

A New Headache For Employers: Whistleblower Claims Under the Affordable Care Act

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INTRODUCTION

On February 22, 2013, the United States Department of Labor's Occupational Health and Safety Administration ("OSHA") published an interim final rule ("Rule"), effective February 27, 2013, setting forth procedures governing whistleblower complaints under the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act").

Section 1558 of the Act prohibits retaliation (*e.g.*, intimidation, blacklisting, discipline, etc.) against employees who (i) report violations of Title I of the Act (which contains most of the substantive provisions that relate to employee health plans, as discussed below) or (ii) receive tax credits or cost-sharing reductions in connection with participation in a health insurance exchange. The Act authorizes the Secretary of Labor to conduct investigations into retaliation complaints and issue determinations, and the Rule delegates that duty to OSHA. Retaliating employers can be required to, among other things, reinstate terminated employees, provide back pay with interest, and pay compensatory damages, attorneys' fees, and expert witness fees.

The procedures, burdens of proof, and multi-level review process implemented by the Rule, in conjunction with the broad retaliation provisions in the Act, provide expansive protection for purported whistleblowers. Employers should become familiar with this Rule and implement procedures to minimize risks. Unlike some other forms of whistleblowing — such as those related to securities laws, environmental protection, or food safety provisions — virtually *any employee*, at any seniority level, can assert an Affordable Care Act whistleblowing claim.

PROTECTED ACTIVITY UNDER THE AFFORDABLE CARE ACT

Section 1558 of the Act, which adds Section 18C to the Fair Labor Standards Act of 1938 ("FLSA"), prohibits employers from retaliating against any employee because he or she received a credit under Section 36B of the Internal Revenue Code of 1986 (the "Code") or a cost-sharing reduction under Section 1402 of the Affordable Care Act. In brief, a tax credit or cost-sharing reduction (with respect to out-of-pocket limits, deductibles, co-insurance, or copayments) will be available to employees who are not offered employer-sponsored healthcare and who purchase health insurance through an affordable health insurance exchange (either operated by a state, or under a federal exchange for those states without exchanges), which will begin operating in 2014.

The Act also prohibits retaliation against an employee who:

- Provided, or is about to provide, to the 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 Affordable Care Act;
- Testified, assisted, or participated (or is about to take any of these actions) in a proceeding concerning such violation; or
- Objected to or refused to participate in an activity that the employee reasonably believed to be in violation of Title I of the Act.

Title I of the Act includes many of the central provisions of the healthcare legislation (some of which are not yet in effect), including: (i) prohibitions on lifetime coverage limits, unreasonable annual limits, and exclusions due to preexisting conditions; (ii) required coverage for preventative services and immunization; (iii) development of uniform coverage documents; and (iv) required dependent coverage up to the age of 26.

The Rule defines “employee” to include both former employees and applicants. It also identifies specific forms of retaliation prohibited under the Act including, but not limited to *intimidating, restraining, coercing, blacklisting, or disciplining an employee with respect to the terms, conditions, or privileges of employment*.

PROCEDURES

The Act provides that an employee who believes he or she is a victim of prohibited retaliation can pursue relief through the procedures governing claims under the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b). The Rule implements this process by adding part 1984 to Title 29 of the Code of Federal Regulations, titled “Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act.”

Filing Of A Retaliation Complaint

A complainant must file a complaint with OSHA within 180 days after the alleged violation. No particular format is required, and the complaint may be either oral or written (although OSHA will reduce oral complaints to writing).

Investigation By OSHA

OSHA will notify the employer of the complaint, the allegations, and the substance of the supporting evidence. It also will notify the employer of its right to respond, as discussed below. Copies of these materials will be provided to the complainant and to the agency administering the provision of the Act with respect to which the complaint is filed (*i.e.* the Internal Revenue Service (“IRS”), the Department of Health and Human Services (“DHHS”), or the Employee Benefits Security Administration (“EBSA”).

Within 20 days of receiving OSHA’s notice, each party may submit a written statement and supporting affidavits and documents. During that same timeframe, either party may request a meeting with OSHA to present its position. The complainant will receive and have a chance to respond to any employer submissions.

The investigation will not commence, and the complaint will be dismissed, unless the complainant makes a *prima facie* case in the complaint (and supplemental interviews if appropriate) that the

protected activity was a *contributing factor* in the alleged adverse action. To establish a *prima facie* case, the complainant must establish that (i) he or she engaged in protected activity, (ii) the employer knew of or suspected such engagement, (iii) he or she suffered an adverse employment action, and (iv) the circumstances are sufficient to lead to the inference that the protected activity was a contributing factor to the adverse action.

Once a *prima facie* case is established, the employer must demonstrate — by clear and convincing evidence — that it would have taken the same adverse action, regardless of the alleged protected activity, in order for the matter to be dismissed.

Prior to issuing findings and a preliminary order, if OSHA has reasonable cause to believe that the employer retaliated against the complainant and that preliminary reinstatement is warranted, OSHA will again contact the employer, which has 10 business days to provide a written response, meet with investigators, and present its legal and factual arguments in an effort to dissuade OSHA from ordering reinstatement.

Issuance Of Findings And Preliminary Order

Within 60 days after the complaint is filed, OSHA will issue written findings as to whether there is reasonable cause to believe that the employer engaged in retaliation.

If OSHA finds that no violation occurred, it will notify the parties. If OSHA finds reasonable cause that a violation occurred, it will issue a preliminary order, which could require abatement of the violation, reinstatement with back pay and interest, compensatory damages and, at the complainant's request, costs and expenses (including attorneys' fees and expert witness fees). It is unclear whether emotional distress damages are recoverable.

