



Reply to the attention of:

FEB 2 - 2016

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
WHISTLEBLOWER MANAGERS

THROUGH: *Dorothy Dougherty*
DOROTHY DOUGHERTY
Deputy Assistant Secretary

JORDAN BARAB
Deputy Assistant Secretary *Jordan Barab*

FROM: *Maryann Barrahan*
MARYANN BARRAHAN
Director, Directorate of Whistleblower Protection Programs

SUBJECT: Procedures for Significant or Novel Whistleblower Cases

This memorandum revises the procedures for handling significant whistleblower cases. Regional Administrators and Whistleblower Managers must ensure that field personnel adhere to the procedures established in this memorandum when processing significant whistleblower cases¹.

I. Definition of a Significant or Novel Whistleblower Case

- A. A significant whistleblower case is a meritorious case which meets one or more of the following criteria:
1. Either punitive damages and/or emotional distress damages being ordered (or sought by DOL in litigation) exceeding \$100,000;
 2. Secretary's Findings ("Findings") were issued (or complaint filed by DOL in litigation in U.S. District Court) against the same respondent on two or more previous occasions in the preceding two years, excluding cases brought under the Federal Railroad Safety Act (FRSA);
 3. The case relates to a significant OSHA safety and health enforcement action; or
 4. The case is against a federal agency.
- B. The following are examples of a novel whistleblower case that meets the requirements of this memorandum:

¹ This memorandum supersedes the memorandum dated April 25, 2012, from DAS Richard E. Fairfax; "Clearance Procedures for Significant Whistleblower Cases."

1. Protected activity, coverage, or the Secretary's enforcement authority is in dispute due to a recently-enacted statute or conflicting legal precedent;
2. There is reason to believe that the case may attract significant regional or national public attention (e.g., a case involving a subject of congressional interest; a case involving the subject of a Government Accountability Office (GAO) and/or an Office of the Inspector General (OIG) audit, such as incentive programs); or
3. Any other issue that the Regional Administrator considers to be novel.

II. Regional Administrator/Office Responsibilities

Regional Office personnel and the Regional Administrators (RA) must:

1. Review each whistleblower case to ensure that proposed meritorious determinations are supported by the evidence;
2. Ensure that the proposed Secretary's Findings or Solicitor of Labor (SOL) Litigation Memo:
 - a. Are findings of fact (not just summaries of the evidence);
 - b. Cite the statutes correctly;
 - c. Order damages that are permissible under the statute and supported by the evidence;
 - d. Award damages that are properly calculated (e.g., not double counted, transposed, etc.);
 - e. Have no typographical or grammatical errors;
3. Consult with the Regional Solicitor (RSOL) to resolve all factual and legal issues;
4. Prepare the draft Significant Whistleblower Case Briefing Memorandum (see attached); and
5. Generate the News Release.

The Regional Office/RA should encourage preliminary communication between the RSOL and the appropriate division of the National Office of Solicitor (NSOL) prior to submittal, to expedite the clearance and approval process. No request for significant whistleblower case clearance shall be made in Section 11(c), AHERA, or ISCA cases unless the RSOL approves, or in STAA or SPA cases unless the RSOL has reviewed the Secretary's Findings for legal sufficiency.

The Occupational Safety and Health Division (OSH) of NSOL is responsible for the following statutes:

- Asbestos Hazard Emergency Response Act (AHERA)
- International Safe Container Act (ISCA)
- Section 11(c) of the Occupational Safety and Health Act (Section 11(c))
- Surface Transportation Assistance Act (STAA)
- Seaman's Protection Act (SPA)

The Fair Labor Standards Division (FLS) of NSOL is responsible for the remaining OSHA whistleblower statutes.

Notification

The draft briefing memo and Secretary's Findings must be submitted to DWPP for review using the "zzOSHA-WB-SIGCASE" email address **at least two weeks prior to the expected issuance date**, to allow for the clearance process to be completed at the national level. For cases filed under Section 11(c), AHERA and ISCA, the Regional Office should submit the RSOL litigation memo instead of Secretary's Findings. In a limited number of cases, it may be necessary for DWPP to request additional case file documentation. In those instances, DWPP will explain to the Region why that information is needed.

In the event that a settlement is reached between the parties before the clearance process is completed, the Regional Office shall notify the DWPP Director so that the clearance process can be terminated.

News Release

The Regional Office will work with its Regional Office of Public Affairs (OPA) to generate the news release, for issuance at either the Regional or National level, depending on the significance of the case. The news release should not be included in the significant case package submittal to DWPP, as this should be processed through OPA. No press release will be issued until the Secretary's Findings have been received by Respondent in administrative (ALJ) cases. For district court cases (Section 11(c), AHERA, or ISCA), no press release will be issued until suit has been filed in U.S. District Court.

III. National Office Responsibilities

DWPP personnel and Director must:

1. Ensure the case meets the requirements of a significant case;
2. Verify the briefing package is complete;
3. Review the briefing package focusing on the following issues:

- a. Worker Coverage;
 - b. Respondent Coverage;
 - c. Timeliness;
 - d. Prima Facie Elements properly addressed;
 - e. Remedies supported by the evidence;
 - f. Use of Terminology; and
4. Coordinate, as appropriate, with NSOL to ensure timely clearance of the case.

