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One Minute Memo®

OSHA Announces Procedures For Handling Whistleblower Complaints Under The Affordable Care Act

The Affordable Care Act's whistleblower provisions present yet another hazard for the unwary employer. Under the provisions of the ACA, employees are protected from retaliation for reporting potential violations of the law's consumer protections and affordability assistance provisions, including the prohibitions on denials of insurance due to pre-existing conditions, access to health insurance premium tax credits, and the right to enroll in a health plan offered by one of the new health exchanges established by the ACA.

On February 22, OSHA issued its interim regulations governing how those whistleblower provisions would be enforced. The new regulations establish procedures and time frames for handling retaliation complaints, including investigations by OSHA and subsequent hearing and appeal rights to an administrative law judge, the Administrative Review Board, and, ultimately, the courts.

What constitutes protected activity is under the ACA is potentially very broad. The law covers any employee who provides or is about to provide to their employer, the federal government, or the attorney general of a state, information relating to any act or omission that the employee reasonably believes to be a violation of Title I of the Act, testifies or is about to testify concerning such violation, assists or participates in an investigation of a violation, or objects to or refuses to participate in any activity, policy, practice, or task that the employee reasonably believes to be a violation. In 2014, those protections will be expanded to apply to employees of insurance issuers that provide employer-sponsored health insurance coverage.

The new procedural rules give employees 180 days from the day the violation occurred to file a complaint. The complaint itself does not need to be a formal document; it must only alert the agency to the existence of the alleged retaliation and of the desire for an investigation. It need not meet the heightened pleading requirements set forth in the Supreme Court's landmark *Twombly* and *Iqbal* decisions.

OSHA will investigate a complaint that makes out a prima facie case that the protected activity was a "contributing factor" in the alleged adverse employment action. The Agency has the same authority to issue subpoenas and conduct investigations as provided under the FLSA.

The proposed rules require that within 60 days after a complaint is filed, the Assistant Secretary issue written findings regarding whether there is reasonable cause to believe that the complaint has merit. If found to have merit, then appropriate relief will be ordered, including reinstatement. Objections can be made within 30 days of receipt of the findings and will automatically stay all provisions of the preliminary order except for any portion requiring reinstatement. Employers may seek a stay of the order of reinstatement with the Office of Administrative Law Judges, but those will be granted only in exceptional circumstances.

If the Secretary does not make a final decision within 210 days after the complaint is filed, the complainant may file suit for de novo review in federal district court. Based upon recent experience, OSHA has had great difficulty issuing its findings on retaliation complaints within similar timeframes, so it seems likely that a great many complaints would be eligible for filing in federal court.

The regulations will be subject to a 60-day comment period after they are published in the Federal Register. The final rule will be published after the Agency receives and reviews the public's comments.

These new procedural rules are in line with those applied to other whistleblower protections that fall under OSHA's authority. They, along with the broad scope of the protections under the ACA, can cause major problems for unguarded employers. As always, an effective internal reporting and compliance program can help prevent or minimize the risk.

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