

# Complaining Employees Get Added Protection Under The Affordable Care Act

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**Insight — February 26, 2013**

The Occupational Safety and Health Administration (OSHA) recently issued the interim final regulations governing the employee whistleblower protection provisions of the Affordable Care Act (ACA). As enacted in 2010, the ACA added a provision to the Fair Labor Standards Act (FLSA) that prohibits employers, regardless of size, from discriminating or retaliating against an employee who reports a violation of Title I of the ACA. Title I contains a broad range of rules governing health insurance and employer shared responsibility provisions.

Under the ACA's whistleblower protections, employers are prohibited from retaliating against an employee who reports violations of the health insurance provisions, including prohibition of lifetime limits on coverage or coverage exclusions due to pre-existing conditions. The whistleblower protection also prohibits employers from discriminating against an employee who receives a health insurance tax credit or cost sharing reduction. OSHA's interim regulations set forth the timing and procedures that will apply to employee complaints of retaliation, including the investigation, hearing and appeals process.

### **What Employee Activity Is Protected Under the ACA?**

Employees who engage in the following whistleblower activities are protected against discharge or any other manner of retaliation by their employer:

- Providing information to their employer, the Federal government or a state attorney general that relates to any violation of Title I of the ACA or any act or omission that the employee "reasonably believes" to be such a violation;
- Testifying, assisting or participating in a proceeding concerning a violation of Title I of the ACA; or
- Objecting to or refusing to participate in any activity that the employee "reasonably believes" to be in violation of Title I of the ACA.

An employee's whistleblower activity is protected as long as the employee has a reasonable belief that a violation of the relevant law has occurred, even if such belief is mistaken.

Examples of adverse or retaliatory actions by an employer that would give

rise to a whistleblower claim include threats or decisions to fail to hire or rehire, fire, lay off, demote, reduce pay or hours, reassign, or deny employee benefits to the complaining employee.

### ***Insurance Issuers***

Starting in 2014, the whistleblower provisions will extend to health insurance issuers, regardless of whether those issuers are the employer of the person retaliated against.

For example, suppose a full-time employee complains to his large employer that the employer-sponsored health plan in effect after January 1, 2014 improperly excluded his pre-existing condition. Subsequently, the insurance issuer drops its coverage of the employee and the employer reduces the employee's hours to part-time status (less than 30 hours a week) to avoid potentially triggering the employer penalty provisions. Under the ACA whistleblower provisions, the employee may file a complaint alleging retaliation by both the employer (for reducing hours) and the insurance issuer (for the issuer's imposition of limitations and discontinuance of insurance coverage).

### ***Employer Shared Responsibility Provisions***

Also effective in 2014, the ACA prohibits an employer from retaliating against employees who receive a cost sharing reduction or health insurance tax credits. Under the ACA, employers with 50 or more full-time equivalent employees who fail to offer coverage to their full-time employees, or who fail to offer their employees affordable coverage or adequate ("minimum value") coverage may be assessed a penalty if any of their full-time employees apply for and receive a premium tax credit through an Exchange. The interim OSHA rules make clear that the whistleblower provisions are designed to prevent retaliation against an employee for his or her receipt of a cost-sharing subsidy or tax credit.

For example, if a full-time employee is offered coverage through an employer-sponsored plan, but the cost of self-only coverage is "unaffordable" because it exceeds 9.5% of the employee's household income, the employee may apply for and receive a premium tax credit to be used to purchase insurance from an Exchange. The employer then will receive a certification from the Internal Revenue Service (IRS) stating that the full-time employee received a tax credit, resulting in the employer facing a \$3,000 penalty for failing to provide affordable coverage. If the employer fires the employee because of that notice, the ACA's whistleblower provisions will allow the employee to file a complaint for retaliation.

### **How Does An Employee File a Retaliation Complaint?**

An employee who believes that he or she has been retaliated against may file a complaint with OSHA. The regulations make clear that the complainant and the employer do not need to have a current employment relationship in order for the complainant to have a claim as the ACA

whistleblower protections also apply to former and prospective employees.

The complaint may be either oral or in writing and need not be in any particular form. If the employee cannot make the complaint in English, OSHA will accept it in any language. In addition, another person may make a complaint on behalf of an employee as long as the employee so consents. The employee must file his or her complaint within 180 days after the alleged retaliation occurred. Notably, an employee does not need to notify the employer that they believe they have been asked to perform a task or participate in an activity that violates the ACA at the time they are asked to perform the activity.

### **What Investigation Takes Place?**

Upon receipt of a complaint, OSHA must provide written notice to the person(s) named in the complaint alleged to have committed retaliation. OSHA first will review the complaint to determine whether it was filed timely and meets coverage requirements. OSHA then will begin its investigation of the complaint. The employee must make an initial showing that the protected whistleblower activity was a contributing factor in the adverse, retaliatory action. If the employee does not make this initial showing, even with supplemental information and/or interviews, the complaint will be dismissed.

If the employee meets his or her initial burden, the employer then must show by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the whistleblower activity. If the employer provides this proof, OSHA will discontinue the investigation and dismiss the complaint. However, if the employer fails to respond timely or fails to meet the clear and convincing standard of proof, the investigation will proceed. As part of its investigation, OSHA has the authority to issue subpoenas to request documents and conduct interviews.

### **What Relief Can Be Ordered?**

Within 60 days of the complaint filing, OSHA must issue written findings as to whether there is reasonable cause to believe that the complaint has merit. A finding of reasonable cause will result in application of appropriate remedies, such as reinstatement of the employee to his or her former position, back pay with interest, and payment of compensatory damages including attorney's fees and expert witness fees.

### **Can We Object to the Findings?**

If either party wants to appeal OSHA's findings, they must request a hearing within 30 days of receipt of the preliminary order. An administrative law judge (ALJ) will conduct the hearing. Either party may seek review of the ALJ's decision by filing a petition for review with the Department of Labor's Administrative Review Board (ARB). An employee may file a complaint in federal court if a final agency order is not issued within 210 days of the filing of the initial complaint, or within 90 days after the

employee receives OSHA's findings.

### **Deadlines and Timing of Procedures**

- 180 days after alleged retaliation: deadline for employee to file complaint
- 20 days after receipt of notice of complaint: employer's deadline to file position statement with supporting documentation
- Within 60 days of the filing of complaint: OSHA must issue preliminary order regarding reasonable cause
- 30 days after receipt of order: deadline to request hearing with ALJ to review findings
- 14 days after ALJ's decision: deadline to file petition for review by the ARB
- 120 days after conclusion of ARB review: ARB must issue its final decision
- If a final order not issued within 210 days from date complaint is filed, or within 90 days after employee receives OSHA's findings: employee may file federal court lawsuit

### **Next Steps**

Interested parties may file comments on this interim final rule within 60 days of the rule's publication in the Federal Register, which is expected to be February 27, 2013. In the meantime, employers must abide by the interim regulations. For more information, employers should review OSHA's fact sheet that details how whistleblower complaints under the ACA are to be filed and processed.

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