Clearance Process

Upon receipt of the significant case briefing documents, DWPP will:

1. Review the information submitted to verify that the documents are accurate.
2. Schedule a joint conference call with the Region, the RSOL, and the NSOL to resolve any issues or concerns identified during the clearance process.
3. Finalize the Significant Whistleblower Case Briefing Memorandum and prepare the documents for Office of the Assistant Secretary (OAS) approval. The significant case briefing package shall be submitted to OAS through the Controlled Correspondence Unit (CCU) for processing and tracking. The Findings or litigation memo may not be forwarded to OAS for approval unless the Regional Administrator and the Director of DWPP concur with them.
4. If appropriate, in some cases involving novel issues or high profile cases, request that the Region participate in a more comprehensive screening, which will include a presentation of the case to the Office of the Assistant Secretary (OAS). These screenings will be conducted via webinar and/or conference call, and will be available to OSHA and SOL staff who may wish to attend.
5. In the event that the Findings are disapproved by OAS, work with the Regional Office to expeditiously resolve any identified concerns.
6. Upon notification from OAS that the case is approved, DWPP shall promptly notify the Regional Office that it can proceed with issuance or filing and provide the Regional Office with a copy of the approved package.

News Release

Upon issuance of the case's news release by OPA (whether regional or national), DWPP will ensure that the news release is highlighted on the Whistleblower Protection Program Webpage at www.whistleblowers.gov. DWPP may be involved in the clearance process of the news release at the request of the OPA.

Annual Report

DWPP will complete an Annual Report by October 30th of each year, summarizing the significant case activity for the previous fiscal year. The report should include a summary of each case, along

with other statistical data, including but not limited to: a breakdown of significant cases by Region, the number of cases filed by statute, remedies ordered (separated by a. reinstatement, b. punitive damages, and c. compensatory damages), and any other analyses suitable for the annual report.

Attachment:

Significant Whistleblower Case Briefing Memorandum Template

Attachment- Significant Whistleblower Case Briefing Memorandum Template

This memorandum shall be from the Director, Directorate of Whistleblower Protection Programs (DWPP), through the appropriate Deputy Assistant Secretary, to the Office of the Assistant Secretary. The narrative sections of the Memorandum should be brief and provide a high-level overview of the significant issues of the case.

OAS Approval: _____

Date: _____

MEMORANDUM FOR: DAVID MICHAELS, PhD, MPH
Assistant Secretary

THROUGH: DOROTHY DOUGHERTY
Deputy Assistant Secretary

FROM: MARYANN GARRAHAN
Director, Directorate of Whistleblower Protection Programs

SUBJECT: Notification of Significant Whistleblower Case –
[Respondent /Complainant /Case Number]

Issue(s):

This memorandum is to request your approval of Region []'s intention to *[insert significant action, e.g., issue Secretary's Findings and Preliminary Order of Reinstatement/seek punitive damages in litigation]* against *[Respondent]*. The Regional Administrator, DWPP Director, RSOL and NSOL have concurred with the proposed action. The Regional Office will *[insert action]* upon National Office approval.

Statute:

[Insert statute, for example, Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109]

Significance of the Whistleblower Case:

(Check one or more and provide additional explanation below):

<input type="checkbox"/>	Punitive and/or emotional distress damages in excess of \$100,000
<input type="checkbox"/>	Prior merit findings (within past two years) excluding FRSA
<input type="checkbox"/>	Parallel significant enforcement action
<input type="checkbox"/>	Federal agency respondent
<input type="checkbox"/>	Novel legal or policy issues

Explanation Regarding Significance:*[Briefly describe why the case is significant, e.g., prior, novel, federal agency, etc.]***Respondent Background:***[Briefly describe respondent information, such as where headquartered, number of employees, union involvement, etc.]***Whistleblower Protection Program History/Safety and Health/Other Statute History:***[Summarize any previous whistleblower complaints and the outcome, as well as any Safety and Health inspections, FRA/FMCSA investigations, etc. (if available). Discuss the relevancy to this investigation.]***Summary of Investigative Findings and Analysis:***[Provide a brief summary of the case, including complainant's allegations and investigative findings.]***Proposed Monetary Damages:**

Back Pay	\$0,000.00
Front Pay	
Compensatory Damages	
Punitive Damages	
Attorney's Fees	
Other	
TOTAL	

Proposed Non-Monetary Damages:*The proposed non-monetary remedies include [preliminary reinstatement, expungement of records, posting of notice to employees, etc.]*

Congressional Interest:

[Include only if there have been Congressional inquiries or interest related to this case. If so, identify the representative and contact information.]

WBI/RSI:

[Name of the Whistleblower Investigator (WBI) and Regional Supervisory Investigator (RSI)]

Regional Contact Person:

[Provide the name and contact information for individual(s) who should be contacted for more information related to the case. In most instances this will be the RA, DRA or ARA.]

Attachment: Secretary's Findings or Litigation Memo