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Health Care Reform Management Alert Series

OSHA Announces Procedures for Handling Whistleblower Complaints Under the Affordable Care Act — Issue 54

This is the fifty-fourth issue in our series of alerts for employers on selected topics on health care reform. (Click here to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

The Affordable Care Act's whistleblower provisions present yet another hazard for the unwary employer. Under ACA, employers may not discriminate against any employee because the employee reports a potential violation of ACA or receives a tax credit or subsidy through a government health care exchange.

Background

As background, as reported in earlier Alerts (such as Issues *45* and *48*), beginning January 1, 2014, employers with at least 50 full-time employees, including full-time equivalents, will be subject to a penalty if:

- they fail to offer minimum essential coverage to all full-time employees (and their dependents) and;
- a single full-time employee receives a tax credit or subsidy through a government health care exchange.

Under the whistleblower provisions, employers cannot retaliate against employees who receive a tax credit or subsidy through a government health care exchange.

Interim Final Regulations

On February 22, 2013, the Occupational Safety and Health Administration of the Department of Labor (OSHA) issued interim final regulations governing how those whistleblower provisions would be enforced (published in the February 27, 2013 *Federal Register*). OSHA also issued a *Fact Sheet* on these rules. 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 broad. The law covers any employee who provides or is about to provide to their employer, the federal government, or a state attorney general 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. The law also prohibits an employer from retaliating against an employee because the employee has received a tax credit or subsidy through a government health care exchange. Unfortunately, however, these interim final rules do not include any specific examples of what actions would be considered retaliation in this regard. In 2014, these protections will be expanded to apply to retaliation by health insurance issuers offering group or individual health insurance coverage, regardless of whether the issuer is the employer of the person being retaliated against.

Procedural Rules

The new procedural rules give employees 180 days from when 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.

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

Within 60 days of the filing of the complaint, the Assistant Secretary will 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.

In the event that there has been no final decision of the Secretary within 210 days of the filing of the complaint, there is a kick-out provision that allows the complainant to file an action for de novo review in the appropriate federal district court. Based upon recent experience, OSHA has had great difficulty issuing its findings on retaliation complaints within similar timeframes, which could lead to many federal court lawsuits to enforce the ACA whistleblower protections.

The Agency will accept comments through April 29, 2013. 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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