Under STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, SPA, and FSMA, immediate ("preliminary") reinstatement generally must be ordered if the complainant has been discharged or demoted. This portion of the preliminary order is effective immediately upon receipt by the respondent. Other statutes may include a reinstatement order in a case's final orders. See WIM Chapter 5, Section V(c).

Case Analysis upon Respondent's Settlement Breach