In general, the findings and preliminary order will take effect 30 days after receipt by the employer or on a compliance date set forth in the order (whichever is later), unless either party timely files an objection, as discussed below. A preliminary order directing reinstatement is effective on the employer's receipt, regardless of any objection. An employer can file a motion with the Office of Administrative Law Judges seeking a stay of the reinstatement, but it will be granted only in exceptional circumstances.

If no timely objection is filed, OSHA's findings will become the final decision of the Secretary and *will not be subject to judicial review*.

Objections To Findings And Order

Either party can seek review of OSHA's findings or preliminary order by filing written objections, a request for a hearing on the record, or a request for attorneys' fees (if the employer alleges that the complaint was frivolous or in bad faith) within 30 days after receiving the findings and preliminary order. The timely filing of such an objection or request stays the findings or preliminary order, except with respect to any portion requiring reinstatement.

Litigation Before An Administrative Law Judge

If at least one party files an objection and request for hearing, the Chief Administrative Law Judge will assign the parties to an ALJ, who will notify them of the day, time, and place of hearing. If both parties file objections, the objections are consolidated, and there will be a single hearing. Hearings are conducted *de novo* on the record. ALJs have broad discretion to limit discovery, and while they will not

use formal evidentiary rules, they will apply procedures intended to ensure production of the most probative evidence.

If the ALJ finds a violation, the ALJ can issue an order requiring abatement, reinstatement, etc. If the ALJ finds no violation, the ALJ can issue an order dismissing the complaint and, if the ALJ finds the complaint was frivolous or in bad faith, can award up to \$1,000 in attorneys' fees to the employer.

In general, the ALJ's order will take effect 14 days after the decision, unless either party files a timely petition for review with the Administrative Review Board ("ARB") of the Department of Labor. Any order requiring reinstatement, or lifting an order of reinstatement, is effective immediately.

Unless a petition for review is timely filed with the ARB and accepted for review, the ALJ's order will become the final order of the Secretary, *not subject to judicial review*.

A party also can file a motion for reconsideration with the ALJ, during the pendency of the ARB process, discussed below.

Review Before The Administrative Review Board

If a petition for review with the ARB is filed, the ALJ's order will become final if the ARB does not accept the petition within 30 days of its filing. If the ARB does accept the case for review, the ALJ's decision is inoperative (except with respect to any reinstatement order, absent a motion to stay such an order for exceptional circumstances). The ARB will specify the terms of any briefing, and will review the ALJ's factual findings to determine whether its decision was supported by "substantial evidence."

The ARB's final decision must be issued within 120 days after the conclusion of the ALJ hearing (the conclusion of the hearing is deemed to be 14 days after the ALJ's decision, or if a party filed a motion for reconsideration with the ALJ in the interim, the date that motion is heard or 14 days after issuance of a new decision).

As with the ALJ-level proceedings, the ARB can issue an order providing relief or dismissing the complaint (and, if appropriate, awarding attorneys' fees).

Withdrawal And Settlements

A complainant may withdraw his or her complaint, but may not do so after a party files an objection to OSHA's order. OSHA can withdraw its findings or preliminary order and can replace it with new findings or a new preliminary order (which starts a new 30-day objection period) at any point prior to the earlier of (i) the expiration of the 30-day objection period, or (ii) the date a party files an objection. Either party can withdraw objections by filing a written withdrawal before OSHA's order becomes final. If the case is pending with the ARB, either party can withdraw its petition for review regarding an ALJ's decision before the ALJ's decision becomes final.

OSHA, the complainant, and the employer may settle a case at any time before a party objects to OSHA's findings or order, or before such findings or order become final. Once any objections have been filed with respect to OSHA's findings or order, the ALJ or ARB must approve any settlement.

Judicial Review

Within 60 days after a final order by an ALJ or the ARB, any person adversely affected or aggrieved by the order can file a petition for review with the United States Court of Appeals for the circuit in which

the violation allegedly occurred or in which the complainant resided on the date of the alleged violation.

The complainant may bring an action for de novo review in federal district court (i) within 90 days after receiving an Assistant Secretary's findings, providing there is no final order, or (ii) within 210 days of the filing of the complaint if there is no final decision of the Secretary. A jury trial is available at either party's request.

RECOMMENDATIONS FOR EMPLOYERS

The whistleblower protections under the Affordable Care Act are robust, both with respect to the range of protected activity and the procedural tools and burdens of proof available to complaining employees. The potential impact on employers is significant. Unlike many areas for retaliation complaints, the Affordable Care Act is intended to cover most, if not all, employees — making them all potential whistleblowers.

That said, employers can take steps to protect themselves and minimize risk, including:

- Ensuring that proper controls are in place to limit internal disclosure of which employees received a credit under Section 36B of the Code or a cost-sharing reduction under Section 1402 of the Affordable Care Act, to help ensure that no adverse action is taken;
- Developing a mechanism for receiving, addressing, and (if warranted) implementing corrections to internal complaints regarding violations of Title I of the Affordable Care Act;
- Revising the employer's employee handbook and anti-retaliation policy to include protected activity under the Affordable Care Act among the categories of actions for which retaliation is prohibited; and
- Training supervisors and managers on the revised handbook and anti-retaliation policy.

The law in this area is in its infancy, and it may be that OSHA, the ALJs, and the courts read the Act's retaliation provisions and procedures narrowly. However, unless and until there is administrative or judicial guidance on point, employers should become and remain familiar with those provisions and procedures, while also implementing the above measures to the extent practicable.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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