

OSHA Publishes Final Rule re ACA Retaliation

October 18, 2016

Employers making discharge and discipline decisions must consider past employee statements or conduct regarding employment health and benefit plans. The Occupational Safety and Health Administration (OSHA) recently issued its final rule outlining procedures and time frames for whistle-blower claims under the Affordable Care Act. This final rule responds to the public comments that were made to the interim final rule published by the administration in 2013. This rule applies only to whistle-blower claims under the Affordable Care Act, (the Act) not any other whistle-blower statutory provisions enforced by OSHA.

The administration is responsible for enforcing the whistle-blower provisions of the Act, which protects employees from retaliation for engaging in certain protected activities such as receiving a credit or cost-sharing reductions under the Act. The Act also protects employees from retaliation when they inform their employer, the federal government, or the state attorney general of conduct that they believe violates the consumer protections and health insurance reforms in Title I of the Act.

THE PROCEDURE ESTABLISHED BY THE FINAL RULE:

Under the new final rule effective October 13, 2016, an employee who believes he or she has been retaliated against may file a complaint, either orally or written, to OSHA within 180 days after an alleged violation the anti-retaliation provisions of the Act. OSHA will then notify the employer of the alleged violation of the Act, and each side has 20 days to submit a written statement and any supporting documents and may request a meeting to present its position.

An investigation will commence if the employee can establish the basic elements for a case that the protected activity was a contributing factor to the adverse action it suffered. The new rule outlines what an employee needs to show in order to satisfy its burden, which can be done through either direct or circumstantial evidence. Once the employee has met the first threshold showing of evidence, the burden shifts to the employer/respondent who can end the investigation if it shows by clear and convincing evidence that it would have taken the same adverse action if the employee's alleged protected activity had not occurred.

The Assistant Secretary then has 60 days from the filing of the complaint to issue written findings as to whether or not there is reasonable cause to conclude that the respondent has retaliated against the complainant in violation of the Act. The Assistant Secretary will issue a preliminary order providing relief to the complainant if it finds that the respondent has violated the Act. The order becomes effective 30 days after receipt by the respondent and either party may request judicial review of the Assistant Secretary's findings and/or order by filing objections and a request for a hearing on the record within 30 days of receipt of the decision.

The final rule also provides procedures for withdrawal and how settlements between the parties are approved by the administration. It gives the parties the ability to seek enforcement of an order in a US District Court if the other party fails to comply with the order. Furthermore, the complainant may bring its retaliation complaint to a US District Court if the Secretary fails to make a final decision within a certain time period.

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WHAT THIS MEANS FOR EMPLOYERS:

Although new rule made only minor changes to the previous rule published by the administration in 2013, employers making discharge and discipline decisions must consider past employee statements or conduct regarding employment health and benefit plans. Employers should also be mindful of the timing and filing procedures for responding to retaliation claims under the Act as missing the regulatory deadlines could result in liability without consideration of the underlying merit of the claims.

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