

NHSTA Issues First-Ever Whistleblower Award: How Companies Should Address Potential Whistleblowers



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On November 9, 2021, the National Highway Traffic Safety Administration (“NHTSA”), issued its first award under the Motor Vehicle Safety Whistleblower Program (“MVSWP”) to a former safety engineer of Hyundai Motor Co (“Hyundai”) who reported information about safety lapses and design flaws in Hyundai’s and its Kia subsidiary’s Theta II engines that were in violation of the National Traffic and Motor Vehicle Safety Act.. The award to the whistleblower was \$24.3 million and accounted for 30 percent of the \$81 million consent order collected by the NHSTA from Hyundai.

In light of this award and the potential recoveries available under MSVWP, it is important for companies who are subject to regulation by NHTSA to understand MSVWP, what MSVWP applies to, and how they can avoid running afoul of MSVWP should they find themselves under investigation due to a whistleblower.

What is the Motor Vehicle Safety Whistleblower Program

On December 4, 2015, Congress passed the Motor Vehicle Safety Whistleblower Act (the “Act”) to “incentivize a motor vehicle manufacturer, part supplier, or dealership employee or contractor to voluntarily provide the Secretary of Transportation . . . information relating to any motor vehicle defect, noncompliance, or any violation of any notification or reporting requirement that is likely to cause unreasonable risk of death or serious physical injury.” S. Rep. 114-13, p. 1.

Specifically, the Act, which created the MVSWP, allows the Secretary for the Department of Transportation pay eligible whistleblowers between 10% and 30% of any monetary sanction over \$1 million collected from a violating company if the information provided by the whistleblower leads to a successful resolution of a covered action. See 49 U.S.C. § 30172(b). The amount of the award is discretionary and is predicated on multiple factors, such as the substance and weight of the information, the quality and amount of assistance the whistleblower provides, and whether the relevant information was reported by internally by the whistleblower.

NHTSA is responsible for overseeing the MVSWP and issuing the award. While NHTSA is still in the process of drafting rules and regulations, eligible whistleblowers can still

receive an award without a final rule. Notably, the MVSWP does not create any new liabilities or reporting requirements under the Vehicle Safety Act. Instead, the MVSWP incentivizes potential whistleblowers to report to NHTSA potential violations of the Vehicle Safety Act and its regulations.

To qualify as a “whistleblower”, an individual must be:

1. An employee or contractor (they are not required to be a U.S. citizen or resident and can report on violations that occur in or outside of the U.S. provided that some of the vehicles or components under consideration are sold or circulated in the U.S. market);
2. Of an automotive manufacturer, part supplier or dealership;
3. Who voluntarily provides;
4. **Original information** (meaning the information is first-hand information and the individual was first to report it to the agency);
5. Relating to a motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement (applicable to all types of federal vehicle-safety violations);
7. Which is likely to cause unreasonable risk of death or serious physical injury.

In addition, NHTSA launched a new website that is intended to streamline the reporting process by giving potential whistleblowers access to resources about what information to share and how to share it. This website also makes it easier for potential whistleblowers to come forward and report violations by explaining the anti-retaliation and anonymity protections afforded to whistleblowers by the federal law.

The MVSWP is modeled after the SEC Whistleblower Program, which recently passed the \$1 billion mark in awards to insiders worldwide who reported fraud. Given the breadth of who qualifies as whistleblower, the ease of reporting, and the substantial awards handed down under similar types of whistleblower programs, it can be expected that plaintiff and whistleblower attorneys will continue vigorously engaging potential whistleblowers to capitalize on the large financial awards that can be provided by the MVSWP.

What Employers Should Do When the Whistle Blows

As already noted, the MVSWP offers anti-retaliation and anonymity protections to potential whistleblowers. Employers are forbidden from taking any “materially adverse” actions against an employee or contractor for making a protected disclosure.

“Materially adverse” actions include more than employment actions such as denial of promotion, non-hire, denial of job benefits, demotion, suspension, the creation of a hostile work environment, or other actions that can be challenged directly as employment discrimination. Retaliation encompasses any employer action that “dissuade” an employee from engaging in the protected activity.

It is paramount for employers to maintain and enforce a strict no-retaliation policy or face investigation by the Occupational Safety and Health Administration (OSHA). Further, the identity of the whistleblower, together with the relevant information reported, must remain confidential unless the whistleblower gives written consent or is otherwise revealed as part of a public hearing. Employers must refrain from taking any action that attempts to expose the identity of the whistleblower.

Best Practices to Mitigate Emerging Risks Associated With MVSWP

In light of NHTSA's historic award, companies should expect a significant increase of whistleblower cases under the MVSWP. To that end, it is important to consider effective and lawful practices to provide for and respond to whistleblower complaints, including taking a proactive approach by implementing dynamic whistleblower protection and anti-retaliation policies and systems. With this in mind, best practice recommendations include:

Regular compliance training. Training frontline management to report noteworthy employee concerns up the chain of command and avoid reacting in a negative manner that exposes the company to a retaliation complaint.

Robust compliance program. Having policies and system in place to ensure serious employee concerns prompt a comprehensive internal and independent investigation, allowing senior management to evaluate and remedy potential violations while minimizing external legal and public relations risks, and improving employee satisfaction and involvement. Specifically, employers should direct any whistleblower complaints to in-house or outside legal counsel to assist with an internal investigations, responses, and compliance.

Leadership commitment. Top leaders and executive management should understand the impacts of retaliation, the associated legal obligations and what it takes programmatically to prevent it. Further, leadership must make a concentrated effort to know employees' real willingness to report issues and the organization's current record in preventing retaliation and fear thereof.

Monitoring Progress. Tracking of progress and trends is crucial to preventing retaliation. Accountability and incentives should focus on "leading indicators" of problem solving, encouraging compliance with safety, financial and other safeguards, and creating organizational culture and measurements that don't contribute to suppression of reporting and which measure the effort and effectiveness of the non-retaliation program.

Independent Audits and Program Improvement. Even well-constructed anti-retaliation programs can fail in implementation, either in certain facilities, functions or company-wide. Potential problems can remain hidden from management and not be

accounted for in routine data collection. To ensure the program is working effectively, employers should consider engaging independent compliance auditors whose assessments go beyond safety or financial systems audits, but which add depth to ensure compliance with applicable laws and regulations.

How companies prepare for and respond to whistleblower complaints are critical factors that may have a direct impact on the company's finances, regulatory compliance, corporate culture, and employee morale. With that framework in mind, it is important for companies to ensure compliance programs and policies are up-to-date and consistent with federal rules, law, regulation and guidance.