



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

OSHA Issues Its Interim Final Rule On Whistleblowers Procedures Under Dodd-Frank's Consumer Financial Protection Act

By James L. Curtis, Ada W. Dolph and Craig B. Simonsen

OSHA yesterday [announced](#) its interim final rule for "Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010," [79 Fed. Reg. 18630](#) (April 3, 2014). These rules are in effect immediately, but could be revised by OSHA after the comment period.

The [Consumer Financial Protection Act of 2010](#) (CFPA) protects employees against retaliation by employers that offer or provide consumer financial products or services, such as residential mortgages, mortgage loan modification and foreclosure relief services, private education loans, payday loans, consumer credit, and debt relief services. The CFPA is part of the [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010](#), 12 [U.S.C.A.](#) §5567.

The interim final rule provides that a covered employer for the purposes of CFPA includes "any person that engages in offering or providing a consumer financial product or service" including "any affiliate of [such] ... if [the] affiliate acts as a service provider to such person." A "covered employee" protected from retaliation for engaging in protected activity includes "any individual performing tasks related to the offering or provision of a consumer financial product or service." OSHA has also interpreted CFPA's definition of "covered employee" broadly to include current and former employees, applicants for employment and "individuals whose employment could be affected by a covered person or service provider" when the individual is performing tasks connected with a consumer financial product or service.

This rule also establishes procedures, burdens of proof, remedies, and statutes of limitations similar to other whistleblower protection statutes that OSHA administers. Complaints must be filed within 180 days after the alleged retaliatory action. If after its investigation OSHA decides that the evidence supports the employee's claim of retaliation, OSHA may issue an order requiring the employer to put the employee back to work, pay lost wages, restore benefits, and provide other relief, as appropriate. After OSHA issues a decision, the employer or the employee may request a full hearing before an administrative law judge. A final decision by an administrative law judge may then be appealed to the Administrative Review Board (ARB). The employee may also file a complaint in federal court for de novo review if the ARB does not issue a final decision within 210 days of the filing of the complaint, or within 90 days of OSHA's written investigation findings. However, the rule provides that a complainant may not seek district court review once the ARB has issued a final decision denying the whistleblower complaint.

This rule also perpetuates some of the same problematic provisions contained in the agency's 2011 revisions to its procedures for handling [Sarbanes-Oxley Act](#) (SOX) complaints. In particular, the rule permits complainants to file a complaint orally, to be "reduced in writing by OSHA," which has raised questions regarding whether OSHA will stay within its role as a neutral investigator of complaints. Additionally, the rule does not contain limitations on the circumstances under which reinstatement would be ordered. The comments to the rule also contemplate circumstances under which, after an initial finding that the complaint has merit, OSHA may order preliminary "economic reinstatement" (full back and front pay)--in lieu of actual reinstatement--before OSHA's findings are final.

In sum, this rule is consistent with the position that OSHA has taken with respect to its rulemaking authority for other whistleblower statutes. As always, an effective internal reporting and compliance program can help prevent or minimize liability for employers.

The interim final rule is effective on April 3, 2014, with comments submitted to Docket No. OSHA-2011-0540 due by June 2, 2014.

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